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DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Part 4279

RIN 0570–AA81

Conditions of Guarantee

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Direct final rule.

SUMMARY: The Rural Business-Cooperative Service is amending its regulations for the Business and Industry Guaranteed Loan Program to ensure the Agency has sufficient right(s) for reimbursement when an Agency guaranteed portion of a loan is sold to a holder. This action is necessary because the rule is not sufficiently clear that the use of loan funds for purposes not approved by the Agency is a reason to find the guarantee unenforceable regardless of whether the guaranteed portion of the loan has been sold to a holder. This action ensures the Agency has sufficient rights for reimbursement when an Agency guaranteed portion of the loan is sold to a holder.

DATES: This rule will become effective September 2, 2011 without further action unless the Agency receives significant written adverse comments or written notice of intent to submit adverse comments on or before August 18, 2011. If the Agency receives significant adverse comments or notices, the Agency will publish a timely notice in the **Federal Register** withdrawing the rule.

Comments received will be considered under the proposed rule published in this edition of the **Federal Register** in the proposed rule section. A second public comment period will not be held. Written comments must be received by the Agency or carry a postmark or equivalent no later than August 18, 2011.

ADDRESSES: You may submit adverse comments or notice of intent to submit adverse comments to this rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: Mr. David Lewis, Rural Development, Business Programs, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3224, Washington, DC 20250–3221; e-mail: *david.lewis@wdc.usda.gov;* telephone (202) 690–0797.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been determined to be not significant for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB).

Programs Affected

The Catalog of Federal Domestic Assistance Program number assigned to the Business and Industry Guaranteed Loan Program is 10.782.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' Rural Development has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.,* an Environmental Impact Statement is not required.

Executive Order 12372, Intergovernmental Consultation

The program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. Consultation will be completed at the time of the action performed.

Executive Order 12988, Civil Justice

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. Additionally, (1) All state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to the rule; and (3) administrative appeal procedures, if any, must be exhausted before litigation against the Department or its agencies may be initiated, in accordance with the regulations of the National Appeals Division of USDA at 7 CFR part 11.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this final rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

Regulatory Flexibility Act Certification

Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. The Agency made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be impacted to a greater extent than large entity applicants.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the

private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that the final rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this final rule is not subject to the requirements of Executive Order 13175. If a tribe determines that this rule has implications of which Rural Development is not aware and would like to engage with Rural Development on this rule, please contact Rural Development's Native American Coordinator at (202) 690–1681 or *AIAN@wdc.usda.gov.*

Paperwork Reduction Act

This rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

E-Government Act Compliance

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

I. Background

The Agency reviewed 7 CFR 4279.72, which is composed of three paragraphs, the first two of which are pertinent.

Section 4279.72(a) lays out the conditions under which a guarantee is not enforceable. The text separately identifies four such conditions:

1. In cases of fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones;

2. To the extent that any loss is occasioned by a provision for interest on interest;

3. To the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof; and

4. To the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment.

Section 4279.72(b) discusses rights and liabilities when a guaranteed portion of a loan is sold to a holder. It states, in part, that the lender will be liable for payments made by USDA to any holder in the event of ''material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation.'' Section 4279.72(b) does not, however, refer to the other conditions listed in § 4279.72(a).

The Agency believes the lender's responsibility to reimburse the Agency for the improper activity should not be dependent upon whether the lender or holder owns the loan guarantee. However, the Agency is concerned that this policy is not sufficiently clear in the regulation. Therefore, the Agency is clarifying its position on this matter. The regulatory change is not retroactive nor does it affect the rights of current holders. However, the Agency recognizes that the issue should be clarified in the regulation. Accordingly, the Agency is making the changes in this direct final rule.

II. Discussion of Change

Section 4279.72(a) addresses the lender's coverage under the loan note guarantee. It also identifies those instances when the conduct of a holder may jeopardize their interest in the loan note guarantee. Section 4279.72(b) addresses the holder's coverage under the loan note guarantee. The change being made by this rule clarifies that having a holder purchase part of the loan note guarantee does not increase the coverage provided to the lender under the loan note guarantee. Therefore, the Agency will require the lender to reimburse it for any amount it pays to a holder that would not have been paid to a lender under § 4279.72(a).

The Agency is revising § 4279.72(b) to address the situation discussed in the ''Background'' section and similar situations.

List of Subjects in 7 CFR Part 4279

Loan programs—Business and industry—Rural development assistance, Rural areas.

For the reasons set forth in the preamble, chapter XLII, title 7 of the Code of Federal Regulations is amended as follows:

CHAPTER XLII—RURAL BUSINESS-COOPERATIVE SERVICE AND RURAL UTILITIES SERVICE, DEPARTMENT OF AGRICULTURE

PART 4279—GUARANTEED LOANMAKING

■ 1. The authority citation for part 4279 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932(a); and 7 U.S.C. 1989.

Subpart A—General

■ 2. Amend § 4279.72 by revising the last sentence of paragraph (b) to read as follows:

§ 4279.72 Conditions of guarantee.

* * * * *

(b) * * * The lender will reimburse the Agency for any payments the Agency makes to a holder of lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

* * * * *

Dated: July 12, 2011.

Dallas Tonsager,

Under Secretary, Rural Development.

[FR Doc. 2011–18010 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–XY–P

FARM CREDIT ADMINISTRATION

12 CFR Part 614

RIN 3052–AC62

Loan Policies and Operations; Loan Purchases From FDIC; Effective Date

AGENCY: Farm Credit Administration.

ACTION: Notice of effective date.

SUMMARY: The Farm Credit Administration (FCA or Agency), through the FCA Board (Board), issued a final rule under part 614 on May 25, 2011 (76 FR 30246) amending our regulations on loan policies and operations. In accordance with 12 U.S.C. 2252, the effective date of the final rule is 30 days from the date of publication in the **Federal Register** during which either or both Houses of Congress are in session. Based on the records of the sessions of Congress, the effective date of the regulations is July 12, 2011.

DATES: *Effective Date:* Under the authority of 12 U.S.C. 2252, the regulation amending 12 CFR part 614 published on May 25, 2011 (76 FR 30246) is effective July 12, 2011.

FOR FURTHER INFORMATION CONTACT:

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

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

(12 U.S.C. 2252(a)(9) and (10))

Dated: July 14, 2011.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2011–18192 Filed 7–18–11; 8:45 am]

BILLING CODE 6705–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2011–0116; Airspace Docket No. 11–ANE–1]

Establishment of Class E Airspace; Brunswick, ME

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule; correction.

SUMMARY: This action corrects the effective date of a final rule correction, that was published in the **Federal Register** on July 6, 2011. The effective date in that Final Rule; Correction. inadvertently listed the wrong effective date in the Correction to Final Rule section.

DATES: *Effective Date:* 0901 UTC, July 28, 2011.

FOR FURTHER INFORMATION CONTACT: John Fornito; telephone (404) 305–6364.

Correction to Final Rule; Correction

In final rule FR Doc 2011–16783, on page 39259 in the **Federal Register** of July 6, 2011 (76 FR 39259), make the following correction:

On page 39259, in the second column, in the Correction to Final Rule section, in the second paragraph, remove the dates August 28, 2011, and July 25, 2011, and replace them with the dates August 25, 2011, and July 28, 2011.

Issued in Washington, DC on July 8, 2011.

Rebecca B. MacPherson,

Assistant Chief Counsel for Regulations.

[FR Doc. 2011–17978 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Parts 801, 802 and 803

RIN 3084–AA91

Premerger Notification; Reporting and Waiting Period Requirements

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''Commission'' or ''FTC'') is amending the Hart-Scott-Rodino (''HSR'') Premerger Notification Rules (the ''Rules''), the Premerger Notification and Report Form (the ''Form'') and associated Instructions in order to streamline the Form and capture new information that will help the FTC and the Antitrust Division, Department of Justice (together the ''Agencies'') conduct their initial review of a proposed transaction's competitive impact. The FTC is making substantive and ministerial revisions, deletions and additions to streamline the Form and make it easier to prepare while focusing the Form on those categories of information the Agencies consider necessary for their initial review. The FTC is also amending certain Rules and parts of the Form and Instructions, as well as adding Items 4(d), 6(c)(ii) and 7(d), in order to capture additional information that would significantly assist the Agencies in their initial review. Finally, minor changes are being made to address minor omissions from the FTC's 2005 rulemaking involving unincorporated entities and to remove the reference to the 2001 transition period.

DATES: These final rules are effective August 18, 2011.

FOR FURTHER INFORMATION CONTACT: Robert L. Jones, Deputy Assistant Director, Premerger Notification Office, Bureau of Competition, Room H–303, Federal Trade Commission, Washington, DC 20580, (202) 326–3100, *rjones@ftc.gov.*

SUPPLEMENTARY INFORMATION:

Statement of Basis and Purpose

Section 7A of the Clayton Act (the ''Act'') requires the parties to certain mergers or acquisitions to file with the Agencies and to wait a specified period of time before consummating such transactions. The reporting requirement and the waiting period that it triggers are intended to enable the Agencies to determine whether a proposed merger or acquisition may violate the antitrust laws if consummated and, when appropriate, to seek a preliminary injunction in federal court to prevent consummation, pursuant to Section 7 of the Act.

On August 13, 2010, the Commission made a Notice of Proposed Rulemaking and Request for Public Comment available on its Web site, and it was published in the **Federal Register** on September 17, 2010.[1] The comment period closed on October 18, 2010. The Proposed Rules recommended improvements and updates to the HSR Form and associated Instructions as well as amendments in 16 CFR parts 801, 802 and 803 of the Rules.

The Commission received eleven public comments addressing the Proposed Rules. The comments are published on the FTC Web site at *http://www.ftc.gov/os/comments/hsr/index.htm.*

The following submitted public comments on the Proposed Rules:

1. Caterpillar, Inc. (Howrey LLP, Paul C. Cuomo) (10/18/2010)
2. The Private Equity Growth Capital Council (10/18/2010)
3. Willkie Farr & Gallagher LLP (Theodore C. Whitehouse) (10/18/2010)
4. Cooley LLP (Francis M. Fryscak and M. Howard Morse) (10/18/2010)
5. Skadden, Arps, Slate, Meagher & Flom LLP (Neal R. Stoll, Steven C. Sunshine and Matthew P. Hendrickson) (10/18/2010)
6. Howrey LLP (Jacqueline I. Grise, Michael W. Jahnke, Paul C. Cuomo, Chris P. Cooper and Victor Cohen) (10/18/2010)
7. International Chamber of Commerce Commission on Competition (10/18/2010)
8. Securities Industry and Financial Markets Association (Sean C. Davy) (10/18/2010)
9. BUSINESSEUROPE, Grocery Manufacturers Association, National Association of Manufacturers, The Pharmaceutical Research and Manufacturers of America, U.S. Chamber of Commerce (10/18/2010)
10. Wachtell, Lipton, Rosen & Katz on behalf of Alcoa Inc., Bank of America Corporation, BB&T Corporation, ConocoPhillips, Harmon International Industries, Incorporated, IAC/Interactive Corporation, JPMorgan Chase & Co., Nustar Energy L.P., NYSE Euronext, PPG Industries, Inc., Qwest Communications International, Inc., Sigma-Aldrich Corporation, The Valspar Corporation, United Rentals, Inc., Valero Energy Corporation, Wells Fargo & Company (10/18/2010)

[1] 75 FR 57110 (September 17, 2010).

11. Sections of Antitrust Law and International Law, American Bar Association (10/15/10)

The Commission proposed ministerial changes in Items 1 through 3 in order to make the Form easier to use, as well as the revision or deletion of many items, such as Items 2(e), 3(b), 3(c), 4(a), 4(b), 5(a), 5(b)(i), 5(b)(ii), 5(d), 6(a), and 6(b), which currently ask for information that the Agencies no longer consider necessary for their initial review. There were no adverse comments received on these amendments, therefore, the Commission adopts the changes as proposed. The Commission also proposed amending certain Rules and parts of the Form and Instructions, such as Items 2(d), 5(c) and 8 in order to capture additional information (such as current year revenues by 10 digit NAICS product code) that would significantly assist the Agencies in their review. There were also no adverse comments received on these revisions and they are adopted as proposed. In addition, there were no adverse comments received on the proposed minor changes to §§ 801.1,[2] 801.15, 801.30, 802.4, 802.21, 802.52, 803.2 and 803.5, and these changes are also adopted as proposed.

The Commission did, however, receive substantive objections or criticisms regarding three proposed changes that commenters found to be overly burdensome additions: Item 4(d), which requires the submission of certain documents separate from those required by Item 4(c); changes to Item 5 requiring the reporting of North American Industry Classification System (''NAICS'') product code information for products manufactured outside of the U.S. and sold into the U.S.; and changes to Items 6(c) and 7 to require the submission of information on the holdings of associates that overlap with the entity(s) or assets that are being acquired. These comments and the Commission's response to them are discussed more fully below.

Part 801—Coverage Rules

801.1(d)(2) Associate

An acquiring person is required to provide information in its notification with respect to all entities included within it at the time of filing. In some instances, particularly with families of investment funds, entities that are commonly managed with the acquiring person are not included because these ''associated'' entities are not controlled, as defined in § 801.1(b) of the Rules, by the acquiring Ultimate Parent Entity (''UPE''). As a result, the Agencies do not receive the information they need to get a complete picture of potential antitrust ramifications of an acquisition. This scenario arises frequently in the energy industry with Master Limited Partnerships, where competitive overlaps among limited partnerships (''LPs'') with the same general partner may go undetected.

To capture information on overlaps between entities commonly managed with the acquirer and the target, the Commission proposed three changes: introducing and defining the term associate, creating Item 6(c)(ii), and revising Item 7 to require the submission of information on minority and controlling interests of associates that overlap with the entity(s) or assets that are being acquired.

The Commission received six comments regarding the proposed definition of associate and its application to proposed Items 6(c)(ii) and 7. The comments generally focused on two concerns: the definition of associate as too vague and overly broad, and the burden of compiling the information required by Items 6(c)(ii) and 7 regarding the holdings of associates that overlap with the target, particularly minority holdings. Both will be discussed below.

Section 801.1(d)(2): Definition of Associate

The Commission proposed the term ''associate'' in new § 801.1(d)(2) to define entities under common management with the acquiring person, but not controlled by the acquiring person. The proposed definition reads:

Associate. For purposes of Items 6(c) and 7 on the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but: (A) Has the right, directly or indirectly, to manage, direct or oversee the affairs and/or the investments of an acquiring entity (a ''managing entity''); or (B) has its affairs and/or investments, directly or indirectly, managed, directed or overseen by the acquiring person; or (C) directly or indirectly, controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly, manages, directs or oversees, is managed by, directed by or overseen by, or is under common management with a managing entity.

Comments 2, 6, 9 and 11 stated that the definition of associate as proposed was not only overly broad, but was also unduly complex and confusing. Comment 2 stated that the phrase ''the right, directly or indirectly, to manage, direct or oversee'' affairs of the acquiring entity was so expansive as to provide little guidance regarding the relationships to be covered. Comment 6 noted that the definition as proposed was not limited to entities subject to common investment management, but also included entities that were subject to a common ability to ''direct and oversee the affairs'' of other entities. Comment 9 also addressed the potentially broad scope of the term ''oversee.'' Comment 11 recommended that the Commission consider limiting associates to master limited partnerships and private equity funds.

Comments 7 and 9 stated that the control rules provided well understood and easily applied guidance as to the scope of HSR filings. Comment 7 stated that requiring filers to determine which entity might be an associate would increase the complexity, burden and expense of HSR filings. Both recommended that the Commission reconsider requiring information on associates.

To address these concerns, the Commission has refined the definition of associate. The Commission's purpose in requiring information on associates is to be able to analyze the holdings of entities that are under common investment or operational management with the person filing notification. The term is not intended to include entities that are under other forms of common management or direction. To clarify this, the definition of associate has been revised to eliminate the terms ''direct'', ''oversee'' and ''affairs'' from the rule. Any examples that contain these terms have also been revised. Additional examples have also been added to clarify the definition.

The Commission is unwilling to limit the definition to master limited partnerships and private equity funds, as suggested by Comment 11. New types of entities that are not master limited partnerships or private equity funds may emerge in the future, and the Commission does not want to limit the information it would receive about these entities as a result. The Commission believes that the changes to the definition of associate clarify its intent and reduce the burden of identifying associates.

The new definition of associate reads as follows:

Associate. For purposes of Items 6 and 7 of the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ''managing entity''); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational

[2] These minor changes to § 801.1 do not relate to the definition of associate.

or investment management with a managing entity.

Items 6(c) and 7

The Commission proposed adding Item 6(c)(ii) to require an acquiring person to report, based on its knowledge or belief, all of its associates' holdings of voting securities and non-corporate interests of 5 percent or more but less than 50 percent in the acquired entity(s) and in entities having 6-digit NAICS industry code overlaps with the acquired entity(s) or assets.

The Commission also proposed amending the instructions to Item 7 as follows:

Item 7(a) to require reporting any 6-digit NAICS industry code in which the acquiring person, or any associate of the acquiring person, derives revenues and in which the acquired entity(s) or assets also derive revenues;

Item 7(b)(i) to require reporting the name of any entity(s) controlled by the acquiring person that derived revenues in the overlapping 6-digit NAICS code in the most recent fiscal year and Item 7(b)(ii) to require reporting the name of any entity(s) controlled by an associate of the acquiring person that derived revenues in the overlapping 6-digit NAICS code in the most recent fiscal year; and

Item 7(c) to require reporting the geographic information for any entity(s) controlled by the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year.

Item 7(d) to require reporting the geographic information for any entity(s) controlled by an associate of the acquiring person that derived revenues in the overlapping NAICS code in the most recent fiscal year.

The comments focused on Item 6(c)(ii), citing Item 7 only in reference to Item 6(c)(ii), and addressed the burden of gathering the information required by Item 6(c)(ii).[3] Comment 5 stated that the request in Item 6(c)(ii) to provide information on minority holdings of associates that overlap with the acquired assets or entity(s) exceeded reasonable expectations about the type of information that an acquiring person can obtain when it does not have possession or control of the requested data and does not maintain the data in the ordinary course of its business. In the same vein, Comment 6 contended that the specific requirements of Item 6(c)(ii) imposed a disproportionate burden on filing parties regardless of the benefit to the Agencies. Comment 11 stated that the breadth of Item 6(c)(ii) could create a significant additional burden on a filing party, while providing the Agencies with little additional useful information. It claimed that, as written, this item required a filing party to report minority holdings of minority holdings, and suggested limiting Item 6(c)(ii) to holdings of associates of interests in the target company rather than including holdings of other entities that overlap with the target.

The purpose of Item 6(c)(ii) is not to obtain information on ''minority holdings of minority holdings'' as Comment 11 suggested, but to receive information on competitively relevant minority holdings of entities that are under common investment or operational management with the acquiring person. For the Agencies, there is clear utility to having the HSR filing contain information regarding the acquiring person's associates' minority holdings in competitors of the target. As such, limiting the response for Item 6(c)(ii) only to holdings of associates in the acquired entity(s), as suggested by Comment 11, is too narrow. Take, for instance, a transaction in which Pharma Fund A is acquiring 100 percent of the voting securities of Acquired Pharma Corp. Pharma Fund A does not have holdings in any competitors of Acquired Pharma Corp, but four associates of Pharma Fund A (Pharma Funds B–E) each hold 15 percent of Pharma Competitor. The Agencies would certainly benefit from knowing that the funds under common management hold an aggregate controlling interest in a competitor. The Agencies, however, may have no other realistic means of learning about the holdings of Pharma Funds B–E, particularly if Pharma Competitor is not publicly traded, making it very difficult to find this information through public sources. Item 6(c)(ii) as proposed requires the disclosure of the holdings of Pharma Funds B–E.

Item 6(c)(ii) would also provide very useful information to the Agencies in transactions involving the intricate structures that often characterize Master Limited Partnerships. For example, consider a transaction in which Pipeline MLP A is acquiring 100 percent of Acquired Pipeline Corp., and Pipeline MLP A's general partner is Pipeline GP, which is also the general partner of Pipeline MLP B and Pipeline MLP C, neither of which holds a minority interest in Acquired Pipeline Corp. or a controlling interest in a competitor of Acquired Pipeline Corp. Thus, Pipeline MLP B and Pipeline MLP C would not be identified in either Item 6(c)(ii) or Item 7 under Comment 11's proposal. Pipeline MLP B and Pipeline MLP C each indirectly hold a 45 percent interest in Competing Pipeline Co., a direct competitor of Acquired Pipeline Corp., through a number of intermediate entities. The Agencies clearly would be interested in these minority holdings in this fairly typical scenario in the oil and gas industry, but might have trouble identifying the relationship as a result of the number of layers between the top level entity and the competitor at the bottom of the structure. Item 6(c)(ii) requires the disclosure of the holdings of Pipeline MLP B and Pipeline MLP C. As these examples illustrate, Item 6(c)(ii) provides the Agencies with a much clearer picture of the competitive impact in transactions involving families of private equity funds or master limited partnerships.

The Commission acknowledges that some filing parties may face an increase in burden the first time they respond to Item 6(c)(ii) but believes that thereafter, the burden should be largely limited to keeping responsive information current. Further, it believes the burden of responding to Item 6(c)(ii) does not outweigh the benefit to the Agencies. An acquiring person must look beyond the concept of control to determine whether it has entities that are under common investment or operational management with the acquiring person. The general partner makes investment or operational decisions for its managed limited partnerships and should therefore have access to information on the holdings of the other managed limited partnerships for the purposes of responding to Item 6(c)(ii).

Further, the Commission notes that Item 6(c)(ii) provides mechanisms for limiting the potential burden. For instance, if an acquiring person cannot provide information on the minority holdings of its associates in response to Item 6(c)(ii) at the NAICS-code level, it could opt to respond on the basis of industry. That is, instead of providing a list of its associates' minority holdings based on an overlapping NAICS code with the target, the acquiring person could provide a list of its associates' minority holdings that fall into the same industry as the target, such as pharmaceuticals, mining, healthcare, etc.

Item 6(c)(ii) also allows the acquiring person to respond to Item 6(c)(ii) by listing all the minority holdings of its associates. This is intended to provide an option for an acquiring person that, despite its best efforts, cannot obtain more granular information about the minority holdings of its associates. The Commission notes that if an acquiring person responds by listing all holdings in Item 6(c)(ii), whether overlapping or not, the review of the filing could be

[3] Comment 5 stated that the problems with collecting information for associates that are identified for Item 6(c)(ii) are equally applicable to Item 7.

delayed and the parties may be more likely to receive follow up requests from staff to obtain the information. It is thus in the best interests of the acquiring person to limit the list of minority holdings in Item 6(c)(ii) to those that overlap with the acquired entity(s) or assets, even if only by industry, to allow the Agencies to conclude quickly whether the acquisition may be competitively problematic because of these holdings.

The Commission has made one additional change to Item 6(c) to attempt to mitigate further the burden on persons who must respond to this item. The person filing notification may rely on its regularly prepared financials that list investments and the regularly prepared financials of its associates that list investments to respond to Items 6(c)(i) and (ii), provided the financials are no more than three months old.[4] Many investment funds routinely prepare such documents on a quarterly basis, and this change allows acquiring persons to rely on documents prepared in the ordinary course to gather the information necessary to respond to Items 6(c)(i) and (ii). If the acquiring person and its associates make quarterly filings concerning their investments in publicly traded companies with the Securities and Exchange Commission (''SEC''), those lists can be relied on to gather the information necessary to respond to Items 6(c)(i) and (ii) with respect to publicly traded companies, as long as they are no more than three months old. Of course, acquiring persons must still report in Items 6(c)(i) and (ii) their holdings of non-publicly traded companies.

In summary, the Commission believes that the benefits of Item 6(c) and Item 7, as revised, to the Agencies with regard to information on associates outweigh the additional burden on certain acquiring persons of providing the information. Consequently, the Commission promulgates Items 6(c)(i) and 6(c)(ii), with the aforementioned allowance for relying on financial statements and SEC documents, and Item 7, as proposed. The caveats in the language in the instructions to Items 6(c)(i) and 6(c)(ii) that the information be provided based on the knowledge or belief of the acquiring person should ease concerns on certification of the Form. If the information is completely unobtainable the acquiring person can rely on a statement of reasons for noncompliance.[5]

Item 4

Item 4(d): Additional Documents

In proposing Item 4(d), the Commission noted that certain categories of documents are quite useful for the Agencies' initial substantive analysis of transactions but were not always provided because parties have differing interpretations as to whether they were called for under current Item 4(c). The Commission proposed new Item 4(d) to enumerate these discrete categories of documents and require their submission with the Form.

In expressing concerns regarding proposed Item 4(d), all of the comments raised the overarching issue of the relationship of proposed Item 4(d) to Item 4(c). Item 4(d) is indeed closely related to Item 4(c), as is evident in the language of Item 4(d) which closely parallels the language of Item 4(c). But Item 4(d) seeks different documents from those covered by the language of Item 4(c) as will be more fully discussed below.

Item 4(d)(i): Offering Memoranda

Proposed Item 4(d)(i) required filing parties to provide all offering memoranda (or documents that served that function) that reference the acquired entity(s) or assets produced up to two years before the date of filing.

With the exception of Comments 5 and 8, the comments suggested that proposed Item 4(d)(i) uses, in the words of Comment 3, ''ambiguous and overbroad language.'' For instance, the requirement that materials responsive to Item 4(d)(i) ''reference'' the acquired entity(s) or assets and documents that ''serve the function of''an offering memorandum were imprecise and as drafted could lead to the production of a large of amount of documents in response to Item 4(d)(i). Comments 1, 2, 6, 7, 10, and 11 expressed concern that the Item 4(d)(i) requirement was not limited to the evaluation or analysis of the acquisition, as is the language of Item 4(c). Comments 1, 2, 3, 6, 10 and 11 suggested that a limitation such as the one in Item 4(c) involving only materials prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) would be helpful in guiding responses to Item 4(d)(i). Comments 1, 2, 3, 4, 6, 7 and 11 expressed the related concern that searching beyond the team of people aware of the transaction would compromise the confidentiality of the transaction. Finally, Comments 1, 2, 9 and 11 stated that the 2-year time frame in Item 4(d)(i) was too long to provide a useful limitation on this item.

In proposing Item 4(d)(i), the Commission intended to capture offering memoranda. These are formal documents created in-house or by a third party that lay out the details of a company, or a part of a company, that is for sale. The Commission intends to reach in Item 4(d)(i) what comment 10 termed ''transaction-specific marketing presentation[s]'' because they are invaluable to staff in their initial analysis. In order to make the parameters of this item more clear, the Commission uses the term ''Confidential Information Memoranda'' instead of the broader term ''offering memoranda.'' Many filing parties already submit Confidential Information Memoranda because these documents often contain a section on the industry or competitive landscape and thus fall within the requirements of Item 4(c). But, in cases where they do not, the in-depth overview of the business, even without competition-related content, is still immensely helpful to staff in understanding the companies and products involved in a transaction.

Confidential Information Memoranda are useful even though, arguably, there may be no ''acquisition'' at the time they are prepared. Item 4(c) requires the submission of all studies, surveys, analyses and reports prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) *for the purpose of evaluating or analyzing the transaction* with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets. Leaving out of the language of Item 4(d)(i) the Item 4(c) requirement that responsive materials evaluate or analyze ''the acquisition'' addresses the fact that some parties have relied on the transaction-specific language of Item 4(c) when not submitting Confidential Information Memoranda.

The comments expressed concern that without the requirement that responsive materials evaluate or analyze the transaction, the scope of what was required by Item 4(d)(i) was too broad. In response to this concern, the Commission can provide a more precise parameter than ''some reference to the acquired entity(s) or assets.'' The Commission intends to capture materials that provide an in-depth overview or analysis of the entities or assets that are for sale, not just those materials that contain a passing

[4] This approach does not apply to the response required with regard to associates in Item 7. Item 7 deals with controlled entities and the information required by Item 7 should therefore be easier to obtain.

[5] 16 CFR 803.3.

reference to them. To make this intent clear, the language in Item 4(d)(i) has been changed to adopt in part the language proposed by Comment 4, namely to capture those Confidential Information Memoranda that ''specifically relate to the sale of the acquired entity(s) or assets.''

Comment 4 also suggested narrowing proposed Item 4(d)(i) to ''those separate presentations [that] would have been responsive to Item 4(c) if they had been prepared for the filed-for transaction.'' The problem with this language is that it requires competition-related content. As discussed above, the underlying rationale behind Item 4(d)(i) is that Confidential Information Memoranda are always helpful, and so Item 4(d)(i) requires their submission regardless of the presence of competition-related content.

Comments 1, 2, 3, 4, 5, 10 and 11 expressed concern that proposed Item 4(d)(i) was not limited to officers and directors. The Commission does not intend to reach those Confidential Information Memoranda, as stated in Comment 1, received by ''any employee within the company regardless of their location or involvement in a particular transaction.'' Instead, the Commission intends to reach those Confidential Information Memoranda prepared in the specific contemplation of a sale. In reality, an officer or director would likely be informed of the internal or external drafting of such a memorandum. The easiest way to clarify the Commission's intent is by adopting the suggestion in the comments that a limitation involving officer(s) or director(s) be added to Item 4(d)(i). As such, the Commission is promulgating Item 4(d)(i) with a requirement that responsive documents must have been prepared by or for any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions. Further, the Commission limits this requirement to any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Ultimate Parent Entity of the Acquiring or Acquired Person and/or any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Acquiring or Acquired Entity(s). These changes also address the concerns raised by many of the comments that gathering documents responsive to Item 4(d)(i) could compromise the confidentiality of the transaction.

Comment 10 suggested that this item be limited to ''offering memoranda prepared for the purpose of evaluating or analyzing the transaction and which were shared with prospective buyers.'' Sellers will sometimes create a Confidential Information Memorandum and, for one reason or another, it does not end up being shared with the eventual buyer. This, if the Commission limited Item 4(d)(i)'s requirement to submit Confidential Information Memoranda to only those given to the buyer, in some cases, no Confidential Information Memorandum would be submitted even though one was created. This is counter to the rationale behind Item 4(d)(i). Under Item 4(d)(i), if the eventual buyer did not receive a copy of the Confidential Information Memorandum, but one was prepared, that Confidential Information Memorandum must be submitted with the Acquired Person's filing.

Comments 1, 2, 3, 6, 7, 9, 10, and 11, expressed concern about the exact definition of ''documents serving the same function as an offering memorandum.'' As a starting point, if there was a Confidential Information Memorandum prepared, filing parties do not need under Item 4(d)(i) to supply documents that served the purpose of a Confidential Information Memorandum. The Commission intends to capture only those situations in which no Confidential Information Memorandum was prepared, but the seller has a pre-existing presentation containing an overview of the company that was given to any officer(s) or director(s) of the buyer as an introduction to the company. In this case, the presentation *effectively serves the purpose* of a Confidential Information Memorandum in an instance in which no Confidential Information Memorandum was prepared. Filing parties often submit such documents when no Confidential Information Memorandum was prepared, and the Commission does not seek any other category of materials in response to this item. For instance, the Commission does not intend this item to require ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials are shared with the buyer *specifically to serve the purpose* of a Confidential Information Memorandum when no Confidential Information Memorandum was prepared. Unlike the case of Confidential Information Memoranda, a document that served the purpose of a Confidential Information Memorandum will only be responsive to Item 4(d)(i) if it was given to the buyer (and a Confidential Information Memorandum was not). The instructions to Item 4(d)(i) outline these specifics.

Many filing parties already submit materials responsive to Item 4(d)(i) based on longstanding informal interpretations that Confidential Information Memoranda should be submitted as Item 4(c) documents. However, parties have sometimes excluded these documents on the grounds that they were not prepared for the purpose of evaluating or analyzing the acquisition or did not contain competition-related content. Item 4(d)(i) is intended to make clear that Confidential Information Memoranda must be submitted in response to Item 4(d)(i). The Commission intends Items 4(c) and 4(d) to complement one another. For instance, if a filing party includes a document responsive to Item 4(d)(i) with its HSR filing, it need not submit that document separately in response to Item 4(c).

The comments raised concerns about the length of the proposed two year time period applicable to proposed Item 4(d)(i). Although such a timeframe is consistent with the specified ''relevant time period'' of two years as applicable to second requests in the 2006 merger process reforms,[6] the Commission believes that, as applied to the documents required by Item 4(d)(i), a period of one year is more appropriate. Confidential Information Memoranda are typically drafted within this shorter timeframe and arguably are more useful to staff if they are more recent. The instructions to Item 4(d)(i) have been changed to reflect the one year time period.[7]

In summary, the Commission is promulgating Item 4(d)(i) using the term ''Confidential Information Memoranda'' instead of ''Offering Memoranda'' and with the clarification that this item requires only those Confidential Information Memoranda that ''specifically relate to the sale of the acquired entity(s) or assets'' and that were prepared by or for any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Ultimate Parent Entity of the Acquiring or Acquired Person and/or any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Acquiring or Acquired Entity(s) within one year of filing. In addition, the Commission requires the submission of

[6] See REFORMS TO THE MERGER REVIEW PROCESS (p.19) announced by then Chairman Deborah Platt Majoras on February 16, 2006. *http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf* and *http://www.justice.gov/atr/public/press_releases/2006/220302.htm.*

[7] The one year time limit applicable to materials responsive to Items 4(d)(i) and 4(d)(ii) does not apply to materials responsive to Item 4(c); Item 4(c) has no specific timeframe.

documents that served the function of a Confidential Information Memorandum only when given to the buyer in situations in which no such Confidential Information Memorandum exists.

Item 4(d)(ii): Materials Prepared by Investment Bankers, Consultants or Other Third Party Advisors

Proposed Item 4(d)(ii) required filing parties to provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors if they were prepared for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and that also reference the acquired entity(s) or assets produced up to two years before the date of filing.

In response to proposed Item 4(d)(ii), the comments expressed concern that this item as drafted was too broad and would capture many documents immaterial to staff's initial analysis. Each comment stated that Item 4(d)(ii) as drafted would pull in ordinary course documents because it was not limited to materials that evaluated or analyzed the acquisition. Comments 2, 3, 5, 6, 7, 9, 10, and 11 raised the issue that searching beyond the team of people aware of the transaction would lead to confidentiality concerns. Finally, Comments 1, 5, 7, 8, 9, and 11 contended that the 2 year time frame in Item 4(d)(ii) was too long to provide a useful limitation on this item.

Item 4(d)(ii) is intended to reach materials prepared by investment bankers, consultants or other third party advisors (''third party advisors'') that contain competition-related content pertaining to the transaction. The most typical example of this kind of document is, as defined by Comment 8, ''pitch books,'' which are ''developed by investment banking firms for the purpose of seeking an engagement.'' These materials are sometimes also known informally as ''bankers' books.'' In the Commission's experience, these are typically presentations that contain an overview of several potential courses of action available to a company (e.g., whether to buy another business or sell a particular business) and that also contain several pages analyzing the specific industry at issue.

Item 4(d)(ii) also seeks documents prepared by third party advisors who have been hired by a particular company to develop and analyze a variety of strategic options, one of which is a merger that requires an eventual HSR filing. These materials are different from bankers' books in that the third party advisor has been hired and is already working with the company in detail, but they contain information that is just as valuable to staff. Whether developed by a third party for the purpose of seeking an engagement or after having been engaged, these materials often provide staff with a useful overview of the relevant industry and/or competitive landscape. Sometimes such materials fall within the requirements of Item 4(c). In some cases, however, they may not, as there is arguably no ''acquisition'' at the time they are prepared.

The most strenuous objection we received to proposed Item 4(d)(ii) was that leaving out the Item 4(c) requirement that responsive materials evaluate or analyze the acquisition made the language of proposed Item 4(d)(ii) too broad. As noted above, leaving this language out of Item 4(d)(ii) addresses the fact that some parties have relied on this language when not submitting this category of documents. As documents responsive to Item 4(d)(ii) must meet all the other requirements of Item 4(c), one approach would be to rely on the language proposed by Comment 4 in reference to Item 4(d)(i) to require only those materials that ''would have been responsive to Item 4(c) had they been prepared for the acquisition.'' While this language narrows the scope of this item and better reflects the Commission's intent, it leaves Item 4(d)(ii) without the limiting language on the entity(s) or assets for sale and officer(s) and director(s) the Commission has adopted in Item 4(d)(i).

To further clarify the intent of Item 4(d)(ii), the Commission limits materials responsive to Item 4(d)(ii) to those prepared by third party advisors during an engagement or for the purpose of seeking an engagement and, as has been done in Item 4(d)(i), that specifically relate to the sale of the acquired entity(s) or assets. In addition, the Commission similarly limits the officer(s) and director(s) encompassed in Item 4(d)(ii) to any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Ultimate Parent Entity of the Acquiring or Acquired Person and/or any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Acquiring or Acquired Entity(s). These clarifications, included in the instructions to Item 4(d)(ii), also address the confidentiality concerns raised by many of the comments.

Item 4(d)(ii) seeks materials developed by third party advisors during an engagement or for the purpose of seeking an engagement prepared by or for certain officers and directors (as discussed above) that contain competition-related content specifically related to the sale of the acquired entity(s) or assets, and the instructions specify this. Item 4(d)(ii) is not intended to capture many of the broad categories of materials envisioned by the comments; the language of Item 4(d)(ii) is drafted in recognition of the fact that there are numerous kinds of consultants who create responsive materials during an engagement or for the purpose of seeking an engagement. We note that Item 4(d)(ii) does not require, as enumerated in Comment 11, the submission of corporate subscriptions to market studies, information or periodicals; industry reference materials and databases; routine market research; information received by financial investors; unsolicited financial and market analyses from investment bankers and consultants; and reports prepared in the course of patent, securities, antitrust or other forms of litigation. Some unsolicited materials developed by investment banking firms or other third parties for the purpose of seeking an engagement may appear in the files of officers or directors covered by Item 4(d)(ii). Item 4(d)(ii) requires the submission of such unsolicited materials only if they specifically relate to the sale of the acquired entity(s) or assets and contain competition related content as specified in the instructions.[8]

Many filing parties already submit materials responsive to Item 4(d)(ii) based on longstanding informal interpretations that materials developed by third party advisors during an engagement or for the purpose of seeking an engagement should be submitted as Item 4(c) documents. However, parties have sometimes excluded these documents on the grounds that they were not prepared for the purpose of evaluating or analyzing the acquisition. Item 4(d)(ii) is intended to make clear that materials developed by third party advisors during an engagement or for the purpose of seeking an engagement must be submitted in response to Item 4(d)(ii). The Commission intends Items 4(c) and 4(d) to complement one another. For instance, if a filing party includes a document responsive to Item 4(d)(ii)

[8] Item 4(d)(ii) does not require the inclusion of unsolicited materials received from third party advisors as a separate category.

with its HSR filing, it need not submit that document separately in response to Item 4(c).

The comments raised concerns about the length of the proposed two-year time period applicable to proposed Item 4(d)(ii). Consistent with the modification to Item 4(d)(i), the time period for this item has been changed to one year.[9]

In summary, the Commission is promulgating Item 4(d)(ii) with the clarification that this item seeks materials developed by third party advisors during an engagement or for the purpose of seeking an engagement that ''specifically relate to the sale of the acquired entity(s) or assets'' and that were prepared by or for any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Ultimate Parent Entity of the Acquiring or Acquired Person and/or any officer(s) or director(s) or, in the case of unincorporated entities, individuals exercising similar functions, of the Acquiring or Acquired Entity(s) within one year of filing.

Item 4(d)(iii): Materials Evaluating or Analyzing Synergies and/or Efficiencies

Proposed Item 4(d)(iii) required filing parties to provide all studies, surveys, analysis and reports evaluating or analyzing synergies and/or efficiencies if they were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition.

Although proposed Item 4(d)(iii) did not receive as many comments as the other parts of proposed Item 4(d), Comments 2 and 6 questioned staff's need to review these documents in every transaction, suggesting that staff could seek these documents from the parties at a later time if relevant in a specific transaction. Comments 1, 6, and 11 stated that even if filers did not submit synergies documents at the time of filing, they should not be precluded from being able to make arguments concerning applicable synergies at a later time.

Item 4(d)(iii) requires the submission of documents that evaluate or analyze the synergies related to a particular acquisition. Although many filing parties do submit documents discussing synergies in response to Item 4(c), the PNO has long provided the informal advice that this category of documents, without separate competition-related content, is not caught by the language in Item 4(c). At the same time, these kinds of documents are very useful to staff in many transactions. Thus, Item 4(d)(iii) requires that these documents be submitted. The Commission believes that the benefits to the Agencies from receiving this discrete set of documents outweighs the burden to parties of producing them. Filing parties can assert synergies arguments at any time, but there is the possibility that documents submitted with an HSR filing in response to Item 4(d)(iii) may carry greater weight with the Agencies than materials claiming synergies created and submitted at a later time during an investigation.

Instructions to Item 4(d)

Incorporating many of the comments as described above, the instructions to Item 4(d) will read as follows:

Item 4(d)

For each category below, indicate (if not contained in the document itself) the date of preparation, and the name of the company or organization that prepared each such document.

Item 4(d)(i): Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors (''third party advisors'') for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii): Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

Item 5

Item 5(a) and Foreign Manufactured Products

The Commission proposed changes to Item 5 of the Form to make it easier for filing parties to complete, and to obtain information more useful to the Agencies. In this vein, the Commission proposed modifying the Form to require filing persons to identify the 10-digit NAICS product codes and revenues for each product they manufacture outside the U.S. and sell in the U.S. at the wholesale or retail level, or that they sell directly to customers in the U.S. This would give the Agencies a more accurate understanding of products in the U.S. Filing parties would include 10-digit NAICS product codes and revenues for such foreign manufactured products only for the most recent year in proposed Item 5(a). As proposed, sales made directly to customers in the U.S. would be reported in a manufacturing code while sales made into the U.S. through a wholesale operation within the same person would be reported in both manufacturing (transfer price) and wholesale or retail (sales price) codes, to be consistent with current practice when companies have both domestic manufacturing and wholesale or retail operations.

Comment 1 objected to the proposed reporting of revenues for products manufactured outside the U.S. on the grounds that compiling NAICS code information would be a substantial burden for foreign manufacturers who do not currently use NAICS. Comment 2 objected on the same grounds, and also stated that the double listing of foreign manufacturing and importing revenues was confusing. Comment 6 stated that the Commission specifically declined to require foreign manufactured product data by U.S. census code in the 1978 final rules, and that the burden of providing such data is not significantly smaller today. Comment 7 also stated that finding NAICS information would be burdensome for foreign filers and that only U.S. operations should be reported. Comment 9 also raised this concern and cited to International Competition

[9] The one-year time limit applicable to materials responsive to Items 4(d)(i) and 4(d)(ii) does not apply to materials responsive to Item 4(c); Item 4(c) has no specific timeframe.

Network principles that unnecessary costs on transactions should be avoided.

After considering these comments, the Commission is not persuaded that NAICS reporting would be significantly more difficult for foreign manufacturers than it is for domestic manufacturers. One of the reasons the Commission decided to propose the elimination of base year reporting was that HSR practitioners have told the PNO that filers generally do not rely on previous NAICS data compiled for submission to the Bureau of Census, as the Commission previously understood, but rather that the parties determine the appropriate NAICS codes and underlying revenues as they are preparing their filings. That being the case, foreign manufacturers should be able to identify appropriate NAICS codes as readily as domestic manufacturers can; in fact, foreign entities with U.S. wholesale or retail operations already use the NAICS system to report revenues from those operations. Finally, the Commission believes that whatever additional burden may be initially experienced by foreign manufacturers because of their unfamiliarity with NAICS manufacturing codes is outweighed by the usefulness of the information to the Agencies.

Comments 6 and 11 also objected to the double-counting effect that would result from the proposed requirement that foreign manufacturers report revenues under both manufacturing codes (at transfer price) and wholesaling codes (sales revenues) if their products are manufactured outside the U.S. and sold in the U.S. Indeed, Comment 11 stated that this is a long-standing problem with Item 5 in its current form as it relates to domestic manufacturers who sell their product from a separate establishment and must then report manufacturing and wholesaling revenues.

The Commission agrees that double-counting can distort revenues reported in Item 5 and therefore will amend the instruction for Item 5(a) to require that any manufacturer, whether foreign or domestic, report revenues from the sale of its manufactured products only under 10-digit NAICS manufacturing product codes. Sales of products that are not manufactured by the parties but only sold by them would, of course, continue to be reported under 6-digit wholesaling or retailing codes. Comment 6 advocated eliminating the double-counting problem by requiring the listing of revenues from manufactured products by 6-digit wholesaling code only, but this solution would not provide the Agencies with sufficient information about the products being manufactured and sold.

Item 5 De Minimis Exception

The proposed changes to Item 5 also included a proposal to eliminate the million dollar minimum that currently applies to reporting revenues for non-manufacturing operations in the most recent year. As discussed in the Proposed Rule, the minimum was based on the way filing persons reported non-manufacturing data to the Census Bureau, but given that there appears to be little or no reliance on the part of filers on previously assembled census data for HSR reporting, there seemed to be little reason to retain it. In addition, the minimum was sometimes misconstrued as a minimum for the reporting of overlaps in Item 7, which it is not. Comments 6 and 11 objected to the proposed elimination of the million dollar minimum, stating that the minimum reduces the burden of characterizing minor operations by NAICS code and allocating revenues to those codes; further, the comments suggested that instead of eliminating the minimum, an instruction could be added to clarify that an Item 7 overlap can still exist for operations that generate less than $1 million in revenues in the most recent year.

The Commission accepts that the million dollar minimum is helpful to filers and agrees that amending the instruction to Item 7 to state that the item is applicable to an overlap of operations generating any amount of revenue is a reasonable approach. Therefore, the million dollar minimum will remain for Item 5, and the Item 7 instruction has been amended, as below:

> If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see § 801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year, or in which a joint venture corporation or unincorporated entity will derive dollar revenues (note that if the acquired entity is a joint venture the only overlaps will be between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture), then for each such 6-digit NAICS industry code:
> * * *

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601–612, requires that the agency conduct an initial and final regulatory analysis of the anticipated economic impact of the amendments on small businesses, except where the Commission certifies that the regulatory action will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605. Because of the size of the transactions necessary to trigger a Hart-Scott-Rodino filing, the premerger notification rules rarely, if ever, affect small businesses. Indeed, these amendments are intended to reduce the burden of the premerger notification program. Further, none of the rule amendments expands the coverage of the premerger notification rules in a way that would affect small business. Accordingly, the Commission certifies that these rules will not have a significant economic impact on a substantial number of small entities. This document serves as the required notice of this certification to the Small Business Administration.

Paperwork Reduction Act

The Paperwork Reduction Act, 44 U.S.C. 3501–3521, requires agencies to submit ''collections of information'' to the Office of Management and Budget (''OMB'') and obtain clearance before instituting them. Such collections of information include reporting, recordkeeping, or disclosure requirements contained in regulations. The existing information collection requirements in the HSR Rules and Form have been reviewed and approved by OMB under OMB Control No. 3084–0005. The current clearance expires on June 30, 2013. On September 23, 2010, the Commission submitted a clearance request to OMB regarding the then proposed amendments to the reporting requirements in the Rules and Form. On November 8, 2010, OMB filed a comment, requesting that the FTC consider public comments on the proposed amendments and to respond to them and make any necessary adjustments in its ensuing submission to OMB for the final amendments. Consistent with the analysis shown here, the Commission is submitting a supplemental response to OMB as a follow-up to its prior clearance request.

Increase or Decrease in Filings Due to Ministerial Changes in Filing Requirements

The final amendments are primarily changes to the information reported on the Notification and Report Form and do not affect the reportability of a transaction. Most of the ministerial changes to the Rules are clarifications (e.g., the change to § 802.4) or new procedures (e.g., the change to § 801.30), which also would have no effect on reporting obligations. One amendment could theoretically produce an increase

in filings. The definition of ''entity'' in § 801.1(a)(2) is being modified to include unincorporated entities engaged in commerce that are controlled by a government. The definition currently includes only corporations engaged in commerce. Another amendment could theoretically produce a decrease in filings. The amendment to the aggregation rules in § 801.15 would eliminate the unintended effect of requiring aggregation when exactly 50 percent of multiple subsidiaries have been acquired and additional voting securities of the same person are newly being acquired. The Commission believes that any increase or decrease in filings as a result of the final ministerial amendments would be negligible.

Reduced Time Collecting Data for and Preparing the Form

Premerger Notification Office staff canvassed eight practitioners from the private bar to estimate the projected change in burden due to the then proposed, now final, amendments to the Form. All those consulted are considered HSR experts and have extensive experience with preparing HSR filings for the types of transactions that are most likely to be affected by the amendments.

Many of the final amendments would significantly reduce burden for all filers. Others would increase burden, particularly for acquiring persons that are private equity funds and master limited partnerships. The consensus of those canvassed was that, on average, burden for collecting and reporting would decrease by approximately five percent. Thus, 37 hours (rounded to the nearest hour) will be allocated to non-index filings.[10] [(Current estimate, 39 hours[11]) × (1 − .05) = 37.05 hours.]

Net Effect

The Form changes only affect non-index filings which, for FY 2011, the FTC projects will total 1,428. The amendments to the HSR Rules and Notification and Report Form should reduce the time required to prepare responses for non-index filings, with an estimated net reduction of 2 hours per filing (39 hours to 37 hours). Cumulatively, however, owing to a projected increase from 841 such filings to 1,428 (independent of the amendments' effects), total burden will increase from the currently cleared estimate of 33,298 hours[12] to 53,756 hours.[13]

Applying the revised estimated hours, 53,756, to the previous assumed hourly wage of $460 for executive and attorney compensation,[14] yields $24,728,000 (rounded to the nearest thousand) in labor costs.[15] The amendments presumably will impose minimal or no additional capital or other non-labor costs, as businesses subject to the HSR Rules generally have or obtain necessary equipment for other business purposes. Staff believes that the above requirements necessitate ongoing, regular training so that covered entities stay current and have a clear understanding of federal mandates, but that this would be a small portion of and subsumed within the ordinary training that employees receive apart from that associated with the information collected under the HSR Rules and the corresponding Notification and Report Form.

List of Subjects in 16 CFR Parts 801, 802 and 803

Antitrust.

For the reasons stated in the preamble, the Federal Trade Commission amends 16 CFR parts 801, 802 and 803 as set forth below:

PART 801—COVERAGE RULES

■ 1. The authority citation for part 801 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 2. Amend § 801.1 by revising paragraphs (a)(2) and (b)(2), revising example 2 to paragraph (b), adding example 5 to paragraph (b), revising paragraph (d), and revising paragraph (f)(1)(ii) to read as follows:

§ 801.1 Definitions.

* * * * *

(a) * * *

(2) *Entity.* The term *entity* means any natural person, corporation, company, partnership, joint venture, association, joint-stock company, trust, estate of a deceased natural person, foundation, fund, institution, society, union, or club, whether incorporated or not, wherever located and of whatever citizenship, or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his or her capacity as such; or any joint venture or other corporation which has not been formed but the acquisition of the voting securities or other interest in which, if already formed, would require notification under the act and these rules:

Provided, however, that the term entity shall not include any foreign state, foreign government, or agency thereof (other than a corporation or unincorporated entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce).

* * * * *

(b) * * *

(2) Having the contractual power presently to designate 50 percent or more of the directors of a for-profit or not-for-profit corporation, or in the case of trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest, the trustees of such a trust.

* * * * *

Examples: * * *

2. A statutory limited partnership agreement provides as follows: The general partner ''A'' is entitled to 50 percent of the partnership profits, ''B'' is entitled to 40 percent of the profits and ''C'' is entitled to 10 percent of the profits. Upon dissolution, ''B'' is entitled to 75 percent of the partnership assets and ''C'' is entitled to 25 percent of those assets. All limited and general partners are entitled to vote on the following matters: the dissolution of the partnership, the transfer of assets not in the ordinary course of business, any change in the nature of the business, and the removal of the general partner. The interest of each partner is evidenced by an ownership certificate

[10] *Id.* Clayton Act sections 7A(c)(6) and (c)(8) exempt from the requirements of the premerger notification program certain transactions that are subject to the approval of other agencies, but only if copies of the information submitted to these other agencies are also submitted to the FTC and the Assistant Attorney General. Thus, parties must submit copies of these ''index'' filings, but completing the task requires significantly less time than non-exempt transactions that require ''non-index'' filings.

[11] *Id.*

[12] The preceding estimate, detailed further at 75 FR 27558, 27559–27560 (May 17, 2010), was calculated as follows: [(841 non-index filings × 39 hours) + (22 transactions requiring more precise valuation × 40 hours) + (20 index filings × 2 hours)] − [841 non-index filings × ½ of these filings incorporating Item 4(a) and Item 4(b) documents by reference to an Internet link × 1 hour savings) = 33,298 hours. The reduction within this prior calculation for time saved when incorporating Item 4(a) and Item 4(b) documents by reference to an Internet link would be mooted by the final amendments. The amendments would further reduce time to complete the Form, and are factored into the estimated five percent reduction stated above.

[13] This is determined as follows: [(1428 non-index filings × 37 hours) + (22 transactions requiring more precise valuation × 40 hours) + (20 index filings × 2 hours)].

[14] *See* 75 FR at 57122 n. 48 and accompanying text.

[15] Though the filing time and associated labor per respondent is reduced as a result of these amendments, the cumulative dollar total is higher than previously stated ($15,317,000) at the time of the proposed rulemaking. This is attributable solely to a projected increase in the number of related filings for fiscal year 2011, as compared to the prior estimated filings for fiscal year 2010.

that is transferable under the terms of the partnership agreement and is subject to the Securities Act of 1933. For purposes of these rules, control of this partnership is determined by paragraph (1)(ii) of this section. Although partnership interests may be securities and have some voting rights attached to them, they do not entitle the owner of that interest to vote for a corporate ''director'' as required by § 801.1(f)(1). Thus control of a partnership is not determined on the basis of either paragraph (1)(i) or (2) of this section. Consequently, ''A'' is deemed to control the partnership because of its right to 50 percent of the partnership's profits. ''B'' is also deemed to control the partnership because it is entitled to 75 percent of the partnership's assets upon dissolution.

* * * * *

5. A is the settlor of an irrevocable trust in which it does not retain a reversionary interest in the corpus of the trust. A is entitled under the trust indenture to designate four of the eight trustees of the trust. A controls the trust pursuant to § 801.1(b)(2) and is deemed to hold the assets that constitute the corpus of the trust. Note that the right to designate 50 percent or more of the trustees of a business trust that has equity holders entitled to profits or assets upon dissolution of the business trust does not constitute control. Such business trusts are treated as unincorporated entities and control is determined pursuant to § 801.1(b)(1)(ii).

* * * * *

(d)(1) *Affiliate.* An entity is an affiliate of a person if it is controlled, directly or indirectly, by the ultimate parent entity of such person.

(2) *Associate.* For purposes of Items 6 and 7 of the Form, an associate of an acquiring person shall be an entity that is not an affiliate of such person but:

(A) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ''managing entity''); or

(B) Has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or

(C) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(D) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity.

Examples:

1. ABC Investment Group has organized a number of investment partnerships. Each of the partnerships is its own ultimate parent, but ABC makes the investment decisions for all of the partnerships. One of the partnerships intends to make a reportable acquisition. For purposes of Items 6(c) and 7, each of the other investment partnerships, and ABC Investment Group itself are associates of the partnership that is the acquiring person. In response to Item 6(c)(i), the acquiring person will disclose any of its 5 percent or greater minority holdings that generate revenues in any of the same NAICS codes as the acquired entity(s) in the reportable transaction. In Item 6(c)(ii) it would report any 5 percent or greater minority holdings of its associates in the acquired entity(s) and in any entities that generate revenues in any of the same NAICS codes as the acquired entity(s). In Item 7, the acquiring person will indicate whether there are any NAICS code overlaps between the acquired entity(s) in the reportable transaction, on the one hand, and the acquiring person and all of its associates, on the other.

2. XYZ Corporation is its own ultimate parent and intends to make a reportable acquisition. Pursuant to a management contract, Fund MNO has the right to manage the investments of XYZ Corporation. For the HSR filing by XYZ Corporation, Fund MNO is an associate of XYZ, as is any other entity that either controls, or is controlled by, or manages or is managed by Fund MNO or is under common control or common investment management with Fund MNO.

3. EFG Investment Group has the contractual power to determine the investments of PRS Corporation, which is its own ultimate parent. Natural person Mr. X, who is not an employee of EFG Investment Group, has been contracted by EFG Investment Group as its investment manager. When PRS Corporation makes an acquisition, its associates include (i) EFG Investment Group, (ii) any entity over which EFG Investment Group has investment authority, (iii) any entity that controls, or is controlled by, EFG Investment Group, (iv) Natural person Mr. X, (v) any entity over which Natural person Mr. X has investment management authority, and (vi) any entity which is controlled by Natural person Mr. X, directly or indirectly.

4. CORP1 controls GP1 and GP2, the sole general partners of private equity funds LP1 and LP2 respectively. LP1 controls GP3, the sole general partner of MLP1, a newly formed master limited partnership which is its own ultimate parent entity. LP2 controls GP4, the sole general partner of MLP2, another master limited partnership that is its own ultimate parent entity and which owns and operates a natural gas pipeline. In addition, GP4 holds 25 percent of the voting securities of CORP2, which also owns and operates a natural gas pipeline.

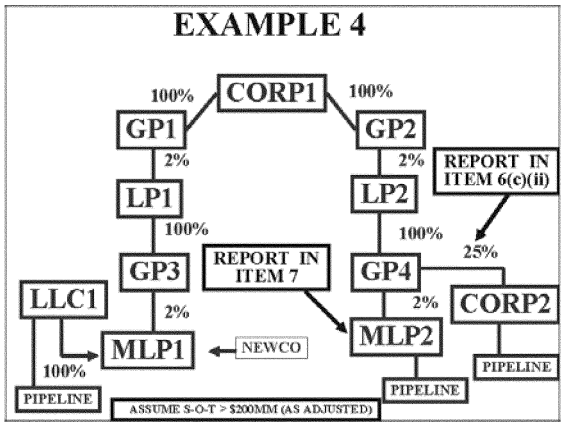
MLP1 is acquiring 100 percent of the membership interests of LLC1, also the owner and operator of a natural gas pipeline. MLP2, CORP2 and LLC1 all derive revenues in the same NAICS code (Pipeline Transportation of Natural Gas). All of the entities under common investment management of CORP1, including GP4 and MLP2, are associates of MLP1, the acquiring person.

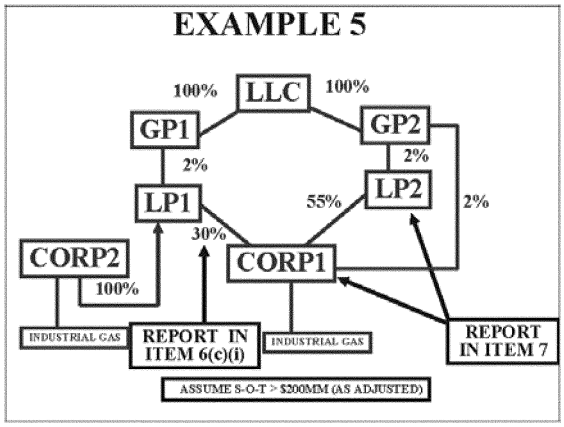
In Item 7 of its HSR filing, MLP1 would identify MLP2 as an associate that has an overlap in pipeline transportation of natural gas with LLC1, the acquired person. Because GP4 does not control CORP2 it would not be listed in Item 7, however, GP4 would be listed in Item 6(c)(ii) as an associate that holds 25 percent of the voting securities of CORP2. In this example, even though there is no direct overlap between the acquiring person (MLP1) and the acquired person (LLC1), there is an overlap reported for an associate (MLP2) of the acquiring person in Item 7. 5. LLC is the investment manager for and ultimate parent entity of general partnerships GP1 and GP2. GP1 is the general partner of LP1, a limited partnership that holds 30 percent of the voting securities of CORP1. GP2 is the general partner of LP2, which holds 55 percent of the voting securities of CORP1. GP2 also directly holds 2 percent of the voting securities of CORP1. LP1 is acquiring 100 percent of the voting securities of CORP2. CORP1 and CORP2 both derive revenues in the same NAICS code (Industrial Gas Manufacturing).

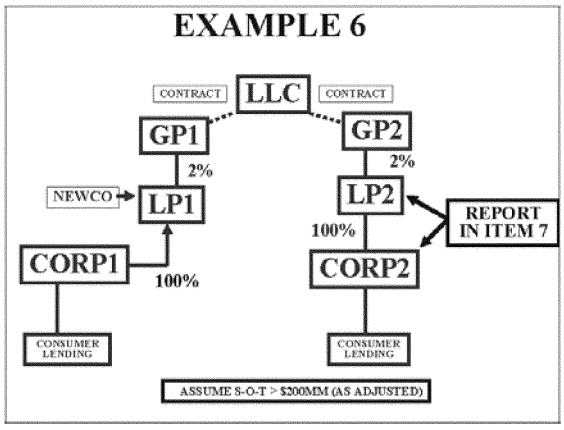
All of the entities under common investment management of the managing entity LLC, including GP1, GP2, LP2 and CORP1 are associates of LP1. In Item 6(c)(i) of its HSR filing, LP1 would report its own holding of 30 percent of the voting securities of CORP1. It would not report the 55 percent holding of LP2 in Item 6(c)(ii) because it is greater than 50 percent. It also would not report GP2's 2 percent holding because it is less than 5 percent. In Item 7, LP1 would identify both LP2 and CORP1 as associates that derive revenues in the same NAICS code as CORP2.

6. LLC is the investment manager for GP1 and GP2 which are the general partners of limited partnerships LP1 and LP2, respectively. LLC holds no equity interests in either general partnership but manages their investments and the investments of the limited partnerships by contract. LP1 is newly formed and its own ultimate parent entity. It plans to

acquire 100 percent of the voting securities of CORP1, which derives revenues in the NAICS code for Consumer Lending. LP2 controls CORP2, which derives revenues in the same NAICS code. All of the entities under the common management of LLC, including LP2 and CORP2, are associates of LP1. For purposes of Item 7, LP1 would report LP2 and CORP2 as associates that derive revenues in the NAICS code that overlaps with CORP1. Even though the investment manager (LLC) holds no equity interest in GP1 or GP2, the contractual arrangement with them makes them associates of LP1 through common management.







7. Corporation A is its own ultimate parent entity and is making an acquisition of Corporation B. Although Corporation A is operationally managed by its officers and its investments, including the acquisition of Corporation B, are managed by its directors, neither the officers nor directors are considered associates of A.

8. Limited partnership A is an investment partnership that is making an acquisition. LLC B has no equity interest in A, but has a contract to manage its investments for a fee. LLC B has an investment committee comprised of twelve of its employees that makes the actual investment decisions. LLC B is an associate of A but none of the twelve employees are associates of A, as LLC B is a managing entity and the twelve individuals are merely its employees. Contrast this with example 3 where a managing entity, EFG, is itself managed by another entity, Mr. X, who is thus an associate.

9. GP is the general partner of FUND. GP has contracted with LLC to act as an

investment advisor with respect to FUND's investments. In this role, LLC acts as a consultant who makes recommendations to GP on what portfolio companies FUND should invest in. The recommendations are non-binding and GP is the only entity that has the authority to exercise investment discretion over FUND's acquisitions of interests in portfolio companies. In this example, GP is an associate of FUND, while LLC is not.

10. GP A is the general partner and investment manager of FUND A1. Mr. X is a principal in the A family of private equity funds and has the contractual right to veto certain proposed actions of GP A and FUND A1, for example, divestitures of stock that would result in a change of control in a portfolio company. His contractual right to veto certain proposed actions does not constitute managing operations. Mr. X does not have the authority under the contract to veto proposed investments of FUND A1 directed by GP A or to direct GP A to authorize investments by FUND A1. In this example, GP A is an associate of FUND A1, while Mr. X is not.

11. LLC is the general partner of LP and has entered into a management contract to exercise investment discretion over LP's investments in portfolio companies as well as to provide certain other administrative services for LP. Mr. Y is the managing member of LLC and as such is the person who actually makes the investment decisions on behalf of LLC. Mr. Y has no management contract with either LLC or LP. In this example, LLC is an associate of LP, while Mr. Y is not. Compare with Example 7 where officers and directors of a corporation are not associates of the corporation.

12. GP is the general partner of LP and has entered into a management contract to exercise investment discretion over LP's investments in portfolio companies. GP has entered into a contract with CORP, under which CORP will manage building maintenance and certain back office functions (e.g., maintenance of phones and computers, accounting, IT and human resources) for LP. GP is an associate of LP because it manages LP's investments. However, the management services provided by CORP do not constitute operational management, therefore, CORP is not an associate of LP.

* * * * *

(f) * * *

(1) * * *

(ii) *Non-corporate interest.* The term ''non-corporate interest'' means an interest in any unincorporated entity which gives the holder the right to any profits of the entity or in the event of dissolution of that entity the right to any of its assets after payment of its debts. These unincorporated entities include, but are not limited to, general partnerships, limited partnerships, limited liability partnerships, limited liability companies, cooperatives and business trusts; but these unincorporated entities do not include trusts that are irrevocable and/or in which the settlor does not retain a reversionary interest and any interest in such a trust is not a non-corporate interest as defined by this rule.

* * * * *

■ 3. Amend § 801.10 by revising paragraph (c)(2) to read as follows:

§ 801.10 Value of voting securities, non-corporate interests and assets to be aquired.

* * * * *

(c) * * *

(2) *Acquisition price.* The acquisition price shall include the value of all consideration for such voting securities, non-corporate interests or assets to be acquired.

* * * * *

■ 4. Amend § 801.15 by revising its section heading, introductory text and paragraphs (a) and (b) to read as follows:

§ 801.15 Aggregation of voting securities, non-corporate interests and assets the acquisition of which was exempt.

Notwithstanding § 801.13, for purposes of determining the aggregate total amount of voting securities, non-corporate interests and assets of the acquired person held by the acquiring person under Section 7A(a)(2) and § 801.1(h), none of the following will be held as a result of an acquisition:

(a) Assets, non-corporate interests or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the act and these rules been in effect), or the present acquisition of which is exempt, under—

(1) Sections 7A(c)(1), (3), (5), (6), (7), (8), and (11)(B);

(2) Sections 802.1, 802.2, 802.5, 802.6(b)(1), 802.8, 802.30, 802.31, 802.35, 802.52, 802.53, 802.63, and 802.70 of this chapter;

(b) Assets, non-corporate interests or voting securities the acquisition of which was exempt at the time of acquisition (or would have been exempt, had the Act and these rules been in effect), or the present acquisition of which is exempt, under Section 7A(c)(9) and §§ 802.3, 802.4, and 802.64 of this chapter unless the limitations contained in Section 7A(c)(9) or those sections do not apply or as a result of the acquisition would be exceeded, in which case the assets or voting securities so acquired will be held; and

* * * * *

■ 5. Amend § 801.30 by revising its section heading and paragraph (a)(5) to read as follows:

§ 801.30 Tender offers and acquisitions of voting securities and non-corporate interests from third parties.

(a) * * *

(5) All acquisitions (other than mergers and consolidations) in which voting securities or non-corporate interests are to be acquired from a holder or holders other than the issuer or unincorporated entity or an entity included within the same person as the issuer or unincorporated entity;

* * * * *

PART 802—EXEMPTION RULES

■ 6. The authority citation for part 802 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 7. Amend § 802.4 by revising paragraph (a) to read as follows:

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

(a) An acquisition of voting securities of an issuer or non-corporate interests in an unincorporated entity whose assets together with those of all entities it controls consist or will consist of assets whose acquisition is exempt from the requirements of the Act pursuant to section 7A(c) of the Act, this part 802, or pursuant to § 801.21, is exempt from the reporting requirements if the acquired issuer or unincorporated entity and all entities it controls do not hold non-exempt assets with an aggregate fair market value of more than $50 million (as adjusted). The value of voting or non-voting securities of any other issuer or interests in any unincorporated entity not included within the acquired issuer or unincorporated entity does not count toward the $50 million (as adjusted) limitation for non-exempt assets.

* * * * *

§ 802.21 [Amended]

■ 8. Amend § 802.21 by removing paragraph (b) and its three examples.

■ 9. Amend § 802.52 by revising its section heading and paragraph (b) to read as follows:

§ 802.52 Acquisitions by or from foreign governmental entities.

* * * * *

(b) The acquisition is of assets located within that foreign state or of voting securities or non-corporate interests of an entity organized under the laws of that state.

* * * * *

PART 803—TRANSMITTAL RULES

■ 10. The authority citation for part 803 continues to read as follows:

Authority: 15 U.S.C. 18a(d).

■ 11. Amend § 803.2 by revising paragraphs (b)(2), (c), and (e) to read as follows:

§ 803.2 Instructions applicable to Notification and Report Form.

* * * * *

(b) * * *

(2) For purposes of item 7 of the Notification and Report Form, the acquiring person shall regard the acquired person in the manner described in paragraphs (b)(1)(ii), (iii) and (iv) of this section.

* * * * *

(c) In response to items 5, 7, and 8 of the Notification and Report Form—Information need not be supplied with respect to assets or voting securities to be acquired, the acquisition of which is exempt from the requirements of the act.

* * * * *

(e) A person filing notification may instead provide:

(1) A cite to a previous filing containing documentary materials required to be filed in response to item 4(b) of the Notification and Report Form, which were previously filed by the same person and which are the most recent versions available; except that when the same parties file for a higher threshold no more than 90 days after having made filings with respect to a lower threshold, each party may instead provide a cite to any documents or information in its earlier filing provided that the documents and information are the most recent available;

(2) A cite to an Internet address directly linking to the document, only documents required to be filed in response to item 4(b) of the Notification and Report Form. If an Internet address is inoperative or becomes inoperative during the waiting period, or the document that is linked to it is incomplete, or the link requires payment to access the document, upon notification by the Commission or Assistant Attorney General, the parties must make these documents available to the agencies by either referencing an operative Internet address or by providing paper copies to the agencies as provided in § 803.10(c)(1) by 5 p.m. on the next regular business day. Failure to make the documents available, by the Internet or by providing paper copies, by 5 p.m. on the next regular business day, will result in notice of a deficient filing pursuant to § 803.10(c)(2).

* * * * *

■ 12. Amend § 803.5 by revising paragraphs (a)(1) introductory text, (a)(1)(ii), (a)(1)(iii), and (a)(1)(vi) to read as follows.

§ 803.5 Affidavits required.

(a)(1) *Section 801.30 acquisitions.* For acquisitions to which § 801.30 applies, the notification required by the act from each acquiring person shall contain an affidavit, attached to the front of the notification, or attached as part of the electronic submission, attesting that the issuer or unincorporated entity whose voting securities or non-corporate interests are to be acquired has received notice in writing by certified or registered mail, by wire or by hand delivery, at its principal executive offices, of:

* * * * *

(ii) The fact that the acquiring person intends to acquire voting securities or non-corporate interests of the issuer or unincorporated entity;

(iii) The specific classes of voting securities or non-corporate interests of the issuer or unincorporated entity sought to be acquired; and if known, the number of voting securities or non-corporate interests of each such class that would be held by the acquiring person as a result of the acquisition or, if the number of voting securities is not known in the case of an issuer, the specific notification threshold that the acquiring person intends to meet or exceed; and, if designated by the acquiring person, a higher threshold for additional voting securities it may hold in the year following the expiration of the waiting period;

* * *

(vi) The fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the act.

* * * * *

■ 13. Appendix to Part 803 is revised to read as follows:

Appendix to Part 803—Notification and Report Form

16 C.F.R. Part 803 – Appendix

NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS

☐☐☐☐☐☐☐☐ TRANSACTION NUMBER ASSIGNED

FEE INFORMATION *(For Payer Only)*

AMOUNT PAID $ _____

In cases where your filing fee would be higher if based on acquisition price or where the acquisition price is undetermined to the extent that it may straddle a filing fee threshold, attach an explanation of how you determined the appropriate fee.

Attachment Number _____

TAXPAYER IDENTIFICATION NUMBER _____
OR SOCIAL SECURITY NUMBER FOR NATURAL PERSONS

NAME OF PAYER *(if different from PERSON FILING)* _____

WIRE TRANSFER ☐ or CERTIFIED CHECK / MONEY ORDER ATTACHED ☐

WIRE TRANSFER CONFIRMATION NO. _____

FROM (NAME OF INSTITUTION) _____

IS THIS A CORRECTIVE FILING? ☐ YES ☐ NO | CASH TENDER OFFER? ☐ YES ☐ NO | BANKRUPTCY? ☐ YES ☐ NO

DO YOU REQUEST EARLY TERMINATION OF THE WAITING PERIOD? ☐ YES ☐ NO
(Grants of early termination are published in the Federal Register and on the FTC web site, www.ftc.gov)

(*voluntary*) IS THIS ACQUISITION SUBJECT TO NON-US FILING REQUIREMENTS? ☐ YES ☐ NO
IF YES, list jurisdictions:

ITEM 1

1(a) PERSON FILING

NAME
HEADQUARTERS ADDRESS
ADDRESS LINE 2
CITY, STATE, COUNTRY
ZIP CODE
WEB SITE

1(b) PERSON FILING NOTIFICATION IS ☐ an acquiring person ☐ an acquired person ☐ both

1(c) PUT AN "X" IN THE APPROPRIATE BOX TO DESCRIBE THE PERSON FILING NOTIFICATION
☐ Corporation ☐ Unincorporated Entity ☐ Natural Person ☐ Other *(Specify)*: _____

1(d) DATA FURNISHED BY
☐ calendar year ☐ fiscal year *(specify period)*: _____ (month/year) to _____ (month/year)

1(e) PUT AN "X" IN THE APPROPRIATE BOX BELOW AND GIVE THE NAME AND ADDRESS OF THE ENTITY FILING NOTIFICATION, IF DIFFERENT THAN THE ULTIMATE PARENT ENTITY

☐ Not Applicable | ☐ This report is being filed on behalf of a foreign person pursuant to § 803.4. | ☐ This report is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file pursuant to § 803.2(a).

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

1(f) NAME AND ADDRESS OF ENTITY MAKING ACQUISITION OR WHOSE ASSETS, VOTING SECURITIES OR NON-CORPORATE INTERESTS ARE BEING ACQUIRED, IF DIFFERENT FROM THE ULTIMATE PARENT ENTITY IDENTIFIED IN ITEM 1(a)

NAME
ADDRESS
CITY, STATE, COUNTRY
ZIP CODE

☐ Not Applicable

PERCENT OF VOTING SECURITIES OR NON-CORPORATE INTERESTS THAT THE UPE HOLDS DIRECTLY OR INDIRECTLY IN THE ACQUIRING OR ACQUIRED ENTITY IDENTIFIED IN ITEM 1(f) %

1(g) IDENTIFICATION OF PERSONS TO CONTACT REGARDING THIS REPORT

CONTACT PERSON 1		CONTACT PERSON 2	
FIRM NAME		FIRM NAME	
BUSINESS ADDRESS		BUSINESS ADDRESS	
CITY, STATE, COUNTRY		CITY, STATE, COUNTRY	
ZIP CODE		ZIP CODE	
TELEPHONE NUMBER		TELEPHONE NUMBER	
FAX NUMBER		FAX NUMBER	
E-MAIL ADDRESS		E-MAIL ADDRESS	

1(h) IDENTIFICATION OF AN INDIVIDUAL LOCATED IN THE UNITED STATES DESIGNATED FOR THE LIMITED PURPOSE OF RECEIVING NOTICE OF ISSUANCE OF A REQUEST FOR ADDITIONAL INFORMATION OR DOCUMENTS (See § 803.20(b)(2)(iii))

NAME
FIRM NAME
BUSINESS ADDRESS
CITY, STATE, COUNTRY
ZIP CODE
TELEPHONE NUMBER
FAX NUMBER
E-MAIL ADDRESS

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 2

2(a) LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRING PERSONS	LIST NAMES OF ULTIMATE PARENT ENTITIES OF ALL ACQUIRED PERSONS

2(b) THIS ACQUISITION IS *(put an "X" in all the boxes that apply)*

- ☐ an acquisition of assets
- ☐ a merger (see § 801.2)
- ☐ an acquisition subject to § 801.2(e)
- ☐ a formation of a joint venture or other corporation or unincorporated entity (see § 801.40 or § 801.50)
- ☐ an acquisition subject to § 801.30 (*specify type*)
- ☐ a consolidation (see § 801.2)
- ☐ an acquisition of voting securities
- ☐ a secondary acquisition
- ☐ an acquisition subject to § 801.31
- ☐ an acquisition of non-corporate interests
- ☐ other (*specify*) _____

2(c) INDICATE THE HIGHEST NOTIFICATION THRESHOLD IN § 801.1(h) FOR WHICH THIS FORM IS BEING FILED
(acquiring person only in an acquisition of voting securities)

☐ $50 million (as adjusted) ☐ $100 million (as adjusted) ☐ $500 million (as adjusted) ☐ 25% (see Instructions) (as adjusted) ☐ 50% ☐ N/A

2(d)(i) VALUE OF VOTING SECURITIES ALREADY HELD ($MM) $	**(v)** VALUE OF NON-CORPORATE INTERESTS ALREADY HELD ($MM) $	
(ii) PERCENTAGE OF VOTING SECURITIES ALREADY HELD %	**(vi)** PERCENTAGE OF NON-CORPORATE INTERESTS ALREADY HELD %	
(iii) TOTAL VALUE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(vii)** TOTAL VALUE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $	**(ix)** VALUE OF ASSETS TO BE HELD AS A RESULT OF THE ACQUISITION ($MM) $
(iv) TOTAL PERCENTAGE OF VOTING SECURITIES TO BE HELD AS A RESULT OF THE ACQUISITION %	**(viii)** TOTAL PERCENTAGE OF NON-CORPORATE INTERESTS TO BE HELD AS A RESULT OF THE ACQUISITION %	**(x)** AGGREGATE TOTAL VALUE ($MM) $

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 3

3(a) DESCRIPTION OF ACQUISITION

ACQUIRING UPE(S)	ACQUIRED UPE(S)
ACQUIRING ENTITY(S)	ACQUIRED ENTITY(S)

TRANSACTION DESCRIPTION

3(b) SUBMIT A COPY OF THE MOST RECENT VERSION OF THE CONTRACT OR AGREEMENT *(or letter of intent to merge or acquire)*

(DO NOT ATTACH THE DOCUMENT TO THIS PAGE) ATTACHMENT OR REFERENCE NUMBER OF CONTRACT OR AGREEMENT _____

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 4

PERSONS FILING NOTIFICATION MAY PROVIDE BELOW AN OPTIONAL INDEX OF DOCUMENTS REQUIRED TO BE SUBMITTED BY ITEM 4 *(See Item by Item instructions)*. THESE DOCUMENTS SHOULD NOT BE ATTACHED TO THIS PAGE.

4(a) ENTITIES WITHIN THE PERSON FILING NOTIFICATION THAT FILE ANNUAL REPORTS WITH THE SECURITIES AND EXCHANGE COMMISSION — CENTRAL INDEX KEY NUMBER

4(b) ANNUAL REPORTS AND ANNUAL AUDIT REPORTS — ATTACHMENT OR REFERENCE NUMBER

4(c) STUDIES, SURVEYS, ANALYSES, AND REPORTS — ATTACHMENT OR REFERENCE NUMBER

4(d) ADDITIONAL DOCUMENTS — ATTACHMENT OR REFERENCE NUMBER

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 5

5(a) DOLLAR REVENUES BY NON-MANUFACTURING INDUSTRY CODE AND BY MANUFACTURED PRODUCT CODE

6-DIGIT INDUSTRY CODE AND/OR 10-DIGIT PRODUCT CODE	DESCRIPTION	YEAR |_____| TOTAL DOLLAR REVENUES ($MM)

NONE ☐ *(PROVIDE EXPLANATION)*

NAME OF PERSON FILING NOTIFICATION	DATE

5(b) COMPLETE ONLY IF ACQUISITION IS IN THE FORMATION OF A JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY	☐ Not Applicable

5(b)(i) CONTRIBUTIONS THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY HAS AGREED TO MAKE

5(b)(ii) DESCRIPTION OF CONSIDERATION THAT EACH PERSON FORMING THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL RECEIVE

5(b)(iii) DESCRIPTION OF THE BUSINESS IN WHICH THE JOINT VENTURE CORPORATION OR UNINCORPORATED ENTITY WILL ENGAGE

5(b)(iv) SOURCE OF DOLLAR REVENUES BY 6-DIGIT INDUSTRY CODE (non-manufacturing) AND BY 10-DIGIT PRODUCT CODE (manufactured)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 6

6(a) ENTITIES WITHIN PERSON FILING NOTIFICATION

6(b) HOLDERS OF PERSON FILING NOTIFICATION

6(c)(i) HOLDINGS OF PERSON FILING NOTIFICATION

6(c)(ii) HOLDINGS OF ASSOCIATES *(ACQUIRING PERSON ONLY)*

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 7

OVERLAP DOLLAR REVENUES

7(a) 6-DIGIT NAICS INDUSTRY CODE AND DESCRIPTION

7(b)(i) LIST THE NAME OF EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

7(b)(ii) LIST THE NAME OF EACH ASSOCIATE OF THE ACQUIRING PERSON THAT ALSO DERIVED DOLLAR REVENUES (*ACQUIRING PERSON ONLY*)

7(c) GEOGRAPHIC MARKET INFORMATION FOR EACH PERSON THAT ALSO DERIVED DOLLAR REVENUES

7(d) GEOGRAPHIC MARKET INFORMATION FOR ASSOCIATES OF THE ACQUIRING PERSON (*ACQUIRING PERSON ONLY*)

NAME OF PERSON FILING NOTIFICATION	DATE

ITEM 8

PRIOR ACQUISITIONS *(ACQUIRING PERSON ONLY)*

CERTIFICATION

This **NOTIFICATION AND REPORT FORM,** together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

NAME (Please print or type)	TITLE
SIGNATURE	DATE

Subscribed and sworn to before me at the

City of _____, State of _____ [SEAL]

this _____day of _____, the year _____

Signature _____

My Commission expires _____

16 C.F.R. Part 803 – Appendix NOTIFICATION AND REPORT FORM FOR CERTAIN MERGERS AND ACQUISITIONS	Approved by OMB 3084-0005 Expires xx/xx/20xx

Attach the Affidavit required by § 803.5 to the Form.

THE INFORMATION REQUIRED TO BE SUPPLIED ON THESE ANSWER SHEETS IS SPECIFIED IN THE INSTRUCTIONS

THIS FORM IS REQUIRED BY LAW and must be filed separately by each person which, by reason of a merger, consolidation or acquisition, is subject to §7A of the Clayton Act, 15 U.S.C. §18a, as added by Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390, and rules promulgated thereunder (hereinafter referred to as "the rules" or by section number). The statute and rules are set forth in the *Federal Register* at 43 FR 33450; the rules may also be found at 16 CFR Parts 801-03. Failure to file this **Notification and Report Form**, and to observe the required waiting period before consummating the acquisition in accordance with the applicable provisions of 15 U.S.C. §18a and the rules, subjects any "person," as defined in the rules, or any individuals responsible for noncompliance, to liability for a penalty of not more than $16,000 for each day during which such person is in violation of 15 U.S.C. §18a.

Pursuant to the Hart-Scott-Rodino Act, information and documentary material filed in or with this Form is confidential. It is exempt from disclosure under the Freedom of Information Act, and may be made public only in an administrative or judicial proceeding, or disclosed to Congress or to a duly authorized committee or subcommittee of Congress.

DISCLOSURE NOTICE - Public reporting burden for this report is estimated to vary from 8 to 160 hours per response, with an average of 37 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this report, including suggestions for reducing this burden to:

Premerger Notification Office, H-303, Federal Trade Commission, Washington, DC 20580
and
Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503

Under the **Paperwork Reduction Act**, as amended, 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. That number is 3084-0005, which also appears above.

Privacy Act Statement--Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $16,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

This page may be omitted when submitting the Form.

ANTITRUST IMPROVEMENTS ACT
NOTIFICATION AND REPORT FORM
for Certain Mergers and Acquisitions

INSTRUCTIONS

GENERAL

The Notification and Report Form ("the Form") is required to be submitted pursuant to §803.1(a) of the premerger notification rules, 16 CFR Parts 801-803 ("the Rules").

These instructions specify the information which must be provided in response to the items on the Form. The completed Form, together with all documentary attachments, are to be filed with the Federal Trade Commission and the Department of Justice ("the Agencies").

The term "documentary attachments" refers to materials supplied in response to Item 3(b), Item 4 and to submissions pursuant to §803.1(b) of the Rules.

Persons providing responses on attachment pages rather than on the Form must submit a complete set of attachment pages with each copy of the Form.

Information

The central office for information and assistance concerning the Rules and the Form is:

Premerger Notification Office
Federal Trade Commission, Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
phone: (202) 326-3100 - e-mail: HSRHelp@hsr.gov

Copies of the Form, Instructions and Rules as well as materials to assist in completing the Form are available at www.ftc.gov/bc/hsr. An electronic version of the Form is available at www.hsr.gov and may be used for the direct electronic submission of filings or to generate a print version of the Form for paper copy submission.

Definitions

The definitions and other provisions governing this Form are set forth in the Rules, 16 CFR Parts 801-803. The governing statute ("the Act"), the Rules, and the Statement of Basis and Purpose for the Rules are set forth at 43 FR 33450 (July 31, 1978), 44 FR 66781 (November 22, 1979) 48 FR 34427 (July 29, 1983), 61 FR 13688 (March 28, 1996), 66 FR 8693 (February 1, 2001), 70 FR 4994 (January 31, 2005), 70 FR 11513 (March 8, 2005), 70 FR 73369 (December 12, 2005), 70 FR 77312 (December 30, 2005), 71 FR 2943 (January 18, 2006), and Pub. L. No. 106-533, 114 Stat. 2762. See www.ftc.gov/bc/hsr for copies of these materials.

Affidavit

Attach the affidavit required by §803.5 to the Form. If filing electronically, submit an electronic version of the affidavit as attachment 1.

The language found in 28 U.S.C. §1746 relating to unsworn declarations under penalty of perjury may be used instead of notarization of the affidavit.

For acquisitions to which §801.30 does not apply, the affidavit must attest that a contract, agreement in principle or letter of intent to merge or acquire has been executed, and further attest to the good faith intention of the person filing notification to complete the transaction.

For acquisitions to which §801.30 does apply, the affidavit must also attest that the issuer whose voting securities or the unincorporated entity whose non-corporate interests are to be acquired has received notice; the identity of the acquiring person and the fact that the acquiring person intends to acquire voting securities of the issuer or non-corporate interests of the unincorporated entity; the specific notification threshold that the acquiring person intends to meet or exceed if an acquisition of voting securities; the fact that the acquisition may be subject to the Act, and that the acquiring person will file notification under the Act; the anticipated date of receipt of such notification by the Agencies; and the fact that the person within which the issuer or unincorporated entity is included may be required to file notification under the Act.

Acquiring persons in transactions covered by §801.30 are required to also submit a copy of the notice served on the acquired person pursuant to §803.5(a)(3).

In the case of a tender offer, the affidavit must also attest that the intention to make the tender offer has been publicly announced.

An affidavit is **not** required of an acquired person in a transaction covered by §801.30. (See §803.5(a)).

Responses

Each answer should identify the item to which it is addressed. Attach separate additional sheets as necessary in answering each item. Each additional sheet should identify, at the top of the page, the item to which it is addressed. Voluntary submissions pursuant to §803.1(b) should also be identified.

For electronic filings, all items are automatically identified within the Form. Electronic attachments and endnotes may be appended to the Form for any item.

Enter the name of the person filing notification as reported in Item 1(a) on page 1 of the Form and the date on which the Form is completed at the top of each page of the Form, at the top of any sheets attached to complete the response to any item, and at the top of the first or cover page of each documentary attachment.

If unable to answer any item fully, give such information as is available and provide a statement of reasons for non-compliance as required by §803.3. If exact answers to any item cannot be given, enter best estimates and indicate the sources or bases of such estimates. All financial information should be expressed in millions of dollars rounded to the nearest one-tenth of a million dollars. Estimated data should be followed by the notation, "est." For electronic filings, add an endnote with the notation, "est." to any item where data is estimated.

Year

All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available.

North American Industry Classification System (NAICS) Data

The Form requests dollar revenues and lines of commerce for non-manufactured and manufactured products with respect to operations conducted within the United States and for products manufactured outside of the United States and sold into the United States. Filing persons must submit data at the 6-digit NAICS national industry code level to reflect non-manufacturing revenues. To the extent that dollar revenues (see §803.2(d)) are derived from manufacturing operations (NAICS Sectors 31-33), filing persons must submit data at the 10-digit NAICS product code levels.

References

In reporting information by 6-digit NAICS industry code, refer to the most recent *North American Industry Classification System - United States* published by the Executive Office of the President, Office of Management and Budget. In reporting information by 10-digit NAICS product code, refer to the most recent *Numerical List of Manufactured and Mineral Products* published by the Bureau of the Census. Information regarding NAICS is available at www.census.gov.

Thresholds

Filing fee and notification thresholds are adjusted annually pursuant to Section 7A(a)(2) of the Clayton Act based on the change in gross national product, in accordance with Section 8(a)(5). The current threshold values can be found at www.ftc.gov/bc/hsr.

Limited Response

Information need not be supplied regarding assets, non-corporate interests, or voting securities currently being acquired, when their acquisition is exempt under the statute or rules. (See §803.2(c)). The acquired person should limit its response in the case of an acquisition of assets, to the assets being sold, in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) whose non-corporate interests are being acquired, and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such acquired entities. Separate responses may be required where a person is both acquiring and acquired. (See §§803.2(b) and (c)).

Filing

Filers have three options:

(1) Complete and return **ONE** original and **ONE** copy (with one notarized original affidavit and certification and one set of documentary attachments) of the Notification and Report Form ("Form") to:

Premerger Notification Office
Federal Trade Commission, Room 303
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Also, **THREE** copies (with one set of documentary attachments) should be sent to:

Office of Operations, Premerger Unit
Antitrust Division, Department of Justice
950 Pennsylvania Avenue, N.W., Room #3335
Washington, D.C. 20530.

(For FEDEX airbills to the Department of Justice, do not use the 20530 zip code; use zip code 20004);

(2) Complete the electronic version of the Form and submit the completed Form with all electronic attachments as directed at www.hsr.gov; or

(3) Complete the electronic version of the Form and submit it electronically as directed at www.hsr.gov, while providing the documentary attachments in paper copy to the FTC and DOJ as in Option 1 above. Note that for Option 3, the attachments must be listed on the attachments page of the Form and classified as "paper to follow".

If one or both delivery sites are unavailable, the Agencies may announce alternate sites for delivery through the media and, if possible, at www.ftc.gov/bc/hsr and www.hsr.gov.

ITEM BY ITEM

Fee Information

The fee for filing the Notification and Report Form is based on the aggregate total amount of assets, voting securities, and controlling non-corporate interests to be held as a result of the acquisition:

Value of assets, voting securities and controlling non-corporate interests to be held	Fee Amount
greater than $50 million (as adjusted) but less than $100 million (as adjusted)	$45,000
$100 million (as adjusted) or greater but less than $500 million (as adjusted)	$125,000
$500 million or greater (as adjusted)	$280,000

For current thresholds and fee information, see www.ftc.gov/bc/hsr.

Amount Paid

Indicate the amount of the filing fee paid. This amount should be net of any banking or financial institution charges. Where an explanatory attachment is required, include in your explanation any adjustments to the acquisition price that serve to lower the fee from that which would otherwise be due. If there is no acquisition price or if the acquisition price may fall within a range that straddles two filing fee thresholds, state the transaction value on which the fee is based and explain the valuation method used. Include in your explanation a description of any exempt assets, the value assigned to each, and the valuation method used.

Payer Identification

Provide the 9-digit Taxpayer Identification Number (TIN) of the

acquiring person and, if different from the filing person, the TIN of the payer(s) of the filing fee. A payer or filing person who is a natural person having no TIN must provide the name and social security number (SSN) of the payer. If the payer or filing person is a foreign person, only the name of the payer and the name of the filing person, if different, need be supplied.

Method of Payment

Check the box indicating the method of fee payment. If paying by electronic wire transfer (EWT), provide the name of the financial institution from which the EWT is being sent and the confirmation number.

To insure filing fees paid by EWT are attributed to the appropriate payer filing notification, the payer must provide the following information to the financial institution initiating the EWT:

The Department of Treasury's ABA Number: 021030004; and
The Federal Trade Commission's ALC Number: 29000001.

If the name used to transmit the EWT differs from the filer's name, provide the filer's name. If the confirmation number is unavailable at the time notification is filed, provide this information by letter within one business day of filing.

When submitting an EWT, all payers should include a contact person and a phone number in the Comment Field.

If paying by certified check or money order, send the payment to the Premerger Notification Office at the address above.

Corrective Filing

Put an X in the appropriate box to indicate whether the notification is a corrective filing being made for an acquisition that has already taken place in violation of the statute. See http://www.ftc.gov/bc/hsr/postconsumfilings.shtm for more information on how to proceed in the case of a corrective filing.

Cash Tender Offer

Put an X in the appropriate box to indicate whether the acquisition is a cash tender offer.

Bankruptcy

Put an X in the appropriate box to indicate whether the acquired person's filing is being made by a trustee in bankruptcy or by a debtor-in-possession for a transaction that is subject to section 363(b) of the Bankruptcy Code (11 USC §363).

Early Termination

Put an X in the "yes" box to request early termination of the waiting period. Notification of each grant of early termination will be published in the Federal Register as required by §7A(b)(2) of the Clayton Act and on the FTC web site, www.ftc.gov. Note that if *either* party requests early termination, it may be granted and published.

Transactions Subject to International Antitrust Notification

If, to the knowledge or belief of the filing person at the time of filing, a non-U.S. antitrust or competition authority has been or will be notified of the proposed transaction, list the name of each such authority and the date or anticipated date of each such notification. Response to this item is voluntary.

ITEM 1

Item 1(a)

Provide the name, headquarters address and website (if one exists) of the person filing notification. The name of the person filing is the name of the ultimate parent entity.

Item 1(b)

Indicate whether the person filing notification is an acquiring person, an acquired person, or both an acquiring and acquired person. (See §801.2).

Item 1(c)

Put an X in the appropriate box to indicate whether the person in Item 1(a) is a corporation, unincorporated entity, natural person, or other (specify).

Item 1(d)

Put an X in the appropriate box to indicate whether data furnished is by calendar year or fiscal year. If fiscal year, specify period.

Item 1(e)

Put an X in the appropriate box to indicate if the Form is being filed on behalf of the ultimate parent entity by another entity within the same person authorized by it to file notification on its behalf pursuant to §803.2(a), or if the Form is being filed pursuant to §803.4 on behalf of a foreign person. Then provide the name and mailing address of the entity filing notification on behalf of the reporting person named in Item 1(a) of the Form.

Item 1(f)

If an entity within the person filing notification (other than the ultimate parent entity listed in Item 1(a)) is making the acquisition, or if the assets, voting securities or non-corporate interests of an entity other than the ultimate parent entity listed in Item 1(a) are being acquired, provide the name and mailing address of that entity and the percentage of its voting securities or non-corporate interests held by the person named in Item 1(a) above. (If control is effected by means other than the direct holding of the entity's voting securities, describe the intermediaries or the contract through which control is effected (see §801.1(b)).

Item 1(g)

Provide the name and title, firm name, address, telephone number, fax number and e-mail address of the primary individual to contact regarding the Form and a backup contact. (See §803.20(b)(2)(ii)).

Item 1(h)

Foreign filing persons must provide the name, firm name, address, telephone number, fax number and e-mail address of an individual located in the United States designated for the limited purpose of receiving notice of the issuance of a request for additional information or documentary material. (See §803.20(b)(2)(iii)).

ITEM 2

Item 2(a)

Give the names of all ultimate parent entities of acquiring and

acquired persons that are parties to the acquisition, whether or not they are required to file notification. If not required to file, note as non-reportable.

Item 2(b)

Put an X in all the boxes that apply to this acquisition.

Item 2(c)

(Acquiring person only) Put an X in the box to indicate the highest threshold for which notification is being filed (see §801.1(h)): $50 million (as adjusted), $100 million (as adjusted), $500 million (as adjusted), 25% (if value of voting securities to be held is greater than $1 billion, as adjusted), or 50%. The notification threshold selected should be based on **voting securities only** that will be held as a result of the acquisition.

Note that the 50% notification threshold is the highest threshold and should be used for any acquisition of 50% or more of the voting securities of an issuer, regardless of the value of the voting securities (e.g. an acquisition of 100% of the voting securities of an issuer, valued in excess of $500 million (as adjusted) would cross the 50% notification threshold, not the $500 million (as adjusted) threshold.

Item 2(d)

Item 2(d)(i)

State the value of voting securities already held (see §801.10).

Item 2(d)(ii)

State the percentage of voting securities already held (see §801.12).

Item 2(d)(iii)

State the total value of voting securities to be held as a result of the acquisition (see §801.10).

Item 2(d)(iv)

State the total percentage of voting securities to be held as a result of the acquisition (overall voting power; see §801.12).

Item 2(d)(v)

State the value of non-corporate interests already held (§801.10).

Item 2(d)(vi)

State the percentage of non-corporate interests already held (economic interests).

Item 2(d)(vii)

State the total value of non-corporate interests to be held as a result of the acquisition (see §801.10).

Item 2(d)(viii)

State the total percentage of non-corporate interests to be held as a result of the acquisition (economic interests).

Item 2(d)(ix)

State the value of assets to be held as a result of the acquisition (see §801.10).

Item 2(d)(x)

State the aggregate total value of voting securities, assets and non-corporate interests of the acquired person to be held by each acquiring person, as a result of the acquisition (see §§801.10, 801.12, 801.13, and 801.14).

ITEM 3

Item 3(a)

Briefly describe the transaction, indicating whether assets, voting securities, or non-corporate interests (or some combination) are to be acquired. Include a list of the name and mailing address of each acquiring and acquired person, whether or not required to file notification, and the names of any acquired issuers or non-corporate entities. In an asset acquisition, provide a brief description of the business the assets to be acquired comprise. Also indicate what consideration will be received by each party. In describing the acquisition, include the expected dates of any major events required to consummate the transaction (e.g., stockholders' meetings, filing of requests for approval, other public filings, terminations of tender offers) and the scheduled consummation date of the transaction. If there are additional filings, such as shareholder backside filings, associated with the transaction, list those, as well as any special circumstances that apply to the filing, such as whether part of the transaction is exempt under one of the exemptions found in Section 802.

If voting securities or non-corporate interests are to be acquired from a holder other than the issuer or unincorporated entity (or an entity within the same person as the issuer or unincorporated entity) separately identify (if known) such holder and the issuer of the voting securities; an acquisition of non-corporate interests from a holder other than the unincorporated entity or an entity within the unincorporated entity should be reported in the same manner. Acquiring persons involved in tender offers should describe the terms of the offer.

Item 3(b)

Furnish copies of all documents that constitute the agreement(s) among the acquiring person(s) and the person(s) whose voting securities, non-corporate interests or assets are to be acquired. Also furnish Agreements Not to Compete. Documents that constitute the agreement(s) (e.g., a Letter of Intent, Merger Agreement, Purchase and Sale Agreement) must be executed, while Agreements Not to Compete may be provided in draft form if that is the most recent version. If parties are filing on an executed Letter of Intent, they may also submit a draft of the definitive agreement. Note that transactions subject to §801.30 and bankruptcies under 11 USC §363 do not require an executed agreement or letter of intent. (For paper copy submissions, do not attach these documents to the Form).

ITEM 4

Item 4(a)

Provide the names of all entities, including the UPE, within the person filing notification that file annual reports (Form 10-K or Form 20-F) with the United States Securities and Exchange Commission and provide the Central Index Key (CIK) number for each entity.

For Items 4(b) through 4(d), furnish one copy of each of the indicated documents.

Item 4(b)

Provide the most recent annual reports and/or annual audit reports

of the person filing notification and of each unconsolidated United States entity included within such person. Natural persons need only provide annual reports and/or annual audit reports for the highest level entity(s) they control. Alternatively, the person filing notification may incorporate a document by reference to an internet address directly linking to the document (see §803.2(e)(2)).

> **NOTE:** In response to Item 4(b), the person filing notification may incorporate by reference documents submitted with an earlier filing as explained in the staff formal interpretations dated April 10, 1979, and April 7, 1981, and in §803.2(e).

If the annual report and/or annual audit report does not show sales or assets sufficient to meet the size of person test, and the size of person test is relevant given the size of the transaction, the filing person must stipulate in Item 4(b) that it meets the test.

Item 4(c)

Provide all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

> **NOTE:** If the person filing notification withholds or redacts any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and §803.3(d).

Item 4(d)

For each category below, indicate (if not contained in the document itself) the date of preparation, and the name of the company or organization that prepared each such document.

Item 4(d)(i): Provide all Confidential Information Memoranda prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) that specifically relate to the sale of the acquired entity(s) or assets. If no such Confidential Information Memorandum exists, submit any document(s) given to any officer(s) or director(s) of the buyer meant to serve the function of a Confidential Information Memorandum. This does not include ordinary course documents and/or financial data shared in the course of due diligence, except to the extent that such materials served the purpose of a Confidential Information Memorandum when no such Confidential Information Memorandum exists. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(ii): Provide all studies, surveys, analyses and reports prepared by investment bankers, consultants or other third party advisors ("third party advisors") for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) of the Ultimate Parent Entity of the Acquiring or Acquired Person or of the Acquiring or Acquired Entity(s) for the purpose of evaluating or analyzing market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate to the sale of the acquired entity(s) or assets. This item requires only materials developed by third party advisors during an engagement or for the purpose of seeking an engagement. Documents responsive to this item are limited to those produced up to one year before the date of filing.

Item 4(d)(iii): Provide all studies, surveys, analyses and reports evaluating or analyzing synergies and/or efficiencies prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition. Financial models without stated assumptions need not be provided in response to this item.

Persons filing notification may provide an optional index of documents called for by Item 4.

ITEMS 5 through 7

For Items 5 through 7, the acquired person should limit its response in the case of an acquisition of assets, to the assets to be acquired, in the case of an acquisition of non-corporate interests, to the unincorporated entity(s) being acquired and all entities controlled by such unincorporated entity(s), and in the case of an acquisition of voting securities, to the issuer(s) whose voting securities are being acquired and all entities controlled by such issuer. A person filing as both acquiring and acquired may be required to provide a separate response to these items in each capacity so that it can properly limit its response as an acquired person. (See §§ 803.2(b) and (c)).

> **NOTE:** See "References" listed in the General Instructions to the Form.

ITEM 5

This item requests information by NAICS code regarding non-manufacturing and manufacturing dollar revenues. All persons must submit data on non-manufacturing revenues at the 6-digit NAICS industry code level. To the extent that dollar revenues are derived from manufacturing operations (NAICS Sectors 31-33), data must be submitted at the 10-digit product code level (NAICS-based codes). Where certain published NAICS industry codes contain only 5 digits, the filing person should add a zero (0) after the fifth (5th) digit.

Nondepository credit intermediation (NAICS Industry Group Code 5222); securities, commodity contracts, and other financial investments (NAICS Subsector 523); funds, trusts, and other financial vehicles (NAICS Subsector 525); real estate (NAICS Subsector 531); lessors of nonfinancial intangible assets, except copyright works (NAICS Subsector 533); and management of companies and enterprises (NAICS Subsector 551) should identify or explain the revenues reported (e.g. dollar sales receipts).

Persons filing notification should include the total dollar revenues for all entities included within the person filing notification at the time the Form is prepared. If no revenues are reported, check the "None" box and provide a brief explanation.

Item 5(a)

Provide 6-digit NAICS industry data concerning the aggregate operations of the person filing notification for the most recent year in NAICS Sectors other than 31-33 (non-manufacturing industries) in which the person engaged and 10-digit NAICS product code data

for each product code within NAICS Sectors 31-33 (manufacturing industries) in which the person engaged, including revenues for each product manufactured outside the U.S. but sold in or into the U.S. Sales of any manufactured product should be reported in a manufacturing code only, even if sold through a separate warehouse or retail establishment. If such data have not been compiled for the most recent year, estimates of dollar revenues by 6-digit NAICS industry codes and 10-digit NAICS product codes may be provided if a statement describing the method of estimation is furnished. Industries for which the dollar revenues totaled less than one million dollars in the most recent year may be omitted.

NOTE: *This million dollar minimum is applicable only to non-manufacturing NAICS codes.*

Item 5(b)

Supply the following information only if the acquisition is the formation of a joint venture corporation or unincorporated entity (see §§801.40 and 801.50). If the acquisition is not a formation, check the "Not Applicable" box.

Item 5(b)(i)

List the contributions that each person forming the joint venture corporation or unincorporated entity has agreed to make, specifying when each contribution is to be made and the value of the contribution as agreed by the contributors.

Item 5(b)(ii)

Describe fully the consideration which each person forming the joint venture corporation or unincorporated entity will receive in exchange for its contribution(s).

Item 5(b)(iii)

Describe generally the business in which the joint venture corporation or unincorporated entity will engage, including location of headquarters and principal plants, warehouses, retail establishments or other places of business, its principal types of products or activities, and the geographic areas in which it will do business.

Item 5(b)(iv)

Identify each 6-digit NAICS industry code in which the joint venture corporation or unincorporated entity will derive dollar revenues. If the joint venture corporation or unincorporated entity will be engaged in manufacturing, also specify each 10-digit NAICS product code in which it will derive dollar revenues.

ITEM 6

This item need not be completed by a person filing notification only as an acquired person if only assets are to be acquired. Persons filing notification may respond to Items 6(a), 6(b), or 6(c) by referencing a "document attachment" furnished with this Form if the information so referenced is a complete response and is up-to-date and accurate. Indicate for each item the specific page(s) of the document that are responsive to that item.

Item 6(a)

List the name and city and state/country of any U.S. entities and any foreign entities that have sales into the U.S. included within the person filing notification. Entities with total assets of less than $10 million may be omitted. In responding to Item 6(a), it is permissible for a filing person to report all entities within it.

Item 6(b)

For the acquired entity(s) and for the acquiring entity(s) and its UPE or, in the case of natural persons, the top-level corporate or unincorporated entity(s) within that UPE, list the name and headquarters mailing address of each other person that holds (See §801.1(c)) five percent or more of the outstanding voting securities or non-corporate interests of the entity, and the percentage of voting securities or non-corporate interests held by that person.

For limited partnerships, only the general partner(s), regardless of percentage held, should be listed.

Item 6(c)

The person filing notification may rely on its regularly prepared financials that list its investments and those of its associates (for acquiring persons) that list their investments to respond to Items 6(c)(i) and (ii), provided the financials are no more than three months old.

Item 6(c)(i)

If the person filing notification holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity, list the issuer and percentage of voting securities held, or in the case of an unincorporated entity, the unincorporated entity and the percentage of non-corporate interests held.

The acquiring person should limit its response, based on its knowledge or belief, to entities that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year. The acquired entity should limit its response, based on its knowledge or belief, to entities that derive revenues in the same 6-digit NAICS industry code as the acquiring person. If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the filing person, should be listed. In responding to Item 6(c)(i),it is permissible for a filing person to list all entities in which it holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings of issuers or unincorporated entities with total assets of less than $10 million may be omitted.

Item 6(c)(ii)

(Acquiring person only) For each associate (see §801.1(d)(2)) of the person filing notification holding five percent or more but less than fifty percent of the voting securities or non-corporate interests of the acquired entity(s) or five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity that derived dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which the acquired entity(s) or assets also derived dollar revenues in the most recent year, list, based on the knowledge or belief of the acquiring person, the associate, the issuer or unincorporated entity and percentage held. If NAICS codes are unavailable, holdings in entities that have operations in the same industry, based on the knowledge or belief of the acquiring person, should be listed. In responding to Item 6(c)(ii), it is permissible for the acquiring person to list all entities in which its associate(s) holds five percent or more but less than fifty percent of the voting securities of any issuer or non-corporate interests of any unincorporated entity. Holdings of issuers or unincorporated entities with total assets of less than $10 million may be omitted.

ITEM 7

If, to the knowledge or belief of the person filing notification, the acquiring person, or any associate (see §801.1(d)(2)) of the acquiring person, derived any amount of dollar revenues in the most recent year from operations in industries within any 6-digit NAICS industry code in which any acquired entity that is a party to the acquisition also derived any amount of dollar revenues in the most recent year, or in which a joint venture corporation or unincorporated entity will derive dollar revenues (note that if the acquired entity is a joint venture the only overlaps will be between the assets to be held by the joint venture and any assets of the acquiring person or its associates not contributed to the joint venture), then for each such 6-digit NAICS industry code:

Item 7(a)

Supply the 6-digit NAICS industry code and description for the industry.

Item 7(b)

Item 7(b)(i)

List the name of each person that is a party to the acquisition that also derived dollar revenues in the 6-digit industry and, if different, the name of the entity(s) that actually derived those revenues.

Item 7(b)(ii)

(Acquiring person only) List the name of each associate of the acquiring person that also derived dollar revenues in the 6-digit industry and, if different, the name of the entity(s) that actually derived those revenues.

Item 7(c)

Item 7(c)(i)

For each 6-digit NAICS industry code within NAICS Sectors 31-33 (manufacturing industries) listed in Item 7(a) above, list the states or, if desired, portions thereof in which, to the knowledge or belief of the person filing notification, the products in that 6-digit NAICS industry code produced by the person filing notification are sold without a significant change in their form, whether they are sold by the person filing notification or by others to whom such products have been sold or resold.

Item 7(c)(ii)

For each 6-digit NAICS industry code within NAICS Sectors or Subsectors 11 (agriculture, forestry, fishing and hunting); 21 (mining); 22 (utilities); 23 (construction); 48-49 (transportation and warehousing); 511(publishing industries); 515 (broadcasting); 517 (telecommunications); and 71 (arts, entertainment and recreation) listed in item 7(a) above, list the states or, if desired, portions thereof in which the person filing notification conducts such operations.

Item 7(c)(iii)

For each 6-digit NAICS industry code within NAICS Sector 42 (wholesale trade) listed in Item 7(a) above, list the states or, if desired, portions thereof in which the customers of the person filing notification are located.

Item 7(c)(iv)

For each 6-digit NAICS industry code within NAICS Sectors or Subsectors Nonmetallic Mineral Mining and Quarrying (2123); Concrete (32732); Concrete products (32733); Industrial gases (32512); 44-45 (retail trade), except 442 (furniture and home furnishings stores), and 443 (electronics and appliance stores); 512 (motion picture and sound recording industries); 521 (monetary authorities- central bank); 522 (credit intermediation and related activities); 532 (rental and leasing services); 62 (health care and social assistance); 72 (accommodations and food services), except 7212 (recreational vehicle parks and recreational camps), and 7213 (rooming and boarding houses); 811 (repair and maintenance), except 8114 (Personal and Household Goods Repair and Maintenance); and 812 (personal and laundry services) listed in Item 7(a) above, provide the address, **arranged by state, county and city or town**, of each establishment from which dollar revenues were derived in the most recent year by the person filing notification.

Item 7(c)(v)

For each 6-digit NAICS industry code within NAICS Subsectors 442 (furniture and home furnishings stores), 443 (electronics and appliance stores); 516 (internet publishing & broadcasting); 518 (internet service providers); 519 (other information services); 523 (securities, commodity contracts and other financial investments and related activities); 525 (funds, trusts and other financial vehicles); 53 (real estate and rental and leasing); 54 (professional, scientific and technical services); 55 (management of companies and enterprises); 56 (administrative and support and waste management and remediation services); 61 (educational services); 813 (religious, grantmaking, civic, professional, and similar organizations); and NAICS Industry Group 5242 (insurance agencies and brokerages, and other insurance related activities); 7212 (recreational vehicle parks and recreational camps), 7213 (rooming and boarding houses) and 8114 (personal and household goods repair and maintenance) listed in Item 7(a) above, list the states or, if desired, portions thereof in which establishments were located from which the person filing notification derived revenues in the most recent year.

Item 7(c)(vi)

For each 6-digit NAICS industry code within NAICS Industry Group 5241 (insurance carriers) listed in Item 7(a) above, list the state(s) in which the person filing notification is licensed to write insurance.

NOTE: Except in the case of those NAICS major industries in the Sectors and Subsectors mentioned in Item 7(c)(iv) above, the person filing notification may respond with the word "national" if business is conducted in all 50 states.

Item 7(d)

(Acquiring person only) Use the geographic markets listed in Items 7(c)(i) through 7(c)(vi) to respond to this item, providing the information for associates of the acquiring person. List separately responses for each associate of the acquiring person and, if different, the entity(s) that actually derived the revenues.

ITEM 8

(Acquiring person only). Determine each 6-digit NAICS industry code listed in Item 7(a) above, in which the acquiring person derived dollar revenues of $1 million or more in the most recent year and in which either the acquired entity derived revenues of $1 million or more in the recent year (or in the case of the formation of a joint venture corporation or unincorporated entity, the joint venture corporation or unincorporated entity reasonably can be expected to derive revenues of $1 million or more), or, in the case of acquired assets, to which revenues of $1 million or more were attributable in

the most recent year. For each such 6-digit NAICS industry code, list all acquisitions made by the person filing notification in the five years prior to the date of filing of entities deriving dollar revenues in that 6-digit NAICS industry code. List only acquisitions of 50 percent or more of the voting securities of an issuer or 50 percent or more of non-corporate interests of an unincorporated entity that had annual net sales or total assets greater than $10 million in the year prior to the acquisition, and any acquisitions of assets valued at or above the statutory size-of-transaction test at the time of their acquisition.

For each such acquisition, supply:

(a) the name of the entity from which the voting securities, non-corporate interests or assets were acquired;

(b) the headquarters address of that entity prior to the acquisition;

(c) whether voting securities, non-corporate interests or assets were acquired;

(d) the consummation date of the acquisition; and

(e) the 6-digit (NAICS code) industries by (number and description) identified above in which the acquired entity derived dollar revenues.

CERTIFICATION- (See §803.6)

The language found in 28 U.S.C. §1746 relating to unsworn declarations under penalty of perjury may be used instead of notarization of the certification.

Privacy Act Statement–Section 18a(a) of Title 15 of the U.S. Code authorizes the collection of this information. Our authority to collect Social Security numbers is 31 U.S.C. 7701. The primary use of information submitted on this Form is to determine whether the reported merger or acquisition may violate the antitrust laws. Taxpayer information is collected, used, and may be shared with other agencies and contractors for payment processing, debt collection and reporting purposes. Furnishing the information on the Form is voluntary. Consummation of an acquisition required to be reported by the statute cited above without having provided this information may, however, render a person liable to civil penalties up to $16,000 per day. We also may be unable to process the Form unless you provide all of the requested information.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–17822 Filed 7–18–11; 8:45 am]

BILLING CODE 6750–01–C

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1120

Substantial Product Hazard List: Children's Upper Outerwear in Sizes 2T to 12 With Neck or Hood Drawstrings and Children's Upper Outerwear in Sizes 2T to 16 With Certain Waist or Bottom Drawstrings

AGENCY: U.S. Consumer Product Safety Commission.

ACTION: Final rule.

SUMMARY: The Consumer Product Safety Improvement Act of 2008 (''CPSIA''), authorizes the U.S. Consumer Product Safety Commission (''Commission,'' ''CPSC,'' or ''we'') to specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under certain circumstances. We are issuing a final rule to determine that children's upper outerwear garments in sizes 2T to 12 or the equivalent, which have neck or hood drawstrings, and in sizes 2T to 16 or the equivalent, which have waist or bottom drawstrings that do not meet specified criteria, present substantial product hazards.

DATES: The rule takes effect August 18, 2011. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of August 18, 2011.

FOR FURTHER INFORMATION CONTACT: Tanya Topka, Office of Compliance and Field Operations, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7594, *ttopka@cpsc.gov.*

SUPPLEMENTARY INFORMATION:

A. Background and Statutory Authority

The Consumer Product Safety Improvement Act of 2008 (''CPSIA'') was enacted on August 14, 2008. Public Law 110–314, 122 Stat. 3016 (August 14, 2008). The CPSIA amends statutes that the Commission administers and adds certain new requirements.

Section 223 of the CPSIA expands section 15 of the Consumer Product Safety Act (''CPSA'') to add a new subsection (j). That subsection delegates authority to the Commission to specify by rule, for a consumer product or class of consumer products, characteristics whose presence or absence the Commission considers a substantial product hazard. To issue such a rule, the Commission must determine that those characteristics are readily observable and have been addressed by an applicable voluntary standard. The Commission also must find that the standard has been effective in reducing the risk of injury and that there has been substantial compliance with it. 15 U.S.C. 2064(j).

Drawstrings in children's upper outerwear can present a hazard if they become entangled with other objects. Drawstrings in the neck and hood areas of children's upper outerwear present a strangulation hazard when the drawstring becomes caught in objects, such as playground slides. Drawstrings in the waist or bottom areas of children's upper outerwear can catch in the doors or other parts of a motor vehicle, thereby presenting a ''dragging'' hazard when the operator of the vehicle drives off without realizing that someone is attached to the vehicle by the drawstring. The injury data associated with drawstrings is discussed below in section C of this preamble.

In 1994, at the urging of the CPSC, a number of manufacturers and retailers agreed to modify or eliminate drawstrings from hoods and necks of children's clothing. In 1997, the American Society for Testing and Materials (now ASTM International) addressed the hazards presented by drawstrings on upper outerwear by creating a voluntary consensus standard, ASTM F 1816–97, *Standard Safety Specification for Drawstrings on Children's Upper Outerwear,* to prohibit drawstrings around the hood and neck area of children's upper outerwear in sizes 2T to 12, and also to limit the length of drawstrings around the waist and bottom of children's upper outerwear in sizes 2T to 16 to 3 inches outside the drawstring channel when the garment is expanded to its fullest width. For waist and bottom drawstrings in upper outerwear sizes 2T to 16, the Standard prohibited toggles, knots, and other attachments at the free ends of drawstrings. The Standard further required that waist and bottom drawstrings in upper outerwear sizes 2T to 16 that are one continuous string be bartacked (*i.e.,* stitched through to prevent the drawstring from being pulled through its channel).

We have estimated that the age range of children likely to wear garments in sizes 2T to 12 is 18 months to 10 years. The age range of children likely to wear garments in sizes 2T to 16 is 18 months to 14 years.

On July 12, 1994, we announced a cooperative effort with a number of manufacturers and retailers who agreed to eliminate or modify drawstrings on the hoods and necks of children's clothing.

In February 1996, we issued guidelines for consumers, manufacturers, and retailers that incorporated the requirements that became ASTM F 1816–97.

On May 12, 2006, the CPSC's Office of Compliance posted a letter on CPSC's website to the manufacturers, importers, and retailers of children's upper outerwear, citing the fatalities that had occurred and urging compliance with the industry standard, ASTM F 1816–97. The letter explained that we consider children's upper outerwear with drawstrings at the hood or neck area to be defective and to present a substantial risk of injury under section 15(c) of the Federal Hazardous Substances Act (FHSA), 15 U.S.C. 1274(c).

The 2006 letter also indicated that we would seek civil penalties if a manufacturer, importer, distributor, or retailer distributed noncomplying children's upper outerwear in commerce and/or failed to report that fact to the Commission as required by section 15(b) of the CPSA, 15 U.S.C. 2064(b). From 2006 through 2010, we participated in 115 recalls of noncomplying products with drawstrings and obtained a number of civil penalties based on the failure of firms to report the defective products to CPSC, as required by section 15(b) of the CPSA.

On May 17, 2010, we published a proposed rule (75 FR 27497) that would deem children's upper outerwear garments in sizes 2T to 12, or the equivalent that have neck or hood drawstrings, and in sizes 2T to 16 or the equivalent that have waist or bottom drawstrings that do not meet specified criteria, substantial product hazards. We received seven comments in response to the proposed rule. We describe and respond to the comments in section E of this preamble.

B. Readily Observable Characteristics That Have Been Addressed by a Voluntary Standard

As mentioned in section A of this preamble, ASTM F 1816–97 addresses upper outerwear garments in sizes 2T to 12 that have neck or hood drawstrings, and in sizes 2T to 16 that have waist or bottom drawstrings that do not meet specified criteria. All of the requirements of the ASTM voluntary standard can be evaluated with simple physical manipulations of the garment,

simple measurements of portions of the garments, and unimpeded visual observation. Thus, the product characteristics defined by the voluntary standard are readily observable.

C. The Voluntary Standard Has Been Successful in Reducing the Risk of Injury

a. Hood and Neck Drawstring Incidents

We examined reports of fatalities and injuries for the age groups whose upper outerwear is subject to the voluntary standard. We are aware of 56 reports of neck/hood drawstring entanglements occurring between January 1985 and April 2011. Eighteen (32%) of these entanglements were fatal. The majority of the entanglements involved the neck/hood drawstrings snagging on slides. Neck/hood drawstrings also became entangled on parts of cribs in several incidents. Of the 38 nonfatal incidents involving children between the ages of 18 months and 10 years, 30 incidents resulted in injuries. In the remaining eight incidents, the neck/hood drawstring snagged or entangled the child, but no injury was reported. The year with the highest number of reported fatalities—three—is 1994. The three years with the highest number of reported incidents (including fatal and nonfatal incidents) were 1992 (11), 1993 (9), and 1994 (9). Slides were associated with 10 of the fatalities, 26 of the injury incidents, and all 8 of the noninjury incidents (the jackets or sweatshirts snagged by the hood or neck drawstring on playground slides prior to escape or rescue).

The Standard for drawstrings on children's upper outerwear, ASTM F 1816–97, was approved in June 1997, and published in August 1998. We are aware of 12 fatalities and 33 nonfatal incidents involving children ages 18 months to 10 years of age, who were entangled by a neck/hood drawstring of upper outerwear during the 12 years (1985–1996) prior to the Standard. On average, this results in one reported fatality and about three nonfatal incidents a year. In the eight years (1999–2006) for which reporting is complete after ASTM F 1816–97 was published, we received reports of two fatal and two nonfatal neck/hood drawstring incidents. On average, this is approximately one fatality every four years and about one nonfatal entanglement every four years. For the years for which reporting is complete, the data show a reduction in the annual average number of reported fatalities after the ASTM standard of approximately 75 percent. The corresponding reduction in the annual average number of reported nonfatal entrapments is 91 percent. It should be noted that we are continuing to receive incident reports for the years 2007–2010. We are aware of three fatalities between 2007–2010. No fatalities have been reported to date for 2011. When reporting 2010 is considered complete, the percent reduction in the annual average number of reported fatalities associated with neck/hood drawstrings, at most, will be 58 percent, if no additional fatal incidents are reported.

b. Reported Incidents Associated With Waist/Bottom Drawstring Entanglements

Between January 1985 and April 2011, we received 28 reports of entanglement incidents associated with a waist/bottom drawstring on children's upper outerwear. Of these 28 incidents, 8 (29%) were fatal; 11 (39%) resulted in injuries; and 9 (32%) constituted snags or entanglements that did not result in injuries. No waist/bottom drawstring incidents were reported to us before 1991. All eight fatalities (7 involving a bus, 1 involving a slide) associated with waist/bottom drawstrings occurred between 1991 and 1996. During 1991 to 1996, there were a total of 19 waist/bottom drawstring incidents, of which 13 involved buses (7 bus fatalities and 6 nonfatal bus incidents). We are not aware of any bus-related drawstring incidents after the year 1996. There were nine waist/bottom drawstring incidents from 1997 to the present (all nonfatal), of which three involved children whose waist/bottom drawstring caught on car doors.

All of the reported fatalities associated with waist/bottom drawstrings on children's upper outerwear occurred prior to the approval and publication of ASTM F 1816–97. For years in which reporting is considered complete, the number of reported fatalities associated with waist and bottom drawstrings have fallen from the eight reported fatalities between 1985 and 1996 to zero since adoption of the ASTM voluntary standard in 1997. For corresponding periods for which reporting is complete (1985 through 1996 and 1999 through 2006), reported nonfatal injuries fell from 11 in 12 years to 6 in 8 years. These data suggest that after the ASTM standard was adopted, for waist and bottom drawstrings the annual average of reported fatalities fell by 100 percent and the annual average of reported nonfatal incidents fell by about 18 percent. Reporting is ongoing for 2007–2011. CPSC staff is not aware of any reported fatalities for this time. Staff has two reports of non-fatal incidents occurring between 2007–2011. These numbers may change in the future.

D. Substantial Compliance

There is no statutory definition of ''substantial compliance'' in either the CPSIA or the CPSA. Legislative history of the CPSA provision that is related to issuance of consumer product safety standards indicates that substantial compliance should be measured by reference to the number of complying products, rather than the number of manufacturers of products complying with the standard. H.R. Rep. No. 208, 97th Cong., 1st Sess. 871 (1981). Legislative history of this CPSA rulemaking provision also indicates that there is substantial compliance when the unreasonable risk of injury associated with a product will be eliminated or adequately reduced ''in a timely fashion.'' *Id. The Random House Dictionary of the English Language* defines ''substantial'' as ''of ample or considerable amount, quantity, size, etc.'' Thus ''substantial'' refers to an amount less than ''all'' or ''total.'' The Commission has not taken the position that there is any particular percentage that constitutes substantial compliance. Rather than any bright line, the Commission has indicated in the rulemaking context that the determination needs to be made on a case-by-case basis.

Table 1 shows information about the CPSC recalls involving drawstrings on children's upper outerwear for the years 2006–2010. The number of compliance cases related to recalls of children's upper outerwear garments with drawstrings numbered 115 for that period, involving about 2.5 million units.

The number of recalls in 2008, 2009, and 2010 was more than the number of recalls in 2006 and 2007, with the number of recalls in 2010 representing the largest of those five years; however, fewer units of children's outerwear garments were recalled in 2010, than in 2006, 2007, and 2009.

TABLE 1—CPSC OFFICE OF COMPLIANCE RECALLS DRAWSTRINGS ON CHILDREN'S UPPER OUTERWEAR
[2006–2010]

Year	Number of recall cases	Number of units of upper outerwear recalled
2006	17	676,597
2007	14	626,172
2008	24	227,868
2009	23	526,193
2010	37	431,145
Total	115	2,487,975

Source: Communication from CPSC Office of Compliance, March 18, 2010, and May 2, 2011.

In response to a comment to the proposed rule regarding whether ties are included in the definition of drawstring (discussed in more detail in section E of this preamble), staff reviewed the recall data to determine how many recall cases involved ties. For the 2006–2010 time period, there were six recalls (occurring in 2009 and 2010) of children's upper outerwear that involved ties, accounting for 135,406 units.

Using population data, garment sizing information, and assumptions about purchase and use, one can calculate the number of units recalled as a proportion of sales. This calculation provides a rough estimate of the extent of compliance with the voluntary standard.

As explained in the preamble to the proposed rule (75 FR at 27498) and in section A of this preamble, the voluntary standard applies to sizes 2T to 12 for neck and hood drawstrings and sizes 2T to 16 for drawstrings at the waist and bottom of upper outerwear. Information available to us indicates that a child's age generally matches the child's clothing size or is a year or two below the clothing size. For example, a child 12 years old might wear a size 12 or a size 14 garment. Similarly, for smaller sizes, children who are as young as 18 months might wear size 2T clothing. Thus, the ages of children wearing size 2T to 12 (the sizes covered by the voluntary standard for upper outerwear with hood or neck drawstrings) would be 18 months to 10 years. The age range of children who typically wear sizes 2T to 16 (the sizes covered by the voluntary standard for upper outerwear with waist or bottom drawstrings) would be 18 months to 14 years.

For each of the years 2006 through 2010, the population of children ages 18 months to 10 years old (those wearing sizes 2T to 12, as noted above) was about 39 million. The population of children ages 18 months to 14 years old (those wearing sizes 2T to 16, as noted above) was about 55 million.[1]

No numerical data about recent annual sales of children's upper outerwear is available. However, given children's growth patterns, it may be that, on average, at least one new piece of upper outerwear is purchased each year for each child. If so, then sales of upper outerwear with neck and hood drawstrings or with waist and bottom drawstrings could total the population of children who wear children's sizes 2T to 16, or approximately 55 million units.

Assuming that: (1) All garments violating the drawstring voluntary standard were recalled in the years 2006 through 2010; (2) at least one new piece of upper outerwear, on average, is purchased for each child each year; and (3) annual unit sales of upper outerwear with neck or hood drawstrings totaled 55 million, then it would appear that the number of children's upper outerwear garments that complied with the drawstring requirements of ASTM F 1816–97 was in the very high 90 percent range. While the number of recalled units in the years 2006 through 2010 totaled about 2.5 million, the number of units sold during those five years, under the assumptions above, totaled 275 million. Thus, for the period 2006 through 2010, the units recalled by the CPSC (with ties included or excluded) would account for about 1 percent of all units sold; in other words, given the assumptions above, there was about 99 percent compliance with the voluntary standard. Even if these assumptions are not entirely accurate, the Commission concludes that compliance with ASTM F 1816–97 is very high and constitutes substantial compliance, as that term is used in section 15(j) of the CPSA. This determination extends to ties.

[1] For the years 2006 through 2009, this number is based on Bureau of the Census, U.S. Department of Commerce data, which can be found in ''Table 1. Annual Estimates of the Resident Population by Sex and Five-Year Age Groups for the United States: April 1, 2000 to July 1, 2009'' at *http://www.census.gov/popest/national/asrh/NC-EST2009/NC-EST2009-01.xls.* For 2010, the number is based on Bureau of the Census, U.S. Department of Commerce data found in ''Table 1. Population by Age and Sex: 2010'' at *http://www.census.gov/population/www/socdemo/age/age_sex_2010.html.*

E. Comments on the Proposed Rule and CPSC's Responses

In the **Federal Register** of May 17, 2010 (75 FR 27497), we published a proposed rule that would specify that children's upper outerwear garments in sizes 2T to 12 or the equivalent that have neck or hood drawstrings, and in sizes 2T to 16 or the equivalent that have waist or bottom drawstrings that do not meet specified criteria, have characteristics that constitute substantial product hazards. We received seven comments on the proposed rule. We summarize and respond to the issues raised by those comments here. To make it easier to identify the comments and our responses, the word ''Comment,'' in parentheses, will appear before the comment's description, and the word ''Response,'' in parentheses, will appear before our response. We also numbered each comment to help distinguish between different comments. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value, or importance, or the order in which it was received.

1. Request for a Mandatory Ban

(Comment 1)—One commenter characterized the proposed rule as an ''effort to urge voluntary compliance with the garment industry'' and asked that we ''institute an outright mandatory ban on the types of drawstring garments [the Commission] describe[s] in [the] proposed rule'' instead.

(Response 1)—The commenter's characterization of the rule as an effort to urge ''voluntary compliance'' from the garment industry is misplaced. Section 15(j) of the CPSA, 15 U.S.C.

2064(j), authorizes the Commission to deem characteristics of any consumer product or class of consumer products to be a substantial product hazard under section 15(a)(2) of the CPSA, if we determine that: (A) Such characteristics are readily observable and have been addressed by voluntary standards; and (B) such voluntary standards have been effective in reducing the risk of injury from the consumer product(s) and that there is substantial compliance with such standards. A product that is or has a substantial product hazard is subject to the reporting requirements of section 15(b) of the CPSA. 15 U.S.C. 2064(b). A manufacturer who fails to report a substantial product hazard to the Commission is subject to civil penalties under section 20 of the CPSA and possibly to criminal penalties under section 21 of the CPSA. *Id.* §§ 2069 and 2070.

A product that is or contains a substantial product hazard is also subject to corrective action under section 15(c) and (d) of the CPSA. *Id.* § 2064(c) and (d). Thus, we can order the manufacturer, distributor, or retailer of the product to offer to repair or replace the product, or refund the purchase price to the consumer. Finally, a product that is offered for import into the United States and is or contains a substantial product hazard shall be refused admission into the United States under section 17(a) of the CPSA. *Id.* § 2066(a).

2. Range of Sizes Covered by the Standard

(Comment 2)—One commenter recommended that the rule should cover sizes smaller than 2T and should prohibit drawstrings in pants as well as upper outerwear.

(Response 2)—Both recommendations are outside the scope of this rulemaking. The voluntary standard applicable to drawstrings does not cover sizes smaller than 2T and does not apply to drawstrings in pants. Section 15(j) of the CPSA only allows a determination of a substantial product hazard for product characteristics that have been addressed by voluntary standards with which there is substantial compliance. Therefore, we cannot adopt the commenter's recommendations. If information becomes available showing that such action is needed, then we could consider whether we could make the findings to issue a standard or ban drawstrings in sizes smaller than 2T or in pants, or to support industry in the implementation of a voluntary standard addressing these issues.

3. Age of Children at Risk

(Comment 3)—Two commenters stated that product safety standards should refer to the ages of the children at risk and not to the sizes of the garments.

(Response 3)—This suggestion is outside the scope of this rulemaking. Only those characteristics of a product that have been addressed by a voluntary standard may be deemed to be a substantial product hazard in a rule made under section 15(j) of the CPSA. The applicable voluntary standard for drawstrings in children's upper outerwear, ASTM F 1816–97, addresses garment sizes but not children's ages. Therefore, the Commission cannot take the action requested in this rulemaking.

However, the preamble to the proposed rule (75 FR at 27501 through 27502) discussed what the corresponding ages are—namely, that size 2T would be worn by children about 18 months of age; size 12 would be worn by children about 10 years of age; and size 16 would be worn by children about 14 years of age. Furthermore, although the voluntary standard on which the proposed rule is based (ASTM F 1816–97) refers to children's clothing sizes only, it also references age in the Rationale (Appendix, section X1). That section reports the ages of the victims in incidents involving hood and neck drawstrings (14 months to 8 years) and incidents involving waist and bottom drawstrings (7 years to 14 years). The CPSC Directorate for Epidemiology staff's review of the data on related incidents shows that little has changed with regard to age since the Standard was developed. Those incidents associated with neck drawstrings involved children 10 years old and younger. Incidents associated with waist or bottom drawstrings involved children 14 years old and younger. The ages reported in the incident data correlate well with information from retailer size charts, anthropometric body measurement data, and standard tables of body measurements developed by ASTM. These sources show that the age range of children likely to wear garments in sizes 2T to 12 is 18 months to 10 years, and the age range of children likely to wear garments sizes 2T to 16 is 18 months to 14 years. These are the ages the Standard is intended to cover because children of those ages are most at risk.

4. Adult Apparel and Marketing Concerns

(Comment 4)—Two commenters also requested ''that CPSC clearly state that adult apparel, marketed to adults, or merchandised in adult departments will not be subject to this rule.'' These commenters stated that ''adult apparel sized small or extra small could easily pass for a larger sized child's garment. * * * [a] generic adult's sized extra small hooded sweatshirt could easily be mistaken as a children's garment.''

(Response 4)—We agree that garments intended for adults and marketed to adults only would not be subject to the rule because they are not children's garments. We do not believe, however, that consideration of the manufacturer's intended wearer should supersede consideration of the actual or reasonably foreseeable wearers. While a manufacturer, retailer, or distributor may intend that only adults should wear the garment, we will consider the reasonably foreseeable uses and misuses of garments that are labeled ambiguously, including uses by those whom it is reasonably foreseeable will wear it. Many factors could confound a manufacturer's, retailer's, or distributor's intent that only adults would wear a garment.

We believe that consumers make their buying and wearing decisions based primarily on a garment's size and characteristics, including fabric, color, print, texture, and other features, independent of label information related to the intended wearer. We agree that smaller adult apparel could easily pass for an older child's garment. This is evidenced in the overlap of body dimensions used in industry sizing charts to define smaller adult sizes and larger children's sizes. Further, children at the pre-teen and teen stages often want to dress like adults, and adults sometimes wear clothing that appeals to children and is available in sizes for both children and adults (*e.g.,* clothing with designs relating to cartoon characters and theme-related characters). Because of the overlap in sizes and appeal, it is foreseeable that ambiguously labeled apparel could pass for a child's garment and may be purchased for use by children. Therefore, we believe that such clothing should meet the Standard's drawstring requirements and should be subject to the 15(j) rule for drawstrings and that it would be inappropriate to exclude all ''adult apparel'' from the rule.

In addition, relying on where or how a given retailer may display a garment would present practical problems. One retailer may offer the garment in the women's section; another retailer may offer the same garment in the children's section; and yet another retailer may offer the garment in a grouping by garment type, without reference to age

or gender (*e.g.,* all sweatshirts). Some retailers may not differentiate at all between departments within their store based on age or gender. It would be impractical and unwise to rely on presumptions about the retail treatment.

For these reasons, if upper outerwear is labeled ambiguously or not marketed clearly for adults only and is equivalent to a size within the range of 2T to 16, then that upper outerwear should meet the Standard's drawstring requirements and should be subject to the 15(j) rule for drawstrings. If a manufacturer, retailer, or distributor has any doubt, it should report the garment to the Commission in accordance with section 15 of the CPSA.

5. Definition of Drawstring

(Comment 5)—Two commenters jointly requested clarification regarding the definition of a ''drawstring'' as stated in the Standard. Specifically, these commenters stated that the common industry understanding of a drawstring is a cord that passes through a channel, and the commenters raised concerns about the 2009 recall of children's hooded sweatshirts with ties sewn in at the base of the hood. The commenters stated that these ties do not pass through a channel or necessarily provide for closure. They expressed concern about the potential for confusion in the marketplace regarding which closures meet the ''drawstring'' definition in the Standard.

(Response 5)—The Commission has long understood that nonretractable cords, ribbons, or tapes of any material that pull together parts of upper outerwear to provide for closure constitute drawstrings, regardless of whether they pass through a channel. Drawstrings that fail to comply with or that result in an article of children's upper outerwear failing to comply with the Standard's performance requirements constitute defects that create a substantial risk of injury to children, regardless of whether they pass through a channel. Both where the drawstring is through a channel and where the drawstring is in the form of a tie, if the drawstring becomes caught, the garment's neck, collar, or other such part becomes taut around the neck, leading to possible strangulation. In the Commission's recall and other enforcement efforts, CPSC has interpreted and applied the Standard in a manner consistent with these beliefs.

The Standard defines a ''drawstring'' as ''a non-retractable cord, ribbon, or tape of any material to pull together parts of upper outerwear to provide for closure.'' The Standard's ''drawstring'' definition is not limited to cords, ribbons, or tapes that pass through a channel. Further, the definition does not exclude ties. The Commission believes the definition in the Standard is without ambiguity, and there is sufficient information to determine that there has been substantial compliance with the Standard with respect to ties. Thus, ties continue to be included within the definition of ''drawstrings'' in this final rule.

We believe that, under section 15 of the CPSA, manufacturers, retailers, and distributors have had a continuing duty to report to the Commission regarding drawstrings, which include ties, and that firms will continue to have such a duty. Reporting will increase the safety of children, a vulnerable population, and, as warranted, we will continue to seek recalls of children's upper outerwear with drawstrings given the substantial risk of injury these garments present to children.

6. Manufacturers' Sizing Systems

(Comment 6)—A commenter expressed concern about how the Commission would evaluate whether a children's garment falls within the size range stated in the Standard. Noting that apparel sizing varies among companies, the commenter questioned the Commission's position in proposed § 1120.3(b)(2)(v) that a firm's statement of what sizes are equivalent to sizes 2T to 16 may not be used to show that the size of a garment is not equivalent to a size in the range of 2T to 16. The commenter stated that the Commission's position is inconsistent with the CPSIA's definition of the term ''children's product,'' which lists a statement of the manufacturer's intended use as a factor to be considered. The commenter stated that a manufacturer's statement, if reasonable, should be the primary consideration of whether a garment is covered by the Standard.

(Response 6)—After further evaluation, we are removing § 1120.3(b)(2)(v) in its entirety. We will consider a manufacturer's statement about the intended use of a children's garment, if such statement is reasonable. We do not believe, however, that a manufacturer's statement, even if reasonable, should be the primary consideration in determining whether a garment is covered by the Standard. Rather, in any given matter, we will consider all of the relevant factors and will weigh them appropriately.

7. Definition of ''Upper Outerwear''

(Comment 7)—A commenter recommended that ''Lightweight garments worn on the upper body, but intended as an inner layer, or intended for warmer weather climates that do not use outerwear should be excluded.''

(Response 7)—The Standard defines ''upper outerwear'' as ''clothing, such as jackets and sweatshirts, generally intended to be worn on the exterior of other garments.'' This definition excludes underwear and inner layers, but includes lightweight outerwear that is appropriate for use in warmer climates. The hazards presented by drawstrings on children's upper outerwear are not limited to heavyweight outerwear. Any drawstring that can dangle from the neck or waist area of outerwear during play activities presents the hazard, even if the garment's fabric is lightweight. Pants, shorts, and skirts are not intended for the upper portion of the body and are excluded from the scope of the Standard.

F. Description of the Final Rule

The final rule for drawstrings creates a new § 1120.3(b)(1) to specify that items of children's upper outerwear that are subject to ASTM F 1816–97, but that do not comply with it, are substantial product hazards under section 15(a)(2) of the CPSA. The rule also creates a new § 1120.2(c) to define a ''drawstring'' as ''a non-retractable cord, ribbon, or tape of any material to pull together parts of outerwear to provide for closure.''

To facilitate determining which garments that are sized under a sizing system other than the numerical system (2T to 16) are equivalent to sizes 2T to 16, § 1120.3(b)(2)(i) provides that garments in girls' size Large (L) and boys' size Large (L) are equivalent to size 12. Section 1120.3(b)(2)(ii) specifies that garments in girls' size Extra-Large (XL) and boys' size Extra-Large (XL) are equivalent to size 16.

Section 1120.3(b)(2)(iii) provides that if a garment is labeled for a range of sizes, the garment will be considered subject to ASTM F 1816–97, if any size within the range is subject to ASTM F 1816–97. Section 1120.3(b)(2)(iv) provides that, in order to fall within the scope of § 1120.3(b)(2)(i) through (iii), a garment need not state anywhere on it, or on its tags, labels, package, or any other materials accompanying it, the term ''girls'' or the term ''boys'' or whether the garment is intended for girls or boys. Last, § 1120.3(b)(v) states that the Commission may use any other evidence that would tend to show that an item of children's upper outerwear is a size that is equivalent to sizes 2T to 16.

G. Effect of Section 15(j) Rule

Section 15(j) of the CPSA authorizes us to issue a rule specifying that a consumer product (or class of consumer products) has characteristics whose presence or absence creates a substantial product hazard. This rule, which falls under section 15 of the CPSA, is not a consumer product safety rule and does not create a consumer product safety standard. Thus, the rule does not trigger any testing or certification requirements under section 14(a) of the CPSA.

Although the final rule does not establish a consumer product safety standard, placing a consumer product on this substantial product hazard list has certain consequences. A product that is or has a substantial product hazard is subject to the reporting requirements of section 15(b) of the CPSA. 15 U.S.C. 2064(b). A manufacturer who fails to report a substantial product hazard to the Commission is subject to civil penalties under section 20 of the CPSA and possibly is subject to criminal penalties under section 21 of the CPSA. 15 U.S.C. 2069, 2070.

A product that is or contains a substantial product hazard is subject to corrective action under section 15(c) and (d) of the CPSA. 15 U.S.C. 2064(c), (d). Thus, the Commission can order the manufacturer, distributor, or retailer of the product to offer to repair or replace the product, or to refund the purchase price to the consumer.

Finally, a product that is offered for import into the United States, and is or contains a substantial product hazard, must be refused admission into the United States under section 17(a) of the CPSA. 15 U.S.C. 2066(a).

H. Regulatory Flexibility Certification

The Regulatory Flexibility Act (''RFA'') generally requires that agencies review proposed and final rules for their potential economic impact on small entities, including small businesses. 5 U.S.C. 601–612. In the preamble to the proposed rule (75 FR at 27503), we noted that Commission staff estimates that a very high percentage of small businesses that manufacture or sell children's upper outerwear already sell only garments that comply with, ASTM F 1816–97. Also, the Commission's Office of Compliance and Field Operations already considers children's upper outerwear with hood or neck area drawstrings that are subject to, but do not comply with, ASTM F 1816–97 to be a substantial product hazard and would seek recalls of such products, regardless of whether they are added, by rule, to the list of substantial product hazards under Section 15(j) of the CPSA. Finally, conformance to ASTM F 1816–97 is achieved for many garments distributed in commerce simply by eliminating drawstrings from the manufacturing process with minimal or no increase in resulting production costs. Therefore, we certified that, in accordance with section 605 of the RFA, the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

We received no comments concerning the rule's impact on small businesses, and we are not aware of any information that would change our certification.

I. Environmental Considerations

The Commission's environmental review regulation at 16 CFR part 1021 has established categories of actions that normally have little or no potential for affecting the human environment and therefore do not require either an environmental assessment or an environmental impact statement. This rule is within the scope of the Commission's regulation, at 16 CFR 1021.5(c)(1) that provides a categorical exclusion for rules to provide design or performance requirements for products. Thus, no environmental assessment or environmental impact statement for this rule is required.

J. Paperwork Reduction Act

The final rule does not impose any information collection requirements. Accordingly, the final rule is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501–3520.

K. Effective Date

The preamble to the proposed rule indicated that a final rule would take effect 30 days from its date of publication in the **Federal Register**, such that, after that date, all items of children's upper outerwear that are subject to, but do not comply with, ASTM F 1816–97, would constitute a substantial product hazard.

We received no comments regarding the effective date. Accordingly, the effective date for this rule is August 18, 2011.

L. Preemption

Under section 26(a) of the CPSA, 15 U.S.C. 2075(a), if a ''consumer product safety standard under [the CPSA]'' is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury, unless the state requirement is identical to the federal standard. A rule under section 15(j) of the CPSA is not a ''consumer product safety standard.'' Accordingly, the preemptive effect of section 26(a) of the CPSA does not apply to a rule under section 15(j) of the CPSA.

List of Subjects in 16 CFR Part 1120

Administrative practice and procedure, Consumer protection, Household appliances, Imports, Incorporation by reference.

Conclusion

For the reasons stated above, and under the authority of 15 U.S.C. 2064(j), 5 U.S.C. 553, and section 3 of Public Law 110–314, 122 Stat. 3016 (August 14, 2008), the U.S. Consumer Product Safety Commission amends title 16 of the Code of Federal Regulations as follows:

PART 1120—SUBSTANTIAL PRODUCT HAZARD LIST

■ 1. The authority citation for part 1120 continues to read as follows:

Authority: 15 U.S.C. 2064(j); Sec. 3, Pub. L. 110–314, 122 Stat. 3016.

■ 2. Amend § 1120.2 by adding a new paragraph (c) to read as follows:

§ 1120.2 Definitions.

* * * * *

(c) *Drawstring* means a non-retractable cord, ribbon, or tape of any material to pull together parts of upper outerwear to provide for closure.

■ 3. In § 1120.3, add paragraph (b) to read as follows:

§ 1120.3 Substantial product hazard list.

* * * * *

(b) (1) Children's upper outerwear in sizes 2T to 16 or the equivalent, and having one or more drawstrings, that is subject to, but not in conformance with, the requirements of ASTM F 1816–97, *Standard Safety Specification for Drawstrings on Children's Upper Outerwear,* approved June 10, 1997, published August 1998. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428–2959 USA, telephone: 610–832–9585; *http://www2.astm.org/*. You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 502, 4330 East West Highway, Bethesda, MD 20814, telephone 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/*

federal_register/code_of_federal_regulations/ibr_locations.html.

(2) At its option, the Commission may use one or more of the following methods to determine what sizes of children's upper outerwear are equivalent to sizes 2T to 16:

(i) Garments in girls' size Large (L) and boys' size Large (L) are equivalent to girls' or boys' size 12, respectively. Garments in girls' and boys' sizes smaller than Large (L), including Extra-Small (XS), Small (S), and Medium (M), are equivalent to sizes smaller than size 12. The fact that an item of children's upper outerwear with a hood and neck drawstring is labeled as being larger than a size Large (L) does not necessarily mean that the item is not equivalent to a size in the range of 2T to 12.

(ii) Garments in girls' size Extra-Large (XL) and boys' size Extra-Large (XL) are equivalent to size 16. The fact that an item of children's upper outerwear with a waist or bottom drawstring is labeled as being larger than size Extra-Large (XL) does not necessarily mean that the item is not equivalent to a size in the range of 2T to 16.

(iii) In cases where garment labels give a range of sizes, if the range includes any size that is subject to a requirement in ASTM F 1816–97, the garment will be considered subject, even if other sizes in the stated range, taken alone, would not be subject to the requirement. For example, a coat sized 12 through 14 remains subject to the prohibition of hood and neck area drawstrings, even though this requirement of ASTM F 1816–97 only applies to garments up to size 12. A coat size 13 through 15 would not be considered within the scope of ASTM F 1816–97's prohibition of neck and hood drawstrings, but would be subject to the requirements for waist or bottom drawstrings.

(iv) To fall within the scope of paragraphs (b)(2)(i) through (2)(iii) of this section, a garment need not state anywhere on it, or on its tags, labels, package, or any other materials accompanying it, the term ''girls,'' the term ''boys,'' or whether the garment is designed or intended for girls or boys.

(v) The Commission may use any other evidence that would tend to show that an item of children's upper outerwear is a size that is equivalent to sizes 2T to 16.

Dated: July 12, 2011.

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2011–17961 Filed 7–18–11; 8:45 am]

BILLING CODE 6355–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter 1

Effective Date for Swap Regulation

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On June 17, 2011, the Commodity Futures Trading Commission (''CFTC'' or the ''Commission'') published for public comment in the **Federal Register** a proposed order that would grant, pursuant to the Commission's exemptive authority pursuant to the Commodity Exchange Act (''CEA''), certain temporary relief from the provisions of the CEA added or amended by title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') that reference one or more terms regarding entities or instruments that title VII requires be ''further defined,'' such as the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' or ''eligible contract participant,'' to the extent that requirements or portions of such provisions specifically relate to such referenced terms and do not require a rulemaking. The CFTC also proposed to grant temporary relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions in exempt or excluded commodities as a result of the repeal of various CEA exemptions and exclusions as of the general effective date set forth in section 754 of the Dodd-Frank Act, July 16, 2011. Upon consideration of the full record, the Commission has determined to issue this final exemptive order (''Final Order'') essentially as proposed, with appropriate or necessary modification or clarification.

DATES: Effective July 14, 2011.

FOR FURTHER INFORMATION CONTACT: Terry Arbit, Deputy General Counsel, 202–418–5120, *tarbit@cftc.gov,* or Harold Hardman, Deputy General Counsel, 202–418–5120, *hhardman@cftc.gov,* Office of the General Counsel, or Steven Kane, Consultant, 202–418–5911, *skane@cftc.gov,* Office of the Chief Economist, CFTC, Three Lafayette Centre, 1151 21st Street, NW., Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act amends the CEA[2] to establish a comprehensive new regulatory framework for swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the rulemaking and enforcement authorities of the Commission with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Title VII also includes amendments to the federal securities laws to establish a similar regulatory framework for security-based swaps under the authority of the Securities and Exchange Commission (''SEC'').

Section 754 of the Dodd-Frank Act states that, unless otherwise provided, the provisions of subtitle A of title VII of the Dodd-Frank Act (''Title VII'')[3] ''shall take effect on the later of 360 days after the date of the enactment of this subtitle or, to the extent a provision of this subtitle requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision of this subtitle.'' The date 360 days after the date of enactment is July 16, 2011.

To implement the Dodd-Frank Act, as of July 8, 2011, the Commission has issued 52 advance notices of proposed rulemaking or notices of proposed rulemaking, two interim final rules, six final rules, and one proposed interpretive order. The regulatory requirements that have been proposed by the Commission present a substantially complete mosaic of the Commission's proposed regulatory framework under Title VII. In light of

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law. 111–203, 124 Stat. 1376 (2010).

[2] 7 U.S.C. 1 *et seq.*

[3] Subtitle A of Title VII contains two parts. Part I, entitled ''Regulatory Authority,'' consists of sections 711–720; part II, entitled ''Regulation of Swap Markets,'' consists of sections 721–754. Subtitle B of Title VII is entitled ''Regulation of Security-Based Swap Markets,'' and consists of sections 761–774. References to ''Title VII'' in this Release shall include only subtitle A of Title VII.

this substantially complete mosaic, the Commission reopened or extended the comment period of many of its proposed rulemakings in order to provide the public with an additional opportunity to comment on the proposed new regulatory framework for swaps, either in part or as a whole.[4] The extended comment period closed on June 3, 2011. The Commission also has solicited public comments on the phasing of rule implementation (i.e., identifying which requirements can be met sooner and which ones will take more time).[5]

Section 712(d)(1) of the Dodd-Frank Act requires the Commission and the SEC to further define certain terms used in Title VII, including the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant.''[6] Section 721(c) requires the Commission to adopt a rule to further define the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' and ''eligible contract participant'' to prevent evasion of statutory and regulatory obligations.[7] The Commission has issued two notices of proposed rulemaking that address these further definitions.[8]

The Commission's final rulemakings further defining the terms in sections 712(d) and 721(c) will not be in place as of July 16, 2011. Consequently, concerns have been raised about effects upon the swaps market and the applicability of various regulatory requirements to certain agreements, contracts, and transactions during the period between July 16, 2011 and the date(s) that those rulemakings have been completed. To address these concerns, and to ''strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime,''[9] the Commission proposed to exercise its authority under CEA section 4(c) and section 712(f) of the Dodd-Frank Act.

Section 4(c) of the CEA, as amended by the Dodd-Frank Act, provides the Commission with authority to exempt certain agreements, contracts, and transactions (referred to hereafter collectively as ''transactions'') that may otherwise be subject to the CEA from various provisions of the CEA.[10] Section 712(f) of the Dodd-Frank Act states that ''in order to prepare for the effective dates of the provisions of this Act,'' including the general effective date set forth in section 754, the Commission may ''exempt persons, agreements, contracts, or transactions from provisions of this Act, under the terms contained in this Act.'' Section 754 specifies that unless otherwise provided in Title VII, provisions requiring a rulemaking become effective ''not less than 60 days after publication of the final rule'' (but not before July 16, 2011).

The provisions of Title VII can be grouped into four major categories: (1) Provisions that require a rulemaking (for which relief was not proposed); (2) self-effectuating provisions that reference terms that require further definition; (3) self-effectuating provisions that do not reference terms that require further definition and that repeal provisions of current law; and (4) self-effectuating provisions for which relief was not proposed.

Category 1 provisions are not self-effectuating because they require a rulemaking. A significant number of the Title VII provisions fall into this category. Examples of Category 1 provisions include new CEA section 4s(a) (governing registration of swap dealers and major swap participants), new CEA section 4s(e) (governing capital and margin requirements for swap dealers and major swap participants), and new CEA section 4s(h) (external business conduct standards for swap dealers and major swap participants).[11] Pursuant to section 754, the rulemakings to implement these provisions of the CEA will not become effective, at a minimum, until 60 days after publication of a final Commission rule (and not before July 16, 2011).

Because the Category 1 provisions are not self-effectuating as of July 16, 2011, it was not necessary for the Commission to propose relief with respect to the same. As noted above, the Category 1 provisions will not go into effect until at least 60 days after publication of a final Commission rule in the **Federal Register**.[12]

The Category 4 provisions also fell outside the scope of the proposed order. They are self-effectuating and do not require relief because, in the judgment of the Commission, compliance with these requirements upon the effective date will not cause undue disruption to affected transactions, markets, or entities, and a delay of the imposition of these statutory requirements would not be in the public interest.

The proposed order, as well as lists of the Category 1 and Category 4 provisions prepared by Commission staff, were published on the Commission's Web site (*http://www.cftc.gov*) on June 14, 2011. A list of the provisions in each of the four categories is provided in the Appendix to this Final Order.

II. The Proposed Order

On June 14, 2011, the Commission issued a proposed order to provide temporary exemptive relief in two parts, each addressing one of the remaining categories of provisions noted above: (1) Category 2—provisions that are self-effectuating (i.e., do not require rulemaking) and reference terms that require further definition (i.e., ''swap,'' ''swap dealer,'' ''major swap participant,'' or ''eligible contract

[4] *See* Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274, May 4, 2011.

[5] The Commission has noted its ability to phase in implementation of the new requirements based on factors such as: The type of swap, including by asset class; the type of market participants that engage in such trades; the speed with which market infrastructures can meet the new requirements; and whether registered market infrastructures or participants might be required to have policies and procedures in place ahead of compliance with such policies and procedures by non-registrants. *See http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/staffconcepts050211.pdf.*

[6] Section 712(d)(1) provides: ''Notwithstanding any other provision of this title and subsections (b) and (c), the Commodity Futures Trading Commission and the Securities and Exchange Commission, in consultation with the Board of Governors [of the Federal Reserve System], shall further define the terms 'swap', 'security-based swap', 'swap dealer', 'security-based swap dealer', 'major swap participant', 'major security-based swap participant', and 'security-based swap agreement' in section 1a(47)(A)(v) of the Commodity Exchange Act (7 U.S.C. 1a(47)(A)(v)) and section 3(a)(78) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(78)).''

[7] Section 721(c) provides: ''To include transactions and entities that have been structured to evade this subtitle (or an amendment made by this subtitle), the Commodity Futures Trading Commission shall adopt a rule to further define the terms 'swap', 'swap dealer', 'major swap participant', and 'eligible contract participant'.''

[8] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant,'' 75 FR 80174, Dec. 21, 2010 (''Entity Definitions'') and Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 FR 29818, May 23, 2011.

[9] *See* Notice Regarding the Treatment of Petitions Seeking Grandfather Relief for Trading Activity Done in Reliance Upon Section 2(h)(1)–(2) of the Commodity Exchange Act, 75 FR 56512, 56513, Sept. 16, 2010 (''Grandfather Notice'').

[10] 7 U.S.C. 6(c).

[11] To be codified at 7 U.S.C. 6s(a), 6s(e) and 6s(h), respectively.

[12] As stated in footnote 5, supra, the Commission has discretion to phase-in implementation of new requirements in Category 1 rulemakings as well as rulemakings conducted with respect to Category 2 provisions. Accordingly, the Commission anticipates that it may establish compliance dates for the substantive requirements established in a rulemaking implementing Category 1 provisions that differ from the effective date of the rulemaking. The effective date and compliance dates for each rulemaking will be determined in each rulemaking proceeding. Additionally, as stated in footnote 69, infra, the Commission has received and has solicited public comments with respect to the appropriate phase-in of the Dodd-Frank Act rulemaking requirements.

participant''); and (2) Category 3—provisions that are self-effectuating (i.e., do not require rulemaking) and repeal provisions of current law, but that do not reference terms that require further definition. The Commission's proposed order was published in the **Federal Register** on June 17, 2011.[13]

With respect to part one of the proposed order addressing Category 2 provisions, the Commission proposed to temporarily exempt persons and entities from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, including the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' or ''eligible contract participant.'' [14] CEA section 4d(f), as amended by section 724 of the Dodd-Frank Act, is an example of a Category 2 provision to which the exemption provided in the proposed order would extend.[15]

The Commission made clear that the proposed exemptive relief from such provisions would apply only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms. Further, the Commission stressed that the proposed relief ''would not in any way limit the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud.'' [16]

The Commission also placed other limitations on the relief in part one of the proposed order. First, the Commission stated that the relief would not apply to any provisions of Title VII and the CEA that have become effective prior to July 16, 2011 or to Commission regulations already issued.[17] Further, the relief would not affect any effective date set out in any specific Dodd-Frank Act rulemaking by the Commission.[18] In addition, the proposed order would not limit the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision.[19] Finally, the Commission stated that the proposed order would not affect the applicability of any provision of the CEA to futures contracts or options on futures contracts.[20]

The Commission proposed that the temporary exemptive relief would expire upon the earlier of: (1) The effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011.[21] In proposing to limit the relief to no more than a fixed period (i.e., December 31, 2011), the Commission provided the following reasons:

> First, the Commission believes it appropriate and prudent to periodically review the extent and scope of any relief provided from the CEA, as amended by the Dodd-Frank Act. The Commission anticipates that additional rulemakings to implement the Dodd-Frank Act will be completed during this period of transitional relief. During this period the Commission also will be considering the appropriate phase-in of the various regulatory requirements under the Dodd-Frank rulemakings. Accordingly, the Commission believes it would be appropriate to periodically re-examine the scope and extent of the proposed exemptive relief in order to ensure that the scope of relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.
>
> Second, the limitation of this exemptive relief to no more than a fixed period of time is consistent with similar limitations on transitional relief provided by the Congress elsewhere in Title VII. Section 723(c) of the Dodd-Frank Act allows persons to submit petitions to the Commission ''to remain subject to section 2(h) of the [CEA].'' In acting upon such petitions, the Commission may allow persons to ''continue operating subject to section 2(h) [of the CEA] for not longer than a 1-year period.'' Similarly, section 734 authorizes the Commission to grant petitions for persons to remain subject to the provisions of section 5d of the CEA governing the operation of exempt boards of trade (''EBOTs'') ''for up to 1 year after the effective date of this subtitle.'' In light of these provisions authorizing the Commission to provide transitional relief for no longer than a fixed period of time, the Commission believes it would be appropriate to provide transitional relief consistent with section 712(f) of the Dodd-Frank Act and CEA section 4(c) under this proposed order for no longer than a fixed time period.[22]

In the proposed order, the Commission reiterated its intent: (1) That existing practices should not be unduly disrupted during any transition period; and (2) to deliberatively and efficiently proceed to complete the rulemakings to implement the Dodd-Frank Act.[23] As to timing, the Commission proposed that in the event that a further definitions rulemaking is completed prior to December 31, 2011, the Commission will at the time of such

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[13] *See* Effective Date for Swap Regulation, 76 FR 35372, June 17, 2011.

[14] 76 FR at 35374. In footnote 15 of the proposed order, the Commission stated: ''The Commission's authority to provide exemptive relief under CEA section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions of the Dodd-Frank Act and the CEA. These provisions include: new CEA section 4s(l), 7 U.S.C. 6s(l) (providing for swap dealer segregation requirements with respect to uncleared swaps); amended CEA section 5b(a), 7 U.S.C. 7a–1(a) (prohibiting a DCO from performing the functions of a DCO with respect to swaps unless the DCO is registered with the Commission); and new CEA section 4s(k), 7 U.S.C. 6s(k) (providing for the duties and designation of a chief compliance officer for swap dealers and major swap participants). As such, these provisions will take effect on July 16, 2011, and may not be subject to the exemptive relief noted above granted by the Commission. The Commission staff has informed the Commission that it is separately considering whether to issue a no-action letter in which the staff would state that it would not recommend that the Commission commence an enforcement action against markets or market participants for failure to comply with the above-referenced provisions over a similar time period.'' Subsequently, a draft staff no-action letter that would provide such relief was posted on the Commission's Web site. *See http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/noaction061411.pdf.*

[15] To be codified at 7 U.S.C. 6d(f). Thus, for example, persons who accept money, securities or property (or extend credit in lieu thereof) from, for, or on behalf of a swaps customer to margin, guarantee, or secure a swap cleared by or through a derivatives clearing organization would not be required to register as futures commission merchants as otherwise required by section 4d(f)(1) until the expiration of the exemption in part one of the proposed order.

[16] 76 FR at 35374. In footnote 16 of the proposed order, the Commission stated, ''The Dodd-Frank Act amended the CEA's anti-fraud and anti-manipulation provisions to cover 'swaps.''' Examples of such provisions include the amendments to the antifraud provisions in CEA section 4b, 7 U.S.C. 6b, as well as the amendments set forth in section 746 of the Dodd-Frank Act, which enacted certain insider trading prohibitions that apply to, among other things, futures contracts and swaps. The Commission stated: ''Although these provisions therefore would, under the proposed relief, not apply to 'swaps' under the Dodd-Frank Act because that term is subject to further definition, nevertheless, they will apply to all transactions other than 'swaps' (including, but not limited to, futures contracts, options on futures contracts, transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2) (7 U.S.C. 2(c)(2)), and transactions subject to exemptive relief pursuant to part two of the proposed order).''

[17] 76 FR at 35374. In footnote 17 of the proposed order, the Commission included the following citation: ''*See, e.g.,* section 737(d) of the Dodd-Frank Act (amendments regarding position limits effective on the date of enactment). Similarly, this relief would not affect the effective date of any provision that may become effective after July 16, 2011, such as section 716 of the Dodd-Frank Act.''

[18] 76 FR at 35374.

[19] Id.

[20] Id. In footnote 18 of the proposed order, the Commission stated: ''Accordingly and by way of non-exclusive example, where a provision references both swaps and futures, this relief does not affect in any way the application of the provision (and any implementing Commission regulations thereunder) insofar as it refers to futures.''

[21] 76 FR at 35374.

[22] 76 FR at 35375 (footnotes omitted).

[23] Id.

rulemaking address the appropriate phase-in and implementation dates of the resulting regulatory requirements. Alternatively, the Commission stated, should the proposed order expire at the end of the fixed time period—December 31, 2011—such expiration will not affect the Commission's ability to provide further relief, as appropriate, to avoid undue disruption or costs to market participants.[24]

With respect to part two of the proposed order addressing Category 3 provisions, the Commission's proposed order identified the existing provisions of the CEA that currently exclude or exempt, in whole or in part, certain transactions from Commission oversight under the CEA.[25] These are as follows:

i. Section 2(d)(1),[26] transactions in excluded commodities [27] between eligible contract participants and not executed or traded on a trading facility;

ii. Section 2(d)(2),[28] principal-to-principal transactions in excluded commodities between certain eligible contract participants and executed or traded on an electronic trading facility;

iii. Section 2(g),[29] transactions subject to individual negotiation between eligible contract participants in commodities other than agricultural commodities and not executed or traded on a trading facility;

iv. Sections 2(h)(1)–(2),[30] transactions in exempt commodities [31] between eligible contract participants and not entered into on a trading facility;

v. Sections 2(h)(3)–(7),[32] principal-to-principal transactions in exempt commodities between eligible commercial entities [33] and executed or traded on an electronic trading facility (called exempt commercial markets, or ''ECMs'');

vi. Section 5d,[34] transactions in commodities, among other things, having a nearly inexhaustible deliverable supply or no cash market, between eligible contract participants and traded on an exempt board of trade (''EBOT''); and

vii. Section 2(e),[35] which generally provides that nothing in the CEA governs or is applicable to an electronic trading facility that limits transactions authorized to be conducted on its facilities to those satisfying the requirements of sections 2(d)(2), 2(g) or 2(h)(3).

Under the Dodd-Frank Act, these provisions will be removed from the CEA as of July 16, 2011. However, the Commission noted that part 35 of the Commission's regulations,[36] and part 32 with respect to options,[37] will continue to be available with respect to transactions that meet the conditions therein, until such time as they may be withdrawn, amended, or replaced by the Commission.[38]

As the Commission stated in the proposed order, part 35 originally was promulgated in 1993 pursuant to, among others, the Commission's general exemptive authority in CEA section 4(c) and authority under section 4c(b), and provides a broad-based exemption from the CEA for ''swap agreements'' in any commodity.[39] Specifically, part 35 exempts ''swap agreements,'' as defined therein, from most of the provisions of the CEA if: (1) They are entered into by ''eligible swap participants'' (''ESPs''); [40] (2) they are not part of a fungible class of agreements standardized as to their material economic terms; [41] (3) the creditworthiness of any party having an actual or potential obligation under the swap agreement would be a material consideration in entering into or determining the terms of the swap agreement, including pricing, cost, or credit enhancement terms; [42] and (4) they are not entered into or traded on a multilateral transaction execution facility.[43] The Commission stated that transactions fully meeting the conditions of part 35 are outside the scope of the proposed order.[44]

However, because part 35 covers essentially non-standardized, non-cleared, non-exchange traded transactions, certain persons or entities that currently rely on the CEA exclusions or exemptions cited above may not qualify for part 35. Therefore, and in response to requests from market participants for greater clarity regarding the applicability of various statutory and regulatory requirements to certain transactions following the general effective date, the Commission, pursuant to its authority under CEA section 4(c), proposed to grant relief for those transactions that satisfy certain criteria specified below.[45]

Specifically, the Commission proposed to temporarily exempt a transaction in exempt or excluded commodities (and any person or entity offering or entering into such transaction) from the CEA (other than the anti-fraud and anti-manipulation enforcement provisions identified below) following the general effective date if the transaction otherwise would comply with part 35, notwithstanding that: (1) The transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to July 16, 2011); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public (the ''line of business provision'').[46]

[24] Id.

[25] Id.

[26] 7 U.S.C. 2(d)(1).

[27] The term ''excluded commodity'' is defined in CEA section 1a(13), 7 U.S.C. 1a(13), to include, among other things, financial instruments such as a currency, interest rate, or exchange rate, or any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the transaction.

[28] 7 U.S.C. 2(d)(2).

[29] 7 U.S.C. 2(g).

[30] 7 U.S.C. 2(h)(1)–(2).

[31] The term ''exempt commodity'' is defined in CEA section 1a(14), 7 U.S.C. 1a(14), as a commodity other than an excluded or agricultural commodity, and includes energy and metals commodities.

[32] 7 U.S.C. 2(h)(3)–(7).

[33] The term ''eligible commercial entity'' is defined in CEA section 1a(11), 7 U.S.C. 1a(11).

[34] 7 U.S.C. 7a–3.

[35] 7 U.S.C. 2(e).

[36] 17 CFR 35.1 *et seq.*

[37] 17 CFR 32.1 *et seq.*

[38] 76 FR at 35375 and 35376 n.36.

[39] The Commission notes, as discussed infra, that part 35 was originally promulgated in part pursuant to the Commission's plenary options authority in CEA section 4c(b), 7 U.S.C. 6c(b).

[40] The parties covered under the ESP definition, while very broad, are not coextensive with those covered by the terms ''eligible commercial entity'' or ''eligible contract participant.'' Therefore, it is possible that a small segment of persons or entities that are currently relying on one or more of the CEA exclusions or exemptions cited above might not qualify as an ESP and consequently would not be eligible for exemptive relief under part 35.

[41] This condition was designed so that the exemption would not establish ''a market in swap agreements, the terms of which are fixed and are not subject to negotiation that functions essentially in the same manner as an exchange but for the bilateral execution of transactions.'' *See* Exemption for Certain Swap Agreements, 58 FR 5587, 5590, Jan. 22, 1993.

[42] By this condition, the exemption does not extend to transactions that are subject to a clearing system where the credit risk of individual members of the system to each other in a transaction to which each is a counterparty is effectively eliminated and replaced by a system of mutualized risk of loss that binds members generally, whether or not they are counterparties to the original transaction. *Id.* at 5591.

[43] In this context, a multilateral transaction execution facility is a physical or electronic facility in which all market makers and other participants that are members simultaneously have the ability to execute transactions and bind both parties by accepting offers which are made by one member and open to all members of the facility. Id.

[44] 76 FR at 35376. In footnote 36, the proposed order also stated that ''part 32 of the Commission's regulations will continue to be available with respect to commodity option transactions that meet the conditions therein, until such time as part 32 may be withdrawn, amended, or replaced by the Commission.'' *See* Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

[45] 76 FR at 35376.

[46] *Id.* In footnote 37, the proposed order stated that commenters responding to the Commission's proposed Entity Definitions have suggested that the

Continued

As the Commission noted, the proposed temporary exemptive relief would not affect the availability of either parts 35 or 32 with respect to transactions that fully meet the conditions therein.[47] For transactions that fall outside of existing parts 35 or 32, the Commission made clear that the proposed relief would only be available to the extent those transactions (and persons offering or entering into such transactions) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d as in effect prior to July 16, 2011 or the line of business provision.[48]

With respect to any transaction within the scope of part two of the proposed order, the Commission stated that the proposed exemptive relief ''would not in any way limit the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2) or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud.'' [49] Additionally, the Commission stated that the proposed relief would not affect any Dodd-Frank Act implementing regulations (and any implementation period contained therein) that the Commission promulgates and applies to the subject transactions, market participants, or markets.[50] With respect to timing, the Commission proposed that this temporary exemptive relief would expire upon the earlier of: (1) December 31, 2011; or (2) the repeal or replacement of parts 35 or 32, as applicable.[51] The Commission also specified that the exemptive relief in part two of the proposed order would operate for no longer than a fixed period of time for the same reasons as described above with respect to part one of the proposed order.[52]

III. Comments on the Proposed Relief and Commission Determinations

A. Comments Generally

The Commission requested comment on all aspects of the proposed order, including whether the proposed temporary exemptions are consistent with the public interest and other requirements of CEA section 4(c).[53] The Commission received 19 comment letters from a variety of interested parties, including market participants and trade associations, trading platforms and clearing organizations, futures and derivatives committees of bar associations, a law firm, and a non-governmental public interest organization.[54]

The majority of commenters generally supported the Commission taking action to provide clarity and exemptive relief with respect to the July 16 effective date. For example, the American Feed Industry Association (''AFIA'') described the proposed order as ''a prudent move'' to ''ensure current practices for bona fide hedgers and end-users of agricultural commodities are not unduly disrupted during the transition.'' [55] Better Markets, Inc. (''Better Markets'') described the proposed relief as ''appropriate and reasonable,'' and said that a limited delay is ''consistent with the Dodd-Frank Act, informed rulemaking and the goal of financial reform.'' [56] The Alternative Investment Management Association (''AIMA'') commented that the proposed order was ''clear and provide[s] sufficient guidance for persons and entities to know which rules fall within the order and which do not.'' [57] The National Grain and Feed Association (''NGFA'') commended the agency ''for taking steps to ensure the continued availability of important risk management tools used by hedgers in the grain, feed and processing industry.'' [58]

Commenters also suggested various modifications or clarifications of the proposed order to address specific issues related to the scope or basis for the proposed exemptive relief. These issues, which are discussed in the remainder of this section below, include: (1) The scope of temporary relief; (2) the expiration date; (3) coverage of commodity options and agricultural swaps; (4) coverage of eligible contract participants; (5) private rights of action; (6) preemption; (7) market issues; (8) core principles; (9) intermediary issues; and (10) the scope of ''appropriate persons'' under CEA section 4(c). After considering the complete record in this matter, the Commission has determined that the requirements of CEA section 4(c) have been met. For the reasons discussed below, the Commission deems it in the public interest to issue this Final Order substantially as proposed, except for certain clarifications set forth in the discussion in this section below, which the Commission deems appropriate or necessary upon due consideration of the comments received.

B. Scope of Temporary Relief

1. Comments

Several commenters expressed general support for the Commission's effort to provide exemptive relief but urged the Commission to use what they stated to be the Commission's broad authority to grant a more comprehensive relief. For example, the Committee on Futures and Derivatives Regulation of the New York City Bar Association (''NYCBA'') stated that the Commission has ''ample'' authority, either based solely on CEA Section 4(c) or as supplemented by section 754 and section 712(f) of the Dodd-Frank Act, to

Commission should exercise its authority to further define the term ''eligible contract participant'' to encompass the ''line of business'' provision that was a part of the Commission's Policy Statement Concerning Swap Transactions, 54 FR 30694, 30696–30697, July 21, 1989. The staff is evaluating these comments in the context of the Commission's rulemaking to further define the term ''eligible contract participant.''

[47] 76 FR at 35376. In addition, in September 2010, the Commission published an order in the **Federal Register** providing that it would extend grandfather relief, as provided in sections 723(c) and 734(c) of the Dodd-Frank Act, to ECMs and EBOTs provided that certain conditions are met. *See* Order Regarding the Treatment of Petitions Seeking Grandfather Relief for Exempt Commercial Markets and Exempt Boards of Trade, 75 FR 56513, Sept. 16, 2010 (''grandfather relief orders''). The Commission stated that nothing in the proposed order was intended to impact the availability of the independent grandfather relief provided in the grandfather relief orders. Id. at n.38.

[48] 76 FR at 35376. The Commission stated in footnote 39 of the proposed order that the exemptive relief would not be available to an electronic trading facility that, as of July 15, 2011, is not already operating as an ECM pursuant to CEA sections 2(h)(3)–(7), or to an EBOT that, as of July 15, 2011, is not already operating pursuant to CEA section 5d, or not compliant with the conditions set forth in such provisions.

[49] 76 FR at 35376. In so doing, the Commission noted that ''the addition of the term 'swap' to some of these provisions would not in any way affect the applicability of these anti-fraud and anti-manipulation enforcement provisions to transactions subject to relief pursuant to part two of the proposed order.'' *Id.* at n.40.

[50] 76 FR at 35376. The Commission noted that the proposed order would not affect any Commission rulemaking authority over agreements, contracts, or transactions that may not depend on the terms subject to further definition under sections 712(d) or 721(c) of the Dodd-Frank Act. This relief also would not affect any provisions of the Dodd-Frank Act or the CEA that have become effective prior to July 16, 2011 or regulations already issued. *Id.* at n.41.

[51] 76 FR at 35376.

[52] Id.

[53] 76 FR at 35377.

[54] Comments unrelated to the proposed order will not be evaluated here, but will inform the Commission as it proceeds with its Dodd-Frank Act rulemakings.

[55] *See* letter dated June 28, 2011, from Joel G. Newman, President and Chief Executive Officer, AFIA, at p. 1.

[56] *See* letter dated July 1, 2011, from Dennis M. Kelleher, President and Chief Executive Officer and Wallace C. Turbeville, Derivatives Specialist, Better Markets, at pp. 1, 2.

[57] *See* letter dated July 1, 2011, from Jiri Krol, Director of Government & Regulatory Affairs, AIMA, at page 2.

[58] *See* letter dated July 1, 2011, from Matt Bruns, Chair, Risk Management Committee, NGFA, at p. 1.

delay the effective date of the Dodd-Frank Act provisions until the effective date of the related implementing regulations.[59] Similarly, the Derivatives and Futures Law Committee of the Business Law Section of the American Bar Association (''ABA Derivatives Committee'') stated that sections 754 and 712(f), as well as CEA section 4(c), authorize the Commission to temporarily grant relief from the Dodd-Frank Act until all necessary final rulemakings, including rulemakings as to definitions, are in place.[60] Finally, BG Americas & Global LNG (''BGA'') contends that section 721(f) of the Dodd-Frank Act authorizes the Commission to extend exemptive relief with respect to CEA sections 4s(l) (collateral segregation requirements for uncleared swaps) and 4s(k) (duties and designation of a chief compliance officer).[61]

The Commission also received comments requesting modification or clarification regarding the categorization of certain provisions of the Dodd-Frank Act.[62] Specifically, seven trade associations (collectively, the ''Associations'') filed a joint comment letter contending that many provisions in Categories 1 and 2 are interdependent with related rulemakings (including those relating to definitions) and, thus, should be extended exemptive relief until all of the mutually-interdependent rulemakings have been completed.[63] The ABA Derivatives Committee believes that Category 2 provisions also are Category 1 provisions because they require the definitional rulemakings to be completed.[64]

Commenters addressing the proposed relief for Category 3 provisions urged that the Commission use its broad authority under CEA section 4(c) and section 712(f) of the Dodd-Frank Act to amend part 35 of the Commission's regulations to provide blanket exemptive relief.[65] The NYCBA recommended that the Commission preserve the current ''safe harbors'' in CEA sections 2(d), 2(e), 2(g), 2(h) and 5d until the effective date of the applicable final rules with certain clarifications, and that such ''safe harbors'' should be available even if the subject transaction is cleared.[66]

2. Commission Determination

As stated in the proposed order, a significant number of Dodd-Frank Act provisions are not self-effectuating and, thus, it is not necessary to provide relief with respect to such provisions (*i.e.,* Category 1). With respect to the provisions of the Dodd-Frank Act in Categories 2 or 3, the Commission has determined to use its authority to issue this exemptive relief under section 712(f) of the Dodd-Frank Act co-extensively with its exemptive authority under the CEA.[67] The exemptive relief will allow markets and market participants to continue to operate under the regulatory regime as in effect prior to July 16, 2011, but subject to various implementing regulations that the Commission promulgates and applies to the subject transactions, market participants, or markets.

This temporary relief, in the Commission's judgment, is appropriately tailored to enable the Commission to continue to implement the Dodd-Frank Act in an expeditious manner, while minimizing undue disruption and uncertainty for the markets and market participants during the transition period. In this regard, the Commission reiterates that, in considering the appropriate phase-in of its various Dodd-Frank Act implementing regulations, it intends to continue to ''strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.''[68] While the sequencing of the final rules is beyond the scope of this Final Order, the interdependencies of the various rulemakings will be a consideration in determining the implementation date for each final rule.[69]

C. Expiration Date

1. Comments

The proposed order included an outermost, fixed expiration date for parts one and two of the exemptive relief. Part one would expire on the earlier of: (1) The effective date of the applicable final rule further defining the relevant term; or (2) December 31, 2011. Part two of the proposed order would expire on the earlier of: (1) December 31, 2011; or (2) the repeal or replacement of part 35 of the Commission's regulations. In the proposed order, the Commission explained that setting an expiration date was ''appropriate to periodically re-examine the scope and extent of the proposed exemptive relief'' and that ''the limitation of this exemptive relief to no more than a fixed period of time is consistent with similar limitations on transitional relief provided by the Congress'' in section 723(c) and section 734 of the Dodd-Frank Act.[70]

Better Markets generally supported the expiration date because it believes that it is extremely important for the

[59] *See* letter dated June 30, 2011, from Timothy P. Selby, Chair, NYCBA, at p. 3. NYCBA asserted that the requirement in section 712(f)(4) that exemptions be made ''under the terms of the Act'' is intended to require that they be made under the provisions establishing or limiting regulatory authority under the Dodd-Frank Act as a whole, rather than referring to the substance of the exemptive authority available under provisions of the CEA. Id. at p. 4.

[60] *See* ABA Derivatives Committee at pp. 2–3. The ABA Derivatives Committee stated that the Commission's exemptive authority under the Dodd-Frank Act is broader than the exemptive authority specifically conferred by the CEA, especially in light of the different language of section 712(e) as compared to section 712(f). Id. at p. 5.

[61] *See* letter dated July 1, 2011, from Lisa Yoho, Director, Regulatory Affairs and Matt Schatzman, Senior Vice President, Energy Marketing, BGA, at pp. 9–10. As discussed in footnote 14, supra, the Commission believes that its authority to provide exemptive relief under section 4(c), as amended by section 721(d) of the Dodd-Frank Act, may not extend to certain Category 2 provisions, such as CEA sections 4s(l) and 4s(k), though the Commission is informed that staff is separately considering a no-action letter with respect to these provisions.

[62] *See generally* letter dated July 1, 2011, from David M. Perlman, Bracewell & Giuliani LLP, on behalf of the Coalition of Physical Energy Companies, at p. 3 (requesting statement that the Commission intends to preserve the legal status quo for the swaps market unless and until it affirmatively and systematically makes changes).

[63] *See* letter dated July 1, 2011, from American Bankers Association, ABA Securities Association, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, and Securities Industry and Financial Markets Association, at p. 4.

[64] *See* ABA Derivatives Committee at p. 3.

[65] *See, e.g.,* letter dated July 1, 2011, from R. Michael Sweeney, Jr., Hunton & Williams, on behalf of the Working Group of Commercial Energy Firms (''CEF''), at pp. 3–4. In the alternative, CEF recommends that at a minimum, the Commission use its authority under sections 723(c)(l)–(2) to provide grandfather relief to all persons who transact, operate, or otherwise rely on current CEA section 2(h) as well as all transactions subject to this provision, for a six-month period commencing on July 16, 2011. CEF states that the Commission may rely on section 712(f) as well as sections 723(c)(l)–(2) to exempt persons relying on current CEA sections 2(h)(l)–(2) in carrying out their bilateral exempt commodity transactions, for up to a one year period, following the effective date. CEF at p. 4.

[66] NYCBA at pp. 6–8.

[67] *See* CEA sections 4(c) and 4c(b).

[68] *See* Grandfather Notice, supra, n.9.

[69] During the Dodd-Frank Act rulemaking process the Commission has received a number of comments recommending that the Commission appropriately sequence the effective dates and compliance dates under the various Dodd-Frank Act rulemakings. As noted in footnote 5, supra, the Commission already has held a roundtable and solicited public comments with respect to the appropriate phase-in of the Dodd-Frank Act rulemaking requirements. Prior to the roundtable, on April 29, 2011, CFTC staff released a document that set forth concepts that the Commission may consider with regard to the effective dates of final rules for swaps under the Dodd-Frank Act. The Commission therefore anticipates that the determinations regarding the phase-in of compliance dates for and within the various rulemakings will continue to be informed by the Commission's further consideration of this issue, including public comments.

[70] 76 FR at 35375.

Commission to have the ability to assess conditions related to implementation as they evolve over the next six months.[71] Conversely, the ABA Derivatives Committee, AIMA, the Associations, CME Group Inc. (''CME''), and MarketAxess Holdings Inc. (''MarketAxess'') argued that a predetermined global expiration date was not necessary and the Commission should provide that the temporary relief will expire for a given rule only upon the effective date (or compliance date, if later) of the applicable final rule.[72]

In the event the Commission decides to include an expiration date, the NYCBA and ABA Derivatives Committee believe that the Commission should revise the proposed order to trigger the effectiveness of the relevant provision only when both the definitional rulemaking and the substantive rulemaking for the relevant provision become effective.[73] Similarly, the Associations and CME urged the Commission, at a minimum, to extend the expiration date to July 2012, consistent with the transitional period specified in sections 723(c) and 734 of the Dodd-Frank Act.[74] Finally, to address a perceived ''potential gap period,'' the NYCBA and ABA Derivatives Committee believe that the order should contain language specifically addressing situations where final rules are adopted within 60 days before December 31, 2011, or where a final rule otherwise has a prescribed effective date after December 31, 2011.[75]

2. Commission Determination

The Commission has determined, for the reasons discussed in the proposed order, not to alter the expiration date(s) contained in the proposed order. An automatic expiration date of no later than December 31, 2011, will allow the Commission to review the extent and scope of relief provided from the CEA on a measured basis. Should the Commission deem it appropriate to extend any exemptive relief, the Commission will be in a better position to tailor any exemption at that time. Further, as noted in the proposed order, limiting exemptive relief to a fixed period is consistent with the approach to transitional relief provided in sections 723(c) and 734 of the Dodd-Frank Act. With regard to any concerns over a potential ''gap period'' before or after the expiration date of December 31, 2011, the Commission notes that it can address compliance date concerns within the context of each individual rulemaking. Once again, the Commission will be able to act in a measured manner tailored to the particular statutory and regulatory provisions.

D. Commodity Options and Agricultural Swaps

1. Comments

Several commenters requested that the Commission clarify that the relief based on part 35 in part two of the proposed order, which applies to certain transactions in exempt and excluded commodities, covers commodity options.[76] The ABA Derivatives Committee also requested that the Commission expand the relief based on part 35 in part two of the proposed order to include swaps and options in agricultural commodities.[77] Finally, commenters including various energy companies urged the Commission to rely, in part, upon CEA section 4c(b) as authority to issue the elements of the relief related to options, stating that the Commission retains its plenary authority to regulate commodity options under CEA section 4c(b)[78] and that section 4c(b) was unaltered by the Dodd-Frank Act.[79] The NGFA, though, noted that the proposed order addressed concerns it had regarding the availability of certain option-based transactions until final rules authorizing their continued use are published.[80]

2. Commission Determination

With respect to options, the Commission is clarifying that the relief in part two of the Final Order that is based on part 35 applies to commodity options on excluded and exempt commodities to the extent they were permitted by the applicable statutory exemptions and exclusions in effect prior to July 16, 2011. As reflected in the commenters' citations to § 35.1 of the Commission's regulations, the text of paragraph (b)(1) of the ''swap agreement'' definition in the rule lists several types of options, including, but not limited to, currency options, interest rate options, and rate caps and collars, and includes the following text: ''any other similar agreement (including any option to enter into any of the foregoing).''[81]

Under part two of the Final Order, transactions in exempt or excluded commodities (and persons offering, entering into, or rendering advice or rendering other services with respect to such transactions) will be temporarily exempt from the CEA if such transactions comply with part 35 notwithstanding that: (1) The transaction may be executed on a multilateral transaction execution facility; (2) the transaction may be cleared; (3) persons offering or entering into the transaction may be eligible contract participants as defined in the CEA (prior to the enactment of the Dodd-Frank Act); (4) the transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or (5) no more than one of the parties to the transaction is entering into the transaction in conjunction with its line of business, but is neither an eligible contract participant nor an ESP, and the transaction was not and is not marketed to the public. The options identified in the swap agreement definition and any options captured by the concluding catch-all language, as well as any options described in paragraphs (b)(1)(ii)[82] and/or (iii)[83] of § 35.1 of the

[71] *See* Better Markets at p. 2.

[72] *See* ABA Derivatives Committee at p. 6; AIMA at p. 2; Associations at p. 6; letter dated July 1, 2011, from Craig S. Donohue, Chief Executive Officer, CME, at p. 2; letter dated June 29, 2011, from Richard McVey, Chairman and Chief Executive Officer, MarketAxess, at p. 2.

[73] *See* NYCBA at p. 4; ABA Derivatives Committee at p. 7.

[74] *See* Associations at p. 6, n.11; CME at p. 2.

[75] *See* NYCBA at p. 5; ABA Derivatives Committee at pp. 7–8. NYCBA and the ABA Derivatives Committee proposed the following language: ''This order shall expire on (1) December 31, 2011, with respect to any provision for which final rules (including final definitional rules) were not adopted on or before December 31, 2011, or (2) with respect to any provision for which final rules (including final definitional rules) were adopted on or before December 31, 2011, on the later of the effective date of all final definitional rules used in the provision and the effective date of the provision as set forth in the final rules adopting such provision.''

[76] *See* CEF at p. 5; ABA Derivatives Committee at p. 12; BGA at p. 8.

[77] *See* ABA Derivatives Committee at pp. 9, 11–13; letter dated June 29, 2011, from Paul J. Pantano, Jr., and Athena Eastwood, Cadwalader, Wickersham & Taft LLP, on behalf of the Commodity Options and Agricultural Swaps Working Group, at p. 2.

[78] *See* CEF at p. 5, n.12.

[79] *See* ABA Derivatives Committee at pp. 10–11; BGA at p. 8, n.22.

[80] *See* NGFA at p. 1.

[81] 17 CFR 35.1(b)(1)(i). In addition to the options specifically identified in the swap agreement definition, in the part 35 adopting release, the Commission stated that ''[t]he words 'any similar agreement' in the definition includes any agreement with a similar structure to those transactions expressly included in the definition (e.g., a cap, collar, or floor) without regard to the nature of the underlying commodity interest involved.'' Exemption for Certain Swap Agreements, 58 FR 5587, 5589 n.16, Jan. 22, 1993. The Commission also said that ''[i]n enacting this exemptive rule, the Commission is also acting under its plenary authority under section 4c(b) of the Act with respect to swap agreements that may be regarded as commodity options.'' Id. at 5589.

[82] Paragraph (b)(1)(ii) of § 35.1 defines ''any combination of the foregoing [list of identified swap agreements]'' as a swap agreement.

[83] Paragraph (b)(1)(iii) of § 35.1 defines ''[a] master agreement for any of the foregoing [list of identified swap agreements] together with all supplements thereto'' as a swap agreement.

Commission's regulations, involving excluded or exempt commodities are, therefore, within the scope of the Final Order.[84]

With respect to agricultural commodities, part 35 is not currently available for option transactions on the agricultural commodities enumerated in either CEA section 1a(4)[85] or § 32.2 of the Commission's regulations[86] (the ''Enumerated Agricultural Commodities''). Such option transactions may occur only pursuant to the agricultural trade option exemption in § 32.13 of the Commission's regulations.[87] As the Commission noted when it adopted § 32.13 as an interim final rule, which it later adopted as a final rule:

> [o]ne commenter representing swaps dealers requested that the Commission clarify that the part 35 exemption applies to off-exchange agricultural options rather than this exemption [17 CFR § 32.13(g)]. The Commission disagrees. Any off-exchange option on an enumerated agricultural commodity must comply with Commission rule 32.13(g) for exemption from the Act and Commission rules, and no other exemptive provision is available.''[88]

Accordingly, part 35 may not be relied upon for options in the Enumerated Agricultural Commodities. As the Commission noted in the proposed order, though, part 32 of the Commission's regulations will continue to be available with respect to commodity option transactions that meet the conditions therein, until such time as part 32 may be withdrawn, amended, or replaced by the Commission.[89] The Commission further stated in the proposed order that the purpose of the proposed relief is to ''strive to ensure that *current* practices will not be unduly disrupted during the transition to the new regulatory regime.''[90] Accordingly, the Commission is clarifying that part two of this Final Order does not apply to options on Enumerated Agricultural Commodities.

Part 35, however, always has covered swap agreements (other than options) on the Enumerated Agricultural Commodities and swap agreements (including options)[91] on non-enumerated agricultural commodities (e.g., coffee, sugar, cocoa). As the Commission noted in the proposed order, part 35 will continue to be available with respect to transactions that meet the conditions therein, until such time as it may be withdrawn, amended, or repealed by the Commission.[92]

For certain transactions, part two of this Final Order provides relief notwithstanding that the transaction may not satisfy certain part 35 requirements (e.g., cleared, executed on a multilateral trade execution facility, entered into by certain persons that are not eligible contract participants, etc.).[93] This relief is limited to transactions in exempt and excluded commodities, and does not extend to transactions in agricultural commodities (enumerated or non-enumerated). As stated in the proposed order, the purpose of part two of the Final Order is to provide relief with respect to CEA provisions that will be repealed as of July 16, 2011—specifically, current CEA sections 2(d), 2(e), 2(g), 2(h), and 5d. These provisions apply only to transactions in exempt and excluded commodities, and do not encompass agricultural commodities. Thus, because transactions in agricultural commodities cannot today be executed in reliance on one or more of these provisions to be repealed on July 16, extending part two of the Final Order to transactions in agricultural commodities is not necessary to ''strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.''[94]

In sum, the Commission is clarifying that the temporary exemptive relief in part two of the Final Order that is based on part 35 applies to commodity options on excluded and exempt commodities to the extent that these transactions were permitted by the applicable statutory exclusions and exemptions in effect prior to July 16, 2011. It does not apply, however, with respect to swaps and commodity options on agricultural commodities (enumerated or non-enumerated). Market participants may continue to rely on part 35 with respect to swaps and commodity options on non-enumerated agricultural commodities, as well as swaps (other than commodity options) on Enumerated Agricultural Commodities, to the extent these transactions fully comply with part 35. Market participants also may continue to rely on part 32 for options on Enumerated Agricultural Commodities to the extent these transactions are conducted in accordance with § 32.13(g) of the Commission's regulations.

E. Eligible Contract Participants

1. Comments

First, with respect to the amendments that the Dodd-Frank Act made to the existing definition of the term ''eligible contract participant'' in the CEA, the NYCBA asked the Commission to confirm that these changes are subject to exemptive relief under the Final Order.[95] The ABA Derivatives Committee believes that because the term ''eligible contract participant'' expressly requires rulemaking, the amendments to the existing CEA definition would not take effect even in the absence of exemptive relief; it asked that the Final Order confirm this.[96] Comment letters from various energy companies supported the request of the ABA Derivatives Committee in this regard.[97]

The Associations requested that the Commission confirm that amendments to CEA sections 2(c)(2)(B), 2(c)(2)(C), and 2(c)(2)(E) regarding off-exchange foreign currency (''forex'') transactions with retail customers will not become effective until relevant required

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[84] In addition to CEA section 4(c) and section 712(f) of the Dodd-Frank Act, CEA section 4c(b), 7 U.S.C. 6c(b) also provides the Commission with authority to issue the temporary exemptive Order with respect to commodity options. Section 4c(b), which was unaltered by the Dodd-Frank Act, provides the Commission plenary authority to regulate commodity options. Parts 32 and 35 were issued, in part, based on the Commission's authority under CEA section 4c(b).

[85] 7 U.S.C. 1a(4).

[86] 17 CFR 32.2.

[87] 17 CFR 32.13. The Commission notes that the NGFA comment letter generally supported the Commission's approach ''to preserve the availability of certain option-based transactions such as * * * OTC options until final rules authorizing their continued use are published.'' *See* NGFA at p. 1.

[88] *See* Trade Options on the Enumerated Agricultural Commodities, 63 FR 18821, 18829, Apr. 16, 1998. § 32.13(a) technically also would be available to persons satisfying its terms. However, that would require such persons to register as agricultural trade option merchants (''ATOMs'') and comply with the ATOM regulatory regime. Only one firm has ever registered as an ATOM, and it later withdrew its registration. Currently, no firm is registered as an ATOM. The Commission recently proposed to repeal § 32.13. *See* Commodity Options and Agricultural Swaps, 76 FR 6095, Feb. 3, 2011.

[89] 76 FR at 35376 n.36.

[90] 76 FR at 35373, quoting Grandfather Notice, supra, n. 9 (emphasis added).

[91] Options on non-enumerated agricultural commodities may be conducted pursuant to part 35, as the agricultural trade option rules in § 32.13 apply only to options on the Enumerated Agricultural Commodities.

[92] 76 FR at 35375.

[93] Id. at 35376.

[94] *See* supra, n.9. The Commission has in the past granted exemptive relief pursuant to CEA section 4(c) from the requirements of part 35 to permit the clearing of certain agricultural basis and calendar swaps. *See* orders granted to ICE Clear US, Inc., 73 FR 77015, Dec. 18, 2008; Chicago Mercantile Exchange, 74 FR 12316, Mar. 24, 2009; and Kansas City Board of Trade, 75 FR 34983, June 21, 2010. Part two of this Final Order does not apply; however, parties may continue to rely on these prior orders to the extent their transactions fully comply with them.

[95] *See* NYCBA at p. 5.

[96] *See* ABA Derivatives Committee at p. 8.

[97] *See* CEF at p. 8; BGA at p. 6.

rulemakings have been completed.[98] The Associations requested that the Commission confirm that, notwithstanding its general classification of the Dodd-Frank Act's retail forex amendments as Category 4 provisions, it will regard the specific provisions that relate to the definition of the term ''eligible contract participant'' as Category 1 provisions.[99] The Associations believe that CEA Section 2(c)(2)(E) also should be treated as a Category 1 provision because it explicitly requires rulemakings by other financial regulatory agencies. Alternatively, the Associations stated, these provisions fall in Category 2 because they depend on the definition of the term ''eligible contract participant,'' and thus should be subject to section 4(c) exemptive relief.[100] The Associations requested, if the Commission declines to adopt either of these categorizations, a non-enforcement position until the rule further defining the term ''eligible contract participant'' and the federal regulatory agency rules applicable to retail forex transactions have been finalized, along with a corresponding section 4(c) order exempting affected persons from private rights of action.[101]

2. Commission Determination

With respect to the first issue, the term ''eligible contract participant'' is currently defined in the CEA.[102] The Dodd-Frank Act amended the existing CEA definition by, among other things, raising the monetary thresholds for certain persons and entities to qualify as eligible contract participants. As noted, the term ''eligible contract participant'' is one of the terms that Congress, in sections 712(d) and 721(c), required the Commission (jointly with the SEC, and in consultation with the Board of Governors of the Federal Reserve System) to further define. Sections 712(d) and 721(c) are included in the list of Category 1 provisions in the Appendix. Accordingly, the Commission confirms that pending the effective date of the required rulemaking to further define the term ''eligible contract participant,'' that term shall continue to mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

With respect to the second issue, sections 741 and 742 of the Dodd-Frank Act enacted various amendments to CEA sections 2(c)(2)(B) and (C), which address certain types of forex transactions with retail customers. These amendments do not themselves require a rulemaking, nor do they reference the term ''eligible contract participant'' or any other term requiring further definition. Therefore, they are appropriately placed in Category 4, outside the scope of the Final Order granting temporary exemptive relief from the July 16 effective date.

To be sure, both of these provisions, in text that was not amended by the Dodd-Frank Act, define the ''retail'' customers to which they apply as persons that are not eligible contract participants. Yet, the amendments in sections 741 and 742 of the Dodd-Frank Act contain important protections for non-eligible contract participants engaging in off-exchange forex transactions, which represent an area that historically has been fraught with customer fraud and other abusive sales practices. As one example, they clarify that an account or pooled investment vehicle that is offered for the purpose of trading, or that trades, a covered off-exchange forex transaction with a non-eligible contract participant—in addition to the transaction itself—is subject to the Commission's jurisdiction, including its anti-fraud authority.

Unlike new statutory terms required to be further defined (e.g., ''swap,'' ''swap dealer,'' and ''major swap participant''), the CEA prior to enactment of the Dodd-Frank Act already contains a definition of the term ''eligible contract participant'' that has been in place for over a decade.[103] The Commission does not believe that it is necessary or appropriate to delay the effective date of the important customer protections in amended CEA sections 2(c)(2)(B) and (C) until such time as it issues the final joint rulemaking further defining the term ''eligible contract participant'' for purposes of the new swap regulatory regime.[104] Accordingly, the Commission, as proposed, considers the amendments to CEA sections 2(c)(2)(B) and (C) to be Category 4 provisions in their entirety and is not providing exemptive relief from the July 16 effective date of these provisions. As discussed above, though, pending the effective date of the required rulemaking to further define the term ''eligible contract participant,'' for purposes of CEA sections 2(c)(2)(B) and (C) that term shall continue to mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

With respect to new CEA section 2(c)(2)(E) enacted as part of section 742 of the Dodd-Frank Act,[105] it generally prohibits a financial institution for which there is a Federal regulatory agency [106] from entering into certain off-exchange forex transactions [107] with retail customers (i.e., non-eligible contract participants) except pursuant to a rule or regulation of the Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe. The Commission does not agree that CEA section 2(c)(2)(E) should be treated as a Category 1 provision on the basis that it requires rulemakings by other financial regulatory agencies.[108] Although section 2(c)(2)(E) prohibits a financial institution from entering into certain forex transactions with non-eligible contract participants unless its Federal regulatory agency adopts rules allowing such transactions, it does not require Federal regulatory agencies to adopt such rules.

Granting relief from the July 16 effective date with respect to section 2(c)(2)(E) would treat this provision differently from the Commission's treatment of the similar provisions in sections 2(c)(2)(B) and (C) as Category 4 provisions, as discussed above.[109] In light of the important customer protection interests served by section 2(c)(2)(E), the Commission does not believe that such different treatment is necessary or appropriate. Accordingly, the Commission, as proposed, considers new CEA section 2(c)(2)(E) to be a Category 4 provision and is not

[98] *See* Associations at p. 3.

[99] Id. at p. 16.

[100] Id.

[101] *See* Associations at p. 16, n.38.

[102] *See* CEA section 1a(12), 7 U.S.C. 1a(12).

[103] The amendments to the definition of the term ''eligible contract participant'' in the Dodd-Frank Act were motivated largely by concerns regarding the marketing of over-the-counter derivatives that the Dodd-Frank Act defines as ''swaps.'' *See generally* Department of the Treasury, Financial Regulatory Reform: A New Foundation; Rebuilding Financial Supervision and Regulation, at pp. 45–46, June 17, 2009.

[104] Even if these provisions were placed in Category 2, section 742 of the Dodd-Frank Act is listed in section 721(d), which places limits on the Commission's exemptive authority under CEA section 4(c).

[105] To be codified at 7 U.S.C. 2(c)(2)(E).

[106] Section 2(c)(2)(E) defines a ''Federal regulatory agency'' to include the Commission, the SEC, the National Credit Union Administration, the Farm Credit Administration, and an ''appropriate Federal banking agency.'' Section 721(a)(2) of the Dodd-Frank Act, in turn, adds a new definition of the term ''appropriate Federal banking agency'' in CEA section 1a(2), to be codified at 7 U.S.C. 1a(2), that includes the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System.

[107] The prohibition applies to forex transactions of the type described in CEA section 2(c)(2)(B), as well as all forex transactions ''that are functionally or economically similar'' to such transactions.

[108] *See* Associations at p. 16.

[109] *See also* supra, n.104.

providing exemptive relief from the July 16 effective date of this provision.[110] As discussed above, though, pending the effective date of the required rulemaking to further define the term ''eligible contract participant,'' for purposes of CEA section 2(c)(2)(E) that term shall mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.[111]

F. Private Right of Action

1. Comments

Section 749 of the Dodd-Frank Act amends CEA section 22(a)(1)(B)[112] to apply the CEA's private right of action to violations involving swaps. The Associations requested that the Commission confirm that it is granting a temporary exemption pursuant to CEA section 4(c) with respect to the Dodd-Frank Act's expansion of the private right of action to violations involving swaps, and to provide a specific section 4(c) exemption with respect to the application of CEA section 22(a)(1)(B) to any provision that is the subject of a Commission or staff no-action position.[113] The Associations noted that ''under the Commission's proposed categorization, it is clear that section 749's amendment to CEA Section 22(a)(1)(B) should logically fall under Category 2, and accordingly be the subject of a temporary exemption under CEA Section 4(c).''[114]

2. Commission Determination

As noted in the proposed order, amended CEA section 22(a) (private right of action with respect to swaps) is a provision that amends the CEA and that references a term that requires further definition, but nevertheless, the Commission does not believe that it is appropriate to include the provision within the scope of the exemptive relief.[115] To the extent that the Final Order provides exemptive relief under CEA section 4(c) with respect to Category 2 and Category 3 provisions, such exemptive relief would, in effect, preclude a person from succeeding in a private right of action under CEA section 22(a) for violation of such provisions. Accordingly, the Commission believes that the requested relief is not necessary to achieve the purposes of the Final Order.[116]

Nevertheless, the staff's Category 4 list that was posted on the CFTC Web site identified only CEA sections 22(a)(4) and (5)—not section 22(a)(1), which is the provision that provides for a private right of action for violation of the swap provisions. To address this inadvertent omission, the Category 4 list in the appendix to this Final Order includes CEA section 22(a)(1)(B).[117]

NYCBA requested the Commission to ''explicitly provide that section 22(a)(4)(B) of the CEA as amended by the Dodd-Frank Act will become effective July 16, 2011.''[118] The Commission notes that the Category 4 list in the Appendix includes amended sections 22(a)(4)–(5) under the Dodd-Frank Act section 739 provisions governing legal certainty for swaps. As such, sections 22(a)(4)–(5) become effective on July 16, 2011.

G. Preemption

1. Comments

The Commission also received comments addressing questions of the preemption of state gaming and bucket shop laws. NYCBA requested that the Final Order clarify that any agreement, contract or transaction subject to the Final Order ''will benefit from the preemption of any state or local laws provided by Section 12(e)(2) of the CEA because the relief is granted under Section 4(c) of the CEA.''[119]

The Associations noted that because the Dodd-Frank Act repealed the application of CEA section 12(e)(2)(B)[120] to certain previously exempted swap transactions, ''market participants are concerned that transactions conducted in accordance with the federal statutory provisions and rules applicable to swaps could potentially be subject to challenges for invalidity under state law prohibitions against gaming and bucket shops that in many cases pre-date even federal regulation of futures contracts.''[121] To address these concerns, the Associations suggested the adoption of a permanent exemption under section 4(c) for such transactions. They noted that ''[i]f the Commission extends permanent exemptive relief to such transactions, this risk would be eliminated, since CEA section 12(e)(2)(B) explicitly states that the CEA supersedes state gaming and bucket shop laws in the case of 'an agreement, contract or transaction * * *

[110] Although none of the comment letters discussed new CEA section 2(c)(2)(D) enacted in section 742 of the Dodd-Frank Act, to be codified at 7 U.S.C. 2(c)(2)(D), it provides protections to retail customers, which it defines as persons that are not eligible contract participants, in transactions in commodities other than foreign currency. Thus, it raises similar issues. Fraud and abusive practices also have been a frequent problem in off-exchange transactions with retail customers in commodities such as precious metals. In light of these important customer protection concerns, and the fact that the CEA prior to enactment of the Dodd-Frank Act already contains a settled definition of the term ''eligible contract participant,'' the Commission is clarifying that new CEA section 2(c)(2)(D) similarly is a Category 4 provision for which no relief from the July 16 effective date is being provided. Pending the effective date of the required rulemaking to further define the term ''eligible contract participant,'' for purposes of CEA section 2(c)(2)(D) that term shall mean an eligible contract participant as defined by the CEA prior to the enactment of the Dodd-Frank Act.

[111] AIMA submitted a comment letter that expressed ''support [for] exemptive relief from any rule that relies on the amended definition'' of the term ''eligible contract participant.'' *See* AIMA at p. 2. The exemptive relief being issued by the Commission applies to various provisions of the Dodd-Frank Act and the CEA that otherwise would become effective on July 16, 2011. The Commission will consider the appropriate effective date and compliance date of the rules implementing the Dodd-Frank Act in its final rulemakings adopting such rules.

[112] 7 U.S.C. 25(a)(1)(B).

[113] *See* Associations at p. 12.

[114] Id. at 11.

[115] 76 FR at 35374, n.13.

[116] The Commission also declines to provide a section 4(c) exemption with respect to the application of CEA section 22(a)(1)(B) to any provision that is the subject of a no-action letter, as such relief would be the functional equivalent of exemptive relief which may be restricted under the limitations on CEA section 4(c) set forth in section 721(d) of the Dodd-Frank Act. In the absence of clear authority to provide such relief in this manner, the Commission does not believe that granting such relief in this Final Order would provide the requested legal clarity.

[117] In addition, the lists of Category 1 and Category 4 provisions set forth in the Appendix include other changes as compared to the staff lists that were posted on the Commission's Web site on June 14, 2011. Specifically with respect to Category 1: (i) section 711 of the Dodd-Frank Act has been added to the ''Required Rulemaking'' column for Teams II and XXI; (ii) section 741(b)(10) of the Dodd-Frank Act has been added to the ''Required Rulemaking'' column for Team II; (iii) the reference to ''section 2(h)(7)'' of the CEA for Team XI has been modified to read ''section 2(h)(7)(A)–(D);'' and (iv) the separate rows with respect to swap data recordkeeping and reporting requirements have been combined. And with respect to Category 4: (i) sections 722(a) and (c) of the Dodd-Frank Act have been added; (ii) new CEA section 5b(h), to be codified at 7 U.S.C. 7a–1(h), has been added; (iii) section 741(a) of the Dodd-Frank Act has been added; (iv) the reference to ''section 741(b)'' of the Dodd-Frank Act has been modified to read ''section 741(b)(8)–(9);'' (v) wording changes to the ''Summary Description'' of sections 742(a) and (c) of the Dodd-Frank Act have been made; (vi) new CEA sections 23(g) and (m), to be codified at 7 U.S.C. 26(g) and (m), have been added with respect to section 748 of the Dodd-Frank Act; and (vii) a technical correction in the reference to CEA section 6(b) has been made with respect to section 749 of the Dodd-Frank Act.

[118] *See* NYCBA at p. 8.

[119] Id.

[120] CEA section 12(e)(2)(B), as amended by section 749 of the Dodd-Frank Act, provides that:

(2) This Act shall supersede and preempt the application of any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability) in the case of—

* * *

(B) An agreement, contract, or transaction that is excluded from this Act under section 2(c) or 2(f) of this Act * * * or exempted under section 4(c) of this Act (regardless of whether any such agreement, contract, or transaction is otherwise subject to this Act.)

[121] *See* Associations at p. 14.

exempted under section 4(c) of [the CEA] * * *'' [122]

2. Commission Determination

The Commission notes that the Final Order does not affect the applicability of CEA section 12(e)(2)(B) to any exemptive relief under section 4(c) that is provided by the Final Order. CEA section 12(e)(2)(B) as amended by section 749 of the Dodd-Frank Act provides that the CEA supersedes state gaming and bucket shop laws in the case of ''an agreement, contract or transaction * * * exempted under section 4(c)'' of the CEA. To the extent that the Final Order provides temporary exemptive relief under CEA section 4(c), CEA section 12(e)(2)(B) will apply to such transactions that are within the scope of such exemptive relief.

As the Commission explained in its proposed order, the purpose of the relief is to address concerns that were raised about the effects upon the swaps market during the period between July 16, 2011 and the date(s) that the definitional rulemakings have been completed.[123] Indeed, the Commission reaffirmed in its proposed order that it intends to ''strive to ensure that current practices will not be unduly disrupted during the transition to the new regulatory regime.'' [124] Insofar as these comments seek a permanent exemption under section 4(c), the requested relief is outside the scope of the Final Order.

H. Market Issues

1. Comments

State Street Corporation (''State Street'') expressed concern that ''limiting exemptive relief under the Commission's Order and grandfather relief under the [swap execution facility] rules to the small number of firms that are already operating an electronic trading platform or system for the trading of exempt commodities (in the case of ECMs) or the trading of futures contracts on excluded commodities (in the case of EBOTs) would have the effect of making it impossible for new entrants—who would have to wait for the [swap execution facility] rules to be adopted and their applications to be approved'' to enter the swaps market and compete.[125] State Street also requested that the Commission clarify that electronic trading facilities that operate, either currently or at any point during the relief period, under CEA sections 2(d)(2) and 2(e), as in effect prior to July 16, 2011, will be permitted to conduct business operations on a temporary basis during the relief period, without regard to whether the electronic trading facility is currently operating or instead commences operations at some point during the relief period.[126]

CME requested that the Commission confirm that exemptive relief is not needed for a designated contract market (''DCM'') to list swaps for trading on or after July 16, so long as those products are regulated as futures products and market participants trading those products are regulated as futures market participants. Alternatively, if the Commission views it differently, CME asks the Commission to issue such exemptive relief.[127]

2. Commission Determination

In response to the comments, the Commission would like to clarify the conditions that apply to the grandfather relief orders for ECMs and EBOTs that were issued by the Commission in September 2010.[128] Both of those orders have three basic conditions. First, the ECM or EBOT must file an appropriate and timely petition with the Commission. In the case of ECMs, the filing deadline was September 20, 2010 and for EBOTs, the deadline is July 15, 2011. Second, the ECM or EBOT must file a DCM or swap execution facility (''SEF'') application with the Commission within 60 days of the effective date of final regulations regarding the DCM or SEF provisions. Third, the ECM's or EBOT's DCM or SEF application must remain pending before the Commission.

The Commission is clarifying the second and third conditions, in that the Commission has not yet issued any final DCM or SEF rulemakings since enactment of the Dodd-Frank Act. The Commission notes that the list of conditions for the ECM and EBOT grandfather relief orders are premised on the ECM or EBOT ''meet[ing] all of the following applicable conditions.'' [129] Given that the Commission has not yet adopted either final DCM or final SEF regulations, the ECM and EBOT grandfather relief order conditions premised on DCM or SEF applications are not yet applicable. Accordingly, at this point in time, all that an ECM or EBOT must do to receive relief pursuant to the grandfather relief orders is to have satisfied the orders' petition condition in a timely manner.

The Commission also is clarifying the relationship between the grandfather relief orders and this Final Order. For ECMs that filed their petitions with the Commission by September 20, 2010, the grandfather relief order operates independently and those ECMs may rely on either the grandfather relief order or this Final Order, or both. For those ECMs that did not file a petition for grandfather relief by September 20, 2010, they may qualify for relief under this temporary Final Order if they satisfy the requisite terms and conditions herein.[130] Similarly, for EBOTs that file or have filed their petitions for grandfather relief by July 15, 2011, that grandfather relief operates independently and those EBOTs may rely on either the grandfather relief order or this Final Order, or both. Likewise, for those EBOTs that have not filed their petitions for grandfather relief by July 15, 2011, they may qualify for relief under this Final Order if they, too, satisfy the requisite terms and conditions herein.

The Commission stated in footnote 39 of the proposed order that the proposed exemptive relief would not be available to an electronic trading facility that, as of July 15, 2011, was not already operating as an ECM pursuant to CEA sections 2(h)(3)–(7), or to an EBOT that, as of July 15, 2011, was not already operating pursuant to CEA section 5d, or not compliant with the conditions set forth in such provisions. The Commission, however, has determined not to limit the Final Order herein to those ECMs and EBOTs that already are operating as of July 15, 2011. Further, the Commission also clarifies that the relief under this Final Order is available to an electronic trading facility that currently operates or commences operations during the pendency of this relief pursuant to CEA sections 2(d)(2) and 2(e), as in effect prior to July 16, 2011.

The Commission also confirms that a DCM may list and trade swaps on or after July 16 under the DCM's rules related to futures contracts, without exemptive relief.[131]

[122] Id.; *see also* ABA Derivatives Committee at p. 13.

[123] 76 FR at 35373.

[124] *See* n.9, supra.

[125] *See* letter dated June 28, 2011, from David C. Phelan, Executive Vice President and General Counsel, State Street, at p. 3.

[126] Id. at pp. 2–3.

[127] *See* CME at pp. 4–5.

[128] *See* supra, n.47.

[129] Id. at 56515.

[130] EBOTs and ECMs that rely on this exemptive relief also must comply with part 36 of the Commission's regulations and, in particular, its various reporting requirements.

[131] The Commission notes that if a DCM intends to trade swaps pursuant to the rules, processes, and procedures currently regulating trading on its DCM, the DCM may need to amend or otherwise update applicable rules, processes, and procedures, in order to address the trading of swaps, depending upon the composition of the DCM's rules.

I. Core Principles

1. Comments

The Commission received a number of comments on the application of the Proposed Order to the DCM and derivatives clearing organization (''DCO'') core principles. On the one hand, CME agreed that the core principles for DCMs and DCOs are appropriately categorized as Category 4 provisions for which the Commission is not issuing exemptive relief.[132]

On the other hand, some commenters believe that the core principles for DCMs and DCOs in CEA sections 5(d) and 5b(c)(2), respectively,[133] should be treated as either Category 1 or 2 provisions. The Minneapolis Grain Exchange, Inc. (''MGEX'') stated that the Commission should grant temporary relief from the new core principles of the Dodd-Frank Act for DCOs and DCMs.[134] The Natural Gas Exchange (''NGX'') expressed concern that DCOs will have to make modifications to come into compliance with amended core principles by July 16, 2011, and then may be required to again make modifications when final rules are issued. NGX requested that the Commission or its staff adopt a non-enforcement policy against any DCO or DCO member or participant with respect to compliance with the DCO core principles until the implementation of final Commission rules governing the operation of DCOs or, alternatively, that the Commission provide at least a 60-day period following July 16, 2011, before it takes any enforcement action.[135]

Nodal Exchange cautioned that placing the DCM core principles in section 735 of the Dodd-Frank Act into Category 4, while the core principles for SEFs in section 733 are in Category 1, may lead to their respective regulations being issued and finalized at different times.[136] Nodal Exchange recommended that the Commission issue final rules regarding the DCM and SEF core principles simultaneously.[137]

2. Commission Determination

The Commission has considered these comments and believes that the DCO and DCM core principles are properly treated as Category 4 provisions outside the scope of relief of this Final Order. These amended core principles apply to the trading and clearing of instruments on DCMs and DCOs, regardless of whether the instrument is a futures contract or a swap. The Commission sees no need to delay the application of these amended core principles to DCMs that trade futures contracts or to DCOs that clear futures, a term which does not require further definition under the Dodd-Frank Act. Moreover, the amended core principles provide that, absent a rule or regulation prescribed by the Commission, DCMs and DCOs shall have reasonable discretion in developing their rules and programs to comply with the core principles.[138]

To the extent that the Commission has issued proposed rulemakings with regard to these core principles, any requirements or guidance in such rulemakings will not become effective until the effective or compliance date of a final rulemaking. The Commission, in its discretion, will, where appropriate, establish separate compliance dates to address issues arising from the impact of compliance with any new requirements.

J. Intermediary Issues

1. Comments

The Commission received a comment on part two of its proposed order relating to whether the exemption provided under part 35 applies to agency transactions. Specifically, State Street requested that the Commission ''make clear that eligible swap participants and eligible contract participants may continue to rely on the Part 35 exemption to effect transactions in excluded or exempt commodities, either directly or through brokers and other agents, as currently permitted by Part 35.'' [139]

The Commission also received a comment on part two of the Proposed Order relating to registration requirements for futures commission merchants (''FCMs''), introducing brokers (''IBs''), and commodity trading advisors (''CTAs''). The law firm of Covington & Burling noted that many participants exclusively in the ''OTC'' swaps market are not currently registered with the Commission in any capacity, but may have to register with the Commission as FCMs, IBs or CTAs after the Commission's Dodd-Frank Act rules are made effective. The commenter requested that the Commission clarify that these entities will not be required to register in those capacities based solely on their swaps activity until after the last adopted final product definition rules become effective.[140]

2. Commission Determination

The purpose of this exemptive relief is to maintain the status quo during the implementation process for the Dodd-Frank Act. As noted in the proposed order, the temporary exemptive relief would not affect the availability of part 35 with respect to transactions that fully meet the requirements of part 35.[141] Thus, the Commission confirms that to the extent that agency transactions are permitted under part 35, that relief is unaffected by the temporary exemptive relief provided herein.[142] However, for transactions that exclusively qualify for the temporary exemptive relief in part two of this Final Order (*i.e.,* do not comply fully with the requirements of part 35), such agency transactions would only be permitted to the extent they were permitted by the applicable statutory exclusions and exemptions in effect prior to July 16, 2011 (*i.e.,* current CEA sections 2(d), 2(e), 2(g), 2(h), and 5d).

The Dodd-Frank Act amended various intermediary definitions to cover swaps activity as well as futures transactions.[143] The Commission confirms that if an entity is exclusively participating in the swaps market, it would not have to register as an FCM, IB or CTA prior to the completion of the rulemaking further defining the term ''swap.'' In sum, the Commission will not require registration in an intermediary capacity in this situation until the further definition of the term ''swap'' becomes effective.

IV. Section 4(c) of the Commodity Exchange Act

Section 4(c)(1) of the CEA [144] authorizes the CFTC to exempt any

[132] CME at p. 4.

[133] 7 U.S.C. 7(d) and 7a–1(c)(2).

[134] *See* letter dated July 1, 2011, from Layne G. Carlson, Corporate Secretary, MGEX, at pp. 1–2.

[135] *See* letter dated June 30, 2011, from Peter Krenkel, President and Chief Executive Officer, NGX, at pp. 2–3.

[136] *See* letter dated June 30, 2011, from Paul Cusenza, Chief Executive Officer, Nodal Exchange, at pp. 1, 4.

[137] Id. at p. 4.

[138] *See, e.g.,* CEA section 5(d)(1)(B) and section 5b(c)(2)(A)(ii), 7 U.S.C. 7(d)(1)(B) and 7a–1(c)(2)(A)(ii).

[139] *See* State Street at p. 4.

[140] *See* letter dated July 1, 2011 from Bruce C. Bennett, Covington & Burling LLP, at p. 5.

[141] 76 FR at 35376.

[142] *See* Exemption for Bilateral Transactions, 65 FR 78030, 78033, Dec. 13, 2000.

[143] *See, e.g.,* 76 FR at 35374 n.16.

[144] CEA section 4(c)(1), 7 U.S.C. 6(c)(1), provides in full that:

In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering

Continued

transaction or class of transactions (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the transaction) from any of the provisions of the CEA (subject to certain exceptions). Pursuant to CEA section 4(c)(2), the Commission must determine that: (1) The exemption is appropriate for the transaction and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transaction will be entered into solely between ''appropriate persons;'' [145] and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[146]

The Commission may grant such an exemption by rule, regulation or order, after notice and opportunity for hearing, and may do so on application of any person or on its own initiative. Further, the Commission may grant such an exemption either conditionally or unconditionally, or for stated periods within the Commission's discretion. Finally, section 712(f) of the Dodd-Frank Act authorizes the Commission to ''exempt persons, agreements, contracts, or transactions from provisions of the Act, under the terms contained in'' the Act, in order to prepare for the effective dates of the provisions of Title VII.

A. The Proposed Order

In enacting section 4(c), Congress noted that the goal of the provision ''is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'' [147] In proposing the temporary relief, the Commission stated its intention to provide clarity and stability to the markets and market participants concerning the applicability of the provisions of the CEA, as added or amended by the Dodd-Frank Act (in part one), and the current provisions of the CEA as repealed by the Dodd-Frank Act (in part two), upon the general effective date of Title VII, thereby avoiding or minimizing undue and unwarranted disruptions to the markets.[148]

The Commission also noted the limited duration of the proposed order and that it reserved the Commission's anti-fraud and anti-manipulation enforcement authority.[149] As such, the Commission stated its belief that the proposed order would be consistent with the public interest and purposes of the CEA.[150] The Commission proposed to limit the relief to appropriate persons, including persons in current registration categories for which the Dodd-Frank Act expanded the definition to include activities relating to swaps (e.g., IBs, commodity pool operators (''CPOs''), CTAs, and associated persons thereof).[151] The Commission stated its belief that the proposed order would not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[152]

B. Comments

The ABA Derivatives Committee commented that the Commission should exercise its authority under CEA section 4(c)(3)(K) to make it clear that the ''appropriate persons'' who qualify for relief under its exemptive order include individuals whose total assets exceed $10 million and ''persons relying on the 'line of business' exemption to engage in swaps without ECP status.'' [153]

C. Commission Determination

For the purpose of making the requisite findings under section 4(c) for part two of the Final Order, the Commission confirms that individuals whose total assets exceed $10 million are appropriate persons. Likewise, for purposes of part two of this Final Order, persons relying on the ''line of business'' exemption as described in the proposed order are appropriate persons. It should be noted that the explicit reference in the proposed order to IBs, CPOs, and CTAs (and associated persons thereof) as appropriate persons was not intended to restrict the scope of appropriate persons to only those persons. The Commission confirms that for the purpose of this temporary Final Order, the Commission has found the various persons and entities subject to this temporary relief to be appropriate persons.

For the reasons provided in the proposed order and mentioned above, the Commission has determined that: (1) The exemption provided by this Final Order is appropriate for the subject transactions and consistent with the public interest; (2) the exemption is consistent with the purposes of the CEA; (3) the transactions will be entered into solely between appropriate persons; and (4) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.

V. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [154] imposes certain requirements on federal agencies (including the Commission) in connection with conducting or sponsoring any collection of information as defined by the PRA. This Final Order does not require a new collection of information from any persons or entities that would be subject to the Final Order.

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into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)), if the Commission determines that the exemption would be consistent with the public interest.

[145] CEA section 4(c)(3), 7 U.S.C. 6(c)(3), includes within the term ''appropriate person'' a number of specified categories of persons deemed appropriate under the CEA for entering into transactions exempted by the Commission under section 4(c). This includes persons the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections. *See* CEA section 4(c)(3)(K), 7 U.S.C 6(c)(3)(K).

[146] CEA Section 4(c)(2), 7 U.S.C. 6(c)(2), provides in full that:

The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) unless the Commission determines that—

(A) The requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this Act; and

(B) The agreement, contract, or transaction—

(i) Will be entered into solely between appropriate persons; and

(ii) Will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this Act.

[147] House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213.

[148] 76 FR at 35377.

[149] Id.

[150] Id.

[151] 76 FR at 35377 n.46, *citing* CEA section 4(c)(3)(K), 7 U.S.C. 6(c)(3)(K) (appropriate persons may include such ''other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections'').

[152] 76 FR at 35377.

[153] *See* ABA Derivatives Committee at p. 9. *See also* CEF at p. 7 n.21. The ''line of business'' provision was a part of the Commission's Policy Statement Concerning Swap Transactions, 54 FR 30694, 30696–30697, July 21, 1989.

[154] 44 U.S.C. 3507(d).

VI. Cost-Benefit Considerations

Section 15(a) of the CEA [155] requires the Commission to consider the costs and benefits of its action before issuing an order under the CEA. CEA section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

The Commission has decided to issue, pursuant to its authority under CEA sections 4(c) and 4c(b), certain temporary relief from the provisions of the CEA added or amended by Title VII of the Dodd-Frank Act that reference one or more terms regarding entities or instruments that Title VII requires be ''further defined,'' such as the terms ''swap,'' ''swap dealer,'' ''major swap participant,'' or ''eligible contract participant,'' to the extent that requirements or portions of such provisions specifically relate to such referenced terms and do not require a rulemaking. The Commission also is granting temporary relief from certain provisions of the CEA that will or may apply to certain agreements, contracts, and transactions as a result of the repeal of various CEA exemptions and exclusions as of the general effective date of Title VII of the Dodd-Frank Act set forth in section 754—July 16, 2011.

The Commission received no comments on the cost and benefit considerations section of the proposed order. Nevertheless, the Commission did receive two specific comments requesting additional exemptive relief due to potential costs.

NGX is concerned that DCOs will have to make modifications to come into compliance with amended core principles by July 16, 2011, and then may be required to again make modifications when final rules are issued by the Commission.[156] Similarly, MGEX states that the Commission should grant temporary relief from the new core principles of the Dodd-Frank Act for DCOs and DCMs in sections 725 and 735.[157]

The Commission has decided not to grant more relief to DCOs and DCMs. The Commission recognizes that DCOs and DCMs have discretion in how to comply with the core principles unless and until the CFTC issues rules in this area.

An analysis of the specific areas of concern identified in section 15(a) is set out immediately below:

1. Protection of Market Participants and the Public

As discussed above, the scope of this temporary exemptive relief is limited to persons who are ''appropriate persons'' as set forth in section 4(c) of the CEA and in this Final Order. Further, this Final Order does not affect the Commission's existing and future anti-fraud and anti-manipulation authorities, including CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud. The Commission believes that market participants and the public will benefit from the clarity offered by the temporary exemptive relief, while maintaining the Commission's authorities regarding the prevention and deterrence of fraud and manipulation. With respect to costs, the Commission believes that the exemptive relief imposes no affirmative duties or obligations on market participants and the public. The temporary exemptive relief does not contain any requirement to create, retain, submit, or disclose any information. Furthermore, the exemptive relief imposes no recordkeeping or related data retention or disclosure requirements on any person, including small businesses. Consequently, the Commission finds it unlikely that the exemptive relief will impose any additional costs beyond the existing costs associated with ongoing operations, including those that ensure that behavior and statements are not fraudulent or manipulative.

2. Efficiency, Competition, and Financial Integrity

Although the Dodd-Frank Act establishes a comprehensive new regulatory framework for swaps, the Commission's work to implement that framework will not be complete as of July 16, 2011. Accordingly, this relief offers the benefit of greater clarity in the swaps market that is in the interest of both the markets and the public. The Commission believes that this temporary exemptive relief is an appropriate measure to facilitate a transition to the comprehensive new regulatory framework for swaps set out in Title VII of the Dodd-Frank Act. Such an orderly transition will promote market efficiency, competition, and financial integrity.

3. Price Discovery

As stated above, the temporary relief provided here is designed to maintain the functioning of the markets until such time as the comprehensive new regulatory framework for swaps set forth in the Dodd-Frank Act is in place. With the clarity offered by the exemptive relief, markets will function better as venues for price discovery.

4. Sound Risk Management Practices

Appropriate persons covered by this exemptive relief will be subject to the Commission's full array of existing anti-fraud and anti-manipulation provisions and certain new authorities provided under the Dodd-Frank Act. Market participants and the public will benefit substantially from the continuing protection through the prevention and deterrence of fraud and manipulation. Markets protected from fraud and manipulation function better as venues for price discovery and risk management.

5. Other Public Interest Considerations

This Final Order is temporary and limited. It will not affect the applicability of any provision of the CEA to futures contracts, options on futures contracts, or transactions with retail customers in foreign currency or other commodities pursuant to CEA section 2(c)(2). Further, it will expire at an appropriate date, as discussed above. The expiration provision will permit the Commission to ensure that the scope and extent of exemptive relief is appropriately tailored to the schedule of implementation of the Dodd-Frank Act requirements.

After considering the costs and benefits, the Commission has determined to issue this Final Order.

VII. Order

The Commission, to provide for the orderly implementation of the requirements of Title VII of the Dodd-Frank Act, pursuant to sections 4(c) and 4c(b) of the CEA and section 712(f) of the Dodd-Frank Act, hereby issues this Order essentially as proposed, consistent with the determinations set forth above, which are incorporated in this Final Order by reference, and:

[155] 7 U.S.C. 19(a).

[156] *See* NGX at p. 2.

[157] *See* MGEX at p. 2.

(1) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, as added or amended by the Dodd-Frank Act, that reference one or more of the terms regarding entities or instruments subject to further definition under sections 712(d) and 721(c) of the Dodd-Frank Act, which provisions are listed in Category 2 of the Appendix to this Order; *provided, however,* that the foregoing exemption:

a. Applies only with respect to those requirements or portions of such provisions that specifically relate to such referenced terms; and

b. Shall expire upon the earlier of: (i) the effective date of the applicable final rule further defining the relevant term referenced in the provision; or (ii) December 31, 2011;

(2) Exempts, subject to the conditions set forth in paragraph (3), all agreements, contracts, and transactions in exempt and excluded (but not agricultural) commodities, and any person or entity offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction, from the provisions of the CEA, if the agreement, contract, or transaction complies with part 35 of the Commission's regulations, notwithstanding that:

a. The agreement, contract, or transaction may be executed on a multilateral transaction execution facility;

b. The agreement, contract, or transaction may be cleared;

c. Persons offering or entering into the agreement, contract or transaction may not be eligible swap participants, provided that all parties are eligible contract participants as defined in the CEA prior to the date of enactment of the Dodd-Frank Act;

d. The agreement, contract, or transaction may be part of a fungible class of agreements that are standardized as to their material economic terms; and/or

e. No more than one of the parties to the agreement, contract, or transaction is entering into the agreement, contract, or transaction in conjunction with its line of business, but is neither an eligible contract participant nor an eligible swap participant, and the agreement, contract, or transaction was not and is not marketed to the public;

Provided, however, that: (i) such agreements, contracts, and transactions (and persons offering, entering into, or rendering advice or rendering other services with respect to, any such agreement, contract, or transaction) fall within the scope of any of the existing CEA sections 2(d), 2(e), 2(g), 2(h), and 5d provisions or the line of business provision as in effect prior to July 16, 2011; and (ii) the foregoing exemption shall expire upon the earlier of: (I) the repeal, withdrawal or replacement of part 35 of the Commission's regulations; or (II) December 31, 2011;

(3) Provides that the foregoing exemptions in paragraphs (1) and (2) above shall not:

a. Limit in any way the Commission's authority with respect to any person, entity, or transaction pursuant to CEA sections 2(a)(1)(B), 4b, 4o, 6(c), 6(d), 6c, 8(a), 9(a)(2), or 13, or the regulations of the Commission promulgated pursuant to such authorities, including regulations pursuant to CEA section 4c(b) proscribing fraud;

b. Apply to any provision of the Dodd-Frank Act or the CEA that has become effective prior to July 16, 2011;

c. Affect any effective or compliance date set forth in any rulemaking issued by the Commission to implement provisions of the Dodd-Frank Act;

d. Limit in any way the Commission's authority under section 712(f) of the Dodd-Frank Act to issue rules, orders, or exemptions prior to the effective date of any provision of the Dodd-Frank Act and the CEA, in order to prepare for the effective date of such provision, provided that such rule, order, or exemption shall not become effective prior to the effective date of the provision; and

e. Affect the applicability of any provision of the CEA to futures contracts or options on futures contracts, or to cash markets.

In its discretion, the Commission may condition, suspend, terminate, or otherwise modify this Order, as appropriate, on its own motion. This Final Order shall be effective immediately.

Issued in Washington, DC, on July 14, 2011 by the Commission.

David A. Stawick,

Secretary of the Commission.

Note: The following Commissioner's statement will not appear in the Code of Federal Regulations.

Concurrence of Commissioner Scott D. O'Malia on the Order Regarding the Effective Date for Swap Regulation

I concur with the Commission's decision to use its exemptive authority under section 4(c) of the Commodity Exchange Act (CEA) to provide temporary relief from certain provisions of the Dodd-Frank Act. This order will provide much needed legal certainty to the market, at least until December 31, 2011, while the Commission continues its efforts to adopt final rules under the Dodd-Frank Act. Whereas I support the Commission in providing legal certainty, albeit limited, I am disappointed in the lack of harmonization between our order and the exemptive relief that the Securities and Exchange Commission (SEC) provided. I am also disappointed that the final order ignored a number of comments from market participants, those that have most at stake in each of the Commission's decisions. I hope that this order does not foreshadow the direction of final rulemakings to come.

Lack of Harmonization

In general, the SEC's order provides exemptive relief until the relevant final rulemaking is implemented. The Commission's order provides such relief only until December 31, 2011. I proposed an amendment that would have conformed the two orders that the Commission rejected. The SEC is a full partner in many of our rulemakings; it only makes sense to develop identical relief policies. The CFTC's sunset provision is based on an arbitrary date and cuts short the very legal certainty that this order purports to provide. Moreover, participants from every aspect of our market—including investor advocates, a designated contract market and derivatives clearing organization, a potential swap execution facility, and multiple trade associations representing intermediaries—commented that the December 31, 2011, expiration date is unnecessary. In contrast, only one commenter supported the expiration date.

Comments From Market Participants

In addition to not heeding market participants with respect to the expiration date, the Commission has also not addressed the public's requests for an implementation plan. I have repeatedly asked the Commission to set forth an implementation plan for public notice and comment. SEC Chairman Shapiro indicated, in her prepared remarks before the House Financial Services Committee, that the SEC is working on an implementation plan that will include opportunity for public comment. This Commission has already begun voting on final rules, but we have yet to see a proposed implementation plan.

Market participants bear the burden of implementing the multitude of reforms that the Commission is proposing. We

cannot pretend that Dodd-Frank has any chance of meeting its goals if we do not work with the public to implement the regulatory requirements.

The Commission is currently planning to meet on August 4th to consider several final rules. I strongly urge the Commission to put forward an implementation plan for public comment during the month of August. This provides a perfect opportunity to receive comment on rule order and implementation, without delaying the Commission schedule this fall. If we wait until September, we will only have ourselves to blame.

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APPENDIX

CATEGORY 1: REQUIRED RULEMAKINGS

Team	Rule Name	Required Rulemaking	CEA Section No.
I	Registration of Swap Dealers ("SDs") and Major Swap Participants ("MSPs")	731	4s(a)-(c)
II	Further definition of swap entity terms - Joint with Securities Exchange Commission ("SEC")	711, 712(d), 721(a), 721(c), 741(b)(10)	1a(18), (32), (33), (42), (43), (47) and (49)
III	Business Conduct Standards ("BCS")-SDs and MSPs with Counterparties	731	4s(h)
IV	BCS-Firewall Policies by Futures Commission Merchants ("FCMs") and Introducing Brokers ("IBs"); Chief Compliance Officer	732	4d(c)-(d)
IV	BCS-Duties of SDs and MSPs; Firewall Policies by SDs and MSPs; SD and MSP Reporting, Recordkeeping, and Daily Trading Records Requirements; Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements; Swap Trading Relationship Documentation; Documentation for SDs and MSPs relating to Title II (210(c)(8)); Annual Report Requirement for SDs or MSPs	731	CEA 4s(f) – Reporting and Recordkeeping CEA 4s(g) – Daily Trading Records CEA 4s(i) – Documentation Standards CEA 4s(j) – Duties CEA 4s(j)(5) – Conflicts of Interest for SDs & MSPs CEA - 4s(k)(3) - Annual Report Requirement
V	Capital	731	4s(e)
V	Margin	731	4s(e)
VI	Treatment of Securities in a Portfolio Margining Account	713(c)	20(c)
VII	Designation of Chief Compliance Officer	725(b)	5b(i)
VII	Process for Review of Swaps for Mandatory Clearing	723(a)(3)	2(h)(2)-(3)
IX	Conflict of Interest (180 days) - DCOs, DCMs, SEFs	725(d), 726	none
XI	End-User Exception to Mandatory Clearing	723(a)(3)	2(h)(7)(A)-(D)
XIII	SEFs	733	5h
XVI	Swap Data Repositories	728	21
XVII	Swap data recordkeeping and reporting requirements, including interim final rules	723, 727, 728, 729	2(a)(13)(G), 2(h)(5), 2(h)(6), 4r, 21(b)

CATEGORY 1: REQUIRED RULEMAKINGS

Team	Rule Name	Required Rulemaking	CEA Section No.
XVIII	Real-Time Reporting	727	2(a)(13)(A)-(E)
XIX	Agricultural Commodity Definition	723(c)(3)	none
XIX	Agricultural Swaps and Commodity Options	723(c)(3)	none
XXI	Further definition of swap product terms - Joint with SEC	711, 712(a)(8), 712(d), 721(c)	1a(42), 1a(47)
XXIII	Antimanipulation	753(a)	6(c)
XXV	Whistleblower Provisions	748	23
XXVI	Large Trader Reporting	730	4t

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			SUBTITLE A, PART I: SECTIONS 701-720 – REGULATORY AUTHORITY
712(a)(1)-(7), 712(b)-(c)	None	None	Review of Regulatory Authority General provisions regarding rulemakings.
			SUBTITLE A, PART II: SECTIONS 721-754 – REGULATION OF SWAP MARKETS
			SECTION 721 – DEFINITIONS
721(a)	1a	Various registrants and registered entities	Definitions[159] New or amended definitions of terms "associated person of a swap dealer or major swap participant," "cleared swap," "commodity pool," "commodity pool operator," "commodity trading advisor," "floor broker," "floor trader," "foreign exchange forward," "foreign exchange swap," "futures commission merchant," "introducing broker," "registered entity," "significant price discovery contract," "swap data repository," and "swap execution facility."
722(b)	12(h)	None	Regulation of Swaps as Insurance under State Law Provides that a swap shall not be considered to be insurance; and may not be regulated as an insurance contract under the law of any State.
722(d)	2(i)	Any person engaged in swap activities outside United States	Extra-territoriality CFTC-related provisions of Title VII shall not apply to swap activities outside the U.S. unless those activities have a direct and significant connection with activities in, or effect on, commerce of the U.S., or contravene CFTC rules to prevent evasion.
			SECTION 723 - CLEARING
723(a)(2)	2(d)-(e)	Swap counterparties	Application of CEA to Swaps and Market Participant Limitation Identifies CEA provisions applicable to swaps. Also, makes it unlawful for any person, other than an ECP, to enter into a swap unless the swap is entered into on or subject to the rules of a DCM.
723(a)(3)	2(h)(1)(A)	Any person	Standard for Clearing Prohibits any person from engaging in a swap unless that person submits the swap to a registered DCO or a DCO that is exempt from registration if the swap if required to be cleared.
723(a)(3)	2(h)(1)(B)	DCOs	DCO Rule Requirements Requires a DCO to include certain provisions prescribing that all swaps submitted to the DCO with the same terms and conditions are economically equivalent within the DCO and may be offset with each other within the DCO and providing for non-discriminatory clearing of swaps executed bilaterally or on or through the rules of an unaffiliated DCM or SEF.
723(a)(3)	2(h)(4)	None	Prevention of Evasion of Mandatory Clearing of Swaps Requires CFTC to investigate, issue a public report, and take action if it finds that a particular swap or group, category, type or class thereof would be subject to mandatory clearing, but no DCO has listed it. Provides authority to CFTC to adopt rules as determined to be necessary to prevent evasion

[158] Unless otherwise indicated, the CEA references in this column refer to the provisions of the CEA after its amendment by the Dodd-Frank Act.
[159] If a provision references the term "swap," but also applies to futures contracts and/or options on futures contracts, the Category 2 label applies solely to the extent the provision references the term "swap." No relief from the application of the provision to futures and options on futures would be appropriate on July 16, 2011.

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			of mandatory clearing requirement.
723(a)(3)	2(h)(7) (E)-(F)	Swap counterparties	Counterparty Election of DCO; Prevention of Use of End-User Exception to Evade Mandatory Clearing If swap is not subject to the mandatory clearing requirement, and is entered into by an SD/MSP with a counterparty that is not an SD/MSP, the counterparty: (a) may elect to require that the swap be cleared; and (b) to select the DCO. Provides authority to CFTC to adopt rules as determined to be necessary to prevent evasion of end-user clearing exception.
723(a) (3)	2(h)(8)	Swap counterparties	Trade Execution Requirements for Swaps Subject to Mandatory Clearing If a swap is subject to the mandatory clearing requirement, the counterparties must execute it on a DCM, a registered SEF, or an exempt SEF. The requirement does not apply if no DCM or SEF makes the swap available to trade or if the swap is subject to the end-user clearing exception, but, pursuant to Section 723(c)(4), counterparties must comply with any reporting and recordkeeping requirements prescribed by the CFTC.
723(b)	2(j)	Swap counterparties	Approval of Swaps by Committee of Board End-user exception to clearing and trade execution requirements are available to registered issuer of securities and issuers required to file reports with SEC, but only if appropriate committee of the Board approves entering into the swap subject to such exceptions.
724(a)	4d(f)	Various	Segregation Requirements for Cleared Swaps Makes it unlawful for a person to accept money, securities or property (or to extend credit) from, for, or on behalf of a swap customer to margin, guarantee, or secure a swap cleared by or through a DCO unless the person is registered as an FCM. Requires segregation for cleared swaps. Provides that a swap cleared by or through a DCO will be considered a commodity contract under the Bankruptcy Code.[160]
724(c)	4s(l)	SDs/MSPs	Segregation Requirements for Uncleared Swaps SDs/MSPs are required to notify their counterparties at the beginning of a swap transaction that the counterparty has the right to require segregation of funds or other property supplied to margin, guarantee or secure the obligations of the counterparty. At the request of a counterparty to a swap, an SD/MSP shall segregate the funds or other property for the benefit of the counterparty in an account carried by an independent custodian. If counterparty does not choose segregation, SD/MSP shall report quarterly that its back office procedures regarding margin comply with the agreement of the counterparties.[161]
725(a)	5b(a)	DCOs	Registration Requirement Requires that a DCO clearing swaps be registered.[162]
725(e)	5b(k)	DCOs	DCO Reporting Requirements Reporting and recordkeeping requirements for DCOs that clear swaps and security-based swap agreements.
725(g)	None	Banks	Identified Banking Products Amends Legal Certainty for Bank Products Act of 2000 with respect to swaps.
			SECTION 727 – REAL-TIME REPORTING
727	2(a)(14)	None	Real-Time Reporting

[160] This has been addressed via an existing interpretation.

[161] Exemptive relief may not be available.

[162] Exemptive relief may not be available.

CATEGORY 2: TITLE VII PROVISIONS REFERENCING TERMS THAT REQUIRE FURTHER DEFINITION BY CFTC

Dodd-Frank Section No.	CEA Section No.[158]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			Requires CFTC to issue semiannual and annual reports regarding trading and clearing in major swap categories.
			SECTION 731 – REGISTRATION AND REGULATION OF SDs/MSPs
731	4s(k)	SDs/MSPs	SD/MSP Chief Compliance Officer Must designate a Chief Compliance Officer, who reports directly to the Board or to the senior officer of the SD/MSP, to perform specified duties.[163]
			SECTION 740 – MCOs UNDER FDICIA
740	None	Foreign MCOs	Repeals Sections 408 and 409 of the Federal Deposit and Insurance Corporation Improvement Act (FDICIA) Repeals FDICIA provisions that, among other things, permitted a foreign multilateral clearing organization (MCO) to clear OTC derivatives if it is supervised by a foreign financial regulator that a U.S. agency determines satisfies appropriate standards.
			SECTIONS 741–744 AND 746-748 – ENFORCEMENT PROVISIONS
741(b)(1)-(2), (4)-(7), (11)	Various	Various	General Enforcement Provisions Provides CFTC with anti-fraud and insider trading authority with respect to futures, options on futures, and swaps on a security index. Makes conforming amendments to anti-fraud, anti-manipulation, and procedural enforcement provisions to apply them to swaps. Increases penalties for DCOs and SDs/MSPs that knowingly or recklessly evade the mandatory swap clearing requirement.
746	4c(a) (3)-(4)	Employees and agents of the federal government; persons who knowingly receive or misappropriate non-public government information	Insider Trading The so-called "Eddie Murphy" provision makes it unlawful for any employee or agent of the federal government to trade based on non-public information and to impart such information to others for purposes of trading. Also prohibits knowing use of non-public government information to trade and misappropriation of non-public government information by any person.
747	4c(a)(7)	Any person	Anti-Disruptive Practices Authority – Use of Swaps to Defraud Prohibits any person from entering into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap or part of a device, scheme, or artifice to defraud any third party.
745(b)	5c(c)(5)(C)	Registered entities	Special Review for Event Contracts and Swaps Prohibits a contract, including a swap, that has been determined by the CFTC to be contrary to the public interest, to be listed of made available for clearing or trading. In connection with the listing of a swap for clearing by a DCO, CFTC must determine the initial eligibility, or the continuing qualification of a DCO, to clear the swap under those criteria, conditions, or rules the CFTC determines. The criteria must include the financial integrity of the DCO and other factors the CFTC may determine.
749	Multiple	Various	Conforming Amendments Conforming amendments to CEA Sections 4m(3) (CTA/CPO Registration Requirements).

[163] Exemptive relief may not be available.

CATEGORY 3: SELF-EFFECTUATING PROVISIONS THAT REPEAL PROVISIONS OF CURRENT LAW BUT DO NOT REFERENCE TERMS THAT REQUIRE FURTHER DEFINITION

Dodd-Frank Section No.	CEA Section No.	Provision, Obligation or Prohibition Applicable To:	Summary Description
723(a)(1)	2(d), 2(e), 2(g), and 2(h) (under pre-Dodd-Frank Act CEA)	Persons engaged in swap activities in excluded or exempt commodities	Excluded and Exempt Commodities Repeals CFMA provisions that provided exclusions and exemptions from pre-Dodd-Frank Act CEA provisions for OTC derivatives in excluded and exempt commodities.
734(a)	5d (under pre-Dodd-Frank Act CEA)	Persons trading on EBOTs	Repeals CFMA provisions that permit Exempt Boards of Trade

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
			SUBTITLE A, PART I: SECTIONS 701-720 – REGULATORY AUTHORITY
701	None	None	Short Title
711	None	None	Definitions Various terms have the meanings given in Commodity Exchange Act ("CEA") Section 1a.
712(a)(1)-(7), 712(b)-(c)	None	None	Review of Regulatory Authority General provisions regarding rulemakings.
712(e)-(f)	None	None	Rulemaking Timeframe and Rules/Registration before Final Effective Dates Provides global rulemaking deadline of 360 days from enactment (unless otherwise provided). Permits issuance of rules, studies, reports and exemptions, and registration of persons, prior to effective date.[165]
713(b)[166]	4d	Futures Commission Merchants ("FCMs")	Portfolio Margining Pursuant to exemption or rule, dually-registered FCM-Broker Dealer may, pursuant to a portfolio margining program approved by Securities and Exchange Commission ("SEC"), hold futures and options on futures, and margin thereon, in a portfolio margining account carried as a securities account.
714	None	None	Abusive Swaps CFTC may collect information concerning markets for swaps and issue report re. types of swaps that are detrimental to stability of a financial market or participants therein.
715	None	None	Authority to Prohibit Participation in Swap Activities If CFTC determines that regulation of swap markets in a foreign country undermines stability of U.S. financial system, it may, in consultation with Secretary of Treasury, prohibit an entity domiciled in the foreign country from participating in the U.S. in any swap activities.
716	None	Swap Dealers ("SDs")/Major Swap Participants ("MSPs")	Prohibition on Federal Assistance Prohibits Federal assistance to certain registered SDs/MSPs; requires insured depository institutions to comply with "Volcker Rule."
717(a) and (d)[167]	2(a)(1)(C) and 5c(c)(1)	None	New Product Approval CFTC-SEC Process Provides CFTC jurisdiction over options exempted by SEC; provides for stay of certification of product pending jurisdictional determination.
718	None	None	Novel Derivative Products Provides a process for CFTC and SEC to resolve jurisdictional issues relating to novel derivative products.

[164] Unless otherwise indicated, the CEA references in this column refer to the provisions of the CEA after its amendment by the Dodd-Frank Act.
[165] Section 712(f) became effective upon enactment of the Dodd-Frank Act.
[166] Section 713(a) amends the Securities Exchange Act of 1934.
[167] Sections 717(b) and (c) amend the Securities Exchange Act of 1934.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
719	None	None	Studies Requires 4 Studies re: (a) effects of position limits on trading on exchanges in U.S.; (b) feasibility of requiring use of standardized algorithmic description for financial derivatives; (c) international swap regulation; and (d) stable value contracts.
720	None	None	Memoranda of Understanding Requires CFTC and the Federal Energy Regulatory Commission ("FERC") to negotiate Memoranda of Understanding ("MOUs") to: (a) establish procedures for addressing jurisdictional issues; and (b) share information in investigations into potential manipulation, fraud or market power abuse.
			SUBTITLE A, PART II: SECTIONS 721-754 – REGULATION OF SWAP MARKETS
			SECTION 721 – DEFINITIONS
721(a) and 721(f)	1a	Various	Definitions New or amended definitions of terms "appropriate Federal banking agency," "Board," "eligible commercial entity," "interstate commerce," "prudential regulator," and "trading facility."[168]
721(b), (d) and (e)	Various	None	Authority to define terms; exemptions; and conforming amendments Provides CFTC authority to adopt rule defining any term in CFTC-related portions of Title VII; limits CFTC exemptive authority with respect to Title VII; sets forth conforming amendments required due to re-numbering of definitions in CEA Section 1a.
			SECTION 722 – JURISDICTION
722(a), and (c)	2(a)(1), 2(c)(2)(A)		Regulation of swaps General provisions re. jurisdiction of CFTC with respect to swaps.
722(e), (f), and (g)	2(a)(1) and 4(c)	None	FERC General provisions re. impact on jurisdiction of FERC and provision granting CFTC authority to issue public interest waivers re. transactions entered into pursuant to tariff or rate schedule approved or permitted to take effect by FERC or regulatory authority of State or municipality with jurisdiction to regulate rates and charges for sale of electric energy.
722(h)	1b	None	Foreign Exchange Swaps and Foreign Exchange Forwards Provides process for Secretary of Treasury in considering whether to exempt foreign exchange swaps or foreign exchange forwards from the swap definition.
			SECTION 723 - CLEARING
723(c) (1)-(2)	None	Persons subject to pre-Dodd-Frank Act CEA Section 2(h)	Grandfather Provision Permits petition with the CFTC within 60 days of enactment to allow petitioners to remain subject to existing Section 2(h) of the CEA for 1 year.
724(b)	None	FCMs and Derivatives Clearing Organizations	Bankruptcy Treatment of Cleared Swaps Makes amendments to the Bankruptcy Code relating to cleared swaps.

[168] The amended definition of the term "commodity" became effective on June 1, 2010.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
		("DCOs")	
725(a)	5b(b)	DCOs	Voluntary Registration A person clearing transactions that are not required to be cleared may voluntarily register as a DCO.
725(b)	5b(g)-(h)	SEC-registered Depository institutions, SEC-registered clearing agencies, foreign clearinghouses	Depository Institutions/Clearing Agencies/Foreign Clearinghouses If required to be registered as a DCO: (a) depository institutions are deemed to be registered to the extent that, before enactment, they cleared swaps as a multilateral clearing organization; and (b) SEC-registered clearing agencies are deemed to be registered to the extent that, prior to enactment, they cleared swaps. Provides CFTC with authority to exempt SEC-registered clearing agencies and foreign clearinghouses from DCO registration requirements for clearing swaps if subject to comparable, comprehensive supervision and regulation.
725(b)	5b(i)	DCOs	DCO – Chief Compliance Officer ("CCO") Must designate a CCO who reports directly to the board or to the senior officer of the DCO, to perform specified duties.
725(c)	5b(c)(2)	DCOs	DCO Core Principles Registered DCOs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
725(f)	8(e)	Foreign central banks	Information Sharing Permits CFTC to share information with foreign central banks and ministries under certain circumstances.
725(h)	5b(f)(1)	DCOs	Reducing Clearing Systemic Risk Provides that DCO may not be compelled to accept counterparty credit risk of another clearing organization.
			SECTION 734 – DERIVATIVES TRANSACTION EXECUTION FACILITIES ("DTEFs") AND EXEMPT BOARDS OF TRADE
734	5a of pre-Dodd-Frank Act CEA	DTEFs	DTEFs Repeal provisions enacted in Commodity Futures Modernization Act of 2000 that authorized DTEFs.
			SECTION 735 – Designated Contract Markets ("DCMs")
735(a)	5(b)	DCMs	Contract Market Designation Repeals provisions setting forth criteria for designation as a DCM.
735(b)	5(d)	DCMs	DCM Core Principles Registered DCMs must comply with the new Core Principles and any other requirements imposed by rule or regulation.
			SECTION 736 – MARGIN WITH RESPECT TO REGISTERED ENTITIES
736	8a(7)	Registered entities	Margin with respect to registered entities Permits CFTC to alter or supplement rules of a registered entity with respect to the setting of margin levels upon certain specified conditions.
			SECTION 738 – FOREIGN BOARDS OF TRADE ("FBOTs")
738	4(b)	FBOTs	FBOT Requirements. Permits CFTC to write rules for the registration of FBOTs that provide direct access to U.S. customers. Imposes requirements on FBOT contracts provided to U.S. customers by direct access that are linked to the settlement price of a contract traded on a registered entity in the U.S. Provides protections for CFTC registrants trading futures contracts on an FBOT in certain circumstances, and legal certainty for such transactions even if the FBOT fails to comply with the CEA.
			SECTIONS 739 and 749 – LEGAL CERTAINTY FOR SWAPS

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
739	22(a)(1), (4)-(5)	Swap counterparties	Legal Certainty for Swaps No transaction between Eligible Contract Participants ("ECPs") (or persons reasonably believed to be ECPs) shall be void, voidable, or unenforceable, and no party shall be entitled to rescind or recover any payment made with respect thereto, based solely on the failure of the agreement, contract, or transaction to meet the definition of a swap or otherwise be cleared as required by the CEA. Unless specifically reserved in a swap, neither the enactment of the Dodd-Frank Act nor any requirement under that Act shall qualify as a termination event, force majeure, illegality, regulatory change or similar event under the swap that would permit termination, renegotiation, modification or amendment of the swap.
749	22(a)(1)	Swap counterparties	Private Rights of Action Applies CEA private right of action provisions to violations involving swaps.
			SECTIONS 741–744 AND 746-748 – ENFORCEMENT PROVISIONS
741(a)	4b-1	Various	General Enforcement Provision Sets boundaries of enforcement authority over swaps and SDs/MSPs between CFTC and prudential regulators.
741(b)(8)-(9)	2(c)(2)(B)-(C)	Persons engaged in off-exchange forex transactions with retail customers	Forex Enforcement Authority Amends CFTC enforcement authority with respect to off-exchange forex transactions with retail customers.
741(c)	None	Entities regulated by Federal banking agencies	Prudential Regulators Savings clause for appropriate Federal banking agencies with respect to prudential standards imposed outside of Title VII.
742(a) and (c)[169]	2(c)(2)(D)-(E)	Persons engaged in off-exchange transactions with retail customers	Retail Commodity Transactions Provides CFTC with enforcement authority for non-forex retail commodity transactions. Prohibits entities regulated by certain Federal regulatory agencies from engaging in retail forex transactions except pursuant to rules by the applicable regulatory agency allowing such transactions on such terms and conditions as the regulatory agency shall prescribe.
743	None	None	Other Authority Unless otherwise provided, CFTC-related provisions in Title VII do not divest banking agencies, the CFTC, the SEC, or other Federal or state agencies of any authority derived from any other applicable law.
744	6c(d)	None	Restitution Remedies Provides CFTC with the authority to seek restitution for violations of the CEA in the amount of losses proximately caused by such violations.
747	4c(a)(5)-(6)	Traders on registered entities	Anti-Disruptive Practices Authority Prohibits any person from engaging in specifically enumerated bad acts: (a) violating bids or offers; (b) intentional or reckless disregard for the orderly execution of transactions during the closing period; or (c) spoofing. Provides CFTC with authority to prohibit other deceptive trading practices.

[169] Section 742(b) makes a technical correction to the Gramm-Leach-Bliley Act.

CATEGORY 4: SELF-EFFECTUATING TITLE VII PROVISIONS THAT ARE NOT SUBJECT TO CFTC PROPOSED TEMPORARY RELIEF RE. EFFECTIVE DATE

Dodd-Frank Section No.	CEA Section No.[164]	Provision, Obligation or Prohibition Applicable To:	Summary Description
748	23(g), (h), (m) and (n)	Employers of whistleblowers	Commodity Whistleblower Incentives and Protection Protects whistleblowers from retaliation. Provides that such right may not be waived, and whistleblowers may not be required to agree to arbitration of retaliation disputes.
745(a), (b) and (c)	5c(a)(2), 5c(c) and pre-Dodd-Frank Act Section 5c(d)	Registered entities	Interpretations; Certifications and Prior Approvals Provides that CFTC interpretations of Core Principles may provide the exclusive means for complying with those Core Principles. Establishes a self-certification procedure with respect to rules and products under a 10/90 day CFTC review process for new rules or rule amendments. Provides that a registered entity may seek CFTC prior approval with respect to rules or products. Repeals requirements imposed by CEA Section 5c(d) of pre-Dodd-Frank Act on filing enforcement action when CFTC determines that a registered entity is violating a Core Principle.
749	Multiple	Various	Conforming Amendments Conforming amendments to CEA Sections 4d (FCM Registration Requirements); 5c (Common Provisions Applicable to Registered Entities); 5e (Suspension or Revocation of Designation as a Registered Entity); 6(b) (Court Review of CFTC Orders); 12(e)(2)(B) (Cooperation with Other Agencies); and 17(r)(1) (Registered Futures Associations: Duplicative Regulation of Dual Registrants).
750	None	None	Study on Oversight of Carbon Markets
751	2(a)(15)	None	Energy and Environmental Markets Advisory Committee
752	None	None	International Harmonization
754	None	None	Effective Date

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket Nos. RM10–15–001 and RM10–16–001; Order Nos. 748–A and 749–A]

Mandatory Reliability Standards for Interconnection Reliability Operating Limits; System Restoration Reliability Standards

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Clarification.

SUMMARY: On March 17, 2011, the Commission issued Order Nos. 748 and 749, which approved new and revised Reliability Standards, including IRO–004–2 and EOP–001. In this order, we grant the North American Electric Reliability Corporation's (NERC) request for clarification of certain aspects of Order No. 748 including: The proper effective date language for Reliability Standard IRO–004–2; the correct version identification for the approval of EOP–001 intended by the Commission; and the proper effective date for Reliability Standard EOP–001–2. The Commission also grants NERC's request for clarification of Order No. 749 with respect to the version EOP–001 the Commission intended to approve and its effective date.

DATES: *Effective Date:* This order on rehearing and clarification will become effective July 19, 2011.

FOR FURTHER INFORMATION CONTACT:

Darrell Piatt (Technical Information), Office of Electric Reliability, Division of Reliability Standards, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502–6687.

David O'Connor (Technical Information), Office of Electric Reliability, Division of Reliability Standards, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6695.

William Edwards (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, Telephone: (202) 502–6669.

Terence Burke (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6498.

SUPPLEMENTARY INFORMATION:

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

Order on Clarification

Issued July 13, 2011

1. On March 17, 2011, the Commission issued Order Nos. 748 and 749, which approved new and revised Reliability Standards, including IRO–004–2 and EOP–001. In this order, we grant the North American Electric Reliability Corporation's (NERC) request for clarification of certain aspects of Order No. 748 including: (1) The proper effective date language for Reliability Standard IRO–004–2; (2) the correct version identification for the approval of EOP–001 intended by the Commission; and (3) the proper effective date for Reliability Standard EOP–001–2. The Commission also grants NERC's request for clarification of Order No. 749 with respect to the version EOP–001 the Commission intended to approve and its effective date.

I. Background

A. Order No. 748

2. Order No. 748 [1] approved three new Interconnection Reliability Operations and Coordination (IRO) Reliability Standards and seven revised Reliability Standards related to Emergency Operations and Preparedness (EOP), IRO, and Transmission Operations (TOP). The approved IRO Reliability Standards were designed to prevent instability, uncontrolled separation, or cascading outages that adversely impact the reliability of the interconnection by ensuring that the reliability coordinator has the data necessary to analyze and monitor Interconnection Reliability Operating Limits (IROL) within its Wide-Area .[2] The Final Rule also approved the addition of two new terms to the NERC Glossary of Terms, ''Operational Planning Analysis'' and ''Real Time Assessment.''

B. Order No. 749

3. Order No. 749 [3] approved three EOP Reliability Standards as well as the definition of the term ''Blackstart Resource.'' The approved Reliability Standards require transmission operators, generation operators, and certain transmission owners and distribution providers to ensure that plans, facilities, and personnel are prepared to enable system restoration from Blackstart Resources and require reliability coordinators to establish plans and prepare personnel to enable effective coordination of the system restoration process. The Commission also approved NERC's request to retire four effective and one pending Reliability Standards.

C. Requests for Clarification

4. On April 18, 2011, NERC submitted a request for clarification of certain aspects of Order No. 748 including: (1) The effective date of Reliability Standard IRO–004–2; (2) the version of EOP–001 approved by the Commission; and (3) the effective date of Reliability Standard EOP–001–2. On the same day, NERC submitted a request for clarification of Order No. 749 similarly seeking clarification on the version of Reliability Standard EOP–001 approved by the Commission and its effective date.

5. With respect to Reliability Standard IRO–004–2, NERC states that the effective date provision in Reliability Standard IRO–004–2 is inconsistent with the implementation of the three new IRO standards. NERC explains that it proposed, in its petition, to retire six of the seven requirements in the IRO–004–1 standard, and designated the one remaining requirement as IRO–004–2. The Commission approved IRO–004–2 in the Final Rule, but the effective date provision in IRO–004–2 states that the entire Reliability Standard should be retired, even though one requirement remains in effect with Commission approval of revised Reliability Standard. NERC requests clarification from the Commission that the effective date language in the IRO–004–2 standard should be revised as ''the latter of either April 1, 2009 or the first day of the first calendar quarter, three months after applicable regulatory approval.''

6. Second, NERC requests clarification regarding the Commission's approval of Reliability Standard EOP–001–1. NERC notes that at the same time NERC submitted a Petition in RM10–15–000, NERC filed a petition in Docket No. RM10–16–000 seeking approval of certain EOP Reliability Standards. Each Petition contained specific proposed changes to Reliability Standard EOP–001–0. NERC states in both Petitions that it requested that the Commission approve revised Reliability Standard EOP–001–1 only if the concurrent petition is not previously (or concurrently) approved by the Commission and otherwise to approve Reliability Standard EOP–001–2, which reflected the changes in both Petitions, rather than EOP–001–1. NERC requests clarification that EOP–001–2 is the approved Reliability Standard given the concurrent issuance of the Final Rules.

7. Finally, NERC requests clarification regarding the effective date of Reliability Standard EOP–001–2. NERC states that it requested Reliability Standard EOP–001–1 to become effective ''the first day of the first calendar quarter, three months after applicable regulatory approval.'' However, NERC states that it also requested that if the Commission previously or concurrently approved Reliability Standard EOP–001–2, it should be made effective ''twenty-four months after the first day of the first calendar quarter following applicable regulatory approval.'' NERC seeks clarification that Reliability Standard EOP–001–2 be made effective in accordance with the implementation schedule in the EOP–001–2 Reliability Standard given the concurrent issuance of the Final Rules.

II. Discussion

8. The Commission grants NERC's request for clarification regarding Reliability Standard IRO–004–2. Consistent with our approval of IRO–004–2, the Commission clarifies that the effective date provision in IRO–004–2 should be modified as requested by NERC to reflect the one requirement in IRO–004–2 that was not retired. NERC has included the modified effective date provision for IRO–004–2 as Exhibit A to its request for clarification. This clarification should alleviate confusion implementing Reliability Standard IRO–004–2.

9. The Commission also clarifies that it approved Reliability Standard EOP–001–2. Each NERC Petition in Docket Nos. RM10–15–000 and RM10–16–000 proposed unique changes to EOP–001–0 not reflected in the other petition presenting a logistical problem with cross-references. Given the issuance of Order Nos. 748 and 749, both on March 17, 2011, Reliability Standard EOP–001–2 is the currently-operative version. Moreover, we clarify that Reliability Standard EOP–001–2 shall become effective according to the implementation schedule in that standard.

III. Document Availability

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

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

12. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the

[1] *Mandatory Reliability Standards for Interconnection Reliability Operating Limits,* Order No. 748, 134 FERC ¶ 61,213 (2011).

[2] The term ''Wide-Area'' is defined in the NERC Glossary of Terms Used in Reliability Standards (NERC Glossary), approved by the Commission. As defined, Wide-Area includes not only the reliability coordinators' area, but also critical flow and status information from adjacent reliability coordinator areas as determined by detailed system studies to allow the calculation of IROLs. *See* NERC Glossary *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[3] *System Restoration Reliability Standards,* Order No. 749, 134 FERC ¶ 61,215 (2011).

Public Reference Room at *public.referenceroom@ferc.gov.*

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Part 511

RIN 2125–AF19

Real-Time System Management Information Program

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Summary of responses to request for comments.

SUMMARY: The final rule establishing the minimum parameters and requirements for States to make available and share traffic and travel conditions information via real-time information programs as required by Section 1201 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) was published on November 8, 2010. In issuing the final rule, the FHWA also sought additional comments relating to the costs and benefits of the Real-Time System Management Information Program and general information about current and planned programs. Thirty-one entities provided responses to the Request for Comments and this document provides a summary of those responses.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rupert, FHWA Office of Operations, (202) 366–2194, or via e-mail at *robert.rupert@dot.gov.* For legal questions, please contact Ms. Lisa MacPhee, Attorney Advisor, FHWA Office of the Chief Counsel, (202) 366–1392, or via e-mail at *lisa.macphee@dot.gov.* Office hours for the FHWA are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document, all comments, and the final rule may be viewed on line through the Federal eRulemaking portal at: *http://www.regulations.gov.* The docket identification number is FHWA–2010–0156. The Web site is available 24 hours each day, 365 days each year. Anyone is able to search the electronic form of all comments in any one of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, or labor union). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, Pages 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Request for Comments

The FHWA issued the final rule establishing requirements for the Real-Time System Management Information Program on November 8, 2010, at 75 FR 68418. The final rule document also sought additional comments relating to the costs and benefits of the Real-Time System Management Information Program and general information about current and planned programs. Although the Regulatory Cost Analysis found in the docket for the rulemaking attempts to capture the scope of costs and benefits associated with this rule, the FHWA sought further information to determine a comprehensive picture of costs and benefits given the flexibility of approaches that can be used and the limitations of the current studies.

The specific questions posed in the Request for Comments were:

(1) What are the costs and benefits of each individual provision required under rule? If some provisions have net costs, would certain modifications to those provisions lead to net benefits?

(2) What are the impacts of requiring these provisions on States and Metropolitan Areas (do some States and Metropolitan Areas realize net costs instead of net benefits)? If some States and Metropolitan Areas realize net costs, would certain modifications to provisions ensure net benefits?

(3) Is there a specific, alternative approach to calculating costs and benefits that would be more appropriate than the current use of the Atlanta Navigator Study?

(4) Although information dissemination to the public is not within scope of this rule, it is important to understand how information is typically disseminated so that the technologies used to collect and monitor data are compatible with technologies used to disseminate this information. This is especially important to keep up with new technological advances and to ensure that States use the most effective, low cost methods to both collect and disseminate information.

(A) What technologies will States use to collect and monitor information under this rule?

(B) What technologies are States planning to use to disseminate this information or what are they already using?

(C) Do the technologies States plan to use present any interoperability issues? Do they allow for use of advanced technologies that could be the most cost-effective means of collecting and disseminating this information?

(D) Are there any structural impediments to using low-cost advanced technologies in the future given the provisions and specifications contained in this rule?

(E) Given the research investment into wireless communications systems in the 5.9 GHz spectrum for Intelligent Transportation Systems applications, to what extent could systems in this spectrum also be used to fulfill the requirements of this rule and/or enable other applications?

(F) Given that there are legacy technologies in place now, and that there are new technologies on the horizon that are being adopted, how can we ensure that investments made today to comply with this rule are sustainable over the long term?

(5) This rule defines Metropolitan Areas to mean the geographic areas designated as Metropolitan Statistical Areas by the Office of Management and Budget with a population exceeding 1,000,000 inhabitants. Is this population criterion appropriate, rather than considering traffic, commuting times, or other considerations?

Summary of Responses

Fourteen of the 31 parties that provided comments responded to at least some of the questions. Other comments provided discussions regarding real-time information or presented questions on specific provisions of the regulation. Clarifications are offered below in addition to summarizing the responses to the Request for Comments.

Comments on the Final Rule

Three of the general comments to the docket posed questions related to the roadways that are included under the Real-Time System Management Information Program and travel time reporting requirements. The program includes all the roads of the Interstate System (23 CFR 511.311) and other roads in metropolitan areas deemed to be ''routes of significance'' by the States (23 CFR 511.313). Similar to design exceptions permitted under 23 U.S.C. 103(c)(1)(B)(ii), highways on the Interstate System in Alaska and Puerto Rico may be granted exemptions from the requirements of the Real-Time System Management Information Program upon request from the States.

In metropolitan areas, the requirement for travel time information in metropolitan areas under 23 CFR 511.309(a)(4) only applies to roads of the Interstate System and routes of significance that are limited-access roads.

Seven of the comments posed questions related to the information requirements of the Real-Time System Management Information Program. There were two specific comments about the need for increased infrastructure or sensors to provide continuous roadway weather monitoring to comply with the requirements of 23 CFR 511.309(a)(3) for roadway weather observations. In addressing similar comments received to the Notice of Proposed Rulemaking, the Final Rule was revised to reduce the frequency and minimum level of roadway weather information required under the program so that observation-level (in contrast to electronically-monitored) information could comply with the requirement.

A couple of these commenters included questions related to determining the quality of the real-time information in meeting the requirements of 23 CFR 511.309(a)(5) and (6). Since the Real-Time System Management Information Program only includes requirements for information and does not include any specific technology or system design requirements, specific methods for measuring the quality of information cannot be included. The States, as designers or procurers of the systems that provide the information required under the program, are in the best position to decide upon the specific methods for gauging the quality of their information systems. Hence, the provision in 23 CFR 511.311(b) requires States to determine the methods to be used in measuring the quality of the real-time information and receive FHWA concurrence in the selected methods.

Finally, three commenters discussed specific aspects of system design or information dissemination related to the Real-Time System Management Information Program, including referring to private sector providers and detailed methods for determining locations. Since the program requirements do not include specific system design or dissemination, these comments, while providing good information and discussion about real-time information systems, are outside the scope of the regulation.

Responses to the Request for Comments

The responses to the first two questions were very similar in nature. Responders noted that determining costs and benefits for individual provisions of the regulation was difficult if not impossible since, as noted by the South Dakota Department of Transportation, ''* * * the same infrastructure is used to satisfy multiple provisions, identifying individual costs is also very complex.'' The Virginia Department of Transportation commented that the benefits of information depend largely on how such information will be used and decoupling data collection from data usage makes it challenging to properly define or quantify the benefits. In addition, the Minnesota Department of Transportation commented that it is very difficult to determine costs and benefits for the individual rule provisions since the various provisions are not normally implemented separately. Since these functions tend to be deployed simultaneously, separate determination of the costs and benefits is often impossible.

Three responders provided information related to costs to implement and operate various transportation management and information systems. Minnesota provided its costs for installing freeway management systems that include real-time traffic monitoring components but also include video cameras, dynamic message signs, and other components outside the scope of this regulation. Alaska provided costs related to its statewide information system, but also included costs related to highways of significance. Because Alaska does not have any major metropolitan areas (as defined in 23 CFR 511.303), there are no routes of significance subject to this regulation. Kansas provided detailed cost information for its traveler information systems, including costs related to additional installation of roadway devices for real-time monitoring in the Kansas City metropolitan area that reflect implementation across the entire Metropolitan Statistical Area (MSA). As noted later in the summary of responses to the fifth question and responding to concerns related to the expanse of the MSA, the FHWA will develop guidelines to provide assistance in consistent identification of affected roadways in metropolitan areas. This cost information, when examined for potential implementation of systems within the scope of this regulation, aligns with the cost assumptions presented in the rulemaking.

No responder was able to provide any readily-available quantifiable information about benefits of a real-time information program. The Kansas Department of Transportation provided information from an analysis conducted for the Kansas City metropolitan area that indicated an eight to one (8:1) benefit to cost ratio for investments in the intelligent transportation systems (ITS) technologies used in the Kansas City area, but noted that the ratio would likely be lower for rural areas. The Kansas Department of Transportation also noted that potential modifications to the provisions to eliminate continuous reporting of construction, incident, and road condition information or increasing the timeliness of information to more than 20 minutes may reduce overall costs. The North Dakota Department of Transportation similarly commented on the challenges of providing continuous traffic and travel conditions, especially for rural States.

The Minnesota Department of Transportation commented that one consideration of costs and benefits is that for public sector transportation management systems, the benefits accrue to a different entity than the entity that pays the costs. The benefits accrue to individual drivers and to society as a whole, but do not provide funding back into the public agency's budget, although the public agency must manage the costs of installation, operation, and maintenance as part of its constrained budget. Minnesota further commented that one way to increase the benefit-to-cost ratio would be to increase the use of automation, thereby decreasing manual data entry. The personnel that manually enter data are the busiest with their other tasks at the very time the data needs to be entered. Meeting the rule timeliness requirements is most affected by availability of staff to ensure timely data entry, which is a cost consideration. The Alaska Department of Transportation and Public Facilities noted that a Federal requirement for real-time data management requires department-wide cooperation and collaboration at the State and local levels, and it cannot stress this as a benefit enough, considering the many stove pipe systems around the department that should coordinate.

There were four responses to the third question. The Pennsylvania Department of Transportation commented that it anticipated using its own benefit-cost analysis methods for any real-time information system implementations. The Virginia Department of Transportation commented that one alternative approach is to calculate costs and benefits within the contexts of different objective areas, for example, analyzing congestion relief along a

corridor or an urban area, improving traveler satisfaction, or improving the effectiveness of traffic incident management. The Kansas Department of Transportation reiterated the approach it used in determining the benefit-to-cost ratio of eight-to-one for the Kansas City area. The South Dakota Department of Transportation commented that an approach that is more clearly applicable to rural areas would be desirable since congestion is not the primary travel concern in rural States such as South Dakota.

The fourth question, with its six parts, was the most complex and received 12responses. Not all responders commented on all parts of the question. The responses to the first two parts related to technologies used to collect and to disseminate information, indicated the use of traditional techniques such as manually-entered information, sensors, cameras, highway advisory radios, dynamic message signs, 511 travel information telephone services, and Internet web sites. Some responders noted the use of newer and emerging techniques such as gathering information from buses serving as traffic probes, acquiring information from private providers, using social media to provide information, electronic mail alerts, and developing applications for use by consumer mobile electronic devices.

Responders to the third part of the fourth question, related to interoperability issues of planned technologies, discussed the desire to use open platform based applications and approved ITS communications standards. The Pennsylvania Department of Transportation noted that interoperability issues associated with meeting the Real-Time System Management Information Program requirements would be similar to interoperability issues associated with deployment of a statewide ITS device command and control software application. The Chicago Department of Transportation noted that it is working with regional stakeholders to address the interoperability, technical, and comparability issues within the framework of the northeastern Illinois regional ITS architecture.

Responses to the fourth part of the fourth question indicated that there may be some challenges to using low-cost advanced technologies, especially related to State procurement or public-private partnership arrangements. The Pennsylvania Department of Transportation noted that a potential impediment may be State procurement laws that could determine how technologies may be obtained, and that there are certain cases where proprietary hardware should be considered. The Minnesota Department of Transportation commented that a structural impediment exists in combining State-owned infrastructure-based information with purchased privately-sourced information. The use of purchased data from private sources to fill in gaps in coverage has been hindered by data ownership issues, necessitating a completely separate data system to ensure that the private-sourced data is not provided to competitors through the State's information dissemination system. These duplicate systems have not been practical, but in geographic areas with little State-owned infrastructure-based information this would be less of an impediment. The Kansas Department of Transportation commented that although it has had a positive experience with public-private partnerships, it is also aware of the risks associated with purchasing from or relying on third-party providers for critical infrastructure components needed for the rule.

The fifth part of the fourth question asked about the potential for 5.9 gigahertz (GHz) wireless communications to fulfill the requirements of the Real-Time System Management Information Program. In general, responders commented that 5.9 GHz communications holds potential for helping meet the regulation's requirements, but in cooperation with other wireless communications methods. The Vehicle Infrastructure Integration Consortium (VIIC) noted that it expects that vehicles and roadway infrastructure equipped with 5.9 GHz communications systems for safety enhancement ultimately could support the purposes of the Program and be used to fulfill some of the requirements of the rule. However, these cooperative communication systems are unlikely to be available widely on vehicles or the infrastructure by the November 2014 date for States to establish their information programs for interstate highways. The Minnesota Department of Transportation noted that, given the likely time frame for deployment of 5.9 GHz communications systems, it is too early to plan for 5.9 GHz as part of the implementation of the Real-Time System Management Information Program. The Virginia Department of Transportation commented that it envisions using 5.9 GHz communications as a component of its future ITS roadside applications since it could facilitate the collection and derivation of travel time information, but Virginia is also testing other wireless technologies to capture travel times. The Illinois Department of Transportation noted that absent a system architecture and standards for this communication and data, there is a significant risk that stakeholders might invest in technologies that will depend on the 5.9 GHz spectrum that may be allocated to other users as the migration to comply with this requirement occurs. Other responders such as the Nebraska Department of Roads and the Alaska Department of Transportation and Public Facilities did not see a role for 5.9 GHz communications at this time.

The last part of the fourth question asked about ensuring that investments made today to comply with the Real-Time System Management Information Program are sustainable over the long term. In general, responders commented that sound planning for investments, including the appropriate use of established standards, offers the best opportunity to ensure that the investments made today and the investments needed in the future are sustainable. One responder commented that technology advancements should not discourage deployment of systems using technologies, but rather sound investments require that agencies and developers need to do a good job with the engineering of these systems. The Pennsylvania Department of Transportation commented that it is always transitioning to newer and more cost-effective technologies where applicable since ITS technologies are ever advancing. The replacement of today's technologies will be addressed as part of the on-going expansion and update of a State's ITS infrastructure, with effective planning, partner participation, and standardization for interoperability where possible assisting with program sustainability. The Chicago Department of Transportation also noted that the regional ITS architectures, the architecture planning process, and the continued engagement of operator-level stakeholders offers the best opportunity to insure that the investments made today and the investments needed in the future are sustainable. Chicago also noted that continued vigilance is required to make sure that changing technologies are appropriately considered in planning for, developing, deploying, and operating Intelligent Transportation Systems. The Minnesota Department of Transportation noted that there have always been legacy technologies and new technologies and it has sought out new technologies and adopted them as appropriate. Minnesota further

commented that it will use the best current technologies for new projects and upgrade legacy equipment through attrition, since it is not necessary to replace all the operational legacy equipment every time something new comes out. The Kansas Department of Transportation noted that using existing standards offers the greatest probability of future compatibility as States continue to stay up to date on new technologies, use non-proprietary equipment, support standards compatibility, and cautiously use non-proven technologies. Finally, the VIIC commented that related to the development of 5.9 GHz communications systems, Federal governance is necessary to avoid the implementation of divergent and conflicting requirements at the State or local governance levels, which would make deployment of a 5.9 GHz communications system impracticable for both system providers and users. The VIIC also commented that a Federal role is important to help assure long-term technological stability for these 5.9 GHz communications systems.

The 11 responses to the fifth question were consistent in identifying issues related to metropolitan areas. In general, there was agreement to using the metropolitan statistical area population of at least one million to determine which metropolitan areas should fall under the provisions of the Real-Time System Management Information Program. However, the comments identified issues related to the expanse of the geographic coverage of the roads within the metropolitan area. Because the geographic areas included under the Metropolitan Statistical Area (MSA) designations are expansive to include areas to provide nationally consistent delineations for collecting, tabulating, and publishing Federal statistics, there may be Interstate and other significant roads that rarely if ever experience congestion or variations in travel times. Four responses, three from States that do not include affected metropolitan areas, concurred with the use of the MSA for the Real-Time System Management Information Program. Three responses concurred with the use of the MSA but suggested flexibility be permitted to address the needs reflected by traffic patterns. Four responses suggested using the metropolitan planning boundaries or central counties for the geographic coverage of the Real-Time System Management Information Program. While there are no changes to the definition of metropolitan areas, these comments indicate a need for additional guidelines related to the roadway coverage within the metropolitan areas. The FHWA will develop guidelines from these comments and in collaboration with States and other stakeholders to provide assistance in consistent identification of affected roadways in metropolitan areas for implementation of the Real-Time System Management Information Program.

Conclusion

The FHWA and other programs within the DOT will use the valuable information offered in the responses in shaping program activities and projects. Specifically, FHWA will use the information to help in developing further assistance in implementing the Real-Time System Management Information Program, including working with stakeholders to develop guidelines related to roadway coverage in metropolitan areas.

Issued on: July 11, 2011.

Victor M. Mendez,

Administrator, Federal Highway Administration.

[FR Doc. 2011–17986 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210–AB08

Requirements for Fee Disclosure to Plan Fiduciaries and Participants—Applicability Dates

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Final rule; delay of applicability dates.

SUMMARY: This document delays specified applicability and effective dates of the Employee Benefits Security Administration's (EBSA) interim final rule concerning fiduciary-level fee disclosure and final rule concerning participant-level fee disclosure. These final rules were published in the **Federal Register** on July 16, 2010 and October 20, 2010, respectively. This document delays and more closely aligns the initial compliance dates of the two rules in order to provide regulated parties with more time to comply with the new disclosure requirements. This document adopts final amendments to the initial compliance dates for both rules.

DATES: The amendments made by this document are effective as of July 15, 2011 and the effective date for the interim final fiduciary-level fee disclosure rule published on July 16, 2010 (75 FR 41600) is delayed from July 16, 2011 to April 1, 2012.

FOR FURTHER INFORMATION CONTACT: Michael Del Conte, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

On July 16, 2010, EBSA published in the **Federal Register** an interim final rule enhancing required disclosure from certain pension plan service providers to plan fiduciaries as part of a ''reasonable'' contract or arrangement for services under ERISA section 408(b)(2) (75 FR 41600) (the ''408(b)(2) regulation'' codified at 29 CFR 2550.408b–2(c)). EBSA subsequently published in the **Federal Register**, on October 20, 2010, a final rule concerning the disclosure of plan fee and expense information by plan administrators to plan participants and beneficiaries (75 FR 64910) (the ''participant-level disclosure regulation'' codified at 29 CFR 2550.404a–5). The participant-level disclosure regulation also modifies the disclosure requirements in the Department's regulation under ERISA section 404(c), at 29 CFR 2550.404c–1 (the ''404(c) regulation''), in order to avoid duplication and to integrate its requirements with those of the new participant-level disclosure regulation.

As originally published, the effective date for the interim final 408(b)(2) regulation was July 16, 2011, as to both new and existing contracts or arrangements between covered plans and covered service providers. The Department received many requests that this effective date be delayed. A significant number of parties argued that more time is essential to update systems and procedures for information collection and disclosure. Pointing out that the Department had not yet published a final rule, parties explained that, if the Department modifies the current interim final rule, service providers will need additional time to make further changes to their systems and procedures for information collection and disclosure. Based on these concerns, the Department believed that an extension of the rule's effective date would allow time for improved compliance by plans and service providers, and thus would be in the interests of participants and

beneficiaries. In February 2011, the Department announced its intention to delay the 408(b)(2) regulation's effective date until January 1, 2012.[1] The Department did not receive any negative comments on this announcement. In order to effectuate its intention, on June 1, 2011, the Department published a proposal to formally delay the effective date of the 408(b)(2) regulation to January 1, 2012.

As with the 408(b)(2) regulation, the Department received many requests that additional time be provided for parties to comply with the participant-level disclosure regulation. Parties argued that it would be preferable to extend application of the participant-level disclosure regulation until after the effective date of the 408(b)(2) regulation. Specifically, these parties pointed to the provision in the 408(b)(2) interim final regulation which requires covered service providers to furnish information requested by a responsible plan fiduciary or plan administrator in order to comply with ERISA's reporting and disclosure requirements,[2] which would include information needed to comply with the participant-level disclosure regulation. It would facilitate compliance with the participant-level disclosure regulation, they argued, if covered contracts and arrangements were first brought into compliance with the 408(b)(2) regulation, so that this reporting and disclosure provision is in effect, prior to the applicability of the participant-level disclosure regulation. The Department agreed that aligning the application of these two regulations would assist plan fiduciaries and plan administrators in obtaining information required to comply with the participant-level disclosure regulation. Further, the Department believed that, similar to the 408(b)(2) regulation, a limited extension of time to satisfy the initial compliance requirements for the participant-level disclosure regulation is in the best interests of covered individual account plans and their participants and beneficiaries. Delaying the application date would better afford plans sufficient time to ensure an efficient and effective implementation of the participant-level disclosure regulation.

To accomplish this, the Department, in its June 1, 2011 **Federal Register** notice, proposed to amend the transitional rule in paragraph (j)(3)(i) of the participant-level disclosure regulation. The transitional rule (as originally published) required individual account plans to furnish the initial disclosures required under the regulation no later than 60 days after the applicability date. The applicability date is the first day of the first plan year beginning on or after November 1, 2011. The Department proposed to delay the transition rule to provide plans with up to 120 days (rather than 60) after the plan's applicability date to furnish the initial disclosures that otherwise are required to be furnished on or before the date on which a participant or beneficiary can first direct his or her investments. Under the proposed transition rule, the initial disclosures would have to be provided to all participants and beneficiaries who have the right to direct their investments when such disclosures are furnished, not just to those individuals who had the right to direct their investments on the applicability date. This was to ensure that individuals who become plan participants in between the applicability date and the end of the proposed 120-day period receive the important information required under the regulation.[3]

B. Comments Received and the Department's Response

In response to its proposal, the Department received 11 comment letters.[4] This section summarizes these comments, the Department's response, and the final regulatory amendments published in this notice.

1. Applicability Dates; Technical Clarifications

Commenters generally supported the Department's proposed alignment of the two rules' applicability dates and believe that the 408(b)(2) regulation should, as proposed, be effective before plans are required to comply with the participant-level disclosure regulation. Commenters disagreed, however, about the specific timeframes proposed by the Department (i.e., that the 408(b)(2) regulation would be effective on January 1, 2012 and that the transition rule for the participant-level disclosure regulation would be extended from 60 to 120 days following a covered individual account plan's applicability date). Some commenters endorsed the proposed timeframes. They explained that the Department has been working on fee disclosure and related issues for several years, and that service and investment providers, as well as plan fiduciaries, have had ample time to monitor these developments in fee disclosure and prepare for compliance. Further, one commenter stressed that application of the rules should not be further delayed because of the direct impact of plan fees on participants' and beneficiaries' retirement security.

Other commenters, however, argued that the Department must further delay application of the rules to enable timely compliance by service providers, plan fiduciaries, and plan administrators. Commenters explained that continuing uncertainty exists as to whether the Department will make significant changes from the interim final rule when it publishes the final 408(b)(2) regulation. Given this uncertainty, service providers argued that they will not be able to effectively finalize their system modifications or to firmly establish the content and format of their disclosures to reflect any such changes by January 1, 2012. One commenter also asserted that plan fiduciaries, who will be required to review and analyze the 408(b)(2) regulation's new disclosures, will not have enough time to satisfy these obligations and, if necessary, take action in response to the disclosures received from their plan service providers. Commenters provided several alternatives for further delaying the effective date of the 408(b)(2) regulation, for example, delaying the compliance date for six or twelve months following publication of a final rule or until January 1, 2013. To address commenters' concerns as to any new requirements in the final regulation, commenters suggested that the Department also could provide a delayed effective date for such new requirements, or announce a transition period during which parties may rely on the interim final rule.

Commenters also presented a variety of concerns as to why application of the participant-level disclosure regulation should be further delayed. For example, service providers and plan administrators continue to request interpretive guidance from the Department as to plan administrators' obligations under the participant-level disclosure regulation; commenters believe that such obligations are not clear and that additional guidance from the Department is necessary before parties are required to comply. Commenters also offered a variety of technical issues faced by plans and service providers as they prepare for compliance, for example potential difficulties in obtaining required

[1] *See http://www.dol.gov/ebsa/newsroom/2011/ebsa021111.html.*

[2] 29 CFR 2550.408b–2(c)(1)(vi).

[3] One commenter requested clarification that the proposed transition rule was not intended to apply to newly eligible employees on an ongoing basis; the Department confirms that the transition rule, as finalized in this notice, applies only to employees newly eligible on the applicability date and during the transition period, but not after a plan's transition period ends.

[4] These comments are available on the Department's Web site at: *http://www.dol.gov/ebsa/regs/cmt-1210-AB08a.html.*

investment information concerning non-registered plan designated investment alternatives and challenges faced by multi-vendor 403(b) plans that must obtain and compile data from vendors with different recordkeeping systems. Commenters suggested that the transition rule should be revised to be 120 or 180 days following the effective date of the 408(b)(2) regulation (rather than 120 days following the plan's applicability date). Commenters explained that tying the transition rule to the effective date of the 408(b)(2) regulation would avoid inconsistent treatment for non-calendar year plans under the proposed transition rule, which would, for example, result in a November 1 plan being unable to take full advantage of the proposed 120-day transition rule.

Based on its careful review of the comments and consideration of the arguments presented, the Department is amending the effective date of the 408(b)(2) regulation to be April 1, 2012. This is 3 months longer than the length of the extension in the proposal. As of publication of this notice in the **Federal Register**, the Department has not yet published a final 408(b)(2) regulation. To the extent the final regulation includes changes from the interim final rule, the Department agrees that covered service providers and plan fiduciaries would benefit from additional time to review such changes and make final modifications to their systems and disclosures. The Department wants to ensure that thorough and accurate disclosures, in compliance with the final 408(b)(2) regulation, are furnished to plan fiduciaries to help them carefully analyze plan service contracts and arrangements in compliance with their fiduciary duties under ERISA. Commenters generally requested an extension longer than 3 months. The Department, however, is not persuaded that such an extension is necessary under the circumstances. The Department intends to publish a final 408(b)(2) regulation in the **Federal Register** before the end of the year, and does not expect that the changes to the interim final rule are likely to require more additional time for compliance than is provided in this document. The Department also believes that a further delay in implementing the regulation is not in the best interest of responsible plan fiduciaries, plan administrators, and plan participants and beneficiaries. In the Department's view, delaying the effective date until April 1, 2012 strikes a balance between these competing considerations.

As proposed, and consistent with commenters' views, these final amendments will continue to align application of the rules so that the 408(b)(2) regulation will be effective prior to plans being required to furnish disclosures pursuant to the participant-level disclosure regulation. However, in response to commenters' concerns, the Department has modified the proposed transition rule for the participant-level disclosure regulation. First, the Department agrees with commenters that the transition rule should be tied to the effective date for the final 408(b)(2) regulation. This linkage will ensure that the 408(b)(2) regulation becomes effective first, and that all plans (regardless of whether they are calendar year plans) will be able to take advantage of the transition period following the 408(b)(2) regulation's effective date. Second, because the Department delayed the effective date of the 408(b)(2) regulation for an additional 3 months, and because the beginning of the transition period under the participant-level disclosure regulation's transitional rule will be correspondingly delayed, the Department is adopting a 60-day transition period for the participant level fee disclosure rule. Given the additional time (3 months) being provided to plan administrators because of the 408(b)(2) regulation's delayed effective date, the Department believes that a 60-day transition period following such delayed date for the participant level fee disclosure rule is sufficient given commenters' concerns. Accordingly, paragraph (j)(3)(i)(A) of the participant-level disclosure regulation now provides that the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investments must be furnished no later than the later of 60 days after the plan's applicability date or 60 days after the effective date of the 408(b)(2) regulation.

Finally, the Department also revised the transitional rule by adding a new subsection (j)(3)(i)(B) to provide guidance on when the quarterly disclosures required under paragraphs (c)(2)(ii) and (c)(3)(ii) of the participant-level disclosure regulation must first be furnished. These disclosures must be furnished no later than 45 days after the end of the quarter in which the initial disclosures (referred to in subsection (j)(3)(i)(A) of the transitional rule) are required to be furnished to participants and beneficiaries. The new subsection preserves ordinary sequencing of disclosures under the regulation by preventing the first quarterly disclosure from being due before the first initial disclosure.

The following example illustrates the new bifurcated transitional rule in paragraph (j)(3)(i)(A) and (B). As to calendar year plans, the participant-level disclosure regulation becomes applicable on January 1, 2012. Pursuant to subsection (A) of the final transitional rule, such plans must furnish their first set of initial disclosures (all disclosures other than disclosures required at least quarterly) no later than May 31, 2012, which is 60 days after the April 1, 2012 effective date of the 408(b)(2) regulation. Further, pursuant to subparagraph (B) of the transitional rule, the disclosures required by paragraphs (c)(2)(ii) and (c)(3)(ii) of the regulation (*e.g.,* the quarterly statement of fees/expenses actually deducted) would have to be furnished no later than August 14, 2012, which is the 45th day after the end of the second quarter (April–June) in which the initial disclosure was required.

A few commenters requested that the Department clarify when plans must comply with the revised 404(c) regulation's disclosures. The final amendments to the 404(c) regulation require, in part, that participants and beneficiaries be furnished: ''[t]he information required pursuant to 29 CFR 2550.404a–5'' (*i.e.,* the participant-level disclosure regulation).[5] In a footnote to the proposal's preamble, the Department stated that the amendments to the 404(c) regulation apply for plan years beginning on or after November 1, 2011 and that proposal would have no effect on the applicability of these amendments. Although the transition rule, finalized in this notice, does not itself apply to the amended 404(c) regulation, the Department confirms that plan administrators do not have to furnish the newly required information under the 404(c) regulation before such information must be delivered (subject to the final transition rule) under the participant-level disclosure regulation. Such information is ''required pursuant to'' the participant-level disclosure regulation only at such time(s) as it must first be furnished under such regulation.

It has been determined that this is not a significant rulemaking for purposes of E.O. 12866. In addition, the Department finds that the amendments in this document will not significantly affect the regulatory flexibility analyses issued in connection with the rules so amended. 75 FR 41629 (July 16, 2010); 75 FR 64934 (Oct. 20, 2010).

Pursuant to 5 U.S.C. 553(d)(3), the Department finds for good cause that in order to accomplish the purposes of

[5] 29 CFR 2550.404c–1(b)(2)(i)(B)(2).

these amendments, they must be effective before the current July 16, 2011, effective date of the interim final 408(b)(2) regulation (29 CFR 2550.408b–2(c), RIN 1210–AB08).

2. Electronic Delivery

Several commenters requested further guidance from the Department as to the standards for electronic delivery that will apply to disclosures furnished to participants and beneficiaries under the participant-level disclosure regulation. Commenters argued that whether, and the extent to which, these disclosures may be furnished electronically will significantly impact service providers' systems design and compliance efforts. Although the Department separately is pursuing a regulatory initiative to explore electronic delivery in the context of participant and beneficiary disclosures,[6] commenters do not believe that the Department will complete its broad review of this issue and publish final guidance as to the standards that will apply before plans will have to comply with the participant-level disclosure regulation. In the meantime, these commenters suggested that the Department extend to the participant-level disclosure regulation the guidance on the manner of delivery that was provided for pension benefit statements in Field Assistance Bulletin (FAB) 2006–03.[7]

The Department is carefully analyzing these comments as part of its broader review of public comments in response to its recent request for information concerning ERISA electronic delivery standards generally.[8] These issues, however, are beyond the scope of this rulemaking which is limited to delaying the compliance dates for the 408(b)(2) and participant-level disclosure regulations. Consistent with its statement in the preamble to the final participant-level disclosure regulation, the Department intends to provide guidance on this issue for purposes of the participant-level disclosure regulation in advance of the regulation's compliance date, so as to ensure appropriate notice for plans.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and Trustees.

For the reasons set forth in the preamble, the Department of Labor delays the effective date for the interim rule published on July 16, 2010 (75 FR 41600) from July 16, 2011 to April 1, 2012 and further amends 29 CFR part 2550 as follows:

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

■ 1. The authority citation for part 2550 continues to read as follows:

Authority: 29 U.S.C. 1135, sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. and Secretary of Labor's Order No. 6–2009, 74 FR 21524 (May 7, 2009). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a–2 also issued under sec. 657, Pub. L. 107–16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c–5 also issued under 29 U.S.C. 1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1). Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972. Sec. 2550.412–1 also issued under 29 U.S.C. 1112.

■ 2. Section 2550.404a–5 is amended by revising paragraph (j)(3)(i) to read as follows:

§ 2550.404a–5 Fiduciary requirements for disclosure in participant-directed individual account plans.

* * * * *

(j) * * *

(3) * * *

(i) (A) Notwithstanding paragraphs (b), (c) and (d) of this section, the initial disclosures required on or before the date on which a participant or beneficiary can first direct his or her investments must be furnished no later than the later of 60 days after such applicability date or 60 days after the effective date of 29 CFR 2550.408b–2(c).

(B) Notwithstanding paragraphs (b) and (c) of this section, the initial disclosures required under paragraphs (c)(2)(ii) and (c)(3)(ii) of this section must be furnished no later than 45 days after the end of the quarter in which the disclosure referred to in paragraph (j)(3)(i)(A) of this section was required to be furnished to participants and beneficiaries.

* * * * *

§ 2550.408b–2 [Amended]

■ 3. Section 2550.408b–2 is amended, in paragraph (c)(1)(xii), by removing the date ''July 16, 2011'' and adding in its place ''April 1, 2012''.

Signed at Washington, DC, this 12th day of July 2011.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 2011–18029 Filed 7–15–11; 8:45 am]

BILLING CODE 4510–29–P

[6] *See* 76 FR 19285 (April 7, 2011).

[7] *See* Field Assistance Bulletin No. 2006–03 (Dec. 20, 2006).

[8] 76 FR 19285.

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2011–0306]

RIN 1625–AA08

Special Local Regulations for Marine Events, Bogue Sound; Morehead City, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing Special Local Regulations for ''The Crystal Coast Grand Prix'' powerboat race, to be held on the waters of Bogue Sound, adjacent to Morehead City, North Carolina. This Special Local Regulation is necessary to protect spectators and vessels from hazards associated with powerboat races. This regulation will close a portion of the waters of Bogue Sound to vessel traffic during the boat race.

DATES: This rule is effective August 20–21, 2011.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2011–0306 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0306 in the ''Keyword'' box, and then clicking ''Search.'' This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail BOSN3 Joseph M. Edge, Coast Guard Sector North Carolina, Coast Guard; telephone 252–247–4525, e-mail *Joseph.M.Edge@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

Regulatory Information

On May 27, 2011, we published a notice of proposed rulemaking (NPRM) entitled Special Local Regulations for Marine Events, Bogue Sound; Morehead City, North Carolina in the **Federal Register** (76 FR 30887). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

On August 20–21, 2011 from 10 a.m. to 4 p.m. East Coast Extreme Corporation will sponsor ''The Crystal Coast Grand Prix'' powerboat race on the waters of Bogue Sound adjacent to Morehead City, North Carolina. This special local regulation is necessary to ensure the safety of vessels and spectators from hazards associated with the powerboat race. The Captain of the Port North Carolina has determined powerboat races in close proximity to watercraft and infrastructure pose significant risk to public safety and property. The likely combination of large numbers of recreational vessels, powerboats traveling at high speeds, and large numbers of spectators in close proximity to the water could easily result in serious injuries or fatalities. Establishing a special local regulation that prohibits vessels or persons from entering the race course and surrounding area will help ensure the safety of persons and property at this event and help minimize the associated risk.

The special local regulation will encompass the waters of Bogue Sound, adjacent to Morehead City from the southern tip of Sugar Loaf Island approximate position latitude 34°42′45″ N, longitude 076°42′48″ W, thence westerly to Morehead City Channel Daybeacon 7 (LLNR 38620), thence southwesterly along the channel line to Bogue Sound Light 4 (LLNR 38770), thence southerly to Causeway Channel Daybeacon 2 (LLNR 28720), thence southeasterly to Money Island Daybeacon 1 (LLNR 38645), thence easterly to Eight and One Half Marina Daybeacon 2 (LLNR 38685), thence easterly to the westernmost shoreline of Brant island approximate position latitude 34°42′36″ N, longitude 076°42′11″ W, thence northeasterly along the shoreline to Tombstone Point approximate position latitude 34°42′14″ N, longitude 076°41′20″ W, thence southeasterly to Morehead City Channel Lighted Buoy 23 (LLNR 29455), thence easterly to approximate position latitude 34°41′25″ N, longitude 076°41′22″ W, thence northerly along the shoreline to approximate position latitude 34°43′00″ N, longitude 076°41′25″ W, thence westerly to the North Carolina State Port Facility, thence westerly along the State Port to the southwest corner approximate position latitude 34°42′55″ N, longitude 076°42′12″ W, thence westerly to the southern tip of Sugar Loaf Island the point of origin. This regulated area encompasses the entire race course located on Bogue Sound near Morehead City, North Carolina. All geographic coordinates are North American Datum 1983 (NAD 83).

Discussion of Comments and Changes

There were no comments and no changes made.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will restrict access to the area, the effect of this rule will not be significant because the regulated area will be in effect for a limited time, from 10 a.m. to 4 p.m., on August 20–21, 2011. The Coast Guard will give advance notification via maritime advisories so mariners can adjust their plans accordingly, and the regulated area will apply only to the section of Bogue Sound adjacent to Morehead City. Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: The owners or operators of vessels intending to transit the specified portion of Bogue Sound from 10 a.m. to 4 p.m. on August 20–21, 2011.

This rule would not have a significant economic impact on a substantial number of small entities for the following reasons. This rule will only be in effect for six hours each day for two days total. The regulated area applies only to the section of Bogue Sound adjacent to Morehead City and traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander. Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

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.

Assistance for Small Entities

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

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

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires

Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h) and (35)(a), of the Instruction. This rule involves implementation of regulations within 33 CFR Part 100 that apply to organized marine events on the navigable waters of the United States that may have potential for negative impact on the safety or other interest of waterway users and shore side activities in the event area. This special local regulation is necessary to provide for the safety of the general public and event participants from potential hazards associated with movement of vessels near the event area. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233

■ 2. Add a temporary § 100.35T05–0306 to read as follows:

§ 100.35T05–0306 Special Local Regulation; Crystal Coast Grand Prix; Morehead City, NC.

(a) *Regulated area.* The following location is a regulated area: All waters of Bogue Sound, adjacent to Morehead City from the southern tip of Sugar Loaf Island approximate position latitude 34°42′45″ N, longitude 076°42′48″ W, thence westerly to Morehead City Channel Daybeacon 7 (LLNR 38620), thence southwesterly along the channel line to Bogue Sound Light 4 (LLNR 38770), thence southerly to Causeway Channel Daybeacon 2 (LLNR 28720), thence southeasterly to Money Island Daybeacon 1 (LLNR 38645), thence easterly to Eight and One Half Marina Daybeacon 2 (LLNR 38685), thence easterly to the westernmost shoreline of Brant island approximate position latitude 34°42′36″ N, longitude 076°42′11″ W, thence northeasterly along the shoreline to Tombstone Point approximate position latitude 34°42′14″ N, longitude 076°41′20″ W, thence southeasterly to Morehead City Channel Lighted Buoy 23 (LLNR 29455), thence easterly to approximate position latitude 34°41′25″ N, longitude 076°41′22″ W, thence northerly along the shoreline to approximate position latitude 34°43′00″ N, longitude 076°41″25″ W, thence westerly to the North Carolina State Port Facility, thence westerly along the State Port to the southwest corner approximate position latitude 34°42′55″ N, longitude 076°42′12″ W, thence westerly to the southern tip of Sugar Loaf Island the point of origin. All coordinates reference North American Datum 1983 (NAD 83).

(b) *Definitions:* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U.S. Coast Guard who has been designated by the Commander, Coast Guard Sector North Carolina.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector North Carolina with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* means all vessels participating in the ''The Crystal Coast Grand Prix'' powerboat race under the auspices of the Marine Event Permit issued to the event sponsor and

approved by Commander, Coast Guard Sector North Carolina.

(4) *Spectator* means all persons and vessels not registered with the event sponsor as participants or official patrol.

(c) *Special local regulations:* (1) The Coast Guard Patrol Commander may forbid and control the movement of all vessels in the vicinity of the regulated area. When hailed or signaled by an official patrol vessel, a vessel approaching the regulated area shall immediately comply with the directions given. Failure to do so may result in termination of voyage and citation for failure to comply.

(2) The Coast Guard Patrol Commander may terminate the event, or the operation of any support vessel participating in the event, at any time it is deemed necessary for the protection of life or property. The Coast Guard may be assisted in the patrol and enforcement of the regulated area by other Federal, State, and local agencies.

(3) Vessel traffic, not involved with the event, may be allowed to transit the regulated area with the permission of the Patrol Commander. Vessels that desire passage through the regulated area shall contact the Coast Guard Patrol Commander on VHF–FM marine band radio for direction. Only participants and official patrol vessels are allowed to enter the regulated area.

(4) All Coast Guard vessels enforcing the regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz) and channel 22 (157.1 MHz). The Coast Guard will issue marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) Enforcement period: This section will be enforced from 10 a.m. to 4 p.m. on August 20–21, 2011.

Dated: July 5, 2011.

T.M. Cummins,

Commander, U.S. Coast Guard, Acting Captain of the Port North Carolina.

[FR Doc. 2011–18043 Filed 7–18–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0536]

RIN 1625–AA11

Regulated Navigation Area; Chelsea Street Bridge Construction, Chelsea, MA

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule with request for comments.

SUMMARY: The United States Coast Guard is establishing a regulated navigation area (RNA) on the navigable waters of the Chelsea River under and surrounding the Chelsea Street Bridge (CSB) that crosses the Chelsea River between East Boston and Chelsea, Massachusetts. This temporary interim rule allows the Coast Guard to suspend all vessel traffic within the RNA for construction operations, both planned and unforeseen, that could pose an imminent hazard to vessels operating in the area. This rule is necessary to provide for the safety of life on the navigable waters during the construction of the Chelsea Street Bridge.

DATES: This rule is effective in the CFR on July 19, 2011 through May 31, 2012. This rule is effective with actual notice for purposes of enforcement on July 8, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0536 using any one of the following methods:

(1) *Federal e-Rulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

Documents indicated in this preamble as being available in the docket are part of docket USCG–2011–0536 and are available online by going to *http://www.regulations.gov,* inserting USCG–2011–0536 in the ''Keyword'' box, and then clicking ''Search.'' They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail MST1 David Labadie of the Waterways Management Division, U.S. Coast Guard Sector Boston; telephone 617–223–3010, e-mail *david.j.labadie@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

As this interim rule will be in effect before the end of the comment period, the Coast Guard will evaluate and revise this rule as necessary to address significant public comments.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0536), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an e-mail address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2011–0536'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail

and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change this rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0536'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting in connection with the public comment period for this interim rule. But you may submit a request for one using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**. Although they were not held specifically to solicit public comments on this interim rule, and were not announced in the **Federal Register**, the Coast Guard has held or participated in multiple locally announced informal waterway user meetings where waterway closures and restrictions were discussed, and we anticipate holding one or more additional informal meetings, with opportunity for public questions or comments, during the bridge construction. We will provide written summaries of any such meetings in the docket.

Regulatory Information

The Coast Guard is issuing this interim rule without prior **Federal Register** notice pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the need for waterway closures was not brought to the attention of the Coast Guard until April 5, 2011. Concerned that the initial waterway closures proposed by J.F. White Contracting Company might have a significant impact on waterway users, it was necessary for the Coast Guard to move quickly to protect public safety. There was insufficient time and therefore it was impracticable to issue an NPRM and conduct a prior notice and comment period. We held informal planning meetings at which the construction plans were presented to and discussed with waterway users; stakeholder comments and concerns were identified and many have been incorporated into this regulation. To view the stakeholder comments and concerns see the CSB meeting minutes in the docket. This rule is necessary to protect the safety of both the construction crew and the waterway users operating in the vicinity of the bridge construction zone. A delay or cancellation of the ongoing bridge maintenance in order to accommodate a full notice and comment period would be contrary to the public interest as it would delay necessary operations thus prolonging the time that construction barges and equipment would be in this location. Additionally, the dynamic nature of the construction process and multitude of construction vessels necessitate that all mariners navigate at a safe speed within the RNA in accordance with Rule 6 of the Inland Navigation Rules, as the barge and construction equipment configuration may change on a daily basis. In order to address any further public concerns, this rule is available for public comment until September 19, 2011. At that time the Coast Guard will publish an amended rule if necessary to address public concerns.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**, as immediate action is needed to protect vessels transiting the area from hazards imposed by construction barges and equipment on the Chelsea River under and surrounding the Chelsea Street Bridge, Chelsea, MA. Any delay in the effective date of this rule would be contrary to the public interest as immediate action is necessary to close the channel as needed from July 8, 2011 to May 31, 2012. These closures are necessary in order to protect vessels transiting in the area from hazards imposed by construction barges and equipment and to expedite the removal of the old Chelsea St. Bridge and construction of the new bridge and fender system.

Basis and Purpose

Under the Ports and Waterways Safety Act, the Coast Guard has the authority to establish RNAs in defined water areas that are determined to have hazardous conditions and in which vessel traffic can be regulated in the interest of safety. See 33 U.S.C. 1231 and Department of Homeland Security Delegation No. 0170.1.

The construction of the Chelsea Street Bridge involves large machinery and construction vessel operations above and in the navigable waters of the Chelsea River. The ongoing operations are, by their nature, hazardous and pose risks both to recreational and commercial traffic as well as the construction crew. In order to mitigate the inherent risks involved in the construction, it is necessary to control vessel movement through the area.

The purpose of this rule is to ensure the safety of waterway users, the public, and construction workers for the duration of the Chelsea Street Bridge construction from July 8, 2011 through May 31, 2012. The RNA will also protect vessels desiring to transit the area by ensuring that vessels are only permitted to transit when it is safe to do so.

Discussion of Rule

This action is intended to prohibit vessel traffic on a portion of the Chelsea River, when necessary for the safety of navigation, while construction equipment works in the channel on demolition of the existing bridge and construction of its replacement. The Coast Guard may close the area prescribed in this rule to all vessel traffic during any circumstance, planned or unforeseen, that poses an imminent threat to waterway users operating in the area. Complete waterway closures will be made with as much advance notice as possible.

The Coast Guard has discussed this project at length with the construction

contractor, J.F. White Contracting Company, to identify if the project can be completed without channel closures and, if possible, what impact that would have on the project timeline. Through these discussions, it became clear that while the majority of construction activities during the span of this project would not require waterway closures, there are certain tasks that can only be completed in the channel and will require closing the waterway. J.F. White issued a letter on April 5, 2011 detailing the required channel work phases that will need waterway closures.

There are currently two planned and ten proposed channel closure periods which are outlined below:

The first planned closure period will be from September 28–30, 2011, and will coincide with the launching of the new bridge truss.

The second planned closure will be from October 7–9, 2011 and will coincide with the concrete bridge deck placement.

There will be four proposed closure periods on dates to be determined between October and December 2011 for the installation of new bulkheads along both sides of the Chelsea River.

The fifth and sixth proposed closure periods will take place in January 2012 for the demolition of the fendering system and the dredging on the Chelsea, MA side of the Chelsea River. These will be for 15-day periods and will be intermittent closures.

The seventh proposed closure period will take place in February 2012 for the installation of new aids to navigation on the Chelsea, MA side of the Chelsea River and will be a 7-day period with intermittent closures.

The eighth and ninth proposed closure periods will take place in February and March of 2012 for the demolition of the fendering system and the dredging on the E. Boston, MA side of the Chelsea River. These will be for 15-day periods and will be intermittent closures.

The tenth proposed closure period will take place in March 2012 for the installation of new aids to navigation on the E. Boston, MA side of the Chelsea River and will be a 7-day period with intermittent closures.

The project is expected to be complete in April 2012 but this rule will be made effective through the end of May 2012 to account for any unforeseen construction delays.

On a case-by-case basis, depending on the construction schedule, J.F. White may request a waterway closure on various dates from July 8, 2011 through May 31, 2012. As discussed below, J.F White will notify the Coast Guard of planned activities as soon as possible; preferably four weeks in advance of any event.

The Coast Guard will notify the maritime community of planned waterway closure dates via Marine Information Broadcasts, Coast Guard Local Notices to Mariners and Marine Safety Information Bulletins.

Closure periods listed above will be made available to J. F. White Contracting Company with the understanding that the construction schedule as well as weather and tide conditions may not allow them to use all closures. For that reason, J. F. White will notify the Coast Guard of planned activities as soon as possible and preferably four weeks in advance. Closure periods similar to those outlined above should be expected throughout the duration of this rule. Additionally, during the winter and into the early spring of 2012 there will certain tasks (i.e. bulkhead and Aids to Navigation installation) that will require a more than 24-hour closure as well as several 15-day long, 12 hour closures to complete the demolition of fender systems and dredging operations. Once these closure periods are identified they will be published with the widest distribution among the affected segments of the public. Such means of notification will include, but is not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. Entry into this RNA during a closure is prohibited unless authorized by the Sector Boston Captain of the Port (COTP). In the event of an emergency all construction equipment shall be removed from the channel to allow for emergency vessels to pass (i.e., Fire Rescue Boat, Marine Police Boat, or Environmental Response Boat).

The implementation of this RNA does not negate the fact that the Inland Rules of the Road as found in 33 CFR part 84 (subchapter E) must be strictly adhered to. Mariners are strongly urged to monitor VHF channel 13 when transiting the area and to communicate with fellow mariners to facilitate movement and/or passing arrangements within the channel.

Any violation of the RNA described herein is punishable by, among others, civil and criminal penalties, in rem liability against the offending vessel, and the initiation of suspension or revocation proceedings against Coast Guard-issued merchant-mariner credentials.

The Sector Boston Captain of the Port will cause notice of enforcement, suspension of enforcement, or closure of this RNA to be made by all appropriate means to affect the widest distribution among the affected segments of the public. Such means of notification will include, but is not limited to, Notice of Enforcement published in the **Federal Register,** Broadcast Notice to Mariners and Local Notice to Mariners.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Executive Order 12866 and Executive Order 13563

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on substantial number of small entities. This rule will affect the following entities some of which may be small entities: The owners or operators of marinas, charter fishing vessels and commercial fishing vessels who intend to transit in those portions of the Chelsea River between July 8, 2011 and May 31, 2012.

This regulation may have some impact on the public, but the potential impact will be minimized for the following reasons: The area of the closure is not likely to be transited by pleasure craft and they will be able to operate on all other portions of the Chelsea River not covered by the RNA. Additionally, many parties that have the potential to be affected have been involved in the discussions and have made plans to work around the closure times. Marine radio broadcasts informing the public of any closures made by the RNA will be made before,

during, and at the conclusion of the RNA closure enforcement periods.

Although the RNA will apply to the entire width of the river, under and surrounding the Chelsea Street Bridge traffic will be allowed to pass through the area with the permission of the COTP. Before the effective period, we will issue maritime advisories widely available to users of the river.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. If this rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call LT Judson Coleman, Prevention Department, Sector Long Island Sound, at 203–468–4596.

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

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

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

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishing of a regulated navigation area and therefore falls within the categorical exclusion noted above. An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**. Any comments received concerning environmental impacts will be considered and changes made to the environmental analysis checklist and categorical exclusion determination as appropriate.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T01–0536 to read as follows:

§ 165.T01–0536 Regulated Navigation Area; Chelsea Street Bridge Construction, Chelsea, MA.

(a) *Location.* The following area is a regulated navigation area: All navigable waters of the Chelsea River in Chelsea, MA, from surface to bottom, within the following points (NAD 83): from 42°23.10′ N, 071°01.26′ W; thence to 42°23.15′ N, 071°01.20′ W; thence to 42°23.10′ N, 071°01.17′ W; thence to 42°23.07′ N, 071°01.24′ W; thence back to the first point.

(b) *Regulations.* (1) The general regulations contained in 33 CFR 165.10, 165.11, and 165.13 apply.

(2) In accordance with the general regulations, entering into, transiting through, mooring or anchoring within this regulated area is prohibited unless authorized by the Captain of the Port (COTP) Boston.

(3) All persons and vessels must comply with the Coast Guard Captain of the Port or the designated on-scene patrol personnel.

(4) Upon being hailed by a U.S. Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel must proceed as directed.

(5) Vessels may request permission to enter the zone during periods of enforcement on VHF–16 or via phone at 617–223–5757.

(6) All other relevant regulations, including but not limited to the Rules of the Road (33 CFR part 84—Subchapter E, Inland Navigational Rules) remain in effect within the regulated area and should be strictly followed at all times.

(c) *Effective Period.* This rule is effective from July 8, 2011 to 11:59 p.m. on May 31, 2012.

(d) *Enforcement Period.* (1) This regulated navigation area is enforceable 24 hours a day from July 8, 2011 until May 31, 2012.

(2) *Notice of suspension of enforcement.* If enforcement is suspended, the COTP will cause a notice of the suspension of enforcement by all appropriate means to affect the widest publicity among the affected segments of the public. Such means of notification may also include, but are not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. Such notification will include the date and time that enforcement is suspended as well as the date and time that enforcement will resume.

(3) *Notice of waterway closure.* In the event of a complete waterway closure, the COTP will make advance notice of the closure by all means available to affect the widest public distribution including, but not limited to, Broadcast Notice to Mariners and Local Notice to Mariners. Such notification will include the date and time of the closure as well as the date and time that normal vessel traffic can resume.

(4) Violations of this regulated navigation area may be reported to the COTP Sector Boston, at 617–223–5757 or on VHF–Channel 16.

Dated: July 7, 2011.

J.B. McPherson,

Captain, U.S. Coast Guard, Acting Commander, First Coast Guard District.

[FR Doc. 2011–18044 Filed 7–18–11; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0595]

Columbia Unlimited Hydroplane Races; Kennewick, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Special Local Regulation for the Columbia Unlimited Hydroplane Races. This regulation which restricts navigation and anchorage on the Columbia River for six days at the end of July. This action is necessary to ensure the safety of the vessels involved in the Annual Kennewick, Washington, Columbia Unlimited Hydroplane Races (Water Follies). During the enforcement period, no person or vessel may operate their vessels in this area without permission from the on scene Patrol Commander.

DATES: The regulations in 33 CFR 100.1303 will be enforced from Tuesday, July 26, through Sunday, July 31, 2011 from 8:30 a.m. until the last race is completed each day at approximately 7:30 p.m., unless sooner terminated by the Patrol Commander.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail BM1 Silvestre Suga III, Coast Guard Marine Safety Unit Portland; telephone 503–240–9327, e-mail *Silvestre.G.Suga@USCG.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the regulations found in 33 CFR 100.1303 restricting regular navigation and anchoring activities on the Columbia River during the periods specified in the **DATES** section.

Under the provisions of 33 CFR 100.1303, no person or vessel may enter or remain in the area without permission of the Captain of the Port, Columbia River or his designated on-scene Patrol Commander. Persons or vessels wishing to enter the area may request permission to do so from the on-scene Captain of the Port representative via VHF Channel 16 or 13. The Coast Guard may be assisted by other Federal, State, or local enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 165.1318 and 5 U.S.C. 552 (a). In addition to this notice in the **Federal Register** , the Coast Guard will provide the maritime community with notification of these enforcement periods via the Local Notice to Mariners.

Dated: July 5, 2011.

L.R. Tumabarello,

Captain, U.S. Coast Guard, Acting Captain of the Port, Sector Columbia River.

[FR Doc. 2011–18045 Filed 7–18–11; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2008–0635; FRL–9437–8]

Approval and Promulgation of Air Quality Implementation Plans; Louisiana; Section 110(a)(2) Infrastructure Requirements for 1997 8-Hour Ozone and Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: EPA is approving submittals from the state of Louisiana pursuant to the Clean Air Act (CAA or Act) that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 1997 8-hour ozone and 1997 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standards). We are determining that the current Louisiana State Implementation Plan (SIP) meets the following infrastructure elements which were subject to EPA's completeness findings pursuant to CAA section 110(k)(1) for the 1997 8-hour ozone

NAAQS dated March 27, 2008, and the 1997 $PM_{2.5}$ NAAQS dated October 22, 2008: 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). EPA is also approving SIP revisions that modify Louisiana's Prevention of Significant Deterioration (PSD) SIP for the 1997 8-hour ozone NAAQS to include nitrogen oxides (NO_X) as an ozone precursor. This action is being taken under section 110 and part C of the Act.

DATES: This rule is effective on August 18, 2011.

ADDRESSES: EPA established a docket for this action under Docket ID No. EPA–R06–OAR–2008–0635. All documents in the docket are listed at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 Freedom of Information Act (FOIA) Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. Please make the appointment at least two working days in advance of your visit. There is a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Paige, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–6521; fax number 214–665–6762; e-mail address *paige.carrie@epa.gov.*

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

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I. Background

The background for today's actions is discussed in detail in our April 18, 2011 proposal to approve revisions to the Louisiana SIP (76 FR 21682). In that action, we proposed to find the current Louisiana SIP meets the provisions of the CAA sections 110(a)(1) and 110(a)(2) (i.e., 110(a)(2)(A)–(C), (D)(ii), (E)–(H), and (J)–(M)) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. We also proposed to approve four revisions to the Louisiana PSD SIP that address NO_X as a precursor to ozone.

Our April 18, 2011 proposal provides a detailed description of the revisions and the rationale for EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for these actions closed on May 18, 2011. See the Technical Support Document (TSD) and our proposed rulemaking at 76 FR 21682 for more information.

II. Additional Background Information

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and $PM_{2.5}$ NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on the infrastructure SIP submissions.[1] The commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM''); and (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''). EPA notes that there are two other substantive issues for which EPA likewise stated that it would address the issues separately: (i) Existing provisions for minor source new source review programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (''minor source NSR''); and (ii) existing provisions for Prevention of Significant Deterioration programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). In light of the comments, EPA now believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be explained in greater depth with respect to these issues. EPA notes that we did not receive comments on these issues in response to our Louisiana proposal (76 FR 21682), but because of the concern raised in the context of action on other state infrastructure SIP submissions, EPA feels it important to further clarify our proposal.

EPA intended the statements in the proposals concerning these four issues merely to be informational, and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a reapproval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that ''in this rulemaking, EPA is not proposing to approve or disapprove any existing State provisions with regard to excess emissions during SSM of operations at facilities.'' EPA further explained, for informational purposes, that ''EPA plans to address such State regulations in the future.'' EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and $PM_{2.5}$ NAAQS should not be construed as explicit or implicit reapproval of any existing provisions that relate to these four substantive issues.

Unfortunately, the commenters and others evidently interpreted these

[1] See, Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA–R05–OAR–2007–1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issue in the context of the infrastructure SIPs. This was not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs, and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)'' and that these SIPS are to provide for the ''implementation, maintenance, and enforcement'' of such NAAQS. Section 110(a)(2) includes a list of specific elements that ''[e]ach such plan'' submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as ''infrastructure SIPs.'' This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as ''nonattainment SIP'' submissions required to address the nonattainment planning requirements of part D, ''regional haze SIP'' submissions required to address the visibility protection requirements of CAA section 169A, new source review permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.[2] Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.[3]

Notwithstanding that section 110(a)(2) states that ''each'' SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).[4] This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general ''infrastructure SIP'' for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter ''interstate transport'' provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.[5] This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state's SIP. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.[6]

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.,* the PSD requirement applicable in attainment areas. Nonattainment SIPs required by part D also would not need

[2] For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

[3] For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state's SIP contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See, e.g., ''Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule,'' 70 FR 25162 (May 12, 2005) (defining, among other things, the phrase ''contribute significantly to nonattainment'').

[4] See, e.g., Id., 70 FR 25162, at 63–65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

[5] EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. See, ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I–X, dated August 15, 2006.

[6] For example, implementation of the 1997 $PM_{2.5}$ NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements ''as applicable.'' In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 $PM_{2.5}$ NAAQS.[7] Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the ''infrastructure'' elements for SIPs, which it further described as the ''basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.'' [8] As further identification of these basic structural SIP requirements, ''attachment A'' to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended ''to constitute an interpretation of'' the requirements, and was merely a ''brief description of the required elements.'' [9] EPA also stated its belief that with one exception, these requirements were ''relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.'' [10] For the one exception to that general assumption, however, *i.e.,* how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS, EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 $PM_{2.5}$ NAAQS, EPA assumed that each State would work with its corresponding EPA regional office to refine the scope of a State's submittal based on an assessment of how the requirements of section 110(a)(2) should reasonably apply to the basic structure of the State's SIP for the NAAQS in question.

Significantly, the 2007 Guidance did not explicitly refer to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus, EPA's proposals mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions.

EPA believes that this approach to the infrastructure SIP requirement is reasonable, because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of ''implementation, maintenance, and enforcement'' of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 $PM_{2.5}$ NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a ''SIP call'' whenever the Agency determines that a state's SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.[11] Section 110(k)(6) authorizes EPA to correct

[7] See, ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I–X, dated October 2, 2007 (the ''2007 Guidance''). EPA issued comparable guidance for the 2006 $PM_{2.5}$ NAAQS entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I–X, dated September 25, 2009 (the ''2009 Guidance'').

[8] Id., at page 2.

[9] Id., at attachment A, page 1.

[10] Id., at page 4. In retrospect, the concerns raised by commenters with respect to EPA's approach to some substantive issues indicates that the statute is not so ''self explanatory,'' and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

[11] EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, ''Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,'' 74 FR 21639 (April 18, 2011).

errors in past actions, such as past approvals of SIP submissions.[12] Significantly, EPA's determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency's subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director's discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.[13]

III. What action is EPA taking?

The EPA is approving the Louisiana SIP submittals that identify where and how the 14 basic infrastructure elements are in the EPA-approved SIP as specified in section 110(a)(2) of the Act. We are determining that the following section 110(a)(2) elements are contained in the current Louisiana SIP: emission limits and other control measures (section 110(a)(2)(A)); ambient air quality monitoring/data system (section 110(a)(2)(B)); program for enforcement of control measures (section 110(a)(2)(C)); international and interstate pollution abatement (section 110(a)(2)(D)(ii); adequate resources (section 110(a)(2)(E)); stationary source monitoring system (section 110(a)(2)(F)); emergency power (section 110(a)(2)(G)); future SIP revisions (section 110(a)(2)(H)); consultation with government officials (section 110(a)(2)(J)); public notification (section 110(a)(2)(J)); PSD and visibility protection (section 110(a)(2)(J)); air quality modeling/data (section 110(a)(2)(K)); permitting fees (section 110(a)(2)(L)); and consultation/participation by affected local entities (section 110(a)(2)(M)).

In conjunction with our determination that the Louisiana SIP meets the section 110(a)(1) and (2) infrastructure SIP elements listed above, we are also approving four severable portions of two SIP revisions submitted by the LDEQ to EPA on December 20, 2005 and November 9, 2007. These portions contain rule revisions by LDEQ to (1) regulate NO_X emissions in its PSD permit program as a precursor to ozone; (2) add NO_X to the PSD definitions for *Major Modification* and *Major Stationary Source;* 3) under the PSD definition for *Significant,* add the emission rate for NO_X, as a precursor to ozone, as 40 tons per year (tpy); and 4) under the PSD requirements, allow for an exemption with respect to ambient air quality monitoring data for a source with a net emissions increase less than 100 tpy of NO_X. At this time, EPA is not taking action on other portions of the December 20, 2005 and November 9, 2007 SIP revisions submitted by LDEQ; EPA intends to act on the other revisions at a later time.

IV. Comments

We received one comment letter on the proposed rulemaking. The comment letter is available for review in the docket for this rulemaking. The comment letter came from the Tulane Environmental Law Clinic, on behalf of the Louisiana Environmental Action Network (LEAN, hereinafter referred to as ''the commenter'').

Generally, the commenter's concerns relate to whether EPA's approval of Louisiana's infrastructure SIP submissions are in compliance with section 110(a)(2)(E) and 110(a)(2)(L) of the CAA, and whether EPA's approval is arbitrary and capricious in finding the State has provided necessary assurances in compliance with the CAA's adequate funding and personnel requirements. To the extent comments 1 through 4 address adequate funding for Louisiana's Title V program with respect to elements 110(a)(2)(C), D(ii), (E), and (L), the commenter addresses issues that are subject to statutory and regulatory evaluation beyond the statutory scope of this rulemaking. Section 110(a)(2) falls under Title I of the CAA and governs the implementation, maintenance, and enforcement of the NAAQS, in this instance 1997 ozone and 1997 $PM_{2.5}$, through the federally approved SIP. Section 110 and 40 CFR part 51 also provide mechanisms for programmatic remedies with respect to the SIP. Furthermore, Title I addresses Minor and Major New Source Review SIP preconstruction permits. The Title V program, by contrast, governs operating permits and is addressed by CAA sections 502 through 507. Any evaluation of the Title V program and any consequent programmatic remedies must be done pursuant to CAA section 502 and 40 CFR part 70. The scope of this action is limited to determining whether the Louisiana SIP meets certain infrastructure requirements of CAA 110(a)(2) with respect to the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.[14] A summary of the comments and EPA's responses are provided below.

Comment 1: The commenter states that because the record contains no evidence of adequate funding, EPA cannot approve Louisiana's infrastructure SIP. The commenter also states that EPA's approval of various Title I and Title V revisions to Louisiana's permit fee system is more than 15 years out of date and therefore cannot support a finding that Louisiana has adequate personnel and funding to carry out its program today. The commenter also states that Louisiana's fee average is less than the presumptive minimum set out by Title V of the CAA under section 502(b)(3)(B)(i) and (v). The commenter further states that it would be unlawful for EPA to approve Louisiana's infrastructure SIP submissions without specifically considering LDEQ's annual reviews of their Fee Schedule as required by the Louisiana Administrative Code. The commenter also states that EPA cannot lawfully conclude Louisiana can adequately implement its program for less than half of EPA's presumptive fee based on the record which does not include Louisiana's annual reviews of their fees.

Response: We disagree with the commenter's statement that the record contains no evidence of adequate funding. Our TSD was posted in the docket for this rulemaking on April 18, 2011, which is the date the rulemaking was published in the **Federal Register**. The TSD evaluates where and how the Louisiana SIP addresses each of the section 110(a)(2) infrastructure elements, including 110(a)(2)(E), which begins on page 12 of the TSD. Within the TSD section evaluating 110(a)(2)(E), we include the various funds the state

[12] EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See, ''Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,'' 75 FR 82536 (Dec. 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See, e.g., 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

[13] EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director's discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See, e.g., 75 FR 42342 at 42344 (July 21, 2010) (proposed disapproval of director's discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

[14] Region 6 intends to evaluate Louisiana's Title V program in fiscal year 2012, pursuant to the statutory and regulatory procedure in CAA section 502 and 40 CFR part 70 that are separate from the procedures in CAA section 110 and 40 CFR part 51. This evaluation would be outside the programmatic scope of section 110 and 40 CFR part 51 evaluated here.

receives to support the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.

Section 110(a)(2)(E) requires that the state provide necessary assurances that it will have adequate funding under state law to carry out the SIP. As cited in our TSD, to address adequate funding, Louisiana statute charges the LDEQ with preparing and developing the SIP, and provides the secretary of the LDEQ with the powers and duties to '' * * * receive and budget duly appropriated monies and to accept, receive, and administer grants or other funds or gifts from public and private agencies, including the federal government, to carry out the provisions and purposes of this Subtitle'' (LA RS 30:2011.D.10). As cited in our TSD, these state statute-assured funds are supplemented by federal funds, including CAA section 103 and section 105 grants. Consequently, there are additional monetary sources, including Louisiana's Environmental Trust Fund monies provided for under LA RS 30:2015, which contribute to Louisiana's ability to provide adequate personnel and funding to implement the SIP for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.

Funding necessary to implement the SIP, as discussed prior in this Response and in the TSD, is provided for pursuant to section 110(a)(2)(E) by Louisiana state statute and various sources of funding. While Louisiana's various permitting fee system and revisions were approved into the SIP over a decade ago, the rules approved into the Louisiana SIP continue today to mandate Major and Minor NSR SIP preconstruction permitting application and annual maintenance fees pursuant to section 110(a)(2)(E) and (L). EPA's previous SIP approvals, as contained within the record and cited to by the commenter, include required fees as described by 110(a)(2)(E) and (L).

The presumptive $25.00 fee minimum under CAA section 502(b)(3) the commenter refers to is part of Title V, which as previously stated in Section IV, second paragraph, is subject to evaluation under different statutory and regulatory mechanisms provided for outside the SIP parameters for evaluation and remedies under CAA section 110 and 40 CFR part 51.

Section 110(a)(2) does not require a specific quantitative metric or methodology for determining adequate resources. The commenter also did not point to specific program deficiencies or implementation issues due to the perceived lack of resources. As described in our proposal, TSD, and previously in this response, EPA's evaluation and approval of Louisiana's fee system and resources is based, in part, upon various sources of funding, state statutes and rules pursuant to section 110(a)(2), and LDEQ's fulfillment of grant obligations. As explained in the TSD, section 105 grants provide monies to help support the foundation of the State's air quality program, including air monitoring, enforcement and SIP development. States are required to provide matching monies to receive their grant and EPA evaluates the performance of the State each year. In fiscal year 2010, Louisiana successfully completed all of their air program obligations as called for under the section 105 grant with some minor exceptions.[15] EPA noted no significant deficiencies thus indicating that LDEQ has sufficient resources to implement its SIP. For example, as described in our proposal and TSD, apart from the grant review, Louisiana's statewide air quality surveillance network as required by section 110(a)(2)(B) undergoes annual review and EPA's most recent approval of this monitoring network dates January 12, 2011. Therefore, we disagree that the record does not support a finding of adequate resources. The fact that the fee requirement that provides the basis for some of these resources was approved by EPA some time ago does not change this conclusion.

Furthermore, we disagree with the commenter's statement that the record does not support a finding of adequate resources solely because the annual fee review is absent from the record. In response to the commenter's concerns, LDEQ explained their fee review process and stated that the fee review is conducted as part of the budget process and essentially insures that sufficient fees are collected to pay for the staff associated with new source review permitting.[16] Though evaluation of the annual fee review was not part of the proposal for this action, EPA's evaluation and approval of Louisiana's fee system and resources under sections 110(a)(2)(L) and 110(a)(2)(E) is based, in part, upon various sources of funding, state statutes and rules pursuant to section 110(a)(2), and LDEQ's fulfillment of grant obligations as described in the proposal, TSD, the supplemental TSD, and this response. In addition, on September 9, 2010, the EPA determined that the Baton Rouge moderate 8-hour ozone nonattainment area (BRNA) had attained the 1997 8-hour ozone NAAQS (75 FR 54778). On August 31, 2010, the state submitted a request to EPA to redesignate the BRNA to attainment and EPA is reviewing that submission in a separate action. This submission was not statutorily required under the Act and was resource intensive for the LDEQ. This exercise provides additional support that the state has adequate resources to comply with the enforceable emission limitations and other control measures requirement of 110(a)(2)(A).

In sum, the record does support a finding of adequate resources. As discussed in the record for this action, the State has the statutory authority to receive monies. The State does, in fact, collect various fees, revenues and federal grants. Section 110 does not provide a specific methodology for determining the adequacy of resources. The commenter does not specify deficiencies or implementation problems. Our reasons for finding that the Louisiana SIP meets section 110(a)(2)(E) for adequate resources for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS are reiterated in our response above, and described in the proposed rulemaking (76 FR 21682) and the TSD. The fact that the fee requirement that provides for some of these resources was approved some time ago does not change this conclusion.[17] Insofar as the commenter states EPA cannot lawfully conclude LDEQ can adequately implement its program for less than half of EPA's presumptive fee, the presumptive fee the commenter is referring to is the Title V presumptive fee. Evaluation of this presumptive fee minimum must be conducted under different statutory and regulatory mechanisms provided for outside the SIP parameters for evaluation and remedies under CAA section 110 and 40 CFR part 51.

Comment 2: Inflation alone shows that EPA cannot rely on its 1995 approval.

Response: The 1995 approval the commenter refers to is found at 60 FR 47296, and was approved pursuant to section 502(b)(3) of the Act and 40 CFR 70.9, the regulations implementing Title V. Title V is not part of the federally approved SIP, and as previously explained in this rulemaking, the mechanism for evaluating the Title V program is legally outside the scope of this rulemaking. The scope of this action is limited to determining whether the existing Louisiana SIP meets certain

[15] See Supplemental TSD for the LDEQ 2010 Air Program End-of-Year Report, in the docket for this rulemaking.

[16] Per communication with Bryan Johnston, LDEQ, dated June 27, 2011; see the Supplemental TSD.

[17] See Supplemental TSD for revisions to the Fee System of the Louisiana Air Quality Control Programs submitted by Bryan Johnston, LDEQ. These revisions were not submitted to EPA for approval into the SIP.

infrastructure requirements of CAA 110(a)(2) with respect to the 1997 ozone and 1997 $PM_{2.5}$ NAAQS.

Comment 3: Louisiana's program will need increased resources to achieve attainment in expanded sulfur dioxide (SO_2) and NO_X non-attainment areas.

Response: The scope of this action is limited to determining whether the Louisiana SIP meets the requirements of CAA 110(a)(2) with respect to the 1997 ozone and 1997 $PM_{2.5}$ NAAQS in attainment areas. We will evaluate whether or not the Louisiana SIP meets the requirements of section 110(a)(2) with respect to the SO_2 and NO_2 standards in one or more separate rulemaking actions.[18]

Comment 4: EPA's proposed approval ignores a 2002 audit report by the EPA's Inspector General, which concluded that Louisiana's average fee of $19.00 per ton is well below the EPA-determined presumptive minimum amount of $35.00 to adequately run a state Title V program.

Response: The audit report referred to by the commenter wholly addresses the Louisiana Title V program and thus is outside the legal parameters of evaluating the Louisiana SIP in meeting the requirements of section 110(a)(2) of the Act with respect to the 1997 ozone and 1997 $PM_{2.5}$ NAAQS. Any evaluation of the Title V program must be done pursuant to the procedural mechanisms in CAA section 502 and 40 CFR part 70.

Comment 5: The commenter states Louisiana's March 24, 2011 (supplemental) certification letter does not list permitting fees as an area of compliance. EPA must evaluate the adequacy of LDEQ's plan, and there is nothing in the record to support a finding that LDEQ's resources are sufficient to run its program.

Response: The March 24, 2011 letter from LDEQ was not intended to replace the December 11, 2007 and January 7, 2008 certification letters, and the March 2011 letter states that it clarifies and amends the prior two certifications. In its January 7, 2008 certification submitted to EPA, Louisiana listed permitting fees as an area of compliance. We therefore disagree with the commenter that the State did not certify Major and Minor NSR SIP preconstruction permitting fees as an area of compliance. EPA evaluated the Louisiana SIP in the April 18, 2011 proposal and TSD, and this evaluation is based on the two certification letters submitted by the state, dated December 11, 2007 and January 7, 2008, and the supplemental certification letter dated March 24, 2011.

Major and Minor NSR SIP preconstruction permitting application and annual maintenance fees and adequate resources sufficient to implement the Louisiana SIP pursuant to sections 110(a)(2)(E) and 110(a)(2)(L) are provided for under the EPA-approved SIP, state statute, and augmented by other sources of funding as described in EPA's Response to Comment 1 of this final action and in the TSD.

The commenter does not specify where Louisiana might be failing to implement any portions of the 1997 ozone and 1997 $PM_{2.5}$ NAAQS SIP, thus we have no specific basis of evaluation or point of reference to evince support of the commenter's allegations of inadequate resources with regards to Louisiana's SIP. Our reasons for finding that the Louisiana SIP meets section 110(a)(2)(E) for adequate resources for the 1997 ozone and 1997 $PM_{2.5}$ NAAQS are reiterated in our response above,[19] and described in the proposed rulemaking (76 FR 21682) and the TSD.

V. Final Action

We are approving the submittals provided by the State of Louisiana to demonstrate that the Louisiana SIP meets the following requirements of Section 110(a)(1) and (2) of the Act:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Program for enforcement of control measures (110(a)(2)(C) of the Act);

Interstate Transport (110(a)(2)(D)(ii) of the Act);

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Prevention of significant deterioration and visibility protection (110(a)(2)(J) of the Act);

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

EPA is also approving the following revisions to 33 LAC 5–509, submitted by LDEQ on December 20, 2005 and November 9, 2007:

1. The 2005 non-substantive recodification of the definition for *Major Modification* subsection 2 to subsection *b,* and the 2007 substantive change adding NO_X to the definition of *Major Modification.*

2. The 2005 non-substantive recodification at of the definition for *Major Stationary Source* at subsection 4 to subsection *d,* and the 2007 substantive change adding NO_X to the definition of *Major Stationary Source.*

3. The 2005 non-substantive recodification of the first paragraph of the definition for *Significant* at subsection 1 to subsection *a,* and the 2007 substantive change adding NO_X as a precursor to the table's criteria and other pollutants listing for ozone.

4. The 2005 non-substantive recodification of the first paragraph of subsection I.8 to subsection *I.5,* and the 2007 substantive change allowing for an exemption with respect to ozone monitoring for a source with a net emissions increase less than 100 tpy of NO_X.

EPA is approving these actions in accordance with section 110 of the Act and EPA's regulations and consistent with EPA guidance.

VI. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

[18] The commenter incorrectly refers to a ''NO_X standard.'' EPA assumes the commenter is referring to the NO_2 standard announced on February 9, 2010 (75 FR 6474).

[19] Response to Comment 1.

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: June 30, 2011.

Al Armendariz,

Regional Administrator, Region 6.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart T—Louisiana

■ 2. Section 52.970 is amended:

■ a. In paragraph (c) by revising the entry for Section 509 under ''Chapter 5 Permit Procedures''.

■ b. In paragraph (e) by adding a new entry for ''Infrastructure for the 1997 Ozone and 1997 $PM_{2.5}$ NAAQS'' at the end of the second table in paragraph (e) entitled ''EPA Approved Louisiana Nonregulatory Provisions and Quasi-Regulatory Measures''.

The amendments read as follows:

§ 52.970 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED LOUISIANA REGULATIONS IN THE LOUISIANA SIP

State citation	Title/subject	State approval date	EPA approval date	Comments
*	*	*	*	* * *
Section 509	Prevention of Significant Deterioration.	2/20/1995	10/15/1996, 61 FR 53639	The following revisions approved by the State on 12/20/2005 and 9/20/2006 are EPA approved on 7/19/2011, [Insert FR page number where document begins]: (a) Section 509(B)—Only the revisions to recodify and add NO_X to the definitions of *Major Modification* and *Major Stationary Source;* and only the revisions to recodify and add NO_X as a precursor to the definition of *Significant;* (b) Section 509(I)—Only the revisions to the table under I.5(a).
*	*	*	*	* * *

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(e) * * *

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EPA APPROVED LOUISIANA NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
*	* *	*	*	* *
Infrastructure for the 1997 Ozone and 1997 $PM_{2.5}$ NAAQS.	Statewide	12/11/2007 1/7/2008 3/24/2011	7/19/2011, [Insert FR page number where document begins].	Approval for CAA sections 110(a)(2)(A), (B), (C), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

[FR Doc. 2011–18061 Filed 7–18–11; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0289; FRL–9440–1]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Regional Haze State Implementation Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the Delaware Regional Haze Plan, a revision to the Delaware State Implementation Plan (SIP) addressing Clean Air Act (CAA) requirements and EPA's rules for states to prevent and remedy future and existing anthropogenic impairment of visibility in mandatory Class I areas through a regional haze program. EPA is also approving this revision since it meets the requirements of 110(a)(2)(D)(i)(II) and 110(a)(2)(J), relating to visibility protection for the 1997 8-Hour Ozone National Ambient Air Quality Standard (NAAQS) and the 1997 and 2006 fine particulate matter ($PM_{2.5}$) NAAQS.

DATES: *Effective Date:* This final rule is effective on August 18, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0289. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Jacqueline Lewis, (215) 814–2037, or by e-mail at *lewis.jacqueline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On May 13, 2011, (76 FR 27973) EPA published a notice of proposed rulemaking (NPR) for the State of Delaware. The NPR proposed approval of Delaware's regional haze plan for the first implementation period, through 2018. EPA proposed to approve this revision since it assures reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas for the first implementation period. This revision also meets the requirements of 110(a)(2)(D)(i)(II) and 110(a)(2)(J), relating to visibility protection for the 1997 8-Hour Ozone NAAQS and the 1997 and $PM_{2.5}$ NAAQS. An explanation of the CAA's visibility requirements and EPA regional haze rule as they apply to Delaware and EPA's rationale for approving this SIP revision was provided in the NPR and will not be restated here.

II. Summary of SIP Revision

The revision includes a long term strategy with enforceable measures ensuring reasonable progress towards meeting the reasonable progress goals for the first planning period, through 2018. Delaware's Regional Haze Plan contains the emission reductions needed to achieve Delaware's share of emission reductions agreed upon through the regional planning process. Other specific requirements of the CAA and EPA's Regional Haze Rule and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

III. Final Action

EPA is approving a revision to the Delaware State Implementation Plan submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control, on September 25, 2008, that addresses regional haze for the first implementation period. EPA is making a determination that the Delaware Regional Haze SIP contains the emission reductions needed to achieve Delaware's share of emission reductions agreed upon through the regional planning process. Furthermore, Delaware's Regional Haze Plan ensures that emissions from the State will not interfere with the reasonable progress goals for neighboring states' Class I areas. In addition, EPA is approving this revision because it meets the applicable visibility related requirements of the CAA section 110(a)(2) including, but not limited to 110(a)(2)(D)(i)(II) and 110(a)(2)(J), relating to visibility protection for the 1997 8-Hour Ozone NAAQS and the 1997 and 2006 $PM_{2.5}$ NAAQS.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to Delaware's Regional Haze Plan for the first implementation period, through 2018 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: June 27, 2011.

W.C. Early,

Acting, Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart I—Delaware

■ 2. In § 52.420, the table in paragraph (e) is amended by adding the entry for Regional Haze Plan at the end of the table to read as follows:

§ 52.420 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
Regional Haze Plan	Statewide	9/25/08	7/19/11 [*Insert page number where the document begins*].	

[FR Doc. 2011–17867 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0287; FRL–9439–8]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Control of Nitrogen Oxides Emissions from Portland Cement Kilns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The SIP revisions pertain to the control of nitrogen oxides (NO_X) emissions from Portland cement kilns. EPA is approving these revisions to reduce emissions from Portland cement kilns in accordance with the requirements of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on August 18, 2011.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2011–0287. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650

Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On May 20, 2011 (76 FR 29180), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed approval to the control of NO_X emissions from Portland cement kilns. The formal SIP revision was submitted by the Pennsylvania Department of the Environmental Protection (PADEP) on July 23, 2010.

II. Summary of SIP Revision

The SIP revision adds definitions and terms to Title 25 of the Pennsylvania Code (25 Pa. Code) Chapter 121.1, relating to definitions, used in the substantive provision of this SIP revision. In addition, the SIP revision amends the NO_X emission standards in the 25 Pa. Code Chapter 145, Subchapter C (Emissions of NO_X from Cement Manufacturing), for Portland cement kilns during the ozone season, from May 1 through September 30, 2011, and for each year thereafter. The amendments to the SIP revision are the following: Standard requirements which include emission requirements; compliance determination by operating and maintaining continuous emissions monitoring systems (CEMS) for NO_X emissions; compliance demonstration on a kiln-by-kiln basis, a facility-wide emissions averaging basis or a system-wide averaging basis; and reporting and recordkeeping requirements by reporting CEMS emissions data and maintaining an operating log for each Portland cement kiln on a monthly basis that is maintained onsite for 5 years.

Other specific requirements of the control of NO_X emissions from Portland cement kilns and the rationale for EPA's proposed action are explained in the NPR and will not be restated here. No public comments were received on the NPR.

III. Final Action

EPA is approving 25 Pa. Code Chapter 121.1, relating to definitions, used in the substantive provision of this SIP revision, and amendments to 25 Pa. Code Chapter 145, Subchapter C (Emissions of NO_X from Cement Manufacturing), for the control of NO_X emissions from Portland cement kilns as a revision to the Pennsylvania SIP.

IV. Statutory and Executive Order Reviews

A. General Requirements

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

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

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action, pertaining to Pennsylvania's control of NO_X emissions from Portland cement kilns may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 27, 2011.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (c)(1) is amended by:

■ a. Revising entries for Sections 145.142 and 145.143.
■ b. Adding entries for Sections 145.144, 145.145 and 145.146.

The amendments read as follows:

§ 52.2020 Identification of plan.

* * * * *

(c) * * *

(1) * * *

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/§ 52.2063 citation
Title 25—Environmental Protection				
Article III—Air Resources				
Chapter 145—Interstate Pollution Transport Reduction				
Subchapter C—Emissions of NO_X From Cement Manufacturing				
*	*	*	*	*
Section 145.142	Definitions	6/19/10	7/19/11, *[Insert page number where the document begins]*.	Added new definitions and terms.
Section 145.143	Standard requirements	6/19/10	7/19/11, *[Insert page number where the document begins]*.	Added compliance dates and allowable emissions of NO_X.
Section 145.144	Compliance determination	6/19/10	7/19/11, *[Insert page number where the document begins]*.	New section.
Section 145.145	Compliance demonstration and reporting requirements.	6/19/10	7/19/11, *[Insert page number where the document begins]*.	New section.
Section 145.146	Recordkeeping	6/19/10	7/19/11, *[Insert page number where the document begins]*.	New section.

* * * * *

[FR Doc. 2011–17869 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2008–0905; A–1–FRL–9439–5]

Approval and Promulgation of Air Quality Implementation Plans; Vermont; Reasonably Available Control Technology (RACT) for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Vermont (VT) on November 22, 2006, and November 14, 2008. These SIP revisions consist of a demonstration that VT meets the requirements of reasonably available control technology (RACT) for oxides of nitrogen (NO_X) and volatile organic compounds (VOCs) set forth by the Clean Air Act (CAA) with respect to the 1997 8-hour ozone standard; minor revisions to Vermont's bulk gasoline plants regulation; and new requirements for wood furniture manufacturing operations. Additionally, EPA is approving VT's negative declarations for several categories of VOC sources. EPA is fully approving all of the submitted items, with two exceptions. EPA is conditionally approving the RACT determinations for two major VOC sources (Churchill Coatings Corporation and H.B.H. Prestain, Inc.). This action is being taken in accordance with the CAA.

DATES: This direct final rule will be effective September 19, 2011, unless EPA receives adverse comments by August 18, 2011. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R01–OAR–2008–0905 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail:* ''Docket Identification Number EPA–R01–OAR–2008–0905'', Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100 (mail code: OEP05–2), Boston, MA 02109–3912.
5. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, 5th Floor, Boston, MA 02109–3912. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R01–OAR–2008–0905. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *http://www.regulations.gov,* or e-mail, information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be

able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, 5th Floor, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

In addition, copies of the state submittal are also available for public inspection during normal business hours, by appointment at the Vermont Air Pollution Control Division, Agency of Natural Resources, Building 3 South, 103 South Main Street, Waterbury, VT 05676.

FOR FURTHER INFORMATION CONTACT: Ariel Garcia, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100 (mail code: OEP05–2), Boston, MA 02109–3912, telephone number (617) 918–1660, fax number (617) 918–0660, e-mail *garcia.ariel@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Organization of this document. The following outline is provided to aid in locating information in this preamble.

I. Background and Purpose
II. Summary of Vermont's SIP Revision
III. EPA's Evaluation of Vermont's SIP Revision
IV. Final Action
V. Statutory and Executive Order Reviews

I. Background and Purpose

On November 14, 2008, the State of Vermont (VT) submitted a formal revision to its State Implementation Plan (SIP). The SIP revision consists of documenting RACT requirements for the 1997 8-hour ozone standard.[1] Although VT was designated attainment for the 1997 8-hour ozone national ambient air quality standard (NAAQS),[2] the state is part of the Ozone Transport Region (OTR). On May 10, 2011, VT withdrew portions of the November 14, 2008 submittal as discussed in more detail in section II.

Certain stationary source control measures specified in the Clean Air Act (CAA) as applicable to areas considered ''moderate'' ozone non-attainment areas also apply to states located in the OTR. Specifically, these areas are required to implement reasonably available control technology (RACT) on all major volatile organic compound (VOC) and nitrogen oxide (NO_X) emissions sources and on all sources covered by a Control Techniques Guideline (CTG). A CTG is a document issued by EPA which establishes a ''presumptive norm'' for RACT for a specific VOC source category.

In 1997, EPA revised the health-based NAAQS for ozone, setting it at 0.08 parts per million (ppm) averaged over an 8-hour time frame. EPA set the 8-hour ozone standard based on scientific evidence demonstrating that ozone causes adverse health effects at lower ozone concentrations and over longer periods of time than was understood when the pre-existing 1-hour ozone standard was set. EPA determined that the 8-hour standard would be more protective of human health, especially with regard to children and adults who are active outdoors, and individuals with a pre-existing respiratory disease, such as asthma.

EPA requires under the 8-hour ozone NAAQS that states meet the CAA RACT requirements, either through a certification that previously adopted RACT controls in their SIP approved by EPA under the 1-hour ozone NAAQS represent adequate RACT control levels for 8-hour attainment purposes, or through the establishment of new or more stringent requirements that represent RACT control levels. See Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2 (the Phase 2 rule). (See 70 FR 71612; November 29, 2005.) EPA has determined that States that have RACT provisions approved in their SIPs for the 1-hour ozone standard have several options for fulfilling the RACT requirements for the 8-hour ozone NAAQS. If a State meets certain conditions, it may certify that previously adopted 1-hour ozone RACT controls in the SIP continue to represent RACT control levels for purposes of fulfilling 8-hour ozone RACT requirements. Alternatively, a State may establish new or more stringent requirements that represent RACT control levels, either in lieu of or in conjunction with a certification. In addition, a State may submit a negative declaration if there are no CTG sources or major sources of VOC and NO_x emissions in lieu of or in addition to a certification.

As noted in the Phase 2 rule, the RACT submittal for the 1997 8-hour ozone standard was due from states in the OTR on September 16, 2006. (See 40 CFR 51.916(b)(2).) On March 24, 2008 (73 FR 15416), EPA issued a finding of failure to submit to VT for the 1997 8-hour ozone RACT requirement. Vermont submitted its RACT SIP revision on November 14, 2008, and EPA determined it complete on December 10, 2008, stopping the 18-month finding sanctions clock.

In addition, on October 5, 2006, EPA issued four CTGs which states were required to address by October 5, 2007 (71 FR 58745). Also, on October 9, 2007, EPA issued three CTGs which states were required to address by October 9, 2008 (72 FR 57215). Furthermore, on October 7, 2008, EPA issued four CTGs which states were required to address by October 7, 2009 (73 FR 58841).

In addition, on November 22, 2006, VT submitted newly adopted regulation 5–253.16, Wood Furniture Manufacturing, to EPA as a SIP revision. This regulation includes VOC emission limits for wood furniture manufacturing operations. In addition to this regulation, the SIP submittal also includes revisions to VT's ''SIP Narrative,'' which contains additional information on how the state implements this rule.

II. Summary of Vermont's SIP Revision

On November 14, 2008, VT submitted a SIP revision documenting RACT requirements for the 1997 8-hour ozone standard. In this SIP revision, VT states that this submittal demonstrates and/or certifies the following with respect to Vermont stationary sources of ozone precursors:

1. All required RACT controls, both CTGs and Major Sources, have been implemented on all relevant stationary sources of VOCs and NO_x emissions;

2. All applicable CTG RACT controls required to be submitted under the current RACT SIP call (applicable to CTGs issued prior to 2006) have been previously approved by EPA under the 1-hour ozone NAAQS; and

[1] Vermont's submittal and today's action are for the 1997 8-hour ozone standard and do not address the 0.075 ppm 2008 ozone standard.

[2] See 69 FR 23858; April 30, 2004.

3. All previously EPA-approved RACT controls, including CTGs issued prior to 2006 and previously submitted Single Source RACT determinations, as well as newly determined Single Source RACT applied to other Major Sources have been certified by the Vermont Air Pollution Control Officer, based on EPA's guidance and standards, to represent RACT control levels under the new 8-hour ozone NAAQS.

The submittal also states that it is the Vermont Air Pollution Control Officer's determination that the Vermont Air Pollution Control rules applicable to the following nine CTG categories, which have been approved and/or are pending approval as RACT for the 1-hour ozone standard, also represent RACT for the 8-hour ozone standard, including any subsequent revisions to the ozone standard that maintain an 8-hour averaging period: (1) Design Criteria for Stage 1 Vapor Control Systems—Gasoline Service Stations (November 1975, no EPA number) and Hydrocarbon Control Strategies for Gasoline Marketing Operations (April 1978, EPA450/3–78–017; (2) Control of Volatile Organic Emissions from Solvent Metal Cleaning (November 1977, EPA–450/2–77–022); (3) Control of Hydrocarbons from Tank Truck Gasoline Loading Terminals (October 1977, EPA–450/2–77–026); (4) Control of Volatile Organic Emissions from Bulk Gasoline Plants (December 1977, EPA–450/2–77–035); (5) Control of Volatile Organic Emissions from Storage of Petroleum Liquids in Fixed-Roof Tanks (December 1977, EPA–450–2–77–036); (6) Control of Volatile Organic Compounds from Use of Cutback Asphalt (December 1977, EPA–450/2–77–037); (7) Control of Volatile Organic Emissions from Existing Stationary Sources, Volume VI: Surface Coating of Miscellaneous Metal Parts and Products (June 1978, EPA–450/2–78–032); (8) Control of Volatile Organic Compounds Leaks from Gasoline Tank Trucks and Vapor Collection Systems (December 1978, EPA–450/2–78–051); and (9) Control of Volatile Organic Compound Emissions from Wood Furniture Manufacturing Operations (April 1996, EPA–453/R–96–007). The Vermont Air Pollution Control Regulations (VAPCR) that cover these CTGs are, respectively: (1) VAPCR Section 5–253.5, Stage I Vapor Recovery Controls at Gasoline Dispensing Facilities; 2) VAPCR Section 5–253.14, Solvent Metal Cleaning; (3) VAPCR Section 5–253.2, Bulk Gasoline Terminals; (4) VAPCR Section 5–253.3, Bulk Gasoline Plants; (5) VAPCR Section 5–253.1, Petroleum Liquid Storage in Fixed Roof Tanks; (6) VAPCR Section 5–253.15, Cutback and Emulsified Asphalt; (7) VAPCR Section 5–253.13, Coating of Miscellaneous Metal Parts; (8) VAPCR Section 5–253.4, Gasoline Tank Trucks; and (9) VAPCR Section 5–253.16, Wood Furniture Manufacturing. All of these Vermont regulations, with one exception, were approved into the Vermont SIP on April 22, 1998 (63 FR 19825). The Vermont wood furniture manufacturing regulation is being approved into the VT SIP in this rulemaking.

The SIP submittal also states that the State of Vermont Air Pollution Control Division has determined that there are no applicable stationary sources of VOC in Vermont, for the following CTG categories identified by EPA in CTG documents issued prior to 2006:

1. Surface Coating Operations (November 1976, EPA–450–2–76–028)
2. Surface Coating of Cans (May 1977, EPA–450/2–77–008)
3. Surface Coating of Coils (May 1977, EPA–450/2–77–008)
4. Surface Coating of Fabrics (May 1977, EPA–450/2–77–008)
5. Surface Coating of Paper (May 1977, EPA–450/2–77–008)
6. Surface Coating of Automobiles and Light Duty Trucks (May 1977, EPA–450/2–77–008)
7. Refinery Vacuum Producing Systems, Wastewater Separators, and Process Unit Turnarounds (October 1977, EPA–450/2–77–025)
8. Surface Coating of Metal Furniture (December 1977, EPA–450/2–77–032)
9. Surface Coating for Insulation of Magnet Wire (December 1977, EPA–450/2–77–033)
10. Surface Coating of Large Appliances (December 1977, EPA–450/2–77–034)
11. Factory Surface Coating of Flat Wood Paneling (June 1978, EPA–450/2–78–032)
12. Petroleum Refinery Equipment (June 1978, EPA–450/2–78–036)
13. Manufacture of Vegetable Oils (June 1978, EPA–450/2–78–035)
14. Manufacture of Synthesized Pharmaceutical Products (December 1978, EPA–450/2–78–029)
15. Manufacture of Pneumatic Rubber Tires (December 1978, EPA–450/2–78–030)
16. Graphic Arts-Rotogravure and Flexography (December 1978, EPA–450/2–78–033)
17. Petroleum Liquid Storage in External Floating Roof Tanks (December 1978, EPA–450/2–78–047)
18. Large Petroleum Dry Cleaners (September 1982, EPA–450/3–82–009)
19. Manufacture of High-Density Polyethylene, Polypropylene, and Polystyrene Resins (November 1983, EPA–450/3–83–008)
20. Equipment Leaks from Natural Gas/Gasoline Processing Plants (December 1983, EPA–450/2–83–007)
21. Leaks from Synthetic Organic Chemical and Polymer Manufacturing Equipment (March 1984, EPA–450/3–83–006)
22. Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industry (December 1984, EPA–450/3–84–015)
23. Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry (August 1993, EPA–450/4–91–031)
24. Shipbuilding and Ship Repair Operations (Surface Coating) (April 1994, EPA–453/R–94–032)
25. Coating Operations at Aerospace Manufacturing and Rework Operations (December 1997, EPA–453/R–97–004)

In addition, the SIP submittal also states that the State of Vermont Air Pollution Control Division has also determined that there are no applicable stationary sources of VOC in Vermont for the following CTG categories identified by EPA in CTG documents issued since 2005:

1. Flat Wood Paneling Coatings (September 2006, EPA–453/R–06–004) [3]
2. Flexible Package Printing (September 2006, EPA–453/R–06–003)
3. Paper, Film, and Foil Coatings (September 2007, EPA–453/R–07–003)
4. Metal Furniture Coatings (September 2007, EPA–453/R–07–005)
5. Large Appliance Coatings (September 2007, EPA–453/R–07–004)

In addition to the items discussed above, the November 14, 2008 SIP submittal also includes minor changes to two of VT's regulations previously approved into the VT SIP.

Specifically, Subsection (3) of regulation 5–251, Control of Nitrogen Oxides Emissions: RACT for large stationary sources, is being submitted with no changes to the regulatory text. This subsection of VT's regulation was previously approved into the VT SIP as 5–251(2) on April 9, 1997 (62 FR 17084). Due to the adoption of a new subsection in VT's regulation and the resulting numbering changes, the appropriate number change will be made to regulation 5–251(3) and the subsection is being approved into the VT SIP. VT's new regulation subsection 5–251(2) is not being submitted for inclusion in the VT SIP.

Also, regulation 5–253.3, Bulk Gasoline Plants, is being submitted with

[3] The negative declaration for the Flat Wood Paneling Coatings (September 2006, EPA–453/R–06–004) CTG was subsequently withdrawn on May 10, 2011.

minor changes to the regulatory text. This regulation was previously approved into the VT SIP on April 22, 1998 (63 FR 19825). The most significant change to VT's adopted revised regulation 5–253.3 is in the regulation's applicability; that is, the revised regulation requires all bulk gasoline plants, for which construction or reconstruction commenced after January 1, 2001, to be subject to the regulation regardless of gasoline throughput. The revised regulation submitted for inclusion into the VT SIP clarified several requirements in the rule related to vapor balance but did not substantively change the requirements of the rule.

Furthermore, Vermont's November 14, 2008 SIP submittal included licenses for four facilities subject to major source VOC requirements and licenses for three facilities subject to major source NO_X requirements. On May 10, 2011, VT withdrew one of the VOC licenses (Green Mountain Prestain) and one of the NO_X licensees (Dalton Hydro), since these two facilities have closed and their operating permits have been terminated. In addition, VT's May 10, 2011 letter includes a written commitment from VT to re-evaluate RACT for two of the major source facilities subject to VOC requirements, namely Churchill Coatings Corporation and H.B.H. Prestain, Inc., as a result of the RACT limits being established for these two facilities prior to the issuance of the 2006 revised CTG for Flat Wood Paneling Coatings (September 2006, EPA–453/R–06–004).

In addition, on November 22, 2006, VT submitted newly adopted regulation 5–253.16, Wood Furniture Manufacturing, to EPA as a SIP revision. This regulation includes VOC emission limits for wood furniture manufacturing operations. In addition to this regulation, the SIP submittal also includes revisions to VT's ''SIP Narrative,'' which contains additional information on how the state implements this rule.

III. EPA'S Evaluation of Vermont's SIP Revision

EPA has evaluated VT's VOC and NO_X regulations which the state certifies meets RACT for the 1997 8-hour standard, and has found that they are generally consistent with the respective EPA guidance documents referenced above. EPA previously approved these rules, with the exception of the wood furniture manufacturing regulation, as meeting RACT for the 1-hour standard. (See 62 FR 17084 and 63 FR 19825.)

VT's newly adopted wood furniture manufacturing regulation, submitted on November 22, 2006, requires facilities, which have allowable emissions of 25 tons per year or more of VOC emissions, to meet specified VOC content limits for the topcoats and sealers used in finishing operations. EPA has evaluated Vermont's rule with respect to EPA's wood furniture manufacturing CTG (referenced above) and has found that this rule, when taken along with the test methods, calculation procedures, record keeping, and monitoring requirements in the SIP narrative, is consistent with EPA guidance.[4]

EPA has also evaluated the NO_X permits for Killington/Pico Ski Resort Partners, LLC and Okemo Limited Liability Company and the VOC permit for Isovolta, Inc. that were included in this submittal and has found that they are consistent with EPA guidance for major stationary sources of NO_X and VOC. For NO_X guidance, see control technique document EPA–450/1–78–001, January 1978, and for VOC guidance, see EPA–450/2–78–022, May 1978, and EPA–453/R–95–010, April 1995. EPA has also evaluated two additional permits for major stationary sources of VOC (permits submitted for Churchill Coatings Corporation; and H.B.H. Prestain, Inc.) that were included in this submittal and has found that they are SIP strengthening but are not consistent with the limits established in the 2006 Flat Wood Paneling Coatings CTG. As a result, EPA is conditionally approving the submitted permits for Churchill Coatings Corporation and H.B.H. Prestain, Inc. A brief description of the type of facility, what has been determined as RACT for the facility, and EPA's reasoning for approval, or conditional approval, of such RACT determination, for each of the five permits is as follows:

1. The Killington/Pico Ski Resort Partners, LLC operating permit covers the snowmaking operations at the Killington and Pico ski resorts. The air pollution sources at the facility consist of diesel powered air compressors for snowmaking operations. With the exception of one engine (unit BR11), the permit requires the replacement of all diesel powered air compressor engines, by July 1, 2007, with the cleanest air pollution emitting engines reasonably available at the time of replacement. The replacement engine cannot have a higher horsepower rating than the engine which it is replacing, and must meet emission limits established by the operating permit. Unit BR11 operates with a Selective Catalytic Reduction (SCR) system designed and operated to achieve a minimum of 70% reduction in NO_X emissions. The permit requires the Unit BR11 to meet emissions limits (after emissions controls) consistent with federal Tier 2 nonroad diesel engine emission standards. The permit also requires the replacement diesel powered air compressor engines to meet emissions limits consistent with federal Tier 2 or Tier 3 nonroad diesel engine emission standards, depending on the date of replacement. The permit also establishes operational limits on the sulfur content of the fuel oil and limits the annual fuel allowed to be consumed by the stationary diesel engine units. The provisions in this operating permit submitted into the VT SIP constitute RACT.

2. The Okemo Limited Liability Company operating permit covers the snowmaking operations at the Okemo ski resort. The air pollution sources at the facility consist of diesel powered air compressors for snowmaking operations and diesel engine generators utilized for generating electricity for snowmaking operations. The facility owns one diesel-powered compressor utilized for generating compressed air for snowmaking operations, has two rental diesel engine generators utilized for generating electricity, and leases 20 diesel-powered compressors utilized for generating compressed air for snowmaking operations. The permit requires the diesel-powered compressor owned by the facility (Caterpillar 3516) to operate on a combination of emission control technologies. Caterpillar 3516 operates with a SCR system and an oxidation catalyst that jointly achieve over 90% reduction in NO_X emissions. The permit requires the Caterpillar 3516 to meet emissions limits (after emissions controls) as stringent as federal Tier 4 nonroad diesel engine emission standards that will be imposed on engines beginning with model year 2011 nonroad diesel engines. The emissions reductions obtained by the Caterpillar 3516, make up for the fact that the two rental units are held to emission limits which are more relaxed than the federal Tier 2 nonroad diesel engine emission standards, for the first two years following the issuance of the operating permit (after which time, the rental units are required to meet emissions limits as stringent as the federal Tier 2 standards). All of the leased diesel

[4] Note that section 5–253.16(e)(1)(iv) of Vermont's regulation provides for the Vermont ANR to approve compliance plans that rely exclusively on compliance methods already specified in the regulation in sections 5–253.16(e)(1)(i)–(iii). This provision does not allow for equivalency demonstrations using methods not already provided for in the regulation.

engines operated at the facility are required to meet at a minimum the federal Tier 2 nonroad diesel engine emission standards. The permit also establishes operational limits on the sulfur content of the fuel oil, limits the annual fuel allowed to be consumed by the stationary diesel engine units, limits the total capacity of engines operated at the facility for generating electricity and compressed air for snowmaking operations, and limits the hours that each type of engine can be in operation. The provisions in this operating permit submitted constitute RACT.

3. The Isovolta, Inc. (formerly U.S. Samica, Inc.) operating permit covers the insulation paper manufacturing facility in Rutland, VT. On April 9, 1997 (see 62 FR 17084), EPA approved an administrative order for this facility (at that time under U.S. Samica Corporation) which required the use of incineration control devices, which achieve an 81% overall VOC control, on two of their process lines. The administrative order also contained enforceable emissions testing, monitoring, recordkeeping, and reporting requirements. These same conditions are included in the operating permit in VT's November 14, 2008 submittal. The 81% reduction requirement is consistent with EPA's model regulation for VOC sources (See ''Model Volatile Organic Compound Rules for Reasonably Available Control Technology'', EPA–Staff Working Document, June 1992). Therefore, EPA is approving the Isovolta, Inc. operating permit as continuing to meet VOC RACT requirements for this facility.

4. The Churchill Coatings Corporation operating permit covers the clapboard painting facility (previously owned by Prestained Lumber Products, Inc.) in North Springfield, VT. The facility consists of two roll coating lines to prime and paint a variety of lumber products. The non-CTG regulation approved by EPA on April 9, 1997 (see 62 FR 17084), defines RACT for coating units as a daily weighted average of VOC content in the coatings of 3.5 pounds of VOC per gallon of coating applied. The operating permit requires the facility to meet the 3.5 pounds of VOC per gallon of coating emission limit and also includes the associated recordkeeping and testing requirements to ensure compliance with these limits. The 3.5 pounds of VOC per gallon of coating emission limit is consistent with EPA's guidance for VOC sources (See ''Model Volatile Organic Compound Rules for Reasonably Available Control Technology'', EPA–Staff Working Document, June 1992). However, the RACT determination for some of the operations at this facility must address whether and how the facility can meet the recommended limits for Exterior Siding, specifically 2.1 pounds of VOC per gallon of coating, included in the 2006 Flat Wood Paneling Coatings (September 2006, EPA–453/R–06–004) CTG. Therefore, EPA finds that the VOC limits in the Churchill Coatings Corporation operating permit are SIP-strengthening but do not constitute a complete RACT determination for this facility and is conditionally approving this operating permit into the VT SIP.

5. The H.B.H. Prestain, Inc. operating permit covers the clapboard painting facility in East Arlington, VT. The facility consists of four roll coating lines to prime, paint, and/or stain wooden clapboards, trim boards, and various other building siding products. The VOC coating limits established by this operating permit are also consistent with what has been determined as RACT in the April 9, 1997 (see 62 FR 17084) EPA rulemaking. Specifically, the four coating lines are required to meet a 3.5 pounds of VOC per gallon of coating emission limit. The permit also includes the associated recordkeeping and testing requirements to ensure this limit is enforceable. As noted previously, this emission limit is consistent with EPA's guidance for VOC sources (See ''Model Volatile Organic Compound Rules for Reasonably Available Control Technology'', EPA–Staff Working Document, June 1992). However, the RACT determination for some of the operations at this facility must address whether and how the facility can meet the recommended limits for Exterior Siding, specifically 2.1 pounds of VOC per gallon of coating, included in the 2006 Flat Wood Paneling Coatings (September 2006, EPA–453/R–06–004) CTG. Therefore, EPA finds that the VOC limits in the H.B.H. Prestain, Inc. operating permit are SIP-strengthening but do not constitute a complete RACT determination for this facility and is conditionally approving this operating permit into the VT SIP.

With respect to the CTGs issued in 2006 and later, VT has submitted negative declarations for four of these 11 CTGs. The state must still address the remaining seven CTGs.

IV. Final Action

EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Vermont on November 14, 2008, and November 22, 2006. EPA is approving Vermont's November 14, 2008 RACT certification and negative declarations as meeting RACT for the 1997 8-hour standard. EPA is also approving the following permits conditions [5] as representing RACT for the applicable sources and incorporating these conditions into the SIP:

- Isovolta Inc. (Formerly U.S. Samica, Inc.) Operating Permit RACT provisions Construction and Equipment Specifications (2), Operational Limitations (5), Emission Limitations (9) and (17), and Continuous Temperature Monitoring Systems (19) through (21);
- Killington/Pico Ski Resort Partners, LLC. Operating Permit RACT provisions Construction and Equipment Specifications (3) through (7), Operational Limitations (8) and (10), Emission Limitations (14) through (16), Compliance Testing and Monitoring (23) and (24), Recordkeeping and Reporting (25), (27) and (33), and Appendix A; and
- Okemo Limited Liability Company Operating Permit RACT provisions Construction and Equipment Specifications (2), Operational Limitations (5) through (7) and (9) through (11), Emission Limitations (14) through (16), Compliance Testing and Monitoring (23) and (24), and Recordkeeping and Reporting (25), (26), (31), and (32).

EPA is also approving into the VT SIP revised regulation 5–253.3 ''Bulk Gasoline Plants,'' revised regulation 5–251(3) ''Control of Nitrogen Oxides Emissions: RACT for large stationary sources,'' as well as the newly submitted regulation 5–253.16 ''Wood Furniture Manufacturing,'' along with the associated revisions to the VT SIP narrative.

In addition, EPA is conditionally approving the following permits conditions as SIP-strengthening, but not completely fulfilling the RACT requirements for the applicable sources, and incorporating these conditions into the SIP:

- Churchill Coatings Corporation Operating Permit RACT conditions Emission Limitations (3) through (6) and (11), and Record Keeping and Reporting (14) through (16); and
- H.B.H Prestain, Inc. Operating Permit RACT provisions Emission Limitations (4) through (8), and (13), and Recordkeeping and Reporting (16) through (18).

The State of Vermont must submit to EPA by July 19, 2012, re-evaluated RACT determinations for Churchill Coatings Corporation and H.B.H Prestain. These RACT determinations must include an evaluation of the

[5] EPA is approving all of the permit conditions that Vermont included in its SIP submittal. Other conditions that are included in the facility's permit, but not listed here, were not submitted by Vermont as part of the SIP revision.

feasibility of the emission limits in the 2006 flat wood paneling CTG for these two facilities. If VT fails to do so, this conditional approval will become a disapproval on that date. EPA will notify VT by letter that this action has occurred. At that time, this commitment will no longer be a part of the approved VT SIP. EPA subsequently will publish a notice in the notice section of the **Federal Register** notifying the public that the conditional approval automatically converted to a disapproval. If VT meets its commitment, within the applicable time frame, the conditionally approved portion of the submittal will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal. If EPA approves the new submittal, the new approval will replace the conditionally approved operating permit sections in the VT SIP.

If the conditional approval is converted to a disapproval, such action will trigger EPA's authority to impose sanctions under section 110(m) of the CAA at the time EPA issues the final disapproval or on the date VT fails to meet its commitment. In the latter case, EPA will notify VT by letter that the conditional approval has been converted to a disapproval and that EPA's sanctions authority has been triggered. In addition, the final disapproval triggers the Federal Implementation Plan (FIP) requirement under section 110(c).

The EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should relevant adverse comments be filed. This rule will be effective September 19, 2011 without further notice unless the Agency receives relevant adverse comments by August 18, 2011.

If the EPA receives such comments, then EPA will publish a notice withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on the proposed rule. All parties interested in commenting on the proposed rule should do so at this time. If no such comments are received, the public is advised that this rule will be effective on September 19, 2011 and no further action will be taken on the proposed rule. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

In addition, Vermont was issued a finding a failure to submit which started an 18 month sanctions clock and a 24 month Federal Implementation Plan (FIP) clock. The 18 month sanctions clock was stopped when Vermont submitted the SIP and we determined it complete on December 10, 2008. The 24 month FIP clock will stop upon the effective date of our final approval, September 19, 2011.

V. Statuatory and Executive Order Reviews

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

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

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by September 19, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: June 28, 2011.

H. Curtis Spalding,

Regional Administrator, EPA New England.

Part 52 of chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart UU—Vermont

■ 2. In § 52.2370, Table (c) is amended by revising two entries and adding an entry; and Tables (d) and (e) are amended by adding the following entries:

§ 52.2370 Identification of plan.

* * * * *

(c) EPA approved regulations.

EPA-APPROVED VERMONT REGULATIONS

Vermont Air Pollution Control Regulation (VAPCR) State citation	Title/Subject	State effective date	EPA Approval date	Explanations
*	* *		* *	* *
5–251	Control of Nitrogen Oxides Emissions: RACT for large stationary sources.	4/27/07	7/19/2011 [Insert **Federal Register** page number where the document begins].	Changes to numbering of RACT-related subsections of regulation. The state did not submit Subsection 5–251(2) as part of the SIP revision.
*	* *		* *	* *
5–253.3	Bulk Gasoline Plants	4/27/07	7/19/2011 [Insert **Federal Register** page number where the document begins].	Changes to bulk gasoline plants regulation.
*	* *		* *	* *
5–253.16	Wood Furniture Manufacturing.	3/1/04	7/19/2011 [Insert **Federal Register** page number where the document begins].	Adopted regulation establishing wood furniture manufacturing requirements.
*	* *		* *	* *

(d) EPA-Approved State Source specific requirements.

EPA-APPROVED VERMONT SOURCE SPECIFIC REQUIREMENTS

Name of source	Permit No.	State effective date	EPA Approval date	Explanations
*	*	*	*	* * *
Isovolta Inc. (Formerly U.S. Samica, Inc.) Operating Permit RACT provisions.	OP–95–040	1/06/2006	7/19/2011 [Insert **Federal Register** page number where the document begins].	Only these sections were submitted by VT and approved into the SIP: Permit Conditions: Construction and Equipment Specifications (2), Operational Limitations (5), Emission Limitations (9) and (17), and Continuous Temperature Monitoring Systems (19) through (21).
Churchill Coatings Corporation Operating Permit RACT conditions.	AOP–06–040	2/06/2008	7/19/2011 [Insert **Federal Register** page number where the document begins].	Only these sections were submitted by VT and conditionally approved into the SIP: Emission Limitations (3) through (6) and (11), and Record Keeping and Reporting (14) through (16).
Killington/Pico Ski Resort Partners, LLC. Operating Permit RACT provisions.	AOP–04–025a	6/14/2007	7/19/2011 [Insert **Federal Register** page number where the document begins].	Only these sections were submitted by VT and approved into the SIP: Construction and Equipment Specifications (3) through (7), Operational Limitations (8) and (10), Emission Limitations (14) through (16), Compliance Testing and Monitoring (23) and (24), Recordkeeping and Reporting (25), (27), and (33), and Appendix A.

EPA—APPROVED VERMONT SOURCE SPECIFIC REQUIREMENTS—Continued

Name of source	Permit No.	State effective date	EPA Approval date	Explanations
Okemo Limited Liability Company Operating Permit RACT provisions.	AOP–04–029	2/26/2006	7/19/2011 [Insert **Federal Register** page number where the document begins].	Only these sections were submitted by VT and approved into the SIP: Construction and Equipment Specifications (2), Operational Limitations (5) through (7) and (9) through (11), Emission Limitations (14) through (16), Compliance Testing and Monitoring (23) and (24), and Recordkeeping and Reporting (25), (26), (31), and (32).
H.B.H Prestain, Inc. Operating Permit RACT provisions.	AOP–03–009	2/06/2008	7/19/2011 [Insert **Federal Register** page number where the document begins].	Only these sections were submitted by VT and conditionally approved into the SIP: Emission Limitations (4) through (8) and (13), and Recordkeeping and Reporting (16) through (18).

(e) Nonregulatory

VERMONT NON REGULATORY

Name of non regulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA Approved date	Explanations
* *	*	*	*	* *
Reasonably Available Control Technology State Implementation Plan (SIP)/certification for the 1997 8-hour Ozone National Ambient Air Quality Standard.	Statewide	Submitted 11/14/2008.	7/19/2011 [Insert **Federal Register** page number where the document begins].	
SIP narrative associated with 5–253.16 wood furniture manufacturing regulation.	Statewide	Submitted 11/22/2006.	7/19/2011 [Insert **Federal Register** page number where the document begins].	

[FR Doc. 2011–17875 Filed 7–18–11; 8:45 am]
BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 43 and 63

[IB Docket No. 04–112; FCC 11–76]

Reporting Requirements for U.S. Providers of International Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) concludes that it should eliminate outdated and unnecessary reporting requirements related to international telecommunications traffic for which the burdens on U.S. international service providers outweigh the benefits. Specifically, the Commission finds four information collections are no longer necessary and removes them from its rules: The division of telegraph tolls report; the quarterly large carrier traffic report; the quarterly foreign-affiliated switched resale carrier report; and the circuit-addition report. The Commission also finds that the annual traffic and revenue reports and annual circuit status reports can be simplified by removing the requirement to separately report for offshore U.S. points.

DATES: Effective July 19, 2011.

FOR FURTHER INFORMATION CONTACT: John Copes or David Krech, Policy Division, International Bureau, FCC, (202) 418–1460 or via the Internet at *John.Copes@fcc.gov* and *David.Krech@fcc.gov*

SUPPLEMENTARY INFORMATION: This is a summary of the First Report and Order portion of the Commission's First Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 04–112, FCC 11–76, adopted May 12, 2011, and released May 13, 2011. The full text of the First Report and Order and Further Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The document also is available for download over the Internet at *http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0513/FCC-11-76A1.pdf*. The complete text also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY–B402, 445 12th Street, SW., Washington, DC 20554. Customers may contact BCPI at its Web site: *http://www.bcpiweb.com* or call 1–800–378–3160.

Summary of First Report and Order

1. In the First Report and Order and Further Notice of Proposed Rulemaking, the Federal Communications Commission (Commission) continues its comprehensive review of the international reporting requirements for U.S. providers of international telecommunications services. In the First Report and Order portion of the document, the Commission finds that there are several reporting requirements that it can eliminate at this time. The

Commission concludes that it no longer needs quarterly traffic and revenue filings or quarterly circuit addition reports. The Commission also finds carriers no longer need to file separately for off-shore U.S. points. In addition, the Commission finds that the toll division reports are out-dated and no longer need to be filed. The Commission concludes, however, that carriers should continue to file annual international traffic and revenue data and international circuit data in order to protect the interests of U.S. consumers and U.S. international service providers, and to facilitate the transition to competition in international markets. This includes certain route-specific data from facilities-based carriers, because the Commission needs route-by-route traffic and revenue information to implement and enforce pro-competitive international policies. The Commission also needs international resale traffic and revenue data on a world-wide basis since most international calls are initiated with a resale carrier. In the Further Notice of Proposed Rulemaking (FNPRM), which is published elsewhere in this issue, the Commission proposes a number of ways to modernize the information that it collects and to make the reporting requirements more tailored to the Commission's needs.

2. *Elimination of the Quarterly Large-Carrier Reports (47 CFR 43.61(b)).* The Commission's rules currently require facilities-based and facilities-resale carriers to file a quarterly traffic and revenue report for any quarter in which such carrier's traffic exceeds one of four thresholds specified in 47 CFR 43.61(b). The Commission adopted this reporting requirement as a way to detect ''one-way bypass'' that might result from international simple resale arrangements. In the Notice of Proposed Rulemaking (NPRM), 69 FR 29676, May 25, 2004, the Commission sought comment on whether the application of the Quarterly Large-Carrier Reports continues to be necessary. All those filing comments in response to the NPRM support elimination of the reports. The Commission agrees that the Quarterly Large-Carrier Reports are no longer needed to detect market distortions. The Commission notes that in practice, sudden changes in international traffic flows are not necessarily related to one-way bypass or other anti-competitive causes. Moreover, the Commission found that the quarterly traffic information filed by the carriers has often been subject to substantial revision and thus has been unreliable as an indicator of changes in traffic ratios. The Commission therefore concludes that requiring carriers to continue to file quarterly traffic reports will serve no useful purpose. Instead, the Commission finds that it will be sufficient to rely on annual traffic and revenue data regarding settlement payments and minutes, as well as on complaints by U.S. carriers, to detect and remedy anti-competitive activity by foreign carriers, including one-way bypass.

3. *Elimination of the Quarterly Foreign-Affiliated Switched Resale Carrier Reports (47 CFR 43.61(c)).* U.S.-authorized providers of international message telephone service (IMTS) resale that are affiliated with a foreign carrier are required to file quarterly traffic and revenue reports on their affiliated routes if they: (1) Have sufficient market power at the foreign end of an international route to affect competition adversely in the U.S. market, and (2) collect settlement payments from U.S. carriers for traffic affiliated in its home market. 47 CFR 43.61(c). The quarterly traffic and revenue report arose out of carrier concerns that overseas incumbent or monopoly telecommunications providers might use their market power to favor their affiliates that operate as carriers in the U.S. market. The report was intended to provide the Commission an early warning of attempts by incumbent carriers to engage in ''price squeeze'' behavior. In the NPRM, the Commission sought comment whether the continued application of the Quarterly Foreign-Affiliated Switched Resale Carrier Reports is necessary at this time. The commenters disagreed on the continued need for this reporting requirement. The Commission, however, has not received any complaints from U.S. carriers alleging such predatory behavior; nor have the reports revealed any such behavior. Furthermore, the 47 CFR 43.61(c) quarterly report is not the only way the Commission can address concerns that the settlement rates on a particular route remain above cost. The Commission finds that annual traffic and revenue filings provide sufficient information and thus the filing of the Quarterly Foreign-Affiliated Switched Resale Carrier Reports is no longer necessary.

4. *Elimination of the Circuit-Addition Report (47 CFR 63.23(e)).* Carriers that have been certified as resellers of private lines are required to report, by March 31 of the following year, the number of circuits they added during the year and to identify the services for which the circuits were used. 47 CFR 63.23(e). In the NPRM, the Commission proposed to eliminate the circuit-addition report. The only commenter to address this issue supports elimination of the report. Because the facilities-based carriers from which private line resellers purchase international circuits report those circuits on their circuit-status report, the Commission has a record that the circuits are being used. As a result, the Commission finds that the information from the annual circuit-addition reports does not justify the continuing burden of the reporting requirement.

5. *Elimination of the Division of Telegraph Tolls Report (47 CFR 43.53).* Telegraph carriers are required file copies of all their agreements with foreign carriers governing the division of tolls for international telegraph traffic. 47 CFR 43.53. In the NPRM, the Commission proposed to eliminate this filing requirement. The Commission agrees with the commenters that the decline in the telegraph industry has made these reports unnecessary. The volume of telegraph traffic has declined sharply over the years as telegraph service has largely been replaced by other means of communication, and this reporting requirement no longer serves a useful purpose.

6. *Annual Traffic and Revenue Reports.* The Commission shall continue to require carriers to file the annual traffic and revenue reports, albeit on a streamlined basis. The Commission finds that route-specific traffic and revenue data from the annual reports provides it with information that it needs to develop and implement policies to facilitate the continuing transition to competition in international markets, to monitor compliance with rules and policies, to gauge the effect of its decisions on competition in the international market, and for policy discussions in bilateral meetings and multilateral forums and for Commission participation in international organizations. The collection of aggregate world-total data would not be an adequate substitute for route-specific data, as it will not provide the specific data that the Commission needs to perform its functions. The Commission also finds that it cannot fully understand the IMTS market without information about IMTS resale. The Commission concludes that it needs to obtain international traffic and revenue data information directly from the international service providers because there are no other reliable sources of information on international traffic and revenue that will give it the full range of information that the Commission needs. Therefore the Commission shall retain the annual international traffic and revenue reporting requirements. Facilities-based

providers of IMTS and private line services will continue to file traffic and revenue data for each international route on which they provide service. Carriers providing IMTS resale services will continue to file traffic and revenue data on a world total basis. The Commission, however, has sought comment on proposals to streamline these filing requirements in the FNPRM portion of the document, which is discussed in a separate **Federal Register** summary.

7. *Annual Circuit-Status Reports.* The Commission shall continue to require carriers to file the annual circuit-status reports, albeit on a streamlined basis. The Commission finds that information on international circuits continues to be essential for it to fulfill its mission and that there is no other source for this information. The Commission uses this data to monitor the continuing transition of international routes to competition, to monitor compliance with Commission rules and policies, to gauge the effect of Commission decisions on competition in the international market and to develop policy positions for bilateral and multilateral negotiations and for Commission participation in international organizations. The Commission also uses circuit-status information to ensure that carriers with market power do not use their access to circuit capacity to engage in any anti-competitive behavior, to analyze merger applications, to determine whether a proposed merger might result in an anti-competitive concentration of market power in the international transport market, and to help monitor compliance with the international bearer circuit regulatory fees established in section 9 of the Communications Act, 47 U.S.C. 159. Therefore, the Commission retains the requirement for facilities-based carriers to file international circuit data for each international route on which they provide service. The Commission, however, has sought comment on proposals to streamline these filing requirements in the FNPRM portion of the document, published elsewhere in this issue.

8. *Elimination of the Requirement to Report Separately Traffic for Off-Shore U.S. Points.* The Commission eliminates the requirement to report separately for off-shore U.S. points for the annual traffic and revenue reports and circuit-status reports. In the NPRM, the Commission proposed to eliminate the requirement that carriers file data for traffic or circuits between a U.S. domestic point and an off-shore U.S. point or between off-shore U.S. points. Several commenters support the proposal, and two commenters argue that the Commission should go further and eliminate disaggregate reports by U.S. points entirely. Because the Commission has not found disaggregate reporting by U.S. points to be of substantial benefit, it cannot justify the additional burden that disaggregate reporting requirements impose on filing carriers. It therefore eliminates all distinctions between domestic and off-shore U.S. points and requires carriers to file a single traffic and revenue report aggregating traffic and revenue data for all U.S. points and a single circuit-status report aggregating circuit data for all for U.S. points. The Commission will therefore no longer require separate reporting for off-shore U.S. points. Carriers should combine the traffic and revenue data and circuit data for the off-shore U.S. points with the data for domestic U.S. points when filing. Carriers thus will only report traffic and revenue data and circuits status for calls and circuits between the ''United States'' and foreign points. The ''United States'' shall be defined as the ''several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone''—the definition in the Communications Act, 47 U.S.C. 153(58).

Paperwork Reduction Act of 1995 Analysis

9. This First Report and Order adopts new or revised information collection requirements, subject to the Paperwork Reduction Act of 1995 (PRA). These information collection requirements will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. The Commission will publish a separate document in the **Federal Register** inviting comment on the new or revised information collection requirements adopted in this document. The requirements will not go into effect until OMB has approved them and the Commission has published a notice announcing the effective date of the information collection requirements. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Final Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act, as amended (RFA), the Federal Communications Commission (Commission) included an Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in the Notice of Proposed Rulemaking (NPRM) in this proceeding. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) addresses the policies and rules that the Commission adopted in the First Report and Order portion of the decision in this proceeding. This First Report and Order retains the annual traffic and revenue report and the annual circuit-status report. The First Report and Order adopts some measures, as described below, to simplify compliance with the reporting requirements but generally does not alter either report. The Commission will consider a number of proposals to streamline the reports and to improve the information that carriers will provide in the Further Notice of Proposed Rulemaking portion of this proceeding. This FRFA conforms to the RFA.

A. Need for, and Objectives of, the First Report and Order

11. The Commission initiated this comprehensive review of the reporting requirements imposed on U.S. carriers providing international telecommunications services under 47 CFR 43.51, 43.61, 43.82, and 63.23(e) of the Commission's rules, to modernize and simplify those requirements. The Commission believes that the policies and rules adopted in the First Report and Order will improve the data filing entities report while making it easier for carriers, both small and large, to provide the information required by the rules.

12. In the First Report and Order, the Commission concluded that it continues to need the traffic and revenue information the carriers now file under 47 CFR 43.61(a) of the rules and the circuit information the carriers file under 47 CFR 43.82. The Commission further concluded in the First Report and Order that it no longer needs the information provided by the large carrier quarterly reports required by 47 CFR 43.61(b), the foreign carrier affiliate quarterly report required by 47 CFR 43.61(c), the circuit-addition report required in 47 CFR 63.23(e), or the telegraph division-of-tolls report required by 47 CFR 43.53.

13. Currently, 47 CFR 43.61 requires that all international telecommunications carriers file an annual report of their traffic and revenues. Under 47 CFR 43.82, facilities-based common carriers

providing international telecommunications services must file an annual report on the status of their circuits. The information derived from the international revenue and traffic report and circuit-status report is critical in understanding the international telecommunications market. These reports are the only source of publicly available information of this nature.

14. The information obtained from the traffic and revenue and circuit-status reports is used extensively by the Commission, the industry, other government agencies, and the public. The Commission uses the information to evaluate applications for international facilities, track market developments and the competitiveness of each service and geographical market to formulate rules and policies consistent with the public interest, monitor compliance with those rules and policies, and guard the competitive effect of its decisions on the market. Carriers use the information to track the balance of payments in international communications services and for market analysis purposes. Carriers and potential entrants use the information for, among other things, assessment of market opportunities and to monitor competition in markets. The Commission, along with other government agencies such as the Department of Justice and the United States Trade Representative, use the information in merger analyses and negotiations with foreign countries, respectively. In addition, the information contained in the circuit-status report allows the Commission to comply with the statutory requirements of the Omnibus Budget Reconciliation Act of 1993.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

15. No comments specifically addressed the IRFA.

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

16. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[1] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [2] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[3] A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[4]

17. The policies adopted in the FR&O apply to entities providing international common carrier services pursuant to section 214 of the Communications Act; entities providing international wireless common carrier services under section 309 of the Act; entities providing common carrier satellite services under section 309 of the Act; and entities licensed to construct and operate submarine cables under the Cable Landing License Act. The Commission has not developed a small business size standard directed specifically toward these entities. As described below, such entities fit within larger categories for which the SBA has developed size standards.

1. Traffic and Revenue Report

18. The First Report and Order retains the annual traffic and revenue report, which common carriers providing international telecommunications services are now required to file. Such entities include entities providing international common carrier services pursuant to section 214 of the Communications Act and entities providing domestic or international wireless common carrier services under section 309 of the Act. The carriers that the First Report and Order will require to continue to file the traffic and revenue report are a mixture of both large and small entities. The Commission has not developed a small business size standard directed specifically toward these entities. However, as described below, these entities fit into larger categories for which the SBA has developed size standards that provide these facilities or services.

19. *Facilities-based Carriers.* Facilities-based providers of international telecommunications services would fall into the larger category of interexchange carriers. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. Under SBA rules, providers of interexchange services fall within the size standard category for Wired Telecommunications Carriers. Under that size standard, a Wired Telecommunications Carrier is considered a small entity if it has 1,500 or fewer employees.[5] Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these interexchange carriers can be considered small entities.[6] Similarly, according to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[7] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[8] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the First Report and Order.

20. In the 2009 annual traffic and revenue report, 38 facilities-based and facilities-resale carriers reported approximately $5.8 billion in revenues from international message telephone service (IMTS). Of these, three reported IMTS revenues of more than $1 billion, eight reported IMTS revenues of more than $100 million, 10 reported IMTS revenues of more than $50 million, 20 reported IMTS revenues of more than $10 million, 25 reported IMTS revenues of more than $5 million, and 30 reported IMTS revenues of more than $1 million. Based solely on their IMTS revenues, the majority of these carriers would be considered non-small entities under the SBA definition.[9]

21. The 2009 traffic and revenue report also shows that 45 facilities-based and facilities-resale carriers (including 14 who also reported IMTS revenues) reported $683 million for international

[1] 5 U.S.C. 603(b)(3).

[2] 5 U.S.C. 601(6).

[3] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[4] 15 U.S.C. 632.

[5] 13 CFR 121.201, NAICS code 517110.

[6] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired telecommunications carriers'') (last visited March 2, 2011).

[7] *See* Trends in Telephone Service at Table 5.3.

[8] *See* id.

[9] *See* 13 CFR 121.201, NAICS Code at Subsector 517—Telecommunications.

private line services. Of these, four reported private line revenues of more than $50 million, 12 reported private line revenues of more than $10 million, 30 reported revenues of more than $1 million, 34 reported private line revenues of more than $500,000, 41 reported revenues of more than $100,000, while 2 reported revenues of less than $10,000.

22. The 2009 traffic and revenue report also shows that seven carriers (including one that reported both IMTS and private line revenues, one that reported IMTS revenues and three that reported private line revenues) reported $51 million for international miscellaneous services, of which two reported miscellaneous services revenues of more than $1 million, one reported revenues of more than $500,000, two reported revenues of more than $200,000, one reported revenues of more than $50,000, while one reported revenues of less than $20,000. Based on its miscellaneous services revenue, only the carrier with revenues of less than $20,000 would be considered a small business under the SBA definition. Based on their private line revenues, most of these entities would be considered non-small entities under the SBA definition.

23. *IMTS Resale Carriers.* Providers of IMTS resale services are common carriers that purchase IMTS from other carriers and resell it to their own customers. The SBA has developed a small business size standard for the category of ''Telecommunications Resellers.'' Under that size standard, such a business is small if it has 1,500 or fewer employees.[10] Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1,000 employees and one operated with more than 1,000.[11] Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. Similarly, in the 2009 traffic and revenue report, 1,232 carriers reported that they provided IMTS on a pure resale basis.[12] Based on their IMTS resale revenues, Commission data reveals that IMTS resale service is primarily provided by carriers that would be considered small businesses under the SBA definition. For example, of the 1,232 IMTS resale carriers, 644 carriers reported revenues of less than $10,000; 1,025 had revenues less than $500,000; and 1,068 had revenues less than $1 million.[13] Consequently, the Commission estimates that the majority of IMTS resellers are small entities that may be affected by our action.

24. *Wireless Carriers and Service Providers.* Included among the providers of IMTS resale are a number of wireless carriers that also provide wireless telephony services domestically. The Commission classifies these entities as providers of Commercial Mobile Radio Services (CMRS). At present, most, if not all, providers of CMRS that offer IMTS provide such service by purchasing IMTS from other carriers to resell it to their customers. The Commission has not developed a size standard specifically for CMRS providers that offer resale IMTS. Such entities would fall within the larger category of wireless carriers and service providers. Below, for those services subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

25. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[14] Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.[15] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[16] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 show that there were 1,383 firms that operated that year.[17] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services.[18] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[19] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

26. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the Wireless Communications Services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[20] The SBA has approved these definitions.[21] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities,

[10] 13 CFR 121.201, NAICS code 517911.

[11] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517911 in the left column for ''Telecommunications Resellers'') (last visited March 2, 2011).

[12] *See* FCC, International Bureau, Strategic Analysis and Negotiations Division, ''2009 International Telecommunications Data'' at page 1–2, Statistical Findings, and Table D at page 22 (April 2011). FCC website location *http://www.fcc.gov/ib/sand/mniab/traffic/.*

[13] *Id.*

[14] U.S. Census Bureau, 2007 NAICS Definitions: Wireless Telecommunications Categories (except Satellite), *http://www.census.gov/naics/2007/def/ND517210.HTM* (last visited March 2, 2011).

[15] U.S. Census Bureau, 2002 NAICS Definitions: Paging, *http://www.census.gov/epcd/naics02/def/NDEF517.HTM* (last visited March 2, 2011); U.S. Census Bureau, 2002 NAICS Definitions: Other Wireless Telecommunications, *http://www.census.gov/epcd/naics02/def/NDEF517.HTM* (last visited March 2, 2011).

[16] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[17] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517210 in the left column for ''Wireless Telecommunications Carriers (except Satellite)'') (last visited March 2, 2011).

[18] *See* Trends in Telephone Service at Table 5.3.

[19] *See id.*

[20] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service,* GN Docket No. 96–228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[21] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998).

and one bidder won one license that qualified as a small business entity.

2. Circuit-Status Report

27. The First Report and Order continues to require common carriers that provide international telecommunications services on a facilities basis to file the annual circuit-status report. The Commission has not developed size standards specifically addressed to such carriers, but they fall within larger categories for which the SBA has developed size standards.

28. *Facilities-based Carriers.* Facilities-based providers of international telecommunications services fall into the larger category of interexchange carriers. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[22] Census Bureau data for 2007 show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these interexchange carriers can be considered small entities.[23] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[24] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.[25] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted in the First Report and Order.

29. According to the 2009 circuit-status report, 75 U.S. international facility-based carriers filed information pursuant to 47 CFR 43.82.[26] The report does not report employee or revenue statistics, so it is impossible for us to determine how many carriers could be considered small entities. Each of the 75 carriers, however, reported a small amount of capacity. Although it is possible that a carrier could report a small amount of capacity and have significant revenues, we will consider those 75 carriers to be small entities at this time. In addition, of the 79 carriers that filed an annual circuit-status report for 2009, there were at least four carriers that reported no circuits owned or in use at the end of 2009.[27]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

30. The First Report and Order retains the annual traffic and revenue report and the annual circuit-status report because the collection and public reporting of this information continues to be necessary and in the public interest. Because carriers currently are required to file the 47 CFR 43.61 annual traffic and revenue report and the 47 CFR 43.82 annual circuit-status report, the decision to retain those reports will not impose an additional significant economic burden on small carriers. Similarly, the decision to retain the reporting of IMTS and international private lines on a route-by-route basis continues the requirement found in 47 CFR 43.61, and therefore will not impose any significant additional burden on small carriers.

31. The decision in the First Report and Order to no longer require carriers to report separately their traffic and revenues for traffic between the conterminous 48 states and off-shore U.S. points will reduce the burden on carriers large and small. The First Report and Order recognizes that the Commission has integrated rates for off-shore U.S. points into the domestic rate structure. As a result, such traffic is no longer considered to be international and, thus, need not be reported in an international traffic and revenue report. Similarly, the First Report and Order no longer requires carriers to separately report their international traffic to or from such off-shore points from or to foreign points. Rather, the Commission concluded that such traffic should be combined with the carriers'' traffic and revenues to and from the conterminous 48 states. As a result, this decision will also not impose any significant additional burden on small carriers.

32. The Commission's decision to eliminate the current Large-Carrier Quarterly Report in 47 CFR 43.61(b) will reduce the burden on those large carriers that are now required to file the report. Because the quarterly reporting requirement was limited to large, dominant facilities-based and facilities-resale international carriers, the elimination of the report has no impact on small carriers. Similarly, the decision in the FR&O to eliminate the Foreign-Affiliated Carrier Quarterly Report in 47 CFR 43.61(c) will reduce the burden on the mostly, if not exclusively, large, dominant U.S. carriers that are now required to file the report. The current reporting requirement applies to U.S.-authorized providers of IMTS resale that are affiliated with a foreign telecommunications provider that (1) has sufficient market power in its home market that it could distort competition in the U.S. market and (2) collects money from U.S. carriers for traffic between the United States and its home market.

33. The Commission's decision to eliminate the circuit-addition report under 47 CFR 63.23(e) and the telegraph division of tolls report under 47 CFR 43.51 will reduce the burden on large and small carriers. As such, it will not impose any significant additional burdens on small businesses.

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

34. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage or the rule, or any part thereof, for small entities.'' [28]

35. The First Report and Order retains the 47 CFR 43.61(a) traffic and revenue and the 47 CFR 43.82 annual circuit-status reports. That decision does not increase the burden of the reporting requirement on either small or large carriers. Further, the Commission's decision to eliminate the requirement that carriers report separately their traffic between the conterminous 48

[22] 13 CFR 121.201, NAICS code 517110.

[23] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired telecommunications carriers'') (last visited March 2, 2011).

[24] *See* Trends in Telephone Service at Table 5.3.

[25] *See id.*

[26] *See* International Bureau Releases 2009 Year-End Circuit Status Report for U.S. Facilities-Based International Carriers; Capacity Use Shows Modest Growth, rel. Dec. 21, 2010. The report is available on the FCC website at *http://www.fcc.gov/ib/pd/pf/csmanual.html.*

[27] *Id.*

[28] 5 U.S.C. 603(c)(1)–(c)(4).

states and U.S. off-shore points or report separately the traffic between U.S. off-shore points and foreign points will reduce the burden of the annual traffic and revenue report and the circuit-status reports for both large and small carriers. Further, the decision to eliminate the large-carrier report under 47 CFR 43.61(b), the foreign-affiliated-carrier quarterly reports under 47 CFR 43.61(c), the circuit-addition report under 47 CFR 63.23(e), and the telegraph division-of-tolls report under 47 CFR 43.51 will also reduce the burden of the international reporting requirements on both large and small carriers. As such, we believe that the policies adopted in the First Report and Order will not significantly increase any burdens on small carriers. Because this First Report and Order does not adopt additional regulations for service providers, the Commission does not need to consider any alternative approaches that would minimize the economic impact of the reporting requirements on small businesses.

Report to Congress

36. The Commission will send a copy of this First Report and Order and Further Notice of Proposed Rulemaking, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act.[29] In addition, the Commission will send a copy of the First Report and Order and Further Notice of Proposed Rulemaking, including a copy of this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the First Report and Order and Further Notice of Proposed Rulemaking and FRFA (or summaries thereof) will also be published in the **Federal Register**.[30]

Ordering Clauses

37. Accordingly, *it is ordered* that, pursuant to sections 1, 4(i)–4(j), 11, 201–205, 211, 214, 219, 220, 303(r), 309 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–154(j), 161, 201–205, 211, 214, 219–220, 303(r), 309, 403, the policies, rules and requirements discussed in this Report and Order *are adopted* and Parts 43 and 63 of the Commission's rules, 47 CFR parts 43 and 63 *are amended* as set forth below.

38. *It is further ordered* that the Motion for Leave to File Reply Comments One Day Late filed by Kelley Drye & Warren LLP *is granted.*

39. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

40. *It is further ordered* that the Commission *shall send* a copy of this First Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 43 and 63

Communications common carriers, Reporting and recordkeeping requirements, Telegraph, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 43 and 63 as follows:

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS, PROVIDERS OF INTERNATIONAL INTERCONNECTED VOICE OVER INTERNET PROTOCOL SERVICES AND CERTAIN AFFILIATES

■ 1. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104–104, sec. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220 as amended.

§ 43.53 [Removed]

■ 2. Remove § 43.53.

■ 3. Section 43.61 is amended by revising paragraph (a) introductory text, removing and reserving paragraph (b), and removing paragraph (c).

The revision reads as follows:

§ 43.61 Reports of international telecommunications traffic.

(a) Each common carrier engaged in providing international telecommunications service between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and any country or point outside that area shall file a report with the Commission not later than July 31 of each year for service actually provided in the preceding calendar year.

* * * * *

■ 4. § 43.82 is amended by revising paragraph (a) to read as follows:

§ 43.82 International circuit status reports.

(a) Each facilities-based common carrier engaged in providing international telecommunications service between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and any country or point outside that area shall file a circuit-status report with the Chief, International Bureau, not later than March 31 each year showing the status of its circuits used to provide international services as of December 31 of the preceding calendar year.

* * * * *

PART 63—EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

■ 5. The authority citation for part 63 continues to read as follows:

Authority: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

§ 63.23 [Amended]

■ 6. Section 63.23 is amended by removing paragraph (e) and redesignating paragraph (f) as paragraph (e).

[FR Doc. 2011–18156 Filed 7–18–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[FCC 11–73; MM Docket No. 00–148; RM–9939, RM–10198]

Radio Broadcasting Services; Oklahoma and Texas

AGENCY: Federal Communications Commission.

ACTION: Final rule; application for review.

SUMMARY: This document denies the Application for Review filed by Rawhide Radio, LLC, Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc., and CCB Texas Licenses, L.P. (''Joint Petitioners'') of the dismissal of a second alternative proposal to their Counterproposal in this proceeding because it was technically defective.

[29] *See* 5 U.S.C. 801(a)(1)(A).

[30] *See* 5 U.S.C. 604(b).

FOR FURTHER INFORMATION CONTACT: Peter H. Doyle, Chief, Audio Division, Media Bureau, (202) 418–2700, or Andrew J. Rhodes, Audio Division, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Memorandum Opinion and Order,* MM Docket No. 00–148, adopted May 5, 2011, and released May 6, 2011. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

A *Notice of Proposed Rule Making* (''NPRM'') in this proceeding proposed the allotment of a new FM channel at Quanah, Texas. *See* 65 FR 53689 (September 5, 2000). In response to the *NPRM,* the Joint Petitioners filed a mutually exclusive Counterproposal involving 22 communities in Texas and Oklahoma, as well as two alternative proposals. The staff dismissed the original Counterproposal and the first alternative proposal for technical defects, and these actions are not contested by the Joint Petitioners. *See* 68 FR 26557 (May 16, 2003). The Joint Petitioners seek review of the dismissal of the second alternative proposal in the *Memorandum Opinion and Order* in this proceeding on the grounds that it was a technically acceptable proposal and that the staff should have made it the subject of a separate Notice of Proposed Rule Making. *See* 69 FR 29242 (May 21, 2004).

The document reasons that, contrary to the Joint Petitioners' contention, the second alternative proposal had two fatal defects that prevented its consideration as either a rule making petition or a counterproposal. Specifically, one of the proposed allotments conflicted with a previously filed, cut-off allotment proposal in another proceeding and was impermissibly contingent upon the staff's approval of a request to withdraw that proposal. Another proposed reallotment had an unsuitable transmitter site located in or near the Colorado River. Because counterproposals must be technically correct and substantially complete when filed, the second alternative proposal was properly dismissed. To the extent that curative amendments have been allowed in some cases, the document finds that this practice has been inconsistently applied and the public interest is better served by no longer entertaining curative amendments for counterproposals or FM allotment rule making proposals.

The Commission will not send a copy of this *Memorandum Opinion and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the Application for Review was denied.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. *See* 46 FR 11549 (February 9, 1981).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2011–17103 Filed 7–18–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 73 and 74

[MB Docket No. 09–52; FCC 11–28]

Policies To Promote Rural Radio Service and To Streamline Allotment and Assignment Procedures

AGENCY: Federal Communications Commission.

ACTION: Final rules; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) has approved, for a period of three years, the information collection requirements contained in 47 CFR 73.7000, FCC Forms 301 and 340 and the AM Auction Section 307(b) Submissions. The information collection requirements were approved on July 5, 2011 and July 11, 2011 by OMB.

DATES: The amendments to 47 CFR 73.7000, FCC Forms 301 and 340 and the AM Auction Section 307(b) Submissions, published at 76 FR 18942, April 6, 2011, are effective on July 19, 2011.

FOR FURTHER INFORMATION CONTACT: For additional information contact Cathy Williams on (202) 418–2918 or via e-mail to: *cathy.williams@fcc.gov (mailto: cathy.williams@fcc.gov).*

SUPPLEMENTARY INFORMATION: This document announces that on July 5, 2011 and July 11, 2011, OMB approved, for a period of three years, the information collection requirements contained in 47 CFR 73.7000, FCC Forms 301 and 340 and the AM Auction Section 307(b) Submissions. The Commission publishes this document to announce the effective date of this rule section and form revisions. See, In the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket No. 09–52; FCC 11–28, 76 FR 18942, April 6, 2011.

Synopsis

As required by the Paperwork Reduction Act of 1995, (44 U.S.C. 3507), the Commission is notifying the public that it received OMB approval on July 5 and July 11, 2011, for the information collection requirement contained in 47 CFR 73.7000, Forms 301 and 340 and the AM Auction Section 307(b) Submissions . Under 5 CFR part 1320, an agency may not conduct or sponsor a collection of information unless it displays a current, valid OMB Control Number.

No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act that does not display a valid OMB Control Number.

The OMB Control Numbers are 3060–0027, 3060–0029 and 3060–0996 and the total annual reporting burdens for respondents for this information collection are as follows:

OMB Control Number: 3060–0027.

Title: Application for Construction Permit for Commercial Broadcast Station, FCC Form 301.

OMB Approval Date: July 5, 2011.

OMB Expiration Date: July 31, 2014.

Form Number: FCC Form 301.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

Number of Respondents and Responses: 4,544 respondents; 7,980 responses.

Estimated Time per Response: 1– 6.25 hours (average).

Frequency of Response: On occasion reporting requirement; Third-party disclosure requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 20,257 hours.

Total Annual Costs: $88,116,793.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking in MB Docket No. 09–52, FCC 10–24. On March 3, 2011, the Commission adopted a Second Report and Order (''Second R&O''), First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking in MB Docket No. 09–52, FCC 11–28. The Second R&O adopts modifications to the manner in which the Commission awards preferences to applicants under the provisions of Section 307(b) of the Act. For Section 307(b) purposes, licensees and permittees seeking to change community of license must demonstrate that the facility at the new community represents a preferential arrangement of allotments (FM) or assignments (AM) over the current facility. Applications that are submitted to change an existing radio facility's community of license must include an Exhibit containing information demonstrating that the proposed change of community of license will result in a preferential arrangement of allotments or assignments under Section 307(b).

Consistent with actions taken by the Commission in the Second R&O, the Instructions to the Form 301 have been revised to incorporate the information that must be included in the Exhibit, which is responsive to the ''Community of License Change-Section 307(b)'' question in the Form 301. The Form 301 itself has not been revised, nor have any questions been added to the Form 301. Rather, the Instructions for the Form 301 have been revised to assist applicants with completing the mandatory, responsive Exhibit.

The modifications to the Commission's allotment and assignment policies adopted in the Second R&O include a rebuttable ''Urbanized Area service presumption'' under Priority (3), whereby an application to locate or relocate a station as the first local transmission service at a community located within an Urbanized Area, that would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the Urbanized Area rather than the proposed community.

In the case of an AM station, the determination of whether a proposed facility ''could be modified'' to cover 50 percent or more of an Urbanized Area will be made based on the applicant's certification in the Exhibit that there could be no rule-compliant minor modifications to the proposal, based on the antenna configuration or site, and spectrum availability as of the filing date, that could cause the station to place a principal community contour over 50 percent or more of an Urbanized Area. In the case of an FM station, the determination of whether a proposed facility ''could be modified'' to cover 50 percent or more of an Urbanized Area will be based on an applicant's certification in the Exhibit that there are no existing towers in the area to which, at the time of filing, the applicant's antenna could be relocated pursuant to a minor modification application to serve 50 percent or more of an Urbanized Area. Specifically, an FM applicant would need to certify that there could be no rule-compliant minor modification on the proposed channel to provide a principal community signal over 50 percent or more of an Urbanized Area, in addition to covering the proposed community of license. In doing so, FM applicants will be required to consider all existing registered towers in the Commission's Antenna Structure Registration database, in addition to any unregistered towers currently used by licensed radio stations. Furthermore, we expect all applicants to consider widely-used techniques, such as directional antennas and contour protection, when certifying that the proposal could not be modified to provide a principal community signal over the community of license and 50 percent or more of an Urbanized Area.

To the extent the applicant wishes to rebut the Urbanized Area service presumption, the Exhibit must include a compelling showing (a) that the proposed community is truly independent from the Urbanized Area; (b) of the community's specific need for an outlet of local expression separate from the Urbanized Area; and (c) the ability of the proposed station to provide that outlet.

For applicants making a showing under Priority (4), other public interest matters, the Exhibit must provide a description of all populations gaining or losing third, fourth, or fifth reception service, and the percentage of the population in the station's current protected contour that will lose third, fourth, or fifth reception service, if any. The Commission will also require applicants to not only set forth the populations gaining and losing service under the proposal, but also the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal provides a preferential arrangement of allotments or assignments and advances the revised Section 307(b) policies.

The Commission specifically stated that these modified allotment and assignment procedures will apply to any applications to change community of license that are pending as of the release date of the Second R&O, March 3, 2011. Therefore, an applicant with a pending community of license change application must file an amendment demonstrating how the proposal represents a preferential arrangement of allotments or assignments under the policy modifications adopted in the Second R&O. For example, an applicant claiming Priority (3) would have to file the above-referenced ''could be modified'' certification, if appropriate, or a showing to rebut the Urbanized Area service presumption, if applicable. Similarly, an applicant claiming Priority (4) will have to make a showing as to the populations gaining or losing service under the proposed community of license change, as well as the numbers of services those populations will receive if the application is granted, and an explanation as to how the proposal advances the revised Section 307(b) priorities set out in the Second R&O. Such amendments must be filed once the information collection requirements are approved by OMB and the effective date for the requirements is announced by the Commission. Finally, under Priority (4) applicants may offer any other information they believe pertinent to a public interest showing and relevant to the Commission's consideration.

OMB Control Number: 3060–0029.

Title: Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, FCC Form 340.

OMB Approval Date: July 11, 2011.

OMB Expiration Date: July 31, 2014.

Form Number: FCC Form 340.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

Number of Respondents and Responses: 2,765 respondents; 2,765 responses.

Estimated Time per Response: 1–6 hours (average).

Frequency of Response: On occasion reporting requirement; Third-party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 303 and 308 of the Communications Act of 1934, as amended.

Total Annual Burden: 7,150 hours.

Total Annual Costs: $29,079,700.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On January 28, 2010, the Commission adopted a First Report and Order in the Matter of Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures, MB Docket No. 09–52, FCC 10–24 (released February 3, 2010). On March 3, 2011, the Commission adopted a Second Report and Order, First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking in MB Docket No. 09–52, FCC 11–28 (released March 3, 2011). In the First Report and Order, the Commission adopted the Tribal Priority proposed in the Notice of Proposed Rule Making, with some modifications. Under the Tribal Priority, a Section 307(b) priority will apply to an applicant meeting all of the following criteria: (1) The applicant is either a Federally recognized Tribe or Tribal consortium, or an entity 51 percent or more owned or controlled by a Tribe or Tribes; (2) at least 50 percent of the daytime principal community contour of the proposed facilities covers Tribal Lands, in addition to meeting all other Commission technical standards; (3) the specified community of license is located on Tribal Lands; and (4) the applicant proposes the first local Tribal-owned noncommercial educational transmission service at the proposed community of license. The proposed Tribal Priority would apply, if at all, before the fair distribution analysis currently used to evaluate noncommercial educational applications. The Tribal Priority does not prevail over an applicant proposing first overall reception service to a significant population. The First Order on Reconsideration modifies the initially adopted Tribal Priority coverage requirement, by creating an alternative coverage standard under criterion (2), enabling Tribes to qualify for the Tribal Priority even when their Tribal Lands are too small or irregularly shaped to comprise 50 percent of a radio station's signal. In such circumstances, Tribes may claim the priority (i) if the proposed principal community contour of the station encompasses 50 percent or more of that Tribe's Tribal Lands, but does not cover more than 50 percent of the Tribal lands of a non-applicant Tribe, (ii) serves at least 2,000 people living on Tribal Lands, and (iii) the total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population, with provision for waivers as necessary to effectuate the goals of the Tribal Priority. This modification will enable Tribes with small or irregularly shaped lands to qualify for the Tribal Priority. The First Order on Reconsideration also provides that, under criterion (2), even an applicant whose Tribal Lands would be covered by 50 percent or more of the proposed principal community contour (the original coverage standard set forth in the First Report and Order) may not claim the credit if the principal community contour would cover more than 50 percent of the Tribal Lands of a non-applicant Tribe.

FCC Form 340 and its instructions have been revised to accommodate those applicants qualifying for the new Tribal Priority. After adoption of the First Report and Order, we added new Questions 1 and 2, which seek information as to the applicant's eligibility for the Tribal Priority and direct applicants claiming the priority to prepare and attach an exhibit, to Section III. The instructions for Section III were also revised to assist applicants with completing the new questions and preparing the exhibit. In the First Order on Reconsideration, the Commission added an alternative definition of ''Tribal Coverage'' to that adopted in the First Report and Order. Accordingly, we have modified the instructions for Section III, Question 2, to comport with the new alternative Tribal Coverage definition. The form itself has not been revised, nor have any questions been added to Form 340.

OMB Control Number: 3060–0996.

Title: AM Auction Section 307(b) Submissions.

OMB Approval Date: July 5, 2011.

OMB Expiration Date: July 31, 2014.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit entities; State, local or Tribal governments.

Number of Respondents and Responses: 210 respondents; 210 responses.

Estimated Time per Response: 0.5–6 hours (average).

Frequency of Response: On occasion reporting requirement.

Obligation To Respond: Required to obtain or retain benefits. Statutory authority for the information collection requirements is contained in Sections 154(i), 307(b) and 309 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,029 hours.

Total Annual Costs: $2,126,100.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Privacy Impact Assessment: No impact(s).

Needs and Uses: On January 28, 2010, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking (''First R&O'') in MB Docket No. 09–52, FCC 10–24. The First R&O adopted changes to certain procedures associated with the award of broadcast radio construction permits by competitive bidding, including modifications to the manner in which it awards preferences to applicants under the provisions of Section 307(b). In the First R&O, the Commission added a new Section 307(b) priority that would apply only to Native American and Alaska Native Tribes, Tribal consortia, and majority Tribal-owned entities proposing to serve Tribal lands. As adopted in the First R&O, the priority is only available when all of the following conditions are met: (1) The applicant is either a Federally recognized Tribe or Tribal consortium, or an entity that is 51 percent or more owned or controlled by a Tribe or Tribes; (2) at least 50 percent of the area within the proposed station's daytime principal community contour is over that Tribe's Tribal lands, in addition to meeting all other Commission technical standards; (3) the specified community of license is located on Tribal lands; and (4) in the commercial AM service, the applicant must propose first or second aural reception service or first local commercial Tribal-owned transmission service to the proposed community of license, which must be located on Tribal lands. Applicants claiming Section 307(b) preferences using these factors will submit information to substantiate their claims.

On March 3, 2011, the Commission adopted a Second Report and Order (''Second R&O''), First Order on Reconsideration, and Second Further Notice of Proposed Rulemaking in MB Docket No. 09–52, FCC 11–28. The First Order on Reconsideration modifies the initially adopted Tribal Priority coverage requirement, by creating an alternate coverage standard under criterion (2), enabling Tribes to qualify for the Tribal Priority even when their Tribal lands are too small or irregularly shaped to comprise 50 percent of a station's signal. In such circumstances, Tribes may claim the priority (i) If the proposed principal community contour encompasses 50 percent or more of that Tribe's Tribal lands, but does not cover more than 50 percent of the Tribal lands of a non-applicant Tribe; (ii) serves at least 2,000 people living on Tribal lands, and (iii) the total population on Tribal lands residing within the station's service contour constitutes at

least 50 percent of the total covered population, with provision for waivers as necessary to effectuate the goals of the Tribal Priority. This modification will now enable Tribes with small or irregularly shaped lands to qualify for the Tribal Priority.

The modifications to the Commission's allotment and assignment policies adopted in the Second R&O include a rebuttable ''Urbanized Area service presumption'' under Priority (3), whereby an application to locate or relocate a station as the first local transmission service at a community located within an Urbanized Area, that would place a daytime principal community signal over 50 percent or more of an Urbanized Area, or that could be modified to provide such coverage, will be presumed to be a proposal to serve the Urbanized Area rather than the proposed community. In the case of an AM station, the determination of whether a proposed facility ''could be modified'' to cover 50 percent or more of an Urbanized Area will be made based on the applicant's certification in the Section 307(b) showing that there could be no rule-compliant minor modifications to the proposal, based on the antenna configuration or site, and spectrum availability as of the filing date, that could cause the station to place a principal community contour over 50 percent or more of an Urbanized Area. To the extent the applicant wishes to rebut the Urbanized Area service presumption, the Section 307(b) showing must include a compelling showing (a) That the proposed community is truly independent from the Urbanized Area; (b) of the community's specific need for an outlet of local expression separate from the Urbanized Area; and (c) the ability of the proposed station to provide that outlet.

In the case of applicants for new AM stations making a showing under Priority (4), other public interest matters, an applicant that can demonstrate that its proposed station would provide third, fourth, or fifth reception service to at least 25 percent of the population in the proposed primary service area, where the proposed community of license has two or fewer transmission services, may receive a dispositive Section 307(b) preference under Priority (4). An applicant for a new AM station that cannot demonstrate that it would provide the third, fourth, or fifth reception service to the required population at a community with two or fewer transmission services may also, under Priority (4), calculate a ''service value index'' as set forth in the case of Greenup, Kentucky and Athens, Ohio, Report and Order, 2 FCC Rcd 4319 (MMB 1987). If the applicant can demonstrate a 30 percent or greater difference in service value index between its proposal and the next highest ranking proposal, it can receive a dispositive Section 307(b) preference under Priority (4). Except under these circumstances, dispositive Section 307(b) preferences will not be granted under Priority (4) to applicants for new AM stations. The Commission specifically stated that these modified allotment and assignment procedures will not apply to pending applications for new AM stations and major modifications to AM facilities filed during the 2004 AM Auction 84 filing window.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary, Office of Managing Director.

[FR Doc. 2011–18151 Filed 7–18–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 100526226–1322–02]

RIN 0648–AY95

Magnuson-Stevens Act Provisions; Fisheries of the Northeastern United States; Northeast Multispecies Fishery; Amendment 16, Framework Adjustment 44, and Framework Adjustment 45

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

ACTION: Interim final rule; correcting amendment; request for comments.

SUMMARY: This action makes corrections, clarifications, and modifications to existing regulations to ensure consistency with measures adopted by the New England Fishery Management Council (Council) to regulate the Northeast (NE) multispecies fishery and to provide additional flexibility for some of the administrative regulatory requirements. The current regulations governing the NE multispecies fishery contain a number of inadvertent errors, omissions, and potential inconsistencies with measures adopted by the Council and approved by the Secretary of Commerce (Secretary) in recent actions regarding the NE Multispecies Fishery Management Plan (FMP). This interim final rule is being taken by NMFS under the authority of section 305(d) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act); NMFS is implementing changes made to the dockside monitoring program (DSM), not included in the proposed rule, as an interim rule in order to seek public comments on the changes.

DATES: Effective on July 19, 2011. Written comments must be received on or before August 18, 2011.

ADDRESSES: You may submit comments, identified by 0648–AY95, by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- *Fax:* (978) 281–9135.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on the Interim Final Rule to Correct/Clarify the NE Multispecies Regulations.''

Instructions: All comments received are a part of the public record and will generally be posted to *http://regulations.gov* without change. All personal identifying information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the Regulatory Impact Review (RIR) prepared for this rule are available from the Regional Administrator at the above address. Copies of previous management actions, including Amendment 16, Framework Adjustment 44 (FW 44), FW 45, and the respective Final Environmental Impact Statements (FEISs) and Environmental Assessments (EAs) prepared for each action are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. These documents are also accessible via the Internet at *http://www.nefmc.org/nemulti/index.html.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to the Office of Management and Budget (OMB) by e-mail at *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Brett Alger, Fishery Management Specialist, *phone:* 978–675–2153, *fax:* 978–281–9135.

SUPPLEMENTARY INFORMATION: A proposed rule soliciting public comment on making corrections and clarifications to the existing regulations and to ensure the regulations are consistent with the measures adopted by the Council was published in the **Federal Register** on May 2, 2011 (76 FR 24444) with public comments accepted through May 17, 2011. One comment was received, but it was not relevant to this action. NMFS has approved the corrections, clarifications, and modifications to ensure consistency with the goals of the NE Multispecies FMP, as described in Amendment 16, FW 44, and FW 45 to the FMP, and other applicable laws. For a complete description of each measure, see the preamble text from the proposed rule.

Background

The most recent management actions in the NE multispecies fishery (Amendment 16 and FW 44) were both implemented by final rules that published in the **Federal Register** on April 9, 2010 (75 FR 18262 and 75 FR 18356, respectively), and became effective on May 1, 2010. FW 45 was implemented by a final rule that published in the **Federal Register** on April 25, 2011 (76 FR 23042), and became effective on May 1, 2011. Amendment 16 and FW 44 implemented measures necessary to end overfishing and rebuild overfished stocks based on new or existing rebuilding programs and to comply with annual catch limit (ACL) and accountability measure (AM) requirements of the Magnuson-Stevens Act. Amendment 16 also substantially revised existing sector management measures and established new sectors. Amendment 16 superseded measures implemented by an emergency final rule (74 FR 17030, April 13, 2009) to immediately reduce overfishing on certain groundfish stocks managed by the FMP until long-term measures could be implemented by the Amendment 16 final rule. FW 45 implemented a measure to require dockside monitors to inspect fish holds as part of the DSM program.

The final rules implementing Amendment 16, FW 44, and FW 45, as well as other previous actions, contained several inadvertent errors, omissions, and potential inconsistencies with the intent of the these actions, as identified below. This rule corrects these errors, and clarifies or modifies the current regulations to ensure consistency with their original intent. Also, changes are made to some of the regulations to provide additional flexibility for some of the administrative requirements, such as allowing sector managers more time to complete their weekly reports. NMFS is taking these actions under authority in section 305(d) of the Magnuson-Stevens Act, which provides that the Secretary of Commerce may, on his/her own, promulgate regulations necessary to ensure that an FMP or its amendments are carried out in accordance with the provisions of the Magnuson-Stevens Act.

Changes From the Proposed Rule

1. Set-Only Vessel Trip Report (VTR) Exemption

After further consideration, NMFS is not implementing one measure that was in the proposed rule. It was proposed that vessels attempting to only set gear on a trip, and not retrieve any gear or land any fish, be given an exemption from VTR requirements. However, due to monitoring, compliance, and consistency concerns, NMFS no longer believes that this measure is appropriate. The definition of a set-only trip at § 648.2 as defined in the proposed rule will remain in place, as well as the prohibition to possess or land fish while on a set-only trip at § 648.14.

2. DSM Operations Standards

The final rule implementing FW 45 included a new requirement for dockside monitors to board vessels and inspect the fish hold for any trip that is assigned a dockside/roving monitor. NMFS implemented this change to the DSM operations standards to enhance the enforceability of existing provisions and minimize the incentives to underreport/misreport the amount of regulated species landed, after consideration of concerns expressed by the public and enforcement personnel.

This rule modifies the DSM operations standards by removing the requirement for dockside monitors to board each vessel at the conclusion of each offload for the purpose of fish hold inspection, and replacing it with a provision that makes such inspection discretionary, unless it is required in the future by the Regional Administrator. The addition of the requirement to inspect the hold was met with strong opposition from industry members, who cited concerns about privacy, additional time associated with the inspection, the increased potential for accidents, and the adequacy of insurance for coverage of the activity. Upon further review, NMFS has determined that retaining the vessel trip-end (pre-landing) hail requirement currently provides an efficient and effective means for observation and enforcement of vessel landing requirements through unannounced observation of vessel offloads at the discretion of law enforcement, which could include inspection of the hold. The hail requirement and spot inspections allow for deployment of limited monitoring and enforcement resources to the greatest effect. The possibility of such inspection is believed to be a sufficient deterrent at this time. Under the new provision, onboard inspections by dockside monitors will not be required unless the Regional Administrator determines that dockside monitoring of holds will improve the efficiency and effectiveness of monitoring landings. If the Regional Administrator makes such a determination, affected permit holders and monitoring providers will be informed through a letter or other appropriate means. Instructions and guidelines deemed necessary for carrying out such inspections will also be provided. In addition, a sector may also independently authorize dockside/roving monitors to inspect any area of the vessel in which fish are stored. Because this provision was not specified in the proposed rule, it is being implemented as an interim final rule for purposes of seeking additional public comment.

Final Measures

In addition to the ''Changes from the Proposed Rule'' discussed above, this action makes several other modifications and corrections stated below, which are listed in the order in which they appear in the regulations; the last section of corrections are found throughout the regulations.

1. VTR Requirements

The current VTR regulations require that a VTR be submitted by a vessel operator upon entering port with fish. This suggests that vessels that may have conducted fishing activity, but that did not catch any fish, do not have to submit a VTR for that trip. However, the Council in Amendment 5 to NE

multispecies FMP stated: ''logbooks are required of all vessels with a multispecies permit and must be completed for all trips rather than for only trips on which groundfish were landed.'' Additionally, due to monitoring, compliance, and consistency concerns, NMFS no longer believes that this measure is appropriate for trips that are only setting gear and not intending to catch fish. To ensure that vessels submit a VTR for all trips that conduct fishing activity, this rule revises the VTR submission regulations to remove the language that states that only trips that land fish must submit a VTR.

2. Dealer Prohibitions

Current regulations at § 648.14(k)(3)(i) are not explicit as to whether they apply to the importation of foreign-caught NE multispecies. Amendment 16 implement zero-retention of certain fish stocks, therefore, the current dealer provisions in this section could allow the importation of the zero-retention species specified in Amendment 16 that would otherwise be prohibited. This creates an unnecessary enforcement burden for NMFS in cases where a dealer lawfully may be in possession of prohibited species that were obtained from sources other than U.S. fishing vessels. In addition, the regulations do not currently prohibit the export of these zero-retention species. This rule revises the regulatory text for the purposes of eliminating any uncertainty whether zero-retention species can be imported or exported.

3. Regulated Mesh Area (RMA)

The regulations at § 648.80(a)(3)(vi) state that a vessel may not fish in either the Gulf of Maine (GOM) or Georges Bank (GB) Exemption Area unless fishing under certain restrictions, including the provisions of an exempted fishery. This paragraph references some, but inadvertently, not all of the exempted fisheries, specifically the exempted fisheries outlined at § 648.80(a)(15), (a)(16), and (a)(18). Therefore, this rule revises the regulations at § 648.80(a)(3)(vi) to reference all applicable exempted fisheries through § 648.80(a)(18) and update other references within § 648.80 to be more consistent with current regulations.

4. Applicability of Restricted Gear Areas (RGA)

Amendment 16 adopted RGAs that require a common pool vessel, fishing any part of a trip within a RGA under a NE multispecies day-at-sea (DAS), to use selective gear (*i.e.,* a haddock separator trawl, a Ruhle trawl, a rope separator trawl, hook gear, or flatfish or roundfish gillnets with mesh size greater than or equal to 10 inches (25.4 cm)) to reduce the catch of species requiring substantial reductions in fishing mortality. The current regulations implementing this provision at § 648.81(n) require that these gear restrictions apply to all NE multispecies limited access vessels fishing any part of a trip within a RGA. This rule clarifies that the RGAs only apply to vessels fishing under a NE multispecies DAS, to maintain consistency with the original intent of Amendment 16.

5. Small Vessel Category Possession Limits

Regulations at § 648.82(b)(5)(i) specify that a vessel electing to fish under the Small Vessel category may retain up to 300 lb (136.1 kg) of cod, haddock, and yellowtail flounder, combined, and one Atlantic halibut per trip, without being subject to DAS restrictions, provided the vessel does not exceed the yellowtail flounder trip limit restrictions specified under § 648.86(g). Additionally, this paragraph currently states that vessels with a Small Vessel category permit are not subject to trip limits for other NE multispecies. Amendment 16 prohibited the possession of four species in any fishery (windowpane flounder, ocean pout, Atlantic wolffish, and SNE/MA winter flounder). The current Small Vessel category regulations could be interpreted to mean that Small Vessel category permits may possess these prohibited species, which undermines the purpose for the prohibition on possessing these species. Therefore, this rule changes the reference to ''§ 648.86(g)'' in § 648.82(b)(5)(i) to read ''§ 648.86,'' and removes the sentence ''Such vessel is not subject to a possession limit for other NE multispecies'' to more accurately reflect the trip limits revised by Amendment 16 and FW 44.

6. Default AM for Stocks Not Allocated to Sectors

This rule revises the common pool differential DAS counting AM regulations at § 648.82(n)(1), the ACL distribution regulations at § 648.90(a)(4)(iii)(E)(*2*), and the overall AM regulations at § 648.90(a)(5) to clarify that sector vessel catch of stocks not allocated to sectors (*i.e.,* Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish) during FYs 2010 and 2011 will be added to the catch of such stocks by common pool vessels during those FYs to determine if the common pool differential DAS counting AM will be triggered. This would ensure that the regulations implementing Amendment 16 correctly reflect the Council's intent and NMFS's understanding that the AMs applicable to the NE multispecies fishery must be sufficient to prevent overfishing on the stock as a whole for FYs 2010 and 2011.

7. Multispecies Minimum Fish Sizes and Fillet Provisions

The current regulations at § 648.83(a) includes two separate lists specifying minimum fish sizes. This rule corrects this error by removing paragraph § 684.83(a)(3) in its entirety. This rule will have no affect on legal fish sizes apart from what is in the current regulations and analyzed in Amendment 16.

This rule expands the existing fillet exemption to all vessels issued a limited access NE multispecies DAS permit, including those that are fishing in a sector and exempt from fishing under a DAS. Consistent with the intent of Amendment 16 and the associated regulation at § 648.87(b)(1)(v), all catch by a sector vessel, including fillets retained by crew for personal use, count against the applicable annual catch entitlement (ACE) for the sector in which that vessel participates.

Currently, fillets and parts of fish as referenced at § 648.83(b) are counted at a rate of 3:1 solely for compliance purposes with DAS possession limits. That is, the regulations require the weight of fillets or parts of fish to be multiplied by 3 and added to the weight of whole fish on board. The total weight of whole fish and fillets combined, must comply with trip limits. However, the current system does not accurately account for the fish landed for at-home consumption under sector and common pool sub-ACLs. This rule replaces the current 1:1 counting method with 3:1 counting for quota monitoring purposes to ensure that all fish being landed for at-home consumption would be accounted for. This is consistent with the intentions of the FMP that all catch by common pool and sector vessels be accounted for, and will prevent a sector from unknowingly fishing over its respective ACE.

8. Adjustments to U.S./Canada Management Area TAC

Amendment 16 states that the catch of stocks of yellowtail flounder by the scallop fishery will be treated as an ''other sub-component'' of the ACL until AMs for the catch of yellowtail flounder in the scallop fishery can be developed in an amendment to the Atlantic Sea Scallop FMP (*i.e.,* Amendment 15). Amendment 15 proposes specific AMs

for the scallop fishery's yellowtail flounder sub-ACL in FY 2011 and beyond, and also proposes retroactive AMs for the FY 2010 yellowtail sub-component allocated to the scallop fishery in FY 2010. Therefore, this rule removes the regulatory reference to the scallop fishery in § 648.85(a)(2)(ii) and replaces it with a reference to the overall groundfish AM provisions in § 648.90(a)(5)(ii). The final rule implementing Scallop Amendment 15, if approved, would likely be implemented in early July 2011. Because the Amendment 15 ACL and AM measures applicable to the scallop fishery were not implemented at the start of the NE multispecies 2011 FY on May 1, 2011, this correction ensures that any overage of the overall GB yellowtail flounder ACL caused by another fishery will be divided between the common pool and sector sub-components to determine if the respective AMs will be triggered.

9. Eastern U.S./Canada Landing Limit Restrictions

Amendment 16 revised the existing closure provisions for the Eastern U.S./Canada Area when 100 percent of the TAC is reached for GB cod. Amendment 16 revised the regulation at § 648.85(a)(3)(iv)(A)(*2*) to require that when 100 percent of the TAC is reached for GB cod, the Eastern U.S./Canada Area will be closed to all NE multispecies DAS vessels. This regulation mistakenly maintains outdated language that fails to recognize the specific allocation of a portion of the Eastern U.S./Canada TACs for this stock to sectors. To maintain consistency with Amendment 16 and ensure that NMFS has the authority to close the Eastern U.S./Canada Area to each component of the NE multispecies commercial fishery that exceeded its allocation of the Eastern U.S./Canada Area GB cod TAC, this rule clarifies the regulations at § 648.85(a)(3)(iv)(A)(*2*) by closing the area to all limited access NE multispecies vessels subject to a particular TAC allocation, once that segment's allocation of the Eastern U.S./Canada Area GB cod TAC is projected to be caught.

10. Special Management Programs

The current regulations at § 648.85(b)(3)(x)(A) restrict the gear that may be used in the Closed Area II Yellowtail Flounder/Haddock Special Access Program (SAP) to only trawl gear when the SAP in open to targeting yellowtail flounder. This is not consistent with the measure originally implemented in the Amendment 13 final rule (69 FR 22906, April 27, 2004). This rule revises these regulations to clarify that vessels also may use hook gear or gillnet gear in this SAP when it is open to the targeting of yellowtail flounder by revising the text to state that NE multispecies vessels ''fishing with trawl gear'' must use a haddock separator trawl, flounder net, or Ruhle trawl.

Amendment 16 revised the Regular B DAS Program to require vessels fishing under the Regular B DAS Program in the GB cod stock area with trawl gear to use a haddock separator trawl, a Ruhle trawl, or other approved trawl gear with a codend composed of at least 6-inch (15.24-cm) diamond or square mesh. However, the regulations implementing Amendment 16 did not specify an area where the 6-inch (15.24-cm) mesh codends could be used. Therefore, this rule clarifies the regulations at § 648.85(b)(6)(iv)(J)(*4*) by specifying that the use of a 6-inch (15.24-cm) codend is only permitted within the GB cod stock area.

In 2005, FW 41 revised the Closed Area I Hook Gear Haddock SAP measures affecting common pool vessels to address concerns identified by NMFS in the original submission of this SAP as part of FW 40–A. The final rule implementing FW 41 inadvertently did not include a provision restricting the bait that may be used by common pool vessels. The final rule implementing Amendment 16 rectified this oversight but inadvertently imposed the bait requirements on sector vessels. This rule revises the bait restrictions for this SAP specified at § 648.85(b)(7)(iv)(E) and (vi) to only apply to common pool vessels.

11. Daily Landing Restrictions

Current landing limit regulations at § 648.86(m) prohibit NE multispecies permitted vessels from landing regulated NE multispecies or ocean pout more than once in any 24-hr period. These regulations provide an example that indicates that this period of time begins when a vessel departs port, rather than when the vessel returns to port and lands groundfish. Amendment 16 states that the intent was to be based upon time of landing. Therefore, this rule changes the regulations at § 648.86(m) by modifying the example to reflect the current regulations, which are correctly based upon time of landing.

12. Sector ACE Allocation

The current regulations at § 648.87(b)(1)(ii) state that a sector may only fish in a particular stock area if it has been allocated or acquires ACE for all stocks caught in that stock area. This text could be interpreted to mean that a sector would have to be allocated or acquire ACE for a stock that sectors are not allocated, such as SNE/MA winter flounder, to be able to fish, for example, in the SNE/MA yellowtail flounder stock area. To clarify that sectors have the ability to fish in a particular stock area for a stock allocated to sectors, the text at § 648.87(b)(1)(ii) will be revised to state that sectors may fish in each stock area provided it has been allocated or acquires ACE for those stocks ''allocated'' to sectors that are caught within that stock area.

13. Sector Monitoring

The DSM program requires all NE multispecies sector vessels (and common pool vessels on a NE multispecies DAS trip starting in FY 2012) in which the NE multispecies catch applies against the sector ACE to submit a trip-start hail (TSH) report to the DSM provider. If the vessel operator does not receive a confirmation that the TSH report has been received within 10 min of sending the report, the current regulations at § 648.87(b)(5)(i)(A)(*1*) require the vessel operator to contact the DSM service provider to confirm the receipt of the TSH report via a back-up system specified by the DSM service provider. The delivery of such reports via VMS often takes more than 10 min because the 10-min response requirement has proven to be impractical. Therefore, this rule eliminates the 10-min requirement currently specified in § 648.87(b)(5)(i)(A)(*1*), but still require the vessel operator to contact the DSM service provider via a back-up system, after a time determined by the DSM provider, to confirm the receipt of the TSH report.

The DSM provisions require that, for a trip that is selected to be monitored, all offload events must be monitored, including offloads occurring at more than one location, offloads to a truck, and offloads at remote locations. The regulations at § 648.87(b)(5)(ii)(B)(*2*) specify that the roving monitor (RM) must ''record all offloaded catch by species and market class'' for offloads to a truck. Based upon input from the fishing industry, NMFS has determined that the regulation requiring that species be sorted by market class is impractical, as sorting does not generally occur at offloads to trucks and in remote locations. Additionally, NMFS has determined that this information is unnecessary to accurately monitor landings data, as catch is monitored at the species/stock level and not at the level of market class. This rule changes the data collection requirement for

offloads to a truck by a RM to not require the species be sorted by market class, by removing the language ''and market class'' from regulations at § 648.87(b)(5)(ii)(B)(*2*).

The regulations at § 648.87(b)(5)(ii)(B)(*2*) require offloads to trucks to specify the number of totes of each species offloaded, the weight of fish in each tote, and that each tote is properly labeled with information that identifies the trip to which the tote is associated. The tote-tagging requirement is intended to ensure that all catch offloaded from a vessel to a truck can be tracked from the offload site to the dealer, where it will be accurately weighed and reported. To minimize the burden on RMs and the cost associated with such monitoring activities, this rule exempts the tote-tagging requirement only if the following three conditions are met: (1) The RM that observed the offload at the dock will also serve as the DSM when the truck is offloaded at the dealer; (2) the RM will follow the truck, in line of sight, from the remote offload location to the dealer where the actual weighing of the fish occurs; and (3) the truck is loaded with only the catch from the one trip being monitored.

14. Sector Reporting Requirements

Amendment 16 implemented a number of sector reporting requirements, including weekly catch reports to be submitted to NMFS by each sector. The regulations at § 648.87(b)(1)(vi)(B) specify that each sector must submit a weekly catch report by 2359 hr on Thursday of the week following the reporting week, however, dealer data are not available until Wednesday. Based on sector manager input, 1 day has not been a sufficient amount of time to accurately complete the weekly sector catch reports. This rule provides additional flexibility by extending the sector deadline submission for the weekly catch report from 2359 hr on Thursday, to 0700 hr on the second Monday for the same reporting week in question.

15. Recreational and Charter/Party Vessel Restrictions

Exemptions allow NE multispecies charter/party permitted vessels to fish in the GOM Closed Areas provided such vessels first obtain a letter of authorization (LOA) from NMFS. The regulations at § 648.89(e)(3)(iv) implementing this provision state that a vessel may not use any NE multispecies DAS during the period of participation to ensure that vessels operating under the charter/party provisions cannot fish commercially within these closed areas. However, not all commercial NE multispecies vessels fish under a DAS. This rule clarifies the regulations by including language that states that vessels possessing an LOA to fish as a charter/party vessel in the GOM Closed Areas cannot fish on a sector trip, under a NE multispecies DAS, or under the provisions of the Small Vessel, Handgear A, and Handgear B categories during the period of participation.

The regulations at § 648.89(d) will also be corrected to state that charter/party vessels cannot sell, barter, trade, or otherwise transfer for a commercial purpose, or attempt to sell, barter, trade, or otherwise transfer for a commercial purpose, NE multispecies caught or landed while fishing in the U.S. Exclusive Economic Zone (EEZ) unless they are fishing under a NE multispecies ''sector trip,'' or fishing under a NE multispecies Handgear A, Handgear B, or Small Vessel Category C permit.

16. Applicability of Possession Prohibition for Certain Stocks

The final rule implementing Amendment 16 measures did not clearly prohibit recreational and charter/party vessels from possessing ocean pout and windowpane flounder. However, Section 4.3.2.1 of Amendment 16 indicates that possession of these stocks is prohibited by all fisheries. Although this section is specific to the effort control measures adopted for NE multispecies common pool vessels, based on further consultation with Council staff, it was determined that the intent of Amendment 16 was to prohibit the retention of these species by all vessels. Therefore, this rule restricts the possession of windowpane flounder and ocean pout in all fisheries, including catch by recreational anglers, charter/party vessels, and other fisheries such as the scallop fishery. The possession of Atlantic wolffish and SNE winter flounder is already correctly prohibited by recreational anglers and charter/party vessels as specified at § 648.89(c)(6) and (7), respectively.

17. Monkfish Declarations

The regulations at § 648.92(b)(1)(iii) allow a vessel fishing in the NE multispecies fishery to change its fishing activity declaration after leaving port to reflect the vessel operator's intention to also fish in the monkfish fishery on the same trip. The applicability of the monkfish option is for a vessel fishing under a NE multispecies Category A DAS, which was the universal effort control in the NE multispecies fishing prior to the implementation of substantial revisions to sector measures under Amendment 16. However, NMFS believes that the Council's intent in Amendment 16 was not to exclude vessels from this option when fishing on a sector trip. Therefore, this rule inserts a reference to vessels fishing on a NE multispecies sector trip to enable such vessels to also take advantage of the monkfish option.

18. Additional Corrections

In addition to the changes specified above, the following changes are being made to the regulations to correct inaccurate references and to further clarify the intent of the Council.

In § 648.10(k)(3)(ii), N. latitude, Point G9 will be corrected to read ''The intersection of the Cape Cod, MA, coastline and 70°00′ W. long.'' This current point incorrectly references the ''South-facing shoreline of Cape Cod, MA.''

Section § 648.14(k)(6)(ii)(B) will be corrected to reference the special management programs at ''§ 648.85(b)(7)(iv)(E)'' to replace the current inaccurate reference to ''§ 648.85(b)(7)(iv)(F).''

In § 648.80(a)(2)(ii) and (a)(17)(ii), the ''Approximate loran C bearings'' portion of the table will be removed. The U.S. Coast Guard ceased operations of Loran-C, on February 10, 2010, which renders these coordinates useless. This will have minimum impact, as the same information is displayed in the regulations using latitude and longitude coordinates.

In § 648.80(a)(3)(v), a reference to ''§ 648.87(c)'' will be added to the beginning of the section, to include sector vessels.

In § 648.80(b)(3)(i), the phrase ''unless otherwise restricted in § 648.86'' will be added. This paragraph includes ocean pout as one of the list of species exemptions for the SNE RMA; however, Amendment 16 listed ocean pout as a zero-retention species. The Amendment 16 final rule inadvertently failed to cross-reference this prohibition in § 648.86.

In § 648.80(c)(2)(i), the reference to § 648.104(a) will be revised to read ''shall be that specified by § 648.104(a).'' This was the original regulatory text used to cite the regulations and was inadvertently changed in the final rule implementing Amendment 16.

In § 648.85(a)(1)(ii), this rule corrects the Eastern U.S./Canada Area, N. latitude coordinates for Points USCA 7 and USCA 6 to 40°50′ N. latitude, and Points USCA 5 and 4 to 40°40′ N. latitude. Amendment 13 defined the Eastern U.S./Canada Area as being composed of statistical areas 561 and 562. The coordinates for statistical area 562 used to define the Eastern U.S./

Canada Area were incorrectly transposed in the Amendment 13 final rule and will be rectified by this action.

Section § 648.87(b)(1)(ix) will be corrected to reference the prohibited species regulations at ''§ 648.86(l),'' instead of the inaccurate reference to ''§ 648.87(1).'' In addition, a reference to ''§ 648.86(c)'' will be inserted at § 648.87(b)(1)(ix) to clarify that sector vessels are held to the one-fish per trip possession limit of Atlantic halibut, as intended in Amendment 16.

In § 648.87(c)(2), a reference to ''fishing regulations within the groundfish Fishery Management Plan (FMP)'' will be inserted to clarify that a NE multispecies sector operations plan can only include exemptions from regulations within the groundfish FMP, as intended in Amendment 16.

In § 648.89(c)(2)(i), the reference to ''private recreational vessel'' will be corrected to read ''charter/party vessel.''

In § 648.90(a)(4), the reference to ''(a)(5)'' will be corrected to read ''(a)(6).''

Section § 648.90(a)(4)(iii)(E) will be revised to include a reference to the recreational fishery. A reference to the recreational fishery was made in the title of this paragraph, but was not included in the regulations.

Classification

Pursuant to sections 304(b)(1)(A) and 305(d) of the Magnuson-Stevens Act, I have determined that this interim final rule is consistent with the NE Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

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

This interim final rule contains reporting and recordkeeping requirements and associated information collections subject to the Paperwork Reduction Act (PRA), which have been previously approved by OMB under control numbers 0648–0202, 0648–0212, and 0648–0229. Measures in this rule include provisions that require revised collection-of-information requirements. Public reporting burden for these collections of information are estimated to average as follows:

1. VMS area and DAS declaration, OMB# 0648–0202, (5 min/response);
2. VMS trip-level catch reports, OMB# 0648–0212, (15 min/response);
3. Request for a LOA to fish in a NE multispecies RGA, OMB# 0648–0202, (5 min/response);
4. VMS declaration to fish in a NE multispecies RGA, OMB# 0648–0202, (5 min/response);
5. Pre-trip hail report to a dockside monitoring service provider, OMB# 0648–0202, (2 min/response);
6. Trip-end hail report to a dockside monitoring service provider, OMB# 0648–0202, (15 min/response);
7. Confirmation of dockside monitoring trip-end hail report, OMB# 0648–0202, (2 min/response);
8. Dockside/roving service provider data entry, OMB# 0648–0202, (3 min/response);
9. Daily VMS catch reports when fishing in the U.S./Canada Management Area and Closed Area II SAPs, OMB# 0648–0212, (15 min/response);
10. Daily VMS catch reports when fishing in the Closed Area I Hook Gear Haddock SAP, OMB# 0648–0212, (15 min/response);
11. Daily VMS catch reports when fishing in the Regular B DAS Program, OMB# 0648–0212, (15 min/response); and
12. Copy of the dealer weigh-out slip or dealer signature of the dockside monitor report, OMB# 0648–0212 (2 min/response).
13. Letter of authorization for charter/party vessels to access the Western GOM Closure Area and the GOM Rolling Closure Areas, OMB# 0648–0202, (5 min/response);
14. Declaration of the monkfish DAS option via VMS, OMB# 0648–0202, (5 min/response);
15. Sector weekly catch report, OMB# 0648–0212, (4 hr/response);
16. VTR requirement, OMB# 0648–0212, (5 min/response); and
17. Dealer report, OMB# 0648–0229, (4 min/response).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

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

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping.

Dated: July 13, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reason set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

■ 2. In § 648.2, add in alphabetical order the new definition for ''set-only trip'' to read as follows:

§ 648.2 Definitions.

* * * * *

Set-only trip means a fishing trip on which any federally permitted vessel deploys gear with the intention of retrieving it on a separate trip and does not haul-back or retrieve any gear capable of catching fish on the set-only trip.

* * * * *

■ 3. In § 648.7, revise paragraph (c) to read as follows:

§ 648.7 Recordkeeping and reporting requirements.

* * * * *

(c) *When to fill out a log report.* Log reports required by paragraph (b)(1)(i) of this section must be filled out with all required information, except for information not yet ascertainable, prior to entering port. Information that may be considered unascertainable prior to entering port includes dealer name, dealer permit number, and date sold. Log reports must be completed as soon as the information becomes available. Log reports required by paragraph (b)(1)(ii) of this section must be filled out before landing any surfclams or ocean quahogs.

* * * * *

■ 4. In § 648.10, revise paragraph (k)(3)(ii) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(k) * * *

(3) * * *

(ii) *Inshore GB Stock Area 2.* The inshore GB Stock Area is defined by straight lines connecting the following points in the order stated:

INSHORE GB STOCK AREA 2

Point	N. latitude	W. longitude
G9	(1)	70°00′
G10	42°20′	70°00′
IGB1	42°20′	68°50′
IGB2	41°00′	68°50′
IGB3	41°00′	69°30′
IGB4	41°10′	69°30′
IGB5	41°10′	69°50′
IGB6	41°20′	69°50′
IGB7	41°20′	70°00′
G12	(2)	70°00′

[1] The intersection of the Cape Cod, MA, coastline and 70°00′ W. long.

[2] South-facing shoreline of Cape Cod, MA.

* * * * *

■ 5. In § 648.14, add paragraph (k)(2)(iv); and revise paragraphs (k)(3)(i) and (k)(6)(ii)(B) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(2) * * *

(iv) Possess or land fish while setting fixed gear on a set-only trip as declared through the pre-trip notification system pursuant to § 648.11(k).

(3) * * *

(i) It is unlawful to purchase, possess, import, export, or receive as a dealer, or in the capacity of a dealer, regulated species or ocean pout in excess of the possession limits specified in § 648.82, § 648.85, § 648.86, or § 648.87 applicable to a vessel issued a NE multispecies permit, unless otherwise specified in § 648.17, or unless the regulated species or ocean pout are purchased or received from a vessel that caught them on a sector trip and such species are exempt from such possession limits in accordance with an approved sector operations plan, as specified in § 648.87(c).

* * * * *

(6) * * *

(ii) * * *

(B) *Hook gear.* Fail to comply with the restrictions on fishing and gear specified in § 648.80(a)(3)(v), (a)(4)(v), (b)(2)(v), and (c)(2)(iv) if the vessel has been issued a limited access NE multispecies permit and fishes with hook gear in areas specified in § 648.80(a), (b), or (c), unless allowed under § 648.85(b)(7)(iv)(E).

* * * * *

■ 6. In § 648.80, revise paragraphs (a)(2)(ii), (a)(3)(v), (a)(3)(vi), (a)(17)(ii), (b)(3)(i), and (c)(2)(i) to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(a) * * *

(2) * * *

(ii) Bounded on the east by straight lines connecting the following points in the order stated:

GB REGULATED MESH AREA

Point	N. latitude	W. longitude
CII3	42°22′	67°20′ [1]
SNE1	40°24′	65°43′ [2]

[1] The U.S.-Canada Maritime Boundary.

[2] The U.S.-Canada Maritime Boundary as it intersects with the EEZ.

* * * * *

(3) * * *

(v) *Hook gear restrictions.* Unless otherwise specified in this paragraph (a)(3)(v) or § 648.87(c), vessels fishing with a valid NE multispecies limited access permit and fishing under a NE multispecies DAS or on a sector trip, and vessels fishing with a valid NE multispecies limited access Small-Vessel permit in the GOM Regulated Mesh Area, and persons on such vessels, are prohibited from fishing, setting, or hauling back, per day, or possessing on board the vessel, more than 2,000 rigged hooks. All longline gear hooks must be circle hooks, of a minimum size of 12/0. An unbaited hook and gangion that has not been secured to the ground line of the trawl on board a vessel during the fishing trip is deemed to be a replacement hook and is not counted toward the 2,000-hook limit. A ''snap-on'' hook is deemed to be a replacement hook if it is not rigged or baited during the fishing trip. The use of de-hookers (''crucifer'') with less than 6-inch (15.2-cm) spacing between the fairlead rollers is prohibited. Vessels fishing with a valid NE multispecies limited access Hook Gear permit and fishing under a multispecies DAS or on a sector trip in the GOM Regulated Mesh Area, and persons on such vessels, are prohibited from possessing gear other than hook gear on board the vessel. Vessels fishing with a valid NE multispecies limited access Handgear A permit, and persons on such vessels, are prohibited from fishing, or possessing on board the vessel, gear other than handgear. Vessels fishing with tub-trawl gear are prohibited from fishing, setting, or hauling back, per day, or possessing on board the vessel more than 250 hooks.

(vi) *Other restrictions and exemptions.* A vessel is prohibited from fishing in the GOM or GB Exemption Area as defined in paragraph (a)(17) of this section, except if fishing with exempted gear (as defined under this part) or under the exemptions specified in paragraphs (a)(5) through (7), (a)(9) through (a)(16) and (a)(18), (d), (e), (h), and (i) of this section; or if fishing under a NE multispecies DAS; or if fishing on a sector trip; or if fishing under the Small Vessel or Handgear A permit specified in § 648.82(b)(5) and (6), respectively; or if fishing under a Handgear B permit specified in § 648.88(a); or if fishing under the scallop state waters exemptions specified in § 648.54 and paragraph (a)(11) of this section; or if fishing under a scallop DAS in accordance with paragraph (h) of this section; or if fishing pursuant to a NE multispecies open access Charter/Party or Handgear permit specified in § 648.88; or if fishing as a charter/party or private recreational vessel in compliance with § 648.89. Any gear used by a vessel in this area must be authorized under one of these exemptions. Any gear on a vessel that is not authorized under one of these exemptions must be stowed as specified in § 648.23(b).

* * * * *

(17) * * *

(ii) Bounded on the south by straight lines connecting the following points in the order stated:

GULF OF MAINE/GEORGES BANK EXEMPTION AREA

Point	N. latitude	W. longitude
G6	40°55.5′	66°38′
G7	40°45′	68°00′
G8	40°37′	68°00′
G9	40°30′	69°00′
NL3	40°22.7′	69°00′
NL2	40°18.7′	69°40′
NL1	40°50′	69°40′
G11	40°50′	70°00′
G12	(1)	70°00′

[1] Northward to its intersection with the shoreline of mainland Massachusetts.

* * * * *

(b) * * *

(3) * * *

(i) *Species exemption.* Unless otherwise restricted in § 648.86, owners and operators of vessels subject to the minimum mesh size restrictions specified in paragraphs (a)(4) and (b)(2) of this section may fish for, harvest,

possess, or land butterfish, dogfish (caught by trawl only), herring, Atlantic mackerel, ocean pout, scup, shrimp, squid, summer flounder, silver hake and offshore hake, and weakfish with nets of a mesh size smaller than the minimum size specified in the GB and SNE Regulated Mesh Areas when fishing in the SNE Exemption Area defined in paragraph (b)(10) of this section, provided such vessels comply with requirements specified in paragraph (b)(3)(ii) of this section and with the mesh size and possession limit restrictions specified under § 648.86(d).

* * * * *

(c) * * *

(2) * * *

(i) *Vessels using trawls.* Except as provided in paragraph (c)(2)(iii) of this section, and § 648.85(b)(6), the minimum mesh size for any trawl net not stowed and not available for immediate use in accordance with § 648.23(b), on a vessel or used by a vessel fishing under the NE multispecies DAS program or on a sector trip in the MA Regulated Mesh Area, shall be that specified by § 648.104(a), applied throughout the body and extension of the net, or any combination thereof, and 6.5-inch (16.5-cm) diamond or square mesh applied to the codend of the net, as defined in paragraph (a)(3)(i) of this section. This restriction does not apply to nets or pieces of nets smaller than 3 ft (0.9 m) × 3 ft (0.9 m), (9 sq ft (0.81 sq m)), or to vessels that have not been issued a NE multispecies permit and that are fishing exclusively in state waters.

* * * * *

■ 7. In § 648.81, revise the introductory text of paragraph (n) to read as follows:

§ 648.81 NE multispecies closed areas and measures to protect EFH.

* * * * *

(n) *NE Multispecies Restricted Gear Areas.* With the exception of a vessel on a sector trip, any vessel issued a limited access NE multispecies permit fishing under a NE multispecies DAS that is fishing any part of a trip in one or both of the NE Multispecies Restricted Gear Areas specified in paragraphs (n)(1) and (2) of this section must comply with all applicable restrictions specified in this paragraph (n). If such a vessel fishes inside/outside of these areas on the same trip, the most restrictive measures for the areas fished apply, including, but not limited to, gear restrictions and trip limits.

* * * * *

■ 8. In § 648.82, revise the introductory text of paragraphs (b)(5)(i), and (n)(1) to read as follows:

§ 648.82 Effort-control program for NE multispecies limited access vessels.

* * * * *

(b) * * *

(5) * * *

(i) *DAS allocation.* A vessel qualified and electing to fish under the Small Vessel category may retain up to 300 lb (136.1 kg) of cod, haddock, and yellowtail flounder, combined, and one Atlantic halibut per trip, without being subject to DAS restrictions, provided the vessel does not exceed the yellowtail flounder possession restrictions specified at § 648.86(g). Such a vessel is subject to the possession limits specified for other regulated species and ocean pout, as specified at § 648.86. Any vessel may elect to switch into the Small Vessel category, as provided in § 648.4(a)(1)(i)(I)(*2*), if the vessel meets or complies with the following:

* * * * *

(n) * * *

(1) *Differential DAS counting AM for fishing years 2010 and 2011.* Unless otherwise specified pursuant to § 648.90(a)(5), based upon catch and other information available to NMFS by February of each year, the Regional Administrator shall project the catch of regulated species or ocean pout by common pool vessels for the fishing year ending on April 30 to determine whether such catch will exceed any of the sub-ACLs specified for common pool vessels pursuant to § 648.90(a)(4)(iii). This initial projection of common pool catch shall be updated shortly after the end of each fishing year once information becomes available regarding the catch of regulated species and ocean pout by vessels fishing for groundfish in state waters outside of the FMP, vessels fishing in exempted fisheries, and vessels fishing in the Atlantic sea scallop fishery; and the catch of Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish by sector vessels to determine if excessive catch by such vessels resulted in the overall ACL for a particular stock to be exceeded. If such catch resulted in the overall ACL for a particular stock being exceeded, the common pool's catch of that stock shall be increased by an amount equal to the amount of the overage of the overall ACL for that stock multiplied by the common pool's share of the overall ACL for that stock calculated pursuant to § 648.90(a)(4)(iii)(E)(*2*). For example, if the 2010 overall ACL for GOM cod was exceeded by 10,000 lb (4,536 kg) due to excessive catch of that stock by vessels fishing in state waters outside the FMP, and the common pool's share of the 2010 overall GOM cod ACL was 5 percent, then the common pool's 2010 catch of GOM cod shall be increased by 500 lb (226.8 kg) (10,000 lb (4,536 kg) × 0.05 of the overall GOM cod ACL). If based on the initial projection completed in February, the Regional Administrator projects that any of the sub-ACLs specified for common pool vessels will be exceeded or underharvested, the Regional Administrator shall implement a differential DAS counting factor to all Category A DAS used within the stock area in which the sub-ACL was exceeded or underharvested, as specified in paragraph (n)(1)(i) of this section, during the following fishing year, in a manner consistent with the Administrative Procedure Act. Any differential DAS counting implemented at the start of the fishing year will be reevaluated and recalculated, if necessary, once updated information is obtained. The differential DAS counting factor shall be based upon the projected proportion of the sub-ACL of each NE multispecies stock caught by common pool vessels, rounded to the nearest even tenth, as specified in paragraph (n)(1)(ii) of this section, unless otherwise specified pursuant to § 648.90(a)(5). For example, if the Regional Administrator projects that common pool vessels will catch 1.18 times the sub-ACL for GOM cod during fishing year 2010, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to all Category A DAS used by common pool vessels only within the Inshore GOM Differential DAS Area during fishing year 2011 (*i.e.,* Category A DAS will be charged at a rate of 28.8 hr for every 24 hr fished—1.2 times 24-hr DAS counting). If it is projected that catch in a particular fishing year will exceed or underharvest the sub-ACLs for several regulated species stocks within a particular stock area, including both exceeding and underharvesting several sub-ACLs within a particular stock area, the Regional Administrator shall implement the most restrictive differential DAS counting factor derived from paragraph (n)(1)(ii) of this section for the sub-ACLs exceeded or underharvested to any Category A DAS used by common pool vessels within that particular stock area. For example, if it is projected that common pool vessels will be responsible for 1.2 times the GOM cod sub-ACL and 1.1 times the CC/GOM yellowtail flounder sub-ACL, the Regional Administrator shall implement a differential DAS counting factor of 1.2 to any Category A DAS fished by common pool vessels only

within the Inshore GOM Differential DAS Area during the following fishing year. For any differential DAS counting factor implemented in fishing year 2011, the differential DAS counting factor shall be applied against the DAS accrual provisions specified in paragraph (e)(1)(i) of this section for the time spent fishing in the applicable differential DAS counting area based upon the first VMS position into the applicable differential DAS counting area and the first VMS position outside of the applicable differential DAS counting area, pursuant to § 648.10. For example, if a vessel fished 12 hr inside a differential DAS counting area where a differential DAS counting factor of 1.2 would be applied, and 12 hr outside of the differential DAS counting area, the vessel would be charged 48 hr of DAS use because DAS would be charged in 24-hr increments ((12 hr inside the area × 1.2 = 14.4 hr) + 12 hr outside the area, rounded up to the next 24-hr increment to determine DAS charged). For any differential DAS counting factor implemented in fishing year 2012, the differential DAS counting factor shall be applied against the DAS accrual provisions in paragraph (e)(1)(i) of this section, or if a differential DAS counting factor was implemented for that stock area during fishing year 2011, against the DAS accrual rate applied in fishing year 2011. For example, if a differential DAS counting factor of 1.2 was applied to the Inshore GOM Differential DAS Area during fishing year 2011 due to a 20-percent overage of the GOM cod sub-ACL, yet the GOM cod sub-ACL was exceeded again, but by 50 percent during fishing year 2011, an additional differential DAS factor of 1.5 would be applied to the DAS accrual rate applied during fishing year 2012 (*i.e.,* the DAS accrual rate in the Inshore GOM Differential DAS Counting Area during fishing year 2012 would be 43.2 hr charged for every 24-hr fished—1.2 × 1.5 × 24-hr DAS charge). If the Regional Administrator determines that similar DAS adjustments are necessary in all stock areas, the Regional Administrator will adjust the ratio of Category A:Category B DAS specified in paragraph (d)(1) of this section to reduce the number of available Category A DAS available based upon the amount of the overage, rather than apply a differential DAS counting factor to all Category A DAS used in all stock areas.

* * * * *

■ 9. In § 648.83, remove paragraph (a)(3), and revise paragraph (b)(1) to read as follows:

§ 648.83 Multispecies minimum fish sizes.

* * * * *

(b) * * *

(1) Each person aboard a vessel issued a NE multispecies limited access permit and fishing under the NE multispecies DAS program or on a sector trip may possess up to 25 lb (11.3 kg) of fillets that measure less than the minimum size, if such fillets are from legal-sized fish and are not offered or intended for sale, trade, or barter. The weight of fillets and parts of fish, other than whole-gutted or gilled fish, shall be multiplied by 3. For the purposes of accounting for all catch by sector vessels as specified at § 648.87(b)(1)(v), the weight of all fillets and parts of fish, other than whole-gutted or gilled fish reported for at-home consumption shall be multiplied by a factor of 3.

* * * * *

■ 10. In § 648.85, revise paragraphs (a)(1)(ii), (a)(2)(ii), (a)(3)(iv)(A)(*2*), (b)(3)(x)(A), (b)(6)(iv)(J)(*4*), (b)(7)(iv)(E), and (b)(7)(vi)(B) to read as follows:

§ 648.85 Special management programs.

* * * * *

(a) * * *

(1) * * *

(ii) *Eastern U.S./Canada Area.* The Eastern U.S./Canada Area is the area defined by straight lines connecting the following points in the order stated (a chart depicting this area is available from the Regional Administrator upon request):

EASTERN U.S./CANADA AREA

Point	N. latitude	W. longitude
USCA 12	42°20′	67°40′
USCA 11	41°10′	67°40′
USCA 10	41°10′	67°20′
USCA 9	41°00′	67°20′
USCA 8	41°00′	67°00′
USCA 7	40°50′	67°00′
USCA 6	40°50′	66°50′
USCA 5	40°40′	66°50′
USCA 4	40°40′	66°40′
USCA 15	40°30′	66°40′
USCA 14	40°30′	65°44.3′
USCA 13	42°20′	67°18.4′
USCA 12	42°20′	67°40′

* * * * *

(2) * * *

(ii) *Adjustments to TACs.* Any overages of the GB cod, GB haddock, and GB yellowtail flounder TACs specified for either the common pool or individual sectors pursuant to this paragraph (a)(2) that occur in a given fishing year shall be subtracted from the respective TAC in the following fishing year and may be subject to the overall groundfish AM provisions as specified in § 648.90(a)(5)(ii) if the overall ACL for a particular stock in a given fishing year, specified pursuant to § 648.90(a)(4), is exceeded.

* * * * *

(3) * * *

(iv) * * *

(A) * * *

(*2*) *Possession restriction when 100 percent of TAC is harvested.* When the Regional Administrator projects that 100 percent of the TAC allocation for cod specified in paragraph (a)(2) of this section will be harvested, NMFS shall, in a manner consistent with the Administrative Procedure Act, close the Eastern U.S./Canada Area to all limited access NE multispecies DAS and sector vessels subject to that particular TAC allocation, as specified in paragraph (a)(3)(iv)(E) of this section, by prohibiting such vessels and all other vessels not issued a limited access NE multispecies permit from entering or being in this area and from harvesting, possessing, or landing cod in or from the Eastern U.S./Canada Area during the closure period.

* * * * *

(b) * * *

(3) * * *

(x) * * *

(A) *Approved gear.* When the CA II Yellowtail Flounder/Haddock SAP is open to target yellowtail flounder, as specified in paragraph (b)(3)(vii) of this section, NE multispecies vessels fishing with trawl gear must use a haddock separator trawl or a flounder trawl net, as described in paragraph (a)(3)(iii) of this section, or the Ruhle trawl, as described in paragraph (b)(6)(iv)(J)(*3*) of this section (all three nets may be onboard the fishing vessel simultaneously). When this SAP is only open to target haddock, NE multispecies vessels must use a haddock separator trawl, a Ruhle trawl, or hook gear. Gear other than the haddock separator trawl, the flounder trawl, or the Ruhle trawl may be on board the vessel during a trip to the Eastern U.S./Canada Area outside of the CA II Yellowtail Flounder/Haddock SAP, provided the gear is stowed according to the regulations at § 648.23(b).

* * * * *

(6) * * *

(iv) * * *

(J) * * *

(*4*) *Mesh size.* An eligible vessel fishing in the Regular B DAS Program within the GB Cod Stock Area as defined in paragraph (b)(6)(v)(B) of this section pursuant to paragraph (b)(6) of this section must use trawl gear described in this paragraph (b)(6)(iv)(J) with a minimum codend mesh size of 6-

inch (15.24-cm) square or diamond mesh.

* * * * *

(7) * * *

(iv) * * *

(E) *Gear restrictions.* A vessel declared into, and fishing in, the CA I Hook Gear Haddock SAP may fish with and possess on board demersal longline gear or tub trawl gear only, unless further restricted as specified in paragraphs (b)(7)(v)(A) and (vi)(B) of this section.

* * * * *

(vi) * * *

(B) *Gear restrictions.* A common pool vessel is exempt from the maximum number of hooks restriction specified in § 648.80(a)(4)(v), but must comply with the gear restrictions in paragraph (b)(7)(iv)(E) of this section. Such vessels are prohibited from using as bait, or possessing on board, squid or mackerel during a trip into the CA I Hook Gear Haddock SAP.

* * * * *

■ 11. In § 648.86, revise paragraph (m)(1) to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(m) * * *

(1) *Daily landing restriction.* A vessel issued a limited access NE multispecies permit, an open access NE multispecies Handgear B permit, or a limited access monkfish permit and fishing under the monkfish Category C or D permit provisions may only land regulated species or ocean pout once in any 24-hr period, based upon the time the vessel lands following the end of the previous trip. For example, if a vessel lands 1,600 lb (725.7 kg) of GOM cod at 6 p.m. on Tuesday, that vessel cannot land any more regulated species or ocean pout until at least 6 p.m. on the following Wednesday.

* * * * *

■ 12. In § 648.87, revise paragraphs (b)(1)(ii), (b)(1)(vi)(B), (b)(1)(ix), (b)(5)(i)(A)(*1*), (b)(5)(ii)(B)(*2*) (b)(5)(ii)(E), and revise the introductory text to paragraph (c)(2) to read as follows:

§ 648.87 Sector allocation.

* * * * *

(b) * * *

(1) * * *

(ii) *Areas that can be fished.* Vessels in a sector may only fish in a particular stock area, as specified in paragraphs (b)(1)(ii)(A) through (F) of this section, and § 648.85(b)(6)(v), or the Eastern U.S./Canada Area, as specified in § 648.85(a)(1), if the sector has been allocated, or acquires, pursuant to paragraph (b)(1)(viii) of this section, ACE for all stocks allocated to sectors pursuant to paragraph (b)(1)(i)(A) of this section that are caught in that stock area. A sector must project when its ACE for each stock will be exceeded and must ensure that all vessels in the sector cease fishing operations prior to exceeding it. Once a sector has harvested its ACE for a stock, all vessels in that sector must cease fishing operations in that stock area on a sector trip unless and until it acquires additional ACE from another sector pursuant to paragraph (b)(1)(viii) of this section, or as otherwise specified in an approved operations plan pursuant to paragraph (b)(2)(xiv) of this section. For the purposes of this paragraph (b)(1)(ii), an ACE overage means catch of regulated species or ocean pout by vessels participating in a particular sector that exceeds the ACE allocated to that sector, as of the date received or purchased by the dealer, whichever occurs first, after considering all ACE transfer requests ultimately approved by NMFS during the current fishing year, pursuant to paragraph (b)(1)(viii) of this section, unless otherwise specified pursuant to § 648.90(a)(5).

* * * * *

(vi) * * *

(B) *Weekly catch report.* Each sector must submit weekly reports to NMFS stating the remaining balance of ACE allocated to each sector based upon regulated species and ocean pout landings and discards of vessels participating in that sector and any compliance/enforcement concerns. These reports must include at least the following information, as instructed by the Regional Administrator: Week ending date; species, stock area, gear, number of trips, reported landings (landed pounds and live pounds), discards (live pounds), total catch (live pounds), status of the sector's ACE (pounds remaining and percent remaining), and whether this is a new or updated record of sector catch for each NE multispecies stock allocated to that particular sector; sector enforcement issues, including any discrepancies noted by dockside/roving monitors between dealers and offloads; summary of offloads witnessed by dockside/roving monitors for that reporting week; and a list of vessels landing for that reporting week. These weekly catch reports must be submitted no later than 0700 hr on the second Monday after the reporting week, as defined in this part. The frequency of these reports must be increased to more than a weekly submission when the balance of remaining ACE is low, as specified in the sector operations plan and approved by NMFS. If requested, sectors must provide detailed trip-by-trip catch data to NMFS for the purposes of auditing sector catch monitoring data based upon guidance provided by the Regional Administrator.

* * * * *

(ix) *Trip limits.* With the exception of stocks listed in § 648.86(1) and the Atlantic halibut trip limit at § 648.86(c), a sector vessel is not limited in the amount of allocated NE multispecies stocks that can be harvested on a particular fishing trip, unless otherwise specified in the operations plan.

* * * * *

(5) * * *

(i) * * *

(A) * * *

(*1*) *Trip-start hail report.* The vessel operator must submit a trip-start hail report prior to departing port at the beginning of each trip notifying the sector manager and/or dockside/roving monitor service provider of the vessel permit number; trip ID number in the form of the VTR serial number of the first VTR page for that trip, or another trip identifier specified by NMFS; and an estimate of the date and time of arrival to port. Trip-start hail reports by vessels operating less than 6 hr or within 6 hr of port must also include estimated date and time of offload. If the vessel operator does not receive confirmation of the receipt of the trip-start hail report from the dockside/roving monitor provider, the operator must contact the service provider to confirm the trip-start hail report via an independent back-up system developed by the service provider.

* * * * *

(ii) * * *

(B) * * *

(*2*) *Offloads to a truck.* A roving monitor observing offloads into a truck shall retain copies of all VTRs filled out for that trip with all information submitted (*i.e.,* no blocked cells) provided by the sector vessel; if there are no scales at the offload site, record the number of totes of each species and the captain's estimate of the weight in each tote; if there are scales at the offload site, record whether the scales were certified by an appropriate state agency and observe and record whether ice and box weights are tared before catch is added, or record the estimated weight of ice and the box; determine and record whether all fish have been offloaded, including an estimate of the weight of fish being retained by captain and crew for personal consumption or other use and the reason for retention of such catch; record all offloaded catch by

species in a report, unless the driver creates such a report that the roving monitor may use which shall be signed by the roving monitor; document that each tote is labeled with the appropriate identifying information including, but not limited to, the serial number of the first VTR page filled out for that trip or another trip ID specified by NMFS, the roving monitor's name, tote number, and species; provide data summarizing the offloads of each trip, including copies of the VTR(s) and roving monitor report to the sector manager or designated third party contractor, as appropriate, within 24 hr of offloading; and retain a copy of such information to document that the offload was monitored, as instructed by the Regional Administrator. The roving monitor must submit copies of the VTR(s); driver manifest(s), if separate from the roving monitor's report; and the roving monitor's report to the sector manager or third-party service provider, as appropriate. The tote tagging requirements specified in this paragraph (b)(5)(ii)(B)(*2*), are not required, provided the following three requirements are met: The roving monitor that observed the offload at the dock will also be the dockside monitor at the truck offload to the dealer; the roving monitor will follow the truck, in line of sight, from the remote offload to the dealer offload where the weighing occurs; and, the truck is loaded with only the catch from the one trip being monitored.

* * * * *

(E) *Inspection of fish holds and other areas of a vessel.* Except to the extent authorized by a sector to inspect fish holds and other areas of such sector's members' vessels in which fish are stored, dockside/roving monitors assigned to observe the offloading of fish shall not inspect fish holds or any other areas of a vessel in which fish are stored unless first required by the Regional Administrator. Prior to any such requirement becoming effective, the Regional Administrator shall notify affected permit holders and monitoring providers by letter or other appropriate means, and shall provide instructions and guidelines deemed necessary to carry out such inspections.

* * * * *

(c) * * *

(2) If a sector is approved, the Regional Administrator shall issue a letter of authorization to each vessel operator and/or vessel owner participating in the sector. The letter of authorization shall authorize participation in the sector operations and may exempt participating vessels from any Federal fishing regulation applicable to NE multispecies vessels, except those specified in paragraphs (c)(2)(i) and (ii) of this section, in order to allow vessels to fish in accordance with an approved operations plan, provided such exemptions are consistent with the goals and objectives of the FMP. The letter of authorization may also include requirements and conditions deemed necessary to ensure effective administration of, and compliance with, the operations plan and the sector allocation. Solicitation of public comment on, and NMFS final determination on such exemptions shall be consistent with paragraphs (c)(1) and (2) of this section.

* * * * *

■ 13. In § 648.89, revise paragraphs (c)(2)(i), (c)(6), (c)(7), (d), and (e)(3)(iv), and add paragraphs (c)(8) and (c)(9) to read as follows:

§ 648.89 Recreational and charter/party vessel restrictions.

* * * * *

(c) * * *

(2) * * *

(i) Unless further restricted by the Seasonal GOM Cod Possession Prohibition, specified in paragraph (c)(2)(v) of this section, each person on a charter/party vessel may possess no more than 10 cod per day.

* * * * *

(6) *Atlantic wolffish.* Persons aboard charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program, on a sector trip, under a Handgear A permit, under a Handgear B permit, or under a Small Vessel Category C permit, and private recreational fishing vessels in or possessing fish from the EEZ may not possess Atlantic wolffish.

(7) *SNE/MA winter flounder.* Persons aboard charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program, on a sector trip, under a Handgear A permit, under a Handgear B permit, or under a Small Vessel Category C permit, and private recreational fishing vessels fishing in the SNE/MA winter flounder stock area, as defined in § 648.85(b)(6)(v)(F), may not fish for, possess, or land winter flounder. Private recreational vessels in possession of winter flounder caught outside of the SNE/MA winter flounder may transit this area, provided all bait and hooks are removed from all fishing rods, and any winter flounder on board has been stored.

(8) *Windowpane flounder.* Persons aboard charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program, on a sector trip, under a Handgear A permit, under a Handgear B permit, or under a Small Vessel Category C permit, and private recreational fishing vessels in or possessing fish from the EEZ, may not possess windowpane flounder.

(9) *Ocean pout.* Persons aboard charter/party vessels permitted under this part and not fishing under the NE multispecies DAS program, on a sector trip, under a Handgear A permit, under a Handgear B permit, or under a Small Vessel Category C permit, and private recreational fishing vessels in or possessing fish from the EEZ may not possess ocean pout.

(d) *Restrictions on sale.* It is unlawful to sell, barter, trade, or otherwise transfer for a commercial purpose, or to attempt to sell, barter, trade, or otherwise transfer for a commercial purpose, NE multispecies caught in or landed from the EEZ by recreational, charter, or party vessels permitted under this part not fishing under a DAS, on a sector trip, or under a Handgear A permit, Handgear B permit, or Small Vessel Category C permit.

(e) * * *

(3) * * *

(iv) For the GOM charter/party closed area exemption only, the vessel may not fish on a sector trip, under a NE multispecies DAS, or under the provisions of the NE multispecies Small Vessel Category or Handgear A or Handgear B permit categories, as specified at § 648.82, during the period of participation.

* * * * *

■ 14. In § 648.90, revise the introductory text to paragraph (a)(4)(iii)(E), and revise paragraphs (a)(4)(i), (a)(4)(iii)(E)(*2*), (a)(5)(i)(A) and (a)(5)(ii) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(4) * * *

(i) *ABC/ACL recommendations.* As described in this paragraph (a)(4), with the exception of stocks managed by the Understanding, the PDT shall develop recommendations for setting an ABC, ACL, and OFL for each NE multispecies stock for each of the next 3 years as part of the biennial review process specified in paragraph (a)(2) of this section. ACLs can also be specified based upon updated information in the annual SAFE report, as described in paragraph (a)(1) of this section, and other available information as part of a specification package, as described in paragraph (a)(6) of this section. For NE multispecies

stocks or stock components managed under both the NE Multispecies FMP and the Understanding, the PDT shall develop recommendations for ABCs, ACLs, and OFLs for the pertinent stock or stock components annually, as described in this paragraph (a)(4) and § 648.85(a)(2).

* * * * *

(iii) * * *

(E) *Regulated species or ocean pout catch by the NE multispecies commercial and recreational fisheries.* Unless otherwise specified in the ACL recommendations developed pursuant to paragraph (a)(4)(i)(B) of this section, after all of the deductions and considerations specified in paragraphs (a)(4)(iii)(A) through (D) of this section, the remaining ABC/ACL for each regulated species or ocean pout stock shall be allocated to the NE multispecies commercial and recreational fisheries, pursuant to this paragraph (a)(4)(iii)(E).

* * * * *

(*2*) *Commercial allocation.* Unless otherwise specified in this paragraph (a)(4)(iii)(E)(*2*), the ABC/ACL for regulated species or ocean pout stocks available to the commercial NE multispecies fishery, after consideration of the recreational allocation pursuant to paragraph (a)(4)(iii)(E)(*1*) of this section, shall be divided between vessels operating under approved sector operations plans, as described at § 648.87(c), and vessels operating under the provisions of the common pool, as defined in this part, based upon the cumulative PSCs of vessels participating in sectors calculated pursuant to § 648.87(b)(1)(i)(E). For fishing years 2010 and 2011, the ABC/ACL of each regulated species or ocean pout stocks not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (*i.e.,* Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish) that is available to the commercial NE multispecies fishery shall be allocated entirely to the common pool. Unless otherwise specified in paragraph (a)(5) of this section, regulated species or ocean pout catch by common pool and sector vessels shall be deducted from the sub-ACL/ACE allocated pursuant to this paragraph (a)(4)(iii)(E)(*2*) for the purposes of determining whether adjustments to common pool measures are necessary, pursuant to the common pool AMs specified in § 648.82(n), or whether sector ACE overages must be deducted, pursuant to § 648.87(b)(1)(iii).

* * * * *

(5) * * *

(i) * * *

(A) *Excessive catch by common pool vessels.* If the catch of regulated species and ocean pout by common pool vessels exceeds the amount of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(E)(*2*) of this section, then the AMs described in § 648.82(n) shall take effect. Pursuant to the distribution of ABCs/ACLs specified in paragraph (a)(4)(iii)(E)(*2*) of this section, for the purposes of this paragraph (a)(5)(i)(A), the catch of each regulated species or ocean pout stock not allocated to sectors pursuant to § 648.87(b)(1)(i)(E) (i.e., Atlantic halibut, SNE/MA winter flounder, ocean pout, windowpane flounder, and Atlantic wolffish) during fishing years 2010 and 2011 shall be added to the catch of such stocks by common pool vessels to determine whether the differential DAS counting AM described in § 648.82(n)(1) shall take effect. If such catch does not exceed the portion of the ACL specified for common pool vessels pursuant to paragraph (a)(4)(iii)(E)(*2*) of this section, then no AMs shall take effect for common pool vessels.

* * * * *

(ii) *AMs if the overall ACL for a regulated species or ocean pout stock is exceeded.* If the catch of any stock of regulated species or ocean pout by vessels fishing outside of the NE multispecies fishery; vessels fishing in state waters outside of the FMP; or vessels fishing in exempted fisheries, as defined in this part; or the catch of yellowtail flounder by the Atlantic sea scallop fishery exceeds the sub-component of the ACL for that stock specified for such fisheries pursuant to paragraphs (a)(4)(iii)(A) through (C) of this section, and the overall ACL for that stock is exceeded, then the amount of the overage of the overall ACL for that stock due to catch from vessels fishing outside of the NE multispecies fishery shall be distributed among components of the NE multispecies fishery based upon each component's share of that stock's ACL available to the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(E) of this section. Each component's share of the ACL overage for a particular stock would be then added to the catch of that stock by each component of the NE multispecies fishery to determine if the resulting sum of catch of that stock for each component of the fishery exceeds that individual component's share of that stock's ACL available to the NE multispecies fishery. If the total catch of that stock by any component of the NE multispecies fishery exceeds the amount of the ACL specified for that component of the NE multispecies fishery pursuant to paragraph (a)(4)(iii)(E) of this section, then the AMs specified in paragraphs (a)(5)(i)(A) through (C) of this section shall take effect, as applicable. If the catch of any stock of regulated species or ocean pout by vessels outside of the FMP exceeds the sub-component of the ACL for that stock specified pursuant to paragraphs (a)(4)(iii)(A) through (C) of this section, but the overall ACL for that stock is not exceeded, even after consideration of the catch of that stock by other sub-components of the fishery, then the AMs specified in this paragraph (a)(5)(ii) shall not take effect.

* * * * *

15. In § 648.92, revise the introductory text of paragraph (b)(1)(iii) to read as follows:

§ 648.92 Effort-control program for monkfish limited access vessels.

* * * * *

(b) * * *

(1) * * *

(iii) *DAS declaration provision for vessels fishing in the NFMA with a VMS unit.* Any limited access NE multispecies vessel fishing on a sector trip or under a NE multispecies Category A DAS in the NFMA, and issued an LOA as specified in § 648.94(f), may change its DAS declaration to a monkfish DAS through the vessel's VMS unit during the course of the trip after leaving port, but prior to crossing the VMS demarcation line upon its return to port or leaving the NFMA, if the vessel exceeds the incidental catch limit specified under § 648.94(c).

* * * * *

[FR Doc. 2011–18012 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

RIN 0648–BA40

[Docket No. 101221628–0628–01]

Fisheries Off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Amendments 20 and 21; Trawl Rationalization Program; Pacific Halibut Bycatch Quota for the Remainder of the 2011 Fishery

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

ACTION: Agency determination.

SUMMARY: NMFS announces that the provisions for the Pacific halibut trawl mortality bycatch limit and for calculation of Pacific halibut individual bycatch quota (IBQ) pounds in the Shorebased Individual Fishing Quota (IFQ) Program will remain in effect for the remainder of the 2011 groundfish fishery. This announcement is required in order to maintain the current amount of Pacific halibut IBQ pounds in the Shorebased IFQ Program.

DATES: Effective on July 19, 2011.

ADDRESSES: Background information and documents are available from William W. Stelle, Jr., Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115–0070; or by phone at 206–526–6150.

FOR FURTHER INFORMATION CONTACT: Gretchen A. Hanshew, 206–526–6147; (fax) 206–526–6736; *Gretchen.Hanshew@noaa.gov.*

SUPPLEMENTARY INFORMATION: On December 30, 2010, NMFS published a rule (75 FR 82296) that, among other actions, revised the Pacific halibut trawl mortality bycatch limit, specified at § 660.55(m), subpart C, and calculations for issuance of IBQ pounds in the Shorebased IFQ Program, specified at § 660.140(d)(1)(ii)(C), subpart D. Further background information for this action is provided in the preamble text of the December 30, 2010, rule and in the supporting documents for that action, and is not repeated here.

One public comment letter was received in response to the December 30, 2010, rule. In its January 31, 2011, letter, the Natural Resource Defense Council urged NMFS to provide adequate protection and adopt conservative harvest levels for rebuilding groundfish species, particularly for yelloweye rockfish, cowcod and darkblotched rockfish. No comments were made specific to provisions at § 660.55(m), subpart C, or § 660.140(d)(1)(ii)(C), subpart D. The provisions that were the subject of the January 31, 2011, letter of comment were superseded by the final rule for the 2011–2012 biennial specifications and management measures (May 11, 2011, 76 FR 27508), and are not related to the measures at issue in this notice.

The Pacific Fishery Management Council is actively working to prepare an amendment to the Pacific Coast Groundfish Fishery Management Plan to address the Pacific halibut trawl mortality bycatch limit and calculation of Pacific halibut IBQ pounds in the Shorebased IFQ Program for 2012 and beyond.

Therefore, this document announces the agency determination made prior to June 29, 2011, to continue through December 31, 2011, the measures set forth in the December 30, 2010, rule at § 660.55(m), subpart C, and § 660.140(d)(1)(ii)(C), subpart D.

Authority: 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 7001 *et seq.*

Dated: July 12, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2011–18013 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 76, No. 138
Tuesday, July 19, 2011

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

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Parts 400, 402, 407, and 457

Farm Service Agency

7 CFR Part 718

Retrospective Review Under E.O. 13563; Improving Common Acreage Reporting Processes

AGENCY: Farm Service Agency and Risk Management Agency, USDA.

ACTION: Request for information.

SUMMARY: This document requests input to help us improve services and reduce duplication of effort, including collecting information from the public. Specifically, the Farm and Foreign Agricultural Services (FFAS) agencies including the Farm Service Agency (FSA) and the Risk Management Agency (RMA) have been working on a joint, coordinated initiative to have a common U.S. Department of Agriculture (USDA) framework for producer's to report information to participate in certain USDA programs. FSA and RMA have been working in coordination with the National Agricultural Statistics Service (NASS) and the Natural Resources Conservation Service (NRCS) on the common reporting process. The USDA retrospective review request for information (RFI) published in the **Federal Register** on April 20, 2011, included the initiative to simplify and reduce the reporting burden on the public for submitting participation information for USDA programs, while simultaneously reducing our administrative and operating costs by sharing similar data across participating agencies. We believe the public, especially farmers, producers, ranchers, and the crop insurance industry who submit and use the information may have suggestions that may effectively reduce the burden of providing the information that USDA agencies require. Any resulting improvements to the processes will be within existing legislative authorities.

DATES: We will consider comments that we receive on the Paperwork Reduction Act by September 19, 2011.

FOR FURTHER INFORMATION CONTACT: For FSA, contact: Tony Jackson, telephone (202) 720–3865. For RMA, contact: Pat Engel, telephone (202) 720–8812. Persons with disabilities or who require alternative means for communication (Braille, large print, audio tape, *etc.*) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION: On April 20, 2011, USDA published an RFI in the **Federal Register** (76 FR 22058–22059) to announce that USDA is reviewing its existing regulations to evaluate the effectiveness in addressing the circumstances for which they were implemented. In implementing new programs or changes to programs, regulations are one part of the process, and establishing information collection requirements is another part. As part of the retrospective review, USDA invited public comment to assist in analyzing its existing significant regulations to determine whether they should be modified, streamlined, expanded, or repealed. For FFAS agencies, the focus of USDA's initial review is to identify areas where it can simplify and reduce the reporting burden on the public for eligibility for and participation in USDA programs, while simultaneously reducing its administrative and operating costs by sharing similar data across participating agencies.

This document provides more information about the on-going FFAS initiative, gives a frame of reference for additional public input, and allows us to clarify some misunderstandings about the initiative.

Who are FFAS, FSA, and RMA?

FFAS agencies help keep America's farmers and ranchers in business as they face the uncertainties of weather and markets. Our agencies deliver insurance, commodity, credit, conservation, disaster, and emergency assistance programs that help improve the stability and strength of the agricultural economy.

Within the current legislative authority, policies, and procedures, FSA is the agency that administers programs that help producers recover from disaster damage and livestock deaths, and other programs that are outside the scope of this notice. Among the key programs available to address impacts from disasters are the Livestock Indemnity Program (LIP), the Emergency Assistance for Livestock, Honeybees and Farm-Raised Fish Program (ELAP), the Noninsured Disaster Assistance Program (NAP), and the Supplemental Revenue Assistance Payments (SURE) Program. For more information about FSA programs, go to the FSA *Web site: http://www.fsa.usda.gov.*

Within the current legislative authority, policies, and procedures, RMA helps producers manage their business risks through effective, market-based risk management solutions. RMA promotes, supports, and regulates sound risk management solutions to preserve and strengthen the economic stability of America's agricultural producers. RMA operates and manages the Federal Crop Insurance Corporation (FCIC). RMA administers FCIC programs, which provide crop insurance to American producers through private insurance companies and approved insurance providers (AIPs) that sell and service the policies. RMA develops or approves the premium rates, administers premium and expense subsidies, approves and supports insurance products, and reinsures the AIPs. In addition, RMA sponsors educational and outreach programs and seminars on the general topic of risk management. For more information about RMA programs, go to the RMA *Web site: http://www.rma.usda.gov.*

What input has USDA already received about improving acreage reporting?

During listening sessions with producers, USDA employees, and representatives of the precision agricultural industry, USDA received comments suggesting it should sponsor an initiative to simplify and standardize acreage reporting processes, program dates, and data definitions across the various USDA programs. Last July, a team lead by Chief Information Officer Chris Smith and Acting Under Secretary Michael Scuse, with representatives from RMA, FSA, NRCS, and NASS, started a series of meetings to develop recommendations for common USDA reporting standards, such as entity types, acreage reporting dates,

commodities, acreage location, and production.

FSA and the Office of the Chief Information Officer (OCIO) listening sessions with producers and employees in 2010 identified several common issues. These were:

(1) Producers want to provide their information just once, such as acreage reporting data, and expect USDA agencies to share the data internally;

(2) Producers currently provide the same information multiple times; and

(3) Acreage reporting is inefficient and does not use Geographic Information System (GIS) technology.

The complete report on the FSA and OCIO listening sessions, titled ''Understanding the Challenges of Service Delivery to USDA Producers and Customers,'' is available at: *http://www.fsa.usda.gov/Internet/FSA_File/1184_usda_list_sessions.pdf*.

In response to the USDA RFI, some commenters suggested ways service could be improved. A majority of the comments were from or on behalf of members of the crop insurance industry or the National Association of State and County Office Employees. Some commenters provided suggestions that the producers should report their information to the crop insurance agent and the agent would submit the information to USDA. Some commenters stated issues consistent with those discussed above. Due to the somewhat overlapping timing of the USDA RFI and RMA Informational Memorandum IS–11–003, which announced a proposal to solicit an outside party to research the reasonable costs of delivery of the crop insurance program by AIPs, some commenters have submitted comments through the RFI contact in response to the RMA memorandum. Also, some commenters specifically focused on an unrelated proposal to change the legislative authority posed by a separate group outside of USDA. The Acreage and Crop Reporting Streamlining Initiative (ACRSI) is working within the current legislative authority. Changes to legislation are made by Congress, not USDA.

Clarification of the Initiative

We expect ACRSI to result in common USDA producer commodity reporting standards to meet the needs of the USDA agencies that require the information to administer their programs, eliminate duplication of information collection, and simplify producer reporting. We expect ACRSI to expand on the success of the Comprehensive Information Management System (CIMS), which compiles common producer, program, and land information collected by FSA, RMA, and AIPs and will allow access to CIMS by all USDA agencies in need of the information. We are committed to the goals of increasing efficiency and effectiveness in administering programs through the use of technology and better coordinated efforts between USDA agencies.

The goal of ACRSI is to establish common data elements and automated processes for producers to report common information for USDA programs, simplify and reduce the reporting burden on producers, and reduce USDA administrative and operating costs by sharing similar data across participating agencies.

ACRSI will provide producers an option to use either a Web site or submit an electronic file to report common information if they choose, or continue to report through their FSA county office or crop insurance agent. FSA, RMA, AIPs, and crop insurance agents will continue to have the same responsibilities for administering their programs under the current legislative authority. FSA, RMA, NRCS, and NASS will all be able to use the reported information for their respective agency programs. For example, FSA would use the information for program participation and RMA would use the information for crop insurance purposes if the producer purchased crop insurance.

ACRSI officially started in July 2010. USDA agencies participating in ACRSI include FSA, NRCS, NASS, and RMA. By streamlining and automating reporting, ACRSI would reduce the burden on the producer to participate in USDA programs while simultaneously improving program integrity through consistent reporting and data across all USDA agencies and programs. Ultimately, we expect ACRSI to allow automated reporting from the producer's precision GPS monitoring equipment or farm management system.

To implement ACRSI in an economical manner, we plan to the extent possible to utilize CIMS, which is a single, centralized storage repository of RMA and FSA producer and program information. CIMS provides FSA, NASS, OIG, RMA, other USDA agencies, AIPs access to a single, centralized storage repository of producer and program information submitted to FSA and RMA. CIMS is increasing the reliability and accuracy of program information collection by providing users access to an integrated information management system containing crop insurance, conservation, and farm program data. Federal employees have made over 60,000 requests and AIPs have submitted over 36 million requests for information from CIMS on insured producers.

CIMS staff is working with FSA and RMA to standardize reporting requirements to reduce differences in definitions of basic agency terms to be used in systems designed to allow producers to report common information to USDA once, which the agencies will share. This will reduce the differences in program participation information.

How can you provide constructive input?

FFAS is working to change the way we operate to better serve our customers. We want to identify improvements that we can achieve through the consolidation of information required to participate in farm programs administered by FSA and the Federal crop insurance program administered by RMA. We are interested in hearing from the public on how best to simplify and standardize data reporting requirements such as acreage reporting processes, program dates, and data definitions across the various USDA programs and agencies.

FFAS welcomes comments on how best to develop procedures, processes, and standards that will allow producers to use information from their farm management and precision agriculture systems for reporting production, planted and harvested acreage, and other key information needed to participate in USDA programs.

We are encouraging public input in the retrospective review to allow us to hear directly from those who participate in USDA programs as we work to streamline this work in a way that improves access to resources intended to create jobs and grow the economy. We are interested in hearing from you about how we can simplify and reduce the reporting required for participation in the FSA and RMA programs. We want to reduce the amount of time and effort spent on data collection by sharing similar data across participating USDA agencies. This will allow FSA, RMA, AIPs, and agents to spend more time on the administration of programs.

We have several programs that require farmers, producers, and ranchers to submit information to be eligible for certain programs and benefits. Although we have made efforts to eliminate or minimize duplication of information collection to reduce the burden on the public, we realize that there are possible duplications or similarities in the acreage reporting that farmers,

producers, and ranchers need to submit to FSA and RMA. Therefore, we have been reviewing the various requirements including the type of information that each agency requests, the specific agency definitions for the data, and the timing of the reporting to each agency. We have considered changes that would meet the current requirements for each agency based on existing legislative authority, policies, procedures, and regulations. Primary goals include improving the public's ability to determine eligibility for and to participate in FSA and RMA programs and reducing the need for our employees to input the same data multiple times, which will allow existing staff to focus more fully on other efforts and better serve the public. In the efforts to eliminate or minimize duplication of information collection, FSA and RMA will not be collecting or obtaining new or more information from the producers, ranchers, and farmers.

USDA is encouraging public participation in several ways, some traditional, and some new ways to reach the greatest number of people. For example, USDA is using the USDA open gov Web site at: *http://www.usda.gov/open* for public discussions related to the retrospective review. In addition to the published RFI, USDA developed a preliminary plan for doing the retrospective review and posted that on the USDA open gov Web site for public participation. Other avenues include news releases, announcements on Twitter, the FSA Fence Post (on-line news updates), and other avenues to reach stakeholders. In addition, FSA posted the published USDA RFI on the FSA webpage with the FSA publications in the **Federal Register.** This outreach effort to encourage additional public participation is in addition to the on-going outreach to FSA and RMA stakeholders and employees about the initiative; information and updates about the initiative have been provided as a part of several presentations by the Acting Under Secretary, the USDA Chief Information Officer, and the RMA Administrator, from November 2010 to April 2011.

The comment period for the USDA RFI closed May 20, 2011. USDA used the input from those comments to make adjustments to finalize the preliminary plan. We will continue the discussion on the USDA Open gov policy gateway Web site at: *http://www.usda.gov/open.* We encourage you to provide your suggestion or otherwise participate in the discussion on the USDA Open gov policy gateway Web site (through the discuss tab). In addition, as discussed in this notice, separate from the input we are requesting on the retrospective review initiative, this notice also provides a 60-day comment period for public input about the information collection approval that we will be requesting for ACRSI.

The following questions may be helpful to consider in submitting your input about ACRSI and the overall goals to reduce duplication of information collection:

(1) What are the potential benefits and limitations for reliability, accuracy, and practicality?

(2) What would be consistent and uniform standards for the collection and reporting of data to multiple USDA agencies?

(3) How can USDA assure the proper calibration and integrity of the data, so the data cannot be manipulated or modified from the original readings or output?

(4) How can USDA have compatibility with automated systems of FSA and RMA to facilitate transmission and sharing of data?

(5) Are there reporting requirements that have become outdated and, if so, how can they be modernized to accomplish their objectives better?

(6) Do USDA agencies currently collect information that they do not need or use effectively to achieve regulatory objectives?

(7) Is there information that agencies should begin collecting to achieve the required objectives?

(8) Are there reporting requirements, or application processes that are unnecessarily complicated, or that could be streamlined to achieve the objectives in ways that are more efficient?

(9) Are there application processes or reporting requirements that have been overtaken by technological developments? Can new technologies be used to modify, streamline, or do away with existing reporting requirements?

This non-exhaustive list is meant to assist in your input and is not intended to limit the issues that you choose to address. Although we are contemplating focusing our initial review on the area identified in the RFI and this notice, we welcome input from the public on any of USDA's regulations and ways to improve them to help USDA agencies advance the mission of the Department. We encourage you to provide input on rules that have been in effect for a sufficient amount of time to warrant meaningful evaluation. FFAS notes that this notice is issued solely for information and program-planning purposes. Responses to this notice do not bind USDA to any further action.

We will give public input full consideration as we consider changes to FSA acreage reporting requirements for farm programs and RMA acreage reporting requirements for crop insurance. The following suggestions may be helpful for preparing your comments:

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any information on which you based your views.
- Provide specific examples to illustrate your points.
- Offer specific alternatives to the current information reporting requirements.
- Participate in the discussion on USDA's open gov site during the summer of 2011. The requested public input through USDA's open gov site is on-going, but for the purposes of implementing ACRSI, input submitted during the summer of 2011 will be most helpful in implementing improvements as soon as possible.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the Farm Service Agency (FSA) and Risk Management Agency (RMA) are seeking comments from all interested individuals and organizations on a new information collection request associated with the Acreage and Crop Reporting Streamlining Initiative (ACRSI).

Description of Information Collection

Title: Acreage and Crop Reporting Streamlining Initiative (ACRSI).

OMB Control Number: 0563–NEW.

Expiration Date of Approval: 3 years from date of OMB approval.

Type of Request: New information collection.

Abstract: ASCRI is a new initiative in this information collection request to reengineer the procedures, processes, and standards to simplify commodity, acreage, and production reporting by producers, eliminate or minimize duplication of information collection by multiple agencies, and reduce the burden on producers, insurance agents, and AIPs. FSA and RMA are implementing a web-based single source reporting system to establish a single data collection and reporting in the initiative.

FSA and RMA are also improving the existing Office of Management and Budget (OMB) approved information collections for FSA and RMA, 0560–0004, Report of Acreage, and 0563–0053, Multiple Peril Crop Insurance, respectively. Currently, commodity,

acreage, and production information is generally collected from the respondent during a personal visit to the FSA Service Center and again from the respondent during a personal visit to the insurance agent. The forms will still be available to accommodate respondents with no Internet access and those who wish to continue to personally visit the FSA Service Center and insurance agent to report the information.

When a web-based single system is fully implemented, respondents will be allowed to report the information once. The information will also be shared by both FSA and RMA, as well as other USDA agencies, such as NRCS and NASS, that have the authority and need for such information.

In each phase of system implementation, some or all of the commodity, acreage, and production information in the existing approved information collections will be reported via web-based single source reporting system. Furthermore, the information collected will be the same as the information currently approved. Additionally, the respondent will only have to report it one time through a single source thereby reducing the respondent's burden of reporting such information and eliminating the duplicate reporting that may be currently required. The information will then be shared with the other agency without having the producer personally visit both offices. The information collected will be the same as the information currently approved and will be used in the same manner it would be used if reported separately to each agency. FSA and RMA anticipate that producers will be able to use their precision-ag systems, farm management information systems, or download data files to directly report commodity, acreage, and production information needed to participate in USDA programs.

The information being collected will consist of, but not be limited to: Producer name, location state, commodity name, commodity type or variety, location county, date planted, land location (legal description, FSA farm number, FSA track number, FSA field number), intended use, prevented planting acres, acres planted but failed, planted acres, and production of commodity produced.

FSA and RMA will implement the web-based system in phases until fully implemented. The first phase will be initiated in the fall of 2011 in Dickenson, Marion, McPherson, and Saline Counties in Kansas, and only for the collection of information from producers regarding winter wheat. In the first phase, approximately 200 respondents will use a web-based single source reporting system and 3,705 respondents will report information during a personal visit.

To ensure statutory criteria are met for both Federal crop insurance programs, FSA, and Commodity Credit Corporation (CCC) programs, the collection of commodity, acreage, and production information is necessary. This is not a request for a change, addition or deletion to the currently approved information collections. However, the existing approved information collections will be updated, modified or eliminated, as applicable, to reflect the reduction in burden on the respondents when the web-based system is fully implemented.

Respondents: Producers.

Estimated Annual Number of Respondents Utilizing the Web-Based Single Source Reporting System: 204,250.

Estimated Annual Number of Respondents Reporting the Information by Personally Visiting One Agency and Sharing Information Between Agencies: 62,005.

Estimated Annual Number of Responses per Respondent: 1.5.

Estimated Total Annual Burden on Respondents Utilizing the Web-Based Single Source Reporting System: 230,287 hours. (This estimated public reporting burden is from the existing OMB approved information collections 0560–0004.)

Estimated Total Annual Burden on Respondents Reporting the Information by Personally Visiting One Agency and Having That Information Sharing Information Between Agencies: 131,761 hours. (This estimated public reporting burden is from the existing OMB approved information collections 0560–0004, including the estimated burden for travel time.)

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agencies, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility and clarity of the information to be collected;

(4) Minimize the burden of the collection of information on those who are to respond through use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms to technology.

All comments in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the request for Office of Management and Budget (OMB) approval.

Executive Order 13563, ''Improving Regulation and Regulatory Review''

On January 18, 2011, the President issued Executive Order 13563, ''Improving Regulation and Regulatory Review,'' to ensure that Federal regulations use the best available tools to promote innovation that will reduce costs and burden while allowing public participation and an open exchange of ideas. We are required to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. To read background information on Executive Order 13563, go to *http://www.regulations.gov/exchange/topic/eo-13563.*

Signed on July 11, 2011.

Karis T. Gutter,

Acting Under Secretary, Farm and Foreign Agricultural Services.

[FR Doc. 2011–17923 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Part 4279

RIN 0570–AA81

Conditions of Guarantee

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Rural Business-Cooperative Service is proposing to amend its regulations for the Business and Industry Guaranteed Loan Program to ensure the Agency has sufficient right(s) for reimbursement when an Agency guaranteed portion of a loan is sold to a holder. This action is necessary because the rule is not sufficiently clear that the use of loan funds for purposes not approved by the Agency is a reason to find the guarantee unenforceable regardless of whether the guaranteed portion of the loan has been sold to a holder. This action ensures the Agency has sufficient rights for reimbursement when an Agency guaranteed portion of the loan is sold to a holder.

DATES: Comments on this proposed rule must be received on or before August 18, 2011. A second public comment period will not be held.

ADDRESSES: You may submit comments to this proposed rule by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Submit written comments via the U.S. Postal Service to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250–0742.
- *Hand Delivery/Courier:* Submit written comments via Federal Express Mail or other courier service requiring a street address to the Branch Chief, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, 300 7th Street, SW., 7th Floor, Washington, DC 20024.

All written comments will be available for public inspection during regular work hours at the 300 7th Street, SW., 7th Floor address listed above.

FOR FURTHER INFORMATION CONTACT: Mr. David Lewis, Rural Development, Business Programs, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 3224, Washington, DC 20250–3221; *e-mail: david.lewis@wdc.usda.gov;* telephone (202) 690–0797.

SUPPLEMENTARY INFORMATION:

Classification

This rule has been determined to be not significant for purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB).

Programs Affected

The Catalog of Federal Domestic Assistance Program number assigned to the Business and Industry Guaranteed Loan Program is 10.782.

Environmental Impact Statement

This document has been reviewed in accordance with 7 CFR part 1940, subpart G, ''Environmental Program.'' Rural Development has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment and, in accordance with the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.,* an Environmental Impact Statement is not required.

Executive Order 12372, Intergovernmental Consultation

The program is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. Consultation will be completed at the time of the action performed.

Executive Order 12988, Civil Justice

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. Additionally, (1) All state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to the rule; and (3) administrative appeal procedures, if any, must be exhausted before litigation against the Department or its agencies may be initiated, in accordance with the regulations of the National Appeals Division of USDA at 7 CFR part 11.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this final rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with states is not required.

Regulatory Flexibility Act Certification

Under section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency certifies that this rule will not have a significant economic impact on a substantial number of small entities. The Agency made this determination based on the fact that this regulation only impacts those who choose to participate in the program. Small entity applicants will not be impacted to a greater extent than large entity applicants.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

This executive order imposes requirements on Rural Development in the development of regulatory policies that have tribal implications or preempt tribal laws. Rural Development has determined that the proposed rule does not have a substantial direct effect on one or more Indian tribe(s) or on either the relationship or the distribution of powers and responsibilities between the Federal Government and Indian tribes. Thus, this proposed rule is not subject to the requirements of Executive Order 13175. If a tribe determines that this rule has implications of which Rural Development is not aware and would like to engage with Rural Development on this rule, please contact Rural Development's Native American Coordinator at (202) 690–1681 or *AIAN@wdc.usda.gov.*

Paperwork Reduction Act

This rule contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

E-Government Act Compliance

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

I. Background

The Agency reviewed 7 CFR 4279.72, which is composed of three paragraphs, the first two of which are pertinent.

Section 4279.72(a) lays out the conditions under which a guarantee is not enforceable. The text separately identifies four such conditions:

1. In cases of fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder or which a lender or holder participates in or condones;

2. To the extent that any loss is occasioned by a provision for interest on interest;

3. To the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge thereof; and

4. To the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment.

Section 4279.72(b) discusses rights and liabilities when a guaranteed portion of a loan is sold to a holder. It states, in part, that the lender will be liable for payments made by USDA to any holder in the event of ''material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation.'' Section 4279.72(b) does not, however, refer to the other conditions listed in § 4279.72(a).

The Agency believes the lender's responsibility to reimburse the Agency for the improper activity should not be dependent upon whether the lender or holder owns the loan guarantee. However, the Agency is concerned that this policy is not sufficiently clear in this regulation. Therefore, the Agency is clarifying its position on this matter. The regulatory change is not retroactive nor does it affect the rights of current holders. However, the Agency recognizes that the issue should be clarified in the regulation. Accordingly, the Agency is proposing to make these changes in this proposed rule.

II. Discussion of Change

Section 4279.72(a) addresses the lender's coverage under the loan note guarantee. It also identifies those instances when the conduct of a holder may jeopardize their interest in the loan note guarantee. Section 4279.72(b) addresses the holder's coverage under the loan note guarantee. The change being made by this rule clarifies that having a holder purchase part of the loan note guarantee does not increase the coverage provided to the lender under the loan note guarantee. Therefore, the Agency will require the lender to reimburse it for any amount it pays to a holder that would not have been paid to a lender under § 4279.72(a).

The Agency is proposing to revise § 4279.72(b) to address the situation discussed in the ''Background'' section and similar situations.

List of Subjects in 7 CFR Part 4279

Loan programs—Business and industry—Rural development assistance, Rural areas.

For the reasons set forth in the preamble, chapter XLII, title 7 of the Code of Federal Regulations is proposed to be amended as follows:

Chapter XLII—Rural Business-Cooperative Service and Rural Utilities Service, Department of Agriculture

PART 4279—GUARANTEED LOANMAKING

1. The authority citation for part 4279 is revised to read as follows:

Authority: 5 U.S.C. 301; 7 U.S.C. 1932(a); and 7 U.S.C. 1989.

Subpart A—General

2. Amend § 4279.72 by revising the last sentence of paragraph (b) to read as follows:

§ 4279.72 Conditions of guarantee.

* * * * *

(b) * * * The lender will reimburse the Agency for any payments the Agency makes to a holder of lender's guaranteed loan that, under the Loan Note Guarantee, would not have been paid to the lender had the lender retained the entire interest in the guaranteed loan and not conveyed an interest to a holder.

* * * * *

Dated: July 12, 2011.

Dallas Tonsager,

Under Secretary Rural Development.

[FR Doc. 2011–18007 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Parts 53, 71, 82, 93, 94, 95, and 104

[Docket No. APHIS–2009–0094]

RIN 0579–AD45

Importation of Live Birds and Poultry, Poultry Meat, and Poultry Products From a Region in the European Union

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations governing the importation of animals and animal products by recognizing 25 Member States of the European Union as the APHIS-defined European Union poultry trade region and adding it to the list of regions we consider to be free of Newcastle disease. We are taking this action based on a risk evaluation that we prepared in which we determined that the proposed region meets our requirements for being considered free of Newcastle disease. We also determined that the region meets our requirements for being considered free of highly pathogenic avian influenza. In addition, we are proposing to establish requirements governing the importation of live birds and poultry, including hatching eggs, and poultry meat and products from the APHIS-defined European Union poultry trade region, and to update avian disease terms and definitions. These actions would facilitate the importation of live birds and poultry, and poultry meat and products, from the APHIS-defined European Union poultry trade region while protecting the United States from communicable avian diseases.

DATES: We will consider all comments that we receive on or before September 19, 2011.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to (*http://www.regulations.gov/#!documentDetail;D=APHIS-2009-0094-0001*).
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2009–0094, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at (*http://www.regulations.gov/#!docketDetail;D=APHIS-2009-0094*) or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

FOR FURTHER INFORMATION CONTACT: Mr. Javier Vargas, Case Manager, National Center for Import and Export, Veterinary Services, APHIS, 4700 River Road Unit 38, Riverdale, MD 20737–1231; (301) 734–4356.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) regulations in title 9 of the Code of Federal Regulations (CFR), parts 93, 94, and 95, govern the importation into the United States of specified animals and animal products and byproducts to prevent the introduction of various animal diseases, including exotic Newcastle disease [1]

[1] For reasons explained later in this document, we propose to replace in the regulations the term

Continued

and highly pathogenic avian influenza (HPAI).

Newcastle disease, a contagious disease of birds and poultry caused by a paramyxovirus, is one of the most infectious diseases of poultry in the world. Death rates of nearly 100 percent can occur in unvaccinated poultry flocks. Newcastle disease can also infect and cause death even in vaccinated birds and poultry.

Several strains of avian influenza (AI) virus throughout the world can cause varying degrees of illness in many species of birds, including chickens, turkeys, pheasants, quail, ducks, geese, and guinea fowl. AI viruses are characterized as low pathogenicity (LP) or high pathogenicity (HP) by their ability to produce disease or by their molecular characteristics. The ability of the virus to cause clinical signs may depend on the species of bird infected and may change over time, becoming more or less pathogenic. HPAI is an extremely infectious and potentially fatal form of AI in birds that, once established, can spread rapidly from flock to flock. The H5 and H7 subtypes of LPAI have the potential to mutate into HPAI. For this reason, LPAI subtypes H5 and H7 are considered along with any subtype of HPAI as notifiable forms of AI by the World Organisation for Animal Health (OIE).[2]

Existing regulations in § 94.6 restrict the importation of carcasses, parts of products of carcasses, and eggs (other than hatching eggs) [3] of poultry, game birds, and other birds, from all regions where Newcastle disease or any subtype of HPAI are considered to exist.

Paragraph (a)(1) of § 94.6 states that Newcastle disease is considered to exist in all regions of the world except for the regions listed. Paragraph (a)(2) refers readers to an APHIS Web site [4] listing regions in the world in which any subtype of HPAI is considered to exist. Paragraph (b) sets forth processing, handling, and shipping requirements for importations of poultry carcasses, and parts or products of carcasses, including meat, from regions where Newcastle disease or HPAI is considered to exist.

Paragraph (c) of § 94.6 sets forth requirements for importing eggs (other than hatching eggs) from poultry, game birds, or other birds if the birds or poultry are raised in any region where Newcastle disease is considered to exist, if the eggs are imported from any region where Newcastle disease is considered to exist, or if the eggs are moved into or through any region where Newcastle disease is considered to exist at any time before importation or during shipment to the United States.

Under our regulations in 9 CFR part 92, the representative of the national government(s) of any country or countries with the authority to do so may request that all or part of the country or countries be recognized as a region for animal health status purposes. In order to consider a region for recognition, APHIS requires that the applicant provide information about the proposed region regarding animal disease status, diagnostic capabilities, control measures, and related subjects listed in § 92.2 of the regulations. APHIS uses this information to help determine whether importation of specific articles can be safely allowed, and if so, publishes a proposal stating conditions under which imports are permitted.

The region-based model draws on the concept that restrictions on the movement of animals and animal products for the purpose of disease control are most effective when applied to geographically homogenous areas with respect to disease distribution and livestock health infrastructures. Evaluating a region spanning two or more countries, or parts of countries, considers the risks inherent in the free trade of animals and animal products across national borders.

In 2006, the European Commission [5] (EC) requested recognition of the animal health status of a region with respect to Newcastle disease and HPAI. The region consists of the 25 European Union (EU) Member States (EU–25) that comprised the EU in 2005.[6] The regulations currently list nine Member States of the EU–25 as regions in which Newcastle disease is not known to exist.[7] APHIS conducted a risk evaluation of the EU–25 as a single region that would be under the harmonized regulation and oversight of the EC, and to which we would apply a single set of requirements for the importation of live birds and poultry, and poultry meat and products, from the region into the United States.[8] As part of the risk evaluation, we conducted a site visit to representative EU–25 Member States. We also evaluated animal health status information submitted by the EC and consulted information from previous APHIS evaluations.

We have determined that the EU–25 is free of Newcastle disease and HPAI under our requirements and that the EC has demonstrated the ability to rapidly detect and contain outbreaks of these diseases, effectively limiting the need for movement restrictions to distinct Administrative Units within the region.[9] We also determined that the risk of avian disease is evenly distributed across the EU–25 because of the free trade in live birds and poultry, and poultry meat and products, across national borders within the region, and because the EC uniformly applies and enforces its animal disease regulations in all EU Member States.

Our findings are described in detail in the risk evaluation, which may be obtained by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. It may also be viewed on the *Regulations.gov* Web site or in our reading room (see **ADDRESSES** above for a link to *Regulations.gov* and information on the location and hours of the reading room).

Proposed Changes to the Regulations

We are proposing to amend the regulations by recognizing the Member States of the EU–25 as the APHIS-defined European Union poultry trade region (APHIS-defined EU–PTR). We are also proposing to add this new region to the list in § 94.6(a)(1)(i) of regions we consider to be free of Newcastle disease and to recognize the region as free of HPAI in accordance with § 94.6(a)(2)(i). Our proposed recognition of the APHIS-defined EU–PTR as free of these diseases is modeled after an EU region that we currently recognize as being low-risk for classical swine fever (CSF). In response to a 1997 request from the EC, APHIS conducted a risk analysis of a proposed region for CSF, and in a final rule published in the **Federal Register**

''exotic Newcastle disease'' with ''Newcastle disease'' and revise its definition; we use the latter term in this document when referring to the disease.

[2] Terrestrial Animal Health Code, Chapter 10, Article 10.4.1: (*http://www.oie.int/eng/normes/mcode/en_chapitre_1.10.4.htm*).

[3] Regulations for importing hatching eggs are included in §§ 93.104, 93.205, and 93.209.

[4] (*http://www.aphis.usda.gov/import_export/animals/animal_import/animal_imports_hpai.shtml*.)

[5] The European Commission (EC) is the governmental body responsible for representing the European Union as a whole. It proposes legislation, policies and programs of action, and implements decisions of the EU Parliament and Council.

[6] The Member States constituting the EU–25 are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

[7] Denmark, Finland, France, Great Britain, Greece, Luxembourg, Republic of Ireland, Spain, and Sweden. These countries also meet our requirements for HPAI freedom.

[8] ''APHIS Risk Evaluation on the Importation of Highly Pathogenic Avian Influenza (HPAI) and Virulent Newcastle Disease (END) Virus from a European Union Region of Twenty-five Member States,'' June 2009.

[9] Administrative Units are distinct governmental jurisdictions such as counties and provinces. See Appendix D of the risk evaluation document for a list of Administrative Units for each Member State.

and effective on April 7, 2003 (68 FR 16922–16941, Docket No. 98–090–5), we amended the regulations in § 94.24 to recognize an EU region in which CSF is not known to exist and from which swine and pork products may be imported into the United States under certain conditions.[10]

The April 2003 final rule also established a requirement, set forth in § 92.3, that whenever the EC establishes a quarantine for a disease in the EU in a region that APHIS recognizes as one in which the disease is not known to exist, and the EC imposes restrictions on the movement of animals or animal products from that quarantined area, such animals and animal products are prohibited importation into the United States. This prohibition applies to the APHIS-defined EU–CSF region when the EC imposes quarantine and movement restrictions for swine and pork products due to outbreaks of CSF. Because we acknowledge that limited outbreaks of Newcastle disease and HPAI will likely occur sporadically in EU–25 Member States, the prohibitions in § 92.3 would also apply to the APHIS-defined EU–PTR when the EC imposes quarantine and movement restrictions for poultry and poultry products due to outbreaks of Newcastle disease or HPAI.[11]

We also propose to establish a new section, § 94.28, that sets forth import restrictions on live birds and poultry, and poultry meat and products, from the APHIS-defined EU–PTR. These restrictions would reduce the risk of introducing Newcastle disease or HPAI into the United States while acknowledging the EC's ability to successfully manage outbreaks of those diseases.

Import Restrictions for Poultry Meat and Products

Paragraph (a)(1)(i) of proposed § 94.28 would require that poultry meat and products, including eggs and egg products (other than hatching eggs) derived from birds and poultry imported from the APHIS-defined EU–PTR must not have been derived from birds or poultry that were in any region when the region was classified in § 94.6(a)(1)(i) as one in which Newcastle disease is considered to exist, or any region when it was listed in accordance with § 94.6(a)(2)(i) as one in which HPAI is considered to exist, except for the APHIS-defined EU–PTR.[12] Under this exception, poultry meat and products could continue to be imported from unaffected parts of the APHIS-defined EU–PTR if a restricted zone for commercial poultry is established elsewhere in the region because of the detection of Newcastle disease or HPAI.

Paragraph (a)(1)(ii) of proposed § 94.28 would require that poultry meat and products must not have been derived from birds or poultry that were in any restricted zone within the APHIS-defined EU–PTR established because of detection of Newcastle disease or HPAI in commercial poultry. While EC regulations permit lifting a restricted zone as early as 21 days after disease control measures have been completed, APHIS would continue to observe the 90-day restriction periods established in § 93.104 for live birds and § 93.205 for poultry and eggs for hatching. The prohibition on imports of poultry meat and products from restricted zones imposed by the EC would continue from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State, or until 3 months (90 days) following depopulation of the poultry on affected premises in the restricted zone and the cleaning and disinfection of the last affected premises in the zone, whichever is later.

Paragraph (a)(1)(iii) of proposed § 94.28 would prohibit imports of poultry meat and products derived from birds and poultry that were in a restricted zone established within the APHIS-defined EU–PTR because of detection of Newcastle disease or HPAI in racing pigeons, backyard flocks, or wild birds, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State. We acknowledge that in such instances a Member State may choose to lift zone restrictions sooner than the minimum 90 days that APHIS requires for zones established because of detection of Newcastle disease or HPAI in commercial poultry. However, we have determined that (1) the Member States of the EU–25 exercise sufficient biosecurity practices such that isolated outbreaks in racing pigeons, backyard flocks, or wild birds are less likely to infect commercial poultry, and (2) importing commercial poultry meat and poultry products pose more of a potential disease threat to the U.S. poultry industry than do racing pigeons, backyard flocks, and wild birds. Whenever the EC establishes a restricted zone for racing pigeons, backyard flocks, or wild birds and subsequently lifts it, we would first confirm that the infection had not been introduced into commercial poultry in the restricted zone before we lift our import restrictions.

Paragraph (a)(2) of proposed § 94.28 would require that poultry meat and products imported from the APHIS-defined EU–PTR must not have been commingled with poultry meat and products derived from other birds and poultry that were in any of the regions or zones described in proposed § 94.28(a)(1)(i) through (a)(1)(iii). Additionally, we would provide that the poultry meat and products must not have been derived from birds and poultry that were commingled with other birds and poultry that were in any of the regions or zones described in proposed § 94.28(a)(1)(i) through (a)(1)(iii).

Paragraph (a)(3) of § 94.28 would require live birds and poultry from which poultry meat and products are derived to originate within the APHIS-defined EU–PTR. The farms from which they come would not be permitted to have received birds or poultry from outside the region.

Paragraph (a)(4) of proposed § 94.28 would require any equipment used in transporting birds and poultry from which poultry meat and products are derived not to have been used to transport live birds and poultry that do not meet the requirements we are proposing in § 94.28(b), unless the equipment and materials have first been cleaned and disinfected.

Paragraph (a)(5) of proposed § 94.28 would require poultry meat and products imported from the APHIS-defined EU–PTR to be accompanied by an inspection certificate issued by the competent veterinary authority of the Member State. The certificate would have to state that all applicable provisions of § 94.28(a)(1) through (a)(4) have been met.

Import Restrictions for Live Birds and Poultry, Including Hatching Eggs

Paragraph (b)(1)(i) of proposed § 94.28 would require that live birds and

[10] The EU Member States constituting the CSF-free region in this rule included, with the exception of specified regions within Germany and Italy, the countries of Austria, Belgium, Germany, Greece, Italy, the Netherlands, and Portugal. A current list of Member States included in the EU–CSF region is located online at: (*http://www.aphis.usda.gov/import_export/animals/animal_import/animal_imports_csf.shtml*).

[11] EC regulations also require the establishment of control measures following the detection of LPAI based on the risk that some low pathogenic viruses may mutate into HPAI. Depending on an assessment of the risks posed by a particular LPAI outbreak, the control measures imposed by the EC may be less restrictive than those applied following the detection of HPAI.

[12] APHIS is studying issues concerning the importation of table eggs from regions where HPAI is considered to exist. More information on this issue can be found in an interim rule published and effective on January 24, 2011 (76 FR 4046–4056, Docket No. APHIS–2006–0074).

poultry (including hatching eggs) imported from the APHIS-defined EU–PTR must not have been in any region when that region was classified in § 94.6(a)(1)(i) as one in which Newcastle disease is considered to exist, or any region when the region was listed in accordance with § 94.6(a)(2)(i) as one in which HPAI is considered to exist, except for the APHIS-defined EU–PTR. Under this exception, live birds and poultry could continue to be imported from unaffected parts of the APHIS-defined EU–PTR if a restricted zone for commercial poultry is established elsewhere in the region because of the detection of Newcastle disease or HPAI.

Paragraph (b)(1)(ii) of proposed § 94.28 would require that live birds and poultry imported from the APHIS-defined EU–PTR must not have been in a restricted zone in the APHIS-defined EU–PTR established because of the detection of Newcastle disease or HPAI in commercial poultry. The prohibition on imports of live birds and poultry from a restricted zone would continue from the time of detection until the restricted zone designation is removed by the competent veterinary authority of the Member State, or until 3 months (90 days) following depopulation of the birds and poultry on affected premises in the restricted zone and the cleaning and disinfection of the last affected premises in the zone, whichever is later.

Paragraph (b)(1)(iii) of proposed § 94.28 would prohibit imports of live birds and poultry from a restricted zone in the APHIS-defined EU–PTR established because of detection of Newcastle disease or HPAI in racing pigeons, backyard flocks, and wild birds, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State.

Paragraph (b)(2) of proposed § 94.28 would require that live birds and poultry offered for import not have been commingled with other birds and poultry that have at any time been in any of the regions or zones described in proposed § 94.28(b)(1)(i) through (b)(1)(iii).

Paragraph (b)(3) of proposed § 94.28 would require live birds and poultry offered for import to originate within the APHIS-defined EU–PTR. Their farms of origin would not be permitted to have received birds and poultry imported from outside the APHIS-defined EU–PTR.

Paragraph (b)(4) of § 94.28 would require that no equipment and materials used in transporting live birds and poultry have been used previously for transporting birds and poultry that do not meet the other requirements we are proposing in § 94.28(b), unless the equipment and materials have first been cleaned and disinfected.

Paragraph (b)(5) of proposed § 94.28 would require that live birds and poultry imported from the APHIS-defined EU–PTR be accompanied by an inspection certificate issued by the competent veterinary authority of the Member State. The certificate would state that all applicable provisions of proposed § 94.28(b)(1) through (b)(4) have been met.

Paragraph (c) of § 94.28 would require that the certificates required in § 94.28(a)(5) and (b)(5) be presented by the importer to an authorized inspector at the port of arrival, upon arrival of the live birds, poultry, hatching eggs, or bird and poultry meat and products.

Because we are proposing to recognize the 25 Member States of the APHIS-defined EU–PTR collectively as a single region free of Newcastle disease and HPAI, we would remove from § 94.6(a)(1)(i) the nine EU–25 Member States individually listed as regions free of Newcastle disease: Denmark, Finland, France, Great Britain, Greece, Luxembourg, Ireland, Spain, and Sweden. The APHIS-defined EU–PTR would be included in proposed § 94.6(a)(1)(i) as a single region considered to be free of Newcastle disease.

Changes to Terms and Definitions

We propose to make changes to the regulations regarding the terms and definitions we use for Newcastle disease and HPAI. We would remove the word ''exotic'' from the current references to ''exotic Newcastle disease'' in 9 CFR parts 53, 82, 93, 94 and 95. We are making this change so that our terminology for this disease is consistent with that used in the OIE animal health standards. We also propose to update our definition of Newcastle disease in parts 53, 82, and 94. The definition currently included in these parts describes how a virulent strain of the virus presents itself but does not define the technical criteria for determining virulence. We would use the definition published in the OIE animal health standards because it includes the technical criteria of virulence.[13]

In parts 71, 93, and 104, we propose to remove the terms ''fowl pest'' and ''fowl plague'' from the regulations and replace them with ''highly pathogenic avian influenza.'' The terms currently in the regulations predate identification of the avian influenza virus and are no longer commonly used in scientific discourse. This change would be consistent with our previous efforts to replace these terms in other parts of the regulations and reflects OIE terminology.[14] In addition, we propose to add a definition of HPAI to § 94.0. We would use the definition of HPAI included in § 53.1 of the current regulations because it defines all HPAI subtypes, makes the regulations more consistent, and is consistent with the definition used by the OIE.

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with the Regulatory Flexibility Act, we have analyzed the potential economic effects of this action on small entities. The analysis is summarized below. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing *Regulations.gov*).

The analysis examines impacts for U.S. small entities of a rule that would amend § 94.6 by establishing a region made up of 25 Member States of the EU and adding it to the list of regions considered to be free of Newcastle disease and HPAI. This region would be designated as the APHIS-defined EU–PTR, for which import restrictions for live birds and poultry, including hatching eggs, poultry meat, and poultry products would be uniformly applied. If outbreaks of either disease were to occur, this proposed rule would facilitate the continuation of imports from other areas within the APHIS-defined EU–PTR that are considered to be free of Newcastle disease and HPAI.

We expect the proposed rule to have negligible economic effects for U.S. entities, large or small. Nine EU Member States are currently permitted to export poultry or poultry products to the United States, but the quantities exported are small, and the quantities of birds, poultry, and poultry products that would be imported from the EU–PTR are not expected to be significant. EU Member States, in aggregate, exported only 40 metric tons of poultry meat to the United States in 2009. In contrast,

[13] *Terrestrial Animal Health Code,* Article 10.13.1: (*http://www.oie.int/eng/normes/mcode/en_chapitre_1.10.13.htm*).

[14] *Terrestrial Animal Health Code,* Article 10.4.1: (*http://www.oie.int/eng/normes/mcode/en_chapitre_1.10.4.htm*).

the United States is one of the world's largest producers and exporters of poultry meat; about 20 percent of U.S. poultry production was exported in 2009. Over 99 percent of U.S. live poultry imports, 97 percent of poultry meat imports, and 91 percent of hatching egg imports came from Canada in 2009. Imports from the APHIS-defined EU–PTR would therefore face a highly competitive U.S. market.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. If this proposed rule is adopted: (1) No retroactive effect will be given to this rule, and (2) administrative proceedings will not be required before parties may file suit in court challenging this rule.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with recognition of the APHIS-defined EU poultry trade region as being free of Newcastle disease and HPAI, we have prepared an environmental assessment. The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects

9 CFR Part 53

Animal diseases, Indemnity payments, Livestock, Poultry and poultry products.

9 CFR Part 71

Animal diseases, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements, Transportation.

9 CFR Part 82

Animal diseases, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements, Transportation.

9 CFR Part 93

Animal diseases, Imports, Livestock, Poultry and poultry products, Quarantine, Reporting and recordkeeping requirements.

9 CFR Part 94

Animal diseases, Imports, Livestock, Meat and meat products, Milk, Poultry and poultry products, Reporting and recordkeeping requirements.

9 CFR Part 95

Animal feeds, Hay, Imports, Livestock, Reporting and recordkeeping requirements, Straw, Transportation.

9 CFR Part 104

Animal biologics, Imports, Reporting and recordkeeping requirements, Transportation.

Accordingly, we propose to amend 9 CFR parts 53, 71, 82, 93, 94, 95, and 104 as follows:

PART 53—FOOT-AND-MOUTH DISEASE, PLEUROPNEUMONIA, RINDERPEST, AND CERTAIN OTHER COMMUNICABLE DISEASES OF LIVESTOCK OR POULTRY

1. The authority citation for part 53 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

2. Section 53.1 is amended as follows:

a. In the definition of *Disease,* by removing the word ''exotic''.

b. By removing the definition of *Exotic Newcastle Disease (END).*

c. By adding, in alphabetical order, a definition of *Newcastle disease* to read as set forth below.

§ 53.1 Definitions.

* * * * *

Newcastle disease. Newcastle disease is an acute, rapidly spreading, and usually fatal viral infection of poultry caused by an avian paramyxovirus serotype 1 that meets one of the following criteria for virulence: The virus has an intracerebral pathogenicity index (ICPI) in day-old chicks (*Gallus gallus*) of 0.7 or greater; or multiple basic amino acids have been demonstrated in the virus (either directly or by deduction) at the C-terminus of the F2 protein and phenylalanine at residue 117, which is the N-terminus of the F1 protein. The term ''multiple basic amino acids'' refers to at least three arginine or lysine residues between residues 113 and 116. In this definition, amino acid residues are numbered from the N-terminus of the amino acid sequence deduced from the nucleotide sequence of the F0 gene; 113–116 corresponds to residues -4 to -1 from the cleavage site. Failure to demonstrate the characteristic pattern of amino acid residues as described above may require characterization of the isolated virus by an ICPI test. A failure to detect a cleavage site that is consistent with virulent strains does not confirm the absence of a virulent virus.

* * * * *

§ 53.2 [Amended]

3. In § 53.2, paragraph (b) is amended by removing the word ''exotic''.

PART 71—GENERAL PROVISIONS

4. The authority citation for part 71 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

§ 71.3 [Amended]

5. In § 71.3, paragraph (b) is amended by removing the words ''European fowl pest'' and adding the words ''highly pathogenic avian influenza'' in their place.

PART 82—NEWCASTLE DISEASE AND CHLAMYDIOSIS

6. The authority citation for part 82 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

7. The heading for part 82 is revised to read as set forth above.

Subpart A—Newcastle Disease

8. The heading for subpart A is revised to read as set forth above.

Subpart A—[Amended]

9. In subpart A, revise all references to ''END'' to read ''Newcastle disease''.

10. Section 82.1 is amended as follows:

a. By removing the definition of *END.*

b. By adding, in alphabetical order, a definition of *Newcastle disease* to read as set forth below.

§ 82.1 Definitions.

* * * * *

Newcastle disease. Newcastle disease is an acute, rapidly spreading, and usually fatal viral infection of poultry caused by an avian paramyxovirus serotype 1 that meets one of the following criteria for virulence: The virus has an intracerebral pathogenicity index (ICPI) in day-old chicks (*Gallus gallus*) of 0.7 or greater; or multiple basic amino acids have been demonstrated in the virus (either directly or by deduction) at the C-terminus of the F2 protein and phenylalanine at residue 117, which is the N-terminus of the F1 protein. The term ''multiple basic amino acids'' refers to at least three arginine or lysine residues between residues 113 and 116. In this definition, amino acid residues are numbered from the N-terminus of the amino acid sequence deduced from the nucleotide sequence of the F0 gene; 113–116 corresponds to residues −4 to −1 from the cleavage site. Failure to demonstrate the characteristic pattern of amino acid residues as described above may require characterization of the isolated virus by an ICPI test. A failure to detect a cleavage site that is consistent with virulent strains does not confirm the absence of a virulent virus.

* * * * *

PART 93—IMPORTATION OF CERTAIN ANIMALS, BIRDS, FISH, AND POULTRY, AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS; REQUIREMENTS FOR MEANS OF CONVEYANCE AND SHIPPING CONTAINERS

11. The authority citation for part 93 continues to read as follows:

Authority: 7 U.S.C. 1622 and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

§ 93.101 [Amended]

12. Section 93.101 is amended as follows:

a. In paragraph (g)(2), by removing the words ''exotic Newcastle disease (END)'' and adding the words ''Newcastle disease'' in their place.

b. By revising all references to ''END'' in footnote 7 and paragraphs (g)(3) and (g)(4) to read ''Newcastle disease''.

§ 93.106 [Amended]

13. Section 93.106 is amended as follows:

a. In paragraph (c)(5)(iii), in the Cooperative and Trust Fund Agreement, in (A)(14), the second sentence, and in (A)(17), the first sentence, remove the word ''exotic'' each time it occurs.

b. In paragraph (c)(5)(iii), in the Cooperative and Trust Fund Agreement, in (B)(4) and (B)(5), revise the references to ''END'' to read ''Newcastle disease''.

§ 93.205 [Amended]

14. In § 93.205, paragraph (a), the fourth sentence is amended by removing the words ''European fowl pest (fowl plague)'' and adding the words ''highly pathogenic avian influenza'' in their place.

§ 93.209 [Amended]

15. In § 93.209, paragraph (b), the first sentence is amended by removing the word ''exotic''.

PART 94—RINDERPEST, FOOT-AND-MOUTH DISEASE, NEWCASTLE DISEASE, HIGHLY PATHOGENIC AVIAN INFLUENZA, AFRICAN SWINE FEVER, CLASSICAL SWINE FEVER, SWINE VESICULAR DISEASE, AND BOVINE SPONGIFORM ENCEPHALOPATHY: PROHIBITED AND RESTRICTED IMPORTATIONS

16. The authority citation for part 94 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, 7781–7786, and 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

17. The heading for part 94 is revised to read as set forth above.

18. Section 94.0 is amended as follows:

a. By removing the definition of *Exotic Newcastle Disease (END).*

b. By adding, in alphabetical order, definitions of *APHIS-defined EU Poultry Trade Region, Highly pathogenic avian influenza,* and *Newcastle disease* to read as set forth below.

§ 94.0 Definitions.

* * * * *

APHIS-defined EU Poultry Trade Region. The European Union Member States of Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom (England, Scotland, Wales, the Isle of Man, and Northern Ireland).

* * * * *

Highly pathogenic avian influenza. Highly pathogenic avian influenza is defined as follows:

(1) Any influenza virus that kills at least 75 percent of eight 4- to 6-week-old susceptible chickens within 10 days following intravenous inoculation with 0.2 mL of a 1:10 dilution of a bacteria-free, infectious allantoic fluid;

(2) Any H5 or H7 virus that does not meet the criteria in paragraph (1) of this definition, but has an amino acid sequence at the haemagglutinin cleavage site that is compatible with highly pathogenic avian influenza viruses; or

(3) Any influenza virus that is not an H5 or H7 subtype and that kills one to five chickens and grows in cell culture in the absence of trypsin.

* * * * *

Newcastle disease. Newcastle disease is an acute, rapidly spreading, and usually fatal viral infection of poultry caused by an avian paramyxovirus serotype 1 that meets one of the following criteria for virulence: The virus has an intracerebral pathogenicity index (ICPI) in day-old chicks (*Gallus gallus*) of 0.7 or greater; or multiple basic amino acids have been demonstrated in the virus (either directly or by deduction) at the C-terminus of the F2 protein and phenylalanine at residue 117, which is the N-terminus of the F1 protein. The term ''multiple basic amino acids'' refers to at least three arginine or lysine residues between residues 113 and 116. In this definition, amino acid residues are numbered from the N-terminus of the amino acid sequence deduced from the nucleotide sequence of the F0 gene; 113–116 corresponds to residues −4 to −1 from the cleavage site. Failure to demonstrate the characteristic pattern of amino acid residues as described above may require characterization of the isolated virus by an ICPI test. A failure to detect a cleavage site that is consistent with virulent strains does not confirm the absence of a virulent virus.

* * * * *

19. Section 94.6 is amended as follows:

a. By revising the section heading to read as set forth below.

b. In the paragraph (a) heading, by removing the words ''*exotic Newcastle disease (END)''* and adding the words ''*Newcastle disease''* in their place.

c. By revising paragraph (a)(1)(i) to read as set forth below.

d. By revising all references to ''END'' to read ''Newcastle disease''.

§ 94.6 Carcasses, meat, parts or products of carcasses, and eggs (other than hatching eggs) of poultry, game birds, or other birds; importations from regions where Newcastle disease or highly pathogenic avian influenza is considered to exist.

(a) * * *

(1) * * *

(i) The following regions are considered to be free of Newcastle

disease: APHIS-defined EU Poultry Trade Region, Argentina, Australia, Canada, Chile, Costa Rica, Fiji, Iceland, Mexico (States of Campeche, Quintana Roo, and Yucatan), New Zealand, and Switzerland.

* * * * *

§ 94.23 [Amended]

20. Section 94.23 is amended by removing in paragraph (c) and paragraph (e) introductory text the word ''exotic'' each time it occurs.

§ 94.26 [Amended]

21. Section 94.26 is amended as follows:

a. In the introductory text, by removing the words ''exotic Newcastle disease (END)'' and adding the words ''Newcastle disease'' in their place.

b. By revising all references to ''END'' to read ''Newcastle disease''.

22. A new § 94.28 is added to read as follows:

§ 94.28 Restrictions on the importation of poultry meat and products, and live birds and poultry, from the APHIS-defined EU poultry trade region.

(a) *Poultry meat and products.* In addition to meeting all other applicable provisions of this part, poultry meat and poultry products, including eggs and egg products (other than hatching eggs) imported from the APHIS-defined EU Poultry Trade Region must meet the following conditions:

(1) The poultry meat and products must not have been derived from birds and poultry that were in any of the following regions or zones, unless the birds and poultry were slaughtered after the periods described:

(i) Any region when the region was classified in § 94.6(a)(1)(i) as one in which Newcastle disease is considered to exist, or any region when the region was listed in accordance with § 94.6(a)(2)(i) as one in which HPAI is considered to exist, except for the APHIS-defined EU Poultry Trade Region;

(ii) A restricted zone in the APHIS-defined EU Poultry Trade Region established because of detection of Newcastle disease or HPAI in commercial poultry, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State or until 3 months (90 days) following depopulation of the poultry on affected premises in the restricted zone and the cleaning and disinfection of the last affected premises in the zone, whichever is later; or

(iii) A restricted zone in the APHIS-defined EU Poultry Trade Region established because of detection of Newcastle disease or HPAI in racing pigeons, backyard flocks, or wild birds, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State.

(2) The poultry meat and products must not have been commingled with poultry meat and products derived from other birds and poultry that were in any of the regions or zones described in paragraphs (a)(1)(i) through (a)(1)(iii) of this section. Additionally, the poultry meat and products must not have been derived from poultry that were commingled with other poultry that were in any of the regions or zones described in paragraphs (a)(1)(i) through (a)(1)(iii) of this section.

(3) The live birds and poultry from which the poultry meat and products were derived must only originate from within the APHIS-defined EU Poultry Trade Region and the farms of origin must not have received live birds or poultry imported from outside the APHIS-defined EU Poultry Trade Region.

(4) No equipment or materials used in transporting the birds or poultry from which the poultry meat and products were derived from the farm of origin to the slaughtering establishment may have been used previously for transporting live birds or poultry that do not meet the requirements of § 94.28(b), unless the equipment and materials have first been cleaned and disinfected.

(5) The poultry meat and products, including eggs and egg products (other than hatching eggs) must be accompanied by a certificate issued by an official of the competent veterinary authority of the APHIS-defined EU Poultry Trade Region Member State who is authorized to issue the inspection certificate required by § 93.205 of this subchapter, stating that the applicable provisions of paragraphs (a)(1) through (a)(4) of this section have been met. The certification for poultry meat and products may be placed on the foreign meat inspection certificate required by § 381.196 of this title or may be contained in a separate document.

(b) *Live birds and poultry.* In addition to meeting all other applicable provisions of this title, live birds and poultry, including hatching eggs, imported from the APHIS-defined EU Poultry Trade Region must meet the following conditions:

(1) The birds and poultry must not have been in any of the following regions or zones, unless the birds and poultry are exported to the United States after the periods described:

(i) Any region when the region was classified in § 94.6(a)(1)(i) as one in which Newcastle disease is considered to exist, or any region when the region was listed in accordance with § 94.6(a)(2)(i) as one in which HPAI is considered to exist, except for the APHIS-defined EU Poultry Trade Region;

(ii) A restricted zone in the APHIS-defined EU Poultry Trade Region established because of detection of Newcastle disease or HPAI in commercial poultry, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State or until 3 months (90 days) following depopulation of the poultry on affected premises in the restricted zone and the cleaning and disinfection of the last affected premises in the zone, whichever is later; or

(iii) A restricted zone in the APHIS-defined EU Poultry Trade Region established because of detection of Newcastle disease or HPAI in racing pigeons, backyard flocks, and wild birds, from the time of detection until the designation of the zone as a restricted zone is removed by the competent veterinary authority of the Member State.

(2) The birds and poultry must not have been commingled with other birds or poultry that have at any time been in any of the regions or zones described in paragraphs (b)(1)(i) through (b)(1)(iii) of this section.

(3) The birds and poultry must only originate from within the APHIS-defined EU Poultry Trade Region and the farms of origin must not have received birds or poultry imported from outside the APHIS-defined EU Poultry Trade Region.

(4) No equipment or materials used in transporting the birds and poultry may have been used previously for transporting birds or poultry that do not meet the requirements of this paragraph, unless the equipment and materials have first been cleaned and disinfected.

(5) The birds and poultry must be accompanied by a certificate issued by an official of the competent veterinary authority of the Member State who is authorized to issue the inspection certificate required by § 93.205 of this subchapter, stating that the applicable provisions of paragraphs (b)(1) through (b)(4) of this section have been met. The certification may be placed on the foreign meat inspection certificate required by § 381.196 of this title or may be contained in a separate document.

(c) *Presentation of certificates.* The certificates required by paragraphs (a)(5) and (b)(5) of this section must be

presented by the importer to an authorized inspector at the port of arrival, upon arrival of the birds, poultry, hatching eggs, or poultry meat and products at the port.

PART 95—SANITARY CONTROL OF ANIMAL BYPRODUCTS (EXCEPT CASINGS), AND HAY AND STRAW, OFFERED FOR ENTRY INTO THE UNITED STATES

23. The authority citation for part 95 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 21 U.S.C. 136 and 136a; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.4.

§ 95.5 [Amended]

24. In § 95.5, paragraph (c) is amended by removing the words ''exotic'' and ''subtype H5N1''.

§ 95.6 [Amended]

25. In § 95.6, paragraph (c) is amended by removing the word ''exotic''.

PART 104—PERMITS FOR BIOLOGICAL PRODUCTS

26. The authority citation for part 104 continues to read as follows:

Authority: 21 U.S.C. 151–159; 7 CFR 2.22, 2.80, and 371.4.

§ 104.2 [Amended]

27. In § 104.2, paragraph (b) is amended by removing the words ''fowl pest (fowl plague)'' and adding the words ''highly pathogenic avian influenza'' in their place.

Done in Washington, DC, this 13th day of July 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–18108 Filed 7–18–11 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0717; Directorate Identifier 2010–NM–108–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 Airplanes; and Model A340–200 and –300 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above that would supersede an existing AD. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

During A330 and A340 aeroplanes fatigue tests, cracks appeared on the right (RH) and left (LH) sides between the crossing area of the keel beam fitting and the front spar of the Centre Wing Box (CWB). This condition, if not corrected, could lead to keel beam rupture which would affect the area structural integrity.

* * * * *

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by September 2, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 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 proposed 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; e-mail *airworthiness.A330–A340@airbus.com*; Internet *http://www.airbus.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. 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;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the 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, Washington 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–2011–0717; Directorate Identifier 2010–NM–108–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

On July 24, 2007, we issued AD 2007–16–02, Amendment 39–15141 (72 FR 44731, August 9, 2007). That AD required actions intended to address an unsafe condition on the products listed above.

Since we issued AD 2007–16–02, the European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2010–0024, dated February 12, 2010 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

During A330 and A340 aeroplanes fatigue tests, cracks appeared on the right (RH) and left (LH) sides between the crossing area of the keel beam fitting and the front spar of the Centre Wing Box (CWB). This condition, if not corrected, could lead to keel beam rupture which would affect the area structural integrity.

In order to maintain the structural integrity of the aeroplane, EASA AD 2006–0315R1 required repetitive special detailed

inspections on the horizontal flange of the keel beam in the area of first fastener hole aft of FR40.

This AD, which supersedes EASA AD 2006–0315R1:

—Retains the inspection requirements of EASA AD 2006–0315R1,
—Extends the AD applicability to aeroplanes which have embodied Airbus modification 49202, and
—Modifies the inspection thresholds and intervals.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Airbus has issued the following service information.

TABLE—SERVICE INFORMATION

Document	Revision	Date
Airbus Mandatory Service Bulletin A330–57–3081, including Appendix 1	03	July 31, 2009.
Airbus Mandatory Service Bulletin A340–57–4089, including Appendix 1	03	July 31, 2009.
Airbus Service Bulletin A330–57–3090	Original	March 27, 2006.
Airbus Service Bulletin A330–57–3098, including Appendix 1	01	July 31, 2009.
Airbus Service Bulletin A340–57–4106, including Appendix 1	01	July 31, 2009.
Airbus Service Bulletin A340–57–4098	Original	March 27, 2006.

Airbus Mandatory Service Bulletins A330–57–3081, Revision 03, dated July 31, 2009; and A340–57–4089, Revision 03, dated July 31, 2009; reduce certain compliance times. The compliance time for the initial special detailed inspection ranges from 10,350 flight cycles or 69,870 flight hours, to 21,180 flight cycles or 63,560 flight hours, depending on airplane configuration. The compliance times for the repetitive interval range from 7,780 flight cycles or 52,510 flight hours, to 12,360 flight cycles or 37,080 flight hours, depending on airplane configuration. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

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 the same type design.

Change to Existing AD

This proposed AD would retain all requirements of AD 2007–16–02. Since AD 2007–16–02 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2007–16–02	Corresponding requirement in this proposed AD
paragraph (e)(1)	paragraph (h)
paragraph (e)(2)	paragraph (i)
paragraph (e)(3)	paragraph (j)
paragraph (e)(4)	paragraph (k)
paragraph (e)(5)	paragraph (l)
paragraph (e)(6)	paragraph (m)

Differences Between This AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 35 products of U.S. registry.

For the 9 airplanes affected by the existing AD, the actions that are required by AD 2007–16–02 and retained in this proposed AD take about 41 work-hours per product, at an average labor rate of $85 per work hour. Required parts cost about $191 per product. Based on these figures, the estimated cost of the currently required actions is $3,676 per product.

For the 26 additional airplanes added in this AD, we estimate the actions in this proposed AD would take about 41 work-hours per product, at an average labor rate of $85 per work hour. Required parts would cost about $191 per product. Based on these figures, the estimated cost of the proposed AD is $3,676 per product.

In addition, because the proposed AD advises to contact the manufacturer for repair instructions, we cannot estimate the parts or labor costs for any necessary follow-on actions. 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 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); and

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15141 (72 FR 44731, August 9, 2007) and adding the following new AD:

Airbus: Docket No. FAA–2011–0717; Directorate Identifier 2010–NM–108–AD.

Comments Due Date

(a) We must receive comments by September 2, 2011.

Affected ADs

(b) This AD supersedes AD 2007–16–02, Amendment 39–15141.

Applicability

(c) This AD applies to the airplanes identified in paragraphs (c)(1) and (c)(2) of this AD; certificated in any category; except as provided by paragraph (c)(3) of this AD.

(1) Airbus Model A330–201, –202, –203, –223, –243, –301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes, all serial numbers, except those on which Airbus modification 55306 or 55792 has been embodied in production.

(2) Airbus Model A340–211, –212, –213, –311, –312, and –313 airplanes, all serial numbers, except those on which Airbus modification 55306 or 55792 has been embodied in production.

(3) This AD is not applicable to Airbus Model A340–211, –212, –213, –311, –312, and –313 airplanes that have been repaired in accordance with Airbus Repair Drawing R57115053, R57115051, or R57115047 (installation of titanium doubler on both sides). AD 2007–12–08, Amendment 39–15086 (72 FR 31171, June 6, 2007), applies to these airplanes.

Subject

(d) Air Transport Association (ATA) of America Code 57: Wings.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

During A330 and A340 aeroplanes fatigue tests, cracks appeared on the right (RH) and left (LH) sides between the crossing area of the keel beam fitting and the front spar of the Centre Wing Box (CWB). This condition, if not corrected, could lead to keel beam rupture which would affect the area structural integrity.

* * * * *

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Restatement of Requirements of AD 2007–16–02, With Revised Service Information

(g) For Model A330–201, –202, –203, –223, –243, –301, –321, –322, –323, –341, –342, and –343 airplanes, except those on which Airbus modification 49202 has been embodied in production, or Airbus Service Bulletin A330–57–3090 has been embodied in service, and Model A340–200 and –300 series airplanes, except those on which Airbus modification 49202 has been embodied in production or Airbus Service Bulletin A340–57–4098 has been embodied in service, and except Model A340–211, –212, –213, –311, –312, and –313 airplanes that have been repaired in accordance with Airbus Repair Drawing R57115053, R57115051, or R57115047: Do the actions required by paragraphs (h), (l), and (m) of this AD.

(h) For airplanes identified in paragraph (g) of this AD, within the mandatory threshold (flight cycles or flight hours) mentioned in the paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02; or A330–57–3081, Revision 02; both dated January 24, 2006; depending on the configuration of the aircraft model; or within 3 months after September 13, 2007 (the effective date of AD 2007–16–02); whichever occurs later: Carry out the NDT (non-destructive test) inspection of the hole(s) of the horizontal flange of the keel beam located on FR 40 datum on RH (right-hand) and/or LH (left-hand) side of the fuselage, in accordance with the instructions of the applicable service bulletin listed in table 1 of this AD. After the effective date of this AD, use only Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable. Inspection in accordance with Airbus A330/A340 200–300 Technical Disposition F57D03012810, Issue B, dated August 18, 2003; or 582.0651/2002, Issue A, dated October 17, 2002; satisfies the inspection requirements for the first rotating probe inspection which is specified at the inspection threshold of this AD. Doing the inspection required by paragraph (n) of this AD terminates the requirements of this paragraph of this AD.

Note 1: In order to prevent large repairs or heavy maintenance, Airbus recommends to perform the above inspection according to recommended thresholds mentioned in paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02; both dated January 24, 2006.

TABLE 1—ACCEPTABLE SERVICE INFORMATION FOR CERTAIN REQUIREMENTS OF PARAGRAPH (H)

Document	Revision	Date
Airbus Mandatory Service Bulletin A330–57–3081	02	January 24, 2006.
Airbus Mandatory Service Bulletin A330–57–3081	03	July 31, 2009.
Airbus Mandatory Service Bulletin A340–57–4089	02	January 24, 2006.
Airbus Mandatory Service Bulletin A340–57–4089	03	July 31, 2009.

(i) In case of any crack finding during the inspection required by paragraph (h) of this AD, before further flight, contact Airbus in order to get repair instructions before next flight, and repair before further flight.

(j) Should no crack be detected during the inspection required by paragraph (h) of this AD:

(1) Before further flight: Follow up the actions indicated in the flow charts, Figure 7, 8, or 9, of Airbus Mandatory Service Bulletin A340–57–4089, including Appendix 01, Revision 02, dated January 24, 2006, or Revision 03, dated July 31, 2009; or Figure 5, 6, or 7, of Airbus Mandatory Service Bulletin A330–57–3081, including Appendix 01, Revision 02, dated January 24, 2006, or Revision 03, dated July 31, 2009; in accordance with the instructions of Airbus Mandatory Service Bulletin A340–57–4089, including Appendix 01, Revision 02, dated January 24, 2006, or Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A330–57–3081, including Appendix 01, Revision 02, dated January 24, 2006, or

Revision 03, dated July 31, 2009; as applicable.

(2) Within 30 days after September 13, 2007, or within 30 days after doing the inspection required by paragraph (h) of this AD, whichever occurs later: Send the report of actions carried out in paragraph (j)(1) of this AD to Airbus.

(3) Renew the inspection at mandatory intervals given in paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006; as applicable; in accordance with the instructions of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006, or Revision 03, dated July 31, 2009, or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006, or Revision 03, dated July 31, 2009; as applicable, and send the inspection results to Airbus. Doing the inspection required by paragraph (n) of this AD terminates the requirements of this paragraph of this AD.

Note 2: In order to prevent large repairs or heavy maintenance, Airbus recommends to perform the above repetitive inspection according to recommended intervals mentioned in paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006.

(k) Upon detection of a crack during a repetitive inspection required by paragraph (j)(3) of this AD, before further flight, contact Airbus to get repair instructions, and repair before further flight.

(l) For airplanes identified in paragraph (g) of this AD: No additional work is required for compliance with paragraph (h) of this AD for aircraft inspected in accordance with the instructions of Airbus Service Bulletin A330–57–3081, dated October 30, 2003, or Revision 01, dated May 18, 2004; or Airbus Service Bulletin A340–57–4089, dated October 30, 2003, or Revision 01, dated March 2, 2004. Nevertheless, the operators must check that their inspection program is in accordance with paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006; as applicable; for the repetitive inspection.

(m) For airplanes identified in paragraph (g) of this AD on which Airbus Modification 41652 is not embodied: When the aircraft has been modified in accordance with Airbus Service Bulletin A330–57–3090, dated March 27, 2006; or Airbus Service Bulletin A340–57–4098, dated March 27, 2006; as applicable; the repetitive inspections required by this AD are cancelled. In case of any crack finding during the modification: Where the applicable service bulletin specifies to contact Airbus, before further flight, contact Airbus to get repair instructions, and repair.

New Requirements of This AD

(n) At the applicable time in paragraph (n)(1) or (n)(2) of this AD: Do an NDT inspection of the hole(s) of the horizontal flange of the keel beam located on FR 40 datum on RH and/or LH side of the fuselage, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable. Inspection in accordance with Airbus A330/A340 Technical Disposition F57D03012810, Issue B, dated August 18, 2003; or 582.0651/2002, Issue A, dated October 17, 2002; is acceptable for compliance with the inspection requirements for the first rotating probe inspection required by this paragraph. Doing the inspection required by this paragraph terminates the requirements of paragraphs (h) and (j)(3) of this AD.

(1) For airplanes on which an inspection required by paragraph (h) of this AD has not been done as of the effective date of this AD: At the applicable time specified in paragraph (n)(1)(i) or (n)(1)(ii) of this AD.

(i) For all airplanes except those identified in paragraph (g) of this AD: Within the ''Mandatory Threshold'' (flight cycles or flight hours) specified in table 1 of paragraph 1.E.(2) of the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable; or within 3 months after the effective date of this AD; whichever occurs later. The compliance times for configuration 02 through 06 specified in the ''Mandatory Threshold'' column in table 1 of paragraph 1.E., ''Compliance,'' are total flight cycles and total flight hours.

(ii) For airplanes identified in paragraph (g) of this AD: At the earlier of the times specified in paragraphs (n)(1)(ii)(A) and (n)(1)(ii)(B) of this AD.

(A) Within the ''Mandatory Threshold'' (flight cycles or flight hours) specified in table 1 of paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006; depending on the configuration of the aircraft model; or within 3 months after September 13, 2007; whichever occurs later. The compliance times for Model A330 post-mod. No. 41652 and pre-mod. No. 44360, post-mod. No. 44360, and pre-mod. No. 49202 (specified in Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006); and Model A340 post-mod. No. 41652, post-mod. No. 43500 and pre-mod. No. 44360, post-mod. No. 44360 and pre-mod. No. 49202, and Weight Variant 027 (specified in Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006); specified in the ''Mandatory Threshold'' column in table 1 of paragraph 1.E., ''Compliance,'' are total flight cycles and total flight hours.

(B) Within the ''Mandatory Threshold'' (flight cycles or flight hours) specified in table 1 of paragraph 1.E.(2) of the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable; or within 3 months after the effective date of this AD; whichever occurs later. The compliance times for configuration 02 through 06 specified in the ''Mandatory Threshold'' column in table 1 of paragraph 1.E., ''Compliance,'' are total flight cycles and total flight hours.

(2) For airplanes on which an inspection required by paragraph (h) of this AD has been done as of the effective date of this AD: At the earlier of the times specified in paragraphs (n)(2)(i) and (n)(2)(ii) of this AD.

(i) Within the ''Mandatory Intervals'' given in table 1 of paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A340–57–4089, Revision 02, dated January 24, 2006; or Airbus Mandatory Service Bulletin A330–57–3081, Revision 02, dated January 24, 2006; as applicable.

(ii) Within the applicable ''Mandatory Interval'' specified in table 1 of Paragraph 1.E.(2). of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable; or within 3 months after the effective date of this AD; whichever occurs later.

Note 3: To prevent large repairs or heavy maintenance, Airbus recommends to perform the above inspection according to recommended thresholds specified in paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable.

(o) If any cracking is found during any inspection required by paragraph (n) of this AD, before further flight, repair in accordance with a method approved by the International Branch, ANM–116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(p) If no cracking is found during any inspection required by paragraph (n) of this AD, do the actions required by paragraphs (p)(1) and (p)(2) of this AD.

(1) Before further flight: Install new or oversized fastener, as applicable; seal the fastener; and do all other applicable actions; in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable.

(2) Repeat the inspection required by paragraph (n) of this AD thereafter at intervals not to exceed the mandatory intervals specified in Paragraph 1.E.(2). of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable.

Note 4: To prevent large repairs or heavy maintenance, Airbus recommends to perform the above repetitive inspection according to recommended intervals mentioned in paragraph 1.E.(2) of Airbus Mandatory Service Bulletin A330–57–3081, Revision 03, dated July 31, 2009; or Airbus Mandatory Service Bulletin A340–57–4089, Revision 03, dated July 31, 2009; as applicable.

Credit for Actions Accomplished in Accordance With Previous Service Information

(q) Inspections done before the effective date of this AD in accordance with the service information specified in table 2 of this AD are acceptable for compliance with the corresponding inspection required by paragraph (n) of this AD.

TABLE 2—CREDIT SERVICE INFORMATION FOR CERTAIN ACTIONS

Document	Revision	Date
Airbus Mandatory Service Bulletin A330–57–3081	02	January 24, 2006.
Airbus Mandatory Service Bulletin A340–57–4089	02	January 24, 2006.
Airbus Service Bulletin A330–57–3081	Original	October 30, 2003.
Airbus Service Bulletin A330–57–3081	01	May 18, 2004.
Airbus Service Bulletin A340–57–4089	Original	October 30, 2003.
Airbus Service Bulletin A340–57–4089	01	March 2, 2004.

(r) Modifying the fasteners installation in the junction keel beam fitting at FR 40, in accordance with Airbus Service Bulletin A330–57–3098, dated August 30, 2007; or Airbus Service Bulletin A340–57–4106, dated August 30, 2007; as applicable; before the effective date of this AD terminates the requirements of this AD; except for airplanes on which a crack was detected at hole 5 before oversizing of the keel beam (in accordance with step 3.B.(1)(b)*3* of the Accomplishment Instructions of Airbus Service Bulletin A330–57–3098 or Airbus Service Bulletin A340–57–4106), before further flight, repair in accordance with a method approved by the International Branch, ANM–116, Transport Airplane Directorate, FAA, or EASA (or its delegated agent).

(s) Modifying the fasteners installation in the junction keel beam fitting at FR 40, in accordance with Airbus Service Bulletin A330–57–3098, Revision 01, dated July 31, 2009; or Airbus Service Bulletin A340–57–4106, Revision 01, dated July 31, 2009; as applicable; terminates the requirements of this AD.

(t) Modifying the fasteners installation in the junction keel beam fitting at FR 40, in accordance with Airbus Service Bulletin A330–57–3090, dated March 27, 2006; or Airbus Service Bulletin A340–57–4098, dated March 27, 2006; as applicable; terminates the requirements of this AD.

(u) In case of any crack finding during any modification specified paragraphs (r), (s), and (t) of this AD: Where the applicable service bulletin specifies to contact Airbus, before further flight, repair in accordance with a method approved by the International Branch, FAA, or EASA (or its delegated agent).

FAA AD Differences

Note 5: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(v) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Vladimir Ulyanov, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1138; fax (425) 227–1149. Information may be e-mailed 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) *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.

Related Information

(w) Refer to MCAI European Aviation Safety Agency Airworthiness Directive 2010–0024, dated February 12, 2010, and the applicable service information specified/identified in table 3 of this AD, for related information.

TABLE 3—RELATED SERVICE INFORMATION

Document	Revision	Date
Airbus Mandatory Service Bulletin A330–57–3081	02	January 24, 2006.
Airbus Mandatory Service Bulletin A330–57–3081	03	July 31, 2009.
Airbus Mandatory Service Bulletin A340–57–4089	02	January 24, 2006.
Airbus Mandatory Service Bulletin A340–57–4089	03	July 31, 2009.
Airbus Service Bulletin A330–57–3090	Original	March 27, 2006.
Airbus Service Bulletin A330–57–3098	01	July 31, 2009.
Airbus Service Bulletin A340–57–4106	01	July 31, 2009.
Airbus Service Bulletin A340–57–4098	Original	March 27, 2006.
Airbus A330/A340 200–300 Technical Disposition F57D03012810	Issue B	August 18, 2003.
Airbus A330/A340 Technical Disposition 582.0651/2002	Issue A	October 17, 2002.

Issued in Renton, Washington, on July 7, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–18131 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0719; Directorate Identifier 2010–NM–087–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Model 767–200, –300, and –400ER Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to supersede an existing airworthiness directive (AD) that applies to the products listed above. The existing AD currently requires replacing the separation link assembly on the applicable entry and service doors with an improved separation link assembly, and doing related investigative and corrective actions if necessary. Since we issued that AD, we have received a report that an additional airplane is subject to the unsafe condition. This proposed AD would add that airplane to the applicability and also remove certain other airplanes from the applicability. We are proposing this AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

DATES: We must receive comments on this proposed AD by September 2, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* 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 AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, Washington 98124–2207; telephone 206–544–5000, extension 1, fax 206–766–5680; e-mail *me.boecom@boeing.com*; Internet *https://www.myboeingfleet.com*. You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. 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;* 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: Stephen Styskal, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: (425) 917–6439; fax: (425) 917–6590; e-mail: *stephen.styskal@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–2011–0719; Directorate Identifier 2010–NM–087–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 January 22, 2009, we issued AD 2009–04–12, Amendment 39–15818 (74 FR 8717, February 26, 2009), for certain Model 767–200, –300, and –400ER series airplanes. That AD requires replacing the separation link assembly on the applicable entry and service doors with an improved separation link assembly, and doing related investigative and corrective actions if necessary. That AD resulted from reports that entry and service doors did not open fully during deployment of emergency escape slides, and additional reports of missing snap rings. We issued that AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

Actions Since Existing AD Was Issued

Since we issued AD 2009–04–12, we have received a report indicating that an additional airplane is subject to the unsafe condition. In addition, four airplanes were converted to freighter configurations without the affected slides, and, therefore, are no longer subject to the unsafe condition.

Relevant Service Information

We reviewed Boeing Special Attention Service Bulletin 767–25–0428, Revision 3, dated October 21, 2010. This service bulletin describes the same procedures that are described in Boeing Special Attention Service Bulletin 767–25–0428, Revision 1, dated May 8, 2008 (which was referenced in AD 2009–04–12 as the appropriate source of service information). Revision 3 of Boeing Special Attention Service Bulletin 767–25–0428 adds a step to the entry/service door bustle installation process, and contains information on airplanes identified in the revised Effectivity section and a changed part number for a cap screw.

Boeing Special Attention Service Bulletin 767–25–0428, Revision 2, dated February 4, 2010, included an additional airplane in the Effectivity section and removed four airplanes from the Effectivity 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 retain all the requirements of AD 2009–04–12 using the revised service information described previously. This proposed AD would add an airplane to the

applicability and also remove certain other airplanes from the applicability.

Change to Existing AD

This proposed AD would retain all requirements of AD 2009–04–12. Since AD 2009–04–12 was issued, the AD format has been revised, and certain paragraphs have been rearranged. As a result, the corresponding paragraph identifiers have changed in this proposed AD, as listed in the following table:

REVISED PARAGRAPH IDENTIFIERS

Requirement in AD 2009–04–12	Corresponding requirement in this proposed AD
paragraph (f)	paragraph (g)

Costs of Compliance

We estimate that this proposed AD affects 355 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
Replacement (retained actions from existing AD).	Up to 7 work-hours × $85 per hour = $595.	Up to $10,671	Up to $11,266	Up to $3,999,430.

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) 2009–04–12, Amendment 39–15818 (74 FR 8717, February 26, 2009), and adding the following new AD:

The Boeing Company: Docket No. FAA–2010–0719; Directorate Identifier 2010–NM–087–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 2, 2011.

Affected ADs

(b) This AD supersedes AD 2009–04–12, Amendment 39–15818.

Applicability

(c) This AD applies to The Boeing Company Model 767–200, –300, and –400ER series airplanes, certificated in any category, as identified in Boeing Special Attention Service Bulletin 767–25–0428, Revision 3, dated October 21, 2010.

Subject

(d) Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 25: Equipment/Furnishings.

Unsafe Condition

(e) This AD was prompted by reports that entry and service doors did not open fully during deployment of emergency escape slides, and additional reports of missing snap rings. We are issuing this AD to prevent failure of an entry or service door to open fully in the event of an emergency evacuation, which could impede exit from the airplane. This condition could result in injury to passengers or crewmembers.

Compliance

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

Restatement of Requirements of AD 2009–04–12, with Revised Service Information and Additional Airplane:

Replacement

(g) At the applicable time specified in paragraphs (g)(1) and (g)(2) of this AD, replace the separation link assembly on the deployment bar of the emergency escape system on all the applicable entry and service doors with an improved separation link assembly; and do all the applicable related investigative and corrective actions before further flight; by accomplishing all of the applicable actions specified in the Accomplishment Instructions of any service bulletin identified in table 1 of this AD. After April 2, 2009 (the effective date of AD 2009–04–12), only Boeing Special Attention Service Bulletin 767–25–0428, Revision 1 or Revision 3 may be used to accomplish the requirements of AD 2009–04–12. After the effective date of this AD, only Revision 3 may be used.

TABLE 1—SERVICE INFORMATION

Boeing special attention Service Bulletin—	Revision—	Dated—
767–25–0428	Original	August 23, 2007.
767–25–0428	1	May 8, 2008.
767–25–0428	3	October 21, 2010.

(1) For airplanes other than those having variable number VN 137: Within 48 months after April 2, 2009.

(2) For the airplane having variable number VN 137: Within 48 months after the effective date of this AD.

Credit for Actions Accomplished in Accordance With Previous Service Information

(h) Actions done before the effective date of this AD in accordance with Boeing Special Attention Service Bulletin 767–25–0428, Revision 2, dated February 4, 2010, are acceptable for compliance with the corresponding requirements of this AD.

Alternative Methods of Compliance (AMOCs)

(i)(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 the Related Information section of this AD. Information may be e-mailed to: *9-ANM-Seattle-ACO-AMOC-Requests@faa.gov.*

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

(3) AMOCs approved for AD 2009–04–12 are approved as AMOCs for the corresponding provisions of this AD.

Related Information

(j) For more information about this AD, contact Stephen Styskal, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; phone: (425) 917–6439; fax: (425) 917–6590; e-mail: *stephen.styskal@faa.gov.*

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

Issued in Renton, Washington, on July 8, 2011.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2011–18136 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2011–0691; Directorate Identifier 2011–NE–26–AD]

RIN 2120–AA64

Airworthiness Directives; Lycoming Engines Model TIO 540–A Series Reciprocating Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); rescission.

SUMMARY: We propose to rescind an airworthiness directive (AD) for Lycoming Engines model TIO 540–A series reciprocating engines. The existing AD, AD 71–13–01 (Amendment 39–1231) resulted from a report of a failed fuel injector tube assembly.

Since we issued AD 71–13–01, we became aware that Lycoming Engines no longer supports Service Bulletin (SB) No. 335A, which was incorporated by reference in AD 71–13–01. The intent of the requirements of that SB is now in Lycoming Engines Mandatory SB No. 342F. This proposal to rescind AD 71–13–01 allows the public the opportunity to comment on the FAA's determination of the duplication of requirements in another AD, before we rescind the engine-level AD.

DATES: We must receive comments on this proposed AD by September 2, 2011.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 0590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (phone: 800–647–5527) is the same as the Mail address provided in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Norm Perenson, Aerospace Engineer, New York Aircraft Certification Office, FAA, Engine & Propeller Directorate, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; phone: 516–228–7337; fax: 516–794–5531; e-mail: *Norman.perenson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD rescission. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2011–0691; Directorate Identifier 2011–NE–26–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD rescission. We will consider all comments received by the closing date and may amend this proposed AD rescission 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 with FAA personnel concerning this proposed AD rescission. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the

individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Discussion

In June of 1971, the FAA Engine & Propeller Directorate issued AD 71–13–01. That AD requires a one-time visual inspection of external fuel injector lines on Lycoming Engines model TIO 540–A series reciprocating engines for fuel stains, cracks, dents, and bend radii under 5/8 inch and, if necessary, removal from service and replacement with serviceable parts. That AD also requires installing if necessary, fuel injector line support clamps in accordance with Lycoming Engines SB No. 335 or later version of that SB.

Since we issued AD 71–13–01, Lycoming Engines has informed us that it no longer supports SB No. 335A. They also pointed out that Lycoming Engines Mandatory SB No. 342F, dated June 4, 2010, or the Instructions for Continued Airworthiness section of the Engine Overhaul Manual is the service information the owners, operators, and certificated repair facilities must use for initial and repetitive visual inspections of external fuel lines, on all affected Lycoming Engines reciprocating engines.

We incorporated by reference Lycoming Engines Mandatory SB No. 342E, dated May 18, 2004, in AD 2008–14–07 (73 FR 39574, July 10, 2008). We are in the process of issuing a supersedure to that AD, which will incorporate by reference Lycoming Engines Mandatory SB No. 342F, dated June 4, 2010.

FAA's Determination and Requirements of This Proposed AD Rescission

We are proposing this AD rescission of AD 71–13–01 because we evaluated all information and determined that the requirements of that AD are no longer supported by Lycoming Engines SB No. 335A, but are supported by Mandatory SB No. 342E, Mandatory SB 342F, and the Instructions for Continued Airworthiness section of the Engine Overhaul Manual.

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 rescission would not have federalism implications under Executive Order 13132. This proposed AD rescission 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 rescission of a regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD rescission and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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 rescinding airworthiness directive (AD) 71–13–01, Amendment 39–1231:

Lycoming Engines (formerly Textron Lycoming Division, AVCO Corporation): Docket No. FAA–2011–0691; Directorate Identifier 2011–NE–26–AD.

(a) Comments Due Date

We must receive comments by September 2, 2011.

(b) Affected ADs

This AD rescinds AD 71–13–01.

(c) Applicability

This AD applies to Lycoming Engines model TIO 540–A series reciprocating engines, with serial numbers lower than 1931–61.

Issued in Burlington, Massachusetts, on July 13, 2011.

Colleen M. D'Alessandro,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–18170 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0710; Directorate Identifier 2010–NE–26–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca Arriel 1 Series Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise an existing airworthiness directive (AD) that applies to the products listed above. The existing AD currently requires removing from service certain gas generator second stage turbine discs, part number (P/N) 0 292 25 040 0, that are not marked with ''CFR'' before the discs exceed 2,500 cycles-in-service (CIS) since-new or within 20 CIS from the effective date of the AD, whichever occurs later. That AD also requires removing from service certain gas generator second stage turbine discs, P/N 0 292 25 040 0, that are marked with ''CFR'' before the discs exceed 3,500 CIS since-new. Since we issued that AD, Turbomeca has restored all or part of the life limits of the affected discs, and the European Aviation Safety Agency (EASA) issued AD 2010–0101R2, dated March 24, 2011 to do the same. This proposed AD would still prevent disc failure but extends the life limits of the affected discs. We are proposing this AD to prevent failure of the gas generator second stage turbine disc which could result in the release of high energy debris and damage to the helicopter.

DATES: We must receive comments on this proposed AD by September 2, 2011.

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 AD, contact Turbomeca, 40220 Tarnos, France; phone: 33 05 59 74 40 00, fax: 33 05 59 74 45 15. You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Rose Len, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; e-mail: *rose.len@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–2010–0710; Directorate Identifier 2010–NE–26–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 September 10, 2010, we issued AD 2010–19–06, Amendment 39–16434 (75 FR 57371, September 21, 2010), for Turbomeca Arriel 1 series turboshaft engines. That AD requires removing from service gas generator second stage turbine discs, P/N 0 292 25 040 0 that do not have the ''CFR'' marking, before exceeding 2,500 CIS since-new or within 20 CIS from the effective date of the AD, whichever occurs later. That AD also requires removing from service gas generator second stage turbine discs, P/N 0 292 25 040 0 that have the ''CFR'' marking, before exceeding 3,500 CIS since-new. Discs that have the ''CFR'' marking have been inspected using a ''reinforced'' eddy-current inspection (ECI). Discs that do not have the ''CFR'' marking have not been inspected using the ''reinforced'' ECI. Based on the ''reinforced'' ECI and additional analysis finding performed by Turbomeca, the discs with the ''CFR'' marking are compliant with their original published life limit of 6,500 CIS since-new, and the life limit of discs with no ''CFR'' marking can be increased to 4,000 CIS since-new. AD 2010–19–06 resulted 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. We issued that AD to prevent failure of the gas generator second stage turbine disc which could result in the release of high energy debris and damage to the helicopter.

Actions Since Existing AD Was Issued

Since we issued AD 2010–19–06, Turbomeca has restored all or part of the life limits of the affected discs, based on the reinforced eddy current inspection that provides an improved detection threshold of any metallurgical non-conformities in the discs, in combination with additional testing and analysis.

Also since we issued AD 2010–19–06, EASA has issued MCAI AD 2010–0101R2, dated March 24, 2011, which, for gas generator second stage turbine discs, P/N 0 292 25 040 0 that do not have the ''CFR'' marking, increases the life limit to 4,000 cycles, and for gas generator second stage turbine discs, P/N 0 292 25 040 0 that have the ''CFR'' marking, returns the life limit to the original published life limit of 6,500 cycles.

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 removing gas generator second stage turbine discs, P/N 0 292 25 040 0 that do not have the ''CFR'' marking, from service before exceeding 4,000 CIS since-new. This proposed AD would also require removing gas generator second stage turbine discs, P/N 0 292 25 040 0 that have the ''CFR'' marking, from service before exceeding 6,500 CIS since-new.

Costs of Compliance

We estimate that this proposed AD would affect 203 Turbomeca Arriel 1 series turboshaft engines on helicopters of U.S. registry. We estimate that no additional labor costs would be incurred to return part of the life limit of the discs that do not have the ''CFR'' marking, to the original published life limit. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $0.

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, 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) 2010–19–06, Amendment 39–16434 (75 FR 57371 September 21, 2010), and adding the following new AD:

Turbomeca: Docket No. FAA–2010–0710; Directorate Identifier 2010–NE–26–AD.

(a) Comments Due Date

The FAA must receive comments on this AD action by September 2, 2011.

(b) Affected ADs

This AD revises AD 2010–19–06, Amendment 39–16434.

(c) Applicability

This AD applies to Turbomeca Arriel 1A, 1A1, 1B, 1C, 1C1, 1C2, 1D, 1D1, and 1S1 turboshaft engines that have incorporated Modification TU347.

(d) Unsafe Condition

This AD was prompted by Turbomeca restoring all or part of the life limits of the affected discs. We are issuing this AD to prevent failure of the gas generator second stage turbine disc which could result in the release of high energy debris and damage to the helicopter.

(e) Compliance

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

(2) Remove from service gas generator second stage turbine discs, part number (P/N) 0 292 25 040 0 that do not have the ''CFR'' marking, before exceeding 4,000 cycles-in-service (CIS) since-new.

(3) Remove from service gas generator second stage turbine discs, P/N 0 292 25 040 0 that have the ''CFR'' marking, before exceeding 6,500 CIS since-new.

(4) Gas Generator Second Stage Turbine Installation Prohibition

(i) After the effective date of this AD, do not install into any engine gas generator second stage turbine discs, P/N 0 292 25 040 0 that do not have the ''CFR'' marking, and have 4,000 or more CIS since-new.

(ii) After the effective date of this AD, do not install into any engine gas generator second stage turbine discs, P/N 0 292 25 040 0 that have the ''CFR'' marking, and have 6,500 or more CIS since-new.

(f) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

(g) Related Information

(1) Refer to Turbomeca Alert Mandatory Service Bulletin No. A292 72 0831, Version C, dated March 3, 2011, for related information. Contact Turbomeca, 40220 Tarnos, France; phone: 33 05 59 74 40 00, fax: 33 05 59 74 45 15, for a copy of this service information.

(2) You may review copies of the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

(3) For more information about this AD, contact Rose Len, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7772; fax: 781–238–7199; e-mail: *rose.len@faa.gov.*

(h) Material Incorporated by Reference

None.

Issued in Burlington, Massachusetts, on July 13, 2011.

Colleen M. D'Alessandro,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2011–18171 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2008–0905 ; A–1–FRL–9439–6]

Approval and Promulgation of Air Quality Implementation Plans; Vermont; Reasonably Available Control Technology (RACT) for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Vermont (VT) on November 22, 2006, and November 14, 2008. These SIP revisions consist of a demonstration that VT meets the requirements of reasonably available control technology (RACT) for oxides of nitrogen (NO_X) and volatile organic compounds (VOCs) set forth by the Clean Air Act (CAA) with respect to the 1997 8-hour ozone standard; minor revisions to Vermont's bulk gasoline plants regulation; and new requirements for wood furniture manufacturing operations. Additionally, EPA is proposing to approve VT's negative declarations for several categories of VOC sources. EPA is proposing full approval all of the submitted items, with two exceptions. EPA is proposing a conditional approval of the RACT determinations for two major VOC sources (Churchill Coatings Corporation and H.B.H Prestain). This action is being taken in accordance with the CAA.

DATES: Written comments must be received on or before August 18, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2008–0905 by one of the following methods:

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

2. *E-mail: arnold.anne@epa.gov.*

3. *Fax:* (617) 918–0047.

4. *Mail:* ''EPA–R01–OAR–2008–0905'', Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100 (mail code: OEP05–2), Boston, MA 02109–3912.

5. *Hand Delivery or Courier.* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, 5th Floor, Boston, MA 02109–3912. Such deliveries are only

accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding legal holidays.

Please see the direct final rule which is located in the Rules Section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Ariel Garcia, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square, Suite 100 (mail code: OEP05–2), Boston, MA 02109–3912., telephone number (617) 918–1660, fax number (617) 918–0660, e-mail *garcia.ariel@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

For additional information, see the direct final rule which is located in the Rules Section of this **Federal Register**.

Dated: June 28, 2011.

H. Curtis Spalding,

Regional Administrator, EPA New England.

[FR Doc. 2011–17874 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[EPA–HQ–OAR–2002–0037; FRL–9440–8]

RIN 2060–AN33

National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of public comment period.

SUMMARY: The EPA is announcing that the period for providing public comments on the May 20, 2011, Proposed National Emission Standards for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production is being extended for 14 days.

DATES: *Comments.* The public comment period for the proposed rule published May 20, 2011 (76 FR 29528) is being extended for 14 days to August 2, 2011, in order to provide the public additional time to submit comments and supporting information.

ADDRESSES: *Comments.* Written comments on the proposed rule may be submitted to EPA electronically, by mail, by facsimile or through hand delivery/courier. Please refer to the proposal for the addresses and detailed instructions.

Docket. Publicly available documents relevant to this action are available for public inspection either electronically in *http://www.regulations.gov* or in hard copy at the EPA Docket Center, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. A reasonable fee may be charged for copying.

World Wide Web. The EPA Web site for this rulemaking is at: *http://www.epa.gov/ttn/atw/pvc/pvcpg.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Jodi Howard, Refining and Chemicals Group (E143–01), Sector Policies and Programs Division, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; Telephone number: (919) 541–4607; Fax number (919) 541–0246; Email address: *howard.jodi@epa.gov.*

SUPPLEMENTARY INFORMATION:

Comment Period

Due to requests we have received from industry to extend the public comment period for the May 20, 2011, Proposed Polyvinyl Chloride and Copolymers Production Rule, the EPA is extending the public comment period for an additional 14 days. Therefore, the public comment period will end on August 2, 2011, rather than July 19, 2011.

How can I get copies of this document and other related information?

The EPA has established the official public docket No. EPA–HQ–OAR–2002–0037. The EPA has also developed websites for the proposed rulemaking at the addresses given above.

Dated: July 13, 2011.

Gina McCarthy,

Assistant Administrator for Air and Radiation.

[FR Doc. 2011–18122 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 43, and 63

[IB Docket No. 04–112; FCC 11–76]

Reporting Requirements for U.S. Providers of International Telecommunications Services

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) is reviewing its reporting requirements for providers of international telecommunications services. The Commission proposes to amend its reporting requirements for providers of international telecommunications services and transmission facilities in order to simplify the filing of the annual traffic and revenue report and the annual circuit-status report and modernize the information collected under those reports. The Commission also proposes to amend its rules to create a new annual services report designed to obtain basic information about providers of international telecommunications services and to update contact information. The Commission also proposes to amend its rules to clarify the confidential treatment of certain disaggregated information reported under the traffic and revenue report and the circuit-status report. This action is part of the Commission's comprehensive review of its international reporting requirements and is intended to remove unnecessary

information collections and tailor its information collections to the current state of the international telecommunications market.

DATES: Submit comments on or before August 18, 2011, and replies on or before September 2, 2011. Paperwork Reduction Act (PRA) comments should be on or before September 19, 2011.

ADDRESSES: You may submit comments, identified by Docket No. 04–112, by any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: David Krech, John Copes, or Sean O'More, Policy Division, International Bureau, FCC, (202) 418–1460 or via the Internet at mail to: *David.Drech@fcc.gov, John.Copes@fcc.gov,* and *Sean.O'More@fcc.gov.* On PRA matters contact Cathy Williams, Office of the managing Director, FCC (202) 418–2918 or via the Internet at mail to: *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Further Notice of Proposed Rulemaking portion of the Commission's First Report and Order and Further Notice of Proposed Rulemaking, IB Docket No. 04–112, FCC 11–76, adopted May 12, 2011, and released May 13, 2011. The full text of the First Report and Order and Further Notice of Proposed Rulemaking is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The document also is available for download over the Internet at *http://transition.fcc.gov/Daily_Release/Daily_Business/2011db0513/FCC-11-76A1.pdf.* The complete text also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY–B402, 455 12th Street, SW., Washington, DC 20554. Customers may contact BCPI at its Web site: *http://www.bcpiweb.com* or call 1–800–378–3160.

Comment Filing Procedures

Pursuant to 47 CFR 1.415, 1.419, interested parties my file comments and reply comments on or before the dates indicated above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by hand delivery. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) at *http://fjallfoss.fcc.gov/ecfs2/. See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - ○ All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
  - ○ Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - ○ U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

Summary of Notice of Proposed Rulemaking

1. In the First Report and Order and Further Notice of Proposed Rulemaking, the Federal Communications Commission (Commission) continues its comprehensive review of the international reporting requirements for U.S. providers of international telecommunications services. In the First Report and Order portion of the document, which is published elsewhere in this issue, the Commission retained the annual international traffic and revenue and circuit status reporting requirements, 47 CFR 43.61(a) and 43.82. Although the Commission is retaining the annual international traffic and revenue and circuit-status reports, it believes that those reporting requirements can and should be modernized and streamlined. This FNPRM sets forth a number of proposed changes to the reporting requirements and seeks comment on those proposals.

2. In the Notice of Proposed Rulemaking (NPRM), 69 FR 29676, May 25, 2004, the Commission made a number of proposals for changes to the reporting requirements, and the Staff Recommendations in the NPRM discussed several more possible changes. Since then, the Commission received formal comments in this proceeding, held meetings with the carriers, and received written *ex parte* comments. Based on that input and further evaluation of the reporting requirements and the type of information that the Commission needs, the Commission altered and refined many of those proposals. In this FNPRM, the Commission seeks comment on these revised proposals, and seeks to refresh the record on some of the proposals previously discussed in the NPRM since the comments on those proposals were filed almost seven years ago. The Commission has also identified entities that provide international communications services but do not currently file traffic and revenue or circuit-status reports. It seeks comment whether public interest requires that the Commission obtain information from these entities. The Commission also seeks comment on proposals to clarify the confidential treatment of certain disaggregated information reported under the traffic and revenue report and the circuit-status report.

3. *Consolidation of Traffic and Revenue Report and Circuit-Status Report.* The Commission proposes to consolidate the traffic and revenue report, 47 CFR 43.61(a), and the circuit-status report, 43.82, into one rule, the proposed 47 CFR 43.62, to adopt a new filing manual to cover both reports and to consolidate the current separate filing dates for the two reports into one date. Currently, carriers must file annual circuit-status reports on or before March 31 and must file the annual traffic and revenue reports on or before July 31. The Commission proposes to require filing entities to file both reports on or before May 1. The Commission also proposes to create a single filing manual with instructions for filing both the annual traffic and revenue and the circuit-status reports. The Commission

believes a consolidated filing manual would be more user friendly than two separate manuals, would provide consistent definitions and would ensure that information is reported in a more uniform manner.

Proposed Changes to the Reporting Requirements

4. *Services Report.* The Commission proposes to require all filing entities to file an annual Services Report. The Services Report would consist of a Registration Form and a Services Checklist. The Registration Form would seek basic information about a filing entity's filing and about the entity itself—such as address, phone number, e-mail address, and the international section 214 authorizations held, if any. The Services Checklist would contain a series of boxes that filing entities would check to provide some basic information about their operations, if any, during the previous year.

5. *Changes to the Annual Traffic and Revenue Report.* The Commission seeks comment on a variety of proposals to the annual traffic and revenue report that it believes will streamline the report by eliminating the reporting of unnecessary information, while modernizing the report by requiring reporting of information more relevant to the current state of the international telecommunications market. First, the Commission proposes to eliminate the use of billing codes that require carriers to disaggregate their international telephone message service (IMTS) traffic to report various routing and billing arrangements. In their place, the Commission proposes to adopt a series of filing schedules that would allow filing entities to report their traffic on a more aggregated basis. The Commission also proposes to eliminate the requirement that filing entities report the number of IMTS messages (i.e., calls) they handle. The Commission has never needed to use the number of IMTS calls in performing its analyses and sees no reason to continue to require filing entities to report them. The Commission also proposes to eliminate the requirement that filing entities report a regional total for tier IMTS and private line traffic.

6. The Commission proposes to require filing entities to disaggregate the minutes terminated on foreign networks and settlement payouts between calls terminated on fixed line networks and those terminated on mobile networks. In recent years, many foreign carriers have instituted significantly different settlement rates for call completion services to fixed-line and mobile networks, and these differences vary substantially by route. The Commission is concerned that the settlement rates for terminating U.S.-billed IMTS calls on mobile networks may be excessive, not based on costs, and discriminatory. Because there is little information currently available on mobile settlement rates, the Commission believes the public interest requires it to gather additional information on such rates. The Commission needs this information to monitor the evolution of mobile settlement rates as basis for taking corrective action if it finds such action necessary in the future.

7. The Commission proposes to require filing entities to report their world-total IMTS traffic and revenues by customer category (residential and mass market, business and government, U.S. resellers, and reoriginated foreign traffic) and by routing arrangement (U.S.-billed facilities IMTS, IMTS resale, and traditional transiting IMTS). This information appears to be essential to understanding the international telecommunications markets. Specifically, the Commission proposes to require world-total IMTS traffic and revenue data be disaggregated for each of the following customer classes: (1) ''Residential and mass market;'' (2) ''business and government;'' and (3) ''U.S. resellers.'' Carriers would be required to report the total minutes and revenues associated with reoriginated traffic on a world-total basis. This proposal simplifies the Staff Recommendations in the NPRM by limiting disaggregation of IMTS data by customer and routing arrangement only to world-total IMTS traffic data. Obtaining information on service sold to various classes of customers and through various routing arrangements would give the Commission additional information it needs to monitor the U.S. IMTS market.

8. The Commission proposes to require filing entities to allocate their non-route-specific revenues to specific U.S. international routes. Non-route-specific revenues are those revenues for international services that are not directly associated with individual calls or, in the case of private lines, with specific lines. They include monthly recurring fees for service plans that include international service an other revenue that cannot be identified with particular destination countries. The Commission seeks comment on whether to set out a specific allocation method or to allow each filing entity to determine an allocation method appropriate for its unique situation. The Commission also proposes that filing entities identify the percentage of revenue for U.S.-billed IMTS subject to the allocations procedures.

9. The Commission proposes to have filing entities report traditional transiting traffic on a world-total basis. It proposes to retain the requirement that filing entities include the terminating leg of traffic that they reoriginated for a foreign carrier in their route-specific data, but no longer report the originating leg. Filing entities would also report reoriginated traffic on a world-total basis. In addition, the Commission proposes to require filing entities to report hubbed or reoriginated traffic on a world-total basis. Filing entities should report IMTS traffic that goes through a ''spot market'' as part of their facilities IMTS or resale IMTS, as appropriate. The Commission proposes that filing entities include country-beyond and country-direct services, as well as call-back services, in their U.S.-billed traffic and revenue data.

10. The commission proposes that service providers with less than $5 million in IMTS resale revenues for the annual reporting period, and who do not provide facilities IMTS, should be exempted from filing their IMTS resale traffic and revenue data. It also proposes to eliminate the requirements that filing entities submit a list of the destinations to which they provide IMTS resale service. With a $5 million threshold, in 2009 over 1,100 carriers would not have needed to file traffic and revenue data. The 86 carriers that would have filed traffic and revenue data in 2009 under a $5 million threshold comprised 96 percent of the IMTS resale revenues for that year.

11. The Commission proposes to eliminate the current requirement that filing entities break down their private line service data into six categories based on the speed (bits per second) of the service. It proposes to continue to require filing entities to report their private line services provided over owned facilities on a route-specific basis, but that filing entities report their circuits and revenues for service provided over resold circuits on a world-total basis only. The Commission proposes that filing entities report their data services with miscellaneous services rather than their private line services. It proposes to streamline the reporting requirements for miscellaneous services by eliminating the current requirement to report by world region and to report traffic volumes (*e.g.,* minutes, messages, lines, etc.) or payouts to foreign carriers. The Commission proposes to streamline the reporting requirement for miscellaneous and data services by only requiring filing entities to report services for

which they have revenues of $5 million or more. Filing entities would report each of their miscellaneous and data services with $5 million or more in revenue by providing the name of the service, a brief description of the service, and the world total revenue for the service.

12. *Proposed Changes to the Circuit-Status Report.* The Commission finds that although it continues to need international circuit-status data, it can simplify the reporting requirement and still obtain the information that it needs. The Commission therefore proposes to streamline the circuit-status reporting requirements by eliminating reporting by service categories and the reporting of derived circuits.

Possible New Filing Entities

13. *Providers of Interconnected VoIP Service.* The Commission seeks comment whether it should require providers of interconnected Voice over Internet Protocol (VoIP) service, *see* 47 CFR 9.3, to submit data regarding their provision of international telephone services under the proposed streamlined reporting rules. Specifically, should the Commission require interconnected VoIP providers to report their international voice traffic and revenue in the same manner that carriers report their IMTS traffic and revenue? International voice traffic generated by interconnected VoIP service appears to constitute a significant and growing component of the U.S. international voice traffic market, and the Commission is concerned that it may not be to able understand the IMTS marking without data regarding international interconnected VoIP traffic. The Commission also seeks comment on its legal authority to have interconnected VoIP providers file international traffic and revenue data. Specifically, the Commission seeks comment on whether requiring interconnected VoIP service providers to meet certain of 47 CFR part 43 reporting requirements is reasonably ancillary to the effective performance of the Commission's statutory obligations under the Communications Act, 47 U.S.C. 151 *et seq.,* and the Cable Landing License Act of 1921, 47 U.S.C. 35–39. The Commission also seeks comment whether it should require providers of VoIP service that may not conform to the definition of ''interconnected VoIP'' to report their international voice traffic and revenue data, including any entities other than interconnected VoIP providers that may have access to the information needed to provide international traffic and revenue data for interconnected VoIP.

14. *Owners of Non-Common Carrier International Circuits.* The Commission seeks comment on whether non-common carrier international circuits should be reported in addition to common carrier circuits. At the time the Commission adopted the circuit-status reporting requirement, most circuits were provided by common carriers and almost all submarine cables were common carrier facilities. Increasingly, however, many of the facilities that are used for providing international services—submarine cable, satellite, and terrestrial—are operated on a non-common carrier basis. The Commission seeks comment whether its statutory obligations under the Cable Landing License Act require it to gather information about the use of international non-common carrier circuits. Further the Commission seeks comment on whether it has authority under the Communications Act to require the reporting of international non-common carrier circuits.

Confidentiality

15. The Commission generally treats traffic and revenue information submitted under 47 CFR 43.61 as non-confidential except for specific pieces of information such as transit information, and has accorded confidentiality to circuit-status information filed under 47 CFR 43.82. The Commission believes that it serves the public interest by making information filed with the Commission available to the public, subject to protections afforded by law. It recognizes that there is international traffic and revenue and circuit-status information that appropriately should be treated as confidential. It does not appear, however, that all such information filed with the Commission should be given blanket treatment as confidential and made unavailable for public inspection. On a going-forward basis, the Commission seeks to determine what information should be identified as ''not routinely available to the public under our rules.''

16. *Traffic and revenue information.* The Commission proposes to identify traffic and revenue filed with the Commission that would be treated as not routinely available to the public. The Commission would consider other information to be routinely available for public inspection subject to our rules. For example, the Commission is proposing in the FNPRM to require service providers to disaggregate the traffic they terminate on foreign fixed-line networks from the traffic they terminate on foreign mobile networks. Such disaggregated reporting could raise competitive concerns for carriers. The Commission believes that it can accommodate such concerns in the same way it now treats disaggregated information in the current traffic and revenue report—it could adopt a proprietary schedule on which carriers report separately the traffic they terminate on foreign fixed-line and mobile networks. The Commission would keep such information confidential and allow filing entities to file a separate schedule in which they would aggregate the two methods of termination and thereby prevent competitors from deriving any specific cost information. Service providers would file this aggregated schedule in a separate, ''public'' version of their traffic and revenue reports that the Commission could then make routinely available to the public.

17. The Commission proposes to provide in 47 CFR 0.457 that disaggregated revenue, traffic and payout data information would not be routinely available for public inspection. As further guidance for the public, the Commission would instruct the International Bureau to include in its Filing Manual detailed examples of records that would be so treated. Commenters should address whether this information or any other type of information that the Commission proposes that they provide should be considered disaggregated and treated as not routinely available for public inspection. Commenters should explain the basis for confidential treatment under the standards of 47 CFR 0.459(a)(1), with sufficient specificity to explain how public release of the information would be competitively harmful. Commenters should also address how the passage of time may make sensitive information non-sensitive. Specifically, the Commission requests comment whether such information could be released after two years, without causing competitive harm.

18. *Revised Circuit-Status Report.* In the FNPRM, the Commission proposes revisions to the circuit status data to be reported. The Commission requests comment on whether the new, simplified circuit-status report that proposed in the FNPRM contains competitively sensitive information and whether they believe there will be a need for the information to be kept confidential. As with the traffic and revenue information, the Commission proposes to identify the circuit information that should continue to be treated as not routinely available.

Paperwork Reduction Act of 1995 Analysis

19. The Further Notice of Proposed Rulemaking portion of this First Report and Order and Further notice of Proposed Rulemaking contains proposed new or modified information collection requirements. As part of the Commission's continuing effort to reduce paperwork burdens, the Commission invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. PRA comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and (e) ways to further reduce the information collection burden on small business concerns with fewer than 25 employees. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

20. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the web page *http://www.reginfo.gov/public/do/PRAMain*, (2) look for the section of the Web page called ''Currently Under Review'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review,'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box (6) when the list of FCC ICRs currently under review appears, look for the Title of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

21. The proposed information collection requirements are as follows:

OMB Control Number: 3060–xxxx.

Title: Section 43.62, Annual Reporting Requirements for U.S. Providers of International Telecommunications Services and Circuits.

Form No.: N/A.

Type of Review: New Collection.

Respondents: Businesses or other profit entities.

Number of Respondents and Responses: 2,200 respondents and 2,976 responses.

Estimated Time per Response: 1 hour to 200 hours.

Frequency of Response: Annual reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for these proposed information collections is found at under Sections 1, 4(i)–4(j), 11, 201–205, 211, 214, 219, 220, 303(r), 309 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–154(j), 161, 201–205, 211, 214, 219–220, 303(r), 309, 403.

Total Annual Burden Hours: 107,172 hours.

Total Annual Costs: $15,300.

Nature and Extent of Confidentiality: An assurance of confidentiality is not offered because this information collection does not require the collection of personally identifiable information (PII) from individuals.

Privacy Act Impact Assessment: No impacts.

Needs and Uses: On May 12, 2011, the Commission adopted a First Report and Order and Further Notice of Proposed Rulemaking in (FCC 11–76) in Reporting Requirements for U.S. Providers of International Telecommunications Services, Amendment of Part 43 of the Commission's Rules, IB Docket No. 04–112 (rel. May 13, 2011) (Part 43 Review Order). That Order did two things. First, in the First Report and Order portion of the Part 43 Review Order (covered by a separate supporting statement), the Commission retained the annual traffic and revenue report currently contained in section 43.61 of the Commission's rules, but removed two reports that were also contained in that section. Also in the First Report and Order portion of the Part 43 Review Order, the Commission retained the annual circuit-status report currently contained in section 43.82 of the rules.

22. Second, the Further Notice of Proposed Rulemaking (FNPRM) portion of the Part 43 Review Order, proposed to modify both the traffic and revenue report and the circuit-status report to streamline them and improve the usefulness of the information the entities filing the reports will submit. The FNPRM also proposed to remove the current sections 43.61 and 43.82 and to consolidate the revised annual traffic and revenue and annual circuit-status reports into a new section 43.62. The FNPRM further proposed to replace the existing filing manuals for each report with one new, consolidated filing manual covering both reports.

Initial Regulatory Flexibility Analysis

23. As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (FNPRM).[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed on or before the dated indicated above. The Commission will send a copy of this FNPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[3] In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.[4]

A. Need for, and Objectives of, the Proposed Rules

24. The Commission initiated this comprehensive review of the reporting requirements imposed on U.S. carriers providing international telecommunications services. The Commission believes that the proposals contained in the FNPRM will make it easier for carriers, both small and large, to provide the information required by the rules. Other proposals will provide the Commission with information it needs but does not receive on an annual basis. In addition, section 11 of the Telecommunications Act of 1996 directs the Commission to undertake, in every even-numbered year beginning in 1998, a review of certain regulations issued under the Communications Act of 1934, as amended.[5]

25. The objective of the FNPRM in this proceeding is to improve the reporting requirements imposed on carriers providing international telecommunications services in the proposed 47 CFR 43.62(a) and 43.62(b). Specifically, the FNPRM proposes to simplify, consolidate, and revise the

[1] *See* 5 U.S.C. 603. The FRA, *see* 5 U.S.C. 601–612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[2] The Commission notes that it may certify this proceeding under 5 U.S.C. 605, because its action will not have a significant economic effect on a substantial number of small entities (as discussed).

[3] *See* 5 U.S.C. 603(a).

[4] *See id.*

[5] Pub. L. 104–104, 110 Stat. 56 (1996).

annual traffic and revenue reporting requirements and the circuit-status reporting requirements. The rule also proposes to require entities to file some additional information in the traffic and revenue report that they do not now file. Additionally, the rule proposes to relieve service providers with annual revenues less than $5 million from filing traffic and revenue reports for IMTS resale and the provision of international miscellaneous services. Finally, the rule proposes to require all providers of international telecommunications services to file an annual services report that updates their contact information and indicates whether or not they provided service during the preceding calendar year. The FNPRM also seeks comment whether to require some additional entities that provide international telecommunications services to file the annual traffic and revenue report and some additional entities that provide international facilities to file the annual circuit-status report.

26. All U.S. carriers providing international telecommunications services are required to file an annual report of their traffic and revenues under 47 CFR 43.61(a). Under the proposed consolidated 47 CFR 43.62(a), those same carriers (and possibly some additional entities that provide international telecommunications services) will file similar traffic and revenue information. All U.S. facilities-based carriers providing international telecommunications services are required to file an annual report on the status of their circuits pursuant to 47 CFR 43.82. Under the proposed 47 CFR 43.62(b), in this proceeding, those same carriers (and possibly some other providers of international telecommunications facilities) will file similar circuit-status information. The information derived from the international revenue and traffic report and circuit-status report is critical in understanding the international telecommunications market. These reports are the only source of publicly available information of this nature.

27. The information obtained from these reports is used extensively by the Commission, the industry, other government agencies, and the public. The Commission uses the information to evaluate applications for international facilities, track the development of the international telecommunications market and the competitiveness of each service and geographical market, formulate rules and policies consistent with the public interest, monitor compliance with those rules and policies, and guage the competitive effect of its decisions on the market. Carriers use the information to track the balance of payments in international communications services and for market analysis purposes. Carriers and potential entrants use the information for, among other things, assessment of market opportunities and to monitor competition in markets. The Commission, along with other government agencies such as the Department of Justice, uses the information in merger analyses and negotiations with foreign countries. In addition, the information contained in the circuit-status report allows the Commission to comply with the statutory requirements of the Omnibus Budget Reconciliation Act of 1993.

B. Legal Basis

28. The FNPRM is adopted pursuant to section 1, 4(i) and (j), 11, 201–205, 211, 214, 219, 220, 303(r), 309, and 403 of the Communications Act of 1934 as amended, 47 U.S.C. 151, 154(i), 154(j), 161, 201–205, 211, 214, 219, 220, 303(r), 309, and 403, and the Cable Landing License Act of 1921, 47 U.S.C. 35–39.

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

29. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposals, if adopted.[6] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [7] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[8] A small business concern is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[9]

1. Traffic and Revenue Report

The proposals in the FNPRM apply only to entities providing international common carrier services pursuant to 47 U.S.C. 214; entities that operate a telecommunications ''spot market'' that themselves carry international traffic; entities providing domestic or international wireless common carrier services under 47 U.S.C. 309; entities providing common carrier satellite facilities under 47 U.S.C. 309; entities licensed to construct and operate submarine cables under the Cable Landing License Act on a common carrier basis; and entities that provide international terrestrial telecommunications facilities on a common carrier basis (including incumbent local exchange carriers that offer such facilities). At present, carriers that provide international telecommunications services are required to file the annual traffic and revenue report. The FNPRM seeks comment on whether to have entities providing VoIP service interconnected with the public switched telephone network also file the traffic and revenue report. The FNPRM also proposes to have all filing entities file a Services Report with information about the filing entity—such as address, phone number, e-mail address, and the international section 214 authorizations held by the carrier. Further, the FNPRM proposes a number of changes that would simplify the traffic and revenue report, as well as require some new information.

31. The entities that the FNPRM proposes to require to file the traffic and revenue and reports are a mixture of both large and small entities. The Commission has not developed a small business size standard directed specifically toward these entities. However, as described below, these entities fit into larger categories for which the SBA has developed size standards that provide these facilities or services.

32. *Facilities-based Carriers.* Facilities-based providers of international telecommunications services would fall into the larger category of interexchange carriers. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[10] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or

[6] 5 U.S.C. 603(b)(3).

[7] 5 U.S.C. 601(6).

[8] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small-business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[9] 5 U.S.C. 632.

[10] 13 CFR 121.201, NAICS code 517110.

fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these interexchange carriers can be considered small entities.[11] According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[12] Of these 359 companies, an estimated 317 have 1,500 or fewer employees and 42 have more than 1, 500 employees.[13] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted pursuant to the FNPRM.

33. In the 2009 annual traffic and revenue report, 38 facilities-based and facilities-resale carriers reported approximately $5.8 billion in revenues from international message telephone service (IMTS). Of these, three reported IMTS revenues of more than $1 billion, eight reported IMTS revenues of more than $100 million, 10 reported IMTS revenues of more than $50 million, 20 reported IMTS revenues of more than $10 million, 25 reported IMTS revenues of more than $5 million, and 30 reported IMTS revenues of more than $1 million. Based solely on their IMTS revenues the majority of these carriers would be considered non-small entities under the SBA definition.[14]

34. The 2009 traffic and revenue report also shows that 45 facilities-based and facilities-resale carriers (including 14 who also reported IMTS revenues) reported $683 million for international private line services; of which four reported private line revenues of more than $50 million, 12 reported private line revenues of more than $10 million, 30 reported revenues of more than $1 million, 34 reported private line revenues of more than $500,000; 41 reported revenues of more than $100,000, while 2 reported revenues of less than $10,000.

35. The 2009 traffic and revenue report also shows that seven carriers (including one that reported both IMTS and private line revenues, one that reported IMTS revenues and three that reported private line revenues) reported $50 million for international miscellaneous services, of which two reported miscellaneous services revenues of more than $1 million, one reported revenues of more than $500,000, two reported revenues of more than $200,000, one reported revenues of more than $50,000, while one reported revenues of less than $20,000. Based on its miscellaneous services revenue, this one carrier with revenues of less than $20,000 would be considered a small business under the SBA definition. Based on their private line revenues, most of these entities would be considered non-small entities under the SBA definition.

36. *IMTS Resale Providers.* Providers of IMTS resale services are common carriers that purchase IMTS from other carriers and resell it to their own customers. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[15] Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1,000 employees and one operated with more than 1,000.[16] Thus under this category and the associated small business size standard, the majority of these resellers can be considered small entities. In the 2009 traffic and revenue report, 1,232 carriers reported that they provided IMTS on a pure resale basis.[17] Based on their IMTS resale revenues, IMTS resale service is primarily provided by carriers that would be considered small businesses under the SBA definition. For example, of the 1,232 IMTS resale carrier, 644 carriers reported revenues of less than $10,000; 1,025 had revenues less than $500,000; and 1,068 had revenues less than $1 million.[18] Consequently, the Commission estimates that the majority of IMTS resellers are small entities that may be affected by our action.

37. *Wireless Carriers and Service Providers.* Included among the providers of IMTS resale are a number of wireless carriers that also provide wireless telephony services domestically. The Commission classifies these entities as providers of Commercial Mobile Radio Services (CMRS). At present, most, if not all, providers of CMRS that offer IMTS provide such service by purchasing IMTS from other carriers to resell it to their customers. The Commission has not developed a size standard specifically for CMRS providers that offer resale IMTS. Such entities would fall within the larger category of wireless carriers and service providers. Below, for those services subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

38. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.[19] Prior to that time, such firms were within the now-superseded categories of Paging and Cellular and Other Wireless Telecommunications.[20] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[21] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[22] Of

[11] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired telecommunications carriers'') (last visited March 2, 2011).

[12] *See* Trends in Telephone Service at Table 5.3.

[13] *See id.*

[14] *See* 13 CFR 121.201, NAICS Code at Subsector 517—Telecommunications.

[15] 13 CFR 121.201, NAICS code 517911.

[16] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517911 in the left column for ''Telecommunications Resellers'') (last visited March 2, 2011).

[17] *See* FCC, International Bureau, Strategic Analysis and Negotiations Division, ''2009 International Telecommunications Data'' at page 1–2, Statistical Findings, and Table D at page 22 (April 2011). FCC website location *http://www.fcc.gov/ib/sand/mniab/traffic/.*

[18] *Id.*

[19] U.S. Census Bureau, 2007 NAICS Definitions: Wireless Telecommunications Categories (except Satellite), *http://www.census.gov/naics/2007/def/ND517210.HTM* (last visited March 2, 2011).

[20] U.S. Census Bureau, 2002 NAICS Definitions: Paging, *http://www.census.gov/epcd/naics02/def/NDEF517.HTM* (last visited March 2, 2011); U.S. Census Bureau, 2002 NAICS Definitions: Other Wireless Telecommunications, *http://www.census.gov/epcd/naics02/def/NDEF517.HTM* (last visited March 2, 2011).

[21] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[22] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.''

Continued

those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service, and Specialized Mobile Radio Telephony services.[23] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[24] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

39. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the Wireless Communications Services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[25] The SBA has approved these definitions.[26] The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, seven bidders won 31 licenses that qualified as very small business entities, and one bidder won one license that qualified as a small business entity.

40. *Providers of Interconnected VoIP services.* In addition to the carriers that now file the annual traffic and revenue report, the FNPRM seeks comment whether interconnected VoIP service providers should also file data on their international voice traffic. The entities that provide such services are a mix of large and small entities. We do not have information on the size of such VoIP providers. The 2007 Economic Census includes VoIP providers in a larger class called ''Internet Service Providers'' (ISPs), and classes such ISPs in two categories, depending upon whether the service is provided over the provider's own facilities (e.g., cable or DSL ISPs), or over client-supplied telecommunications connections (e.g., dial-up ISPs). The former are within the category of Wired Telecommunications Carriers.[27] As a result, for the purpose of this IRFA we shall consider all such entities to be small entities within the meaning of the Small Business Act, which has an SBA small business size standard of 1,500 or fewer employees.[28] The latter are within the category of All Other Telecommunications,[29] which has a size standard of annual receipts of $25 million or less.[30] Our proposal pertains to interconnected VoIP services, which could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is $7.0 million or less in average annual receipts.[31] According to Census Bureau data for 2007, there were 367 firms in this category that operated for the entire year.[32] Of these, 334 had annual receipts of under $5 million, and an additional 11 firms had receipts of between $5 million and $9,999,999.[33] Consequently, we estimate that the majority of interconnected VoIP providers are small entities.

41. *Spot Market operators.* A ''spot market'' is a market where IMTS providers can buy or sell call completion services for calls, including IMTS calls. A customer of the spot market enters into a contract with the spot market owner to buy or sell call completion services by interconnecting at a spot market point of presence. The spot market owner acts as broker by facilitating the exchange of calls between spot market customers, who may not know each other's identity. The Commission has not developed a small business size standard specifically for operators of spot markets. As a result, for purposes of this IRFA, we shall consider all such entities to be small businesses.

2. Circuit-Status Report

42. The proposals in the FNPRM apply only to entities that have international bearer circuits. The FNPRM proposes changes to the information that must be provided about international common carrier circuits. The FNPRM also seeks comment whether data should be reported regarding non-common carrier international circuits.

43. *Providers of International Telecommunications Transmission Facilities.* According to the 2009 Circuit-Status Report, 75 U.S. international facility-based carriers filed information pursuant to § 43.82 of the Commission's rules.[34] Some of these providers would fall within the category of interexchange carriers, some would fall within the category of Wired Telecommunications Carriers, while others may not. The Commission has not developed a small business size standard specifically for provides of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[35] The circuit-status report does not include employee or revenue statistics, so we are unable to determine how many carriers could be considered small entities under the SBA standard. Although it is quite possible that a carrier could be considered small entities under the SBA standard. Although it is quite possible that a carrier could report a small amount of capacity and have significant revenues, we will consider those 75 carriers to be small entities at this time. In addition, of the 79 carrier that filed an annual circuit-status report for 2009, there were at least four carriers that reported no circuits owned or in use at the end of 2009.[36]

44. *Satellite Telecommunications Providers.* Other providers of

Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the US: 2007.'' Click ''Next'' and find data related to NAICS code 517210 in the left column for ''Wireless Telecommunications Carriers (except Satellite)'') (last visited March 2, 2011).

[23] *See* Trends in Telephone Service at Table 5.3.

[24] *See id.*

[25] Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96–228, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[26] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998).

[27] U.S. Census Bureau, 2007 NAICS Definitions: Wired Telecommunications Carriers, *http://www.census.gov/naics/2007/def/ND517110.HTM* (last visited March 2, 2011).

[28] 13 CFR 121.201, NAICS code 517110 (updated for inflation in 2008).

[29] U.S. Census Bureau, 2007 NAICS Definitions: All Other Telecommunications, *http://www.census.gov/naics/2007/def/ND517919.HTM* (last visited March 2, 2011).

[30] 13 CFR 121.201, NAICS code 517919 (updated inflation in 2008).

[31] 13 CFR 121.201 NAICS code 519190. See also *http://www.sba.gov./sites/default/files/Size_Standards_Table.pdf.*

[32] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1200&-ds_name=EC0751SSSZ4&-_lang=en.*

[33] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=1100&-ds_name=EC0751SSSZ4&-_lang=e*

[34] *See* International Bureau Releases 2009 Year-End Circuit Status Report for U.S. Facilities-Based International Carriers; Capacity Use Shows Modest Growth, rel. Dec. 21, 2010. The report is available on the FCC Web site at *http://www.fcc.gov/ib/pd/pf/csmanual.html.*

[35] 13 CFR 121.201, NAICS code 517110.

[36] *Id.*

international transmission facilities are those that operate international common carrier and non-common carrier satellite systems. Such systems provide circuits to providers of international telecommunication services or provide circuits directly to end users. With respect to the circuits such systems provide to telecommunications service providers, those circuits are reported in the circuit-status reports of those providers. Circuits that operators of international satellite systems offer directly to end users are not now reported under the circuit-status report. It is those circuits that the FNPRM proposes to require operators of international satellite services to report in the circuit-status report. The Commission has not determined a size standard specifically for operators of international satellite systems that offer circuits directly to end users. However, two economic census categories address the satellite industry. Under SBA rules, the first category has a small business size standard of $15 million or less in average annual receipts.[37] The second category has a size standard of $25 million or less in annual receipts.[38]

45. The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [39] Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.[40] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[41] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our action.

46. The second category, i.e., All Other Telecommunications, comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' [42] For this category, Census Bureau data for 2007 show that there were a total 2,383 firms that operated for the entire year.[43] Of this total, 2,347 firms had annual receipts of under $25 million and 12 firms had annual receipts of $25 million to $49,999,999.[44] Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

47. *Operators of Non-Common Carrier Undersea Cable Systems.* The FNPRM seeks comment on whether data should be filed for international non-common carrier circuits on submarine cable facilities. Neither the Commission nor the SBA has developed a size standard specifically for operators of non-common carrier undersea cables. Such entities would fall within the large category of Wired Telecommunications Carriers. The size standard under SBA rules for that category is that such a business is small if it has 1,500 or fewer employees.[45] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer, and 44 firms had had employment of 1,000 employees or more. Thus under this category and the associated small business size standard, the majority of these carriers can be considered small entities.[46] We do not have data on the number of employees or revenues of operators of non-common carrier undersea cables. Because providers of non-common carrier undersea cables do not now file an annual circuit-status report, we do not know how many such entities provide circuits directly to end users. We do know that a number of such entities pay regulatory fees on such circuits, but the names of such entities are confidential. Because we do not have information on the number of employees or their annual revenues, we shall consider all such providers to be small entities for purposes of this IRFA.

48. *Operators of Non-Common Carrier International Transmission Facilities.* At present, carriers that provide common carrier international transmission facilities report the number of circuits they provide under the annual circuit-status report. The FNPRM seeks comment on whether data should be filed on international non-common carrier circuits on terrestrial facilities. Neither the Commission nor the SBA has developed a small business size standard specifically for providers of non-common carrier terrestrial facilities. The operators of such terrestrial facilities would fall within the larger category of Wired Telecommunications Carriers. The appropriate size standard under SBA rules for the Wired Telecommunications Carriers category is that such a business is small if it has 1,500 or fewer employees.[47] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer and 44 firms had had employment of 1000 or more. Providers of microwave international transmission facilities would fall into the category of Fixed Microwave Services. The Commission has not yet defined a small business with respect to microwave service. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommuinications Carriers (except satellite). The appropriate size standard under SBA rules for the Wireless Telecommunications Carriers (except

[37] 13 CFR 121.201, NAICS code 517410.

[38] 13 CFR 121.201, NAICS code 517919.

[39] U.S. Census Bureau, 2007 NAICS Definitions, Satellite Telecommunications, *http://www.census.gov/naics/2007/def/ND517410.HTM* (last visited March 2, 2011).

[40] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ4: Receipts Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517210 in the left column for ''Satellite Telecommunications'') (last visited March 2, 2011).

[41] *Id.*

[42] U.S. Census Bureau, 2007 NAICS Definitions, All Other Telecommunications, *http://www.census.gov/naics/2007/def/ND517919.HTM* (last visited March 2, 2011).

[43] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ4: Receipts Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517919 in the left column for ''All Other Telecommunications'') (last visited March 2, 2011).

[44] *Id.*

[45] 13 CFR 121.201, NAICS code 517110.

[46] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information''. Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired Telecommunications carriers'') (last visited March 2, 2011).

[47] 13 CFR 121.201, NAICS code 517110.

satellite) is that such a business is small if it has 1,500 or fewer employees. For the category of Wireless Telecommunications Carrier (except satellite), Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1383 firms that operated that year. Of those 1,383 firms, 1,368 had fewer than 100 employees and 15 had more than 100 employees. Thus under this category and the associated small business size standard, the majority of these providers of international terrestrial facilities can be considered small providers.[48]

49. *Incumbent Local Exchange Carriers.* Because some of the international terrestrial facilities that are used to provide international telecommunications services may be owned by incumbent local exchange carriers, we have included small incumbent local exchange carriers in this present IRFA, to the extent that such local exchange carriers may operate such international facilities. (Local exchange carriers along the U.S.-border with Mexico or Canada may have local facilities that cross the border.) Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange carriers. The appropriate size standard under SBA rules is for the cagtegory Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[49] Census Bureau data for 2007, which now supersede data from the 2002 Census, show that there were 3,188 firms in this category that operated for the entire year. Of this total, 3,144 had employment of 999 or fewer and 44 firms had had employment of 1000 or more. According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.[50] Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.[51] As noted above, a ''small business'' under the IRFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' [52] The SBA's Office of Advocacy contends that, for an IRFA, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope.[53] Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules and policies proposed in the FNPRM. We have therefore included small incumbent local exchange carriers in this IRFA, although we emphasize that this IRFA action has no effect on Commission analysis and determinations in other, non-IRFA contexts. Thus under this category and the associated small business size standard, the majority of these incumbent local exchange service providers can be considered small providers.[54]

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

50. The First Report and Order Portion of this order decided to retain the annual traffic and revenue reporting requirements and the annual circuit-status reporting requirements because it found that the collection and public reporting of this information continues to be necessary in the public interest. The FNPRM portion of this order seeks comment on whether some additional entities that offer international telecommunications services should also file the annual traffic and revenue report. It also seeks comment on whether data should be filed for international non-common carrier circuits on submarine cable, satellite and terrestrial facilities. These additional entities play a significant role in the U.S. international telecommunications market. The FNPRM seeks comment on whether data from these entities is needed to gain a more comprehensive reporting of the international telecommunications market.

51. The FNPRM, however, also proposes to simplify and clarify the reporting requirements to reduce the burdens for both small and large carriers. Because carriers currently are required to file annual traffic and revenue and circuit-status report, the proposals contained in the FNPRM will not impose any significant additional economic burden on small carriers. The proposal to exempt filing entities that only provide IMTS resale and have less than $5 million in annual revenues from filing traffic and revenue data will exempt over 1,100 carriers from filing traffic and revenue data. The FNPRM seeks comment on whether to have additional entities to file the report, which if imposed would place a burden on those additional entities to file a traffic and revenue report. However, because the information contained in the proposed reporting requirements is the same information that the carriers collect and maintain during the routine course of business, that burden should not be substantial.

52. The FNPRM contains proposed revisions to the traffic and revenue reporting requirements, including a new proposed Service Report and five proposed schedules that show the specific information that filing entities would be required to report and how they would report it. The proposed reporting requirements are described below. However, because the Commission may change the reporting proposed in the FNPRM based on comments received in this proceeding, the schedules may also change.

53. First, the FNPRM proposes a new, generic Service Report that all entities that provide international telecommunications services or facilities would be required to file annually. This report would require such entities to file basic information on the services or facilities they provided in the preceding calendar year. Specifically, the entity would be required to provide its name, its Form 499–A identification number,[55] its

[48] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired telecommunications carriers'') (last visited March 2, 2011).

[49] 13 CFR 121.201, NAICS code 517110.

[50] *See* Trends in Telephone Service, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (Trends in Telephone Service).

[51] *See Id.*

[52] 15 U.S.C. 632.

[53] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of ''small-business concern,'' which the RFA incorporates into its own definition of ''small business.'' *See* 15 U.S.C. 632(a) (Small Business Act); 5 U.S.C. 601(3) (RFA). SBA regulations interpret ''small business concern'' to include the concept of dominance on a national basis. 13 CFR 121.102(b).

[54] *U.S. Census Bureau, American FactFinder, 2007 Economic Census, http://factfinder.census.gov,* (find ''Economic Census'' and choose ''get data.'' Then, under ''Economic Census data sets by sector * * *,'' choose ''Information.'' Under ''Subject Series,'' choose ''EC0751SSSZ5: Employment Size of Firms for the U.S.: 2007.'' Click ''Next'' and find data related to NAICS code 517110 in the left column for ''Wired telecommunications carriers'') (last visited March 2, 2011).

[55] FCC Form 499–A is the Commission's Telecommunications Reporting Worksheet. All telecommunications carriers are required to file this form annually to calculate contributions to the universal service support mechanisms, as well as to the TRS Fund, the cost recovery for numbering administration, and the cost recovery for the shared costs of local number portability. In addition, the information is used by carriers to comply with the Commission's registration requirement for new and existing carriers providing interstate

Commission Registration System (CORES) identification number [56] and to update its contact information. Additionally, those carriers that hold authorizations under section 214 of the Communications Act are required to list those authorizations. In addition, a filing entity would be required to indicate which international telecommunications services it provided during the previous year. Based on the services the responding carrier reported, the schedule would inform the carrier which other schedules, if any, the carrier would be required to complete.

54. Proposed Schedule 1 would replace the IMTS billing codes used in the 47 CFR 43.61 report and would, like those codes, require filing entities to continue to submit country-by-country traffic and revenue information for their IMTS service—albeit in a much simplified manner. Filing entities would use the proposed Schedule 1 to report both ''outbound'' and ''inbound'' IMTS traffic and revenues. The proposed schedule would require filing entities to report their minutes of outbound and inbound IMTS, the revenues associated with those minutes, the amount of payouts they make to foreign telecommunications organizations for terminating outbound traffic and the amount of settlement receipts they receive from foreign telecommunications entities to terminate traffic in the United States. The proposed schedule would institute a new requirement for filing entities to report separately the payments they make to their correspondents for terminating traffic on landline networks from the payments for terminating traffic on mobile networks (mobile termination rates). This information is needed because current mobile termination rates are significantly higher that the rates for termination on landline networks and those charges may be excessive, not cost based and possibly discriminatory. The FNPRM proposes to clarify the reporting of ''non-route-specific revenues'' derived from monthly or non-recurring charges for international calling plans by requiring a filing entity to allocate such revenues in way that relates them to the entity's international traffic.

55. The proposed Schedule 1 would make a number of changes that would simplify the reporting of IMTS. First, filing entities would no longer be required to report the number of outbound or inbound IMTS calls they handled. Second, the proposed schedule would eliminate the requirement that filing entities report regional totals for their IMTS services. Third, the proposed schedule would also eliminate the current requirement that filing entities separately report traffic they settle under alternative arrangements such as ''country direct,'' ''country beyond'' and reorigination. Rather, filing entities would be able to include information on such traffic in the total traffic and revenue figures they report for each country they serve.

56. Proposed Schedule 2 would require filing entities to report a number of pieces of traffic and revenue information on a world-total, rather than route-by-route basis. First, it would require filing entities to report their would-total traffic and revenues for facilities-based IMTS and for IMTS resale they handled during the preceding year. Filing entities would be required to total the traffic and revenue figures for these two services to report a total traffic and revenue figure for all U.S.-billed IMTS and to report the percentage of those world-total figures that is attributable to non-route-specific revenues. Second, the proposed schedule would require filing entities to report their world-total U.S.-billed IMTS minutes and revenues separately for three major segments (residential, business and government, and U.S. resellers). Third, the proposed schedule would require riling entities to report on a world-total, rather than route-by-route basis, the traffic and revenues they derive from reoriginated traffic and from traditional transiting IMTS. The proposed schedule would simplify the reporting of IMTS resale by eliminating the current requirement that filing entities provide a list of the countries to which they provided IMTS resale. Additionally, the proposed schedule would exempt from the IMTS resale filing requirement any filing entity that had IMTS resale revenues of less than $5 million during the preceding year.

57. Proposed Schedule 3 would require filing entities to provide country-by-country information on the international private line services they provided in the preceding year. The proposed schedule would require filing entities to report separately the revenues they received for private line service provided over facilities they own and for service provided over resold circuits. Filing entities would no longer be required to report separately each type of private line service they provided. Rather, they would merely report the 64 Kbps equivalents of the private line circuits they provided.

58. Proposed Schedule 4 would require filing entities to continue to provide world-total revenue information for each international ''miscellaneous service'' they provided during the preceding year, but on a simplified basis. Services other than IMTS and private line service would be considered ''miscellaneous service.'' First, the proposed schedule would exempt from the filing requirement any miscellaneous service for which a filing entity had less than $5 million in revenue. Second, filing entities would no longer be required to report the volume of traffic of each service they provided. Filing entities would be required to provide only the name and a brief description for each miscellaneous service and the total annual revenues they received for that service.

59. Proposed Schedule 5 would implement the revised circuit-status report. The proposed schedule would continue to require filing entities to provide a snapshot of their active and idle circuits as of December 31 of each year, but on a simplified basis. Filing entities would continue to report the circuits they have in place for each country they serve. Filing entities would also continue to report separately the circuits they have on submarine cables, satellites, and terrestrial links. The proposed schedule would continue to require filing entities to report their circuit use in units of 64 Kbps equivalent circuits. The proposed schedule, however, would no longer require filing entities to report separately each service for which they use their circuits. The proposed schedule would also eliminate the current requirement that filing entities report the number of 64 Kbps equivalent virtual circuits they derive from their bearer circuits by means of circuit-multiplication equipment.

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

60. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the

telecommunications service.*See* 47 CFR 52.1(b), 52.32(b), 54.711(a), 64,604(c)(4)(iii)(B), and 64.1195.

[56] CORES is a Web-based, password-protected, registration system that assigns a unique 10-digit FCC Registration Number (FRN) for use when doing business with the FCC. See New Commission Registration System (CORES) to be Implemented July 19, Public Notice, 15 FCC Rcd 18754 (2000).

use of performance, rather than design, standards; and (4) an exception from coverage or the rule, or any part thereof, for small entities.'' [57]

61. The FNPRM seeks comment on a number of proposals to simplify and consolidate the reporting requirements for carriers providing international telecommunications services. The proposals in the FNPRM are designed to reduce the regulatory requirements for both small and large carriers, while maintaining and enhancing the goals the reports serve.

62. The possible change to the reporting requirements with the most significant impact on small carriers is the proposal to exempt pure resale carriers with less than $5 million in revenues from IMTS resale during the preceding year from the need to file a traffic and revenue report. Based on the number of carriers filing the annual traffic and revenue report in 2009, the majority of carriers would be considered small carriers.[58] This proposal would benefit a substantial number of small entities by relieving them from the requirement to report their IMTS resale traffic.

63. The FNPRM proposes to simplify the information that the carriers, both small and large, must submit for any traffic and revenue reports. First, the FNPRM proposes to eliminate the requirement that carriers provide information on the number of messages that they carried the previous year. Second, the FNPRM proposes to eliminate the requirement that carriers use the billing codes set out in the Filing Manual and the Public Notices. Currently, carriers report international telephone traffic under 12 different billing codes, and the various billing codes have presented recurrent problems for carriers filing the reports as well as those who review the reports. Third, the FNPRM proposes a set of schedules for the reporting of the traffic and revenue and circuit-status information in lieu of the two filing manuals that are currently used. The FNPRM proposes to streamline some of the reporting categories, which will reduce the reporting requirements on both small and large entities.

64. The FNPRM proposes to consolidate 47 CFR 43.61 (traffic and revenue reporting requirement) and 47 CFR 43.82 (circuit-status reporting requirement) into one rule. Consolidating the rules will eliminate the requirement that carriers file two separate reports—one for traffic and revenue data and one for circuit-status data. The FNPRM proposes that one filing manual be developed that will satisfy the reporting requirements of the new rule. One consolidated filing manual for both reports would be less confusing and less time-consuming for both small and large carriers.

65. The FNPRM also proposes to require carriers to file the report earlier than currently required in order to improve the timeliness of the resulting report. In selecting a proposed filing date, the Commission tried to balance the need for more expeditious filing with any burden an earlier filing would place on carriers. In addition, with more timely-filed data, it would be unnecessary for carriers to file corrected traffic and revenue data. The proposed new filing date minimizes any burden on the carriers because it does not coincide with any other reporting requirements. Also, carriers will not be burdened with filing another report with corrected data.

66. The FNPRM seeks comment on whether it would significantly speed and facilitate the submission of data if the Commission were to encourage or mandate carriers to submit their data electronically. Electronic filing would lessen the burden of filing the reports for both small and large carriers. Because carriers maintain the data electronically, it would be practicable for carriers to submit the data in the same format rather than convert the data into a different format.

67. The FNPRM proposes a general report that will make it very simple for a carrier to determine which, if any, reporting requirements are applicable to the carrier. In addition, this proposal will simplify a carrier's compliance with other reporting requirements, such as the form 499–A.

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

68. None.

Ordering Clauses

69. *It is ordered* that, pursuant to the authority contained in sections 1, 4(i), 4(j) 11, 201–205, 211, 214, 219, 220, 303(r), 309, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 161, 201–205, 211, 214, 219, 220, 303(r), 309 and 403, and the Cable Landing License Act of 1921, 47 U.S.C. 35–39, this Further Notice of Proposed Rulemaking *is hereby adopted* and *comments are requested* as described above.

70. *It is further* ordered that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, *shall send* a copy of this *further notice of proposed rulemaking,* including the Initial Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects in 47 CFR Parts 0, 43 and 63

Communications, Communications common carriers, Telecommunications, Telephone.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 0, 43, and 63 as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068; as amended, 47 U.S.C. 155, 225, unless otherwise noted.

2. Section 0.457 is amended by adding paragraph (d)(1)(viii) to read as follows:

§ 0.457 Records not routinely available for public inspection.

* * * * *

(d) * * *

(1) * * *

(viii) Disaggregated international revenue payout and traffic data filed under § 43.62 of this chapter.

* * * * *

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS, PROVIDERS OF INTERNATIONAL INTERCONNECTED VOICE OVER INTERNET PROTOCL SERVICES AND CERTAIN AFFILIATES

3. The authority citation for part 43 is revised to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996; Pub. L. 104–104, sec. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted. 47 U.S.C. 211, 219, 220, as amended; Cable Landing License Act of 1921, 47 U.S.C. 35–39.

4. Revise the heading to part 43 to read as set forth above.

[57] 5 U.S.C. 603(c)(1)–(c)(4).

[58] *See* FCC, 2009 International Telecommunications Data, p. 1, Statistical Findings (April 2000). The report is available at *http://www.fcc.gov/ib/sand/mniab/traaffic/.*

§ 43.61 [Removed]

5. Remove § 43.61.

6. Add § 43.62 to read as follows:

§ 43.62 Reporting requirements for holders of international Section 214 authorizations and providers of international services.

(a) *Annual reports.* Not later than May 1 of each year, any person or entity that holds an authorization pursuant to section 214 of the Communications Act to provide international telecommunications service; or any person or entity that provided interconnected Voice over Internet Protocol service between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and a foreign point during the previous year; shall submit the following reports:

(1) Any person or entity that holds an authorization pursuant to section 214 to provide international telecommunications service shall report whether it provided international telecommunications services or owned international circuits the preceding year.

(2) Each common carrier engaged in providing international telecommunications service, and each person or entity engaged in providing interconnected Voice over Internet Protocol service, between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and any country or point outside that area shall file a report with the Commission showing revenues, payouts, and traffic for such international telecommunications service and interconnected Voice over Internet Protocol service provided during the preceding calendar year.

(3) Each person or entity owning international facilities between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and any country or point outside that area shall file a circuit-status report with the Commission showing the status of its circuits as of December 31 of the preceding calendar year.

(b) *Filing manual.* The information required under this section shall be furnished in conformance with the instructions and reporting requirements prepared under the direction of the Chief, International Bureau, prepared and published as a filing manual.

§ 43.82 [Removed]

7. Remove § 43.82.

PART 63—EXTENSION OF LINES, NEW LINES AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OR RECOGNIZED PRIVATE OPERATING AGENCY STATUS

8. The authority citation for part 63 continues to read as follows:

Authority: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

9. Section 63.10 is amended by revising paragraphs (c)(2) and (c)(4) as follows:

§ 63.10 Regulatory classification of U.S. international carriers.

* * * * *

(c) * * *

(2) File quarterly reports on traffic and revenue, consistent with the reporting requirements authorized pursuant to § 43.62 of this chapter, within 90 days from the end of each calendar quarter;

* * * * *

(4) In the case of an authorized facilities-based carrier, file quarterly circuit status reports within 90 days from the end of each calendar quarter in the format set out for circuit status reports by the filing manual for § 43.62 of this chapter, except that activated or idle circuits must be reported on a facility-by-facility basis.

* * * * *

10. Section 63.21 is amended by revising paragraph (d) to read as follows:

§ 63.21 Conditions applicable to all international Section 214 authorizations.

* * * * *

(d) Carriers must file annual reports of overseas telecommunications traffic as required by § 43.62 of this chapter.

* * * * *

11. Section 63.22 is amended by revising paragraph (e) to read as follows:

§ 63.22 Facilities-based international common carriers.

* * * * *

(e) The carrier shall file annual international circuit status reports as required by § 43.62 of this chapter.

* * * * *

[FR Doc. 2011–18153 File 7–18–11; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 43 and 64

[IB Docket No. 11–80; FCC 11–75]

International Settlements Policy Reform

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Communications Commission proposes to remove the International Settlements Policy (ISP) from all U.S. international routes except Cuba. Eliminating the ISP will enable more market-based arrangements between U.S. and foreign carriers on all U.S. international routes. The Federal Communications Commission seeks comment on a proposal to enable the Commission to better protect U.S. consumers from the effects of anticompetitive conduct by foreign carriers in instances necessitating Commission intervention. Specifically, it seeks comments on proposals and issues regarding the application of the Commission's benchmarks policy.

DATES: Submit comments on or before August 18, 2011, and replies on or before September 2, 2011.

ADDRESSES: You may submit comments, identified by Docket No. 11–80, by any of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: Kimberly Cook, David Krech or James Ball, Policy Division, International Bureau, FCC, (202) 418–1460 or via the Internet at *Kimberly.Cook@fcc.gov, David.Krech@fcc.gov* and *James.Ball@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in IB Docket No. 11–80, FCC 11–75, adopted May 12, 2011, and released May 13, 2011. The

full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The document also is available for download over the Internet at *http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-75A1.pdf.* The complete text also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), located in Room CY–B402, 445 12th Street, SW., Washington, DC 20554. Customers may contact BCPI at its web site: *http://www.bcpiweb.com* or call
1–800–378–3160.

Comment Filing Procedures

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated above. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by hand delivery. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) at *http://fjallfoss.fcc.gov/ecfs2/.* See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

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

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

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

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

Summary of Notice of Proposed Rulemaking

1. Introduction

In the Notice of Proposed Rulemaking (NPRM), the Federal Communications Commission proposes to remove the International Settlements Policy (ISP) from all U.S. international routes except Cuba. Further, the Commission seeks comment on ways to improve its rules and procedures to enhance its ability to prevent and respond to anticompetitive behavior by foreign carriers in a timely and effective manner. Specifically, the Commission seeks comment on issues and proposals related to the Commission's benchmarks policy and competitive safeguards against anticompetitive behavior. The Commission believes removing the ISP from the remaining international routes will provide U.S. carriers greater flexibility to negotiate lower settlement rates on those routes. The Notice of Proposed Rulemaking seeks comment on whether removal of the ISP from virtually all of the remaining ISP routes will, on balance, result in lower rates and otherwise benefit U.S. consumers. The Notice of Proposed Rulemaking requests comment on whether there are any competitive concerns on a particular U.S. international route that we should consider prior to removing the ISP from that route.

2. ISP

Removing the ISP from the U.S. international routes except Cuba would require amendments to certain Commission rules, and the Notice of Proposed Rulemaking seeks comment on alternatives for amending the Commission's rules, including sections 64.1001, 64.1002 and 43.51. Sections 64.1001 and 64.1002 specify the requirements and procedures that implement the ISP. Section 43.51 specifies the contract filing requirements that apply to U.S. carriers. The Commission proposes to amend section 64.1001 and portions of section 64.1002 which currently codify the ISP and related procedures in the Commission's rules. The Commission also proposes to modify section 43.51 of our rules to reflect the removal of the ISP on all routes except Cuba.

3. Contract Filing

The Commission proposes to require that U.S. carriers file agreements, amendments to agreements (whether written or oral), and rates for the provision of services (hereinafter referred to collectively as ''agreements'') when the agreed-upon rates are above benchmark. The requirement would apply to all U.S. international routes involving any foreign correspondent, dominant or non-dominant, for which U.S. outbound rates are above benchmark regardless of whether the ISP previously had been removed from that route or benchmarks had been temporarily achieved at some point in the past. The Commission proposes that the filing requirement also apply when any provision in the contract has the effect of bringing the settlement rate above benchmark even though the stated contract rate is at or below benchmark.

The Commission would consider actions in response to above-benchmark situations on an *ad hoc* basis. Furthermore, upon the filing of an agreement implementing an above-benchmark rate, the International Bureau would issue a public notice of the filing. Alternatively, rather than requiring the filing of an agreement, the Notice of Proposed Rulemaking requests comment on requiring U.S. carriers to file a notice of any agreement (whether written or oral) that includes rates that are above benchmark. This approach would give the Commission the authority to require a U.S. carrier to file the agreement in particular circumstances, but would not require U.S. carriers to file all agreements with the Commission. The Commission might exercise that authority where there is a competitive concern on a particular route or where the Commission receives a complaint from a carrier or from a consumer with respect to that route. The Notice of Proposed Rulemaking proposes retaining the Commission's authority to require U.S. carriers to file agreements and rates for the provision of services on international routes involving any foreign correspondent at any time and upon reasonable request. It proposes to retain the current practice of considering any such agreement filed pursuant to the ISP available for public inspection, and considering all other such agreements not routinely available for public inspection.

4. Enhanced Competitive Safeguards

The Notice of Proposed Rulemaking seeks comment on various competitive safeguards, including the presumption of anticompetitive behavior, possible procedures to expedite Commission action, and remedies for findings of anticompetitive behavior.

5. Benchmark Issues

In specific, limited circumstances, the Commission proposes to apply benchmark rates to indirect routing arrangements that U.S. carriers have with third-party carriers in other countries to provide services on U.S. international routes. The Notice of Proposed Rulemaking proposes to apply the Commission's benchmark policy on a case-by-case basis to indirect routing on international routes that are found to be subject to anticompetitive conduct by foreign carriers where additional remedies are required. In applying benchmark rates to reorigination of traffic under the limited circumstances specified above, the Commission would not permit any U.S. carrier serving the international route indirectly to pay a fee to a third-party carrier in an intermediate country for reorigination of traffic greater than the established benchmark rate for termination of traffic to the destination country. The Commission would not impose the restriction except after prior notice and opportunity for comment. The Commission would provide notice and opportunity for comment as part of the order suspending U.S. carrier payments for termination services with carriers in the destination country. The Commission believes that existing benchmark rates would be a sufficient cap on fees paid by U.S. carriers for reorigination of traffic to a destination country on an international route where there is continuing anticompetitive conduct. The notice and comment process described above would give affected carriers an opportunity to contest the reasonableness of applying the benchmark rate for charges above the benchmark rate applicable to the particular destination route subject to the notice. If adopted, the restriction would be imposed by order and removed upon a finding that the anticompetitive conduct on the international route had ceased or under other circumstances that the Commission determined appropriate based upon the record in a particular case. The Notice of Proposed Rulemaking also requests comment on whether there may be other circumstances under which the Commission should apply benchmark rates to alternative or indirect routing arrangements. In particular, it requests comment on a broader approach than that described above if such an approach would allow the Commission to more effectively respond to anticompetitive behavior under certain circumstances.

6. Other Issues

Finally, the Notice of Proposed Rulemaking notes that some commenters to the *2005 Notice of Inquiry* and commenters in the proceeding regarding the U.S.-Tonga route argued that U.S. carriers have failed to decrease retail calling rates in proportion to the decrease in settlement rate reductions. Commenters argued that this alleged failure to decrease retail calling rates in proportion to any settlement rate reduction harms U.S. consumers and carriers in foreign countries because U.S. consumers pay higher rates than necessary, which results in lower traffic volumes and reduced terminating revenues received by foreign carriers on the international route. U.S. carriers disputed this argument. The Notice of Proposed Rulemaking noted that section 43.61 traffic and revenue data filed by U.S. carriers show that, on average, U.S. carriers appear to have been flowing through settlement rate reductions in U.S. international calling rates. From 1996 to 2009 (comparing the year before the FCC adopted benchmarks to the most recent year for which data are available), the average IMTS settlement rate paid by U.S. carriers decreased by $0.37 per minute, while the average IMTS revenue per minute (an estimate of the average U.S. international calling rate) decreased by $0.66 per minute, more than flowing through settlement rate reductions. The Commission recognizes that this data has certain limitations and may underestimate the level of U.S. international calling rates to some degree. For instance, the IMTS revenue per minute figure is based on revenue reported by facilities-based carriers and, therefore, reflects a mix of wholesale and retail rates. Also, some carriers may not have included non-route-specific calling plan revenue in their revenue figures. We also note that the figures cited above are average numbers and that settlement rates reductions may not have been flowed through uniformly to all segments of the retail market. There is evidence that some U.S. carriers, between 1985 and 2000, increased the retail ''basic rates'' they charged consumers. Nevertheless, the section 43.61 data covers the entire U.S. facilities-based IMTS industry and all international routes, and shows average IMTS revenue per minute falling much more than the average settlement rate payout. The Commission seeks comment on this issue. In addition to the decrease in the average IMTS settlement rate paid by U.S. carriers as well as a decrease in the average IMTS revenue per minute received by U.S. carriers, the Commission seeks comment on what other data or factors it should consider in evaluating whether U.S. carriers are passing on reductions in settlement rates to the retail rates they charge consumers. The Commission seeks comment on what action, if any, the Commission should consider taking with respect to these issues.

7. Paperwork Reduction Act of 1995 Analysis

The Notice of Proposed Rulemaking proposes new and modified information collection requirements. The Commission, as a part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

8. Initial Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of this NPRM. The Commission will send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.[3]

A. Need for, and Objectives of, the Proposed Rules

In recent years there has been increased participation and competition in the U.S. international marketplace, decreased settlement and end-user rates, and growing liberalization and

[1] *See* 5 U.S.C. 603. The FRA, *see* 5 U.S.C. 601–612 has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. 603(a).

[3] *See id.*

privatization in foreign markets. Because of this increase, the Commission believes that it is an appropriate time to re-examine its International Settlements Policy (ISP) and accounting rate policies. In this proceeding, the Commission expects to obtain further information about the competitive status of the U.S. international marketplace. In addition, the Commission solicits comment on a wide variety of proposals to reform its current application of the ISP, benchmark and settlement rate policies.

B. Legal Basis

The Notice of Proposed Rulemaking is authorized under 47 U.S.C. 151, 152, 154(i), 154(j), 201–205, 208, 211, 214, 303(r), 309, and 403.

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

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[4] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [5] A small business concern is one which: (1) Is independently owned and operated, (2) is not dominant in its field of operation, and (3) satisfies any additional criteria established by the SBA.[6]

The proposals contained in the Notice of Proposed Rulemaking may directly affect up to approximately 38 facilities-based U.S. international carriers providing IMTS traffic. In the 2009 annual traffic and revenue report 38 facilities-based and facilities-resale carriers reported approximately $5.8 billion in revenues from international message telephone service (IMTS). Of these, three reported IMTS revenues of more than $1 billion, eight reported IMTS revenues of more than $100 million, 10 reported IMTS revenues of more than $50 million, 20 reported IMTS revenues of more than $10 million, 25 reported IMTS revenues of more than $5 million, and 30 reported IMTS revenues of more than $1 million. Based solely on their IMTS revenues the majority of these carriers would be considered non-small entities under the SBA definition.[7] Neither the Commission nor the SBA has developed a definition of ''small entity'' specifically applicable to these international carriers. The closest applicable definition provides that a small entity is one with 1,500 or fewer employees.[8] We do not have data specifying the number of these carriers that are not independently owned and operated and have fewer than 1,500 employees. Furthermore, because not all agreements between the U.S. and foreign carriers are required to be filed at the Commission, it is difficult to determine how many of these 38 carriers might have agreements with foreign carriers. The Notice of Proposed Rulemaking solicits comments on a wide variety of proposals, and the proposals are intended to promote market-based policies and reduce unnecessary regulatory burdens on all facilities-based U.S. international carriers regardless of size.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

The NPRM seeks a wide variety of information on the Commission's ISP, benchmarks and international settlement rates policies. In developing these policies, the Commission implemented various reporting requirements to monitor possible anticompetitive behavior and protect the public interest. The NPRM proposes retaining reporting requirements when carriers agree to above-benchmark rates. The NPRM reserves the right to require the filing of particular contracts when presented with evidence of a violation of the ''No Special Concessions'' rule or of other anticompetitive behavior related to these matters on a particular route. The NPRM solicits comment on whether the Commission should retain, eliminate or develop new/additional reporting requirements. The NPRM seeks comment on possible safeguards that could be implemented to address specific competitive concerns.

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

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[9]

The proposals in this NPRM are designed to provide the Commission with information to determine whether its existing regulatory regime may inhibit the benefits of lower calling process and greater service innovations to consumers. Because the NPRM is broad and proposals would likely affect only 38 facilities-based carriers, it would be difficult to adopt specific alternatives for the small facilities-based entities. The proposals contained in the NPRM would benefit all entities, including small entities.

The NPRM proposes steps that would minimize the economic impact on all entities, including small entities. For example, the NPRM seeks comment on whether to remove the ISP from certain remaining routes. This proposal would eliminate the burden of seeking prior Commission approval before a carrier could enter into arrangements with foreign carriers. Any changes to our existing policies and rules will expand the ability of all entities, including small entities, to reap the economic benefits of competition. Thus, the NPRM does not propose any exemption for small entities.

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

None.

9. Ordering Clauses

It is ordered that, pursuant to the authority contained in 47 U.S.C. 151, 152, 154(i), 154(j), 201–205, 208, 211, 214, 303(r), 309 and 403 this Notice of Proposed Rulemaking is *adopted*.

It is further ordered that *notice is hereby given* of the proposed regulatory changes to Commission policy and rules described in this Notice of Proposed Rulemaking and that comment is sought on these proposals.

It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Notice of Proposed Rulemaking,

[4] 5 U.S.C. 603(b)(3).

[5] 5 U.S.C. 603(6).

[6] 5 U.S.C. 603(3) (incorporating by reference the definition of ''small business concern'' in 15 U.S.C. 632). Pursuant to the RFA, the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.'' 5 U.S.C. 601(3).

[7] *See* 13 CFR 121.201, NAICS Code at Subsector 517—Telecommunications.

[8] *See* 13 CFR 121.201, NAICS codes 513310 and 513322.

[9] *See* 5 U.S.C. 603(c).

including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of Small Business Administration.

List of Subjects in 47 CFR Parts 0, 43 and 64

Communications, Communications common carriers, Telecommunications, Telephone.

Federal Communications Commission.

Bulah P. Wheeler,

Deputy Manager.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Parts 0, 43 and 64 of the Commission rules as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Secs. 5, 48 stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.453 is amended by revising paragraph (e)(6) to read as follows:

§ 0.453 Public reference rooms.

* * * * *

(e) * * *

(6) Contracts and other arrangements filed under § 43.51(b)(3) of this chapter, except for those that are filed with a request for confidential treatment (see § 0.459) or are deemed confidential pursuant to sec. 412 of the Communications Act (see also § 0.457(c)(3)).

* * * * *

3. Section 0.457 is amended by revising paragraph (d)(1)(v) to read as follows:

§ 0.457 Records not routinely available for public inspection.

* * * * *

(d) * * *

(1) * * *

(v) The rates, terms and conditions in any agreement between a U.S. carrier and a foreign carrier that govern the settlement of U.S. international traffic, including the method for allocating return traffic, except for any agreement with a foreign carrier presumed to have market power, and subject to the international settlements policy set forth in Part 64, Subpart J of this chapter.

* * * * *

PART 43—REPORTS OF COMMUNICATION COMMON CARRIERS AND CERTAIN AFFILIATES

4. The authority citation for part 43 continues to read as follows:

Authority: 47 U.S.C. 154; Telecommunications Act of 1996, Pub. L. 104–104, secs. 402(b)(2)(B), (c), 110 Stat. 56 (1996) as amended unless otherwise noted, 47 U.S.C. 211, 219, 220 as amended.

Alternative 1 for § 43.51

5. Section 43.51 is amended by revising paragraphs (a)(1) introductory text, (a)(2), and (b)(3), adding paragraph (b)(4), revising paragraphs (d) through (f) and Note 3, and by removing Note 4 to read as follows:

§ 43.51 Contracts and concessions.

(a)(1) Any communication common carrier described in paragraph (b) of this section must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto (collectively hereinafter referred to as ''agreement'' for purposes of this rule) with respect to the following:

* * * * *

(2) If the agreement is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

(b) * * *

(3) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, if the agreement is for an international route on the Commission's ''Exclusion List,'' and the agreement is with a foreign carrier that is presumed to have market power on the foreign end of the route, pursuant to Note 3 to this section. The Commission's ''Exclusion List'' identifies countries and facilities that are not covered by the grant of global section 214 authority under § 63.18(e)(1) of this chapter. This list is available at *http://www.fcc.gov/ib/pd/exclusion_list.pdf*; or

(4) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications and enters into an agreement with a foreign carrier, if the agreement provides for a settlement rate above the applicable benchmark rate, or any provision in the contract has the effect of bringing the settlement rate above the applicable benchmark rate. The Commission established applicable benchmark rates in International Settlement Rates, IB Docket No. 96–261, Report and Order, FCC 97–280, 12 FCC Rcd 19806, 19860 para. 111 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C.* v. *FCC,* 166 F.3d 1224 (D.C. Cir. 1999).

* * * * *

(d) Agreements between a carrier and a foreign carrier that are not included in paragraph (b) of this section are not required to be filed with the Commission pursuant to paragraph (a) of this section, but each U.S. carrier subject to such an agreement shall maintain a copy of it, and upon request by the Commission, shall promptly forward individual agreements to the Commission.

(e) Other filing requirements for carriers providing service on a U.S. international route that is subject to the international settlements policy as set forth in § 64.1002 of this chapter:

(1) If a U.S. carrier files an agreement with a foreign carrier pursuant to paragraph (a) and (b)(3) of this section to begin providing switched voice service between the United States and the foreign point, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. The operating or other agreement cannot become effective until the modification request has been granted under paragraph § 64.1001(e) of this chapter.

(2) If a U.S. carrier files an amendment pursuant to paragraph (a) and (b)(3) of this section, to an existing operating or other agreement with a foreign carrier to provide switched voice service between the United States and a foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier may need to file with the International Bureau a modification request under § 64.1001 of this chapter. The amendment to the operating or other agreement cannot become effective until the modification request has been granted under § 64.1001(e) of this chapter.

(f) *Confidential treatment.* (1) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(3) of this section shall be considered as routinely available for public inspection under

§ 0.453(e)(6) of this chapter. Carriers may request confidential treatment under §§ 0.457 and 0.459 of this chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment of agreements filed pursuant to paragraphs (a) and (b)(3) of this section must include the information specified in § 64.1001(c) of this chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to § 43.51(f).

(3) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(4) of this section shall be considered as not routinely available for public inspection pursuant to § 0.457(d)(1)(v) (Any request that these materials be made available for public inspection must be under the provisions of § 0.461 of this chapter).

* * * * *

Note 3 to § 43.51: Carriers shall rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which of their foreign carrier contracts are subject to the contract filing requirements set forth in paragraphs (a) and (b)(3) of this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.* The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

Alternative 2 for § 43.51

6. Section 43.51 is amended by revising paragraphs (a)(1) introductory text, (a)(2), (b)(3), (d) through (f) and Note 3, and by removing Note 4 to read as follows:

§ 43.51 Contracts and concessions.

(a)(1) Any communication common carrier described in paragraph (b) of this section must file with the Commission, within thirty (30) days of execution, a copy of each contract, agreement, concession, license, authorization, operating agreement or other arrangement to which it is a party and amendments thereto (collectively hereinafter referred to as ''agreement'' for purposes of this rule) with respect to the following:

* * * * *

(2) If the agreement is made other than in writing, a certified statement covering all details thereof must be filed by at least one of the parties to the agreement. Each other party to the agreement which is also subject to these provisions may, in lieu of also filing a copy of the agreement, file a certified statement referencing the filed document. The Commission may, at any time and upon reasonable request, require any communication common carrier not subject to the provisions of this section to submit the documents referenced in this section.

(b) * * *

(3) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, if the agreement is for an international route on the Commission's ''Exclusion List,'' and the agreement is with a foreign carrier that is presumed to have market power on the foreign end of the route, pursuant to Note 3 to this section. The Commission's ''Exclusion List'' identifies countries and facilities that are not covered by the grant of global section 214 authority under section 63.18(e)(1) of the Commission's rules. This list is available at *http://www.fcc.gov/ib/pd/exclusion_list.pdf.*

* * * * *

(d) A carrier, other than a provider of commercial mobile radio services, that is engaged in foreign communications, and enters into an agreement with a foreign carrier, must notify the International Bureau of any agreement within 30 days of the execution of the agreement, if the agreement provides for a settlement rate above the applicable benchmark rate, or any provision in the contract has the effect of bringing the settlement rate above the applicable benchmark rate. The Commission has the authority to require the U.S. carrier providing service on U.S. international routes to file a copy of each agreement to which it is a party. The Commission established applicable benchmark rates in *International Settlement Rates*, IB Docket No. 96–261, Report and Order, FCC 97–280, 12 FCC Rcd 19806, 19860 para. 111 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999) (*Benchmarks Reconsideration Order*); *aff'd sub nom. Cable & Wireless P.L.C.* v. *FCC,* 166 F.3d 1224 (D.C. Cir. 1999).

(e) Other filing requirements for carriers providing service on U.S. international routes that are subject to the international settlements policy as set forth in § 64.1002 of this chapter:

(1) For routes subject to the international settlements policy set forth in § 64.1002 of this chapter, if a U.S. carrier files an operating or other agreement with a foreign carrier pursuant to paragraph (a) of this section to begin providing switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. The operating or other agreement cannot become effective until the modification request has been granted under paragraph § 64.1001(e) of this chapter.

(2) For routes subject to the international settlements policy, if a carrier files an amendment, pursuant to paragraph (a) of this section, to an existing operating or other agreement with a foreign carrier to provide switched voice, telex, telegraph, or packet-switched service between the United States and a foreign point, and the amendment relates to the exchange of services, interchange or routing of traffic and matters concerning rates, accounting rates, division of tolls, the allocation of return traffic, or the basis of settlement of traffic balances, the carrier must also file with the International Bureau a modification request under § 64.1001 of this chapter. The amendment to the operating or other agreement cannot become effective until the modification request has been granted under § 64.1001(e) of this chapter.

(f) *Confidential treatment.* (1) Agreements filed with the Commission pursuant to the requirements of paragraphs (a) and (b)(3) of this section shall be considered as routinely available for public inspection under § 0.453(e)(6) of this chapter. Carriers may request confidential treatment under § 0.457 of this chapter for the rates, terms and conditions that govern the settlement of U.S. international traffic.

(2) Carriers requesting confidential treatment under this paragraph must

include the information specified in § 64.1001(c) of this chapter. Such filings shall be made with the Commission, with a copy to the Chief, International Bureau. The transmittal letter accompanying the confidential filing shall clearly identify the filing as responsive to § 43.51(f).

* * * * *

Note 3 to § 43.51: Carriers shall rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which of their foreign carrier contracts are subject to the contract filing requirements set forth in paragraphs (a) and (b)(3) of this section. The Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points is available from the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.* The Commission will include on the list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points any foreign carrier that has 50 percent or more market share in the international transport or local access markets of a foreign point. A party that seeks to remove such a carrier from the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier lacks 50 percent market share in the international transport and local access markets on the foreign end of the route or that it nevertheless lacks sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market. A party that seeks to add a carrier to the Commission's list bears the burden of submitting information to the Commission sufficient to demonstrate that the foreign carrier has 50 percent or more market share in the international transport or local access markets on the foreign end of the route or that it nevertheless has sufficient market power to affect competition adversely in the U.S. market.

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

7. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B), (c), Public Law 104–104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 225, 226, 228, and 254(k) unless otherwise noted.

8. Section 64.1001 is amended by revising paragraph (a) to read as follows:

§ 64.1001 Requests to modify international settlements arrangements.

(a) The procedures set forth in this rule apply to carrier requests to modify international settlement arrangements on any U.S. international route listed on the Commission's ''Exclusion List.'' *See http://www.fcc.gov/ib/pd/exclusion_list.pdf.* Any operating agreement or amendment for which a modification request is required to be filed cannot become effective until the modification request has been granted under paragraph (e) of this section.

* * * * *

9. Section 64.1002 is amended by revising the introductory text of paragraph (a), removing and reserving paragraph (b) and revising paragraphs (c) and (d) to read as follows:

§ 64.1002 International settlements policy.

(a) A common carrier that is authorized pursuant to part 63 of this chapter to provide facilities-based switched voice service on a U.S. international route that is listed on the Commission's ''Exclusion List'' (*http://www.fcc.gov/ib/pd/exclusion_list.pdf*), and that enters into an operating or other agreement to provide any such service in correspondence with a foreign carrier that does not qualify for the presumption that it lacks market power on the foreign end of the route, must comply with the following requirements:

* * * * *

(b) [Reserved].

(c) A carrier that seeks to exempt from the international settlements policy an international route on the ''Exclusion List'' must make its request to the International Bureau, accompanied by a showing that a U.S. carrier has entered into a benchmark-compliant settlement rate agreement with a foreign carrier that possesses market power in the country at the foreign end of the U.S. international route that is the subject of the request. The required showing shall consist of an effective accounting rate modification, filed pursuant to § 64.1001, that includes a settlement rate that is at or below the Commission's benchmark settlement rate adopted for that country in IB Docket No. 96–261, Report and Order, 12 FCC Rcd 19,806, 62 FR 45758, Aug. 29, 1997, available on the International Bureau's World Wide Web site at *http://www.fcc.gov/ib.*

(d) A carrier or other party may request Commission intervention on any U.S. international route for which competitive problems are alleged by filing with the International Bureau a petition, pursuant to this section, demonstrating anticompetitive behavior that is harmful to U.S. customers. The Commission may also act on its own motion. Carriers and other parties filing complaints must support their petitions with evidence, including an affidavit and relevant commercial agreements. The International Bureau will review complaints on a case-by-case basis and take appropriate action on delegated authority pursuant to § 0.261 of this chapter. Interested parties will have 10 days from the date of issuance of a public notice of the petition to file comments or oppositions to such petitions and subsequently 7 days for replies. In the event significant, immediate harm to the public interest is likely to occur that cannot be addressed through post facto remedies, the International Bureau may impose temporary requirements on carriers authorized pursuant to § 63.18 of this chapter without prejudice to its findings on such petitions.

* * * * *

[FR Doc. 2011–17368 Filed 7–18–11; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2010–0047; MO 92210–0–0008]

Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List Pinus albicaulis as Endangered or Threatened With Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list *Pinus albicaulis* (whitebark pine) as threatened or endangered and to designate critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of all available scientific and commercial information, we find that listing *P. albicaulis* as threatened or endangered is warranted. However, currently listing *P. albicaulis* is precluded by higher priority actions to amend the Lists of Endangered and Threatened Wildlife and Plants. Upon publication of this 12-month petition finding, we will add *P. albicaulis* to our candidate species list. We will develop a proposed rule to list *P. albicaulis* as our priorities and funding will allow. We will make any determination on critical habitat during development of the proposed listing rule. In any interim period, we will address the status of the candidate taxon through our annual Candidate Notice of Review.

DATES: The finding announced in this document was made on July 19, 2011.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R6–ES–2010–0047. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Wyoming Ecological Services Field Office, 5353 Yellowstone Road, Suite 308A, Cheyenne, WY 82009. Please submit any new information, materials, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: R. Mark Sattelberg, Field Supervisor, Wyoming Ecological Services Field Office (see **ADDRESSES**); by telephone at 307–772–2374; or by facsimile at 307–772–2358. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that, for any petition to revise the Federal Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific or commercial information that listing a species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding, we determine whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Federal Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register.**

Previous Federal Actions

On February 5, 1991, the Great Bear Foundation of Missoula, Montana, petitioned the Service to list *Pinus albicaulis* under the Act, stating the species was rapidly declining due to impacts from mountain pine beetles, white pine blister rust, and fire suppression. After reviewing the petition, we found that the petitioner had not presented substantial information indicating that listing *P. albicaulis* may be warranted. We published this finding in the **Federal Register** on January 27, 1994 (59 FR 3824).

On December 9, 2008, we received a petition dated December 8, 2008, from the Natural Resources Defense Council (NRDC) requesting that we list *Pinus albicaulis* as endangered throughout its range and designate critical habitat under the Act. The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required by 50 CFR 424.14(a). Included in this petition was supporting information regarding the species' natural history, biology, taxonomy, lifecycle, distribution, and reasons for decline. The NRDC reiterated the threats from the 1991 petition, and included climate change and successional replacement as additional threats to *P. albicaulis.* In a January 13, 2009, letter to NRDC, we responded that we had reviewed the information presented in the petition and determined that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act was not warranted. We also stated that we could not address the petition promptly because of staff and budget limitations. We indicated that we would process a 90-day petition finding as quickly as possible.

On December 23, 2009, we received NRDC's December 11, 2009, notice of intent to sue over our failure to respond to the petition to list *Pinus albicaulis* and designate critical habitat. We responded in a letter dated January 12, 2010, indicating that other preceding listing actions had priority, but that we expected to complete the 90-day finding during the 2010 Fiscal Year. On February 24, 2010, we received a formal complaint from NRDC for our failure to comply with issuing a 90-day finding on the petition. On May 7, 2010, we responded in writing to the formal complaint and provided answers to their claims and allegations.

We completed a 90-day finding on the petition, which was published in the **Federal Register** on July 20, 2010 (75 FR 42033). In that finding we determined that the petition presented substantial information such that listing *Pinus albicaulis* may be warranted, and announced that we would be conducting a status review of the species. We opened a 60-day information collection period to allow all interested parties an opportunity to provide information on the status of *Pinus albicaulis* (75 FR 42033), and received 20 letters from the public.

This 12-month finding is based on our consideration and evaluation of the best scientific and commercial information available. We reviewed the information provided in NRDC's petition, information available in our files, other available published and unpublished information, and information received from the public. Additionally, we consulted with recognized Federal and non-Federal *Pinus albicaulis* experts, plant pathologists, and plant geneticists. All information received has been carefully considered in this finding.

Funding was made available during the 2010 and 2011 Fiscal Years for work on the status review. This notice constitutes our 12-month finding on the December 9, 2008, petition to list *Pinus albicaulis* as endangered throughout its range and designate critical habitat under the Act.

Species Information

Taxonomy and Life History

Pinus albicaulis Engelm. (whitebark pine) is a 5-needled conifer species placed in the subgenus *Strobus,* which also includes other 5-needled white pines. This subgenus is further divided into two sections (*Strobus* and *Parrya*), and under section *Strobus,* into two subsections (*Cembrae* and *Strobi*). The traditional taxonomic classifications placed *P. albicaulis* in the subsection *Cembrae* with four other Eurasian stone pines (Critchfield and Little 1966, p. 5; Lanner 1990, p. 19). However, recent phylogenetic studies (Liston *et al.* 1999, 2007; Syring *et al.* 2005, 2007; as cited in Committee on the Status of Endangered Wildlife in Canada (COSEWIC) 2010, p. 4) showed no difference in monophyly (ancestry) between subsection *Cembrae* and subsection *Strobi* and merged them to form subsection *Strobus.* No taxonomic subspecies or varieties of *P. albicaulis* are recognized (COSEWIC 2010, p. 6). Based on this taxonomic classification information, we recognize *P. albicaulis* as a valid species and a listable entity.

Pinus albicaulis is typically 5 to 20 meters (m) (16 to 66 feet (ft)) tall with a rounded or irregularly spreading crown shape. On higher density conifer sites, *P. albicaulis* tends to grow as tall, single-stemmed trees, whereas on open, more exposed sites, it tends to have multiple stems (McCaughey and Tomback 2001, pp. 113–114). Above tree line, it grows in a krummholz form (stunted, shrub-like growth) (Arno and Hoff 1989, p. 6). This pine species is monoecious, (both male pollen and female seed cones are on the same tree). Its characteristic dark brown to purple seed cones are 5 to 8 centimeters (cm)

(2 to 3 inches (in.)) long and grow at the outer ends of upper branches (Hosie 1969, p. 42).

Stone pines (so-called for their stone-like seeds) include five species worldwide, and *Pinus albicaulis* is the only stone pine that occurs in North America (McCaughey and Schmidt 2001, p. 30). Characteristics of stone pines include five needles per cluster, indehiscent seed cones (scales remain essentially closed at maturity) that stay on the tree, and wingless seeds that remain fixed to the cone and cannot be dislodged by the wind. Because *P. albicaulis* seeds cannot be wind-disseminated, primary seed dispersal occurs almost exclusively by Clark's nutcrackers (*Nucifraga columbiana*) in the avian family Corvidae (whose members include ravens, crows, and jays) (Lanner 1996, p. 7; Schwandt 2006, p. 2). Consequently, Clark's nutcrackers facilitate *P. albicaulis* regeneration and influence its distribution and population structure through their seed caching activities (Tomback *et al.* 1990, p. 118).

Pinus albicaulis is a hardy conifer that tolerates poor soils, steep slopes, and windy exposures and is found at alpine tree line and subalpine elevations throughout its range (Tomback *et al.* 2001, pp. 6, 27). It grows under a wide range of precipitation amounts, from about 51 to over 254 cm (20 to 100 in.) per year (Farnes 1990, p. 303). *Pinus albicaulis* may occur as a climax species, early successional species, or seral (mid-successional stage) co-dominant associated with other tree species. Although it occurs in pure or nearly pure stands at high elevations, it typically occurs in stands of mixed species in a variety of forest community types.

Pinus albicaulis is a slow-growing, long-lived tree with a life span of up to 500 years and sometimes more than 1,000 years (Arno and Hoff 1989, pp. 5–6). It is considered a keystone, or foundation species in western North America where it increases biodiversity and contributes to critical ecosystem functions (Tomback *et al.* 2001, pp. 7–8). As a pioneer or early successional species, it may be the first conifer to become established after disturbance, subsequently stabilizing soils and regulating runoff (Tomback *et al.* 2001, pp. 10–11). At higher elevations, snow drifts around *P. albicaulis* trees, thereby increasing soil moisture, modifying soil temperatures, and holding soil moisture later into the season (Farnes 1990, p. 303). These higher elevation trees also shade, protect, and slow the progression of snowmelt, essentially reducing spring flooding at lower elevations. *Pinus albicaulis* also provides important, highly nutritious seeds for a number of birds and mammals (Tomback *et al.* 2001, pp. 8, 10).

Pinus albicaulis trees are capable of producing seed cones at 20–30 years of age, although large cone crops usually are not produced until 60–80 years (Krugman and Jenkinson 1974, as cited in McCaughey and Tomback 2001, p. 109). Therefore, the generation time of *P. albicaulis* is approximately 60 years (COSEWIC 2010, p. v). Like many other species of pines, *P. albicaulis* exhibits masting, in which populations synchronize their seed production and provide varying amounts from year to year. During years with high seed production, typically once every 3–5 years in *P. albicaulis* (McCaughey and Tomback 2001, p. 110), seed consumers are satiated, resulting in excess seeds that escape predation (Lorenz *et al.* 2008, pp. 3–4). *Pinus albicaulis* seed predators are numerous and include more than 20 species of vertebrates including Clark's nutcracker (*Nucifraga columbiana*), pine squirrels (*Tamiasciurus spp.*), grizzly bears (*Ursus arctos*), black bears (*Ursus americanus*), Steller's Jay (*Cyanocitta stelleri*), and Pine Grosbeak (*Pinicola enucleator*) (Lorenz *et al.* 2008, p. 3). Seed predation plays a major role in *P. albicaulis* population dynamics, as seed predators largely determine the fate of seeds. However, *P. albicaulis* has co-evolved with seed predators and has several adaptations, like masting, that has allowed the species to persist despite heavy seed predation (Lorenz *et al.* 2008, p. 3–4).

Seeds not retrieved by Clark's nutcrackers or other seed predators are subsequently available for germination when conditions are favorable (McCaughey and Tomback 2001, p. 111). In years with low seed production, most seeds are predated and, therefore, unavailable for germination (Lorenz *et al.* 2008, p. 4). A single nutcracker can cache up to an estimated 98,000 *P. albicaulis* seeds during good seed crop years (Hutchins and Lanner 1982, p. 196). They may bury seeds near parent trees or travel up to 22 kilometers (km) (14 miles (mi)) away at varying elevations. Cache sites have been found to occur on forest floors, above treeline, in rocky outcrops, meadow edges, clearcuts, and burned areas (Tomback *et al.* 1990, p. 120). *Pinus albicaulis* seedlings have highly variable survival rates; seedlings originating from nutcracker caches ranged from 56 percent survival over the first year to 25 percent survival by the fourth year (Tomback 1982, p. 451).

While *Pinus albicaulis* is almost exclusively dependent upon Clark's nutcracker for seed dispersal, the reverse is not true as Clark's nutcracker forage on seeds from numerous species of pine. The frequency of nutcracker occurrence and probability of seed dispersal from a *P. albicaulis* forest is strongly associated with the number of available cones. A threshold of 1,000 cones per hectare (ha) (2.47 acres (ac)) is needed for a high likelihood of seed dispersal by nutcrackers, and this level of cone production occurs in forests with a live basal area (the volume of wood occurring in a given area) greater than 5 square meters (m) per ha (McKinney *et al.* 2009, p. 603). For an adult Clark's nutcracker to survive a subalpine winter (accounting for those seeds consumed by rodents and those fed to juvenile nutcrackers), it would need to cache seeds from 767 to 2,130 cones (McKinney *et al.* 2009, p. 605). Clark's nutcrackers are able to assess cone crops, and if there are insufficient seeds to cache, they will emigrate in order to survive (McKinney *et al.* 2009, p. 599).

Distribution

Pinus albicaulis occurs in scattered areas of the warm and dry Great Basin but it typically occurs on cold and windy high-elevation or high-latitude sites in western North America. As a result, many stands are geographically isolated (Arno and Hoff 1989, p. 1; Keane *et al.* 2010, p. 13). Its range extends longitudinally between 107 and 128 degrees west and latitudinally between 27 and 55 degrees north (McCaughey and Schmidt 2001, p. 33). The distribution of *P. albicaulis* includes coastal and Rocky Mountain ranges that are connected by scattered populations in northeastern Washington and southeastern British Columbia (Arno and Hoff 1990, p. 268; Keane *et al.* 2010, p. 13). The coastal distribution of *P. albicaulis* extends from the Bulkley Mountains in British Columbia to the northeastern Olympic Mountains and Cascade Range of Washington and Oregon, to the Kern River of the Sierra Nevada Range of east-central California (Arno and Hoff 1990, p. 268). Isolated stands of *P. albicaulis* are known from the Blue and Wallowa Mountains in northeastern Oregon and the subalpine and montane zones of mountains in northeastern California, south-central Oregon, and northern Nevada (Arno and Hoff 1990, p. 268; Keane *et al.* 2010, p. 13). The Rocky Mountain distribution of *P. albicaulis* ranges from northern British Columbia and Alberta to Idaho, Montana, Wyoming, and Nevada (Arno and Hoff 1990, p. 268; Keane *et al.* 2010,

p. 13), with extensive stands occurring in the Yellowstone ecosystem (McCaughey and Schmidt 2001, p. 33). The Wind River Range in Wyoming is the eastern most distribution of the species (Arno and Hoff 1990, p. 268; McCaughey and Schmidt 2001, p. 33) (Figure 1).

BILLING CODE 4310–58–P

Figure 1.—Estimated *Pinus albicaulis* range distribution (Little, 1971).

BILLING CODE 4310–58–C

In general, the upper elevational limits of *Pinus albicaulis* decrease with increasing latitude throughout its range (McCaughey and Schmidt 2001, p. 33). The elevational limit of the species ranges from approximately 900 m (2,950 ft) at its northern limit in British Columbia up to 3,660 m (12,000 ft) in the Sierra Nevada (McCaughey and Schmidt 2001, p. 33). *Pinus albicaulis* is typically found growing at alpine timberline or with other high-mountain conifers just below the timberline and upper montane zone (Arno and Hoff 1990, p. 270; McCaughey and Schmidt 2001, p. 33). In the Rocky Mountains, common associated tree species include *P. contorta* var. *latifolia* (lodgepole pine), *Picea engelmannii* (Engelmann spruce), *Abies lasiocarpa* (subalpine fir), and *Tsuga mertensiana* (mountain hemlock). Common associated tree species are similar in the Sierra Nevada and Blue and Cascade Mountains,

except lodgepole pine is present as *P. contorta var. murrayana* (Sierra-Cascade lodgepole pine) and mountain hemlock is absent from the Blue Mountains (Arno and Hoff 1990, p. 270; McCaughey and Schmidt 2001, pp. 33–34).

Roughly 44 percent of the species' range occurs in the United States, with the remaining 56 percent of its range occurring in British Columbia and Alberta, Canada (COSEWIC 2010, p. iv). In Canada, the majority of the species' distribution occurs on private lands (Achuff 2010, pers. comm.). In the United States, approximately 96 percent of land where the species occurs is federally owned or managed. The majority is located on U.S. Forest Service (USFS) lands (approximately 81 percent, or 4,698,388 ha (11,609,969 ac)). The bulk of the remaining acreage is located on National Park Service (NPS) lands (approximately 13 percent, or 740,391 ha (1,829,547 ac)). Small amounts of *P. albicaulis* also can be found on Bureau of Land Management lands (approximately 2 percent, or 119,598 ha (295,534 ac)). The remaining 4 percent is under non-Federal ownership.

Trends

Mortality data collected in multiple studies throughout the range of *Pinus albicaulis* strongly suggests that the species is in range-wide decline (Table 1). Although the majority of available data was collected in the last several decades, the decline in *P. albicaulis* populations likely began sometime following the 1910 introduction of the exotic disease white pine blister rust. Although we do not have a study that quantifies the rate of decline across the entire range, we conclude that the preponderance of data from the studies listed below and elsewhere in this status review provides evidence of a substantial and pervasive decline throughout almost the entire range of the species.

TABLE 1—SUMMARY OF RESULTS FROM STUDIES DOCUMENTING THE DECLINE OF PINUS ALBICAULIS IN THE UNITED STATES AND CANADA

[Adapted from Keane *et al.* 2010, p. 127]

Study year	Geographic area	Percent decline	Source
	United States		
1992	Southern Bitterroot National Forest	14	Arno *et al.* (1993).
1992	Western Montana	51	Keane and Arno (1993).
1993	Bob Marshall Wilderness	44	Keane *et al.* (1994).
1995	Eastern Cascades	2	Hadfield *et al.* (1996).
1996	Bitterroot National Forest	29	Hartwell and Alaback (1997).
1997	Intermountain Region	1	Smith and Hoffman (1998, 2000).
2000	Selkirk Mountains	34	Kegley *et al.* (2001).
2001	Umpqua National Forest	10	Goheen *et al.* (2002).
2003	Western Cascades, Washington	41	Shoal and Aubry (2004).
2003	Eastern Cascades	16	Shoal and Aubry (2004).
2005	Washington, Oregon	35	Summary of multiple studies in Ward *et al.* (2006).
2007	Oregon, Washington	21	Shoal (2007).
2008	Mt. Rainier, North Cascades	31	Rochefort (2008).
2008	Greater Yellowstone	70	Bockino (2008).
2008	Glacier National Park	60	Smith *et al.* (2008).
2008	Central Idaho	31	Hicke and Logan (2009).
	Canada		
1997	British Columbia	21	Campbell (1998); Campbell and Antos (2003).
2001	British Columbia	19	Zeglen (2002, 2007).
2007	Canadian Rocky Mountains	57	Smith *et al.* (2008).

In Canada, based on current mortality rates, it is anticipated that *Pinus albicaulis* will decline by 57 percent by 2100 (COSEWIC 2010, p. 19). The value for this anticipated decline is likely an underestimate, as it assumes current mortality rates remain constant into the foreseeable future. Past trends have shown that mortality rates have been increasing over the last several decades (this is discussed in more detail under Factor C, Disease or Predation). The range of mortality rates for *P. albicaulis* in the United States are similar to those in Canada, which suggests that the anticipated rates of decline will be similar.

Summary of Information Pertaining to the Five Factors

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to *Pinus albicaulis* in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

In considering what factors might constitute threats to a species, we must look beyond the exposure of the species to a particular factor to evaluate whether the species may respond to that factor in a way that causes actual impacts to the species. If there is exposure to a factor and the species responds negatively, the factor may be a threat, and, during the status review, we attempt to determine how significant a

threat it is. The threat is significant if it drives, or contributes to, the risk of extinction of the species such that the species warrants listing as endangered or threatened as those terms are defined in the Act. However, the identification of factors that could impact a species negatively may not be sufficient to compel a finding that the species warrants listing. The information must include evidence sufficient to suggest that these factors are operative threats that act on the species to the point that the species may meet the definition of endangered or threatened under the Act.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

Fire and Fire Suppression

Fire is one of the most important landscape-level disturbance processes within high-elevation *Pinus albicaulis* forests (Agee 1993, p. 259; Morgan and Murray 2001, p. 238; Spurr and Barnes 1980, p. 422), and has been important to perpetuating early seral (successional stage) *P. albicaulis* communities (Arno 2001, p. 82; Shoal *et al.* 2008, p. 20). Without regular disturbance, primarily from fire, these forest communities follow successional pathways that eventually lead to dominance by shade-tolerant conifers such as *Abies lasiocarpa, Picea engelmannii,* and *Tsuga mertensiana,* to the exclusion of *P. albicaulis* (Keane and Parsons 2010, p. 57). When fire is present on the landscape, *P. albicaulis* has an advantage over its competitors for several reasons (Keane and Parsons 2010, p. 57). The Clark's nutcracker serves as the main dispersal agent for *P. albicaulis* by caching seeds in disturbed sites, such as burns. Fire creates sites that are suitable for this seed caching behavior and that most importantly contain optimal growing conditions for *P. albicaulis* (Tomback *et al.* 2001, p. 13). In addition, Clark's nutcrackers can disperse seeds farther than the wind-dispersed seeds of other conifers, thereby facilitating *P. albicaulis* succession in burned sites over a broad geographic area (McCaughey *et al.* 1985, Tomback *et al.* 1990, 1993 in Keane and Parsons 2010, p. 58). Additionally, *P. albicaulis* has thicker bark, a thinner crown, and a deeper root system, which allow it to withstand low-intensity fires better than many of its competitors (Arno and Hoff 1990 in Keane and Parsons 2010, p. 58). Historically, fire has been an important factor in maintaining healthy stands of *P. albicaulis* on the landscape.

Fires in the high-elevation ecosystem of *Pinus albicaulis* can be of low intensity, high intensity, or mixed intensity. These varying intensity levels result in very different impacts to *P. albicaulis* communities. Low-intensity, surface-level ground fires occur frequently under low-fuel conditions. These fires remove small-diameter, thin-barked seedlings and allow large, mature trees to thrive (Arno 2001, p. 82). Low-intensity fires also reduce fuel loads and competition from fire-susceptible conifers, shrubs, and grasses, thereby opening up spaces necessary for the shade-intolerant *P. albicaulis* to regenerate and thus maintain prominence in seral communities (Arno 1986 in Keane *et al.* 1994, p. 215). High-intensity fires occur where high fuel loads, ladder fuels (vegetation below the crown level of forest trees, which allows fire to move from the forest floor to tree crowns), and other compounding conditions result in increased flammability (Agee 1993, p. 258). High-intensity fires, often referred to as stand replacement fires, or crown fires (Agee 1993, p. 16), produce intensive heat, resulting in the removal of all or most of the vegetation from the ground. High-intensity fires begin the process of vegetative succession by opening seed beds that become available for the establishment and development of shade-intolerant species like *P. albicaulis.* High-intensity fires are generally less frequent because it takes longer time intervals to build the large fuel accumulations necessary to promote these types of fires (Agee 1993, p. 258). Mixed-intensity fires are most common and result in a mosaic of dead trees, live trees, and open sites for regeneration (Arno 1980, p. 460; Keane 2001a, p. 17). In general, historical fire return intervals in *P. albicaulis* communities have been estimated at between 50 and 300 years (Arno 1980, p. 461).

Beginning in the 1930s, a policy of fire suppression was effectively implemented by the USFS (Arno 1980, p. 460; USFS 2000, p. 1). During the 1970s, in recognition of the importance of wildfire to maintenance of healthy forests, the USFS began a policy shift away from total fire suppression (Cohen 2008, p. 21; USFS 2000, p. 1). However, despite this shift, fire suppression is still carried out, most frequently in areas where a threat to human health and safety are anticipated, and we expect this trend of fire suppression to continue into the future (Arno 1980, p. 460; Cohen 2008, p. 21; Keane 2011a, pers. comm.).

Fire suppression has had unintended negative impacts on *Pinus albicaulis* populations (Keane 2001a, entire), due to this shift from a natural fire regime to a managed fire regime. Stands once dominated by *P. albicaulis* have undergone succession to more shade-tolerant conifers (Arno *et al.* 1993 in Keane *et al.* 1994, p. 225; Flanagan *et al.* 1998, p. 307). Once shade-tolerant conifer species become firmly established, the habitat is effectively lost to *P. albicaulis* until a disturbance like fire once again opens the area for *P. albicaulis* regeneration. Determining the total amount of *P. albicaulis* habitat lost to succession rangewide is difficult, as there is seldom a historic baseline for comparison, and the degree of succession is very specific to local conditions (Keane 2011a, pers. comm.). Shade-tolerant conifer species grow more densely than shade-intolerant conifer species like *P. albicaulis* (Minore 1979, p. 3). Denser stands eliminate the open sites that are often used by Clark's nutcracker for seed caching and which are also the sites required to facilitate the regeneration of the shade-intolerant *P. albicaulis.* Additionally, the growth of more homogeneously structured stands with continuous crowns and increased surface fuels has resulted in fires that are larger and more intense (Keane 2001b, p. 175).

Pinus albicaulis cannot withstand high-intensity fires; during such fires, all age and size classes can be killed. However, newly burned areas provide a seedbed for *P. albicaulis,* and if stands of unburned cone-producing *P. albicaulis* are nearby (i.e., within the range of Clark's nutcracker caching behavior), Clark's nutcrackers will cache those seeds on the burned site, and regeneration is very likely. However, the introduction of the disease white pine blister rust and the current epidemic of the predatory mountain pine beetle (*Dendroctonus ponderosae*) have reduced or effectively eliminated *P. albicaulis* seed sources on a landscape scale (see Factor C, Disease or Predation). Although there is variation in the degree to which specific stands have been impacted, over the range of *P. albicaulis* the widespread incidence of poor stand health from disease and predation, coupled with changes in fire regimes, means that regeneration of *P. albicaulis* following fire is unlikely in many cases (Tomback *et al.* 2008, p. 20).

Fire and Fire Suppression and the Interaction of Other Factors

Environmental changes resulting from climate change are expected to exacerbate the already observed negative effects of fire suppression (i.e., forest succession, increased fire intensity) (see the Climate Change section below). These environmental

changes are predicted to increase the number, intensity, and extent of wildfires (Aubry *et al.* 2008, p. 6; Keane 2001b, p. 175). Already, large increases in wildfire have been documented and are particularly pronounced in Northern Rockies forests, which account for 60 percent of documented increases in large fires (Westerling *et al.* 2006, p. 941, 943). Some of the increase has been independent of past management activities and, thus, appears to be a direct result of warming trends in the last several decades (Westerling *et al.* 2006, p. 943).

Fire suppression is also expected to negatively interact with white pine blister rust and mountain pine beetle predation. As forests become more dense, individual *Pinus albicaulis* are more vulnerable to white pine blister rust and infestation by mountain pine beetle (see Factor C, Disease and Predation). As mortality from white pine blister rust and mountain pine beetle increase, forest succession to more dense stands of shade-tolerant conifers is accelerated (Keane 2011a, pers. comm.).

Summary of Impacts of Fire and Fire Suppression

Fire suppression results in conditions that favor the dominance of shade-tolerant species such as *Abies lasiocarpa, Picea engelmannii,* and *Tsuga mertensiana,* which form dense stands that eventually exclude *Pinus albicaulis* (Agee 1993, p. 252; Arno 2001, p. 83). We assume that fire suppression efforts that create these impacts will continue to occur into the future. Where *P. albicaulis* persists, dense forest structure crowds and stresses individual trees, making them more susceptible to white pine blister rust, infestation by mountain pine beetle, and mortality. Succession to more shade-tolerant species also results in less *P. albicaulis* regeneration because *P. albicaulis* is shade-intolerant, and seeds will not survive if cached in heavily shaded forest stands. The interaction between fire suppression and environmental effects from climate change exacerbates the impacts to *P. albicaulis,* and in the future will be particularly devastating to *P. albicaulis* populations as *P. albicaulis* seed sources are expected to become increasingly limited by continued impacts from white pine blister rust and mountain pine beetle.

The balance of a natural fire regime with related vegetative successive processes has been disrupted across the *Pinus albicaulis* ecosystem. As a result, *Pinus albicaulis* has lost its competitive advantage and trends indicate its presence has been reduced on the landscape. Because there is seldom a historic baseline for comparison and the degree of succession is very locally specific, we are not able to quantify what portion of the species decline can be attributed to fire management and changes in fire regimes. However, we consider the current fire regime and fire management practices to be threats that limit the abundance of the species and weaken *P. albicaulis* communities, such that other factors create additional negative impacts to the species.

The effects of changing fire regimes and fire suppression on *Pinus albicaulis,* combined with the interaction of white pine blister rust and mountain pine beetles, have created more homogenous forest stands with reduced numbers of *P. albicaulis* compared to historic subalpine landscapes. These effects are becoming more pronounced with climate change (Morgan and Murray 2001, p. 300), creating a trajectory toward forest stands without *P. albicaulis.* The species appears likely to be in danger of extinction, or likely to become so within the foreseeable future, because of habitat losses due to changes to the fire regime, particularly when viewed in combination with climate change, disease, and predation.

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) was established in 1988 by the World Meteorological Organization and the United Nations Environment Program in response to growing concerns about climate change and, in particular, the effects of global warming. Although the extent of warming likely to occur is not known with certainty at this time, the IPCC has concluded that warming of the climate is unequivocal, and that continued greenhouse gas emissions at or above current rates will cause further warming (IPCC 2007, p. 30). Climate change scenarios estimate that the mean air temperature could increase by over 3 °C (5.4 °F) by 2100 (IPCC 2007, p. 46). The IPCC also projects that there will very likely be regional increases in the frequency of hot extremes, heat waves, and heavy precipitation (IPCC 2007, p. 46), as well as increases in atmospheric carbon dioxide (IPCC 2007, p. 36).

We recognize that there are scientific differences of opinion on many aspects of climate change, including the role of natural variability in climate. In our analysis, we rely primarily on synthesis documents (e.g., IPCC 2007; Global Climate Change Impacts in the United States 2009) that present the consensus view of a very large number of experts on climate change from around the world. We have found that these synthesis reports, as well as the scientific papers used in those reports or resulting from those reports, represent the best available scientific information we can use to inform our decision and have relied upon them and provided citations within our analysis.

Direct habitat loss from climate change is anticipated to occur with current habitats becoming unsuitable for *P. albicaulis* as temperatures increase and soil moisture availability decreases (Hamman and Wang 2006, p. 2783; Schrag *et al.* 2007, p. 8; Aitken *et al.* 2008, p. 103). Habitat loss is expected because (1) temperatures become so warm that they exceed the thermal tolerance of *P. albicaulis* and the species is unable to survive or (2) warmer temperatures favor other species of conifer that currently cannot compete with *P. albicaulis* in cold high-elevation habitats. *Pinus albicaulis* is widely distributed and thus likely has a wide range of tolerance to varying temperatures (Keane 2011c, pers.comm.). Therefore, increasing competition from other species that can not normally persist in current *P. albicaulis* habitats is possibly the more probable climate-driven mechanism for habitat loss.

Given the anticipated loss of suitable habitat, *P. albicaulis* persistence will likely be dependent on the species' ability to either migrate to new suitable habitats, or adapt to changing conditions (Aitken *et al.* 2008, p. 95). Historical (paleoecological) evidence indicates that plant species have generally responded to past climate change through migration, and that adaptation to changing climate conditions is less likely to occur (Bradshaw and McNeilly 1991, p. 12; Huntley 1991, p. 19). Adaptation to a change in habitat conditions as a result of a changing climate is even more unlikely for *P. albicaulis,* given its very long generation time of approximately 60 years (Bradshaw and McNeilly 1991, p. 10). The rate of latitudinal plant migration during past warming and cooling events is estimated to have been on the order of 100 m (328 ft) per year (Aitken *et al.* 2008, p. 96). Given the current and anticipated rates of global climate change, migration rates will potentially need to be substantially higher than those measured in historic pollen records to sustain the species over time. A migration rate of at least a magnitude higher (1,000 m (3,280 ft)) per year is estimated to be necessary in order for tree species to be capable of tracking suitable habitats under projected warming trends (Malcolm *et*

al. 2002, entire). Latitudinal migration rates on this scale may significantly exceed the migration abilities of many plant species, including *P. albicaulis* (Malcolm *et al.* 2002, p. 844–845; McKenney *et al.* 2007, p. 941).

Pinus albicaulis may have an advantage in its ability to migrate given that its seeds are dispersed by Clark's nutcracker. As mentioned above, Clark's nutcrackers can disperse seeds farther than the wind-dispersed seeds of other conifers (McCaughey *et al.* 1985, Tomback *et al.* 1990, 1993 in Keane and Parsons 2010, p. 58). However, migration of *P. albicaulis* to the north may be impeded by the disease white pine blister rust, which is currently present at the northern range limits of *P. albicaulis* (Smith *et al.* 2008, Figure 1, p. 984; Resler and Tomback 2008, p. 165).

Pinus albicaulis already is typically the first species to establish on cold, exposed high-elevation sites, thus the species could potentially migrate higher in elevation to more suitable habitats. Shifts in the optimum elevation for many high-elevation plant species have already been documented under current warming trends (Lenoir *et al.* 2008, p. 1770). However, elevational migration as a refuge from temperature increase has limits, because eventually, suitable habitat may not be present even on mountaintops due to continuing temperature increases.

Climate change is expected to significantly decrease the probability of rangewide persistence of *Pinus albicaulis.* Projections from an empirically based bioclimatic model for *P. albicaulis* showed a rangewide distribution decline of 70 percent and an average elevation loss of 333 m (1,093 ft) for the decade beginning in 2030 (Warwell *et al.* 2007, p. 2). At the end of the century, less than 3 percent of currently suitable habitat is expected to remain (Warwell *et al.* 2007, p. 2). Similarly, climate envelope modeling on *P. albicaulis* distribution in British Columbia estimated a potential decrease of 70 percent of currently suitable habitat by the year 2055 (Hamman and Wang 2006, p. 2783). The area occupied by *P. albicaulis* in the Greater Yellowstone Ecosystem also is predicted to be significantly reduced with increasing temperature under various climate change scenarios (Schrag *et al.* 2007, p. 6). *Pinus albicaulis* is predicted to be nearly extirpated under a scenario of warming only and warming with a concomitant increase in precipitation (Schrag *et al.* 2007, p. 7).

The above studies all suggest that the area currently occupied by *P. albicaulis* will be severely reduced in the foreseeable future. We recognize, however, that there are many limitations to such modeling techniques, specifically for *P. albicaulis.* For example, climate envelope models use current environmental conditions in the distribution of the species' range to determine whether similar environmental conditions will be available in the future given predicted climate change. *Pinus albicaulis,* however, is a very long-lived species, and current environmental conditions may not closely resemble environmental conditions present when the trees currently on the landscape were established (Keane 2001c, pers. comm.). Additionally, these models also describe current environmental variables in averages taken over large areas. *Pinus albicaulis* may experience very different environmental conditions even over a small range as individuals can be separated by thousands of meters (Keane 2011c, pers. comm.).

Climate Change and the Interaction of Other Factors

In addition to direct habitat loss, *Pinus albicaulis* is expected to experience decrease in population size from synergistic interactions between habitat changes as a result of climate change and other threat factors including altered fire regimes, disease, and predation. *Pinus albicaulis* has evolved with fire, and under many conditions, fire is beneficial to the species (see Fire and Fire Suppression above). However, environmental changes resulting from climate change are expected to alter fire regimes resulting in increased fire intervals, increased fire severity, and habitat loss (Westerling *et al.* 2006, p. 943).

Pinus albicaulis also evolved with the predatory native mountain pine beetle (*Dendroctonus ponderosae*). However, the life cycle of the mountain pine beetle is temperature dependent, and warming trends have resulted in unprecedented mountain pine beetle epidemics throughout the range of *P. albicaulis* (the interaction of mountain pine beetle and *P. albicaulis* is discussed further below under Factor C, Predation) (Logan *et al.* 2003, p. 130; Logan *et al.* 2010, p. 896). At epidemic levels, mountain pine beetle outbreaks become stand-replacing events killing 80 to 95 percent of suitable host trees, and in many parts of the *P. albicaulis* range, those levels of mortality have already been reached (Gibson *et al.* 2008, p. 10). Even populations of *P. albicaulis* once considered mostly immune to mountain pine beetle epidemics are now being severely impacted; mountain pine beetles have now moved into areas previously climatically inhospitable for epidemic-level mountain pine beetle population growth (Carroll *et al.* 2003 in Gibson *et al.* 2008, p. 4; Raffa *et al.* 2008, p. 503; Logan *et al.* 2010, p. 895). Given ongoing and predicted environmental changes resulting from global climate change, we expect the expansion of habitat favorable to mountain pine beetle (and mountain pine epidemics) to continue into the foreseeable future.

Summary of Impacts of Climate Change

Given projected increases in temperature, a significant loss of the cool high-elevation habitats of *Pinus albicaulis* is expected. Rapid warming is likely to outpace the ability of *P. albicaulis* to migrate to suitable habitats. Additionally, adaptation to warming conditions for this long-lived species seems unlikely. Synergistic interactions between environmental changes resulting from climate change, wildfire, disease, and mountain pine beetle also are negatively impacting *P. albicaulis* rangewide. In particular, mountain pine beetle epidemics brought about by increasing temperatures are currently having significant negative impacts on *P. albicaulis* rangewide. The species appears likely to be in danger of extinction, or likely to become so within the foreseeable future, because of environmental changes resulting from climate change that are exacerbating other threats, particularly when viewed in combination with fire suppression, disease, and predation, that appear to be beyond the natural adaptive capabilities and tolerances of *P. albicaulis.*

Summary of Factor A

We analyzed the effects of fire and fire suppression and climate change as related to the present or threatened destruction, modification, or curtailment of the habitat or range of *Pinus albicaulis.* As identified in our analysis above, fire historically played an integral role in maintaining healthy stands of *P. albicaulis* on the landscape. As a result of past and present fire suppression, forest stands where *P. albicaulis* were once prominent have become dense stands of shade-tolerant conifers. This change in forest composition and structure combined with the exacerbating environmental effects resulting from climate change, has resulted in an increase in the severity, intensity, and frequency of wildfires. We expect that changing fire regimes and fire suppression efforts that create these impacts will continue to affect the species into the foreseeable future. *Pinus albicaulis* can regenerate, even following stand-replacing burns, if

a seed source is available. However, widespread predation and disease currently impacting *P. albicaulis* are limiting available seed sources, reducing the probability of regeneration following increasing wildfire episodes, and increasing the rate of forest succession.

The pace of predicted effect of climate change will outpace many plant species' ability to respond to the concomitant habitat changes. *Pinus albicaulis* is potentially particularly vulnerable to warming temperatures because it is adapted to cool, high-elevation habitats. Therefore, current and anticipated warming is expected to make its current habitat unsuitable for *P. albicaulis.* The rate of migration needed to respond to predicted environmental effects of climate change will be significant (Malcolm *et al.* 2002, p. 844–845; McKenney *et al.* 2007, p. 941). Whether *P. albicaulis* is capable of migrating at a pace sufficient to move to areas that may be more favorable to survival under future habitat conditions is not known. Moreover, the degree to which Clark's nutcracker could facilitate this migration is also not known. In addition, the presence of significant white pine blister rust infection in the northern range of *P. albicaulis* could serve as a barrier to effective northward migration. *P. albicaulis* survives at high altitudes already, so there is little remaining habitat for the species to migrate to higher elevations in response to warmer temperatures. Adaptation in response to a rapidly warming climate also is unlikely as *P. albicaulis* is a long-lived species. Climate models suggest that climate change is expected to act directly to significantly decrease the probability of rangewide persistence in *P. albicaulis* within the next 100 years. This time interval is less than two generations for this long-lived species. In addition, projected environmental changes resulting from climate change are a significant threat to *P. albicaulis,* because the impacts of these environmental effects interact with other stressors such as mountain pine beetle epidemics and wildfire, resulting in habitat loss and population decline.

On the basis of a review of the best scientific and commercial information available concerning present threats to *Pinus albicaulis* habitat, their synergistic effects, and their likely continuation in the future, we conclude that the present or threatened destruction, modification, or curtailment of its habitat or range is a threat to *P. albicaulis.*

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Commercial Harvest

Pinus albicaulis is not targeted for commercial timber production in any part of its range (Arno and Hoff 1989, p. 5; COSEWIC 2010, p. 12; Keane *et al.* 2010, p. 30). At lower elevations where *P. albicaulis* occurs with species of commercial interest, some incidental harvest of *P. albicaulis* does take place. The average yearly estimated harvest of *P. albicaulis* in the United States is less than 405 ha (1,000 ac) (Losensky 1990 in Keane *et al.* 2010, p. 30). We have no information to indicate that harvest is a significant threat to the species or is contributing to the rangewide decline, or decline in any portion of the range of *P. albicaulis.*

Recreational Use

Pinus albicaulis stands are subject to a variety of nonconsumptive recreational activities including hiking and camping. These activities have the potential to cause negative impacts in localized areas through degradation of habitat in areas experiencing overuse. However, we have no information to indicate that recreational use is a threat to *P. albicaulis.*

Scientific and Educational Use

Pinus albicaulis is the subject of many scientific research studies. Currently, there is significant interest in collecting seed cones from individuals identified as being resistant to white pine blister rust. Given the relatively low number of seeds being collected, it is highly unlikely that seed removal is contributing to *P. albicaulis* declines. We have no information to indicate that *P. albicaulis* is being used consumptively for educational purposes. Therefore, the best available scientific information does not indicate that scientific and educational uses are a significant threat to *P. albicaulis.*

Summary of Factor B

We conclude that the best scientific and commercial information available indicates that overutilization for commercial, recreational, scientific, or educational purposes is not a threat to *Pinus albicaulis.*

Factor C. Disease or Predation

Disease

White Pine Blister Rust

White pine blister rust is a disease of 5-needled pines caused by a nonnative fungus, *Cronartium ribicola* (Geils *et al.* 2010, p. 153). It was introduced into western North America in 1910 near Vancouver, British Columbia (McDonald and Hoff 2001, p. 198). White pine blister rust initially spread rapidly through maritime and montane environments, which have environmental conditions more conducive to spread of infection, but over several decades, it spread through continental and alpine environments throughout western North America (Geils *et al.* 2010, p. 163). White pine blister rust's rate and intensity of spread is influenced by microclimate and other factors (described below). Therefore, the incidence of white pine blister rust at stand, landscape, and regional scales varies due to time since introduction and environmental suitability for its development. It continues to spread into areas originally considered less suitable for persistence, and it has become a serious threat, causing severe population losses to several species of western pines, including *Pinus albicaulis, P. monticola* (western white pine), and *P. lambertiana* Dougl. (sugar pine) (Schwandt *et al.* 2010, pp. 226–230). Its current known geographic distribution in western North America includes all U.S. States (except Utah, as well as the Great Basin Desert) and British Columbia and Alberta, Canada (Tomback and Achuff 2010, pp. 187, 206).

The white pine blister rust fungus has a complex life cycle: It does not spread directly from one tree to another, but alternates between living primary hosts (i.e., 5-needle pines) and alternate hosts. Alternate hosts in western North America are typically woody shrubs in the genus *Ribes* (gooseberries and currants) but also may include herbaceous species of the genus *Pedicularis* (lousewort) and the genus *Castilleja* (paintbrush) (McDonald and Hoff 2001, p. 193; McDonald *et al.* 2006, p. 73). *Ribes* is widespread in North America and, while most species are susceptible to white pine blister rust infection, they vary in their susceptibility and capability to support innoculum (spores) that are infective to white pines, depending on factors such as habitat, topographic location, timing, and environment (Zambino 2010, pp. 265–268). A wide-scale Federal program to eradicate *Ribes* from the landscape was conducted from the 1920s to the 1960s. However, due to the abundance of *Ribes* shrubs, longevity of *Ribes* seed in the soil, and other factors, white pine blister rust continued to spread, and pathologists realized that eradication was ineffective in controlling white pine blister rust. White pine blister rust is now pervasive in high-altitude 5-

needled pines within most of the western United States (McDonald and Hoff 2001, p. 201).

White pine blister rust progresses through five spore stages to complete each generation: Two spore stages occur on white pine (*Pinus* spp.), and three stages occur on an alternate host. The five fungal spore stages require specific temperature and moisture conditions for production, germination, and dissemination. The spreading of spores depends on the distribution of hosts, the microclimate, and the different genotypes of white pine blister rust and hosts (McDonald and Hoff 2001, pp. 193, 202). Local meteorological conditions also may be important factors in infection success, infection periodicity, and disease intensity (Jacobi *et al.* 2010, p. 41).

On white pines, spores enter through openings in the needle surface, or stomates, and move into the twigs, branches, and tree trunk, causing swelling and cankers to form. White pine blister rust attacks seedlings and mature trees, initially damaging upper canopy and cone-bearing branches and restricting nutrient flows; it eventually girdles branches and trunks, leading to the death of branches or the entire tree (Tomback *et al.* 2001, p. 15, McDonald and Hoff 2001, p. 195). White pine blister rust can kill small trees within 3 years, and even one canker can be lethal. While some infected mature trees can continue to live for decades, their cone-bearing branches typically die, thereby eliminating the seed source required for reproduction (Geils *et al.* 2010, p. 156). In addition, the inner sapwood moisture decreases, making trees prone to desiccation and secondary attacks by insects (Six and Adams 2007, p. 351). Death to upper branches results in lower or no cone production and a reduced likelihood that seed will be dispersed by Clark's nutcrackers (McKinney and Tomback 2007, p. 1049). Similar to a total loss of cone production, even when cone production is low there could be a loss of regeneration for two reasons: (1) Clark's nutcrackers abandon sites with low seed production; and (2) the proportion of seeds taken by predators becomes so high that no seeds remain for regeneration (COSEWIC 2010, p. 25).

Each year that an infected tree lives, the white pine blister rust infecting it continues to produce spores, thereby perpetuating and intensifying the disease. A wave, or massive spreading, of new blister rust infections into new areas or intensification from a cumulative buildup in already-infected stands occurs where *Ribes* shrubs are abundant and when summer weather is favorable to spore production and dispersal. Spores can be produced on pines for many years, and appropriate conditions need to occur only occasionally for white pine blister rust to spread and intensify (Zambino 2010, p. 265). The frequency of wave years depends on various factors, including elevation, geographical region, topography, wind patterns, temperature, and genetic variation in the rust (Kendall and Keane 2001, pp. 222–223).

Because its abundance is influenced by weather and host populations, white pine blister rust also is affected by climate change. If conditions become moister, white pine blister rust will likely increase; conversely, where conditions become both warmer and drier, it may decrease. Because infection is usually through stomates, whatever affects the stomates affects infection rates (Kliejunas *et al.* 2009, pp. 19–20). Stomates close in drought conditions and open more readily in moist conditions.

In general, weather conditions favorable to the intensification of white pine blister rust occur more often in climates with coastal influences than in dry continental climates (Kendall and Keane 2001, p. 223). Due to current climate conditions in western North America, white pine blister rust now infects *Pinus albicaulis* populations throughout all of its range except for the interior Great Basin (Nevada and adjacent areas) (Tomback and Achuff 2010, Figure 1a, p. 187). However, the small uninfected area in the Great Basin accounts for only 0.4 percent of *P. albicaulis* distribution in the United States. The incidence of white pine blister rust is highest in the Rocky Mountains of northwestern Montana and northern Idaho, the Olympic and western Cascade Ranges of the United States, the southern Canadian Rocky Mountains, and British Columbia's Coastal Mountains (Schwandt *et al.* 2010, p. 228; Tomback *et al.* 2001, p. 15).

White Pine Blister Rust Infection Rates

Researchers have used various sampling methods to assess the effects of white pine blister rust on *Pinus albicaulis* and the amounts of infection present; therefore, exact comparisons between studies are not possible. While white pine blister rust occurs throughout almost all of *P. albicaulis'* range, not all trees are infected and infection rates vary widely. Furthermore, it can be difficult to detect white pine blister rust, especially if cankers occur on gnarled canopy branches where infections may remain undetected (Rochefort 2008, p. 294). However, despite slight differences in sampling methods general trends can be identified from the published literature (Schwandt *et al.* 2010, p. 228). Trends strongly indicate that white pine blister rust infections have increased in intensity over time and are now prevalent even in trees living in cold, dry areas originally considered less susceptible (Tomback and Resler 2007, p. 399), such as the Greater Yellowstone Ecosystem (Table 2).

TABLE 2—PERCENTAGE OF LIVE TREES WITH BLISTER RUST INFECTION ON PLOTS/TRANSECTS FROM RECENT SURVEYS

[Adapted from Schwandt 2006, Table 1, p. 5]

Geographic region—number of reports [reference]	Range of infection (%)	Mean (%)
British Columbia (rangewide) [Campbell and Antos 2000]	0–100	50.0
British Columbia (rangewide) [Zeglen 2002]	11–52.5	38.0
Northern Rocky Mountains (United States and Canada) [Smith *et al.* 2006]	0–100	43.6
Selkirk Mountains, northern Idaho—5 stands [Kegley *et al.* 2004]	57–81	70.0
Colville National Forest, northeast Washington—2 reports [Ward *et al.* 2006]	23–44	41.4
Greater Yellowstone Ecosystem [2005]	0–100	25.0
Intermountain West (Idaho, Nevada, Wyoming, California) [Smith and Hoffman 2000]	0–100	35.0
Blue Mountains, northeast Oregon [Ward *et al.* 2006]	0–100	64.0
Coast Range, Olympic Mountains, Washington—2 reports [Ward *et al.* 2006)	4–49	19.0
Western Cascades, Washington and Oregon—6 reports (Ward *et al.* 2006]	0–100	32.3
Eastern Cascades, Washington and Oregon—13 reports [Ward *et al.* 2006]	0–90	32.3
Coastal Mountains, southwest Oregon [Goheen *et al.* 2002]	0–100	52.0

TABLE 2—PERCENTAGE OF LIVE TREES WITH BLISTER RUST INFECTION ON PLOTS/TRANSECTS FROM RECENT SURVEYS—Continued

[Adapted from Schwandt 2006, Table 1, p. 5]

Geographic region—number of reports [reference]	Range of infection (%)	Mean (%)
California, Statewide [Maloney and Dunlap 2006]	0–71	11.7

While numerous studies have reported the incidence of white pine blister rust on *Pinus albicaulis* and subsequent mortality, few have reported on rates of change. The Greater Yellowstone Whitebark Pine Monitoring Working Group's monitoring results from resurveys conducted in 2008–2009 indicated an average of 32.4 percent of live trees had blister rust, a 12.4 percent increase from their overall 2007 baseline estimate of 20 percent (Greater Yellowstone Whitebark Pine Monitoring Working Group 2010, p. 67).

Additional information on trends has been reported for Canada. In the Canadian Rockies, stands surveyed in 2003 and 2004 had an overall infection level of 42 percent and 18 percent mortality. These were remeasured in 2009 and found to have increased to 52 percent infection and 28 percent mortality (Smith *et al.* 2010, p. 67). Infection and mortality from white pine blister rust were present in all stands, with the highest levels occurring in the southern portions of the study area. The high mortality and infection levels, high crown kill, and reduced regeneration potential in the southern portion of their study area suggests that long-term persistence of *P. albicaulis* is unlikely (Smith *et al.* 2008, p. 982).

Pinus albicaulis infected with white pine blister rust has increased in all regions of the Canadian Rockies, where it ranged from 7 to 70 percent in 2003–2004 to 13 to 83 percent in 2009. Further, based on current mortality rates, the estimated *P. albicaulis* population decline within 100 years is 78 percent in the Canadian Rockies, 97 percent in Waterton Lakes National Park, and 57 percent for all of Canada (COSEWIC 2010, p. viii and Table 4, p. 19). *Pinus albicaulis* was designated in April 2010 as endangered in Canada due to the high risk of extirpation. Based on these studies showing rates of change in the United States and Canada as well as the plethora of infection percentage data, we conclude that the trend of white pine blister rust infection is increasing rangewide.

Genetic Investigations of White Pine Blister Rust Resistance and Virulence

Genetic research and development on white pine blister rust resistance may offer the best long-term prospect for control (Kinloch, Jr. 2003, p. 1045); however, understanding the dynamics of resistance to white pine blister rust, as well as its virulence and evolution, is incomplete (Schwandt *et al.* 2010, p. 241; Richardson *et al.* 2010, p. 321). In *Pinus albicaulis,* some rust resistance has been documented on the landscape and in seeds, suggesting some level of heritable resistance (Hoff *et al.* 2001, p. 350; Mahalovich *et al.* 2006, p. 95). A limited number of *P. albicaulis* rust-resistance trials, in which seedlings are grown from rust-resistant seeds under varying conditions, have produced progeny seedlings with a range of resistance levels from 0 percent resistance in some areas to more than 40 percent resistance in other areas (Sniezko 2011, pers. comm.). In the northwestern United States, where white pine blister rust has infected trees for as long as 60 years or more, *P. albicaulis* rust-resistance trial results have indicated a trend of increasing resistance levels from southern Oregon north to Mount Rainier in Washington (Sniezko 2011, pers. comm.). Despite some encouraging results in limited trials, efforts are in early stages. Further, effective rust-resistance breeding programs to develop *P. albicaulis* trees for planting will likely take decades (Hoff *et al.* 2001, p. 359), and their outcomes are uncertain.

Even if genetic resistance is identified in *Pinus albicaulis,* hybridization between different white pine blister rust populations or mutations within populations could result in genetic variation in virulence, creating a new assortment of genes and behaviors (McDonald and Hoff 2001, p. 210). The potential for development of new white pine blister rust strains between eastern and western North America with greater virulence, fitness, and aggressiveness is currently unknown (Schwandt *et al.* 2010, p. 241). While North American populations of white pine blister rust have low genetic diversity and differentiation overall (Richardson *et al.* 2010, p. 316), rust genotypes with specific virulence to major resistance genes currently exist in some local populations at high frequencies (Kinloch, Jr. 2003, p. 1044). The reintroduction of white pine blister rust from goods imported from abroad also poses a serious danger to genetic selection and breeding programs. In Asia, white pine blister rust exists with different alternate host affinities and also may contain additional genes with wider virulence (Kinloch, Jr. 2003, pp. 1044, 1046).

Management and Restoration Efforts

Most current management and research focuses on producing white pines with inherited resistance to white pine blister rust, but also includes natural regeneration and silvicultural treatments, such as appropriate site selection and preparation, pruning, and thinning (Zeglen *et al.* 2010, p. 347). While genetic management of white pine blister rust is actively conducted for several 5-needled white pine species breeding programs, including the USFS' resistance screening programs for *P. albicaulis,* these investigations are only preliminary (King *et al.* 2010, p. 293).

High-elevation pines such as *P. albicaulis* also present management challenges to restoration due to remoteness, difficulty of access, and conflicting wilderness values (wilderness values are discussed in more detail under Factor D) (Schwandt *et al.* 2010, p. 242). Furthermore, the vast scale at which planting rust-resistant trees would need to occur will make it challenging to restore *P. albicaulis* throughout its range. For example, approximately 5 percent of the historical distribution of the commercial species *Pinus monticola* (western white pine) was planted with resistance-improved stock between 1976 and 1996; however, the rates of planting have declined since then, and given current rates of planting, 60 years would now be required to plant an additional 5 percent (Schwandt *et al.* 2010, pp. 241–242). Therefore, current planting efforts appear to be insufficient to restore *P. albicaulis* throughout its range.

Model Predictions

Several models have been developed to predict residence times of white pine blister rust infection and long-term persistence of *Pinus albicaulis.* Ettl and Cottone (2004, pp. 36–47) developed a spatial stage-based model to examine *P. albicaulis* persistence in the presence of heavy white pine blister rust infections in Mt. Rainier National Park. They predicted median time to quasi extinction (population of less than 100 individuals) is 148 years, which represents approximately two to three generations of *P. albicaulis.* The most recent modeling effort by Hatala *et al.* (*in press*) is the first known study of the rate of blister rust progression and residence time in *P. albicaulis.* Their analysis compares four possible white pine blister rust dynamic infection models in *P. albicaulis* at the ecosystem scale (Greater Yellowstone Ecosystem) and predicts that on average, *P. albicaulis* trees live with white pine blister rust infection for approximately 20 years before succumbing to the disease. Their model also predicts that, within all their study sites, an average of 90 percent of the trees will be infected with white pine blister rust by the year 2013, while two other models calculated a 90 percent infection level within sites by the years 2026 and 2033. These results predict white pine blister rust will continue to spread within *P. albicaulis* in 10–20 years to a level where almost all trees will be impacted. Based on these modeling results, we conclude that, in addition to white pine blister rust occurring across almost the entire range of *P. albicaulis,* individual sites with white pine blister rust infection will continue to increase and intensify, ultimately resulting in stands that are no longer viable and potentially facing extirpation.

Summary of White Pine Blister Rust

Despite white pine blister rust's complex life cycle and the exacting environmental conditions required for reproduction and transmission, it has successfully spread across almost the entire range of *Pinus albicaulis,* and its frequency of occurrence and intensity of infection are increasing. Although some *P. albicaulis* regeneration has been documented in portions of its range, the change in overall *P. albicaulis* population structure will reduce the number of large trees, expose surviving trees to higher white pine blister rust infection levels, and reduce the number of mature, cone-producing trees. The likelihood of sustaining *P. albicaulis* in suitable habitats is further diminished in locations where populations are small (Schwandt *et al.* 2010, p. 235). While *P. albicaulis* trees will continue to persist on the landscape, *P. albicaulis* forests may become functionally extinct (Keane 2011b, pers. comm.). Where additional threats occur, the pattern of forest renewal may be disrupted, leading to severe declines and potential extirpation of *P. albicaulis* (Larson 2009, pp. 45–46). Therefore, we believe that white pine blister rust is a significant threat to *P. albicaulis.*

Predation (Herbivory)

Insect Predation

Pinus albicaulis trees are fed upon by a variety of insects; however, none has had a more widespread impact than the native mountain pine beetle (*Dendroctonus ponderosae* Hopkins). The mountain pine beetle is recognized as one of the principal sources of *P. albicaulis* mortality (Raffa and Berryman 1987, p. 234; Arno and Hoff 1989, p. 7). Mountain pine beetles are true predators on *P. albicaulis* and other western conifers because, to successfully reproduce, the beetles must kill host trees (Logan and Powell 2001, p. 162; Logan *et al.* 2010, p. 895). Upon locating a suitable host (i.e., large-diameter tree with greater resources for brood production success), adult female mountain pine beetles emit pheromones that attract adult males and other adult females to the host tree. This attractant pheromone initiates a synchronized mass attack for the purpose of overcoming the host tree's defenses to mountain pine beetle predation. Once a tree has been fully colonized, the beetles produce an anti-aggregation pheromone that signals to incoming beetles to pass on to nearby unoccupied trees. Almost all host trees, even stressed individuals, will mount a chemical defense against these mass attacks. However, given a sufficient number of beetles, even a healthy tree's defensive mechanisms can be exhausted (Raffa and Berryman 1987, p. 239). Following the pheromone-mediated mass attack, male and female mountain pine beetles mate in the phloem (living vascular tissue) under the bark of the host tree. Females subsequently excavate vertical galleries where they lay eggs. Larvae hatched from these eggs feed on the phloem, pupate, and emerge as adults to initiate new mass attacks of nearby suitable trees (Gibson *et al.* 2008, p. 3). Mountain pine beetle development is directly controlled by temperature. The entire mountain pine beetle life cycle (from egg to adult) can take between 1 and 2 years depending on ambient temperatures. Warmer temperatures promote a more rapid development that facilitates a 1-year life cycle (Amman *et al.* 1997, p. 4; Gibson *et al.* 2008, p. 3).

Beetle activity in the phloem mechanically girdles the host tree, disrupting nutrient and water transport and ultimately killing the host tree. Additionally, mountain pine beetles carry on their mouthparts symbiotic blue-stain fungi, which are introduced into the host tree. These fungi also inhibit water transport and further assist in killing the host tree (Raffa and Berryman 1987, p. 239; Keane *et al.* 2010, p. 34).

Mountain pine beetles are considered an important component of natural forest disturbance (Raffa *et al.* 2008, p. 502; Bentz *et al.* 2010, p. 602). At endemic or 'natural' levels, mountain pine beetle remove relatively small areas of trees, changing stand structure and species composition in localized areas. However, when conditions are favorable, mountain pine beetle populations can erupt to epidemic levels and create stand-replacing events that kill 80 to 95 percent of suitable host trees (Keane *et al.* 2010, p. 34). Such outbreaks are episodic, can have a magnitude of impact on the structure of western forests greater than wildfire (the other major component of natural forest disturbance), and are often the primary renewal source for mature stands of western pines (Hicke *et al.* 2006, p. 1). Mountain pine beetle outbreaks typically subside only when suitable host trees are exhausted or temperatures are sufficiently low to kill larvae and adults (Gibson *et al.* 2008, p. 2).

The range of mountain pine beetle completely overlaps with the range of *Pinus albicaulis,* and mountain pine beetle epidemics affecting *P. albicaulis* have occurred throughout recorded history (Keane *et al.* 2010, p. 34). Recent outbreaks occurred in the 1930s, 1940s, and 1970s, and numerous 'ghost forests' of dead *P. albicaulis* still dot the landscape as a result (Arno and Hoff 1989, p. 7; Ward *et al.* 2006, p. 8).

Despite recorded historical impacts to the species, *Pinus albicaulis* has not been considered an important host of mountain pine beetle in the past. Unlike the lower elevation sites occupied by mountain pine beetle's primary hosts *P. contorta* Douglas (lodgepole pine) and *P. ponderosae* (ponderosa pine), the high-elevation sites occupied by *P. albicaulis* typically have been climatically inhospitable to mountain pine beetle (Logan and Powell 2001, p. 161). At the low temperatures typical of high-elevation sites, mountain pine beetle mostly experience a 2-year life cycle, which is not favorable to epidemic outbreaks (i.e., eruptive population growth). Warmer

temperatures promote a 1-year life cycle, which facilitates the synchronized mass attacks important in overcoming host tree defenses (Logan and Powell 2001, p. 167).

However, unlike previous epidemics, the current mountain pine beetle outbreak is having an increasingly significant impact on *Pinus albicaulis* (Logan *et al.* 2003, p. 130; Logan *et al.* 2010, p. 896). The reported mortality rates of mostly mature trees (i.e., large-diameter trees) can be as high as 96 percent (Gibson *et al.* 2008, p. 9). In 2007 alone, *P. albicaulis* trees on almost 202,342 ha (500,000 ac) were killed. At the time this was the highest recorded mountain pine beetle mortality ever reported for *P. albicaulis* (Gibson *et al.* 2008, p. 2). The number of acres with mountain pine beetle-killed *P. albicaulis* trees continues to increase significantly rangewide, and in 2009 *P. albicaulis* trees on an estimated 809,371 ha (2,000,000 ac) were killed (Service 2010).

Trends of environmental effects from climate change have provided the favorable conditions necessary for the current, unprecedented mountain pine beetle epidemic in high-elevation communities across the western United States and Canada (Logan and Powell 2001, p. 167; Logan *et al.* 2003, p. 130; Raffa *et al.* 2008, p. 511). Warming trends have resulted in not only intensified mountain pine beetle activity in high-elevation *Pinus albicaulis* forests, but have resulted in mountain pine beetle range expansion into more northern latitudes and higher elevations (Logan and Powell 2003, p. 131; Carroll *et al.* 2003 in Gibson *et al.* 2008, p. 4; Raffa *et al.* 2008, p. 503; Logan *et al.* 2010, p. 895). Winter temperatures are now warm enough for winter survival for all mountain pine beetle life stages and for maintenance of the 1-year life cycle that promotes epidemic mountain pine beetle population levels (Bentz and Schen-Langenheim 2007, p. 47; Logan *et al.* 2010, p. 896). Along with warmer winter conditions, summers have been drier, with droughts occurring through much of the range of *P. albicaulis* (Bentz *et al.* 2010, p. 605). Mountain pine beetles frequently target drought-stressed trees, which are more vulnerable to attack as they are less able to mount an effective defense against even less dense mass attacks by mountain pine beetles (Bentz *et al.* 2010, p. 605). Given ongoing and predicted environmental effects from climate change, we expect the expansion of habitat favorable to mountain pine beetle (and mountain pine epidemics) to continue into the foreseeable future.

Current management and research continue to explore methods to control mountain pine beetle mainly with the use of the pesticide Carbaryl and the anti-aggregation pheromone called Verbenone. Both methods can be effective for limited time periods (Progar 2007, p. 108). However, use of either control method may be prohibitively expensive and challenging given the scale of mountain pine beetle outbreaks (i.e., millions of acres) and the inaccessibility of much of *P. albicaulis* habitat. Currently these methods are mostly being suggested for use in targeted protection of high-value trees (e.g. individuals resistant to white pine blister rust, stands in recreational areas) rather than as a large-scale restoration tool (Keane *et al.* 2010, p. 94). Therefore, these control methods are not currently sufficient to protect the species as a whole from mountain pine beetle predation.

Summary of Predation

Mountain pine beetle outbreaks are becoming more common throughout the range of the whitebark pine and are having increasingly significant impacts on *Pinus albicaulis.* In some locations, mortality rates are as high as 96 percent. There are no known ways to stop a mountain pine beetle epidemic once it has started (Raffa *et al.* 2008, p. 514). Mountain pine beetle epidemics typically subside when the availability of suitable hosts is exhausted. In a worst-case scenario, there could be 95 percent mortality of mostly cone-bearing (i.e., reproductive) adults by the time the current epidemic collapses (Keane *et al.* 2010, p. 35). Therefore, we expect the ongoing epidemic to continue to intensify and expand in the future. Additionally, we expect ongoing and predicted environmental effects from climate change (see Factor A, Climate Change) to create more favorable conditions for mountain pine beetle outbreaks to persist in *P. albicaulis* habitats into the foreseeable future.

Synergistic Interactions Between Disease and Predation

White pine blister rust and mountain pine beetle act both individually and synergistically to threaten *Pinus albicaulis* rangewide. Mountain pine beetle will preferentially attack *P. albicaulis* infected with, and weakened by, white pine blister rust (Six and Adams 2007, p. 351). This preference results in increased susceptibility of *P. albicaulis* to mountain pine beetle-caused mortality. Mountain pine beetles and white pine blister rust also interact in other ways that threaten *P. albicaulis* regeneration and persistence. Mountain pine beetles preferentially target large mature trees. As a result, large trees are removed from populations, leaving smaller trees for regeneration in a less competitive environment. Unfortunately, white pine blister rust is not selective and infects all age and size classes of *P. albicaulis.* Thus, in the current environment that contains epidemic levels of mountain pine beetle and a nearly ubiquitous presence of white pine blister rust, *P. albicaulis* that have escaped mountain pine beetle mortality are still susceptible to white pine blister rust, and the possibility of regeneration following mountain pine beetle epidemics is jeopardized. Conversely, the small percentage of *P. albicaulis* individuals that are genetically resistant to white pine blister rust, and thus critical to species persistence, are still vulnerable to mountain pine beetle attack.

White pine blister rust and mountain pine beetle further impact the probability of *P. albicaulis* regeneration because both act to severely decrease seed cone production. White pine blister rust does this by killing cone-bearing branches, such that even if the tree itself remains alive for some time, seed production is compromised. Mountain pine beetles decrease seed production by targeting and killing larger trees, which are the main trees that bear cones. A severe reduction in seed production has the potential to limit the effectiveness of the masting strategy employed by *P. albicaulis* (see Taxonomy and Life History), such that the proportion of seeds taken by seed predators will eventually become too high to allow regeneration. Additionally, severe seed reduction disrupts the relationship between *P. albicaulis* and Clark's nutcracker. Clark's nutcrackers eventually abandon *P. albicaulis* stands when seed production is too low (McKinney *et al.* 2009, p. 599).

Limited research has focused on detecting amounts of *Pinus albicaulis* regeneration. Most remaining high-elevation *P. albicaulis* stands in the U.S. Intermountain West that are climax communities have little regeneration (Kendall and Keane 2001b, p. 228). In contrast, new and advanced *P. albicaulis* regeneration was documented on the majority of plots in southwestern Montana and eastern Oregon, indicating that the Wallowa and Pioneer Mountains sites seem to be more vigorous and to be regenerating better than sites farther north in the Rockies (Larson 2007, pp. 16–18). However, there is much *P. albicaulis* site

variability and the regeneration on some of these sites was preceded by a particularly large cone crop in 2006. In addition, as seedlings grow, their increased foliage surface area becomes a larger target for infection by white pine blister rust spores (Tomback *et al.* 1995, p. 662). Therefore, despite observed regeneration, the level of effective regeneration (i.e., seedlings that actually reach a reproductive age) is questionable given the high incidence of white pine blister rust currently on the landscape. We conclude that *P. albicaulis* regeneration will generally be less successful in the future than it has been in the past.

Summary of Factor C

Disease in the form of white pine blister rust and predation from mountain pine beetle are contributing, individually and in combination, to the decline of *Pinus albicaulis* rangewide. White pine blister rust is now ubiquitous on the landscape; millions of acres (hectares) of *P. albicaulis* have been infected, and that number is increasing yearly. Due to the warmer temperatures and drier conditions brought on by climate change within the range of *P. albicaulis,* mountain pine beetle epidemics now occur at unprecedented levels, causing mortality in millions of acres (hectares) of *P. albicaulis,* much of which was previously thought to be mostly climatically immune from large-scale mountain pine beetle attacks. Additionally, the interaction between white pine blister rust and the mountain pine beetle further intensifies the impact of both threats. White pine blister rust and mountain pine beetle are impacting *P. albicaulis* equally in both Canada and the U.S. portion of the range. In other words, there is currently no refuge from these threats (COSEWIC 2010, p. viii).

There is no known way to control or reduce or eliminate either threat at this time, particularly at the landscape scale needed to effectively conserve this species. Thus, we expect both disease and predation to continue to heavily impact *Pinus albicaulis.* On the basis of a review of the best scientific and commercial information available concerning present threats to *P. albicaulis* from white pine blister rust and mountain pine beetle, their synergistic effects, and their likely continuation in the future, we conclude that disease and predation is a threat to *P. albicaulis.*

Factor D. The Inadequacy of Existing Regulatory Mechanisms

In determining whether the inadequacy of existing regulatory mechanisms constitutes a threat to *Pinus albicaulis,* we focused our analysis on existing Federal, State, and Canadian laws and regulations that apply to *P. albicaulis* habitats and could potentially address the four main threats to the species—the loss of habitat from fire suppression and the environmental effects of climate change under Factor A and mortality from white pine blister rust and mountain pine beetle under Factor C. Regulatory mechanisms may preclude the need for listing if such mechanisms are judged to adequately address the threat(s) to the species such that listing is not warranted. Conversely, threats on the landscape are exacerbated when not addressed by existing regulatory mechanisms, or when the existing mechanisms are inadequate (or not adequately implemented or enforced).

Federal Laws and Regulations

More than 96 percent of the distribution of *Pinus albicaulis* in the contiguous United States is federally owned or managed (Service 2011, p. 1), 34 percent of which is designated as wilderness.

The Wilderness Act of 1964

The USFS and other Federal agencies manage lands designated as wilderness areas under the Wilderness Act of 1964 (16 U.S.C. 1131–1136). Within these areas, the Wilderness Act states the following: (1) New or temporary roads cannot be built; (2) there can be no use of motor vehicles, motorized equipment, or motorboats; (3) there can be no landing of aircrafts; (4) there can be no form of mechanical transport; and (5) no structure or installation may be built. Considerable amounts of *Pinus albicaulis* occur within wilderness areas managed by the USFS and NPS (31 percent and 2.5 percent of the total United States distribution, respectively) (Service 2011, p. 1) and, therefore, are afforded protection from direct loss or degradation by some human activities (e.g., commercial timber harvest, road construction, some fire management actions).

Conversely, the regulations covering wilderness areas on Federal lands also may impede or restrict potential activities necessary for restoring *P. albicaulis* (Aubry 2011, pers. comm.; Reinhart 2010, pers. comm.). Currently, there are inconsistent policy interpretations across wilderness areas (Schwandt 2011, pers. comm.). Consequently, Federal agencies are engaged in ongoing discussions regarding whether restoration of *P. albicaulis* in wilderness areas is appropriate, and if so, what types of actions would be allowed. Taking action on *P. albicaulis* restoration in wilderness areas could compromise the ''untrammeled'' value of wilderness, but not taking action may compromise the ''naturalness'' value of wilderness by allowing the extirpation of a keystone species. If restoration actions are not restricted under the Wilderness Act, they would likely be limited (Reinhart 2011, pers. comm.). To date, limited surveys and monitoring of *P. albicaulis* trees and cone collecting for seeds have occurred in wilderness areas (Schwandt 2011, pers. comm.). While the Wilderness Act may allow for some restoration actions, it does not directly address or alleviate the threats of environmental effects resulting from climate change, white pine blister rust, mountain pine beetle, or fire suppression. The Wilderness Act does influence some fire management actions, which are described under Federal Wildland Fire Management Policies, Plans, and Guides below.

National Environmental Policy Act of 1970

All Federal agencies are required to adhere to the National Environmental Policy Act (NEPA) of 1970 (42 U.S.C. 4321 *et seq.*) for projects they fund, authorize, or carry out. The Council on Environmental Quality's regulations for implementing NEPA (40 CFR 1500–1518) state that agencies shall include a discussion on the environmental impacts of the various project alternatives (including the proposed action), any adverse environmental effects that cannot be avoided, and any irreversible or irretrievable commitments of resources involved (40 CFR 1502). Additionally, activities on non-Federal lands are subject to NEPA if there is a Federal nexus. Since NEPA is a disclosure law, it does not require subsequent minimization or mitigation measures by the Federal agency involved. Although Federal agencies may include conservation measures for *Pinus albicaulis* as a result of the NEPA process, any such measures are typically voluntary in nature and are not required by the statute. As NEPA does not provide any regulatory mechanisms, it does not directly address or alleviate the threats of the environmental effects resulting from climate change, white pine blister rust, mountain pine beetle, or fire suppression.

National Forest Management Act of 1976

Under the National Forest Management Act (NFMA) of 1976, as amended, (16 U.S.C. 1600–1614), the USFS manages National Forest lands based on multiple-use, sustained-yield principles, and implement resource management plans to provide for a diversity of plant and animal communities. As such, individual forests may identify species of concern that are significant to each forest's biodiversity. The USFS recognizes the decline of *Pinus albicaulis* and is developing various strategies that focus on restoration, including the Pacific Northwest Region's Restoration Strategy, individual forest action strategies (Aubry *et al.* 2008, entire), and the Rocky Mountain Research Station's draft General Technical Report, ''A Range-wide Restoration Strategy for Whitebark Pine *(Pinus albicaulis)*'' (Keane *et al.* 2010, entire). The latter report may provide the most effective rangewide restoration strategy available because it integrates the genetics, pathology, and ecology of *P. albicaulis.*

The USFS also implements *P. albicaulis* restoration and management activities (stand thinning, pruning, fire management) on non-wilderness lands, although *P. albicaulis* forests are generally not accessed for commercial forestry commodity extraction and, therefore, tend to be excluded from most stand improvement actions. The USFS has, along with university researchers and others, made important strides in understanding the white pine blister rust pathosystem and mountain pine beetle life history, researching and propagating rust-resistant *P. albicaulis* seeds and seedlings, and developing strategic plans. Their efforts are encouraging and may provide some benefit to the species at local scales, but these efforts under the NFMA do not directly address or alleviate the threats from the environmental effects resulting from climate change, white pine blister rust, mountain pine beetle, or fire suppression at the rangewide level of the species.

National Park Service Organic Act of 1916

The NPS Organic Act of 1916 (16 U.S.C. 1 *et seq.*) as amended, states that the NPS ''shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations to conserve the scenery and national and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.'' Where *Pinus albicaulis* occurs in National Parks, the NPS Organic Act directs the NPS to address *P. albicaulis* and its health. As such, the NPS has made considerable efforts to survey and monitor *P. albicaulis* stands and identify white pine blister rust infection levels. While the NPS makes certain that natural processes will occur, such as natural *P. albicaulis* regeneration, they may actively intervene when natural ecological processes are not adequately functioning. In the case of *P. albicaulis,* intervention could include restoration actions, and these actions would likely mimic criteria provided under the Wilderness Act (D. Reinhart 2011, pers. comm.). While the NPS Organic Act directs the NPS to address *P. albicaulis* health, it does not provide mechanisms that directly address or alleviate the threats from the environmental effects associated with climate change, white pine blister rust, mountain pine beetle, or fire suppression.

Clean Air Act of 1970

As explained under Factor A, warming temperatures are expected to result in direct habitat loss and are also currently causing an increase in populations of the predatory mountain pine beetle resulting in significant mortality rangewide. The Clean Air Act of 1970 (42 U.S.C. 7401 *et seq.*), as amended, requires the Environmental Protection Agency (EPA) to develop and enforce regulations to protect the general public from exposure to airborne contaminants that are known to be hazardous to human health. In 2007, the Supreme Court ruled that gases that cause global warming are pollutants under the Clean Air Act and that the EPA has the authority to regulate carbon dioxide and other heat-trapping gases (*Massachusetts et al.* v. *EPA 2007* [Case No. 05–1120]).

The EPA published a regulation to require reporting of greenhouse gas emissions from fossil fuel suppliers and industrial gas suppliers, direct greenhouse gas emitters, and manufacturers of heavy-duty and off-road vehicles and engines (74 FR 56260; October 30, 2009). The rule, effective December 29, 2009, does not require control of greenhouse gases; rather it requires only that sources above certain threshold levels monitor and report emissions. On December 7, 2009, the EPA found under section 202(a) of the Clean Air Act that the current and projected concentrations of six greenhouse gases in the atmosphere threaten public health and welfare. EPA's finding itself does not impose requirements on any industry or other entities, but is a prerequisite for any future regulations developed by the EPA. At this time, it is not known what regulatory mechanisms will be developed in the future as an outgrowth of EPA's finding or how effective they would be in addressing climate change. Therefore, the Clean Air Act and its existing implementing regulations do not currently provide regulatory mechanisms relevant to threats from the environmental effects associated with climate change, and the synergistic interactions with white pine blister rust, mountain pine beetle, or fire suppression.

Federal Wildland Fire Management Policies, Plans, and Guides

A variety of Federal fire management policies, plans, and implementation guides have been developed to both standardize interagency procedures and provide for a full spectrum of fire management options, including suppression and allowing some fires to function in their natural ecological role. Federal Land and Resource Management Plans also incorporate fire management, including use of prescribed fire, and typically provide more detailed guidance for individual agency units, such as a National Forest. These planning and implementation documents have the potential to benefit the species. However, these documents are typically broad in scope allowing a wide degree of latitude in potential fire management actions. We do not have information to indicate that fire management policies are currently being used in a way that alleviates the threat of fire suppression rangewide or contain fire use prescriptions that could protect *Pinus albicaulis.* Therefore, at this time we conclude that current fire management policies are inadequate to reduce or eliminate the threat of fire suppression across the entire range of *P. albicaulis.*

State Laws and Regulations

Pinus albicaulis generally has not been tracked by State wildlife or natural heritage programs in States where the species occurs. NatureServe's last status review revision of *P. albicaulis* (October 2008) ranked it as a G3 species, which means the species is vulnerable across its entire range (NatureServe 2010, p. 1; NatureServe 2011, p. 2). State rankings include Idaho (S4, apparently secure), Montana (S4, apparently secure), Oregon (S4, apparently secure), and Wyoming (S3, vulnerable), and Washington, which recently elevated *P. albicaulis* to S3 (vulnerable) (Arnett 2011, pers. comm.). California and

Nevada have not ranked the species. However, these rankings do not grant *P. albicaulis* any special status under any State legislation (NatureServe 2010, p. 1; NatureServe 2011, p. 2). The individual State rankings of S4 (apparently secure) are contrary to what the most current data suggest, that is, that *P. albicaulis* is declining rangewide. A very minimal amount of the whitebark pine range is known to occur on State lands. We do not know of any existing State laws or regulations that address or alleviate impacts from white pine blister rust, mountain pine beetle, or fire suppression. Additionally, we are not aware of any State laws or regulations that address the environmental effects resulting from climate change.

Canadian Federal and Provincial Laws and Regulations

The Committee on the Status of endangered Wildlife in Canada recently designated *Pinus albicaulis* as Endangered due to the high risk of extirpation and recommended the species be protected under Canada's Species at Risk Act (SARA) (COSEWIC 2010, p. iii). While listing a species under SARA may provide some benefits, such as providing official recognition, it provides no legal protection. In addition, it applies only to Federal lands, and most of *P. albicaulis'* distribution in Canada occurs on non-Federal lands (most public lands, or Crown lands, are under provincial jurisdiction). At the provincial level, in Alberta, *P. albicaulis* is currently ranked as S2 (imperiled) and assessed as Endangered under the Alberta Wildlife Act, and in British Columbia, it's ranked as S3 (special concern/vulnerable) and blue-listed (species of special concern) (Wilson 2007, p. 1; Environment Canada 2010, p. 71; COSEWIC 2010, p. 30). However, these rankings and assessments do not provide legal protections and only suggest voluntary conservation measures. Parks Canada has initiated conservation efforts including monitoring, prescribed fire, white pine blister rust-resistant tree identification, seed collection, and use of pheromones to protect apparent blister rust-resistant trees from mountain pine beetle attack (Wilson 2007, pp. 12–13). The provincial designations likely benefit the species and raise public awareness; however, they provide no legal protections, as conservation measures are largely voluntary.

Summary of Factor D

We examined a number of existing regulatory mechanisms that have the potential to address current and projected threats to *Pinus albicaulis* populations. The majority of *P. albicaulis* habitat in the United States occurs on Federal lands, where Federal agencies have broad regulatory authority to plan and manage land use activities, including timber harvest, recreation, and a variety of other actions. Some management activities have the potential to benefit *P. albicaulis* and its habitat. However, in our review of existing regulatory mechanisms, only the policies related to Federal Wildland Fire Management Policies, Plans, and Guides directly address any of the four main threats to the species identified in this document. Specifically, these policies have the potential to reduce or eliminate threats to *P. albicaulis* from fire suppression. However, at this time we find that these policies are inadequate to address this threat.

In summary, the existing regulatory mechanisms currently in place throughout the range of *P. albicaulis* are inadequate to reduce or eliminate any of the four main threats to the species identified above—the loss of habitat from fire suppression and the exacerbating environmental effects of climate change under Factor A, and mortality from white pine blister rust and mountain pine beetle under Factor C. Therefore, based on our review of the best scientific and commercial information available, we conclude that existing regulatory mechanisms are inadequate to protect *P. albicaulis* or its habitat.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

We did not identify any other natural or manmade factors that are likely to significantly threaten the existence of the species. Therefore, we conclude that the best scientific and commercial information available indicates that *P. albicaulis* is not threatened by other natural or manmade factors affecting its continued existence.

Finding

As required by the Act, we conducted a review of the status of the species and considered the five factors in assessing whether *Pinus albicaulis* is threatened or endangered throughout all or a significant portion of its range or likely to become so within the foreseeable future. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by *P. albicaulis.* We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with *P. albicaulis* experts and other Federal, State, and tribal agencies. In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat.

If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

This status review identified threats to *Pinus albicaulis* attributable to Factors A, C, and D. The primary threat to the species is from disease (Factor C) in the form of the nonnative white pine blister rust and its interaction with other threats. We found that white pine blister rust is now nearly ubiquitous throughout the range of *P. albicaulis.* White pine blister rust results in the mortality of an overwhelming majority of infected individuals, and all age classes of trees are susceptible. Seedlings are killed rapidly, and while some mature individuals may persist on the landscape for decades following infection, white pine blister rust typically kills seedcone-bearing branches. White pine blister rust has impacted millions of acres (hectares) of *P. albicaulis.* Currently, colder, drier areas of the range that were originally thought to be less susceptible to the disease are now showing considerable rates of infection. Based on current mortality rates, the estimated population decline for the northern 56 percent of the range (i.e., Canada), is expected to be 57 percent within 100 years, which is less than two generations for this species (COSEWIC 2010, pp. viii, 19). However, that is likely an underestimate, as it assumes current mortality rates remain constant.

After examining information collected on the incidence of white pine blister rust, we conclude that white pine blister rust will continue to intensify and kill *Pinus albicaulis* throughout its entire range. The remainder of the range (i.e., United States) is experiencing similar rates of mortality, and thus we anticipate a decline similar to that estimated for the northern portion of the range (Canada). A small percentage of genetic resistance to white pine blister rust is present in *P. albicaulis* on the landscape, and research is currently being conducted to identify and propagate resistant individuals. However, these programs are still in the early stages and an effective breeding program will take decades, if it can be achieved at all.

Pinus albicaulis also is currently experiencing significant mortality from predation (Factor C) by the native mountain pine beetle. Millions of acres (hectares) of *P. albicaulis* have been lost in this decade (i.e., late 1990's to 2011), and we expect that number to continue to increase. For the last decade in particular, warming temperatures have facilitated large mountain pine beetle outbreaks even in areas of *P. albicaulis* habitat that were previously thought to inhibit epidemic levels of mountain pine beetle. Given projected warming trends, we conclude that conditions will remain favorable for epidemic levels of mountain pine beetle to continue into the foreseeable future.

We also anticipate that continuing environmental effects resulting from climate change will result in direct habitat loss (Factor A) for *Pinus albicaulis,* a high-elevation species occurring only in cool mountaintop habitats. Bioclimatic models predict that suitable habitat for *P. albicaulis* will decline precipitously within the next 100 years. Research indicates that northern migration of *P. albicaulis* is a possible, but unlikely, response to the projected rate of warming climatic conditions. Additionally, the presence of white pine blister rust on the northern portions of the range could potentially impede effective migration. Adaptation to a rapidly warming climate also seems unlikely for a species that has an estimated generation time of 60 years.

Past and ongoing fire suppression is also negatively impacting populations of *Pinus albicaulis* through direct habitat loss (Factor A). Many stands of trees once dominated by *P. albicaulis* are now dense stands of shade-tolerant conifers. This change in forest structure and composition facilitates an increased frequency and intensity of wildfire and an increased susceptibility to predation and disease. Additionally, environmental changes resulting from changing climatic conditions are acting alone and in combination with the effects of fire suppression to increase the frequency and severity of wildfires. *P. albicaulis* could potentially regenerate following even stand-replacing wildfires, if an available seed source is available. However, widespread predation and disease currently impacting *P. albicaulis* are limiting available seed sources, making the probability of regeneration following wildfire less likely.

In our analysis of Factor D, we examined several Federal mechanisms that could potentially address the threats to *Pinus albicaulis.* These mechanisms may be useful in minimizing the adverse effects to *P. albicaulis* from potential stressors such as commercial harvest or habitat destruction and degradation from road construction; however, none of these potential stressors rises to the level of a threat to *P. albicaulis.* None of the existing regulatory mechanisms we examined provide adequate protection to *P. albicaulis* from stressors that rise to the level of a threat, including white pine blister rust, mountain pine beetles, the exacerbating effects of environmental change resulting from changing climatic conditions, and fire suppression. Thus, we concluded that the existing regulatory mechanisms are inadequate to address the threats presented above.

In summary, the primary threat to the species is from disease (Factor C) in the form of the nonnative white pine blister rust and its interaction with other threats. *Pinus albicaulis* is also threatened by significant mortality from predation (Factor C) by the native mountain pine beetle. Past and ongoing fire suppression is also negatively impacting populations of *P. albicaulis* through direct habitat loss (Factor A). Environmental effects resulting from climate change also threaten the species through direct habitat loss (Factor A) and by exacerbating the effects of some of the other threats. Also, the existing regulatory mechanisms (Factor D) are inadequate to protect *P. albicaulis* or its habitat. Therefore, based on the threats described above attributable to Factors A, C, and D, we believe *P. albicaulis* is in danger of extinction, or likely to become so in the foreseeable future, throughout all or a significant portion of its range.

On the basis of the best scientific and commercial information available, we find that the petitioned action to list *Pinus albicaulis* rangewide is warranted. We will make a determination on the status of the species as threatened or endangered when we do a proposed listing determination. However, as explained in more detail below, an immediate proposal of a regulation implementing this action is precluded by higher priority listing actions, and progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants.

We reviewed the available information to determine if the existing and foreseeable threats render the species at risk of extinction now such that issuing an emergency regulation temporarily listing the species under section 4(b)(7) of the Act is warranted. We determined that issuing an emergency regulation temporarily listing the species is not warranted for this species at this time, because the threats acting on the species are not impacting the entire species across its range to the point where the species will be immediately lost. However, if at any time we determine that issuing an emergency regulation temporarily listing *Pinus albicaulis* is warranted, we will initiate this action at that time.

Listing Priority Number

The Service adopted guidelines on September 21, 1983 (48 FR 43098) to establish a rational system for utilizing available resources for the highest priority species when adding species to the Lists of Endangered or Threatened Wildlife and Plants or reclassifying species listed as threatened to endangered status. These guidelines, titled ''Endangered and Threatened Species Listing and Recovery Priority Guidelines'' address the immediacy and magnitude of threats, and the level of taxonomic distinctiveness by assigning priority in descending order to monotypic genera (genus with one species), full species, and subspecies (or equivalently, distinct population segments of vertebrates). We assigned *Pinus albicaulis* a Listing Priority Number (LPN) of 2 based on our finding that the species faces threats that are of high magnitude and are imminent. The main threats to *P. albicaulis* include disease and predation, and the present or threatened destruction, modification, or curtailment of its habitat due to environmental changes and exacerbating effects of climate change and fire and fire suppression. A secondary threat is caused by the inadequacy of existing regulatory mechanisms. This is the highest priority that can be provided to a species under our guidance. Our rationale for assigning *P. albicaulis* an LPN of 2 is outlined below.

Under the Service's LPN Guidance, the magnitude of threat is the first criterion we look at when establishing a listing priority. The guidance indicates that species with the highest magnitude of threat are those species facing the greatest threats to their continued existence. These species receive the highest listing priority. The threats that face *Pinus albicaulis* are high in magnitude because the major threats (disease, predation, environmental changes and exacerbating effects of climate change, fire and fire suppression) occur throughout all of the species' range and are having a demonstrable effect on the species. The primary threat, white pine blister rust, currently occurs throughout all of the range of *P. albicaulis* except for the interior Great Basin, which accounts for only 0.4 percent of *P. albicaulis* distribution in the United States. The incidence of white pine blister rust is highest in the Rocky Mountains of northwestern Montana and northern Idaho, the Olympic and western Cascade Ranges of the United States, the southern Canadian Rocky Mountains, and British Columbia's Coastal Mountains. Trends strongly indicate that white pine blister rust infections have increased in intensity over time and are now prevalent in even drier and colder areas originally considered less susceptible to infection. The other major threats, predation, fire and fire suppression, and environmental effects of climate change, which exacerbate some of the threats, also occur throughout the entire range and have resulted in significant loss of whitebark pine. We anticipate these threats to continue to impact *P. albicaulis* into the foreseeable future.

Under our LPN Guidance, the second criterion we consider in assigning a listing priority is the immediacy of threats. This criterion is intended to ensure that the species that face actual, identifiable threats are given priority over those for which threats are only potential or that are intrinsically vulnerable but are not known to be presently facing such threats. The threats are imminent because rangewide disease, predation, fire and fire suppression, and environmental effects of climate change are affecting *Pinus albicaulis* currently and are expected to continue and likely intensify in the foreseeable future. These actual, identifiable threats are covered in detail under the discussion of Factors A and C of this finding and currently include mortality from white pine blister rust, predation by mountain pine beetle, fire and fire suppression, and environmental effects of climate change. Trends indicate that these threats are currently having a significant negative impact on *P. albicaulis.* Attempts to control white pine blister rust and mountain pine beetle have been ineffective, and we believe both threats will have increasingly negative impacts on *P. albicaulis* into the foreseeable future.

The third criterion in our LPN guidance is intended to devote resources to those species representing highly distinctive or isolated gene pools as reflected by taxonomy. *Pinus albicaulis* is a valid taxon at the species level and, therefore, receives a higher priority than a subspecies, but a lower priority than species in a monotypic genus. *P. albicaulis* faces high-magnitude, imminent threats, and is a valid taxon at the species level. Thus, in accordance with our LPN guidance, we have assigned *P. albicaulis* an LPN of 2.

We will continue to monitor the threats to *Pinus albicaulis,* and the species' status on an annual basis, and should the magnitude or the imminence of the threats change, we will revisit our assessment of the LPN.

Work on a proposed listing determination for the *Pinus albicaulis* is precluded by work on higher priority listing actions with absolute statutory, court-ordered, or court-approved deadlines and final listing determinations for those species that were proposed for listing with funds from Fiscal Year 2010. This work includes all the actions listed in the tables below under expeditious progress.

Preclusion and Expeditious Progress

Preclusion is a function of the listing priority of a species in relation to the resources that are available and the cost and relative priority of competing demands for those resources. Thus, in any given fiscal year (FY), multiple factors dictate whether it will be possible to undertake work on a listing proposal regulation or whether promulgation of such a proposal is precluded by higher-priority listing actions.

The resources available for listing actions are determined through the annual Congressional appropriations process. The appropriation for the Listing Program is available to support work involving the following listing actions: Proposed and final listing rules; 90-day and 12-month findings on petitions to add species to the Lists of Endangered and Threatened Wildlife and Plants (Lists) or to change the status of a species from threatened to endangered; annual ''resubmitted'' petition findings on prior warranted-but-precluded petition findings as required under section 4(b)(3)(C)(i) of the Act; critical habitat petition findings; proposed and final rules designating critical habitat; and litigation-related, administrative, and program-management functions (including preparing and allocating budgets, responding to Congressional and public inquiries, and conducting public outreach regarding listing and critical habitat). The work involved in preparing various listing documents can be extensive and may include, but is not limited to: Gathering and assessing the best scientific and commercial data available and conducting analyses used as the basis for our decisions; writing and publishing documents; and obtaining, reviewing, and evaluating public comments and peer review comments on proposed rules and incorporating relevant information into final rules. The number of listing actions that we can undertake in a given year also is influenced by the complexity of those listing actions; that is, more complex actions generally are more costly. The median cost for preparing and publishing a 90-day finding is $39,276; for a 12-month finding, $100,690; for a proposed rule with critical habitat, $345,000; and for a final listing rule with critical habitat, $305,000.

We cannot spend more than is appropriated for the Listing Program without violating the Anti-Deficiency Act (see 31 U.S.C. 1341(a)(1)(A)). In addition, in FY 1998 and for each fiscal year since then, Congress has placed a statutory cap on funds that may be expended for the Listing Program, equal to the amount expressly appropriated for that purpose in that fiscal year. This cap was designed to prevent funds appropriated for other functions under the Act (for example, recovery funds for removing species from the Lists), or for other Service programs, from being used for Listing Program actions (see House Report 105–163, 105th Congress, 1st Session, July 1, 1997).

Since FY 2002, the Service's budget has included a critical habitat subcap to ensure that some funds are available for other work in the Listing Program (''The critical habitat designation subcap will ensure that some funding is available to address other listing activities'' (House Report No. 107–103, 107th Congress, 1st Session, June 19, 2001)). In FY 2002 and each year until FY 2006, the Service has had to use virtually the entire critical habitat subcap to address court-mandated designations of critical habitat, and consequently none of the critical habitat subcap funds have been available for other listing activities. In

some FYs since 2006, we have been able to use some of the critical habitat subcap funds to fund proposed listing determinations for high-priority candidate species. In other FYs, while we were unable to use any of the critical habitat subcap funds to fund proposed listing determinations, we did use some of this money to fund the critical habitat portion of some proposed listing determinations so that the proposed listing determination and proposed critical habitat designation could be combined into one rule, thereby being more efficient in our work. At this time, for FY 2011, we plan to use some of the critical habitat subcap funds to fund proposed listing determinations.

We make our determinations of preclusion on a nationwide basis to ensure that the species most in need of listing will be addressed first and also because we allocate our listing budget on a nationwide basis. Through the listing cap, the critical habitat subcap, and the amount of funds needed to address court-mandated critical habitat designations, Congress and the courts have in effect determined the amount of money available for other listing activities nationwide. Therefore, the funds in the listing cap, other than those needed to address court-mandated critical habitat for already listed species, set the limits on our determinations of preclusion and expeditious progress.

Congress identified the availability of resources as the only basis for deferring the initiation of a rulemaking that is warranted. The Conference Report accompanying Public Law 97–304 (Endangered Species Act Amendments of 1982), which established the current statutory deadlines and the warranted-but-precluded finding, states that the amendments were ''not intended to allow the Secretary to delay commencing the rulemaking process for any reason other than that the existence of pending or imminent proposals to list species subject to a greater degree of threat would make allocation of resources to such a petition [that is, for a lower-ranking species] unwise.'' Although that statement appeared to refer specifically to the ''to the maximum extent practicable'' limitation on the 90-day deadline for making a ''substantial information'' finding, that finding is made at the point when the Service is deciding whether or not to commence a status review that will determine the degree of threats facing the species, and therefore the analysis underlying the statement is more relevant to the use of the warranted-but-precluded finding, which is made when the Service has already determined the degree of threats facing the species and is deciding whether or not to commence a rulemaking.

In FY 2011, on April 15, 2011, Congress passed the Full-Year Continuing Appropriations Act (Pub. L. 112–10) which provides funding through September 30, 2011. The Service has $20,902,000 for the listing program. Of that, $9,472,000 is being used for determinations of critical habitat for already listed species. Also $500,000 is appropriated for foreign species listings under the Act. The Service thus has $10,930,000 available to fund work in the following categories: compliance with court orders and court-approved settlement agreements requiring that petition findings or listing determinations be completed by a specific date; section 4 (of the Act) listing actions with absolute statutory deadlines; essential litigation-related, administrative, and listing program-management functions; and high-priority listing actions for some of our candidate species. In FY 2010, the Service received many new petitions and a single petition to list 404 species. The receipt of petitions for a large number of species is consuming the Service's listing funding that is not dedicated to meeting court-ordered commitments. Absent some ability to balance effort among listing duties under existing funding levels, it is unlikely that the Service will be able to initiate any new listing determination for candidate species in FY 2011.

In 2009, the responsibility for listing foreign species under the Act was transferred from the Division of Scientific Authority, International Affairs Program, to the Endangered Species Program. Therefore, starting in FY 2010, we used a portion of our funding to work on the actions described above for listing actions related to foreign species. In FY 2011, we anticipate using $1,500,000 for work on listing actions for foreign species which reduces funding available for domestic listing actions; however, currently only $500,000 has been allocated for this function. Although there are no foreign species issues included in our high-priority listing actions at this time, many actions have statutory or court-approved settlement deadlines, thus increasing their priority. The budget allocations for each specific listing action are identified in the Service's FY 2011 Allocation Table (part of our record).

For the above reasons, funding a proposed listing determination for the *Pinus albicaulis* is precluded by court-ordered and court-approved settlement agreements, and listing actions with absolute statutory deadlines, and work on proposed listing determinations for those candidate species with a higher listing priority (i.e., candidate species with LPNs of 1–2).

Based on the LPN guidance, we have a significant number of species with a LPN of 2. Using these guidelines, we assign each candidate an LPN of 1 to 12, depending on the magnitude of threats (high or moderate to low), immediacy of threats (imminent or nonimminent), and taxonomic status of the species (in order of priority: monotypic genus (a species that is the sole member of a genus); species; or part of a species (subspecies, or distinct population segment)). The lower the listing priority number, the higher the listing priority (that is, a species with an LPN of 1 would have the highest listing priority).

Because of the large number of high-priority species, we have further ranked the candidate species with an LPN of 2 by using the following extinction-risk type criteria: International Union for the Conservation of Nature and Natural Resources (IUCN) Red list status/rank, Heritage rank (provided by NatureServe), Heritage threat rank (provided by NatureServe), and species currently with fewer than 50 individuals, or 4 or fewer populations. Those species with the highest IUCN rank (critically endangered), the highest Heritage rank (G1), the highest Heritage threat rank (substantial, imminent threats), and currently with fewer than 50 individuals, or fewer than 4 populations, originally comprised a group of approximately 40 candidate species (''Top 40''). These 40 candidate species have had the highest priority to receive funding to work on a proposed listing determination. As we work on proposed and final listing rules for those 40 candidates, we apply the ranking criteria to the next group of candidates with an LPN of 2 and 3 to determine the next set of highest priority candidate species. Finally, proposed rules for reclassification of threatened species to endangered are lower priority, because as listed species, they are already afforded the protection of the Act and implementing regulations. However, for efficiency reasons, we may choose to work on a proposed rule to reclassify a species to endangered if we can combine this with work that is subject to a court-determined deadline.

With our workload so much bigger than the amount of funds we have to accomplish it, it is important that we be as efficient as possible in our listing process. Therefore, as we work on proposed rules for the highest priority species in the next several years, we are preparing multi-species proposals when appropriate, and these may include

species with lower priority if they overlap geographically or have the same threats as a species with an LPN of 2. In addition, we take into consideration the availability of staff resources when we determine which high-priority species will receive funding to minimize the amount of time and resources required to complete each listing action.

As explained above, a determination that listing is warranted but precluded must also demonstrate that expeditious progress is being made to add and remove qualified species to and from the Lists of Endangered and Threatened Wildlife and Plants. As with our ''precluded'' finding, the evaluation of whether progress in adding qualified species to the Lists has been expeditious is a function of the resources available for listing and the competing demands for those funds. (Although we do not discuss it in detail here, we are also making expeditious progress in removing species from the list under the Recovery program in light of the resource available for delisting, which is funded by a separate line item in the budget of the Endangered Species Program. So far during FY 2011, we have completed one delisting rule.) Given the limited resources available for listing, we find that we are making expeditious progress in FY 2011 in the Listing Program. This progress included preparing and publishing the following determinations:

FY 2011 COMPLETED LISTING ACTIONS

Publication date	Title	Actions	FR pages
10/6/2010	Endangered Status for the Altamaha Spinymussel and Designation of Critical Habitat.	Proposed Listing Endangered	75 FR 61664–61690
10/7/2010	12-Month Finding on a Petition to List the Sacramento Splittail as Endangered or Threatened.	Notice of 12-Month petition finding, Not warranted.	75 FR 62070–62095
10/28/2010	Endangered Status and Designation of Critical Habitat for Spikedace and Loach Minnow.	Proposed Listing Endangered (uplisting)	75 FR 66481–66552
11/2/2010	90-Day Finding on a Petition to List the Bay Springs Salamander as Endangered.	Notice of 90-day Petition Finding, Not substantial	75 FR 67341–67343
11/2/2010	Determination of Endangered Status for the Georgia Pigtoe Mussel, Interrupted Rocksnail, and Rough Hornsnail and Designation of Critical Habitat.	Final Listing Endangered	75 FR 67511–67550
11/2/2010	Listing the Rayed Bean and Snuffbox as Endangered.	Proposed Listing Endangered	75 FR 67551–67583
11/4/2010	12-Month Finding on a Petition to List Cirsium wrightii (Wright's Marsh Thistle) as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 67925–67944
12/14/2010	Endangered Status for Dunes Sagebrush Lizard	Proposed Listing Endangered	75 FR77801–77817
12/14/2010	12-month Finding on a Petition to List the North American Wolverine as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78029–78061
12/14/2010	12-Month Finding on a Petition to List the Sonoran Population of the Desert Tortoise as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78093–78146
12/15/2010	12-Month Finding on a Petition to List *Astragalus microcymbus* and *Astragalus schmolliae* as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	75 FR 78513–78556
12/28/2010	Listing Seven Brazilian Bird Species as Endangered Throughout Their Range.	Final Listing Endangered	75 FR 81793–81815
1/4/2011	90-Day Finding on a Petition to List the Red Knot subspecies *Calidris canutus roselaari* as Endangered.	Notice of 90-day Petition Finding, Not substantial	76 FR 304–311
1/19/2011	Endangered Status for the Sheepnose and Spectaclecase Mussels.	Proposed Listing Endangered	76 FR 3392–3420
2/10/2011	12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 7634–7679
2/17/2011	90-Day Finding on a Petition To List the Sand Verbena Moth as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 9309–9318
2/22/2011	Determination of Threatened Status for the New Zealand-Australia Distinct Population Segment of the Southern Rockhopper Penguin.	Final Listing Threatened	76 FR 9681–9692
2/22/2011	12-Month Finding on a Petition to List *Solanum conocarpum* (marron bacora) as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 9722–9733
2/23/2011	12-Month Finding on a Petition to List Thorne's Hairstreak Butterfly as Endangered.	Notice of 12-month petition finding, Not warranted.	76 FR 991–10003
2/23/2011	12-Month Finding on a Petition to List *Astragalus hamiltonii, Penstemon flowersii, Eriogonum soredium, Lepidium ostleri,* and *Trifolium friscanum* as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded & Not Warraned.	76 FR 10166–10203
2/24/2011	90-Day Finding on a Petition to List the Wild Plains Bison or Each of Four Distinct Population Segments as Threatened.	Notice of 90-day Petition Finding, Not substantial	76 FR 10299–10310

FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR pages
2/24/2011	90-Day Finding on a Petition to List the Unsilvered Fritillary Butterfly as Threatened or Endangered.	Notice of 90-day Petition Finding, Not substantial	76 FR 10310–10319
3/8/2011	12-Month Finding on a Petition to List the Mt. Charleston Blue Butterfly as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 12667–12683
3/8/2011	90-Day Finding on a Petition to List the Texas Kangaroo Rat as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 12683–12690
3/10/2011	Initiation of Status Review for Longfin Smelt	Notice of Status Review	76 FR 13121–31322
3/15/2011	Withdrawal of Proposed Rule to List the Flat-tailed Horned Lizard as Threatened.	Proposed rule withdrawal	76 FR 14210–14268
3/22/2011	12-Month Finding on a Petition to List the Berry Cave Salamander as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 15919–15932
4/1/2011	90-Day Finding on a Petition to List the Spring Pygmy Sunfish as Endangered.	Notice of 90-day Petition Finding, Substantial	76 FR 18138–18143
4/5/2011	12-Month Finding on a Petition to List the Bearmouth Mountainsnail, Byrne Resort Mountainsnail, and Meltwater Lednian Stonefly as Endangered or Threatened.	Notice of 12-month petition finding, Not Warranted and Warranted but precluded.	76 FR 18684–18701
4/5/2011	90-Day Finding on a Petition To List the Peary Caribou and Dolphin and Union Population of the Barren-ground Caribou as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 18701–18706
4/12/2011	Proposed Endangered Status for the Three Forks Springsnail and San Bernardino Springsnail, and Proposed Designation of Critical Habitat.	Proposed Listing Endangered	76 FR 20464–20488
4/13/2011	90-Day Finding on a Petition To List Spring Mountains Acastus Checkerspot Butterfly as Endangered.	Notice of 90-day Petition Finding, Substantial	76 FR 20613–20622
4/14/2011	90-Day Finding on a Petition to List the Prairie Chub as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	76 FR 20911–20918
4/14/2011	12-Month Finding on a Petition to List Hermes Copper Butterfly as Endangered or Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 20918–20939
4/26/2011	90-Day Finding on a Petition to List the Arapahoe Snowfly as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 23256–23265
4/26/2011	90-Day Finding on a Petition to List the Smooth-Billed Ani as Threatened or Endangered.	Notice of 90-day Petition Finding, Not substantial	76 FR 23265–23271
5/12/2011	Withdrawal of the Proposed Rule to List the Mountain Plover as Threatened.	Proposed Rule, Withdrawal	76 FR 27756–27799
5/25/2011	90-Day Finding on a Petition To List the Spot-tailed Earless Lizard as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 30082–30087
5/26/2011	Listing the Salmon-Crested Cockatoo as Threatened Throughout its Range with Special Rule.	Final Listing Threatened	76 FR 30758–30780
5/31/2011	12-Month Finding on a Petition to List Puerto Rican Harlequin Butterfly as Endangered.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 31282–31294
6/2/2011	90-Day Finding on a Petition to Reclassify the Straight-Horned Markhor (*Capra falconeri jerdoni*) of Torghar Hills as Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 31903–31906
6/2/2011	90-Day Finding on a Petition to List the Golden-winged Warbler as Endangered or Threatened.	Notice of 90-day Petition Finding, Substantial	76 FR 31920–31926
6/7/2011	12-Month Finding on a Petition to List the Striped Newt as Threatened.	Notice of 12-month petition finding, Warranted but precluded.	76 FR 33924–33965
6/9/2011	12-Month Finding on a Petition to List *Abronia ammophila, Agrostis rossiae, Astragalus proimanthus, Boechera Arabis pusilla,* and *Penstemon gibbensii* as Threatened or Endangered.	Notice of 12-month petition finding, Not Warranted and Warranted but precluded.	76 FR 32911–32929
6/21/2011	90-Day Finding on a Petition to List the Utah Population of the Gila Monster as an Endangered or a Threatened Distinct Population Segment.	Notice of 90-day Petition Finding, Not substantial	76 FR 36049–36053
6/21/2011	Revised 90-Day Finding on a Petition To Reclassify the Utah Prairie Dog From Threatened to Endangered.	Notice of 90-day Petition Finding, Not substantial	76 FR 36053–36068
6/28/2011	12-Month Finding on a Petition to List *Castanea pumila* var. *ozarkensis* as Threatened or Endangered.	Notice of 12-month petition finding, Not warranted.	76 FR 37706–37716

FY 2011 COMPLETED LISTING ACTIONS—Continued

Publication date	Title	Actions	FR pages
6/29/2011	90-Day Finding on a Petition to List the Eastern Small-Footed Bat and the Northern Long-Eared Bat as Threatened or Endangered.	Notice of 90-day Petition Finding, Substantial	76 FR 38095–38106
6/30/2011	12-Month Finding on a Petition to List a Distinct Population Segment of the Fisher in Its United States Northern Rocky Mountain Range as Endangered or Threatened with Critical Habitat.	Notice of 12-month petition finding, Not warranted.	76 FR 38504–38532

Our expeditious progress also includes work on listing actions that we funded in FY 2010 and FY 2011 but have not yet been completed to date. These actions are listed below. Actions in the top section of the table are being conducted under a deadline set by a court. Actions in the middle section of the table are being conducted to meet statutory timelines, that is, timelines required under the Act. Actions in the bottom section of the table are high-priority listing actions. These actions include work primarily on species with an LPN of 2, and, as discussed above, selection of these species is partially based on available staff resources, and when appropriate, include species with a lower priority if they overlap geographically or have the same threats as the species with the high priority. Including these species together in the same proposed rule results in considerable savings in time and funding, when compared to preparing separate proposed rules for each of them in the future.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED

Species	Action
Actions Subject to Court Order/Settlement Agreement	
4 parrot species (military macaw, yellow-billed parrot, red-crowned parrot, scarlet macaw) [5]	12-month petition finding.
4 parrot species (blue-headed macaw, great green macaw, grey-cheeked parakeet, hyacinth macaw) [5]	12-month petition finding.
4 parrot species (crimson shining parrot, white cockatoo, Philippine cockatoo, yellow-crested cockatoo) [5]	12-month petition finding.
Longfin smelt	12-month petition finding.
Actions With Statutory Deadlines	
Casey's june beetle	Final listing determination.
6 Birds from Eurasia	Final listing determination.
5 Bird species from Colombia and Ecuador	Final listing determination.
Queen Charlotte goshawk	Final listing determination.
5 species southeast fish (Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace) [4].	Final listing determination.
Ozark hellbender [4]	Final listing determination.
Altamaha spinymussel [3]	Final listing determination.
3 Colorado plants (*Ipomopsis polyantha* (Pagosa Skyrocket), *Penstemon debilis* (Parachute Beardtongue), and *Phacelia submutica* (DeBeque Phacelia)) [4].	Final listing determination.
6 Birds from Peru & Bolivia	Final listing determination.
Loggerhead sea turtle (assist National Marine Fisheries Service) [5]	Final listing determination.
2 mussels (rayed bean (LPN = 2), snuffbox No LPN) [5]	Final listing determination.
CA golden trout [4]	12-month petition finding.
Black-footed albatross	12-month petition finding.
Mojave fringe-toed lizard [1]	12-month petition finding.
Kokanee—Lake Sammamish population [1]	12-month petition finding.
Cactus ferruginous pygmy-owl [1]	12-month petition finding.
Northern leopard frog	12-month petition finding.
Tehachapi slender salamander	12-month petition finding.
Coqui Llanero	12-month petition finding/ Proposed listing.
Dusky tree vole	12-month petition finding.
Leatherside chub (from 206 species petition)	12-month petition finding.
Frigid ambersnail (from 206 species petition) [3]	12-month petition finding.
Platte River caddisfly (from 206 species petition) [5]	12-month petition finding.
Gopher tortoise—eastern population	12-month petition finding.
Grand Canyon scorpion (from 475 species petition)	12-month petition finding.
Anacroneuria wipukupa (a stonefly from 475 species petition) [4]	12-month petition finding.
3 Texas moths (*Ursia furtiva, Sphingicampa blanchardi, Agapema galbina*) (from 475 species petition)	12-month petition finding.
2 Texas shiners (*Cyprinella* sp., *Cyprinella lepida*) (from 475 species petition)	12-month petition finding.
3 South Arizona plants (*Erigeron piscaticus, Astragalus hypoxylus, Amoreuxia gonzalezii*) (from 475 species petition).	12-month petition finding.
5 Central Texas mussel species (3 from 475 species petition)	12-month petition finding.
14 parrots (foreign species)	12-month petition finding.
Fisher—Northern Rocky Mountain Range [1]	12-month petition finding.
Mohave ground squirrel [1]	12-month petition finding.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
Western gull-billed tern	12-month petition finding.
Ozark chinquapin (*Castanea pumila* var. *ozarkensis*) [4]	12-month petition finding.
HI yellow-faced bees	12-month petition finding.
Giant Palouse earthworm	12-month petition finding.
Whitebark pine	12-month petition finding.
OK grass pink (*Calopogon oklahomensis*) [1]	12-month petition finding.
Ashy storm-petrel [5]	12-month petition finding.
Honduran emerald	12-month petition finding.
Southeastern pop. snowy plover & wintering pop. of piping plover [1]	90-day petition finding.
Eagle Lake trout [1]	90-day petition finding.
32 Pacific Northwest mollusk species (snails and slugs) [1]	90-day petition finding.
42 snail species (Nevada & Utah)	90-day petition finding.
Spring Mountains checkerspot butterfly	90-day petition finding.
Bay skipper	90-day petition finding.
Eastern small-footed bat	90-day petition finding.
Northern long-eared bat	90-day petition finding.
10 species of Great Basin butterfly	90-day petition finding.
6 sand dune (scarab) beetles	90-day petition finding.
404 Southeast species	90-day petition finding.
Franklin's bumble bee [4]	90-day petition finding.
2 Idaho snowflies (straight snowfly & Idaho snowfly) [4]	90-day petition finding.
American eel [4]	90-day petition finding.
Gila monster (Utah population) [4]	90-day petition finding.
Leona's little blue [4]	90-day petition finding.
Aztec gilia [5]	90-day petition finding.
White-tailed ptarmigan [5]	90-day petition finding.
San Bernardino flying squirrel [5]	90-day petition finding.
Bicknell's thrush [5]	90-day petition finding.
Chimpanzee	90-day petition finding.
Sonoran talussnail [5]	90-day petition finding.
2 AZ Sky Island plants (*Graptopetalum bartrami* & *Pectis imberbis*) [5]	90-day petition finding.
I'iwi [5]	90-day petition finding.
Humboldt marten	90-day petition finding.
Desert massasauga	90-day petition finding.
Western glacier stonefly (*Zapada glacier*)	90-day petition finding.
Thermophilic ostracod (*Potamocypris hunteri*)	90-day petition finding.
Sierra Nevada red fox [5]	90-day petition finding.
Boreal toad (eastern or southern Rocky Mtn population) [5]	90-day petition finding.
High-Priority Listing Actions	
19 Oahu candidate species [2] (16 plants, 3 damselflies) (15 with LPN = 2, 3 with LPN = 3, 1 with LPN = 9)	Proposed listing.
19 Maui-Nui candidate species [2] (16 plants, 3 tree snails) (14 with LPN = 2, 2 with LPN = 3, 3 with LPN = 8)	Proposed listing.
Chupadera springsnail [2] (*Pyrgulopsis chupaderae* (LPN = 2)	Proposed listing.
8 Gulf Coast mussels (southern kidneyshell (LPN = 2), round ebonyshell (LPN = 2), Alabama pearlshell (LPN = 2), southern sandshell (LPN = 5), fuzzy pigtoe (LPN = 5), Choctaw bean (LPN = 5), narrow pigtoe (LPN = 5), and tapered pigtoe (LPN = 11)) [4].	Proposed listing.
Umtanum buckwheat (LPN = 2) and white bluffs bladderpod (LPN = 9) [4]	Proposed listing.
Grotto sculpin (LPN = 2) [4]	Proposed listing.
2 Arkansas mussels (Neosho mucket (LPN = 2) & Rabbitsfoot (LPN = 9)) [4]	Proposed listing.
Diamond darter (LPN = 2) [4]	Proposed listing.
Gunnison sage-grouse (LPN = 2) [4]	Proposed listing.
Coral Pink Sand Dunes tiger beetle (LPN = 2) [5]	Proposed listing.
Miami blue butterfly (LPN = 3) [3]	Proposed listing.
Lesser prairie chicken (LPN = 2)	Proposed listing.
4 Texas salamanders (Austin blind salamander (LPN = 2), Salado salamander (LPN = 2), Georgetown salamander (LPN = 8), Jollyville Plateau (LPN = 8)) [3].	Proposed listing.
5 SW aquatics (Gonzales Spring Snail (LPN = 2), Diamond Y springsnail (LPN = 2), Phantom springsnail (LPN = 2), Phantom Cave snail (LPN = 2), Diminutive amphipod (LPN = 2)) [3].	Proposed listing.
2 Texas plants (Texas golden gladecress (*Leavenworthia texana*) (LPN = 2), Neches River rose-mallow (*Hibiscus dasycalyx*) (LPN = 2)) [3].	Proposed listing.
4 AZ plants (Acuna cactus (*Echinomastus erectocentrus* var. *acunensis*) (LPN = 3), Fickeisen plains cactus (*Pediocactus peeblesianus fickeiseniae*) (LPN = 3), Lemmon fleabane (*Erigeron lemmonii*) (LPN = 8), Gierisch mallow (*Sphaeralcea gierischii*) (LPN = 2)) [5].	Proposed listing.
FL bonneted bat (LPN = 2) [3]	Proposed listing.
3 Southern FL plants (Florida semaphore cactus (*Consolea corallicola*) (LPN = 2), shellmound applecactus (*Harrisia* (= *Cereus*) *aboriginum* (= *gracilis*)) (LPN = 2), Cape Sable thoroughwort (*Chromolaena frustrata*) (LPN = 2)) [5].	Proposed listing.
21 Big Island (HI) species [5] (includes 8 candidate species—6 plants & 2 animals; 4 with LPN = 2, 1 with LPN = 3, 1 with LPN = 4, 2 with LPN = 8).	Proposed listing.
12 Puget Sound prairie species (9 subspecies of pocket gopher (*Thomomys mazama* ssp.) (LPN = 3), streaked horned lark (LPN = 3), Taylor's checkerspot (LPN = 3), Mardon skipper (LPN = 8)) [3].	Proposed listing.

ACTIONS FUNDED IN FY 2010 AND FY 2011 BUT NOT YET COMPLETED—Continued

Species	Action
2 TN River mussels (fluted kidneyshell (LPN = 2), slabside pearlymussel (LPN = 2)[5]	Proposed listing.
Jemez Mountain salamander (LPN = 2)[5]	Proposed listing.

[1] Funds for listing actions for these species were provided in previous FYs.
[2] Although funds for these high-priority listing actions were provided in FY 2008 or 2009, due to the complexity of these actions and competing priorities, these actions are still being developed.
[3] Partially funded with FY 2010 funds and FY 2011 funds.
[4] Funded with FY 2010 funds.
[5] Funded with FY 2011 funds.

We have endeavored to make our listing actions as efficient and timely as possible, given the requirements of the relevant law and regulations, and constraints relating to workload and personnel. We are continually considering ways to streamline processes or achieve economies of scale, such as by batching related actions together. Given our limited budget for implementing section 4 of the Act, these actions described above collectively constitute expeditious progress.

Pinus albicaulis will be added to the list of candidate species upon publication of this 12-month finding. We will continue to evaluate this species as new information becomes available. Continuing review will determine if a change in status is warranted, including the need to make prompt use of emergency listing procedures.

We intend that any proposed listing determination for *Pinus albicaulis* will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the Wyoming Ecological Services Field Office (see **ADDRESSES** section).

Author(s)

The primary authors of this notice are the staff members of the Wyoming Ecological Services Field Office.

Authority

The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 1, 2011.

Daniel M. Ashe,

Director, Fish and Wildlife Service.

[FR Doc. 2011–17943 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R2–ES–2011–0044; MO 92210–0–0008–B2]

Endangered and Threatened Wildlife and Plants; Petition To List Grand Canyon Cave Pseudoscorpion

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding on a petition to list the Grand Canyon cave pseudoscorpion (*Archeolarca cavicola*) as threatened or endangered with critical habitat under the Endangered Species Act of 1973, as amended (Act). After review of the best scientific and commercial information available, we find that listing the Grand Canyon cave pseudoscorpion is not warranted at this time. However, we ask the public to submit to us any new information that becomes available concerning the threats to the Grand Canyon cave pseudoscorpion or its habitat at any time.

DATES: The finding announced in this document was made on July 19, 2011.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–R2–ES–2011–0044. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours by contacting the U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone (602) 242–0210; facsimile (602) 242–2513. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at (800) 877–8339. Please submit any new information, comments, or questions concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Steve Spangle, Field Supervisor, U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, AZ 85021; telephone (602) 242–0210; facsimile (602) 242–2513. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition containing substantial scientific or commercial information indicating that listing the species may be warranted, we make a finding within 12 months of the date of receipt of the petition. In this finding we determine that the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted, but immediate proposal of a regulation implementing the petitioned action is precluded by other pending proposals to determine whether species are threatened or endangered, and expeditious progress is being made to add or remove qualified species from the Lists of Endangered and Threatened Wildlife and Plants. Section 4(b)(3)(C) of the Act requires that we treat a petition for which the requested action is found to be warranted but precluded as though resubmitted on the date of such finding, that is, requiring a subsequent finding to be made within 12 months. We must publish these 12-month findings in the **Federal Register**.

Previous Federal Actions

The Grand Canyon cave pseudoscorpion was formerly a candidate 2 species, a taxon for which information in our possession indicated that proposing to list was possibly appropriate, but for which persuasive data on biological vulnerability and threats were not available to support a proposed listing rule (54 FR 554; January 6, 1989). The designation of candidate 2 species was discontinued in

1996; therefore, the species has no candidate status.

On June 25, 2007, we received a formal petition dated June 18, 2007, from Forest Guardians (now WildEarth Guardians), requesting that we do the following: (1) Consider all full species in our Southwest Region ranked as G1 or G1G2 by the organization NatureServe for listing, except those that are currently listed, proposed for listing, or candidates; and (2) list each species under the Act as either endangered or threatened with critical habitat. The petitioners presented two tables that collectively listed 475 species for consideration and requested that the Service incorporate all analyses, references, and documentation provided by NatureServe in its online database *http://www.natureserve.org/* into the petition. The petition clearly identified itself as a petition and included the appropriate identification information, as required in 50 CFR 424.14(a). We acknowledged the receipt of the petition in a letter to WildEarth Guardians dated July 11, 2007.

On December 16, 2009, we made a 90-day finding that the petition presented substantial scientific information indicating that listing 67 of the 475 species may be warranted; the Grand Canyon cave pseudoscorpion (incorrectly referenced as the Grand Canyon cave scorpion) was in that group of 67 species. Based on the evaluation of the information provided in the petition, we determined that the petition presented substantial information to indicate that listing the Grand Canyon cave pseudoscorpion may be warranted due to the present or threatened destruction, modification, or curtailment of its habitat or range resulting from groundwater pollution and recreational impacts, and to the inadequacy of existing regulatory mechanisms resulting from unregulated visitation. The 90-day finding and our initiation of a status review was published in the **Federal Register** on December 16, 2009 (74 FR 66866). This notice constitutes the 12-month finding on the June 18, 2007, petition to list the Grand Canyon cave pseudoscorpion as threatened or endangered.

Species Information

Species Description

In 1978 W. Calvin Welbourn collected one female specimen of the Grand Canyon cave pseudoscorpion (Class Arachnida, Order Pseudoscorpionida, Family Garypidae) in Grand Canyon National Park's Cave of the Domes. This specimen was first described by Muchmore (1981, p. 55). Welbourn's unpublished report (1978, p. 40) stated that the specimen was an undescribed troglophile. A troglophile is a species that can spend its entire life within caves, does not exhibit adaptations for living in caves, but can also be found in suitable habitats outside of caves, such as mines or animal burrows. This is in comparison to troglobites, which are species that are found exclusively in caves and have developed adaptations for cave life, such as heightened sense of hearing, touch, and smell. The Grand Canyon cave pseudoscorpion was recognized within the genus *Archeolarca* and was given the species name *cavicola* in recognition of its subterranean habitat where it was collected by Welbourn (1981, p. 55). The specimen collected in 1978 is the only one known to exist. No other individuals are known to have been collected since 1978, although very little effort has been made to collect this or other species in the genus (Service 1991, p. 3).

Pseudoscorpions are tiny arachnids bearing large chelae, or claws, but lacking a telson, or stinger, that true scorpions possess. The specimen of Grand Canyon cave pseudoscorpion, when compared to other species of pseudoscorpions, such as *Archeolarca welbourni* and *Archeolarca guadalupensis,* was considered large (0.12 inches (in) or 3.03 millimeters (mm)), had longer appendages, more reduced posterior eyes, and fewer setae (stiff bristles present on the body) on its upper dorsal section (Muchmore 1981, p. 56). Muchmore (1981, pp. 52–56) described three new species of *Archeolarca,* and concluded that the Grand Canyon cave pseudoscorpion showed the greatest overall adaption to the cave environment. Welbourn (1978, p. 40) noted that the specimen appeared to be similar to the pseudoscorpions from earth cracks in Wupatki National Mountain, Arizona, approximately 75 miles (121 kilometers (km)) south of Grand Canyon National Park. Other species in the genus *Archeolarca* have been reported in California, Utah, Texas, and Oregon (Muchmore 1981, p. 56; Peck 1998, p. 23).

Distribution

The Cave of the Domes in Grand Canyon National Park is currently the only known location for the Grand Canyon cave pseudoscorpion. Welbourn (1978, pp. 36–41) conducted a regional study of cave fauna on Horseshoe Mesa of the Grand Canyon from 1977 to 1978. Eight caves were examined including Babylon Cave, Crystal Forest Cave, Land's End Cave, Middle Cave, Scorpion Cave, Tse An Cho Cave, Tuning Fork Cave, and Cave of the Domes. All caves except Land's End Cave and Scorpion Cave were visited twice. On each visit, Welbourn (1978, p. 36) describes examining the walls, ceilings, and floors for animals and invertebrates. He identified 12 invertebrates from the 8 caves. The Grand Canyon cave pseudoscorpion was found only in the Cave of the Domes (Welbourn 1978, pp. 38–41).

Wynne *et al.* (2008a, pp. 235–246) summarized all published and unpublished literature on cave-dwelling invertebrates within Grand Canyon National Park, as well as cave trip reports on file at Grand Canyon National Park Museum Collections. The literature review examined 9 studies conducted between 1975 and 2001 representing surveys of 15 caves in Grand Canyon National Park. Wynne *et al.* (2008a, pp. 237–238) reported 37 cave-dwelling invertebrates with the Grand Canyon cave pseudoscorpion referenced only in the Cave of the Domes. This species may possibly be endemic to Cave of the Domes. In fact, a study of patterns of endemism of eastern North American cave fauna reported that within the Pseudoscorpionida is a high level of single-cave endemism compared to other cave taxa (Christman *et al.* 2005, pp. 1444, 1447). However, cave biological research in Grand Canyon National Park is quite limited (Wynne 2010, pers. comm.; Drost 2010, pers. comm.) and more invertebrate surveys need to be conducted before we can conclude that the Grand Canyon cave pseudoscorpion is endemic to the Cave of the Domes. Further, because many cave-dwelling organisms are hard to find, cave inventories cannot be considered complete without intensive invertebrate trapping, baiting of the entity, and multiple site visits (Wynne 2010, pers. comm.). We cannot describe the distribution based on a single specimen; therefore, we are not able to determine the distribution of the Grand Canyon cave pseudoscorpion.

Habitat and Biology

Most species of pseudoscorpions occur in tropical and subtropical areas throughout the world, although pseudoscorpions can also be found in temperate zones (Weygoldt 1969, pg. 108). They are found in a great variety of habitats, but one essential feature appears to be the presence of small crevices where they can retreat. All pseudoscorpion species spend most of their lives within these crevices and seldom appear on open ground. These small crevices can be found in rocks, tree bark, leaf litter, nests of birds and other small mammals, and buildings.

Another important habitat factor is humidity; most pseudoscorpions prefer high humidity, although some species are found in arid conditions, such as deserts (Weygoldt 1969, pp. 108–111).

There are few studies on the ecology and habitat preferences of specific species of pseudoscorpions. We have no specific information about the habitat and biology of the Grand Canyon cave pseudoscorpion because the species is known from only one specimen. Accordingly, we can only speculate about their habitat requirements and biology based on the scant general information known about pseudoscorpions.

Welbourn (1978, p. 37) observed that the single most important limiting factor for the cave fauna on Horseshoe Mesa, which includes Cave of the Domes, was the lack of moisture. Welbourn (1978, p. 37) reported that most of the caves surveyed were dry and dusty with low relative humidity, and that most of the caves examined, including Cave of the Domes, received moisture from rainfall that percolates through the limestone above. Welbourn (1978, p. 40) reported collecting the species ''in the Cross passage of Cave of the Domes in some organic material (grass).'' According to the Grand Canyon National Park's hydrologist, the Cave of the Domes is considered to be a dry cave with no discharge or pools, but that the Cave of the Domes has some small ephemeral drip zones (Rice 2010, pers. comm.). We do not know if the location where the Grand Canyon cave pseudoscorpion was found was optimal habitat or an accidental find, but if pseudoscorpions prefer humid locations, this location may not represent optimal habitat.

Some species of pseudoscorpions are known to be phoretic (use another species for transportation) on other arthropods such as flies, beetles, and wasps. Pseudoscorpions will attach themselves (not as parasites) to the legs and appendages of the adult arthropod, which permits them to ''hitchhike.'' According to Poinar *et al.* (1998, p. 79), the principal benefit of pseudoscorpion phoresy is dispersal; that is, to reach a new habitat with an adequate supply of food. We can only speculate on the presence of the one specimen of Grand Canyon cave pseudoscorpion in Cave of the Domes, but perhaps it was carried there and deposited by an arthropod.

The Park Service's biological report (Hill *et al.* 1998, pg. 16) from Cave of the Domes indicated that packrat middens (nests) were observed inside Cave of the Domes. The report stated that a packrat midden was found ''in the second room of the cave''. Pseudoscorpions are often present in rodent nests (Francke and Villegas-Guzmán 2006, p. 289). Muchmore (1991, pers. comm.) stated that the genus *Archeolarca* does not usually inhabit caves but rather is found in packrat nests, although packrat middens are sometimes found in caves. Francke and Villegas-Guzmán (2006, p. 297) conclude that pseudoscorpions most likely coexist with a particular rodent species in a mutualistic association (a relationship between two species where both species derive benefits) in which pseudoscorpions feed on adult and larval fleas, which reduces the parasite load within the host nest. The benefits to the pseudoscorpion include the host nest providing suitable microclimate, especially in semiarid regions, as well as food (i.e., mites, fleas, flies and their larvae). It is possible that this species may be associated with packrat middens or other small mammal nests within Cave of the Domes, but we cannot draw that conclusion based on one specimen.

In summary, we lack sufficient information on the species to reach conclusions about the biology or the habitat needs of the Grand Canyon cave pseudoscorpion. This is primarily because we know of only one specimen, and we cannot make scientifically sound conclusions regarding habitat characteristics and biology based on a single specimen.

Factors Affecting the Grand Canyon Cave Pseudoscorpion

Section 4 of the Act (16 U.S.C. 1533) and implementing regulations (50 CFR part 424) set forth procedures for adding species to, removing species from, or reclassifying species on the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, a species may be determined to be endangered or threatened based on any of the following five factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

In making this finding, information pertaining to the Grand Canyon cave pseudoscorpion in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The Arizona Game and Fish Department (2003, p. 2) stated that a threat to the Grand Canyon cave pseudoscorpion was groundwater pollution. Our previous discussion in the *Habitat and Biology* section indicates that Cave of the Domes, where the species was collected, is considered dry and has very little ephemeral water (i.e., small drip zones). Further, the specimen was found associated with dry, organic material (grass) in Cave of the Domes. This description of the site where the Grand Canyon cave pseudoscorpion was collected seems unlikely to be affected by groundwater pollution because it is relatively dry, and based on a single specimen we are unable to determine the type of cave habitat associated with this species. Additionally, we have no specific information regarding the presence or introduction of contaminants or pollutants in water sources on Horseshoe Mesa, which could percolate into the Cave of the Domes. Therefore, we are unable to determine if groundwater pollution is a threat.

Cave of the Domes is the only cave in Grand Canyon National Park for which visitation is allowed. It is unknown whether recreation is modifying or destroying the Grand Canyon cave pseudoscorpion's habitat. A report from the Grand Canyon National Park (Western Speleological Institute 1954, pp. 1–2) stated that the cave has been badly vandalized and floor deposits have been marred by trampling. However, it is unknown if this damage affects the pseudoscorpion's habitat because that habitat is unknown. We note that vandalism and trampling have been identified as potential threats to other pseudoscorpion species, such as the Empire cave pseudoscorpion (*Microcreagris imperialis*) (Muchmore and Cokendolpher 1995, pp. 174–175) and the Tooth cave pseudoscorpion (*Tartarocreagris texana*) (Service 1994, pp. 62–63). If the Grand Canyon cave pseudoscorpion occupies packrat middens, as do other pseudoscorpions in the genus *Archeolarca,* then recreational foot traffic may be a discountable impact; however, we are lacking sufficient information on the habitat for this species. As such, we are unable to determine if recreational activity is affecting the Grand Canyon cave pseudoscorpion or its habitat.

In summary, given the paucity of biological information regarding the Grand Canyon cave pseudoscorpion and its habitat, we cannot determine or

conclude that habitat degradation due to groundwater pollution or recreational activities in the Cave of the Domes is a threat to the species now or in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Any commercial, recreational, scientific, or educational collection activities, including the collection of pseudoscorpions, would require a permit by the National Park Service. Because of this regulation, there is no data suggesting that overutilization for commercial, recreational, scientific, or educational purposes pose a threat to the species. There are no known commercial or recreational uses for Grand Canyon cave pseudoscorpions. Therefore, we find that the Grand Canyon cave pseudoscorpion is not threatened by overutilization now or in the foreseeable future.

Factor C. Disease or Predation

We have no information to indicate that the Grand Canyon cave pseudoscorpion is subject to disease or predation. We have not encountered any information that indicates the contrary; however, in the absence of evidence that this factor may constitute a threat to the species, we cannot determine or conclude that the Grand Canyon cave pseudoscorpion is threatened by disease or predation now or in the foreseeable future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Under the current National Park Service policy, all caves in Grand Canyon National Park are closed to visitation by recreational users except for the Cave of the Domes. The Park Service has the authority, under the Federal Cave Resources Protection Act of 1988, to close areas to visitors if there is significant degradation of a resource or the threat of degradation or damage. On Park Service lands, all caves are deemed ''significant,'' and the Park Service protects the caves, including biological, cultural, and paleontological resources within the caves. The decision to regulate visitors or close the cave to recreational use is made by the Park Superintendent with supporting documentation from resource managers. Official criteria for determining recreational access to Grand Canyon National Park caves has not been established, but the initiation of a Cave Management Plan is planned.

Cave of the Domes is located beneath Horseshoe Mesa and is well known to hikers and cavers. The Web site *http://www.birdandhike.com* provides a detailed overview of the cave, including photos and directions to the trailhead and to the mouth of the cave. The Web site *http://www.kaibab.org* also provides information about Cave of the Domes and states that many formations have been damaged by careless individuals and asks visitors to treat the cave with respect. As stated above, we lack data to assess the effect of recreation on the petitioned species. Therefore, due to the lack of information regarding impacts of recreational visitors and the Park Service's ability to close the area if additional information comes to light, we find that the Grand Canyon cave pseudoscorpion is not threatened by inadequacy of regulatory mechanisms now or in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Model predictions are that temperatures in the Southwestern United States will continue to increase, with extreme weather events (such as heat waves, drought, and flooding) occurring with more frequency due to global climate change (Archer and Predick 2008, p. 24). It is unknown how cave-adapted taxa will respond to global climate change. Baseline information on ecosystem structure and community structure is lacking for many caves, and we do not know how cave-dwelling species will respond to rising temperatures. Different layers of a cave may be affected differently, depending on their depth. (Wynne *et al.* 2008b, p. 241). There will most likely be a lag effect; caves with shallow vertical depth are predicted to have a more immediate response than caves with deeper vertical depth (Wynne 2010, pers. comm.). We have no information on the geophysical properties of Cave of the Domes. Researchers are currently attempting to understand the geophysical properties of caves as they relate to cave depth, the potential effects of rising surface temperatures on cave temperatures, and how the physiological requirements of cave-dwelling and cave-adapted species are affected by climate change (Drost 2010, pers. comm.). Based on the best available information, we cannot determine or conclude that climate change is a threat to the Grand Canyon cave pseudoscorpion now or in the foreseeable future.

Finding

As required by the Act, we considered the five factors in assessing whether the Grand Canyon cave pseudoscorpion is threatened or endangered throughout all or a significant portion of its range. We examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Grand Canyon cave pseudoscorpion. We reviewed the petition, information available in our files, other available published and unpublished information, and we consulted with recognized invertebrate experts and the Grand Canyon National Park biologist and hydrologist.

In considering what factors might constitute threats, we must look beyond the mere exposure of the species to the factor to determine whether the species responds to the factor in a way that causes actual impacts to the species. If there is exposure to a factor, but no response, or only a positive response, that factor is not a threat. If there is exposure and the species responds negatively, the factor may be a threat and we then attempt to determine how significant a threat it is. If the threat is significant, it may drive or contribute to the risk of extinction of the species such that the species warrants listing as threatened or endangered as those terms are defined by the Act. This does not necessarily require empirical proof of a threat. The combination of exposure and some corroborating evidence of how the species is likely impacted could suffice. The mere identification of factors that could impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species to the point that the species meets the definition of threatened or endangered under the Act.

Based on our review of the best available scientific and commercial information pertaining to the five factors, we found no evidence to indicate that there are threats to the species or its habitat, from any of the five factors. For this reason, we conclude that the Grand Canyon cave pseudoscorpion does not meet the definition of a threatened or endangered species and are, therefore, recommending a finding of ''not warranted.''

We request that you submit any new information concerning the distribution and status of, or threats to, the Grand Canyon cave pseudoscorpion to our U.S. Fish and Wildlife Service Office (see **ADDRESSES**) whenever it becomes available. New information will help us monitor the Grand Canyon cave pseudoscorpion and encourage its conservation. If an emergency situation develops for the Grand Canyon cave pseudoscorpion or any other species, we will act to provide immediate protection.

References Cited

A complete list of references cited is available on the Internet at *http://www.regulations.gov* and upon request from the U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office (see **ADDRESSES**).

Author(s)

The primary authors of this finding are the staff members of the Arizona Ecological Services Field Office.

Authority: The authority for this section is section 4 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 21, 2011.

Rowan W. Gould,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2011–17864 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 110615334–1325–01]

RIN 0648–XA311

Endangered and Threatened Species: Authorizing Release of a Nonessential Experimental Population of Upper Columbia Spring-Run Chinook Salmon in the Okanogan River Basin Under the Endangered Species Act

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

ACTION: Advance Notice of Proposed Rulemaking; Request for Information.

SUMMARY: We, the National Marine Fisheries Service (NMFS), will be considering a proposal to authorize a nonessential experimental population of Upper Columbia (UC) spring-run Chinook salmon (*Oncorhynchus tshawytscha*) in the Okanogan River and its tributaries in Okanogan County, Washington under the Endangered Species Act (ESA) of 1973, as amended. The geographic boundaries of the experimental population area would likely include the entire Okanogan River subbasin and a portion of the mainstem Columbia River from the confluence of the Columbia and Okanogan Rivers upstream to the base of Chief Joseph Dam. We will consider the best available information to determine if reintroduction of Chinook salmon is biologically feasible and will promote the conservation of the UC spring-run Chinook salmon Evolutionarily Significant Unit (ESU). This advance notice of proposed rulemaking (ANPR) identifies policy and technical issues for consideration and evaluation, and solicits comments regarding them.

DATES: Comments and information regarding the designation process may be sent to us (see **ADDRESSES**), no later than 5 p.m. Pacific Time on September 19, 2011.

ADDRESSES: Comments may be sent to Chief, Protected Resources Division, NMFS, 1201 NE. Lloyd Blvd.—Suite 1100, Portland, OR 97232. Comments may also be sent via facsimile (fax) to 503–230–5441 or submitted on the Internet via the Federal Rulemaking portal at *http://www.regulations.gov*. Follow the instructions for submitting comments.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. We may elect not to post comments that contain obscene or threatening content. All personal identifying information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

We will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Eric Murray, NMFS, Northwest Region, Portland, OR 503–231–2378; or Dwayne Meadows, NMFS, Office of Protected Resources, Silver Spring, MD 301–713–1401.

SUPPLEMENTARY INFORMATION:

Rulemaking Background

We first listed the Upper Columbia (UC) spring-run Chinook salmon ESU as endangered under the ESA on March 24, 1999 (64 FR 14308), and reaffirmed this status on June 28, 2005 (70 FR 37160). ESA Section 9 ''take'' prohibitions currently apply to the UC spring-run Chinook salmon ESU because of its endangered status.

The listed ESU currently includes all naturally spawned populations of spring-run Chinook salmon in accessible reaches of Columbia River tributaries between Rock Island and Chief Joseph Dams, excluding the Okanogan River. Listed spring-run Chinook salmon from this ESU currently spawn in three river basins in eastern Washington: The Methow, Entiat and Wenatchee. A fourth population historically inhabited the Okanogan River Basin, but was extirpated in the 1930s because of overfishing, hydropower development, and habitat degradation (NMFS, 2007).

The designated critical habitat of UC spring-run Chinook salmon similarly includes all accessible reaches of Columbia River tributaries between Rock Island and Chief Joseph Dams, but excludes the Okanogan River. We did not include the Okanogan River Basin in any critical habitat designation because the Okanogan population of spring-run Chinook salmon no longer existed.

The listed UC spring-run Chinook salmon ESU also includes six artificial propagation programs: The Twisp River, Chewuch River, Methow Composite, Winthrop National Fish Hatchery, Chiwawa River, and White River spring Chinook salmon hatchery programs.

On October 9, 2007, we adopted a final recovery plan for the UC spring-run Chinook salmon ESU (72 FR 57303). The recovery plan identifies three extant populations in this ESU (the Methow, Wenatchee, and Entiat) and an historic, extirpated population in the Okanogan River Basin (NMFS, 2007). The recovery plan identifies re-establishment of a population in the Okanogan River Basin as a recovery action (NMFS, 2007). Re-establishment of a spring-run Chinook salmon population in the Okanogan River Basin could aid recovery of this ESU by increasing abundance, by improving spatial structure, and by reducing the risk of extinction to the ESU as a whole.

On November 22, 2010, we received a letter from the Confederated Tribes of the Colville Reservation (CTCR) requesting that we authorize the release of an experimental population of spring-run Chinook salmon in the Okanogan River Basin. The CTCR has also initiated discussions on this topic with the U.S. Fish and Wildlife Service (USFWS), the Bonneville Power Administration, the Army Corps of Engineers, the Bureau of Reclamation, the Washington Department of Fish and Wildlife (WDFW), and the Okanagan Nations Alliance of Canada. The CTCR's request included a large amount of information on the biology of UC spring-run Chinook salmon and the possible management implications of releasing an experimental population in the Okanogan Basin.

Statutory and Regulatory Framework

Section 10(j) of the ESA allows the Secretary of Commerce (Secretary) to authorize the release of populations of listed species outside their current range

if the release would ''further the conservation'' of the listed species. The statute refers to such a population as ''experimental.'' We may only authorize an experimental population by regulation, and the regulation must identify the population and determine, on the basis of the best available information, whether the population is ''essential to the continued existence of the species'' (section 10(j)(B)). Section 10(j) provides that an experimental population is treated as a ''threatened species,'' except that populations authorized as ''non-essential'' experimental populations do not receive the benefits of certain protections normally applicable to threatened species. Below we discuss the impact of treating experimental populations as threatened species, and of exceptions that apply to non-essential experimental populations.

For endangered species, Section 9 of the ESA automatically prohibits take. The ESA defines take to mean harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct. For threatened species, the ESA does not automatically prohibit take, but instead authorizes the agency to adopt regulations it deems necessary and advisable for species conservation (ESA section 4(d)). Such 4(d) regulations may include the take prohibitions of section 9.

If we authorize an experimental population of a threatened species, and there is an existing regulation under ESA section 4(d), that existing regulation will apply to the experimental population. If, however, we authorize an experimental population of an endangered species, there are no protective regulations in place until we adopt regulations under section 4(d). This would be the case for an experimental population of UC spring-run Chinook salmon, which are listed as endangered.

Section 7 of the ESA provides for Federal interagency cooperation and consultation to conserve listed species, ensure survival, help in recovery of the species, and protect designated critical habitat. Section 7(a)(1) mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the ESA in aiding the recovery of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS, to ensure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with NMFS on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

Although ESA Section 10(j) provides that an experimental population is treated as a threatened species, if the experimental population is authorized as non-essential, ESA section 10(j)(C) requires that we apply the ESA Section 7 consultation provisions as if it were a species proposed to be listed, rather than a species that is listed (unless it is located within a National Wildlife Refuge or National Park, in which case it is treated as listed). This means that the ESA Section 7(a)(2) consultation requirement would not apply to a non-essential experimental population in the Okanogan Basin. Only two provisions of ESA Section 7 would apply—section 7(a)(1) and section 7(a)(4).

We have not promulgated regulations implementing ESA Section 10(j), or authorized any experimental populations to date. The USFWS has authorized many experimental populations and developed regulations to implement Section 10(j) at 50 CFR 17.80 through 17.84. While USFWS' regulations do not apply to NMFS' 10(j) authorizations, they can help inform our authorization process. We will consider the factors contained in the USFWS' regulations in determining whether to establish an experimental population of spring-run Chinook in the Okanogan River. The USFWS implementing regulations contain the following provisions:

- The USFWS regulations define an essential experimental population as ''an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.'' All other experimental populations are classified as nonessential. This definition was apparently derived from the legislative history to the ESA amendments that created § 10(j). See, Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 97–835, at 15 (1982).
- In finding whether the experimental population will further the conservation of the species the Secretary shall consider (50 CFR 17.81(b)): (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere, (2) the likelihood that any such experimental population will become established and survive in the foreseeable future, (3) the relative effects that establishment of an experimental population will have on the recovery of the species, and (4) the extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.
- USFWS regulations also describe four components that will be provided in any regulations promulgated with regard to an experimental population under ESA Section 10(j). The components are (50 CFR 17.81(c)): (1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s); (2) a finding, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild; (3) management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population authorized in the regulation from natural populations; and (4) a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

Biological Considerations

Pacific salmon and steelhead are anadromous fish that migrate as adults from the ocean to spawn in freshwater lakes and streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. The migration and spawning times vary considerably between and within species and populations (Groot and Margolis, 1991). At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or ''redds'' excavated by females. Depending on lake/stream temperatures, eggs incubate for several weeks to months before hatching as ''alevins'' (a larval life stage dependent on food stored in a yolk sac). Following yolk sac absorption, alevins emerge from the gravel as young juveniles called ''fry'' and begin actively feeding. Depending on the species and location, juveniles may spend from a few hours to several years in freshwater areas before migrating to the ocean. The physiological and behavioral changes required for the transition to salt water

result in a distinct ''smolt'' stage in most species. On their journey juveniles must migrate downstream through a riverine and estuarine corridor between their natal lake or stream and the ocean. En route to the ocean, the juveniles may spend from a few days to several weeks in the estuary, depending on the species.

Juveniles and subadult salmon and steelhead typically spend from one to five years foraging over thousands of miles in the North Pacific Ocean before returning to spawn. Spawning migrations known as ''runs'' occur throughout the year, varying by species and location. Most adult fish return or ''home'' with great fidelity to spawn in their natal stream, although some do stray to non-natal streams. Pacific salmon species die after spawning.

The homing fidelity of salmon and steelhead has resulted in discrete independent populations distributed among watersheds (McElhany *et al.,* 2000). Portions of the populations will, however, stray into adjacent watersheds to spawn. Straying results in regular genetic exchange among populations, creating genetic similarities among populations in adjacent watersheds. Salmon ESUs that are made up of several independent populations spread over a wide geographic area tend to be at lower risk of extinction than single population ESUs (McElhany *et al.,* 2000).

UC Spring-Run Chinook Salmon Life History

After 2 to 3 years in the ocean, adult UC spring-run Chinook salmon begin returning from the ocean in the early spring, with the run into the Columbia River peaking in mid-May (NMFS, 2007). Spring-run Chinook salmon enter the Upper Columbia River tributaries from April through July. After migration, they hold in these tributaries until spawning occurs in the late summer, peaking in mid to late August. Juvenile spring-run Chinook salmon spend a year in freshwater before migrating to salt water in the spring of their second year of life.

UC Spring-Run Chinook Salmon Recovery Plan

Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing recovery plans for salmon in the interior Columbia River Basin, we assembled a team of scientists from Federal and state agencies, tribes, and academia. This group, known as the Interior Columbia Technical Recovery Team (ICTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead in the Middle Columbia, Upper Columbia, and Snake River basins. The ICTRT recommended specific abundance and productivity goals for each population in the UC spring-run Chinook salmon ESU. The team also identified the current risk level of each population based on the gap between recent abundance and productivity and the desired goals. The ICTRT (2008) considered all three extant populations to be at high risk of extinction based on their current abundance and productivity levels.

The ICTRT also recommended spatial structure and diversity metrics that would reflect an ESU at low risk of extinction (ICTRT, 2007). Spatial structure refers to the geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (*e.g.,* a single landslide) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas that facilitate the expression of gene flow and life history characteristics. Population diversity concerns the phenotypic (morphology, behavior, and life-history traits) and genotypic (DNA) characteristics of populations. Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity (DNA), on the other hand, provides populations with the ability to survive long-term changes in the environment. It is the combination of phenotypic and genotypic diversity expressed in a natural setting that provides populations with the ability to adapt to long-term changes. The mixing of hatchery fish (or excessive numbers of out-of-basin stocks) with naturally produced fish on spawning grounds can decrease genetic diversity within the population (NMFS, 2007). The ICTRT (2008) considers all three extant population of this ESU at high risk of extinction based on their current lack of spatial structure and diversity.

On October 9, 2007, we published a final recovery plan for the UC spring-run Chinook salmon ESU (72 FR 57303). The plan contains specific recovery criteria that, when met, would allow this ESU to be removed from the list of threatened and endangered species. The plan identifies specific abundance and productivity goals for the extant populations (Entiat, Wentachee, and Methow) as well as specific population spatial structure and diversity criteria. The recovery criteria are very similar to those recommended by the ICTRT. The plan states ''Recovery of spring Chinook salmon in the Okanogan Subbasin is not a requirement for delisting because the Interior Columbia Basin Technical Recovery Team determined that this population was extinct. However, this plan recognizes that if a major spawning area could be established in the Okanogan using an Upper Columbia spring-run Chinook stock, then the ESU would be at a lower risk of extinction.'' The recovery plan also contains specific management strategies for achieving the objectives defined by the recovery criteria.

UC Spring-Run Chinook Salmon Current Status

On March 18, 2010, we announced the initiation of 5-year status reviews for 16 ESUs of Pacific salmon including the UC spring-run Chinook salmon ESU (75 FR 13082). As part of this review, our Northwest Fisheries Science Center compiled and issued a report on the newest scientific information on the viability of this ESU. The report states,

> ''The Upper Columbia Spring-run Chinook salmon ESU is not currently meeting the viability criteria (adapted from the ICTRT) in the Upper Columbia Recovery Plan. Increases in natural origin abundance relative to the extremely low spawning levels observed in the mid-1990s are encouraging; however, average productivity levels remain extremely low. Large-scale directed supplementation programs are underway in two of the three extant populations in the ESU. These programs are intended to mitigate short-term demographic risks while actions to improve natural productivity and capacity are implemented. While these programs may provide short-term demographic benefits, there are significant uncertainties regarding the long-term risks of relying on high levels of hatchery influence to maintain natural populations'' (Ford *et al.,* 2010).

All extant populations are still considered to be at high risk of extinction based on the abundance/productivity and spatial structure/diversity metrics. When the risk levels for these attributes are integrated, the overall risk of extinction for this ESU is high (Ford *et al.,* 2010). Will Release of an ''Experimental Population'' Further Conservation of UC Spring-run Chinook Salmon?

Before authorizing the release of an experimental population, we must find that such a release will further the

conservation of the species. In making this finding, we use the best information available to assess the four considerations described above from 50 CFR 17.81(b). Below we describe information relevant to each of these considerations.

Possible Adverse Effects of Removing Individuals From Elsewhere To Establish the Experimental Population

During our analysis of the CTCR's ESA 10(j) authorization request, we will consider the most appropriate source of fish to establish an experimental population. It is likely that this source would be excess hatchery-reared Chinook salmon from the Methow Composite program. These fish are from the neighboring river basin and have evolved in an environment similar to that of the Okanogan Basin. They are likely to be the most similar genetically to the extirpated Okanogan spring-run Chinook salmon population. For the past several years, enough adult salmon from this hatchery program have returned to the Methow Basin that excess eggs and sperm are available to begin raising fish for reintroduction into the Okanogan Basin. If this stock were chosen as the appropriate donor population, we would issue necessary permits under ESA section 10(a)(1)(A) prior to any reintroduction effort. It is not expected that the use of eggs and sperm from excess hatchery fish would have any adverse effects on the natural population of UC spring-run Chinook salmon in the Methow Basin because they exceed the minimum number of adults needed to maintain hatchery production. Although the Methow Composite program seems the most likely source of fish for reintroduction, there are other potential sources. The CTCR's 10(j) authorization request identified the Methow Composite program as the most appropriate source population.

The Likelihood That the Experimental Population Would Become Established and Survive in the Foreseeable Future

Human development of the Okanogan Basin along with commercial and recreational fisheries led to the extirpation of UC spring-run Chinook salmon (NMFS, 2007), and to the 1997 listing of Upper Columbia River steelhead (62 FR 43937) that currently persist in the Okanogan Basin. In recent years, there have been numerous habitat improvement projects completed in the U.S. and Canadian portions of the Okanogan River and its tributaries. The CTCR's 10(j) authorization request includes information on several of these projects. We will consider the information in the request and other information available to determine if there is suitable habitat in the Okanogan Basin for natural reproduction of spring-run Chinook salmon. Although any reintroduction effort is likely to require supplementation with hatchery-origin fish for several years, we will consider the likelihood that a population of spring-run Chinook salmon could become established and eventually persist, without hatchery supplementation.

Potential Effects That Establishment of an Experimental Population Might Have on the Recovery of the Species

The establishment of a fourth population of UC spring-run Chinook salmon could potentially improve viability of this ESU by increasing overall ESU abundance and improving ESU spatial structure. An ESU consisting of four rather than three independent populations faces lower risk of extinction from natural events such as landslides, extreme floods, earthquakes, and volcanic activity. If we authorize an experimental population under ESA section 10(j), and if the reintroduction were successful, any contributions that the experimental population might make to viability of the UC spring-run Chinook salmon ESU as a whole would be evaluated in future reviews of this ESU's status. The recovery plan for the species states recovery of spring Chinook salmon in the Okanogan Subbasin is not a requirement for delisting. The recovery plan also contains specific management strategies for achieving the objectives defined by the recovery criteria. The CTCR's 10(j) request provides a detailed discussion of its view on this consideration.

The Extent to Which an Introduced Population May Be Affected by Existing Federal or State Actions, or Private Activities Within or Adjacent to the Experimental Population Area

There are numerous human activities, including agriculture, forestry, irrigation, urban development, transportation management, and recreational fishing occurring in the Okanogan River Basin that could potentially affect an introduced population of spring-run Chinook salmon. Some of these activities have been altered to reduce their effects on anadromous fish and their habitat due to the presence of ESA-listed UC steelhead in the Okanogan River Basin. Nevertheless, it is likely that the cumulative impacts of these activities will render some portions of the Okanogan river Basin unsuitable for spring-run Chinook salmon. We plan to consider the available information to determine what effect these activities might have on an introduced population of spring-run Chinook salmon. The CTCR's 10(j) authorization request provides a detailed discussion of their view on this consideration.

Issues Related to Regulations Authorizing an Experimental Population

In this section we discuss issues related to the four components that will be provided in any regulations promulgated with regard to an experimental population authorization under ESA Section 10(j) (50 CFR 17.81(c)). The CTCR's 10(j) request provides a detailed discussion of their views on these issues.

Appropriate Means To Identify the Experimental Population

For an experimental population of UC spring-run Chinook salmon to receive a 10(j) authorization, we would need to ensure that the candidate experimental population would be geographically separate from other members of this ESU when the fish are present in the Okanogan River Basin and in the portion of the Columbia River upstream of its confluence with Okanogan River to the base of Chief Joseph Dam. Currently, spring-run Chinook salmon are extirpated from this area and straying of fish from other populations into this area is extremely low. If the ESA 10(j) authorization were to occur, hatchery-origin fish used for the reintroduction would be marked, for example, with specific fin clips and coded-wire tags. Future adult and juvenile spring-run Chinook salmon in this area would be considered to be members of the experimental population. It may be possible to mark these fish in a manner that would distinguish them from other hatchery-raised Chinook salmon, and we will consider this during the development of our proposal. If the reintroduction is successful, and fish begin reproducing naturally, their offspring would not be distinguishable from fish from other Chinook salmon populations. Outside of the experimental population area, *e.g.,* in the Columbia River below the Okanogan or in the ocean, we would consider these unmarked fish to be members of the listed ESU (that is, we would not consider them to be part of the experimental population).

Whether the Experimental Population Is Essential to the Continued Existence of the Species

In authorizing an experimental population under ESA section 10(j), we must determine whether the population is essential to the continued existence of the species in the wild. We have proposed to use the same definition as is in the USFWS regulations at 50 CFR 17.80 (see above). The UC spring-run Chinook salmon ESU is currently at high risk of extinction. Based on the recovery plan's criteria and proposed management strategies, the UC spring-run Chinook salmon ESU could recover to the point where listing under the ESA is no longer necessary solely with contributions from the three extant populations. Specifically, if the Wenatchee and Methow population could achieve a 12-year geometric mean abundance of 2,000 fish and the Entiat reach a 12-year geometric mean abundance of 500 fish, the ESU would meet the recovery criteria for abundance. This would require a minimum productivity of between 1.2 and 1.4 for the 12-year time period (NMFS, 2007). The extant populations would also need to meet specific criteria, identified in the recovery plan, which would result in a moderate or lower risk for spatial structure and diversity. At this point, the ESU would be considered viable and could possibly be delisted, if all threats were being addressed. The Upper Columbia Recovery Plan identifies several harvest, hatchery management, hydropower and habitat related actions that could be taken to improve viability of the three extant spring-run Chinook salmon populations. The plan also clearly states that recovery of spring-run Chinook salmon in the Okanogan Basin is not a requirement for delisting. For these reasons, if this action goes forward it is possible that a reintroduced population in the Okanogan Basin could be considered ''nonessential.''

Management Restrictions, Protective Measures, and Other Special Management Considerations

When authorizing experimental populations, we consider whether the population will require management restrictions, protective measures, or other special management considerations. If we authorize an experimental population of spring-run Chinook salmon in the Okanogan River Basin, we may establish protective regulations under section 4(d) of the ESA. The regulations we may consider are discussed below.

A Process for Periodic Review

If we authorize the release of an experimental population under ESA section 10(j), the success of the reintroduction effort is likely to be assessed by certain ongoing monitoring programs and new programs developed specifically for this purpose. The CTCR request identifies ongoing monitoring and evaluation programs such as the WDFW monitoring program at Wells Dam (located on the mainstem Columbia River downstream of the confluence with the Methow River) that could be slightly modified to include monitoring of an experimental population. The CTCR request also identifies additional monitoring activities in the Okanogan Basin, including spawning ground and carcass surveys, weir counts, and video surveillance at Zosel Dam (located at river mile 79 of the Okanogan River, just south of Osoyoos Lake and the U.S.–Canada border). As data are collected through these monitoring efforts, NMFS, the CTCR, and other potential project partners can evaluate the success of the program.

If the reintroduction were successful, we expect that the experimental population's status in terms of abundance, productivity, spatial structure and diversity would be evaluated in a manner similar to the three extant populations in the UC spring-run Chinook salmon ESU. We would likely request that the ICTRT recommend recovery criteria for this population as they have for the three extant populations. Any contribution that the nonessential experimental population could make to the ESU as a whole would eventually be considered in a 5-year periodic review as required by ESA section 4(c)(2)(A).

Potential Regulations

Any population authorized by the Secretary to be an experimental population shall be treated as if it were a threatened species (for the purposes of ESA section 7, nonessential experimental populations are treated as proposed for listing). This means the agency shall establish regulations under section 4(d) of the ESA it deems necessary and appropriate with respect to such population. The protective regulations adopted for experimental populations may contain prohibitions and exceptions related to that population. In the authorization request, the CTCR asked us to establish limited take prohibitions for this experimental population. In short, the CTCR has requested that we generally prohibit take of members of the population, but allow: (1) Take that is incidental to an otherwise lawful activity, (2) incidental take that occurs as a result of lawful tribal and recreational fishing for non-listed fish; (3) direct harvest of adult salmon in the case that such harvest is required to reduce the proportion of hatchery-origin fish (as compared to naturally-produced fish) returning to spawning grounds; (4) direct take of adults needed for hatchery brood stock, and (5) direct or indirect take that occurs as a result of scientific research, monitoring, or evaluation. We will consider the Tribe's request in developing any proposal. Another option would be to apply our current 4(d) protective regulations for threatened salmon and steelhead in Oregon, Washington, and Idaho (50 CFR 223.203).

Information Solicited

Authorizing the release of an experimental salmon population under ESA section 10(j) is a relatively new activity for NMFS. We believe it is important to engage the public early in the rulemaking process. This ANPR is a key first step, and we encourage all interested parties to submit comments regarding the issues raised in this notice. Similar to the UFWS process, we plan to consult with the WDFW, local government entities, affected Federal agencies, and private landowners in the experimental population area if we develop a proposal. We will also conduct meetings with affected parties prior to developing our proposal. If we move forward with developing a proposal, we will conduct a review of the reintroduction and experimental population designation under the National Environmental Policy Act.

At this time, we seek information on the following:

(1) Possible adverse effects of removing individuals from a donor population to begin the experimental population. Excess fish from the Methow Composite hatchery program appear to be the most likely source of individuals to begin the reintroduction. Currently, we are unaware of any adverse effects of removing these excess hatchery fish. We solicit information on any possible adverse effects we may not have considered;

(2) Other possible sources of spring-run Chinook salmon to begin the reintroduction;

(3) The likelihood that the experimental population will become established in the Okanogan Basin;

(4) The likelihood that the experimental population could eventually persist without substantial hatchery supplementation;

(5) How the establishment of the experimental population may contribute to recovery of the UC spring-run Chinook salmon ESU as a whole;

(6) The extent to which the experimental population would be affected by current or future Federal, state, or private actions within or adjacent to the experimental population area;

(7) Current programs within the experimental population area that protect fish or aquatic habitats;

(8) Whether the experimental population would be essential to the continued existence of the UC spring-run Chinook salmon ESU. The information currently available indicates that the experimental population is likely to be ''nonessential'' for the reasons discussed above. We solicit information to support this conclusion as well as any information to the contrary;

(9) Any necessary management restrictions, protective measures, or other management measures that we have not considered;

(10) Monitoring or evaluation actions that may be needed to assess the success of the reintroduction;

(11) How, if the reintroduction were successful, the experimental population's contribution to overall ESU viability might be assessed; and

(12) Names, expertise, and contact information for potential peer reviewers for this designation. We seek individuals with expertise in salmon biology, population ecology, and/or reintroductions of at-risk species.

We seek the above information as soon as possible but by no later than September 19, 2011.

References

The complete citations for the references used in this document, as well as the CTCR ESA 10(j) authorization request can be obtained by contacting us directly or via the Internet (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Dated: July 13, 2011.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 2011–18015 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket: 110627355–1354–01]

RIN 0648–BB08

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Northeast (NE) Multispecies Fishery; Framework Adjustment 46

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement measures in Framework Adjustment (FW) 46 to the NE Multispecies Fishery Management Plan (FMP). FW 46 was developed and submitted to NMFS for approval by the New England Fishery Management Council (Council) to address haddock catch in the Atlantic herring fishery. The proposed rule would increase the haddock incidental catch cap allocated to the Atlantic midwater trawl herring fishery to 1 percent of the Georges Bank (GB) haddock Acceptable Biological Catch (ABC) and to 1 percent of the Gulf of Maine (GOM) haddock ABC. In addition, this action would modify the cap accountability measures (AMs) such that, upon attainment of the cap, the midwater trawl herring fleet could not catch or land herring in excess of the incidental catch limit (2,000 lb (907.2 kg)) in or from the appropriate haddock stock area. This action is intended to allow the herring fishery to fully utilize available herring quota, while providing incentives for the midwater trawl fishery to minimize haddock catch.

DATES: Comments must be received by August 3, 2011.

ADDRESSES: You may submit comments, identified by 0648–BB08, by any of the following methods:

- *Electronic submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Fax:* (978) 281–9135, Attn: Melissa Vasquez.
- *Mail:* Paper, disk, or CD–ROM comments should be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, ''Comments on the Proposed Rule for NE Multispecies Framework Adjustment 46.''

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of FW 46, its Regulatory Impact Review (RIR), a draft of the environmental assessment (EA) prepared for this action, and the Initial Regulatory Flexibility Analysis (IRFA) prepared by the Council are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950. The IRFA assessing the impacts of the proposed measures on small entities and describing steps taken to minimize any significant economic impact on such entities is summarized in the Classification section of this proposed rule. The FW 46 EA/RIR/IRFA are also accessible via the Internet at *http://www.nefmc.org/nemulti/index.html* or *http://www.nero.noaa.gov.* Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this rule should be submitted to the Regional Administrator at the address above and to the Office of Management and Budget (OMB) by e-mail at *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Melissa Vasquez, Fishery Policy Analyst, phone: 978–281–9166, fax: 978–281–9135.

SUPPLEMENTARY INFORMATION:

Background

The Council initiated FW 46 to revise the haddock incidental catch cap for the Atlantic herring fishery to allow for the full utilization of available herring quota, while providing incentives for the midwater trawl herring fishery to minimize haddock catch. FW 43 to the NE Multispecies FMP (71 FR 46871; August 15, 2006) established an exempted fishery in 2006 to allow for the incidental catch of NE multispecies

by the Atlantic herring fishery. Prior to FW 43, midwater trawl gear was considered exempted gear (gear not capable of catching NE multispecies). FW 43 adopted a cap on the amount of haddock that could be caught by the directed herring fishery of 0.2 percent of what was the combined Target Total Allowable Catch (TTAC) for GOM and GB haddock, at the time. The cap applied to all Category 1 Atlantic herring permits until Amendment 1 to the Atlantic Herring FMP (72 FR 11252; March 12, 2007) implemented a limited access program for the herring fishery in 2007, which clarified that the cap applied to vessels issued limited access Category A (All Areas) and B (Areas 2 and 3) herring permits. Amendment 16 to the FMP (75 FR 18262; April 9, 2010), which implemented Annual Catch Limits (ACL) and AMs in the FMP in 2010, defined the haddock catch cap as a separate sub-ACL (0.2 percent of the combined GOM and GB haddock ABCs) with its own AM, set biennially through the NE multispecies specification process and according to the NE multispecies fishing year (FY; May 1–April 30). Once the Regional Administrator has determined that the combined haddock cap has been reached, any vessel issued an Atlantic herring permit or fishing in the Federal portion of the GOM/GB Herring Exemption Area (defined at § 648.86(a)(3)(ii)(A)(*1*)) is prohibited from possessing more than an incidental trip limit of herring (2,000 lb (907 kg)) in this area. Under current regulations, only observed or reported haddock catch (from NMFS observers, law enforcement officials, dealer reports, and vessel reports) from vessels that have a limited access Category A and/or B Atlantic herring permit are applied to the cap.

Increased abundance of haddock on GB since the implementation of FW 43 has resulted in increased interactions of the herring fishery with haddock, particularly vessels fishing with midwater trawls. In FY 2010, a large portion of the incidental haddock catch cap was caught by early fall (81 percent), and the herring midwater trawl fleet voluntarily moved away from Atlantic Herring Management Area 3 (GB) to avoid fishing in areas with high haddock bycatch to help avert any potential for a closure of the directed herring fishery. As a result, some (59 percent) of the Atlantic Herring Management Area 3 TAC was left uncaught for the remainder of the FY.

In January 2011, the Council initiated FW 46 to address industry concerns that the haddock catch cap was becoming too constraining on the herring fishery, particularly given the increased biomass of haddock on GB and the fact that the commercial groundfish fishery remains incapable of harvesting its own sub-ACL for these stocks. An early closure of the directed herring fishery could result in negative impacts to herring fishery participants and to the supply of herring bait to the lobster fishery. The Council was also concerned that reduced effort in Atlantic Herring Management Area 3 could lead to additional effort in Atlantic Herring Management Area 1 (GOM) in the summer and fall, putting additional fishing pressure on this component of the herring resource, and raising concerns about increased midwater trawl activity inshore. To address these concerns, FW 46 was initiated with the following goals: To maximize the chance for GB (Area 3) herring TAC to be caught; to provide incentives to fish offshore; to provide incentives for fish in a manner, at times, and in areas when and where haddock bycatch is none to low; and to reduce the impact of a haddock cap on the entire herring fishery.

Proposed Measures

The measures proposed by FW 46 are described below. The proposed regulations implementing measures in FW 46 were deemed by the Council to be consistent with FW 46, and necessary to implement such provisions pursuant to section 303(c) of the Magnuson-Stevens Act through a June 17, 2011, letter from the Council Chairman to the Regional Administrator.

Incidental Catch Cap for Midwater Trawl Vessels

FW 46 proposes to revise the current overall haddock incidental catch cap of 0.2 percent, such that vessels with a Federal Atlantic herring permit of any category using midwater trawl gear (both single and paired midwater trawl vessels) would be subject to a stock-specific cap on haddock catch that is equal to 1 percent of the GOM haddock ABC and 1 percent of the GB haddock ABC. The current combined incidental catch cap for the GOM and GB haddock stock areas would be divided into two separate caps to better account for differences in these two stocks and to eliminate the possibility that catches of one stock could trigger the closure of both stock areas. These incidental haddock catch caps would be allocated according to the procedures established by Amendment 16 for the setting of ACLs and sub-ACLs for various components of the NE multispecies fishery, and the cap calculation method revised by FW 44 to the FMP (see Appendix III to FW 44, available on the Council's Web site). Thus, 1 percent of the GOM haddock ABC would be deducted from the sub-ABC allocated to commercial fisheries (which includes the Federal commercial groundfish fishery, state waters fishery, the Atlantic herring fishery, and the other commercial sub-component) and allocated to the herring midwater trawl fishery, after a further reduction for management uncertainty, as a GOM haddock sub-ACL. Similarly, 1 percent of the GB haddock ABC available to U.S. fishermen would be allocated to the herring midwater trawl fishery, after a further reduction for management uncertainty, as a GB haddock sub-ACL. This 1-percent allocation for each of the two haddock stocks was determined to be sufficient to allow the prosecution of the herring midwater trawl fishery without adversely affecting groundfish. Analysis in FW 46 suggests that this proposed value would be robust to changes in GB haddock stock size, such that a future action would not be needed to adjust the cap if GB haddock stock size declines. Estimates of total haddock catch by the herring midwater trawl fishery in recent years have been well below 1 percent of the TTAC or ACL, indicating that the increased haddock catch cap would likely, at least in the short term, allow the full GB herring TAC to be utilized.

Because FW 46 would increase the portion of the haddock sub-ABCs allocated to the herring midwater trawl fishery to 1 percent of each stock (from 0.2 percent of both stocks combined), the ACE available to sectors would decline, as would the amount of the ACL available to common pool groundfish fishing vessels. The decline is slightly greater than the change in the herring fishery allocation because of the way the incidental catch caps for each stock would be calculated. In the case of GB haddock, the commercial groundfish sub-ACL would decline by 0.84 percent, while for GOM haddock the decline would be 1.1 percent. However, because FW 46 proposes small allocations to the herring fishery, and haddock catches by the commercial groundfish fisheries remain well below the sub-ACL for these stocks, the sub-ACL reduction is expected to have no measurable economic impacts to groundfish vessels.

Unlike the current provision where haddock catches by all limited access Category A and B vessels fishing in Atlantic Herring Management Areas 1A, 1B, 2, and 3 (GOM, GB, and Southern New England (SNE)) count against the cap, FW 46 proposes that only the haddock catches from vessels issued a Federal Atlantic herring permit and

fishing with midwater trawl gear in Atlantic Herring Management Areas 1A, 1B, and/or 3 (GOM and GB), would apply against the incidental haddock catch caps. This action would limit the cap and its restrictions to midwater trawl vessels fishing in this reduced area (GOM and GB, but not SNE), because analysis prepared in the development of FW 46 showed that haddock bycatch is largely an issue for these vessels in these areas. Thus, limiting the cap to herring midwater trawl vessels would address haddock catch issues, while eliminating unnecessary restrictions on other segments of the herring fishery that have historically not had much interaction with haddock (i.e., vessels fishing with purse seine, otter trawl, pots, or other gear).

Under FW 46, haddock catch reported by observers on observed herring trips using midwater trawl gear in Herring Management Areas 1A, 1B, and/or 3 would be extrapolated to estimate total haddock catch by the herring midwater trawl fleet in these herring areas, for purposes of monitoring the attainment of each stock-specific cap. The reliance on only haddock catches derived from reports from dealers, vessels, and law enforcement officials for monitoring the attainment of the cap, as currently required, would be eliminated. The method of accounting for haddock catch proposed under FW 46 would thus be less sensitive to changes in observer coverage than the current monitoring method, and would mean that any AMs triggered would be based on estimates of total catch for the entire midwater trawl fleet, rather than only documented catch for a portion of the fleet. Thus, extrapolating observed haddock catches in this way would better account for total haddock catch by the herring fishery.

FW 46 proposes that NMFS would develop the extrapolation methodology and post it on the Northeast Regional Office Web site (see **ADDRESSES**), and that NMFS would monitor and post catches of haddock by the herring fishery at least monthly on its Web site. If the proposed measures are approved, NMFS intends to apply the cumulative methodology currently in use to extrapolate catches of butterfish in the *Loligo* squid fishery and to estimate discards by sector vessels in the groundfish fishery, to extrapolate haddock catches by the herring midwater trawl fishery. This method derives a ratio of the kept catch (or discards) of the species in question to the total weight of all species kept on observed trips (total kept), based on all observed trips as of a certain date (cumulative sums of landings or discards and total kept of all species). The ratio is then expanded to a total catch estimate by applying the ratio to the total kept of all species from all trips by the applicable component of the fishery. For example, an observed haddock catch rate would be derived from the ratio of all haddock catch to all species kept on observed herring midwater trawl trips in Herring Management Areas 1A, 1B, and 3, and applied to the total weight of all species kept from all midwater trawl trips in these same areas, to determine an estimate of total haddock catch by the herring GOM and GB midwater trawl fleet. Further details of the extrapolation methodology to be used would be published on the Northeast Regional Office Web site when finalized.

As noted in FW 46, if approved, the proposed measures would be implemented in-season during the 2011 Northeast multispecies (May 1, 2011–April 30, 2012) and herring (January 1, 2011–December 31, 2011) fishing years. Given that the haddock cap for the midwater trawl herring fishery is monitored based on the groundfish fishing year, upon implementation, NMFS would use observer data and other available data from applicable herring trips to extrapolate haddock catches by the herring fishery since the start of FY 2011 (beginning May 1, 2011) and apply it to the increased stock-specific haddock caps. Retroactively applying the measures in this way would ensure the consistent monitoring of the haddock caps and treatment of haddock catches by the midwater trawl herring fishery throughout FY 2011. As a result, the FY 2011 GOM and GB haddock sub-ACLs for the commercial groundfish fishery (sectors and common pool) would be adjusted in-season, consistent with the proposed modification to the allocation of these stocks' sub-ABCs.

The current regulations require vessels with a Category A and/or B Atlantic herring permit to land all haddock brought on deck or pumped into the hold, for the purpose of monitoring this catch while prohibiting the sale of such fish. Up to 100 lb (45 kg) total of other regulated NE multispecies (§ 648.86(k)) may also be landed per trip, but may not be sold for human consumption. These possession restrictions for Category A and B herring vessels would not be eliminated by FW 46, so Category A and B herring vessels on a declared herring trip would still be required to land all haddock, regardless of gear used or area fished. Maintaining this landing requirement for Category A and B vessels facilitates the monitoring of the ''other sub-components'' portion of the GOM and GB haddock ACLs, to which such haddock catches would apply. In addition, FW 46 proposes to expand the possession restrictions to allow a vessel issued any Federal Atlantic herring permit but fishing any part of a trip with midwater trawl gear in Herring Management Areas 1A, 1B, or 3, to possess and land haddock in addition to 100 lb (45 kg) of other NE multispecies, consistent with the revised scope of the cap. As with the current requirements, such vessels would be required to land all haddock, but would be prohibited from selling it for human consumption. Additionally, NMFS is revising the regulations at § 648.86(k) to clarify that the 100 lb (45 kg) NE multispecies possession limit is meant to apply to NE multispecies other than haddock.

Currently, all vessels issued an Atlantic herring permit are prohibited from possessing or landing herring in excess of the incidental limit in the entire GOM/GB Herring Exemption Area, once the combined GOM/GB haddock cap is reached. FW 46 would revise this broad AM by establishing a stock-specific AM area (the Herring GOM Haddock AM Area and the Herring GB Haddock AM Area) upon attainment of the respective incidental haddock catch caps and by making the AM apply to only herring vessels using midwater trawl gear in the GOM and GB. FW 46 proposes that when the Regional Administrator has determined that the haddock incidental catch cap for a specific haddock stock has been caught, all vessels issued a herring permit and using midwater trawl gear would be prohibited from fishing for, possessing, or landing herring in excess of 2,000 lb (907.2 kg) per trip in or from the applicable AM Area (see Tables 1 and 2). Additionally, the haddock possession/landing limit for the applicable AM Area would be reduced to 0 lb (0 kg) for herring midwater trawl vessels and all Category A and B vessels. For example, if the GOM haddock catch cap was reached, the herring possession limit would be reduced to incidental catch levels (2,000 lb (907 kg)) in the Herring GOM Haddock AM Area (see Table 1) for any vessel issued a herring permit and fishing any part of a trip with midwater trawl gear. In addition, midwater trawl vessels and Category A and B vessels would not be able to possess/land any haddock, but would still be able to land up to 100 lb (45 kg) of other NE multispecies, from the applicable AM area. However, in this example, such midwater trawl vessels would still be

able to retain herring, up to the possession/landing limits, if any, appropriate to their herring permit category, in or from areas of 1A, 1B, or 3 that do not overlap with the Herring GOM Haddock AM Area. Herring vessels that fished both inside and outside of an AM Area on a given trip would be required to comply with the most restrictive measures. The intent of this measure is to make the haddock catch caps less constraining on the herring fishery by accounting for differences between the haddock stocks, and by limiting the AMs to the herring midwater trawl fleet, which has historically been primarily responsible for haddock catches in the herring fishery. The reduced haddock possession/landing limit would not apply to herring vessels that also hold a NE multispecies permit when they are on a declared NE multispecies trip.

TABLE 1—PROPOSED HERRING GOM HADDOCK AM AREA

Point	N. latitude	W. longitude
HGA1	(1)	69°20′
HGA	43°40′	69°20′
HGA3	43°40′	69°00′
HGA4	43°20′	69°00′
HGA5	43°20′	67°40′
HGA6	(2)	67°40′
HGA7	42°53.1′	67°44.4′
HGA8	(2)	67°40′
HGA9	42°20′	67°40′
HGA10 ..	42°20′	70°00′
HGA11 ..	(3)	70°00′

1 The intersection of the Maine coastline and 69°20′ W. long.
2 The intersection of the U.S./Canada maritime boundary and 67°40′ W. long.
3 The intersection of the north-facing shoreline of Cape Cod, MA, and 70°00′ W. long.

TABLE 2—PROPOSED HERRING GB HADDOCK AM AREA

Point	N. latitude	W. longitude
HBA1	42°20′	70°00′
HBA2	42°20′	(1)
HBA3	40°30′	(1)
HBA4	40°30′	66°40′
HBA5	39°50′	66°40′
HBA6	39°50′	68°50′
HBA7	(2)	68°50′
HBA8	41°00′	(3)
HBA9	41°00′	69°30′
HBA10 ..	41°10′	69°30′
HBA11 ..	41°10′	69°50′
HBA12 ..	41°20′	69°50′
HBA13 ..	41°20′	(4)
HBA14 ..	(5)	70°00′
HBA15 ..	(6)	70°00′
HBA16 ..	(7)	70°00′

1 The intersection of the U.S./Canada maritime boundary and 42°20′ N. lat.
2 The intersection of the boundary of Closed Area I and 68°50′ W. long.
3 The intersection of the boundary of Closed Area I and 41°00′ N. lat.
4 The intersection of the east-facing shoreline of Nantucket, MA, and 41°20′ N. lat.
5 The intersection of the north-facing shoreline of Nantucket, MA, and 70°00′ W. long.
6 The intersection of the south-facing shoreline of Cape Cod, MA, and 70°00′ W. long.
7 The intersection of the north-facing shoreline of Cape Cod, MA, and 70°00′ W. long.

FW 46 also proposes an overage reduction as an additional AM, should a haddock incidental catch cap be exceeded by the herring midwater trawl fishery in a given fishing year. Once the total catch of haddock by herring midwater trawl vessels for a fishing year is determined, any overage of the herring midwater trawl fishery GOM or GB haddock sub-ACLs would result in reduction of the corresponding sub-ACL in the following fishing year. For example, if final accounting of the FY 2011 total haddock midwater trawl catch in the GOM haddock stock area indicated that the GOM haddock incidental catch cap had been exceeded by 5 mt, the FY 2012 GOM haddock sub-ACL for the herring midwater trawl fishery would be reduced by 5 mt to account for the overage that occurred during FY 2011. FW 46 proposes that any overage reductions to the midwater trawl haddock sub-ACLs would be announced by NMFS, consistent with APA requirements, in the **Federal Register** prior to the start of the groundfish fishing year (May 1).

In order to facilitate the extrapolation of observed haddock catch to unobserved herring midwater trawl trips, FW 46 proposes that all vessels issued a herring permit and fishing with midwater trawl gear in Herring Management Areas 1A, 1B, or 3, report gear and total kept catch by modified haddock stock area (portions of the haddock stock areas that overlap with these herring areas), via whatever ACL monitoring method is developed for the herring fishery. Based on this, NMFS proposes to require vessels with limited access herring permits (Category A, B, and C permits) using midwater trawl gear to report total kept catch by modified haddock stock area through daily Vessel Monitoring System (VMS) catch reports, as is currently proposed through a regulatory amendment to the Atlantic Herring FMP. A proposed rule published June 15, 2011 (76 FR 34947), would require limited access herring vessels (including vessels with herring limited access incidental permits) to submit daily catch reports through VMS to report herring catch by herring management area, in order to enable accurate and timely monitoring of herring ACLs and Area TACs. NMFS also proposes to require limited access herring vessels fishing with midwater trawl gear in Herring Management Areas 1A, 1B, or 3 to report total weight kept of all species (including herring, mackerel, groundfish, and any other fish kept) by modified haddock stock area in these daily reports. Limited access herring midwater trawl vessels would not be required to report gear used through VMS catch reports at this time, as NMFS has determined that it would not be necessary for the timely monitoring of the proposed haddock incidental catch caps and, therefore, would be an unnecessary reporting burden. Although the proposed reporting rule for the herring fishery proposes to monitor catch by open access incidental herring permits (Category D) through weekly Interactive Voice Response (IVR) reports, it would also increase the frequency of VTR submissions by all herring permitted vessels to require that they be submitted weekly. This action proposes no additional reporting requirements for open access herring permit holders at this time, given that weekly VTR submissions would be sufficient to monitor this small component of the herring fishery. However, should the proposed herring fishery reporting rule be revised or not be implemented as a final rule, limited access and open access herring midwater trawl vessels would be monitored via the current monitoring method in place for the herring fishery: Weekly IVR reports by limited access vessels, weekly IVR reports by open access vessels that catch 2,000 lb (907 kg) or more of Atlantic herring on a trip, and VTRs submitted monthly.

The Council has initiated development of Amendment 5 to the Atlantic Herring FMP, which considers several alternatives that address interactions between the herring fishery and the groundfish fishery, and others that are targeted at improving catch monitoring. If approved, Amendment 5 would likely modify monitoring and reporting requirements for the herring fishery, including those that NMFS proposes to use to monitor the proposed haddock incidental catch caps. Therefore, the Regional Administrator reserves the right to revise reporting requirements implemented through this proposed rule, if it is determined that fishing behavior has, or may be expected to change, and revisions are necessary to allow for the effective monitoring of the proposed haddock incidental catch caps.

FW 43 established a requirement that a vessel issued a Category A or B herring permit must notify NMFS of its intent to take a trip, at least 72 hr prior to

beginning a declared herring trip fishing with midwater trawl or purse seine gear, into Herring Management Areas 1A, 1B, 2, and/or 3, to facilitate the deployment of observers. A final rule published November 2, 2009 (74 FR 56562) also added the requirement that such vessels declare whether the vessel intends to fish any part of a trip in NE multispecies Closed Area I (CA I). FW 46 would not eliminate this requirement for Category A and B vessels, but proposes to expand the scope of this requirement to be account for the modified scope of the haddock incidental catch caps. Thus, Category A and B vessels, intending to use midwater trawl or purse seine gear on a declared herring trip, and any vessel issued a Category C and/or D herring permit and intending to fish or fishing any part of a trip with midwater trawl gear in Herring Management Areas 1A, 1B, or 3, would be required to notify the NMFS Northeast Fishery Observer Program (NEFOP) at least 72 hr prior to beginning a trip, including whether or not it intends to fish any part of a trip in CA 1. Expanding this requirement would facilitate the consistent monitoring and collection of data from all midwater trawl vessels subject to the caps.

Under current regulations, a vessel issued a Category A or B herring permit and using midwater trawl or purse seine gear on a declared herring trip is required to notify the NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to crossing the VMS demarcation line, or at least 6 hr prior to landing, if fishing inside the VMS demarcation line. FW 43 instituted this requirement to facilitate the enforcement of the haddock incidental catch cap, by allowing enforcement officials sufficient notice of landing to enable them to observe offloading or sample catch. FW 46 proposes to expand this pre-landing hail to all vessels issued a herring permit (limited access and open access) that fished any part of a trip with midwater trawl gear in Herring Management Areas 1A, 1B, and/or 3, to be consistent with the expanded scope of the haddock incidental catch cap and possession restrictions. Based on this, NMFS proposes that vessels issued a Category A or B permit, and on a declared herring trip fishing with midwater trawl or purse seine gear, and vessels issued a Category C that fish any part of a trip with midwater trawl gear in Herring Management Areas 1A, 1B, and/or 3, would be required to submit a pre-landing hail via VMS. NMFS does not propose to require open access herring permit holders (Category D) to submit pre-landing hails at this time, because this small portion of the herring fishery accounts for very little of the Atlantic herring landings (0.5 percent in FY 2010) and rarely uses midwater trawl gear in applicable Areas (Category A vessels accounted for all landings by midwater trawl gear in FY 2008–2010). Therefore, NMFS believes that requiring pre-landing hails of Category D vessels would be an unnecessary reporting burden at this time. Federally permitted herring dealers and processors (including at-sea processors) that cull or separate out non-herring catch in the course of normal operations are currently required to separate out and retain all haddock offloaded from vessels that have a Category A or B herring permit, regardless of gear used. In addition, such haddock may not be sold for any purpose and must be retained for at least 12 hours on land to allow inspection by enforcement officials. Under FW 46, this requirement would be expanded so that any Federally permitted herring dealer or processor that culls or separates catch would be required to separate out and retain for the 12-hr period all haddock offloaded from vessels issued any Federal herring permit that fished in Herring Areas 1A, 1B, and/or 3 with midwater trawl gear and vessels issued a Category A and/or B permit, regardless of gear used or area fished. This requirement would facilitate enforcement of the prohibition on sale of such culled haddock. The final rule revising monitoring requirements for midwater trawl vessels fishing in CA I (74 FR 56562; November 2, 2009), prohibited vessels issued a Category A or B herring permit from fishing in CA I with midwater trawl gear without an observer. This measure was implemented to ensure 100-percent observer coverage of midwater trawl vessels fishing in CA I. That same rule also implemented the requirement that no vessel issued a Category A or B herring permit and fishing with midwater trawl gear in CA I may release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer, or otherwise discard fish at sea, unless the fish has first been brought aboard the vessel and made available for sampling and inspection by the observer. However, under specific circumstances, fish that have not been pumped aboard the vessel may be released from the codend without being sampled if the vessel operator finds that: Pumping the catch could compromise the safety of the vessel; mechanical failure precludes bringing some or all of a catch aboard the vessel; or spiny dogfish have clogged the pump and consequently prevent pumping of the rest of the catch. If a net is released for any of these three reasons, the vessel operator must complete and sign a CA I Midwater Trawl Released Codend Affidavit detailing where, when, and why the net was released as well as a good-faith estimated of both the total weight of fish caught in that tow and the weight of the fish released (if the tow had been partially pumped). The completed affidavit must be submitted to NMFS within 48 hr of the completion of the trip, and the vessels must exit CA I for the remainder of the trip.

The CA I restrictions for midwater trawl vessels are currently applicable to Category A and B herring permit holders because these are the permitted vessels subject to the haddock incidental catch cap and possession restrictions established under FW 43. However, given that FW 46 has revised the scope of the incidental catch cap and expanded the NE multispecies possession restrictions to vessels that hold any Federal herring permit category that use midwater trawl gear, this rule proposes that the CA I requirements be revised to apply to any vessel issued a herring permit that fishes with midwater trawl gear in CA I. This measure is necessary to maintain consistency and reduce complication in the regulations regarding the monitoring of haddock bycatch for the incidental catch cap inside and outside CA I.

Classification

Pursuant to section 304 (b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the NE Multispecies FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

This proposed rule does not contain policies with Federalism or ''takings'' implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

An IRFA was prepared for this proposed rule, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA, which includes this section of the preamble to this rule and analyses contained in FW 46 and its accompanying EA/RIR/IRFA, describes the economic impact this proposed rule, if adopted, would have on small

entities. A description of the action, why it is being considered, and the legal basis for this action are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble.

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

Regulated entities include businesses owning vessels engaged in the Atlantic herring and NE multispecies fisheries. These measures would affect regulated entities engaged in commercial fishing for herring. Because the proposed measures reduce the available GOM and GB haddock ABC for the groundfish fishery, vessels permitted in this fishery are potentially regulated by this action. However, because only approximately 17 percent of the haddock GOM and GB ABCs was landed in FY 2010 (and similar under-capture of available quota is expected in FY 2011–2012), it is not expected that NE multispecies permitted vessels would be affected by this action in the near-term. The size standard for commercial fishing entities (NAICS code 114111) is $4 million in sales. Although multiple vessels may be owned by a single owner, available tracking of ownership is not readily available to reliably ascertain affiliated entities. Therefore, for purposes of analysis, each permitted vessel is treated as a single entity. During calendar year 2010, 90 vessels were issued a limited access herring permit. In 2008 and 2009, each year one vessel exceeded $4 million in gross sales, while in 2010 two vessels exceeded that number. In calendar year 2010 there were 84 small commercial fishing entities that were both regulated and potentially affected by the proposed action.

Measures Proposed To Mitigate Adverse Economic Impacts of the Proposed Action

The economic impacts of the proposed action on affected regulated small entities are positive. The proposed action would have no short-term measurable economic impacts to vessels participating in the groundfish fishery, because it proposes small allocations of haddock to the herring fishery that would have no effect on current groundfish revenues, based on most recent fishing activities, and only minor effects on possible future revenues, as these small allocations are unlikely to constrain the groundfish fishery or allow the herring fishery to displace groundfish effort. The proposed action is likely to have a positive impact on vessels participating in the Atlantic herring fishery, as it greatly reduces the possibility that a haddock catch cap would result in AMs that restrict the fishery to incidental catch limits throughout a large portion of the GOM and GB. Based on observed levels of haddock bycatch in the herring fishery and recent reductions in herring fishing effort (through greatly reduced ACLs in 2010), a 1-percent haddock catch cap is unlikely to be reached in the short-term, but provides a backstop and establishes a mechanism to estimate fleet-wide bycatch on a real-time basis. The proposed action separates the GOM and GB haddock stocks and related catch, thereby reducing the overall impact of a fishery closure, if one were to occur. It also eliminates impacts on purse seine vessels by restricting the cap and the AM to midwater trawl vessels only. Because the proposed action makes it more likely that the haddock catch cap will not constrain herring fishing beyond levels anticipated in the Atlantic Herring FMP, this action will not result in a decline in revenue for the herring fishery and may increase fishing opportunities for the herring mid-water trawl fleet for several months relative to baseline conditions. Opportunities to prosecute the offshore fishery (Area 3, GB) and fully utilize the herring optimum yield should be higher under the proposed action than under baseline conditions. The precise magnitude of the positive impact is uncertain, though the offshore areas (Areas 2 and 3) of the herring fishery generated approximately $17 million in gross herring revenues in calendar year 2009, and the revenues from fishing trips expected to be unconstrained due to the proposed action represent a relatively small fraction of that total.

The proposed action and alternatives are described in detail in Framework 46, which includes an EA, RIR, and IRFA (see **ADDRESSES**).

Economic Impacts of Alternatives to the Proposed Action

Two other alternatives to the proposed action were considered. The first represents a no action alternative that would maintain the haddock catch cap for the herring fishery at 0.2 percent of the combined GOM and GB haddock ABC, and thus would have no economic impact on regulated small entities compared to the status quo. The second proposed alternative would incorporate the catch of haddock in the Atlantic herring fishery into the sub-ACL for other sub-components of the haddock fisheries, with options for AMs that would have implemented the proposed action as a backstop. Therefore, the second alternative to the proposed action would have fundamentally identical economic impacts on regulated small entities as the proposed action. With respect to expected impacts on vessels participating in the NE multispecies fishery, similar to the proposed action, less than 20 percent of the GB haddock ACL is being harvested and small allocations to the herring fishery (in the case of the latter option, an unspecified amount, but less than 4 percent) would have no effect on current revenues and only minor effects on possible future revenues. In the GOM, there is not as much of the ACL that has not been caught but the differences between the alternatives are still minor. Concerns have been raised that the proposed action and the second alternative to the proposed action might result in more midwater trawl activity on GB, displacing groundfish fishing activity, but an initial analysis indicates this has not been the effect in previous years and that is not likely to change in the near future. With respect to the herring fishery, the second alternative to the proposed action would, similar to the proposed action, substantially reduce the risk that the directed herring fishery would be closed and increase the likelihood that the available herring yield will be harvested.

During the development of FW 46, four other alternatives were considered, but ultimately rejected by the Council and the Groundfish Oversight Committee because they were difficult to implement and monitor, could not be implemented through a framework adjustment, and/or did not meet the stated objectives of the framework. Detailed descriptions of all the alternatives considered are available in the FW 46 EA (see **ADDRESSES**).

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The proposed action contains a collection-of-information requirement subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement will be submitted to OMB for approval. The proposed action does not duplicate, overlap, or conflict with any other Federal rules.

The proposed action would expand some reporting requirements implemented through FW 43 to monitor the current herring fishery haddock incidental catch cap, to include additional herring permit categories. Limited access herring permit holders fishing with midwater trawl gear in Herring Management Areas 1A, 1B, and/or 3 would be required to report total kept catch by haddock stock area via

daily VMS catch reports. The proposed Atlantic herring regulatory amendment has proposed daily VMS catch reporting by limited access herring vessels for quota monitoring purposes, and the burden to the public of those catch report submissions has been analyzed in that regulatory amendment (76 FR 34947; June 15, 2011). This action would modify that proposed report to add two additional fields and thereby increase the cost per submission for limited access vessels that fish with midwater trawl gear in the GOM or on GB. Based on historic participation in the herring midwater trawl fishery, this change is expect to increase the total annual burden to the public for herring VMS catch reporting by $160 to $2,482, or $26 per entity. This action would also expand the requirements for Category A and B vessels to notify the Northeast Fishery Observer by phone of their intent to take a trip, and to submit a pre-landing hail to enforcement via VMS, to additional permit categories when fishing with midwater trawl gear in the GOM or on GB. However, no Category C or D vessels have reported landing herring or mackerel using midwater trawl gear in the GOM or GB. Thus, based on historic participation in the herring midwater trawl fishery, this action would not be expected to change the reporting burden associated with these requirements. In addition, applying the requirement to submit a CA I Midwater Trawl Codend Release Affidavit to additional permit categories is not expected to change the reporting burden associated with this affidavit, based on historic participation in the CA I herring fishery.

Public reporting burden for these requirements includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: July 11, 2011.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.10, add paragraph (l) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(l) *Area-specific reporting requirements for limited access Atlantic herring vessels fishing in Atlantic Herring Management Areas 1A, 1B, and 3*—(1) *Reporting requirements for vessel operators.* The owner or operator of any vessel issued a limited access herring permit that fishes any part of a tow with midwater trawl gear (including midwater pair-trawl gear) in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (f)(3), must report the estimated total amount of all species retained (in pounds, landed weight) from each of the GOM and GB modified haddock stock areas as defined in paragraph (l)(2) of this section, via the required reporting method specified for Atlantic herring owners or operators at § 648.7(b)(2)(i), unless otherwise specified by § 648.201.

(2) *GOM and GB Modified Haddock Stock Areas.* For the sole purpose of the area-specific reporting requirements in paragraph (l)(2) of this section, the GOM and GB Modified Haddock Stock Areas are defined in paragraphs (l)(2)(i) and (l)(2)(ii) of this section. Copies of a map depicting these areas are available from the Regional Administrator upon request.

(i) *GOM Modified Haddock Stock Area.* The GOM Modified Haddock Stock Area is bounded on the east by the U.S./Canadian maritime boundary and straight lines connecting the following points in the order stated:

GOM MODIFIED HADDOCK STOCK AREA

Point	N. latitude	W. longitude
GMH1 ...	(1)	(1)
GMH2 ...	42°20′	(2)
GMH4 ...	42°20′	70°00′
GMH4 ...	(3)	70°00′

1 The intersection of the shoreline and the U.S.-Canada maritime boundary.
2 The intersection of 42°20 N. lat. and the US/Canada maritime boundary
3 The intersection of the Cape Cod, MA, coastline and 70°00′ W. long.

(ii) *GB Modified Haddock Stock Area.* The GB Modified Haddock Stock Area is bounded on the east by the U.S./Canadian maritime boundary and straight lines connecting the following points in the order stated:

GB MODIFIED HADDOCK STOCK AREA

Point	N. latitude	W. longitude
GBM1 ...	(1)	70°00′
GBM2 ...	42°20′	70°00′
GBM3 ...	42°20′	(2)
GBM4 ...	40°30′	(2)
GBM5 ...	40°30′	66°40′
GBM6 ...	39°50′	66°40′
GBM7 ...	39°50′	70°00′
GBM8 ...	(3)	70°00′

1 The intersection of the North-facing shoreline of Cape Cod, MA and 70° 00' W. long.
2 The U.S.-Canada maritime boundary as it intersects with the EEZ.
3 The intersection of the South-facing shoreline of Cape Cod, MA and 70°0′ W. long.

* * * * *

3. In § 648.14, revise paragraphs (k)(1)(i)(D), (r)(1)(vi)(A), (B), and (C), (r)(1)(vii)(E), (r)(1)(viii)(B), and (r)(2)(i) through (r)(2)(v), and add paragraphs (r)(1)(vi)(E) and (F) to read as follows:

§ 648.14 Prohibitions.

* * * * *

(k) * * *

(1) * * *

(i) * * *

(D) Any haddock, and up to 100 lb of other regulated NE multispecies other than haddock, were harvested by a vessel issued an All Areas Limited Access Herring Permit and/or an Area 2 and 3 Limited Access Herring Permit on a declared herring trip regardless of gear or area fished, or a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that fished with midwater trawl gear, pursuant to the requirements specified at § 648.80(d) and (e), and such fish are not sold for human consumption.

* * * * *

(r) * * *

(1) * * *

(vi) * * *

(A) For the purposes of observer deployment, fail to notify NMFS at least 72 hr prior to departing on a declared herring trip with a vessel issued an All Areas Limited Access Herring Permit and/or an Area 2 and 3 Limited Access Herring Permit and fishing with midwater trawl or purse seine gear, or on a trip with a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that is fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), pursuant to the requirements specified at § 648.80(d) and (e).

(B) Possess, land, transfer, receive, sell, purchase, trade, or barter; or attempt to transfer, receive, sell, purchase, trade, or barter, or sell more than 2,000 lb (907 kg) of Atlantic

herring per trip taken from the Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, defined in § 648.86(a)(3)(ii)(A)(*1*), by a vessel issued an Atlantic herring permit and that fished with midwater trawl gear, after the haddock cap for the area(s) has been reached pursuant to § 648.86(a)(3), unless all herring possessed or landed by the vessel was caught outside the applicable Accountability Measure Area(s).

(C) Transit the Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, defined in § 648.86(a)(3)(ii)(A)(*1*), with a vessel issued an Atlantic herring permit and that fished with midwater trawl gear, when the 2,000-lb (907.2-kg) limit specified in § 648.86(a)(3)(ii)(A)(*1*) is in place for the area being transited, in possession of more than 2,000 lb (907.2 kg) of herring, unless all herring on board was caught outside of the applicable Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, and all fishing gear is stowed and not available for immediate use, as required by § 648.23(b).

* * * * *

(E) Possess or land haddock taken from the Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, defined in § 648.86(a)(3)(ii)(A)(*1*), by a vessel issued an Atlantic herring permit and that fished with midwater trawl gear, after the haddock cap for the area(s) has been reached pursuant to § 648.86(a)(3), unless all haddock possessed or landed by the vessel was caught outside the applicable Accountability Measure Area(s).

(F) Transit the Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, defined in § 648.86(a)(3)(ii)(A)(*1*), with a vessel issued an Atlantic herring permit and that fished with midwater trawl gear, when the 0-lb (0-kg) haddock possession limit specified in § 648.86(a)(3)(ii)(A)(*1*) is in place for the area being transited, in possession of haddock, unless all haddock on board was caught outside of the applicable Herring GOM Haddock Accountability Measure Area and/or the Herring GB Haddock Accountability Measure Area, and all fishing gear is stowed and not available for immediate use, as required by § 648.23(b).

(vii) * * *

* * * * *

(E) Discard haddock at sea that has been brought on deck, or pumped into the hold, of a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of gear or area fished, or on a trip with a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit fishing with midwater trawl gear, pursuant to the requirements specified at § 648.80(d) and (e).

* * * * *

(viii) * * *

* * * * *

(B) Fail to notify the NMFS Office of Law Enforcement of the time and date of landing via VMS at least 6 hr prior to landing herring at the end of a declared herring trip, if a vessel has an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit and is fishing with either midwater trawl or purse seine gear, or a Limited Access Incidental Catch Herring Permit and is fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3).

(2) * * *

(i) Sell, purchase, receive, trade, barter, or transfer haddock or other regulated NE multispecies (cod, witch flounder, plaice, yellowtail flounder, pollock, winter flounder, windowpane flounder, redfish, white hake, and Atlantic wolffish); or attempt to sell, purchase, receive, trade, barter, or transfer haddock or other regulated NE multispecies for human consumption; if the regulated NE multispecies are landed by a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip regardless of gear or area fished, or by a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit fishing with midwater trawl gear pursuant to § 648.80(d).

(ii) Fail to comply with requirements for herring processors/dealers that handle individual fish to separate out, and retain, for at least 12 hr, all haddock offloaded from a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fished on a declared herring trip regardless of gear or area fished, or by a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that fished with midwater trawl gear pursuant to § 648.80(d).

(iii) Sell, purchase, receive, trade, barter, or transfer; or attempt to sell, purchase, receive, trade, barter, or transfer; to another person, any haddock or other regulated NE multispecies (cod, witch flounder, plaice, yellowtail flounder, pollock, winter flounder, windowpane flounder, redfish, white hake, and Atlantic wolffish) separated out from a herring catch offloaded from a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fished on a declared herring trip regardless of gear or area fished, or by a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that fished with midwater trawl gear pursuant to § 648.80(d).

(iv) While operating as an at-sea herring processor, fail to comply with requirements to separate out and retain all haddock offloaded from a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fished on a declared herring trip regardless of gear or area fished, or by a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that fished with midwater trawl gear pursuant to § 648.80(d).

(v) Fish with midwater trawl gear in Closed Area I, as specified at § 648.81(a), without a NMFS approved observer onboard, if the vessel has been issued an Atlantic herring permit.

* * * * *

4. In § 648.15, revise paragraphs (d)(1) and (e) to read as follows:

§ 648.15 Facilitation of enforcement.

* * * * *

(d) *Retention of haddock by herring dealers and processors.* (1) Federally permitted herring dealers and processors, including at-sea processors, that cull or separate out from the herring catch all fish other than herring in the course of normal operations, must separate out and retain all haddock offloaded from a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit that fished on a declared herring trip regardless of gear or area fished, or by a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit that fished with midwater trawl gear pursuant to § 648.80(d). Such haddock may not be sold, purchased, received, traded, bartered, or transferred, and must be retained, after they have been separated, for at least 12 hrs for dealers and processors on land, and for 12 hrs after landing by at-sea processors. The dealer or processor, including at-sea processors, must clearly indicate the

vessel that landed the retained haddock or transferred the retained haddock to an at-sea processor. Authorized officers must be given access to inspect the haddock.

* * * * *

(e) *Retention of haddock by herring vessels using midwater trawl gear.* Vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip regardless of gear or area fished, and vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), may not discard any haddock that has been brought on the deck or pumped into the hold.

5. In § 648.80, revise paragraphs (d)(4) through (d)(6), (d)(7)(i) and (d)(7)(ii) introductory text, and (e)(4) to read as follows:

§ 648.80 NE Multispecies regulated mesh areas and restrictions on gear and methods of fishing.

* * * * *

(d) * * *

(4) The vessel does not fish for, possess or land NE multispecies, except that vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit and fishing on a declared herring trip regardless of gear or area fished, and vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to paragraph (d) of this section, may possess and land haddock and other regulated multispecies consistent with the catch caps and possession restrictions specified in § 648.86(a)(3) and (k). Such haddock or other regulated NE multispecies may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for, or intended for, human consumption. Haddock or other regulated NE multispecies that are separated out from the herring catch pursuant to § 648.15(d) may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for any purpose. Vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip regardless of gear or area fished, and vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to paragraph (d) of this section, may not discard haddock that has been brought on the deck or pumped into the hold;

(5) To fish for herring under this exemption, a vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, or a vessel issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), must provide notice of the following information to NMFS at least 72 hr prior to beginning any trip into these areas for the purposes of observer deployment: Vessel name; contact name for coordination of observer deployment; telephone number for contact; the date, time, and port of departure; and whether the vessel intends to engage in fishing in Closed Area I, as defined in § 648.81(a), at any point in the trip; and

(6) A vessel issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip with midwater trawl gear, or a vessel issued a Limited Access Incidental Catch Herring Permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), must notify NMFS Office of Law Enforcement through VMS of the time and place of offloading at least 6 hr prior to crossing the VMS demarcation line on their return trip to port, or, for a vessel that has not fished seaward of the VMS demarcation line, at least 6 hr prior to landing. The Regional Administrator may adjust the prior notification minimum time through publication of a notice in the **Federal Register** consistent with the Administrative Procedure Act.

(7) *Fishing in Closed Area I.* (i) No vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear, may fish, possess or land fish in or from, Closed Area I unless it has declared first its intent to fish in Closed Area I as required by paragraph (d)(5) of this section, and is carrying onboard a NMFS-approved observer.

(ii) No vessel issued a Federal Atlantic herring permit and fishing with midwater trawl gear, when fishing any part of a midwater trawl tow in Closed Area I, may release fish from the codend of the net, transfer fish to another vessel that is not carrying a NMFS-approved observer (e.g., an Atlantic herring at-sea processing vessel or an Atlantic herring carrier vessel), or otherwise discard fish at sea, unless the fish has first been brought aboard the vessel and made available for sampling and inspection by the observer, except in the following circumstances:

* * * * *

(e) * * *

(4) The vessel does not fish for, possess, or land NE multispecies, except that vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip may possess and land haddock or other regulated species consistent with possession restrictions specified in § 648.86(a)(3) and (k), respectively. Such haddock or other regulated multispecies may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for, or intended for, human consumption. Haddock or other regulated species that are separated out from the herring catch pursuant to § 648.15(d) may not be sold, purchased, received, traded, bartered, or transferred, or attempted to be sold, purchased, received, traded, bartered, or transferred for any purpose. Vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit may not discard haddock that has been brought on the deck or pumped into the hold;

* * * * *

6. In § 648.85, revise paragraph (d) to read as follows:

§ 648.85 Special management programs.

* * * * *

(d) *Haddock incidental catch allowance for some Atlantic herring vessels.* The haddock incidental catch allowance for all vessels that have a Federal Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), is 1 percent of each of the ABCs for GOM haddock and GB haddock (U.S. catch only) specified according to § 648.90(a)(4) for a particular NE multispecies fishing year. Such haddock catch will be determined as specified in § 648.86(a)(3)(ii).

* * * * *

7. In § 648.86, revise paragraphs (a)(3)(i), (a)(3)(ii)(A)(*1*) and (*2*), and (k), and add paragraphs (a)(3)(ii)(A)(*3*) and (*4*) to read as follows:

§ 648.86 NE Multispecies possession restrictions.

* * * * *

(a) * * *

(3) * * *

(i) *Incidental catch allowance for some Atlantic herring vessels.* Vessels issued an All Areas Limited Access Herring Permit and/or an Areas 2 and 3

Limited Access Herring Permit fishing on a declared herring trip, regardless of gear or area fished, and vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), may possess and land haddock, subject to the requirements specified in § 648.80(d) and (e).

(ii) * * *

(A) * * *

(*1*) When the Regional Administrator has determined that the incidental catch allowance for a given haddock stock as specified in § 648.85(d), has been caught, all vessels issued an Atlantic herring permit and fishing with midwater trawl gear in the applicable stock area, i.e., the Herring GOM Haddock Accountability Measure (AM) Area or Herring GB Haddock AM Area, as defined in paragraphs (a)(3)(ii)(A)(*2*) and (*3*) of this section, are prohibited from fishing for, possessing, or landing herring in excess of 2,000 lb (907.2 kg) per trip in or from that area, unless all herring possessed and landed by the vessel were caught outside the applicable AM Area and the vessel complies with the gear stowage provisions specified in § 648.23(b) while transiting the AM Area. Upon this determination, the haddock possession limit is reduced to 0 lb (0 kg) for all vessels that have a Federal Atlantic herring permit and are fishing with midwater trawl gear and all vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of area fished or gear used, in the applicable AM area, unless the vessel also possesses a Northeast multispecies permit and is operating on a declared (consistent with § 648.10(g)) Northeast multispecies trip. In making this determination, the Regional Administrator shall use haddock catches observed by NMFS-approved observers by herring vessel trips using midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), expanded to an estimate of total haddock catch for all such trips in a given haddock stock area.

(*2*) *Herring GOM Haddock Accountability Measure Area.* The Herring GOM Haddock AM Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

HERRING GOM HADDOCK ACCOUNTABILITY MEASURE AREA

Point	N. latitude	W. longitude
HGA1	(1)	69°20′
HGA	43°40′	69°20′
HGA3	43°40′	69°00′
HGA4	43°20′	69°00′
HGA5	43°20′	67°40′
HGA6	(2)	67°40′
HGA7	42°53.1′	67°44.4′
HGA8	(2)	67°40′
HGA9	42°20′	67°40′
HGA10 ..	42°20′	70°00′
HGA11 ..	(3)	70°00′

[1] The intersection of the Maine coastline and 69°20′ W. long.

[2] The intersection of the U.S./Canada maritime boundary and 67°40′ W. long.

[3] The intersection of the north-facing shoreline of Cape Cod, MA, and 70°00′ W. long.

(*3*) *The Herring GB Haddock Accountability Measure Area.* The Herring GB Haddock AM Area is defined by the straight lines connecting the following points in the order stated (copies of a map depicting the area are available from the Regional Administrator upon request):

HERRING GB HADDOCK ACCOUNTABILITY MEASURE AREA

Point	N. latitude	W. longitude
HBA1	42°20′	70°00′
HBA2	42°20′	(1)
HBA3	40°30′	(1)
HBA4	40°30′	66°40′
HBA5	39°50′	66°40′
HBA6	39°50′	68°50′
HBA7	(2)	68°50′
HBA8	41°00′	(3)
HBA9	41°00′	69°30′
HBA10 ..	41°10′	69°30′
HBA11 ..	41°10′	69°50′
HBA12 ..	41°20′	69°50′
HBA13 ..	41°20′	(4)
HBA14 ..	(5)	70°00′
HBA15 ..	(6)	70°00′
HBA16 ..	(7)	70°00′

[1] The intersection of the U.S./Canada maritime boundary and 42°20′ N. lat.

[2] The intersection of the boundary of Closed Area I and 68°50′ W. long.

[3] The intersection of the boundary of Closed Area I and 41°00′ N. lat.

[4] The intersection of the east-facing shoreline of Nantucket, MA, and 41°20′ N. lat.

[5] The intersection of the north-facing shoreline of Nantucket, MA, and 70°00′ W. long.

[6] The intersection of the south-facing shoreline of Cape Cod, MA, and 70°00′ W. long.

[7] The intersection of the north-facing shoreline of Cape Cod, MA, and 70°00′ W. long.

(*4*) The haddock incidental catch caps specified are for the NE multispecies fishing year (May 1–April 30), which differs from the herring fishing year (January 1–December 31). If the haddock incidental catch allowance is attained by the herring midwater trawl fishery for the GOM or GB, as specified in § 648.85(d), the 2,000-b (907.2-kg) limit on herring possession in the applicable AM Area, as described in paragraph (a)(3)(ii)(A)(*2*) or (*3*) of this section, will be in effect until the end of the NE multispecies fishing year. For example, the 2011 haddock incidental catch cap is specified for the period May 1, 2011–April 30, 2012, and the 2012 haddock catch cap would be specified for the period May 1, 2012–April 30, 2013. If the catch of haddock by herring midwater trawl vessels reached the 2011 incidental catch cap at any time prior to the end of the NE multispecies fishing year (April 30, 2012), the 2,000-lb (907.2-kg) limit on possession of herring in the applicable AM Area would extend through April 30, 2012. Beginning May 1, 2012, the 2012 catch cap would go into effect.

* * * * *

(k) *Other regulated NE multispecies possession restrictions for some Atlantic herring vessels.* All vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit on a declared herring trip, regardless of area fished or gear used, and all vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), may possess and land haddock, and up to 100 lb (45 kg), combined, of other regulated NE multispecies, other than haddock, subject to the requirements specified in § 648.80(d) and (e). Such fish may not be sold for human consumption.

* * * * *

8. In § 648.90, revise paragraph (a)(4)(iii)(D), and add paragraph (a)(5)(iii) to read as follows:

§ 648.90 NE multispecies assessment, framework procedures and specifications, and flexible area action system.

* * * * *

(a) * * *

(4) * * *

(iii) * * *

(D) *Haddock catch by the Atlantic herring fishery.* One percent each of the GOM haddock and GB haddock ABC (U.S. share only) will be allocated to the Atlantic herring fishery, pursuant to the restrictions at §§ 648.85(d) and 648.86(a)(3), and pursuant to the process for specifying ABCs and ACLs described in paragraph (a)(4) of this section. An ACL based on this ABC will be determined using the process described in paragraph (a)(4)(i) of this section.

* * * * *

(5) * * *

(iii) *AMs if the incidental catch cap for the Atlantic herring fishery is exceeded.* At the end of the fishing year, NMFS shall evaluate Atlantic herring fishery catch using VTR, VMS, IVR, observer data, and any other available information to determine whether a haddock incidental catch cap has been exceeded based upon the cumulative catch of vessels issued an Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3. If the catch of haddock by all vessels issued an Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, exceeds the amount of the incidental catch cap specified in § 648.85(d) of this section, then the appropriate incidental catch cap shall be reduced by the overage on a pound-for-pound basis during the following fishing year. Any overage reductions shall be announced by the Regional Administrator in the **Federal Register** prior to the start of the NE multispecies fishing year in which the overage would apply.

* * * * *

9. In § 648.201, revise paragraph (a)(2) to read as follows:

§ 648.201 AMs and harvest controls.

(a) * * *

(2) If NMFS determines that the GOM and/or GB incidental catch cap for haddock in § 648.85(d) has been caught, all vessels issued a Federal Atlantic herring permit and fishing with midwater trawl gear in Management Areas 1A, 1B, and/or 3, as defined at § 648.200(f)(1) and (3), shall be prohibited from fishing for, possessing, or landing herring in excess of 2,000 lb (907.2 kg) per trip in or from the applicable AM Area. This prohibition shall apply unless all herring possessed and landed by a vessel were caught outside the applicable AM Area and the vessel complies with the gear stowage provisions specified in § 648.23(b) while transiting the applicable AM Area. Upon determination that a haddock incidental catch cap has been reached, the haddock possession limit shall be reduced to 0 lb (0 kg) for all vessels that have an All Areas Limited Access Herring Permit and/or an Areas 2 and 3 Limited Access Herring Permit fishing on a declared herring trip, regardless of area fished or gear used, and all vessels issued a Limited Access Incidental Catch Herring Permit and/or an Open Access Herring Permit and fishing with midwater trawl gear pursuant to § 648.80(d), unless the vessel also possesses a Northeast multispecies permit and is operating on a declared (consistent with § 648.10(g)) Northeast multispecies trip.

* * * * *

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Notices

Federal Register
Vol. 76, No. 138
Tuesday, July 19, 2011

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2011–0051]

Notice of Request for Approval of an Information Collection; Smuggling, Interdiction, and Trade Compliance Program; Smuggling Form

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: New information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act, this notice announces the Animal and Plant Health Inspection Service's intention to initiate an information collection to support our smuggling, interdiction, and trade compliance program.

DATES: We will consider all comments that we receive on or before September 19, 2011.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0051–0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0051, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS–2011–0051* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue, SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the smuggling, interdiction, and trade compliance program, contact Mr. Jose R. Ceballos, National Coordinator, SITC, PPQ, APHIS, 4700 River Road Unit 52, Riverdale, MD 20737; (301) 734–0872. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

SUPPLEMENTARY INFORMATION:

Title: Smuggling, Interdiction, and Trade Compliance Program; Smuggling Form.

OMB Number: 0579–xxxx.

Type of Request: Approval of a new information collection.

Abstract: The Animal and Plant Health Inspection Service (APHIS) programs are established to ensure the availability of domestic and imported foods in the American marketplace, facilitate the importation and exportation of agricultural commodities to foreign countries, and preserve the health and diversity of APHIS' agricultural resources. APHIS' Plant Protection and Quarantine Smuggling Interdiction and Trade Compliance Program (SITC) is involved with efforts to prevent the unlawful entry, introduction, and distribution of prohibited agricultural commodities and products that may harbor harmful exotic plant and animal pests, diseases, or invasive species. This program allows the public/industry to anonymously or openly report suspicious or current smuggling activities by completing a form or placing a phone call to the SITC National Office Smuggling Hotline (800–877–3835).

When SITC has evidence that an agricultural regulation has been violated, they may turn the case over to APHIS' Investigative and Enforcement Services and United States Department of Agriculture's Office of Inspector General for prosecution.

APHIS is requesting the Office of Management and Budget (OMB) approve PPQ Form 300 for the use of this information collection for 3 years, which is necessary to prevent the unlawful entry and distribution of prohibited agricultural commodities and products that may harbor harmful exotic plant and animal pests, diseases, or invasive species.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; e.g., permitting electronic submission of responses.

Estimate of burden: The public reporting burden for this collection of information is estimated to average 0.025 hours per response.

Respondents: Anyone (public, industry, and farms) who anonymously or openly reports suspicious smuggling activities.

Estimated annual number of respondents: 200.

Estimated annual number of responses per respondent: 1.

Estimated annual number of responses: 200.

Estimated total annual burden on respondents: 50 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 13th day of July 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–18106 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0029]

Availability of an Environmental Assessment and Finding of No Significant Impact for a Biological Control Agent for Hemlock Woolly Adelgid

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that an environmental assessment and finding of no significant impact have been prepared by the Animal and Plant Health Inspection Service relative to the control of hemlock woolly adelgid. Based on its finding of no significant impact, the Animal and Plant Health Inspection Service has determined that an environmental impact statement need not be prepared.

FOR FURTHER INFORMATION CONTACT: Dr. Shirley Wager-Page, Chief, Pest Permitting Branch, PPQ, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737–1237; (301) 734–8453.

SUPPLEMENTARY INFORMATION:

Background

The Animal and Plant Health Inspection Service (APHIS) is proposing to issue permits for the release of an insect, *Laricobius osakensis,* into the continental United States for use as a biological control agent to reduce the severity of hemlock woolly adelgid (*Adelges tsugae,* HWA) infestations.

On January 19, 2011, we published in the **Federal Register** (75 FR 28232–28233, Docket No. APHIS–2010–0029) a notice [1] in which we announced the availability, for public review and comment, of an environmental assessment (EA) that examined the potential environmental impacts associated with the proposed release of this biological control agent into the continental United States.

We solicited comments on the EA for 30 days ending June 21, 2010. We received no comments by that date.

In this document, we are advising the public of our finding of no significant impact (FONSI) regarding the release of *L. osakensis* into the continental United States for use as a biological control agent to reduce the severity of HWA infestations. The finding, which is based on the EA, reflects our determination that release of this biological control agent will not have a significant impact on the quality of the human environment.

The EA and FONSI may be viewed on the Regulations.gov Web site (see footnote 1). Copies of the EA and FONSI are also available for public inspection at USDA, Room 1141, South Building, 14th Street and Independence Avenue, SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect copies are requested to call ahead on (202) 690–2817 to facilitate entry into the reading room. In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

The EA and FONSI have been prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

Done in Washington, DC, this 13th day of July 2011.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–18112 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–34–P

[1] To view the notice, EA, and FONSI go to *http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0029.*

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2010–0125]

Secretary's Advisory Committee on Animal Health; Meeting Agenda

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This is a notice to inform the public of the topics on the agenda for an upcoming meeting of the Secretary's Advisory Committee on Animal Health. The meeting is organized by the Animal and Plant Health Inspection Service to discuss matters of animal health.

DATES: The meeting will be held July 22, 2011, from noon to 5 p.m. (eastern daylight time).

ADDRESSES: The meeting will be conducted as a multi-site teleconference. Opportunities for public participation are described in the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. Michael R. Doerrer, Chief Operating Officer, Veterinary Services, APHIS, USDA, 4700 River Road Unit 37, Riverdale, MD 20737; (301) 734–5665; *e-mail: SACAH.Management@aphis.usda.gov.*

SUPPLEMENTARY INFORMATION: The Secretary's Advisory Committee on Animal Health (the Committee) advises the Secretary of Agriculture on means to prevent, conduct surveillance on, monitor, control, or eradicate animal diseases of national importance. In doing so, the Committee will consider public health, conservation of natural resources, and the stability of livestock economies.

In a notice published in the **Federal Register** on May 19, 2011 (76 FR 28910), we announced that the next meeting of the Committee will be held on July 22, 2011, and that we would publish a notice in advance of that meeting to provide information on the meeting's agenda. This notice provides that information. At the July 2011 public meeting, topics to be discussed will include:

1. Bovine tuberculosis/brucellosis program update and feedback on new framework.
2. *Wildlife Services:* Its mission and collaboration with other units and agencies.
3. Changes to the Scrapie Flock Certification Program.
4. *National Veterinary Stockpile:* Its mission, outreach, and interaction with other agencies in emergency response.
5. Update on the National Animal Health Laboratory Network.
6. Emergency Management and Response: Foot and Mouth Disease Vaccination Supply Challenge.
7. *VS 2015:* A New Perspective.

Additional information, including the final agenda, will be posted on the Committee's Web site at *http://www.aphis.usda.gov/animal_health/acah/.*

Public Participation

This meeting will be a multi-site teleconference. Public attendees may join the call in ''listen-only'' mode. Members of the public who wish to listen in on the teleconference may do so by dialing 1–888–790–3291, followed by a public passcode, 1411045.

Questions and written statements for the meetings may be submitted up to 5 working days in advance of the meeting for the Committee's consideration. Questions and written statements may be sent via e-mail to *SACAH.Management@aphis.usda.gov* or mailed to the person listed under **FOR**

FURTHER INFORMATION CONTACT at the beginning of this notice. Statements may also be filed with the Committee after the meeting by sending them to *SACAH.Management@aphis.usda.gov.*

This notice of the meeting agenda is given pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. App. 2).

Done in Washington, DC, this 14th day of July 2011.

Gregory L. Parham,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2011–18172 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Federal Excess Personal Property (FEPP) Inventory

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension, with revision, of a currently approved information collection, Federal Excess Personal Property (FEPP) Inventory.

DATES: Comments must be received in writing on or before September 19, 2011 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to: USDA, Forest Service, Attn: Melissa Frey, Fire and Aviation Management, 1400 Independence Ave, SW., Mailstop Code: 1107, Washington, DC 20250–1107.

Comments also may be submitted via facsimile to 202–205–1272 or by e-mail to: *mfrey@fs.fed.us.*

The public may inspect comments received at USDA Forest Service, F&AM, Room 2SO, 201 14th St., SW., Washington, DC 20050, during normal business hours. Visitors are encouraged to call ahead to 202–205–1090 to facilitate entry to the building.

FOR FURTHER INFORMATION CONTACT: Melissa Frey, Fire and Aviation Management, phone: 202–205–1090. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Federal Excess Personal Property (FEPP) Inventory.

OMB Number: 0596–218 Expiration Date of Approval: 12/31/2011.

Type of Request: Extension without Revision.

Abstract: The Forest Service acquires excess federally-owned property to loan to state cooperators for wildland fire fighting. Since the property belongs to the Forest Service, the proposed inventory system will facilitate reporting by state agencies to the Forest Service on the status and location of the property. Program authorities include, the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 483), and the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. 2101 (note)). Additional pertinent regulations include the USDA Organic Act of 1944 (16 U.S.C. 508a) and Federal Property Management Regulations 101–43.309–1, 101–43–313, and 101–43–314 (40 U.S.C. 483). State agencies will use the electronic database (Federal Excess Property Management Information System or FEPMIS) to submit information regarding property make, model, serial number, acquisition value, location, and acquisition date when an item is acquired or no longer needed. Forest Service property management technicians will collect the information from FEPMIS and enter it into a National Finance Center database (PROP), as required by Federal Property Management Regulations. Forest Service property management officers will analyze the data collected to ensure that the property accountability is accurate and no misuse of property is occurring.

Estimate of Annual Burden: 2 minutes.

Type of Respondents: State Agency FEPP property managers.

Estimated Annual Number of Respondents: 55.

Estimated Annual Number of Responses per Respondent: 300.

Estimated Total Annual Burden on Respondents: 550 hours.

Comment Is Invited

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

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission request toward Office of Management and Budget approval.

Dated: *July 12, 2011.*

James Hubbard,

Deputy Chief, State and Private Forestry.

[FR Doc. 2011–18050 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Amador County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Amador County Resource Advisory Committee will meet in Sutter Creek, California. The committee is meeting as authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The RAC will review project proposals and recommend projects for funding.

DATES: The meeting will be held on August 2, 2011 beginning at 6 p.m.

ADDRESSES: The meeting will be held at 10877 Conductor Blvd., Sutter Creek, CA.

Written comments should be sent to Frank Mosbacher; Forest Supervisor's Office; 100 Forni Road; Placerville, CA 95667. Comments may also be sent via e-mail to *fmosbacher@fs.fed.us,* or via facsimile to 530–621–5297.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at 100 Forni Road; Placerville, CA 95667. Visitors are encouraged to call ahead to 530–622–5061 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Frank Mosbacher, Public Affairs Officer, Eldorado National Forest Supervisors Office, (530) 621–5268. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. The

following business will be conducted: The RAC will review project proposals and recommend projects for funding. More information will be posted on the Eldorado National Forest Web site @ *http://www.fs.fed.us/r5/eldorado.* A public comment opportunity will be made available following the business activity. Future meetings will have a formal public imput period for those following the yet to be developed public imput process.

Dated: July 13, 2011.

Michael A. Valdes,

Acting Forest Supervisor.

[FR Doc. 2011–18111 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Davy Crockett Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Davy Crockett Resource Advisory Committee will meet in Ratcliff, Texas. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is to review, identify, prioritize and approve RAC Title II projects.

DATES: The meeting will be held July 28, 2011, 6 p.m.

ADDRESSES: The meeting will be held at the Davy Crockett Ranger Station conference room in Ratcliff, TX. The building address is: 18551 State Highway 7 East, Kennard, TX 75847. Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Davy Crockett Ranger Station. Please call ahead to (936) 655–2299 ext. 230 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Gerald Lawrence, Jr., Designated Federal Officer, Davy Crockett National Forest, (936) 655–2299 ext. 225, *glawrence@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accomodation for access to the facility or procedings may be made by contacting the person listed **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: The committee will be asked to review, identify, prioritize and approve RAC Title II Projects, and to discuss the Lancaster Phase II and Groveton Phase II Stewardship Projects. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by July 21, 2011 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to 18551 State Highway 7 East, Kennard, TX 75847 or by e-mail to *glawrence@fs.fed.us* or via facsimile to (936) 655–2817.

Dated: July 11, 2011.

Gerald Lawrence, Jr.,

DFO.

[FR Doc. 2011–18124 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

National Agricultural Library

Notice of Intent To Seek Approval To Collect Information

AGENCY: Agricultural Research Service, National Agricultural Library, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR part 1320, this notice announces the National Agricultural Library's intent to request renewal of an information collection relating to existing nutrition education materials (i.e. recipes and cookbooks) targeting low-income and Supplemental Nutrition Assistance Program (SNAP) eligible persons. These two voluntary forms give SNAP Education (SNAP-Ed) providers the opportunity to share resources that they have developed or used.

DATES: Comments on this notice must be received by September 19, 2011 to be assured of consideration.

ADDRESSES: You may submit comments by any of the following methods:

- *Agency Web site: http://www.nal.usda.gov/fsn/contact.php.* Follow the instructions for submitting comments on the SNAP-Ed Connection Web site.
- *E-mail: rachel.tobin@ars.usda.gov*
- *Fax:* 301–504–6409 attention SNAP-Ed Connection.
- *Mail/Hand Delivery/Courier:* SNAP-Ed Connection/National Agricultural Library, 10301 Baltimore Ave, Room 105, Beltsville, Maryland 20705–2351

SUPPLEMENTARY INFORMATION:

Title: SNAP-Ed Connection Recipe Submission and Review Form.

OMB Number: 0518–0043.

Expiration Date: 3 years from date of approval.

Type of Request: Renewal of existing data collection from SNAP Education providers.

Abstract: The National Agricultural Library's SNAP-Ed Connection (formerly the Food Stamp Nutrition Connection) *http://snap.nal.usda.gov* resource system developed and maintains an on-line recipe database, the Recipe Finder, as a popular feature to the SNAP-Ed Connection Web site. The purpose of the Recipe Finder database is to provide SNAP-Ed providers with low-cost, easy-to-prepare, healthy recipes for classes and demonstrations with SNAP-Ed participants. SNAP-Ed staff members rely on these same educators to submit their best recipes for review, analysis, and inclusion in the database. SNAP-Ed staff and providers benefit from collecting and posting feedback on individual recipes based on educator experiences. Data collected using the voluntary Recipe Finder Submission Form help SNAP-Ed Connection staff identify a recipe's eligibility and appropriateness for inclusion in the Recipe Finder database. Criteria for recipe inclusion in the Recipe Finder database can be found on the SNAP-Ed Connection Web site at: *http://snap.nal.usda.gov/nal_display/index.php?info_center=15&tax_level=2&tax_subject=267&topic_id=1515.* The Recipe Finder Submission Form allows SNAP-Ed providers to submit recipes on-line, saving time and money by eliminating the need to photocopy and mail or fax recipes. Data collected from the Recipe Review Form help educators share their successes or identify opportunities for improvement when

incorporating these recipes into their nutrition education efforts.

The two online submission forms will continue to serve as an efficient vehicle that allows SNAP-Ed Connection staff to communicate with SNAP-Ed providers and inform other interested parties of healthy recipes that are appropriate for low-income Americans.

Estimate of Burden for Recipe Submission Form

Public reporting burden for this collection of information is estimated to average 7.5 minutes per response.

Respondents: SNAP-Ed providers.

Estimated Number of Respondents: 100 per year.

Estimated Total Annual Burden on Respondents: 12.5 hrs.

Estimate of Burden for Recipe Review Form

Public reporting burden for this collection of information is estimated to average 7 minutes per response.

Respondents: SNAP-Ed providers.

Estimated Number of Respondents: 150 per year.

Estimated Total Annual Burden on Respondents: 17.5 hrs.

Copies of this information collection and related instructions can be obtained without charge on the SNAP-Ed Connection Web site at http://www.nal.usda.gov/fsn/add_recipe.shtml and *http://www.nal.usda.gov/fsn/rate_recipe.shtml.*

Comments

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance for the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and 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 those who respond, including the use of appropriate automated, electronic, mechanical, or other technology. Comments should be sent to the address in the preamble. All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Dated: June 30, 2011.

Edward B. Knipling,

Administrator, ARS.

[FR Doc. 2011–18052 Filed 7–18–11; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Institute of Standards and Technology (NIST)

Title: Identification of Human Cell Lines Project.

OMB Control Number: None.

Form Number(s): None.

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

Burden Hours: 250.

Number of Respondents: 100 (15 cell line limit).

Average Hours per Response: 2 hours and 30 minutes (10 minutes/cell line × 15 cell lines).

Needs and Uses: The NIST Biochemical Science Division proposes its intent to identify by short tandem repeat (STR) profiling up to 1,500 human cell line samples as part of the Identification of Human Cell Lines Project. All data and corresponding information will be posted in a publicly held database at the National Center for Biotechnology Information (NCBI).

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Frequency: Once.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6616, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, (202) 395–3123, FAX Number (202) 395–5167, or *Jasmeet_K._Seehra@omb.eop.gov*).

Dated: July 14, 2011.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2011–18086 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment; Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on August 3, 2011, 9 a.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda:

Open Session

1. Opening remarks and introductions.
2. Presentation of papers and comments by the Public.
3. Discussion on proposals from last and for next Wassenaar meeting.
4. Report on proposed changes to the Export Administration Regulations.
5. Other business.

Closed Session

6. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than July 27, 2011.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via e-mail.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 25, 2011, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended, that the portion of the meeting dealing with matters the premature disclosure of which would be

likely to frustrate significantly implementation of a proposed agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)1 and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: July 13, 2011.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2011–18163 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–820]

Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from domestic interested parties,[1] the Department of Commerce (''the Department'') conducted an administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from India manufactured by Essar Steel Limited (''Essar''), Ispat Industries Limited (''Ispat''), JSW Steel Limited (''JSW''), and Tata Steel Limited (''Tata''). The period of review (''POR'') covers December 1, 2008, through November 30, 2009. We determine that Essar, Ispat, JSW, and Tata had no reviewable entries of subject merchandise during the POR.

DATES: *Effective Date:* July 19, 2011.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett or James Terpstra, AD/CVD Operations Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4161 and (202) 482–3965, respectively.

SUPPLEMENTARY INFORMATION:

Background

On January 13, 2011, the Department published in the **Federal Register**, the *Preliminary Results* [2] of this review.

On March 29, 2011, pursuant to the announcement in the *Preliminary Results,* the Department issued a supplemental questionnaire to Tata seeking clarifying information with respect to its exports.[3] On April 6, 2011, Tata submitted its response to the Department's supplemental questionnaire.[4]

We received briefs from U.S. Steel and Nucor and a rebuttal brief from Tata.[5] On May 17, the Department extended the deadline for the *Final Results* to July 12, 2011.[6]

Period of Review

The period covered by this review is December 1, 2008, through November 30, 2009.

Scope of the Order

The merchandise subject to the order is certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*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 a thickness not less than 4.0 mm is not included within the scope of the order.

Specifically included in the scope of the order are vacuum-degassed, fully stabilized (commonly referred to as interstitial-free (''IF'')) steels, high-strength low-alloy (''HSLA'') steels, and the substrate for motor lamination steels. IF steels are recognized as low-carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products in which: (i) Iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of the order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of the order:

- Alloy hot-rolled carbon steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.,* American Society for Testing and Materials (''ASTM'') specifications A543, A387, A514, A517, A506).
- Society of Automotive Engineers (''SAE'')/American Iron & Steel Institute (''AISI'') grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.

[1] The domestic interested parties are United States Steel Corporation (''U.S. Steel''), Nucor Corporation (''Nucor''), and ArcelorMittal USA Inc.

[2] *See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 76 FR 2344 (January 13, 2011) (''*Preliminary Results*'').

[3] *See* Letter to Tata Steel Limited from the Department, regarding the 6th Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India, dated March 29, 2011.

[4] *See* Letter from Tata Steel Limited to the Department, regarding the Antidumping Duty Review of Certain Hot-Rolled Carbon Steel Flat Products from India: Response of Tata Steel to Supplemental Questions, dated April 6, 2011.

[5] *See* Letter from U.S. Steel to the Department, regarding Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India, dated April 14, 2011; Letter from Nucor to the Department, regarding Certain Hot-Rolled Carbon Steel Flat Products from India: Case Brief, dated April 14, 2011; Letter from Tata to the Department, regarding Antidumping Duty Review of Certain Hot-Rolled Carbon Steel Flat Products from India: Reply Brief of Tata Steel Limited, dated April 19, 2011.

[6] *See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Extension of Time Limit for the Final Results of Antidumping Duty Administrative Review,* 76 FR 28419 (May 17, 2011).

• United States Steel (''USS'') Abrasion-resistant steels (USS AR 400, USS AR 500).

• All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).

• Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTSUS.

The merchandise subject to the order is currently classifiable in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled carbon steel covered by the order, including: vacuum-degassed fully stabilized; high-strength low-alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the merchandise subject to the order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the accompanying ''Issues and Decisions Memorandum for the Final Results of 2008–2009 Administrative Review of the Antidumping Duty Order on Certain Hot-Rolled Carbon Steel Flat Products from India,'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration (July 12, 2011) (''Issues and Decision Memorandum''), which is hereby adopted by this notice. A list of the issues which parties have raised, and to which we have responded in the Issues and Decision Memorandum, is attached to this notice as an Appendix. The Issues and Decision Memorandum is on file in the Central Records Unit, room 7046 of the Department of Commerce main building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Issues and Decision Memorandum are identical in content.

Final Results of Review

We continue to determine that Essar, Ispat, JSW, and Tata had no reviewable entries of subject merchandise during the POR.

Assessment Rate

The Department intends to issue appropriate assessment instructions directly to U.S. Customs and Border Protection (''CBP'') 15 days after the publication of the final results of this review.

Since the implementation of the 1997 regulations, our practice concerning no-shipment respondents has been to rescind the administrative review if the respondent certifies that it had no shipments and we have confirmed through our examination of CBP data that there were no shipments of subject merchandise during the POR.[7] As a result, in such circumstances, we normally instructed CBP to liquidate any entries from the no-shipment company at the deposit rate in effect on the date of entry.

In our May 6, 2003, ''automatic assessment'' clarification, we explained that, where respondents in an administrative review demonstrate that they had no knowledge of sales through resellers to the United States, we would instruct CBP to liquidate such entries at the all-others rate applicable to the proceeding.[8]

Because ''as entered'' liquidation instructions do not alleviate the concerns which the May 2003 clarification was intended to address, we find it appropriate in this case to instruct CBP to liquidate any existing entries of merchandise produced by Essar, Ispat, JSW, or Tata and exported by other parties at the all-others rate.[9]

Cash Deposit Requirements

The following deposit rates will be effective upon publication of the final results of this administrative review for all shipments of hot-rolled carbon steel flat products from India entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Tariff Act of 1930, as amended (''Act''): (1) For Essar, Ispat, JSW, Tata, and for previously reviewed or investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent final results in which that manufacturer or exporter participated; (2) if the exporter is not a firm covered in these reviews, a prior review, or the original less-than-fair-value (''LTFV'') investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent final results for the manufacturer of the merchandise; and (3) if neither the exporter nor the manufacturer is a firm covered in this or any previous review or the LTFV investigation conducted by the Department, the cash deposit rate will be 23.87 percent, the all-others rate established from the LTFV investigation.[10] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping and countervailing duties occurred and the subsequent assessment of double antidumping and countervailing duties.

Notification to Interested Parties

This notice serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the

[7] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27393 (May 19, 1997).

[8] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[9] *See, e.g., Magnesium Metal From the Russian Federation: Final Results of Antidumping Duty Administrative Review,* 75 FR 56989, 56989–90 (September 17, 2010).

[10] *Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Antidumping Duty Administrative Review,* 69 FR 36060, 36362, n.2 (June 28, 2004).

disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

These final results of review are issued and published in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: July 12, 2011.

Christian Marsh,

Acting Deputy Assistant Secretary for Import Administration.

Appendix

Comment 1: Whether There is a Reviewable Entry

Comment 2: Application of Adverse Facts Available

Comment 3: Referral of this Matter to U.S. Customs and Border Protection

[FR Doc. 2011–18211 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–602]

Brass Sheet and Strip From Germany: Notice of Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On April 27, 2011, the Department of Commerce (''the Department'') published a notice of initiation of an administrative review of the antidumping duty order on brass sheet and strip from Germany. The review covers one producer/exporter of brass sheet and strip from Germany, Wieland-Werke AG (''Wieland''). Based on a timely withdrawal of the request for review from the petitioners [1] we are now rescinding this administrative review in full.

DATES: *Effective Date:* July 19, 2011.

FOR FURTHER INFORMATION CONTACT: Dennis McClure or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–5973 or (202) 482–1167, respectively.

[1] GBC Metals, LLC, of Global Brass and Copper, Inc., doing business as Olin Brass, Heyco Metals, Inc., Luvata Buffalo, Inc., PMX Industries, Inc., and Revere Copper Products, Inc.

SUPPLEMENTARY INFORMATION:

Background

On March 1, 2011, the Department published in the **Federal Register** the notice of opportunity to request an administrative review of the antidumping duty order on brass sheet and strip from Germany for the period March 1, 2010, through February 28, 2011. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 76 FR 11197 (March 1, 2011). On March 31, 2011, the Department received a request from the petitioners that the Department conduct an administrative review covering brass sheet and strip from Germany. On April 27, 2011, the Department published in the **Federal Register** the notice of initiation of the 2010–2011 administrative review of brass sheet and strip from Germany. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 76 FR 23545 (April 27, 2011). On May 9, 2011, Wieland notified the Department that they had no exports, sales, or entries of subject brass sheet and strip during the period of review (''POR'').

On May 12, 2011, the Department queried U.S. Customs and Border Protection (''CBP'') data for imports of brass sheet and strip under Harmonized Tariff Schedule of the United States (''HTSUS'') headings 7409.21.00 and 7409.29.00 to corroborate Wieland's claim. In addition, on May 20, 2011, the Department sent an inquiry to CBP requesting notification as to whether they had information with respect to imports of brass sheet and strip from Germany manufactured by Wieland during the POR. Finally, on May 24, 2011, the Department requested CBP assistance in obtaining copies of complete entry packages associated with several shipments.

On June 21, 2011, the Department placed the requested entry documents on the record. On June 28, 2011, Wieland submitted their comments concerning the entry documents arguing that the documents supported their claim that Wieland had no exports, sales, or entries during the POR. On June 28, 2011, the petitioners submitted a letter stating that they had no comments on the entry documents.

On July 1, 2011, the petitioners withdrew their request for an administrative review.

Period of Review

The POR is March 1, 2010, through February 28, 2011.

Scope of the Order

The scope of this order covers shipments of brass sheet and strip, other than leaded and tinned, from Germany. The chemical composition of the covered products is currently defined in the Copper Development Association (''C.D.A.'') 200 Series or the Unified Numbering System (''U.N.S.'') C2000; this review does not cover products the chemical compositions of which are defined by other C.D.A. or U.N.S. series. In physical dimensions, the products covered by this review have a solid rectangular cross section over 0.006 inches (0.15 millimeters) through 0.188 inches (4.8 millimeters) in finished thickness or gauge, regardless of width. Coiled, wound-on-reels (traverse wound), and cut-to-length products are included. The merchandise is currently classified under HTSUS item numbers 7409.21.00 and 7409.29.00. Although the HTSUS item numbers are provided for convenience and customs purposes, the Department's written description of the scope of this order remains dispositive.

Rescission of Antidumping Administrative Review

19 CFR 351.213(d)(1) of the Department's regulations provides that the Department will rescind an administrative review if the party that requested the review withdraws its request for review within 90 days of the date of publication of the notice of initiation of the requested review, or withdraws at a later date if the Department determines it is reasonable to extend the time limit for withdrawing the request. The petitioners withdrew their request for review within 90 days of April 27, 2011, the date of publication of notice of initiation of the requested review. Therefore, we are rescinding this administrative review.

Assessment Instructions

The Department will instruct CBP to assess antidumping duties on all appropriate entries. For the company for which this review is rescinded, antidumping duties shall be assessed at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of this notice.

Notification to Importers

This notice serves as a reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate

regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

Notification Regarding Administrative Protective Orders

This notice serves as a reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR 351.213(d)(4).

Dated: July 13, 2011.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2011–18212 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

China Biotech Life Sciences Trade Mission—Clarification and Amendment

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice.

SUMMARY: The United States Department of Commerce, International Trade Administration, U.S. and Foreign Commercial Service (CS) is publishing this supplement to the Notice of the Biotech Life Science Trade Mission to China, 76 FR 17,621, Mar. 30, 2011, to clarify eligibility and amend the Notice to revise the dates and provide for selection of applicants on a rolling basis.

SUPPLEMENTARY INFORMATION:

Clarification of Eligibility of U.S. Architecture and Design Firms Specializing in This Sector

As stated under Mission Description in the March 30, 2011 Notice, this mission is intended to include representatives from a variety of U.S. biotechnology and life science firms and trade organizations. In response to various inquiries, CS is clarifying that the mission is open to applications from U.S. architecture and design firms that specialize in the design and construction of biotech and life sciences facilities including laboratories and research centers. Such firms are encouraged to apply to participate.

Amendments To Revise the Dates and Provide for Selection of Applicants on a Rolling Basis

Background: The dates are changing to coincide closely with the BioChina trade show in Shanghai. Because the mission now runs from Friday through Tuesday, a travel day has been added on Sunday since no business appointments can be made for that day. The proposed tentative time table is provided below.

In addition, recruitment for this Mission began at the end of March, and some pending applicants have indicated a need to finalize their schedules and travel arrangements. Rather than wait until after the August 15, 2011 deadline to vet all applicants and make selection decisions, CS is amending the Notice to allow for vetting and selection decisions on a rolling basis beginning July 25, 2011, until the maximum of 20 participants is selected. Although applications will be accepted through August 15th (and after that date if space remains and scheduling constraints permit), interested U.S. biotechnology and life science firms and trade organizations which have not already submitted an application are encouraged to do so as soon as possible.

Amendments

1. For the reasons stated above, the dates each place they appear in the Notice of the Biotech Life Science Trade Mission to China, 76 FR 17621, Mar. 30, 2011, are revised to read October 14–18, 2011. In addition, revise the Proposed Timetable to read: Oct. 14: Beijing, government and other meetings as appropriate; Oct. 15: Beijing, site visits to biotech industrial parks; Oct. 16: travel to Hong Kong; Oct. 17: Hong Kong, government meetings and one-on-one appointments; Oct. 18: Hong Kong, one-on-one appointments.

2. For the reasons stated above, the Timeframe for Recruitment and Applications section of the Notice of the Biotech Life Science Trade Mission to China, 76 FR 17,621, Mar. 30, 2011, is amended to read as follows:

Timeframe for Recruitment and Applications

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission calendar (*http://export.gov/trademissions*) and other Internet Web sites, press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for this mission will conclude no later than August 15, 2011. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis beginning July 25, 2011. We will inform all applicants of selection decisions on a rolling basis. Applications received after the August 15 deadline will be considered only if space and scheduling constraints permit.

FOR FURTHER INFORMATION CONTACT: Douglas Wallace, Commercial Officer, Phone: 415–705–1765; Fax: 415–705–2299, E-mail: *douglas.wallace@trade.gov*.

Elnora Moye,

U.S. Department of Commerce, Commercial Service/GTP.

[FR Doc. 2011–18138 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–978]

High Pressure Steel Cylinders From the People's Republic of China: Postponement of Preliminary Determination in the Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* July 19, 2011.

FOR FURTHER INFORMATION CONTACT: Scott Holland and Yasmin Nair, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1279 and (202) 482–3813, respectively.

Background

On May 31, 2011, the Department of Commerce (''the Department'') initiated an investigation of high pressure steel

cylinders from the People's Republic of China (''PRC''). *See High Pressure Steel Cylinders From the People's Republic of China: Initiation of Countervailing Duty Investigation,* 76 FR 33239 (June 8, 2011). Currently, the preliminary determination is due no later than August 4, 2011.

Postponement of Due Date for Preliminary Determination

Section 703(b)(1) of the Tariff Act of 1930, as amended (''the Act''), requires the Department to issue the preliminary determination in a countervailing duty investigation within 65 days after the date on which the Department initiated the investigation, However, if the Department concludes that the parties concerned in the investigation are cooperating in the investigation and determines that the investigation is extraordinarily complicated, section 703(c)(1)(B) of the Act allows the Department to postpone making the preliminary determination until no later than 130 days after the date on which the administering authority initiated the investigation.

The Department has determined that the parties involved in the proceeding are cooperating and that the investigation is extraordinarily complicated. *See* section 703(c)(1)(B) of the Act. Specifically, the Department is currently investigating alleged subsidy programs involving loans, grants, income tax incentives, and the provision of goods or services for less than adequate remuneration. Due to the number and complexity of the alleged countervailable subsidy practices being investigated, it is not practicable to complete the preliminary determination of this investigation within the original time limit (*i.e.,* August 4, 2011).

Therefore, in accordance with section 703(c)(1)(B) of the Act, we are fully extending the due date for the preliminary determination to no later than 130 days after the day on which the investigation was initiated. However, as that date falls on a Saturday (*i.e.,* October 8, 2011), and October 10, 2011, is a Federal Holiday, the deadline for completion of the preliminary determination is now Tuesday, October 11, 2011, the next business day.

This notice is issued and published pursuant to section 703(c)(2) of the Act and 19 CFR 351.205(f).

Dated: July 13, 2011.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2011–18210 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 110701366–1365–01]

Establishment of a Team Under the National Construction Safety Team Act

AGENCY: National Institute of Standards and Technology, United States Department of Commerce.

ACTION: Notice.

SUMMARY: The Director of the National Institute of Standards and Technology (NIST), United States Department of Commerce, announces the establishment of a National Construction Safety Team pursuant to the National Construction Safety Team Act. The Team was established to study the effects of the tornado that touched down in Joplin, MO, on May 22, 2011.

DATES: The National Construction Safety Team was established on June 29, 2011.

ADDRESSES: Tina Faecke, Engineering Laboratory, National Institute of Standards and Technology, Mail Stop 8604, Gaithersburg, MD 20899–8604, telephone number (301) 975–5911. Members of the public are encouraged to submit to the Team non-privileged evidence that is relevant to the subject matter of the NIST investigation described in this notice. Such evidence may be submitted to the address contained in this section. Confidential information will only be accepted pursuant to an appropriate nondisclosure agreement.

FOR FURTHER INFORMATION CONTACT: Eric Letvin, Director, Disaster Failure and Studies Program, Engineering Laboratory, National Institute of Standards and Technology, Mail Stop 8611, Gaithersburg, MD 20899–8611, telephone number (301) 975–5412.

SUPPLEMENTARY INFORMATION:

Authority: 15 U.S.C. 7301 *et seq.,* 15 CFR Part 270.

Background

The National Construction Safety Team Act (Act), 15 U.S.C. 7301 *et seq.,* authorizes the Director of the National Institute of Standards and Technology (NIST) to establish investigative teams (Teams) to assess building performance and emergency response and evacuation procedures in the wake of any building failure that has resulted in substantial loss of life or that posed significant potential of substantial loss of life. The purpose of investigations by Teams is to improve the safety and structural integrity of buildings in the United States. As stated in the statute, a Team will (1) Establish the likely technical cause or causes of the building failure; (2) evaluate the technical aspects of evacuation and emergency response procedures; (3) recommend, as necessary, specific improvements to building standards, codes, and practices based on the findings made pursuant to (1) and (2); and (4) recommend any research and other appropriate actions needed to improve the structural safety of buildings, and improve evacuation and emergency response procedures, based on the findings of the investigation. NIST has promulgated regulations implementing the Act, which are found at 15 CFR Part 270.

NIST sent a preliminary reconnaissance team to collect information and data related to the tornado that touched down in Joplin, MO, on May 22, 2011. Based on the recommendations of the preliminary reconnaissance team and evaluation of the criteria listed in the regulations implementing the Act, specifically in 15 CFR 270.102, on June 29, 2011, the Director of the NIST, United States Department of Commerce, established a Team to study the effects of the tornado that touched down in Joplin, MO, on May 22. The NIST Director will appoint the members of the Team. The Team may include members who are Federal employees and members who are not Federal employees. Team members who are Federal employees are governed by the Federal conflict of interest laws. Team members who are not Federal employees will be Federal government contractors, and conflicts of interest related to their service on the Team will be governed by FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest, which will be incorporated by reference into all such contracts.

Members of the public are encouraged to submit to the Team non-privileged data and artifacts that are relevant to the subject matter of the NIST investigation described in this notice. Such data and artifacts may be submitted to the address contained in the **ADDRESSES** section of this notice. Confidential information will only be accepted pursuant to an appropriate nondisclosure agreement.

Dated: July 12, 2011.

Charles H. Romine,

Acting Associate Director for Laboratory Programs.

[FR Doc. 2011–18114 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA577

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council Staff will hold a meeting of the Visioning Project Advisory Panel to discuss communications strategies and data gathering tools for the Visioning Project.

DATES: The meeting will be held on Wednesday, August 3, 2011, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Four Points by Sheraton BWI Airport, 7032 Elm Road, Baltimore, MD 21240; telephone: (410) 859–3300.

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

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

SUPPLEMENTARY INFORMATION: The purpose of this meeting is for the Visioning Project advisors to provide input on communications and data gathering methods that will be used during the Visioning and Strategic Planning Project. Advisors will provide feedback on the draft survey instrument and will identify specific communications strategies that will help maximize participation in the project. The general objective of the project is to identify stakeholders' views on the management approaches currently used by the Council such that the Council can then use the project's results to develop future management actions.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

Dated: July 13, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–18028 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA578

Pacific 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 groundfish project team responsible for drafting and analyzing the 2013–14 harvest specification and management measures for the Pacific Fishery Management Council (Council) will hold a working meeting, which is open to the public.

DATES: The project team meeting will be held Tuesday, August 16, 2011, from 1 p.m. until business for the day is completed.

ADDRESSES: The project team meeting will be held in Portland, Oregon at the Pacific Fishery Management Council, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Ms. Kelly Ames, Groundfish Staff Officer; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The primary purpose of the project team working meeting is to consider the scope of action for the 2013–14 harvest specifications and management measures based on Council action at the June 2011 meeting. Any products from the meeting will be available for Council consideration at the September meeting in San Mateo, CA. No management actions will be decided by the Project Team.

Although non-emergency issues not contained in the meeting agenda may come before the project team for discussion, those issues may not be the subject of formal project team action during this meeting. Project team action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the project team's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: July 14, 2011.

Tracey L. Thompson,

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

[FR Doc. 2011–18073 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Statutory Invention Registration

ACTION: Proposed collection; comment request.

SUMMARY: The United States Patent and Trademark Office (USPTO), as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the revision of a continuing information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before September 19, 2011.

ADDRESSES: You may submit comments by any of the following methods:

- *E-mail: InformationCollection@uspto.gov.* Include ''0651–0036 comment'' in the subject line of the message.
- *Mail:* Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, United States Patent and

Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

• *Federal Rulemaking Portal: http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to the attention of Raul Tamayo, Legal Advisor, Office of Patent Legal Administration, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, by telephone at 571–272–7728, or by e-mail to *Raul.Tamayo@uspto.gov* with ''Paperwork'' in the subject line. Additional information about this collection is also available at *http://www.reginfo.gov* under ''Information Collection Review.''

SUPPLEMENTARY INFORMATION:

I. Abstract

An applicant for an original patent may request, at any time during the pendency of the applicant's pending complete application, that the specification and drawings be published as a statutory invention registration (SIR). A published SIR is not a patent. It has the defensive attributes of a patent, *e.g.*, it is usable as a reference as of its filing date in the same manner as a patent, but does not have the enforceable attributes of a patent. Historically, applicants have requested that the USPTO publish their patent applications as SIRs in certain instances when, for any of a variety of reasons, applicants no longer wanted to go through the effort and expense of obtaining patents on the inventions claimed in the applications. However, given that 37 CFR 1.211 requires the publication of most nonprovisional applications filed on or after November 29, 2000, applicants have increasingly found 1.211 publication of an application to be a desirable alternative to requesting an SIR, particularly since 1.211 publication of the application is achieved without any waiver of patent rights.

35 U.S.C. 157 authorizes the USPTO to publish an SIR containing the specifications and drawings of a regularly filed application for a patent without examination if the applicant: (i) Meets the requirements of 35 U.S.C. 112; (ii) has complied with the requirements for printing; (iii) waives the right to receive a patent on the invention claimed effective upon the date of publication of the SIR; and (iv) pays all application, publication and other processing fees.

The USPTO administers 35 U.S.C. 157 through 37 CFR 1.293–1.297. Any request for an SIR is examined to determine whether the subject matter of the application is appropriate for publication and all other requirements have been met, including the requirements of 35 U.S.C. 112 and 37 CFR 1.293.

The requester may petition the USPTO to review rejection decisions within one month or other such time as is set forth in the decision refusing publication. The requester may also petition the USPTO to withdraw a request to publish an SIR prior to the date of the notice of the intent to publish.

If the request for an SIR is approved, a notice to that effect will be published in the *Official Gazette* of the USPTO. Each SIR that is published will include a statement relating to the attributes of an SIR.

The public uses form PTO/SB/94, Request for Statutory Invention Registration, to request and authorize publication of a regularly filed patent application as an SIR, to waive the right to receive a United States patent on the same invention claimed in the identified patent application, to agree that the waiver will be effective upon publication of the SIR, and to state that the identified patent application complies with the requirements for printing. No forms are associated with the petition for a review of the refusal to publish an SIR or the petition to withdraw the request for publication of an SIR.

II. Method of Collection

By mail, facsimile, or hand delivery to the USPTO when the applicant or agent files an SIR with the USPTO.

III. Data

OMB Number: 0651–0036.

Form Number(s): PTO/SB/94.

Type of Review: Extension of a currently approved collection.

Affected Public: Government agencies.

Estimated Number of Respondents: 8 responses per year.

Estimated Time per Response: The USPTO estimates that it will take approximately 24 minutes (0.40 hours) each to gather, prepare, and submit the completed request, depending upon the complexity of the situation.

Estimated Total Annual Respondent Burden Hours: 4 hours.

Estimated Total Annual Respondent Cost Burden: $1,300. The USPTO expects that attorneys will complete and submit this information. The estimated hourly rate for attorneys in private firms is $325. This is a fully loaded hourly rate.

Item	Estimated time for response (minutes)	Estimated annual responses	Estimated annual burden hours
Statutory Invention Registration	24	5	2
Petition to Review Final Refusal to Publish	24	1	1
Petition to Withdraw SIR Publication Request	24	2	1
Totals		8	4

Estimated Total Annual (Non-Hour) Respondent Cost Burden: $8,170. There are no capital start-up or maintenance costs. However, this collection does have postage costs and filing fees.

The public may submit the paper form and petitions in this collection to the USPTO by mail through the United States Postal Service. The USPTO estimates that the average first-class postage cost for a mailed submission will be $1.28 for a 3 oz. large envelope, and that customers filing the documents associated with this information collection may choose to mail their submissions to the USPTO. Therefore, the USPTO estimates that up to 8 submissions per year may be mailed to the USPTO as an average first-class postage rate of $1.28, for a total postage cost of $10.

Item	Responses (yr) (a)	Postage $ (b)	Total non-hour cost burden (a × b) (c)
Statutory Invention Registration	5	$1.28	$6.00
Petition to Review Final Refusal to Publish	1	1.28	1.00
Petition to Withdraw SIR Publication Request	2	1.28	3.00
Totals	8		10.00

There is annual (non-hour) cost burden in the way of filing fees associated with this collection of $8,160, as shown in the accompanying table.

Item	Responses (yr) (a)	Filing fee $ (b)	Total non-hour cost burden (a × b) (c)
.			
Statutory Invention Registration (Requested prior to mailing of first office action, 37 CFR 1.17(n))	2	$920.00	$1,840.00
Statutory Invention Registration (Requested after mailing of final office action, 37 CFR 1.17(o))	3	1,840.00	5,520.00
Petition to Review Final Refusal to Publish (37 CFR 1.295)	1	200.00	200.00
Petition to Withdraw Publication Request (37 CFR 1.296)	1	200.00	200.00
Petition to Withdraw Publication Request (on or after Date of Notice of Intent to Publish (37 CFR 1.296))	1	400.00	400.00
Totals	8		8,160.00

The USPTO estimates that the total (non-hour) respondent cost burden for this collection in the form of postage costs and filing fees will be $8,170.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, *e.g.,* the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for OMB approval of this information collection; they will also become a matter of public record.

Dated: July 14, 2011.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer.

[FR Doc. 2011–18092 Filed 7–18–11; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Inventions; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are available for domestic licensing by the Department of the Navy. U.S. Patent No. 7,561,261: LADAR Stream Formatting and Processing Method//U.S. Patent No. 7,616,817: Three Dimensional Shape Correlator//U.S. Patent No. 7,948,610 B2: Combined Coherent and Incoherent Imaging LADAR.

ADDRESSES: Requests for copies of the inventions cited should be directed to Naval Air Warfare Center Weapons Division, Code 4L4000D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106 and must include the Navy Case number.

FOR FURTHER INFORMATION CONTACT: Michael D. Seltzer, Ph.D., Head, Technology Transfer Office, Naval Air Warfare Center Weapons Division, Code 4L4000D, 1900 N. Knox Road Stop 6312, China Lake, CA 93555–6106, telephone 760–939–1074, FAX 760–939–1210, E-mail: *michael.seltzer@navy.mil.*

Dated: July 12, 2011.

L.M. Senay,

Lieutenant, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2011–18116 Filed 7–18–11; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

DOE Response to Recommendation 2011–1 of the Defense Nuclear Facilities Safety Board, Safety Culture at the Waste Treatment and Immobilization Plant

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: On June 09, 2011, the Defense Nuclear Facilities Safety Board affirmed their Recommendation 2011–1, concerning *Safety Culture at the Waste Treatment and Immobilization Plant,* to the Department of Energy. In accordance with section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b), The following represents the Secretary of Energy's response to the recommendation.

ADDRESSES: Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear

Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Mr. Nick Suttora, Team Lead, Departmental Representative to the Defense Nuclear Facilities Safety Board, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

Issued in Washington, DC, on July 6, 2011.

Mari-Josette Campagnone,

Departmental Representative to the Defense Nuclear Facilities Safety Board, Office of Health, Safety and Security.

June 30, 2011.
The Honorable Peter S. Winokur,
Chairman,
Defense Nuclear Facilities Safety Board,
625 Indiana Avenue, NW, Suite 700,
Washington, DC 20004–2901.

Dear Mr. Chairman:

The Department of Energy (DOE) acknowledges receipt of Defense Nuclear Facilities Safety Board (Board) Recommendation 2011–1, Safety Culture at the Waste Treatment and Immobilization Plant, issued on June 9, 2011. DOE views nuclear safety and assuring a robust safety culture as essential to the success of the Waste Treatment and Immobilization Plant (WTP) and all of our projects across the DOE complex.

As the Board notes in the introduction to this Recommendation, DOE committed itself to establishing and maintaining a strong nuclear safety culture almost 20 years ago through Secretary of Energy Notice SEN–35–91, Nuclear Safety Policy. This commitment was reiterated and confirmed in February 2011, in DOE Policy 420.1, Department of Energy Nuclear Safety Policy. We agree with the Board's position that establishment of a strict safety culture must be a fundamental principle throughout the DOE complex, and we are in unqualified agreement with the Board that the WTP mission is essential to protect the health and safety of the public, our workers, and the environment from radioactive wastes in aging storage tanks at Hanford.

It is DOE policy and practice to design, construct, operate, and decommission its nuclear facilities in a manner that ensures adequate protection of workers, the public, and the environment. DOE line management is both responsible and accountable for assuring that such adequate protection is at the core of how we conduct business at our nuclear facilities. We hold our contractors to the same standard. A strong nuclear safety and quality culture is the foundation of our work.

Over the past year, the Department has undertaken a broad range of steps to assure a strong and questioning safety culture at WTP and sites across the DOE complex. We will only be successful if we remain committed to continuous improvement and teamwork. DOE takes all safety concerns—whether from our employees, our contractors, the Board, or third-parties—very seriously. This input is an integral part of the Department's efforts to constantly strengthen nuclear safety at our facilities.

Even though the Department cannot accept the allegations without the opportunity to evaluate the Board's full investigative record, in the spirit of continual improvement DOE accepts the Board's recommendations to assert federal control to direct, track, and validate corrective actions to strengthen the safety culture at WTP; conduct an extent of condition review to assess safety culture issues beyond the WTP project; and support the ongoing Department of Labor (DOL) review of Dr. Tamosaitis' case.

Reinforcing and maintaining a strong safety culture at WTP and all DOE sites will require a wide range of approaches, including engagement by senior DOE officials, employee input and participation, self assessments, independent oversight by the Office of Health, Safety and Security (HSS), recommendations from the Board, and an open and transparent process to identify and implement technical issues and corrective actions.

We agree with the Board that ''federal and contract managers must make a special effort to foster a free and open atmosphere in which all competent opinions are judged on their technical merit, to sustain or improve worker and public safety first and foremost, and then [to] evaluate potential impacts of cost and schedule.'' These expectations are clearly articulated in DOE Policy 442.1, Differing Professional Opinion; DOE Manual 442.1–1, Differing Professional Opinions Manual for Technical Issues Involving Environment, Safety, and Health, and DOE Order 442.1A, Department of Energy Employee Concerns Program.

To assure that these issues were being appropriately addressed following Dr. Tamosaitis' initial allegations, the Assistant Secretary for Environmental Management (EM) requested that HSS conduct a comprehensive analysis of the safety culture at WTP.

In October 2010, HSS completed its investigation, which included interviews with more than 250 employees. While HSS found that the fundamentals of a robust safety culture were present at WTP, the report identified the need for improvement in key areas, including, among others: more clearly defining federal roles and responsibilities; identifying mechanisms to strengthen trust among the workforce and better communicate information to employees; and putting in place processes to ensure nuclear safety programs remain robust and effective during project changes.

The corrective actions that address the recommendations from the HSS report will be fully implemented by September 30, 2011. HSS will then conduct a follow-on visit to assure that these steps were executed effectively across the project, as well as to perform additional analysis to determine if cost and schedule pressures are challenging the implementation of a robust nuclear safety culture.

DOE and Bechtel National, Incorporated (BNI)—the prime contractor on the WTP project—have been engaged in a variety of initiatives to strengthen the nuclear safety culture at WTP for over a year. Steps that have already occurred include completing a revision to the WTP Project Execution Plan, currently under review, to more clearly delineate federal roles and organizational responsibilities at WTP and the Office of River Protection (ORP), and conducting a number of employee forums to ensure that employees clearly understand the changes in those roles and responsibilities.

Also in response to the HSS recommendations, BNI commissioned a confidential survey of more than 300 WTP employees to assess if a Nuclear Safety Quality Culture (NSQC) gap existed at the site and to identify additional areas for improvement. As a result, the contractor assigned a retired Navy Admiral and former nuclear utility executive experienced in application of Institute of Nuclear Power Operations (INPO) methods as the Manager of NSQC Implementation for the project. To date, approximately 1,600 people at the site, including all senior managers, have received training focused on making the workforce comfortable with raising issues and systematically moving issues through to resolution. In addition, over the last 13 months, BNI has conducted three all-hands meetings with DOE project team participation to emphasize the importance of a robust nuclear safety culture.

Even while some initiatives are already underway, we recognize the need to continue improving nuclear safety at WTP and across the complex. To that end, DOE has developed a comprehensive action plan to address the Board's specific recommendations to strengthen the safety culture at WTP. Initial steps are discussed below:

- The Deputy Secretary and I will continue to be personally engaged in asserting federal control to ensure the specific corrective actions to strengthen safety culture within the WTP project in both contractor and federal workforces—consistent with DOE Policy 420.1—are tracked and validated. Federal control within the WTP project has been and will continue to be asserted and regularly reinforced through our direct involvement.
- This will include a series of ''town-hall'' style meetings hosted by senior DOE officials to highlight for workers the importance of maintaining a strong nuclear safety culture at each of our sites and to solicit their input. These forums across the DOE complex will also help improve the direct communication of safety issues between senior managers and employees.
- To address the concern regarding extent of condition, HSS will independently review the safety culture across the entire complex. This review will provide insights into the health of safety culture within Headquarters organizations, different program offices, and different field sites.
- In addition, DOE and BNI are arranging Safety Conscious Work Environment (SCWE) training for BNI and ORP managers and supervisors with a firm that conducts SCWE training for the Institute of Nuclear Power Operations Senior Nuclear Plant Manager's course.
- We will also be joining with BNI to sponsor an independent, executive-level

assessment of the project's nuclear safety culture by a group of nuclear industry subject matter experts, who have experience in INPO evaluations and/or Nuclear Regulatory Commission (NRC) inspections.

• At both a site and corporate level, we are also taking steps to enhance reporting mechanisms for safety-related concerns. At the Hanford site, we have combined the Employee Concerns Programs for ORP and the Richland Operations Office to leverage existing resources to both strengthen this important program and increase its visibility at the site.

• Within EM Headquarters, we have established ombudsmen to act as advocates for employees and their concerns. We have made it easier for employees to use a variety of avenues to raise concerns, including: the line management for each project, site employee concerns programs, union representatives, EM's Office of Safety and Security Programs, HSS, and DOE's Chief of Nuclear Safety. Each office now offers employees access to both a hotline number and general email inbox, so that workers will have the opportunity to ask questions or voice concerns either directly or anonymously.

• We will also require that both EM Headquarters and field sites assess nuclear safety culture and the implementation of a safety conscious work environment in their annual submittals for Integrated Safety Management System (ISMS) declarations. The specific criteria will build on the existing requirements for the ISMS declarations and will be expanded to include safety culture principles not only from DOE, but also from INPO and NRC.

• Regarding your final recommendation, when the Department became aware of Dr. Tamosaitis' petition to the Board, the Assistant Secretary for Environmental Management immediately requested the Department's Inspector General to perform an investigation into the alleged retaliation issues raised by Dr. Tamosaitis. The Office of the Inspector General decided not to examine the merits of the allegations since they were already the focus of an ongoing investigation by DOL, which has jurisdiction and expertise to review whistle blower claims. The Department will fully cooperate with the DOL as requested in its investigation.

Even while DOE fully embraces the objectives of the Board's specific recommendations, it is important to note that DOE does not agree with all of the findings included in the Board's report.

Specifically, the conclusions drawn by the Board about the overall quality of the safety culture at WTP differ significantly from the HSS findings and are not consistent with the safety culture data and field performance experience at WTP. We are concerned that your letter includes the October 2010 HSS review in the list of ''other examples of a failed safety culture.'' The Department disagrees with this categorization and believes the HSS report provided an accurate representation of the nuclear safety culture—and existing gaps—at the WTP.

As discussed above, the HSS review found areas in need of immediate improvement; however, most WTP personnel did not express a loss of confidence in management support, a sense of a chilled environment, or a fear of retaliation.

Additionally, in its report, the Board alleges that DOE and contractor management suppressed technical dissent on the project. The Department rightly takes any such claim very seriously. Based on an investigation by the DOE Office of the General Counsel, however, we do not necessarily agree with some of the specific details the Board provided. For example, our investigation found no evidence that DOE or its contractors were aware of and sought to suppress a technical report.

Moreover, the Board's findings appear to rely on a number of accounts describing the actions and behaviors of both contractor and DOE personnel that we believe may have been misunderstood by the Board. The Department feels compelled to address these for the public record and in fairness to its personnel.

To do so effectively, on June 22, 2011, DOE requested the Board's full investigative record, including transcripts, interview notes, and exhibits. Per your conversation with Deputy Secretary Daniel Poneman today, we look forward to continuing to engage with you to obtain additional details from the Board's investigation. The Board's investigative record or other supporting information will allow us to provide further details on specific discrepancies between our findings and the Board's and will be of great use in defining the structure and scope of follow-on safety culture improvement initiatives and actions.

We look forward to working with the Board and its staff as we continue to strive towards excellence. It is important for the both the Department and the Board to function collaboratively and openly as we work to further improve the safety culture at DOE. To facilitate that objective and in recognition of the significance of these concerns, I recommend we jointly charter a third-party review, such as the National Academy of Science, to evaluate how we can strengthen our relationship and most effectively work together to achieve our shared objective of helping DOE to safely perform its mission.

As additional information becomes available from our actions addressing this Recommendation, we will make it available to you. We hope to continue a meaningful, regular, and open dialogue on this and all safety matters.

I am designating Mr. Daniel Poneman, the Deputy Secretary of Energy, as the Responsible Manager for this recommendation. He will be charged with reporting to me regularly on the specific additional steps we are taking to improve the safety culture at WTP and all of our facilities.

Sincerely,

Steven Chu.

cc:
D. Poneman, S–2
M. Campagnone, HS–1.1

[FR Doc. 2011–18084 Filed 7–18–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. EERE–2010–BT–DET–0030]

RIN 1904–AC17

Updating State Residential Building Energy Efficiency Codes

AGENCY: Department of Energy, Office of Energy Efficiency and Renewable Energy.

ACTION: Notice of final determination.

SUMMARY: The U.S. Department of Energy (DOE or Department) has determined that the 2009 edition of the International Code Council (ICC) International Energy Conservation Code (IECC) (2009 IECC or 2009 edition) would achieve greater energy efficiency in low-rise residential buildings than the 2006 IECC, with site energy savings estimated at 14%. Also, DOE has determined that the 2006 edition of the ICC IECC (2006 IECC or 2006 edition) would achieve greater energy efficiency than the 2003 edition of the ICC IECC (2003 IECC or 2003 edition), with site energy savings estimated at 1%. Finally, DOE has determined that the 2003 edition would not achieve greater energy efficiency than the 2000 IECC. Upon publication of this affirmative final determination, States are required to file certification statements to DOE that they have reviewed the provisions of their residential building code regarding energy efficiency and made a determination as to whether to update their code to meet or exceed the 2009 IECC. Additionally, this Notice provides guidance to States on how the codes have changed from previous versions, how to submit certifications, and how to request extensions of the deadline to submit certifications.

DATES: Certification statements by the States must be provided by July 19, 2013.

ADDRESSES: Certification Statements must be addressed to the Buildings Technologies Program-Building Energy Codes Program Manager, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121.

FOR FURTHER INFORMATION CONTACT: Michael Erbesfeld, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Forrestal Building, Mail Station EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 287–1874, *e-mail: michael.erbesfeld@ee.doe.gov.* For legal issues contact Chris Calamita, U.S. Department of Energy, Office of the

General Counsel, Forrestal Building, Mail Station GC–72, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9507, *e-mail: Christopher.Calamita@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction
A. Statutory Requirements
B. Background
C. Preliminary Determination
D. Public Comments Regarding the Preliminary Determination
E. DOE's Final Determination Statements
II. Discussion of Changes in the 2003, 2006, and 2009 IECC
A. 2003 IECC Compared With the 2000 IECC
B. 2006 IECC Compared With the 2003 IECC
C. 2009 IECC Compared With the 2006 IECC
III. Comparison of the 2009 IRC to the 2009 IECC
IV. Filing Certification Statements With DOE
A. State Determinations
B. Certification
C. Request for Extensions
V. Regulatory Analysis
A. Review Under Executive Order 12866
B. Review Under the Regulatory Flexibility Act
C. Review Under the National Environmental Policy Act of 1969
D. Review Under Executive Order 13132, ''Federalism''
E. Review Under the Unfunded Mandates Reform Act of 1995
F. Review Under the Treasury and General Government Appropriations Act of 1999
G. Review Under the Treasury and General Government Appropriations Act of 2001
H. Review Under Executive Order 13211
I. Review Under Executive Order 13175

I. Introduction

A. Statutory Requirements

Title III of the Energy Conservation and Production Act, as amended (ECPA), establishes requirements for the Building Energy Standards Program. (42 U.S.C. 6831–6837) Section 304(b) of ECPA, as amended, provides that when the 1992 Model Energy Code (MEC), or any successor to that code, is revised, the Secretary must determine, not later than 12 months after the revision, whether the revised code would improve energy efficiency in residential buildings and must publish notice of the determination in the **Federal Register**. (42 U.S.C. 6833(a)(5)(A)) The Department, following precedent set by the ICC and the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) considers high-rise (greater than three stories) multifamily residential buildings and hotel, motel, and other transient residential building types of any height as commercial buildings for energy code purposes. Low-rise residential buildings include one- and two-family detached and attached buildings, duplexes, townhouses, row houses, and low-rise multifamily buildings (not greater than three stories) such as condominiums and garden apartments.

If the Secretary determines that the revision would improve energy efficiency then, not later than 2 years after the date of the publication of the affirmative determination, each State [1] is required to certify that it has compared its residential building code regarding energy efficiency to the revised code and made a determination whether it is appropriate to revise its code to meet or exceed the provisions of the successor code. (42 U.S.C. 6833(a)(5)(B)) State determinations are to be made: (1) After public notice and hearing; (2) in writing; (3) based upon findings included in such determination and upon evidence presented at the hearing; and (4) available to the public. (See, 42 U.S.C. 6833(a)(5)(C)) In addition, if a State determines that it is not appropriate to revise its residential building code, the State is required to submit to the Secretary, in writing, the reasons, which are to be made available to the public. (See, 42 U.S.C. 6833(a)(5)(C))

In the specific case of this final determination, where DOE is publishing the results of three residential determinations at once, each state should certify it has compared its residential building code regarding energy efficiency to the 2009 IECC and made a determination whether it is appropriate to revise its code to meet or exceed the provisions of the successor code.

B. Background

The ICC's IECC establishes national energy efficiency requirements for buildings. In 1997, the Council of American Building Officials (CABO) was incorporated into the ICC and the MEC was renamed to the IECC. A previous **Federal Register** notice, 59 FR 36173, July 15, 1994, announced the Secretary's determination that the 1993 MEC increased energy efficiency relative to the 1992 MEC for residential buildings. Similarly, another **Federal Register** notice, 61 FR 64727, December 6, 1996, announced the Secretary's determination that the 1995 MEC is an improvement over the 1993 MEC. Finally, **Federal Register** notice 66 FR 1964, January 10, 2001, simultaneously announced the Secretary's determination that the 1998 IECC is an improvement over the 1995 MEC and the 2000 IECC is an improvement over the 1998 IECC.

C. Preliminary Determination

DOE published in the **Federal Register** a Notice of Preliminary Determination for the 2003, 2006 and 2009 editions of the IECC that preliminarily concluded that the 2009 version of the IECC would achieve greater energy efficiency in low-rise residential buildings than the 2006 IECC. Also, DOE preliminarily determined that the 2006 version of the IECC would achieve greater energy efficiency than the 2003 IECC. Finally, DOE preliminarily determined that the 2003 version of the IECC would not achieve greater energy efficiency than the 2000 IECC. 75 FR 54131 (Sept. 3, 2010).

D. Public Comments Regarding the Preliminary Determination

DOE accepted public comments on the preliminary determination for the 2003, 2006, and 2009 editions of the IECC until October 4, 2010. DOE received submissions from a total of seven different entities.

The Responsible Energy Codes Alliance (RECA) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0006.1, pgs. 2–4) stating that it strongly supports the Department's determination that the 2006 and 2009 editions of the IECC would achieve greater energy efficiency in buildings than the relative previous editions. RECA suggests that DOE follow up with the States after publication of the Final Determination, as well as making public, on the Department's Web site, the certification letters that States submit. RECA went on to comment that the Department's decision to publish a Notice of Preliminary Determination rather than a Notice of Determination is unnecessary to comply with the Energy Policy Act and that adding an extra level of administrative procedure is likely to further delay determinations on future editions of the model energy codes.

In response to RECA's comment concerning following up with the States in their certification efforts, DOE notes that under section 304(d) and (e) of ECPA DOE provides technical assistance and funding to States that choose to improve and implement State residential building energy efficiency codes, including increasing and verifying compliance with such codes. As certification letters are received from the States, they will be made public on the Department's Web site at *http://*

[1] The term State includes ''each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory and possession of the United States.'' 42 U.S.C. 6832(11).

energycodes.gov/states/. The certification letters will also be forwarded to the State Energy Program for their consideration. DOE further notes that a listing of those States that have submitted certification letters from their respective governors under the requirements of the American Recovery and Reinvestment Act is available at *http://www.energy.gov/InYourState.htm.* The letters can be found on each State's Web site under Recovery Act activity.

With regard to issuing a preliminary determination, the Department believes that there is value in providing an opportunity for public comment on its analysis, particularly given that a positive determination could potentially impact States.

The American Chemistry Council (ACC) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0007.1, pg. 1) stating that it strongly supports the Department's determination that the 2009 edition of the IECC would achieve greater energy efficiency in buildings than the 2006 edition.

The Edison Electric Institute (EEI) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0002.1, pgs. 1–2) supporting the preliminary determination with one concern about the analysis. Their concern was that the DOE model estimates the annual average baseline residential lighting energy usage at 2,373 kWh per year. EEI suggests that the annual lighting usage should be closer to 900 kWh per year.

The basis of DOE's lighting energy assumptions comes from the 2006 Mortgage Industry National Home Energy Rating Standards developed by the Residential Energy Services Network (RESNET), *http://www.resnet.us/standards/RESNET_Mortgage_Industry_National_HERS_Standards.pdf* , pg. 3–19. These standards assume 2,375 kWh/year of lighting energy use for a newly constructed 2400 ft[2] house. The EEI comment references data from the 2001 Residential Energy Consumption Survey (RECS), *http://www.eia.gov/emeu/recs/recs2001/enduse2001/enduse2001.html,* which reports average energy usage for all existing housing in the year 2001 to be 940 kWh/year. DOE used RESNET as opposed to RECS, because it was the most up-to-date lighting energy usage estimate for a newly constructed 2400 ft[2] house.[2] Therefore, DOE considers the 2,375 kWh for annual lighting energy usage to be a reasonable estimate based on RESNET's standards.

The ICC submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0003.1, pg. 2) stating that DOE's conclusion that the use of the 2009 IECC will improve energy efficiency in residential buildings that are built to meet its requirements is correct.

The Building Codes Assistance Project (BCAP) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0004.1, pgs. 1–2) supporting the DOE's determination and suggesting that DOE follow up with the States after publication of the Final Determination, as well as making public which States comply with the statutory requirements by updating their code, submitting in writing why they are choosing not to update their code, or by filing for a formal extension within two years of publication. In regards to BCAP's comments see response to RECA's comments above.

The Energy Efficient Codes Coalition (EECC) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0005.1, pg. 2) stating they strongly support DOE's determination that the 2009 IECC achieves greater energy efficiency than the 2006 IECC.

The Natural Resources Defense Council (NRDC) submitted a written comment (Docket No. EERE–2010–BT–DET–0030–0008.1, pgs. 2–4) stating the following three issues: (1) It urges DOE to use this opportunity to clarify States' commitments with regards to updating and implementing their building energy codes; (2) clarify the limits of preemption of testing and labeling of energy conservation of consumer products under section 327 of the Energy Policy and Conservation Act EPCA (42 U.S.C. 6297); and (3) revise the energy efficiency standards for Federal buildings to reflect the most recent model energy codes.

In regards to NRDC's first comment, see response to RECA's comments above. In addition, Section IV below describes the process for States to file certification statements with DOE. NRDC's second comment is in reference to the preemption requirements applicable to the Federal energy efficiency standards for appliances. Essentially, section 307(f) of ECPA limits the ability of State and local building codes to require minimum energy efficiency levels of appliances. (See, 42 U.S.C. 6297(e)) It is important to note that today's final determination does not require States to adopt a specific building code. Today's final determination requires a State to certify that it has reviewed the provisions of its residential building code regarding energy efficiency and made a determination as to whether it is appropriate for such State to revise such residential building code provisions to meet or exceed the revised code for which the Secretary made such determination. (42 U.S.C. 6833(a)(5)(B)) Section 304 of ECPA does not prescribe how State code provisions must achieve the required energy efficiencies. This final determination does not require States to adopt a specific code or to require energy efficiency levels of covered appliances as part of that code, but rather it allows for States to adopt building codes that meet or exceed the energy efficiency requirements of Standard 90.1–2007. As such, there is no potential conflict between the State code provisions of ECPA and the preemption language in EPCA. In response to NRDC's final comment, DOE intends to update the baseline standards for Federal buildings found in 10 CFR part 433 and 10 CFR part 435 that reference IECC following the issuance of this final determination for 2003, 2006 and 2009 IECC.

E. DOE's Final Determination Statement

Below is a detailed discussion of the Department's final determinations for the 2003, 2006, and 2009 IECCs.

2003 IECC

DOE's review and evaluation found that there are not significant differences in energy efficiency between the 2003 edition and the 2000 edition of the IECC. Although there are a few changes that would modestly improve the energy efficiency of residential buildings, there are a number of changes that reduce energy efficiency in certain situations. Most of the changes to the IECC between the 2000 and 2003 editions would not effect energy efficiency but rather make the code simpler and clearer for designers, builders, and code compliance officials to understand and use. Based on these findings, the Department has concluded that the 2003 edition of the IECC should not receive an affirmative determination under Section 304(b) of ECPA. The Department concludes that there is at best a slight improvement in energy efficiency for some residential buildings, but this potential improvement is not sufficient to merit an affirmative determination. This is discussed in further detail below. It should be noted that DOE is not concluding that the energy efficiency of the 2003 IECC is less stringent than the 2000 IECC.

[2] Census data reports an average square footage of 2438 ft[2] in 2009. See, *http://www.census.gov/const/C25Ann/sftotalmedavgsqft.pdf.*

2006 IECC

The residential portion of the 2006 IECC has been extensively changed from that of the 2003 IECC. However, the most significant changes to the code between 2003 and 2006 simplify the code format rather than fundamentally changing the overall (national average) energy efficiency of the code. Multifamily buildings, which in the past have had separate, less stringent thermal requirements, are an exception. By eliminating the separate requirements, the 2006 IECC increased the energy efficiency of multifamily buildings.

Although the most significant 2006 changes did not directly target efficiency improvements, the new format of the code does result in some energy efficiency differences. The requirements for any given building may have increased or decreased based on the specific location (climate) and building design. The Department has found that overall the 2006 IECC has an improvement in energy efficiency compared to the 2003 IECC. The Department concludes that the 2006 edition of the IECC receives an affirmative determination under Section 304(b) of EPCA. A Technical Support Document (TSD) for the 2006 IECC is available at the following Web site; *http://www.energycodes.gov/status/determinations_res.stm.* DOE has prepared a TSD for the 2006 IECC determination and not for the 2003 IECC and 2009 IECC determination for the following reasons. The 2006 IECC contained a very extensive change in the format of the code compared to the 2003 IECC. In addition, the changes in the format to the 2006 IECC reduce energy efficiency in some cases and increase energy efficiency in others. DOE deemed that its analysis to determine whether energy efficiency was improved in the 2006 IECC would be better addressed in a TSD rather than in this Notice. As discussed above, for the 2003 IECC determination, there were very few changes from the 2000 IECC and therefore no TSD is needed. For the 2009 IECC determination, discussed below, there are a substantial number of changes that effect energy efficiency, but nearly all these changes are clear improvements that will reduce energy use. Therefore, highly detailed calculations are not needed to determine whether energy efficiency is improved overall in the code and these changes are also discussed in this Notice rather than a TSD.

2009 IECC

The 2009 IECC has substantial revisions compared to the 2006 IECC. Many of these revisions appear to directly improve energy efficiency, and the sum results of all changes appear to result in a significant increase in code stringency. Therefore, the Department concludes that the 2009 edition of the IECC receives an affirmative determination under Section 304(b) of EPCA.

II. Discussion of Changes in the 2003, 2006, and 2009 IECC

A. 2003 IECC Compared With the 2000 IECC

As a whole, the 2003 IECC's provisions for energy efficiency in residential buildings are largely unchanged from the 2000 IECC. There are some changes in the code that can have a modest effect on energy efficiency. These are discussed below. In addition, there is a variety of minor changes intended to make the code more concise, more complete, and better organized, but not more or less stringent. For example, more specific requirements have been added for steel roofs/ceilings and floors to correspond to those already in the code for steel walls. Another example is the relocation of the 51 pages of state maps from the middle of the code to the back of the code. Additionally, the performance path in chapter 4 of the 2003 IECC contains a variety of modest improvements compared to the 2000 IECC, which creates more concise requirements.

1. Changes in the 2003 IECC From the 2000 IECC That Improve Energy Efficiency

a. Increased Duct Insulation Requirements

Duct insulation requirements generally increased in the 2003 IECC. The 2003 IECC requirements are shown in Table 1. These are somewhat difficult to compare to the 2000 IECC requirements because the latter are more complex, differing between ducts in unconditioned spaces and ducts completely exterior to the building, and distinguishing requirements by the design temperature difference between the duct air and the space in which the ducts are located.

The 2000 IECC requirements for ducts in unconditioned spaces are shown in Table 2. Assuming typical supply air temperatures of 55°F for cooling and 95°F for heating (for heat pumps), the 2000 IECC insulation requirement for supply ducts in unconditioned spaces is R–5 (minimum) for nearly all cases. Insulation required by the 2000 IECC for return ducts in unconditioned spaces will generally be R–3.3 in warmer climates and R–5 in colder climates.

For the very common case of supply ducts in attics, which is likely to have the greatest impact on energy use, the 2003 IECC always requires at least R–8, which exceeds the 2000 IECC's R–5 requirement. For supply ducts in other unconditioned spaces, the 2003 IECC's requirements exceed the 2000 IECC's requirements in all cases except very warm locations (less than 1500 heating degree-days), where the 2003 IECC requires R–4 compared to the 2000 IECC's requirement of R–5. Because supply ducts transport air in its hottest (or coldest) condition, insulation has its greatest impact on these ducts. The 2003 IECC is almost always more stringent than the 2000 IECC for supply ducts. This includes all supply ducts in attics and, based on the distribution of population,[3] more than 80% of ducts in other unconditioned spaces.

Requirements for return ducts in attics are slightly more stringent in the 2003 IECC than the 2000 IECC (R–4 vs. R–3.3) in the warmest climates, slightly less stringent (R–4 vs. R–5) in mid climates, and slightly more stringent (R–6 vs. R–5) in the coldest climates.

Research[4] showing the impact on heating and cooling energy use due to duct insulation is summarized in Table 3. Based on this research, the Department estimates that improved duct insulation in the 2003 IECC will reduce heating and cooling energy use by about 1%.

[3] Estimated from USGS Population Places data that allows mapping of population to climate (*http://geonames.usgs.gov/domestic/download_data.htm*).

[4] Triedler, B., R. Lucas, M. Modera, J. Miller. 1996. Impact of Residential Duct Insulation on HVAC Energy Use and Life-Cycle Costs to Consumers. American Society of Heating, Refrigerating, and Air-Conditioning Engineers.

TABLE 1—DUCT INSULATION REQUIREMENTS IN THE 2003 IECC

Annual heating degree days base 65 °F	Insulation R-value (h· ft²·°F)/Btu			
	Ducts in unconditioned attics or outside building		Ducts in unconditioned basements, crawl spaces, and other unconditioned spaces	
	Supply	Return	Supply	Return
Below 1,500	8	4	4	0
1,500 to 3,500	8	4	6	2
3,501 to 7,500	8	4	8	2
Above 7,500	11	6	11	2

TABLE 2—INSULATION REQUIREMENTS (R-VALUE, H-FT²-F/BTU) FOR DUCTS IN UNCONDITIONED SPACES IN THE 2000 IECC

Design Temperature Difference (TD) between air temperature in duct and space in which duct is located (degrees F)	Cooling	Heating
TD ≤ 15	None required	None required
40 ≥ TD > 15	3.3	3.3
TD > 40	5.0	5.0

TABLE 3—HEATING AND COOLING ENERGY SAVINGS (PERCENT) FROM INCREASED DUCT INSULATION (ATLANTA, NATURAL GAS HEATING)

	Attic	Basement	Crawl-space
R–4 to R–6	2.3	1.6	1.8
R–6 to R–8	1.4	0.9	1.1

b. Minor Changes to ''Systems Analysis'' Performance Compliance Method

There are two changes that can increase the stringency of the performance path in Chapter 4 of the 2003 IECC in certain cases. First, any house proposed to use electric resistance heating must have equal or lower calculated energy use than a hypothetical ''standard design'' that uses a more efficient electric air source heat pump. This change makes the performance approach much more stringent for designs that have electric resistance heating. However, compliance can be achieved for these designs using the prescriptive compliance methods in chapters 5 and 6, thereby bypassing the increased stringency of the performance path.

Second, a provision has also been added requiring that the least efficient orientation in terms of energy use be assumed for a proposed group of residences with identical designs. Therefore, in a development where the same design is built on multiple lots facing various directions, the compliance analysis must be based on the least advantageous orientation. In most of the United States, this is the orientation that points the most window area toward a westerly direction, maximizing solar heat gains in summer afternoons and therefore increasing air conditioning energy use. Because proposed building designs must have a calculated annual energy use equal to or less than that of a home with window area equally distributed toward the four cardinal directions, the requirement to assume the least efficient orientation effectively makes the code more stringent because the increased energy use from the least efficient orientation must be offset by improved energy efficiency. This requirement in the 2003 IECC will have only modest average impact because it affects only the performance approach and identical house designs used repeatedly in a development.

2. Changes in the 2003 IECC From the 2000 IECC That Decrease Energy Efficiency

a. Sunroom Additions

A special set of requirements has been added to Table 502.2.5 of the 2003 IECC for sunroom additions having a floor area of less than 500 ft² (46.5 m²). Sunroom additions are permitted to have ceiling, wall insulation, and window U-factor requirements that are typically less stringent than the requirements for all other types of residential construction. These special requirements for sunrooms only apply to additions to existing dwellings, not to sunrooms that are built as part of a new dwelling. In the 2000 IECC, there were no special requirements for sunroom additions; they had to meet the same requirements as other residential construction. To qualify for the less stringent requirements in the 2003 IECC, the sunroom addition must be capable of being controlled as a separately heated and cooled zone. Additionally, new walls, doors or windows between the sunroom and the house must meet the envelope requirements of the IECC. Finally, the glazing area must exceed 40% of the gross area of the exterior walls and roof to qualify as a sunroom in the IECC.

Testing with the EnergyGuage (DOE–2)[5] simulation tool indicates that for a 500 ft² sunroom, the less stringent 2003 requirements could add about $200 to the annual energy costs in Chicago if the sunroom is both heated and cooled all year. Impacts are much smaller in Houston, about $10 added energy costs. However, this increase in energy consumption is mitigated (on average) by several factors. First, the requirements apply to a very small fraction of all new residential construction. The Wall Street Journal

[5] EnergyGuage (DOE–2) simulation tool is available at *http://doe2.com/*.

Online (June 3, 2003) reports $3 billion worth of sunroom construction each year, or less than one percent of all residential construction expenditures. But that fraction includes new construction as well as additions, so the fraction representing sunroom additions is less than 1%. Second, it is expected that many sunrooms will not be maintained at comfort conditions all year, further reducing the overall impact. Finally, because the 2003 IECC requires that the sunroom be thermally isolated from the rest of the house and that walls, windows, and doors between the sunroom and house meet the code's envelope requirements, the thermal impact when these spaces are not actively conditioned is negligible. Therefore, the overall impact of this reduction in stringency to national energy use is expected to be extremely small.

b. Climate Zone Maps

The IECC contains prescriptive envelope requirements (insulation R-values and glazing U-factors) in Chapter 6 and Section 502.2.4 of the code. In the 2000 IECC, only the heating degree-days for the city where the housing was to be built could be used to determine the applicable prescriptive envelope requirements. In the 2003 IECC, the heating degree-days can still be used to determine the requirements, but additionally the designer/builder can use the climate zones provided in the state maps in the IECC. For most locations, the Chapter 3 climate zones and heating degree-days lead to the exact same requirements. Using the climate zones in the maps instead of the heating degree-days will allow about 10% of cities nationwide to have a less stringent set of prescriptive requirements. However, about 20% of cities nationwide will have more stringent requirements when the climate zones are used with the prescriptive requirements. If the designer/builders select to use the climate zone maps in the 10% of cities where it lowers requirements but not in the 20% of locations where it raises requirements, the 2003 code effectively is less stringent. However, DOE believes code users will make use of the climate zone maps even in many of the locations where they raise requirements. DOE does not anticipate that most code users will go through the level of effort of determining which method of determining climate based requirements may give less stringent requirements. In fact, DOE believes most users will not even be aware of these differences, but will prefer the climate zone maps because of their simplicity. The REScheck compliance materials developed by the DOE utilize the same heating degree day based requirements for both the 2000 and 2003 IECC.

c. Increased U-Factor for Skylight Replacements

The maximum U-factor for skylight replacements in existing buildings (Section 502.2.5 of the IECC) is raised from a U-factor of 0.50 to a U-factor of 0.60 for locations above 1,999 heating degree-days. A higher U-factor reduces energy efficiency.

3. Net Impact of Changes in the 2003 IECC From the 2000 IECC on Energy Efficiency

Ultimately, the DOE finds that the net impact of the changes in the 2003 IECC on energy efficiency is not sufficient to merit an affirmative determination.

The change in the 2003 IECC that is expected to have the greatest impact on the nation's energy efficiency is the improved duct insulation, because a majority of new residential buildings have ducts that pass through attics, crawl spaces, unheated basements and other spaces where the IECC requires duct insulation. The improved duct insulation in the 2003 IECC is estimated to save about 1% of heating and cooling costs.

DOE believes that the changes to the system analysis method are not sufficient to sway the decision on whether the determination is affirmative or not. This performance compliance method is less commonly used, and, as it is optional, the modest energy savings from the improvements in this compliance method can easily be bypassed by choosing a different method.

Although the changes that effect sunroom additions and skylight replacements reduce energy efficiency, DOE does not believe that they will lead to substantial impacts on national energy use, as they do not apply to new buildings and only apply to specific types or retrofits and additions to existing buildings. The skylight U-factor change is only a modest reduction in energy efficiency and sunroom additions are a small fraction of the residential construction market.

The addition of the climate zone maps in the 2003 IECC as an option to using city-specific heating degree-day data allows for the possibility of preferentially lowering thermal envelope requirements in about 10% of all national locations. However, it will be difficult to exploit this change because the code user must perform relatively complex calculations rather than using the popular and user-friendly REScheck software.

In sum, DOE concludes the changes to duct insulation requirements will slightly improve energy efficiency in most houses, however, the reductions in energy efficiency for skylight replacements and sunroom additions are expected to at least partially offset these savings from a national energy total use perspective. Additionally, the vast majority of all requirements in the IECC are unchanged from 2000 to 2003. For these reasons, DOE finds insufficient improvements in the 2003 IECC to merit an affirmative determination.

B. 2006 IECC Compared With the 2003 IECC

1. Changes in the 2006 IECC From the 2003 IECC That Improve Energy Efficiency

The residential portion of the IECC in general and the building thermal envelope (ceilings, walls, doors, windows, foundations, *etc.*) requirements in particular were completely restructured from 2003 to 2006. This resulted in the code becoming much shorter and simpler, its volume reduced from 38 pages to 9 pages. The climate basis on which envelope requirements depend was completely reworked. The 2003 IECC has envelope requirements that vary continuously with heating degree-days (HDD),[6] or with 17 HDD zones (geographically-defined based on counties, roughly following 500–HDD bins). In contrast, the 2006 IECC has eight geographically-defined climate zones with all borders set on county boundaries.

A major change to envelope requirements was the combining of separate 2003 IECC requirements for two building categories (1) One- and two-family dwellings, and (2) all other low-rise residential buildings[7]. The 2006 IECC requirements are the same for all low-rise residential building types, which has the effect of increasing the energy efficiency of the second category, all other low-rise buildings. Also

[6] Some compliance paths defined requirements based on 17 ''zones'' based on HDD ranges.

[7] The 2006 IECC defines residential buildings as ''R–3 buildings, as well as R–2 and R–4 buildings three stories or less in height above grade''. The R–2/3/4 designation is from the International Building Code and these are defined as follows:

R–2—Apartment houses, boarding houses, convents, dormitories, fraternities and sororities, monasteries.

R–3—one or two family dwellings.

R–4—Residential Care/Assisted living.

R–2 and R–4 buildings that have more stories are covered commercial codes.

eliminated were nine related tables that provided predefined packages of thermal transmittance prescriptive requirements (glazing, ceiling-roof, exterior wall, floor over unconditioned space, basement and crawl space walls, and floor slab on grade) for different window to wall area ratios (WWR). In their place, the 2006 IECC provides a single table of predefined packages of thermal transmittance prescriptive requirements that do not vary with WWR.

Table 4 shows a comparison of major prescriptive envelope requirements for a single-family house at a typical 15% WWR. The requirements for the 2003 IECC will differ from those shown in Table 4 for other WWRs and for multifamily buildings. The 2006 IECC climate zones do not exactly map to the 2003 IECC zones. Table 5 shows a more detailed estimate of how residential construction maps from the 2006 IECC compare to the 2003 IECC climate zones.

TABLE 4—COMPARISON OF THE 2003 IECC AND 2006 IECC ENVELOPE THERMAL COMPONENT PRESCRIPTIVE CRITERIA FOR ONE- AND TWO-FAMILY DWELLINGS AT 15% WINDOW AREA

IECC climate zone		Heating degree days	Maximum		Minimum					
			Glazing U-factor		Ceiling R-value		Wall R-value		Floor R-value	
2003	2006		2003	2006	2003	2006	2003	2006	2003	2006
1	1 2	0–499	Any	1.20	R–13	R–30	R–11	R–13	R–11	R–13
2	2	500–999	0.90	0.75	R–19	R–30	R–11	R–13	R–11	R–13
3		1,000–1,499	0.75	0.75	R–19	R–30	R–11	R–13	R–11	R–13
4		1,500–1,999	0.75	0.75	R–26	R–30	R–13	R–13	R–11	R–13
5	3	2,000–2,499	0.65	0.65	R–30	R–30	R–13	R–13	R–11	R–19
6		2,500–2,999	0.60	0.65	R–30	R–30	R–13	R–13	R–19	R–19
7		3,000–3,499	0.55	0.65	R–30	R–30	R–13	R–13	R–19	R–19
8	4	3,500–3,999	0.50	0.40	R–30	R–38	R–13	R–13	R–19	R–19
9		4,000–4,499	0.45	0.40	R–38	R–38	R–13	R–13	R–19	R–19
10		4,500–4,999	0.45	0.40	R–38	R–38	R–16	R–13	R–19	R–19
11	5	5,000–5,499	0.45	0.35	R–38	R–38	R–18	R–19	R–19	R–19/30
12		5,500–5,999	0.40	0.35	R–38	R–38	R–18	R–19	R–21	R–19/30
13		6,000–6,499	0.35	0.35	R–38	R–38	R–18	R–19	R–21	R–19/30
14		6,500–6,999	0.35	0.35	R–49	R–38	R–21	R–19	R–21	R–19/30
15	5 6	7,000–8,499	0.35	0.35	R–49	R–38/49	R–21	R–19	R–21	R–21
16	6	8,500–8,999	0.35	0.35	R–49	R–49	R–21	R–21	R–21	R–21
17	7	9,000–12,999	0.35	0.35	R–49	R–49	R–21	R–21	R–21	R–21

TABLE 4 CONTINUED—COMPARISON OF THE 2003 IECC AND 2006 IECC ENVELOPE THERMAL COMPONENT PRESCRIPTIVE CRITERIA FOR ONE- AND TWO-FAMILY DWELLINGS AT 15% WINDOW AREA

IECC climate zone		Heating degree days	Minimum					
			Basement wall R-value		Slab perimeter R-value and depth feet		Crawl space wall R-value	
2003	2006		2003	2006	2003	2006	2003	2006
1	1 2	0–499	R–0	R–0	R–0	R–0	R–0	R–0
2	2	500–999	R–0	R–0	R–0	R–0	R–4	R–0
3		1,000–1,499	R–0	R–0	R–0	R–0	R–5	R–0
4		1,500–1,999	R–5	R–0	R–0	R–0	R–5	R–0
5	3	2,000–2,499	R–5	R–10/13	R–0	R–0	R–6	R–5
6		2,500–2,999	R–6	R–10/13	R–4,2	R–0	R–7	R–5
7		3,000–3,499	R–7	R–10/13	R–4,2	R–0	R–8	R–5
8	4	3,500–3,999	R–8	R–10/13	R–5,2	R–10,2	R–10	R–10
9		4,000–4,499	R–8	R–10/13	R–5,2	R–10,2	R–11	R–10
10		4,500–4,999	R–9	R–10/13	R–6,2	R–10,2	R–17	R–10
11	5	5,000–5,499	R–9	R–10/13	R–6,2	R–10,2	R–17	R–10
12		5,500–5,999	R–10	R–10/13	R–9,4	R–10,2	R–19	R–10
13		6,000–6,499	R–10	R–10/13	R–9,4	R–10,2	R–20	R–10
14		6,500–6,999	R–11	R–10/13	R–11,4	R–10,2	R–20	R–10
15	5 6	7,000–8,499	R–11	R–10/13	R–13,4	R–10,2	R–20	R–10
16	6	8,500–8,999	R–18	R–10/13	R–14,4	R–10,4	R–20	R–10
17	7	9,000–12,999	R–19	R–10/13	R–18	R–10,4	R–20	R–10

TABLE 5—PERCENTAGE OF HOMES IN EACH 2006 IECC CLIMATE ZONE THAT WOULD HAVE BEEN IN EACH 2003 IECC CLIMATE ZONE

2003 IECC climate zone	2006 IECC climate zone						
	1	2	3	4 except Marine	5 and Marine 4	6	7 & 8
1	100	5	0	0	0	0	0
2	0	20	0	0	0	0	0
3	0	40	22	0	0	0	0
4	0	31	10	0	0	0	0
5	0	3	18	0	0	0	0

TABLE 5—PERCENTAGE OF HOMES IN EACH 2006 IECC CLIMATE ZONE THAT WOULD HAVE BEEN IN EACH 2003 IECC CLIMATE ZONE—Continued

2003 IECC climate zone	2006 IECC climate zone						
	1	2	3	4 except Marine	5 and Marine 4	6	7 & 8
6	0	0	28	0	0	0	0
7	0	0	16	4	0	0	0
8	0	0	6	9	0	0	0
9	0	0	0	13	1	0	0
10	0	0	0	28	6	0	0
11	0	0	0	41	8	0	0
12	0	0	0	5	28	0	0
13	0	0	0	0	31	0	0
14	0	0	0	0	20	12	0
15	0	0	0	0	6	81	3
16	0	0	0	0	0	5	6
17	0	0	0	0	0	2	85
18	0	0	0	0	0	0	5
19	0	0	0	0	0	0	2

2. Net Impact of Changes From the 2003 to 2006 IECC

The Department has conducted an analysis and has found that the 2006 IECC would modestly increase energy efficiency on an overall national average basis. This analysis is summarized below; a TSD published in conjunction with this Notice contains the full results. The Department stresses that this increased energy efficiency is based on an average across all new residential buildings. The analysis identified combinations of locations and building design where the 2006 IECC would slightly reduce energy efficiency; however, the analysis indicates that the reductions would be more than offset by cases where energy efficiency is improved.

Table 6 provides the overall results of the comparative analysis of the prescriptive envelope requirements of the 2006 IECC and the 2003 IECC. The DOE–2 energy simulation software was used to calculate these values. The 2006 IECC has a 1% average overall national energy savings. The table shows combined results for single-family and multifamily construction accounting for weighted average building characteristics. Table 6 illustrates significant regional differences that are primarily a result of the revised climate zones. In most climates, the two codes are very nearly equivalent. In climate zone 5, the 2006 IECC shows a substantial improvement (about 5%). In climate zone 3, the 2003 IECC is more energy efficient (by about 5%).

TABLE 6—ANNUAL ENERGY SAVINGS (MBTU) OF 2006 IECC COMPARED TO 2003 IECC FOR PRESCRIPTIVE BUILDING ENVELOPE REQUIREMENTS

2006 IECC climate zone	Foundation Type				Average	Percent savings
	Heated basement	Crawl space	Slab-on-grace	Unheated basement		
Zone 1	0.5	0.4	0.3	0.4	0.3	2
Zone 2	−0.1	1.4	0.9	−0.1	0.9	3
Zone 3	−8.6	−1	−3.3	−1.5	−3.4	−5
Zone 4	2	0.8	0.6	0.7	1.1	1
Zone 5	5.5	7.3	4.2	6.3	5.7	5
Zone 6	1.1	3.3	0	2.3	1.4	1
Zone 7	−2	4.5	0.4	3.4	−0.4	0
Average	2.4	2.7	−0.3	3.3	1	1

The analysis underlying the results in Table 6 does not account for all changes in the IECC from 2003 to 2006. For example, the 2006 IECC requires increased duct insulation in certain cases. On the other hand, the 2006 IECC is missing requirements for pool heater controls (on-off switch) and pool covers contained in the 2003 IECC. However, these and a few other miscellaneous changes do not appear to alter a determination that the 2006 IECC has a modest improvement in overall energy efficiency compared to the 2003 IECC. The Department expects all heated pools to have an on-off switch, basic pool covers are dependent on the diligent occupant behavior for removing/covering the pool, and many homes do not have a pool or may not heat their pool. Furthermore, the 2003 IECC allows the pool cover requirement to be bypassed if 20% of the heating energy is provided by solar heat from the sun striking the pool surface.

There was one particular issue that received the most extensive debate during the 2006 IECC development process. This issue was how the 2006 IECC sets requirements based on the window area of a home. There was considerable concern because a residential building with unlimited windows (*e.g.,* an ''all glass'' house) can be built without any penalty under the 2006 IECC. This is not the case in the 2003 IECC, where, as the WWR becomes higher, the code requires improved performance of windows and/or wall insulation. However, this effect is offset in two ways. First, while the 2003 IECC becomes more stringent at high WWRs,

it also becomes less stringent at low WWRs, whereas the 2006 IECC does not. Second, the 2006 IECC increased the baseline efficiency requirements (U-factor) of glazing to almost equal then-current Energy Star levels in most locations. The Department's analysis of the IECC's requirements related to window area indicate that the 2006 code is not less stringent than the 2003 IECC when the distribution of window areas in all residential buildings is accounted for.

A major factor influencing the Department's final determination of improved efficiency in the 2006 IECC is the improvement in energy efficiency for multifamily housing. The building envelope requirements in 2006 IECC are identical for all residential building types. This is not the case in the 2003 IECC where the requirements for multifamily building types are considerably less stringent than those for one and two-family dwellings. This is shown in the wall requirements in Figure 502.2(1) of the 2003 IECC. While multifamily residential construction has a much smaller market share than single-family in terms of number of dwelling units, there is a nearly universal improvement in requirements for multifamily buildings regardless of building design or climate zone. As indicated below in the certification discussion, high-rise (greater than three stories) multifamily residential buildings and hotel, motel, and other transient residential building types of any height are classified as commercial buildings for energy code purposes. However, the building envelope revisions in 2006 IECC would impact residential buildings such as townhouses, row houses, and low-rise multifamily buildings (not greater than three stories) such as condominiums and garden apartments.

C. 2009 IECC Compared With the 2006 IECC

1. Changes in the 2009 IECC From the 2006 IECC That Improve Energy Efficiency

Each of the major changes in the 2009 IECC that impact energy efficiency is examined individually below. All but one of the changes improve energy efficiency.

1. Changes That Improve Energy Efficiency

a. Lighting

The 2009 IECC has a major new requirement that a minimum of 50% of all lamps (bulbs, tubes, etc.) be ''high efficacy,'' which is defined to include compact fluorescent lights (CFLs), T–8 or smaller diameter fluorescent tubes, or other products achieving comparable or better lumen-per-watt ratings. Traditional incandescent bulbs do not meet this requirement. The 2006 IECC had no lighting requirements for residential buildings. The Department has referenced the 2006 Mortgage Industry National Home Energy Rating Standards developed by the Residential Energy Services Network (RESNET) to assume 2,375 kWh/year of lighting energy use for a newly constructed 2400 ft^2 house. The new lighting requirements in the 2009 IECC could reduce this lighting energy use by about 25%.

b. Building Envelope Thermal Measures

The 2009 IECC has a number of changes that improve energy efficiency in the building envelope. There are direct increases in prescriptive building envelope requirements in Tables 402.1.1 and 402.1.3 of the IECC. Table 7 below shows these changes. Additionally, there were a number of minor improvements, including establishing an area limit of 24 ft^2 on the door exemption from U-factor requirements.

TABLE 7—IMPROVEMENTS IN PRESCRIPTIVE ENVELOPE REQUIREMENTS

Component	2006 IECC	2009 IECC
Maximum fenestration U-factor (excluding skylights)	Zone 2: 0.75	Zone 2: 0.65.
	Zone 3: 0.65	Zone 3: 0.50.
	Zone 4: 0.40	Zone 4: 0.35.
Maximum fenestration solar heat gain coefficient (SHGC) in Zones 1 through 3.	0.40	0.30.
Basement wall insulation in Zones 6 through 8	R–13 cavity or R–10 continuous insulation.	R–19 cavity or R–15 continuous insulation.
Basement wall insulation in northern section of Zone 3	No insulation required	R–13 cavity or R–5 continuous insulation.
Wood-Frame wall insulation (all but basements) in Zones 5 and 6	R–19	R–20.
Floor insulation in Zones 7 and 8	R–30	R–38.

c. Building Envelope Air Leakage

Although the fundamental requirement to seal all potential sources of leaks has not changed, the air leakage control specifications in Section 402.4 of the 2009 IECC are considerably more detailed than in the 2006 edition, requiring either a comprehensive inspection against a checklist of component sealing criteria or a whole-building pressurization test. There is a new requirement that fireplaces have gasketed doors to limit air leakage. Additionally, compliance with Standard ASTM E283 is now required to limit air leakage through recessed light fixtures. The 2006 IECC only required recessed light fixtures to be sealed but did not require compliance with the ASTM standard. This testing of fixtures is expected to help eliminate energy consuming leaks through these fixtures, which can be a very common method of lighting in kitchens and other rooms in new houses.

d. Duct Leakage Limits and Testing Requirement

The 2009 IECC contains a new requirement that buildings with ducts that pass outside the conditioned space (for example, if ducts are in unconditioned attics, garages or crawlspaces) have the ducts pressure tested and shown to have a maximum leakage rate below specified limits. While the 2006 IECC also requires ducts to be sealed, the addition of a specific leakage limit verified by a pressure test in each new home or retrofit is expected to substantially reduce leakage in many if not most cases.

Testing of completed homes in Washington State where prescriptive code requirements for duct sealing apply without any testing to confirm compliance, ''showed no significant improvement'' over non-code homes.[8] Another study from Washington State

[8] Washington State University. 2001. *Washington State Energy Code Duct Leakage Study Report.* WSUCEEP01105. Washington State University Cooperative Extension Energy Program, Olympia, Washington.

concluded: ''Comparisons to air leakage rates reported elsewhere for homes built before the implementation of the 1991 WSEC show no significant improvement by the general population'' despite years of training emphasizing duct sealing.[9]

Numerous other studies around the nation show substantial duct leakage in new homes, including those in States with codes requiring duct sealing. For example, a 2001 study of 186 houses built under the MEC in Massachusetts reported ''serious problems were found in the quality of duct sealing in about 80% of these houses''.[10] Pressurization tests in 22 of these houses found an average leakage to the outside of the house of 183 cfm, or 21.6% of the system flow, at a pressure of 25 Pascals.

The energy savings of improved duct sealing are very substantial. A California study estimated a sales-weighted state annual average savings from duct sealing of 38 therms and 239 kWh for a 1761 ft^2 house.[11] This is based on an estimated 12% improvement in duct efficiency based on previous studies indicating a 12–15% improvement potential. The Department concludes that the 2009 IECC's requirement that duct air leakage meet an upper limit and be verified by a pressure test will save significant energy compared to the 2006 and prior editions of the IECC.

e. Improvement in Other Requirements

There are a number of changes to the ''simulated performance alternative'' compliance path in the 2009 IECC. The glazing area in the baseline ''standard reference design'' was reduced from a maximum of 18% of the conditioned floor area to 15%. This results in increased energy efficiency for any proposed design having a glazing area of more than 15%. Because use of this compliance path is completely optional, these savings will only occur when the user chooses this compliance path. Another change does not directly alter code stringency in the performance path but may ultimately result in some energy savings is the removal of the option to trade high-efficiency HVAC equipment for reductions in other requirements in the code, such as reduced envelope insulation. Because building envelopes have substantially longer lives than HVAC and/or water heating equipment, energy savings from envelope improvements may persist for many more years than comparable equipment improvements. Also, because high-efficiency equipment is already the predominant choice in many markets, disallowing envelope/equipment trade-offs is likely to result in improved overall efficiency in many situations.

2. Changes in the 2009 IECC From the 2006 IECC That Reduce Energy Efficiency

There is only one change in the 2009 IECC that directly reduces energy efficiency. Insulation requirements for many ducts outside the building thermal envelope are reduced from R–8 to R–6; exceptions are supply ducts in attics, which must still have R–8 insulation, and ducts in floor trusses, which retain the 2006 code's R–6 requirement.

3. Net Impact of Changes From the 2009 IECC to 2009 IECC on Energy Efficiency

The Department has conducted an energy simulation analysis of 2009 IECC compared to the 2006 using the DOE–2 simulation tool to model[12] a typical single family house:

- 2400 ft2 floor area, two-story.
- Crawl space foundation.
- 8.5-ft high ceilings.
- A ceiling area (bordering the unconditioned attic) of 1,200 ft^2,
- A gross exterior wall area of 2,380 ft^2,
- And a window area of 357 ft^2 (15% of the wall area) equally oriented north, south, east, and west.
- Heating with a natural gas furnace ($1.20/therm).
- Central electric air conditioning ($.12/kWh).

High-efficacy lighting was assumed to increase from 10% to 50% of all lighting within the building, reducing lighting energy use by 26%, or $74 a year. Savings attributable to the lighting requirements in the IECC will decrease as Federal law requires improved light bulbs in 2012 to 2014. Improved duct sealing was assumed to save 10% of the heating and cooling costs.

Figure 1 shows the estimated annual energy cost savings resulting from the Department's energy simulation analysis of the 2009 IECC changes for 14 diverse climates and for the national average. The energy simulation analysis, as described above, takes into account changes involving the space heating, space cooling (air conditioning), and lighting systems. A 10% reduction is applied to solely the heating and cooling energy to account for the improved duct sealing necessary to achieve the low duct leakage rates specified in the 2009 IECC. The 10% reduction is applied post energy simulation analysis to all 14 climate locations and is accounted for in the cost savings presented in Figure 1.

[8] Washington State University. 2001. *Washington State Energy Code Duct Leakage Study Report.* WSUCEEP01105. Washington State University Cooperative Extension Energy Program, Olympia, Washington.

[9] Hales, D., A. Gordon, and M. Lubliner. 2003. *Duct Leakage in New Washington State Residences: Findings and Conclusions.* ASHRAE Transactions. KC–2003–1–3.

[10] Xenergy. 2001. Impact Analysis Of The Massachusetts 1998 Residential Energy Code Revisions. *http://www.mass.gov/Eeops/docs/dps/inf/inf_bbrs_impact_analysis_final.pdf.*

[11] Hammon, R. W., and M. P. Modera. 1999.

[12] The DOE–2 simulation tool is available at *http://doe2.com/.*

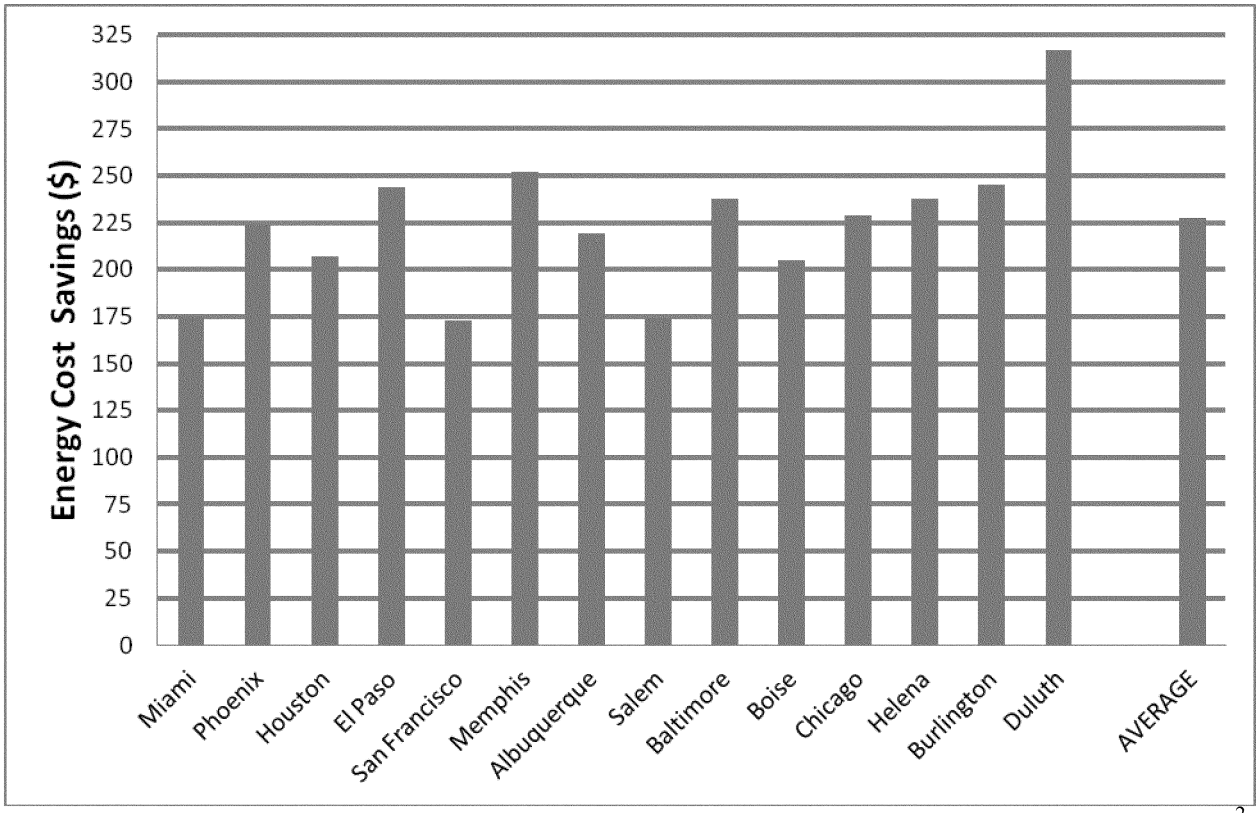

Figure 1. Annual Energy Cost Savings of 2009 IECC Compared to the 2006 IECC for a 2400 ft^2 House

III. Comparison of the 2009 IRC to the 2009 IECC

In the past, some States have adopted the ICC's International Residential Code (IRC) in lieu of the IECC, because the IRC provides a comprehensive building construction code (structural, plumbing, electrical, energy, *etc.*) in a single book for one- and two-family dwellings and townhouses. Consequently, DOE anticipates that some States may wish to adopt the 2009 IRC in lieu of the 2009 IECC. In order to provide technical assistance to States that may wish to adopt the 2009 IRC, DOE has evaluated the 2009 IRC to compare the stringency of its energy provisions with those of the 2009 IECC. Our analysis indicates that the 2009 IRC *would not* equal or exceed the energy efficiency of the 2009 IECC.

A. Changes That Reduce Energy Efficiency or Have the Potential To Increase Energy Consumption

Chapter 11 of the IRC contains energy efficiency provisions. The IRC allows compliance with the IECC as an alternative to complying with Chapter 11. Most of the energy efficiency requirements in the IRC and IECC are identical. However, there are several differences between the two codes that result in the 2009 IRC having reduced energy efficiency compared to the 2009 IECC. All the differences that reduce efficiency are listed below:

1. The 2009 IECC requires a glazed fenestration solar heat gain coefficient (SHGC) of 0.30 or lower whereas the 2009 IRC requires a higher (less stringent) SHGC of 0.35 or lower, in climate zones 1, 2, and 3. Further, the 2009 IRC allows impact resistant fenestration in zones 1 through 3 to meet an even less stringent SHGC requirement of 0.40 and less stringent U-factor requirements in zones 2 and 3.

2. For basement walls, the 2009 IECC requires either R–15 continuous insulation or R–19 cavity insulation in zones 6–8, whereas the 2009 IRC requires lower (less stringent) R-values in these zones: R–10 continuous or R–15 cavity.

3. The 2009 IECC requires R–38 floors in zones 7 and 8; the 2009 IRC requires only R–30.

4. The 2009 IECC limits the allowance for R–30 insulation in ceilings without attics to 500 ft^2 or 20% of the total insulated ceiling area, whichever is less. The 2009 IRC limits the allowance to 500 ft^2 without regard to the total ceiling area. Thus, under the 2009 IRC some smaller homes will have less efficient ceilings.

Additionally, the 2009 IRC differs from the 2009 IECC in some ways that, although they do not reduce the stringency of code requirements, have the potential to result in increased energy consumption in certain situations:

1. Both the IRC and IECC allow for ''trade-offs'' by which the efficiency of one building component can be lowered in trade for higher efficiency in another. The 2009 IECC limits the extent to which glazing properties can be reduced in such trade-offs. The 2009 IECC sets a trade-off ''cap'' on SHGC at a maximum of 0.50 in climate zones 1, 2, and 3 and a cap on U-factor trade-offs of U–0.48 in zones 4 and 5 and U–0.40 in zones 6, 7, and 8. These caps are not present in the 2009 IRC. As these caps do not increase stringency of the code (but rather restrict trade-off options), there is no direct impact on annual energy consumption or cost. There may, however, be some impacts on occupant comfort and/or resistance to moisture condensation, either of which could possibly induce occupants to increase energy consumption, for example by raising thermostat set points.

2. The air barrier and insulation inspection requirements differ slightly between the codes. The 2009 IECC requires checking that ''Air-permeable

insulation is inside of an air barrier'' (right column in the first row). The 2009 IRC is missing this, which could result in insulation on the exterior side of an air barrier being exposed to wind-induced air movement that reduces its effective R-value.

3. The definitions of ''conditioned space'' are different between the two codes, which, depending on local officials' interpretations, could result in different portions of a building being deemed conditioned and hence subject to the code's envelope requirements.

4. The three labels ''*mandatory,*'' ''*prescriptive,*'' and ''*performance*'' are used to label many sections in the 2009 IECC, but are not used at all in the 2009 IRC. The provisions that are *mandatory* are always required while *prescriptive* provisions can be traded off as long as overall home energy efficiency is not decreased. Thus the 2009 IRC may permit trading down the efficiency of some components with the potential to induce increased energy consumption as described above.

5. The 2009 IRC (section N1101.1, ''Scope'') states that chapter 11 (Energy Efficiency) does not apply to portions of the building envelope that do not enclose conditioned space. Section 101.5.2 of the IECC is more specific, exempting only *building thermal envelope provisions* that do not contain conditioned space.

B. Impact of the Differences Between the 2009 IRC and 2009 IECC

DOE has performed a limited analysis of potential impact of the differences between the 2009 IECC and 2009 IRC. The analysis involves thermal simulation of home performance in several representative locations using the EnergyGauge (DOE–2) [13] simulation tool on a typical house:

- 2400 ft^2 floor area, two-story.
- Natural gas furnace heating at $1.20/therm.
- Central air conditioning electricity at 12 cents/kWh.
- Equipment efficiencies at Federal minimum levels.
- 360 ft^2 window area equally distributed to the north, east, south, and west building faces, with no exterior shading.

The results are shown in Tables 8 through 10. The 2009 IRC yields a higher annual energy cost in almost all cases.

TABLE 8—ENERGY SAVINGS OF REDUCING SHGC FROM 0.35 TO 0.30 IN CLIMATE ZONES ONE THROUGH THREE

Climate zone	Representative city	Cooling savings	Heating increase	Energy savings
1	Miami	$29	$0	$29
2	Houston	18	9	9
2	Phoenix	20	1	19
3	Atlanta	16	18	−2
3	Jackson MS	19	15	4
3	Memphis	17	17	0
3	Dallas	20	14	6
3	El Paso	18	17	1
3	Las Vegas	16	15	1

TABLE 9—ENERGY SAVINGS OF INCREASING BASEMENT WALL INSULATION FROM R–13 TO R–19 IN CLIMATE ZONES SIX THROUGH EIGHT

Climate zone	Representative city	Energy savings
6	Burlington	$29
7	Duluth	34
8	Fairbanks	33

TABLE 10—ENERGY SAVINGS OF INCREASING FLOOR INSULATION FROM R–30 TO R–38 IN CLIMATE ZONES SEVEN AND EIGHT (FLOOR OVER UNHEATED BASEMENT)

Climate zone	Representative city	Energy savings
7	Duluth	13
8	Fairbanks	19

IV. Filing Certification Statements With DOE

A. State Determinations

Upon publication of this final determination, each State is required to determine the appropriateness of revising the portion of its residential building code regarding energy efficiency to meet or exceed the provisions of the ICC IECC, 2009 edition. (42 U.S.C. 6833(a)(5)(B)) A State determination for the 2009 IECC would be sufficient to address all of the DOE determinations (e.g. 2006 and 2003) in this notice. The State determination must be: (1) Made after public notice and hearing; (2) in writing; (3) based upon findings and upon the evidence presented at the hearing; and (4) made available to the public. States have considerable discretion with regard to the hearing procedures they use, subject to providing an adequate opportunity for members of the public to be heard and to present relevant information. The Department recommends publication of any notice of public hearing in a newspaper of general circulation and online. The determinations are required to be made not later than two years from the date of publication of this notice of final determination, unless an extension is provided (see section B. below for more details).

Note that the applicability of any State revisions to new or existing buildings would be governed by the State building codes. However, it is our understanding that generally, the revisions would not apply to existing buildings unless they are undergoing a change that requires a building permit.

States should be aware that the Department considers high-rise (greater than three stories) multifamily residential buildings and hotel, motel, and other transient residential building types of any height as commercial buildings for energy code purposes. Residential buildings include one- and two-family detached and attached buildings, duplexes, townhouses, row houses, and low-rise multifamily buildings (not greater than three stories) such as condominiums and garden apartments.

States should also be aware that the determinations do not apply to Chapter 5 of the 2009 IECC, which addresses commercial buildings as defined above. Therefore, States must certify their evaluations of their State building codes for residential buildings with respect to all provisions of the IECC except for that chapter.

Section 304(a)(4) of ECPA, as amended, requires that if a State makes a determination that it is not

[13] EnergyGauge is available at *http://doe2.com/*.

appropriate to revise the energy efficiency provisions of its residential building code, the State must submit to the Secretary, in writing, the reasons for this determination and the statement shall be available to the public. (42 U.S.C. 6833(a)(4))

Some States develop their own codes that are only loosely related to the national model codes and DOE does not typically provide technical support for those codes. However, DOE does provide grants to these States through grant programs administered by the National Energy Technology Laboratory (NETL). DOE does not prescribe how each State adopts and enforces its energy codes.

B. Requests for Extensions To Certify

Section 304(c) of ECPA, as amended, requires that the Secretary permit an extension of the deadline for complying with the certification requirements described above, if a State can demonstrate that it has made a good faith effort to comply with such requirements and that it has made significant progress toward meeting its certification obligations. (42 U.S.C. 6833(c)) Such demonstrations could include one or both of the following: (1) A plan for response to the requirements stated in Section 304; and/or (2) a statement that the State has appropriated or requested funds (within State funding procedures) to implement a plan that would respond to the requirements of Section 304 of ECPA. This list is not exhaustive.

V. Regulatory Analysis

A. Review Under Executive Order 12866

Today's action is a significant regulatory action under section 3(f)(1) of Executive Order 12866, ''Regulatory Planning and Review'' (58 FR 51735 (Oct. 4, 1993)). Accordingly, today's action was reviewed by the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' (67 FR 53461 (Aug. 16, 2002)), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel's Web site: *http://www.gc.doe.gov.*

DOE has reviewed today's rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. Today's final determination of improved energy efficiency between IECC editions requires States to undertake an analysis of their respective building codes. As such, the only entities directly regulated by this rulemaking would be States. DOE does not believe that there will be any direct impacts on small entities such as small businesses, small organizations, or small governmental jurisdictions.

On the basis of the foregoing, DOE certifies that the rule would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

C. Review Under the National Environmental Policy Act of 1969

DOE has determined that today's action is covered under the Categorical Exclusion found in DOE's National Environmental Policy Act regulations at paragraph A.6. of Appendix A to subpart D, 10 CFR part 1021. That Categorical Exclusion applies to actions that are strictly procedural, such as rulemaking establishing the administration of grants. Today's action impacts whether States must perform an evaluation of State building codes. The action would not have direct environmental impacts. Accordingly, DOE has not prepared an environmental assessment or an environmental impact statement.

D. Review Under Executive Order 13132, ''Federalism''

Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that pre-empt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. DOE has examined today's final rule and has determined that it will not pre-empt State law and 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. Pursuant to Section 304(a) of ECPA, DOE is statutorily required to determine whether the most recent version of the 1992 Model Energy Code (MEC), or any successor to that code, would improve the level of energy efficiency in residential buildings compared to the previous version. If DOE makes a positive determination, the statute requires each State to certify that it has compared its residential building code regarding energy efficiency to the revised code and made a determination whether it is appropriate to revise its code to meet or exceed the provisions of the successor code. (42 U.S.C. 6833(a)(5)(B)) Therefore, today's action only impacts whether States must perform an evaluation of State building codes. No further action is required by Executive Order 13132.

F. Review Under the Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

Today's action impacts whether States must perform an evaluation of State building codes. Today's action would not impose a Federal mandate on State, local or tribal governments, and it would not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

G. Review Under the Treasury and General Government Appropriations Act of 1999

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's action would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

H. Review Under the Treasury and General Government Appropriations Act of 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's action under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

I. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to the OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (3) is designated by the Administrator of the Office of Information and Regulatory Affairs (OIRA) as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use, should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

Today's action would not have a significant adverse effect on the supply, distribution, or use of energy and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

J. Review Under Executive Order 13175

Executive Order 13175. ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249 (Nov. 9, 2000)), requires DOE to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' refers to regulations that have ''substantial direct effects 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.'' Today's regulatory action is not a policy that has ''tribal implications'' under Executive Order 13175. DOE has reviewed today's action under executive Order 13175 and has determined that it is consistent with applicable policies of that Executive Order.

Issued in Washington, DC, on July 13, 2011.

Kathleen Hogan,

Deputy Assistant Secretary for Energy Efficiency, Office of Technology Development, Energy Efficiency and Renewable Energy.

[FR Doc. 2011–18080 Filed 7–18–11; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2137–001.
Applicants: Dominion Cove Point LNG, LP.
Description: Supplemental Information of Dominion Cove Point LNG, LP.
Filed Date: 07/01/2011.
Accession Number: 20110701–5303.
Comment Date: 5 p.m. Eastern Time on Friday, July 15, 2011.

Docket Numbers: RP11–2196–001.
Applicants: Ruby Pipeline, L.L.C.
Description: Ruby Pipeline, L.L.C. submits tariff filing per 154.203: Tariff Implementation & Compliance Amendment to be effective 12/31/9998.
Filed Date: 07/06/2011.
Accession Number: 20110706–5102.
Comment Date: 5 p.m. Eastern Time on Monday, July 18, 2011.

Docket Numbers: RP06–298–014.
Applicants: Public Service Commission of New York v. National Fuel Gas Supply Corporation.
Description: Semi-Annual Report of Operational Sales of Gas for the period ending 06/30/11 of National Fuel Gas Supply Corporation.
Filed Date: 07/11/2011.
Accession Number: 20110711–5066.
Comment Date: 5 p.m. Eastern Time on Monday, July 25, 2011.

Docket Numbers: RP11–1940–001.
Applicants: Chesapeake Energy Marketing Inc, BHP Billiton Petroleum (Fayetteville) LL.
Description: Request for Limited Extension of Temporary Waivers and Request for Expedited Action of BHP Billiton Petroleum (Fayetteville) LLC and Chesapeake Energy Marketing, Inc.
Filed Date: 07/11/2011.
Accession Number: 20110711–5219.
Comment Date: 5 p.m. Eastern Time on Monday, July 25, 2011.

Docket Numbers: CP01–69–009.
Applicants: Petal Gas Storage, L.L.C.
Description: Petal Gas Storage, L.L.C. Compliance filing.
Filed Date: 06/03/2011.
Accession Number: 20110603–5136.
Comment Date: 5 p.m. Eastern Time on Monday, July 18, 2011.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 12, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–18021 Filed 7–18–11; 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 corporate filings:

Docket Numbers: EC11–92–000.

Applicants: Magnolia Energy L.P.

Description: Application for Order Authorizing the Disposition of Jurisdictional Facilities under section 203 of the Federal Power Act, Request for Waivers, Expedited Action and Shortened Comment Period.

Filed Date: 07/11/2011.

Accession Number: 20110711–5217.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: EC11–93–000.

Applicants: Emera Incorporated, Algonquin Power & Utilities Corp.

Description: section 203 Application of Emera Incorporated and Algonquin Power & Utilities Corp.

Filed Date: 07/12/2011.

Accession Number: 20110712–5100.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2984–001.

Applicants: Merrill Lynch Commodities, Inc.

Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.

Filed Date: 07/11/2011.

Accession Number: 20110711–5211.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–3326–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: G931 GIA Compliance to be effective 4/9/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5127.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–3327–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: G996 GIA Compliance to be effective 4/9/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5130.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–3330–002.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: G931–G996–H100 MPFCA Compliance to be effective 4/12/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5133.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–3333–000.

Applicants: NV Energy, Inc.

Description: NV Energy, Inc. submits tariff filing per 35.19a(b): Service Agreement No. 11–00036 FERC Refund Report to be effective N/A.

Filed Date: 07/07/2011.

Accession Number: 20110707–5134.

Comment Date: 5 p.m. Eastern Time on Thursday, July 28, 2011.

Docket Numbers: ER11–4026–000.

Applicants: Eel River Power LLC.

Description: Eel River Power LLC submits tariff filing per 35.13(a)(2)(iii: Notice of Succession to be effective 9/9/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5091.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4027–000.

Applicants: James River Genco, LLC.

Description: James River Genco, LLC submits tariff filing per 35.13(a)(2)(iii: James River Genco, LLC Succesion to be effective 7/12/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5106.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4028–000.

Applicants: Portsmouth Genco, LLC.

Description: Portsmouth Genco, LLC submits tariff filing per 35.13(a)(2)(iii: Portsmouth Genco, LLC Succession to be effective 7/12/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5108.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4029–000.

Applicants: Vermont Wind, LLC.

Description: Vermont Wind, LLC submits tariff filing per 35.12: Electric Rate Schedule No. 1 to be effective 8/1/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5126.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4030–000.

Applicants: PPL EnergyPlus, LLC.

Description: PPL EnergyPlus, LLC submits tariff filing per 35.15: Cancellation of July 1, 2011 Filing to be effective 7/11/2011.

Filed Date: 07/11/2011.

Accession Number: 20110711–5151.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4031–000.

Applicants: Duke Energy Ohio, Inc.

Description: Notice of Cancellation of Duke Energy Ohio, Inc.

Filed Date: 07/11/2011.

Accession Number: 20110711–5201.

Comment Date: 5 p.m. Eastern Time on Monday, August 01, 2011.

Docket Numbers: ER11–4032–000.

Applicants: PPL EnergyPlus, LLC.

Description: PPL EnergyPlus, LLC submits tariff filing per 35.13(a)(2)(iii: Transmission Reassignment Tariff to be Effective March 1, 2010 to be effective 9/30/2010.

Filed Date: 07/12/2011.

Accession Number: 20110712–5064.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–4033–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits tariff filing per 35.13(a)(2)(iii: Bountiful Interconnection Agreement (Parrish Substation) to be effective 9/11/2011.

Filed Date: 07/12/2011.

Accession Number: 20110712–5083.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–4034–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA WDT SERV AG SCE–GBU 13277 San Bernardino Ave Fontana Roof Top Solar Project to be effective 7/13/2011.

Filed Date: 07/12/2011.

Accession Number: 20110712–5084.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–4035–000.

Applicants: PJM Interconnection, LLC.

Description: PJM Interconnection, LLC submits tariff filing per 35.15: Notice of Cancellation of Service Agreement No. 2780 in Docket No. ER11–3001–000 to be effective 6/9/2011.

Filed Date: 07/12/2011.

Accession Number: 20110712–5099.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Docket Numbers: ER11–4036–000.

Applicants: PacifiCorp.

Description: Cancellation of PacifiCorp Rate Schedule FERC No. 335, Operating Agreement between PacifiCorp and Bountiful City.

Filed Date: 07/12/2011.

Accession Number: 20110712–5103.

Comment Date: 5 p.m. Eastern Time on Tuesday, August 02, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

As it relates to any qualifying facility filings, the notices of self-certification [or self-recertification] listed above, do not institute a proceeding regarding qualifying facility status. A notice of self-certification [or self-recertification] simply provides notification that the entity making the filing has determined the facility named in the notice meets the applicable criteria to be a qualifying facility. Intervention and/or protest do not lie in dockets that are qualifying facility self-certifications or self-recertifications. Any person seeking to challenge such qualifying facility status may do so by filing a motion pursuant to 18 CFR 292.207(d)(iii). Intervention and protests may be filed in response to notices of qualifying facility dockets other than self-certifications and self-recertifications.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 12, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–18019 Filed 7–18–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP11–2261–000.

Applicants: Caledonia Energy Partners, LLC.

Description: Caledonia Energy Partners, LLC submits tariff filing per 154.204: Caledonia Energy Partners, LLC, Change to FERC Gas Tariff to be effective 8/8/2011.

Filed Date: 07/07/2011.

Accession Number: 20110707–5065.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 19, 2011.

Docket Numbers: RP11–2262–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits tariff filing per 154.204: Creation of EFT Service Filing to be effective 8/7/2011.

Filed Date: 07/07/2011.

Accession Number: 20110707–5114.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 19, 2011.

Docket Numbers: RP11–2263–000.

Applicants: Alliance Pipeline L.P.

Description: Alliance Pipeline L.P. submits tariff filing per 154.204: System Map to be effective 8/7/2011.

Filed Date: 07/07/2011.

Accession Number: 20110707–5116.

Comment Date: 5 p.m. Eastern Time on Tuesday, July 19, 2011.

Docket Numbers: RP11–2264–000.

Applicants: Colorado Interstate Gas Company.

Description: Colorado Interstate Gas Company submits tariff filing per 154.204: TSB–Y Young RIIL Curve Update to be effective 8/7/2011.

Filed Date: 07/08/2011.

Accession Number: 20110708–5064.

Comment Date: 5 p.m. Eastern Time on Wednesday, July 20, 2011.

Docket Numbers: RP11–2265–000.

Applicants: Dominion Transmission, Inc.

Description: Dominion Transmission, Inc. submits tariff filing per 154.203: DTI—2011 Overrun and Penalty Revenue Distribution to be effective N/A.

Filed Date: 07/11/2011.

Accession Number: 20110711–5129.

Comment Date: 5 p.m. Eastern Time on Monday, July 25, 2011.

Docket Numbers: RP08–306–000.

Applicants: Portland Natural Gas Transmission System.

Description: Response of Portland Natural Gas Transmission system to Data requests dated 5/31/22.

Filed Date: 06/30/2011.

Accession Number: 20110630–5170.

Comment Date: 5 p.m. Eastern Time on Monday, August 1, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. 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. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

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 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*. or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 12, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–18020 Filed 7–18–11; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER11–3277–000; ER11–3277–001]

Sky River LLC; Notice of Filing

Take notice that, on July 8, 2011, Sky River LLC filed to amend its Open Access Transmission Tariff (OATT) filing, submitted on April 1, 2011 and amended on April 7, 2011, in the above captioned dockets with information required under the Commission's regulations. Such filing served to reset the filing date in this proceeding.

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 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on July 29, 2011.

Dated: July 11, 2011.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2011–18018 Filed 7–18–11; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–RCRA–2011–0543, FRL–9441–7]

Agency Information Collection Activities; Proposed Collection; Comment Request; Requirements and Exemptions for Specific RCRA Wastes

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR covers collection of information concerning Universal Wastes, Mixed Waste, and Used Oil. This ICR is scheduled to expire on December 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before September 19, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–RCRA–2011–0543, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: rcra-docket@epa.gov.*
- *Fax:* 202–566–9744.
- *Mail:* RCRA Docket (28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.
- *Hand Delivery:* 1301 Constitution Ave., NW., Room 3334, Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–RCRA–2011–0543. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA

Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

FOR FURTHER INFORMATION CONTACT: Kathy Lett, Office of Resource Conservation and Recovery, (5304P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–605–0761; fax number: 703–308–0514; e-mail address: *lett.kathy@epa.gov.*

SUPPLEMENTARY INFORMATION:

How can I access the docket and/or submit comments?

EPA has established a public docket for this ICR under Docket ID No. EPA–HQ–RCRA–2011–0543, which is available for online viewing at *http://www.regulations.gov,* or in person viewing at the RCRA Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for RCRA Docket is (202) 566–0270.

Use *http://www.regulations.gov* to obtain a copy of the draft collection of information, submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the docket ID number identified in this document.

What information is EPA particularly interested in?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

(i) 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;

(ii) 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;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) 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. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Offer alternative ways to improve the collection activity.

6. Make sure to submit your comments by the deadline identified under DATES.

7. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

What information collection activity or ICR does this apply to?

Affected entities: Entities potentially affected by this action are Private Sector and State, Local, or Tribal Governments.

Title: Requirements and Exemptions for Specific RCRA Wastes.

ICR numbers: EPA ICR No. 1597.09, OMB Control No. 2050–0145.

ICR status: This ICR is currently scheduled to expire on December 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: In 1995, EPA promulgated regulations in 40 CFR part 273 that govern the collection and management of widely-generated hazardous wastes known as ''Universal Wastes''. Universal Wastes are wastes that are generated in non-industrial settings by a vast community, and are present in non-hazardous waste management systems. Examples of Universal Wastes include certain batteries, pesticides, mercury-containing lamps and thermostats. The Part 273 regulations are designed to separate Universal Waste from the municipal wastestream by encouraging individuals and organizations to collect these wastes and to manage them in an appropriate hazardous waste management system. EPA distinguishes two types of handlers of Universal Wastes: Small quantity handlers of Universal Waste (SQHUW) and large quantity handlers of Universal Waste (LQHUW). SQHUWs do not accumulate more than 5,000 kg of any one category of Universal Waste at one time, while LQHUWs may accumulate quantities at or above this threshold. More stringent requirements are imposed on LQHUWs because of greater potential environmental risks.

In 2001, EPA promulgated regulations in 40 CFR Part 266 that provide increased flexibility to facilities managing wastes commonly known as ''Mixed Waste''. Mixed Waste are low-level mixed waste (LLMW), and naturally occurring and/or accelerator-produced radioactive material (NARM) containing hazardous waste. These wastes are also regulated by the Atomic Energy Act. As long as specified eligibility criteria and conditions are met, LLMW and NARM are exempt from the definition of hazardous waste as defined in Part 261. Although these eligible wastes are exempted from RCRA manifest, transportation, and disposal requirements, they must still comply with the manifest, transportation, and disposal requirements under the NRC (or NRC-Agreement State) regulations.

And finally, in 1992, EPA finalized management standards for used oils destined for recycling. The Agency codified the used oil management standards in Part 279 of 40 CFR. The regulations at 40 CFR Part 279 establish, among other things, streamlined procedures for notification, testing, labeling, and recordkeeping. They also establish a flexible self-implementing approach for tracking off-site shipments that allow used oil handlers to use standard business practices (*e.g.,* invoices, bill of lading). In addition, part 279 sets standards for the prevention and cleanup of releases to the environment during storage and transit. EPA believes these requirements will minimize potential mismanagement of used oils, while not discouraging recycling.

Burden Statement: The annual public reporting burden for this collection of

information is estimated to average 4.9 hours per response. The total public recordkeeping burden for the Universal Waste requirements is estimated to average 0.2 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of the Agency's estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 123,280.

Frequency of response: Annual.

Estimated total average number of responses for each respondent: 1.03.

Estimated total annual burden hours: 651,135 hours.

Estimated total annual costs: $30,746,047 which includes $10,004,415 annualized capital and O&M costs and $20,741,632 annualized labor costs.

What is the next step in the process for this ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. At that time, EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: July 11, 2011.

Suzanne Rudzinski,

Director, Office of Resource Conservation and Recovery.

[FR Doc. 2011–18155 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2011–0359; FRL–9441–4]

Amendment of Inspector General Operations & Reporting System Audit, Assignment, and Timesheet Files (EPA–42)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), the Office of Inspector General (OIG) is giving notice that it proposes to amend an existing system of records by changing the name of the system from the Inspector General Operations & Reporting (IGOR) System Audit, Assignment, and Timesheet Files (EPA–42) to the Inspector General Enterprise Management System (IGEMS) Audit, Assignment, and Timesheet Modules.

DATES: *Effective Dates:* Persons wishing to comment on this system of records notice must do so by August 29, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2011–0359, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: oei.docket@epa.gov.*
- *Fax:* 202–566–1752.
- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OEI–2011–0359. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov.* The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information for which disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Chris Han, 202–566–2939

SUPPLEMENTARY INFORMATION:

I. General Information

The Inspector General Operations & Reporting (IGOR) System Audit, Assignment, and Timesheet Files (EPA–42) will be changed to Inspector General Enterprise Management System (IGEMS) Audit, Assignment, and Timesheet Modules. The System assists the OIG planning and managing audits, evaluations, investigations and other OIG activities. The privacy of individuals is protected through user authentication and system roles, permissions and privileges. The system is operated and maintained by the

Office of Inspector General, Office of Mission Systems.

Dated: July 8, 2011.

Malcolm D. Jackson,

Assistant Administrator and Chief Information Officer.

EPA–42

SYSTEM NAME:

Inspector General Enterprise Management System (IGEMS) Audit, Assignment, and Timesheet Modules.

SYSTEM LOCATION:

Enterprise Technology Services Division, Environmental Protection Agency, Research Triangle Park, NC 27711.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Office of Inspector General (OIG) employees; individuals who request audits or special projects; names of individual auditees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Incoming audit requests, assignment sheets, review sheets, and reports; incoming special project requests, assignment sheets, and memorandums or briefing materials; and OIG employee timesheets.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM INCLUDES ANY REVISIONS OR AMENDMENTS):

Inspector General Act of 1978, 5 U.S.C. app. 3.

PURPOSE(S):

To assist the OIG in planning and managing audits, evaluations, investigations and other OIG activities.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

General routine uses A, B, C, D E, F, G, H, I, J, K, and L apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

In a computer database.

RETRIEVABILITY:

By assignment number, audit report number, the name and social security number of the assigned OIG auditor, or the name of the audit requestor.

The general assignment module contains records that are retrieved by assignment number, and the name and Social Security Number of the OIG employee performing the assignment.

SAFEGUARDS:

Computer records are maintained in a secure, password protected computer system. All records are maintained in secure, access-controlled areas or buildings.

RETENTION AND DISPOSAL:

Records stored in this system are subject to EPA Schedule 707.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General for Mission Systems, Office of Inspector General, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

NOTIFICATION PROCEDURES:

Requests to determine whether this system of records contains a record pertaining to you must be sent to the Agency's Freedom of Information Office. The address is: U.S. Environmental Protection Agency; 1200 Pennsylvania Ave., NW., Room 6416 West; Washington, DC 20460; (202) 566–1667; E-mail: (*hq.foia@epa.gov*); Attn: Privacy Act Officer.

RECORDS ACCESS PROCEDURE:

Persons seeking access to their own personal information in this system of records will be required to provide adequate identification (*e.g.,* driver's license, military identification card, employee badge or identification card) and, if necessary, proof of authority. Additional identity verification procedures may be required as warranted. Requests must meet the requirements of EPA regulations at 40 CFR part 16.

CONTESTING RECORDS PROCEDURE:

Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete EPA Privacy Act procedures are set out in 40 CFR part 16.

RECORD SOURCE CATEGORIES:

Record subject, OIG supervisors, other EPA employees.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. 2011–18158 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OEI–2011–0349; FRL–9441–3]

Amendment of OIG Hotline Allegation System (EPA–30)

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974 (5 U.S.C. 552a), the Office of Inspector General (OIG) is giving notice that it proposes to amend an existing system of records by changing the name of the system from the Office of Inspector General (OIG) Hotline Allegation System (EPA–30) to the Inspector General Enterprise Management System (IGEMS) Hotline Module.

DATES: *Effective Dates:* Persons wishing to comment on this system of records notice must do so by August 29, 2011.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OEI–2011–0349, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *E-mail: oei.docket@epa.gov.*
- *Fax:* 202–566–1752.
- *Mail:* OEI Docket, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- *Hand Delivery:* OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OEI–2011–0349. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information for which disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov.* The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA

cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information for which disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the OEI Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

FOR FURTHER INFORMATION CONTACT: Chris Han, 202–566–2939

SUPPLEMENTARY INFORMATION:

I. General Information

The OIG Hotline Allegation System (EPA–30) will be changed to the Inspector General Enterprise Management System (IGEMS) Hotline Module. This system fulfills our responsibilities under Section 7 of the Inspector General Act, that is to receive and investigate complaints of information concerning the possible existence of activities constituting a violation of law, rules, or regulations, mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health or safety, and the subject of the complaints. The privacy of individuals is protected through user authentication and system roles, permissions and privileges. The system is operated and maintained by the Office of Inspector General, Office of Mission Systems.

Dated: July 8, 2011.

Malcolm D. Jackson,

Assistant Administrator and Chief Information Officer.

EPA–30

SYSTEM NAME:

Inspector General Enterprise Management System (IGEMS) Hotline Module.

SYSTEM LOCATION:

Office of Inspector General, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons who report information to the Office of Inspector General (OIG) concerning the possible existence of activities constituting a violation of law, rules, or regulations, mismanagement gross waste of funds, abuse of authority, or a substantial and specific danger to the public health or safety and the subject of the complaints; persons about whom complaints are made; and possible witnesses identified.

CATEGORIES OF RECORDS IN THE SYSTEM:

Complainants who report indications of wrongdoing, name and address of the complainant (except for anonymous complainants), date complaint received, program area, nature and subject of complaint, any additional contacts and specific comments provided by the complainant, information on the OIG disposition of the complaint, including investigative case number, preliminary inquiry number, dates of referral, reply and follow-up, status and disposition code of the complaint.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM (INCLUDES ANY REVISIONS OR AMENDMENTS):

Inspector General Act of 1978, 5 U.S.C. app. 3.

PURPOSE(S):

Fulfills OIG's responsibilities under Section 7 of the Inspector General Act, that is to receive and investigate complaints of information concerning the possible existence of activities constituting a violation of law, rules or regulations, mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health or safety, and the subject of the complaints.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS, AND THE PURPOSES OF SUCH USES:

General routine uses A, B, C, D, E, F, G, H, I, J, K, and L apply to this system. Records may also be disclosed:

1. To a Federal agency responsible for considering suspension or debarment action where such record would be relevant to such action.

2. To the Department of Justice to obtain its advice on Freedom of Information Act matters.

3. In response to a lawful subpoena issued by a Federal agency.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy files and a computer database.

RETRIEVABILITY:

By case number, complainant or subject name, and subject matter.

SAFEGUARDS:

Computer records are maintained in a secure, password protected computer system. Paper records are maintained in lockable file cabinets. All records are maintained in secure, access-controlled areas or buildings.

RETENTION AND DISPOSAL:

Records stored in this system are subject to EPA Schedule 703.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General for Mission Systems, Office of Inspector General, Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460.

NOTIFICATION PROCEDURES:

Requests to determine whether this system of records contains a record pertaining to you must be sent to the Agency's Freedom of Information Office. The address is: U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Room 6416 West, Washington, DC 20460; (202) 566–1667; E-mail: (*hq.foia@epa.gov*); Attn: Privacy Act Officer.

RECORD ACCESS PROCEDURE:

To the extent permitted under the Privacy Act of 1974, 5 U.S.C. 552a(k)(2), this system has been exempted from the provisions of the Privacy Act of 1974 that permit access and correction. However, EPA may, in its discretion, fully grant individual requests for access and correction if it determines that the exercise of these rights will not interfere with an interest that the exemption is intended to protect. The exemption from access is limited in some instances by law to information that would reveal the identity of a confidential source. Requesters will be required to provide adequate identification, such as a driver's license, employee identification

card, or other identifying document. Additional identification procedures may be required in some instances.

CONTESTING PROCEDURE:

Requests for correction or amendment must identify the record to be changed and the corrective action sought. Complete EPA Privacy Act procedures are set out in 40 CFR Part 16.

RECORD SOURCE CATEGORIES:

Complainants who are employees of EPA; employees of other Federal agencies; employees of state and local agencies; and private citizens. Records in the system come from complainants through the telephone, mail, personal interviews, and Internet Web Site. Because security cannot be guaranteed on the Internet site, complainants are advised that information they provide through the Internet site may not be confidential.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

Pursuant to 5 U.S.C. 552a(k)(2), this system is exempt from the following provisions of the Privacy Act of 1974, subject to the limitations set forth in that subsection: 5 U.S.C. 552a (c)(3); (d); (e)(1); (e)(4)(G); (e)(4)(H); and (f)(2) through (5).

[FR Doc. 2011–18161 Filed 7–18–11; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sunshine Act Notice

AGENCY HOLDING THE MEETING: Equal Employment Opportunity Commission.

DATE AND TIME: Tuesday, July 26, 2011, 9:30 a.m. Eastern Time.

PLACE: Commission Meeting Room on the First Floor of the EEOC Office Building, 131 ''M'' Street, NE., Washington, DC 20507.

STATUS: The meeting will be open to the public.

MATTERS TO BE CONSIDERED:

Open Session

1. Announcement of Notation Votes, and

2. Arrest and Conviction Records as a Barrier to Employment.

Note: In accordance with the Sunshine Act, the meeting will be open to public observation of the Commission's deliberations and voting. Seating is limited and it is suggested that visitors arrive 30 minutes before the meeting in order to be processed through security and escorted to the meeting room. (In addition to publishing notices on EEOC Commission meetings in the **Federal Register**, the Commission also provides information about Commission meetings on its Web site, *http://eeoc.gov.,* and provides a recorded announcement a week in advance on future Commission sessions.)

Please telephone (202) 663–7100 (voice) and (202) 663–4074 (TTY) at any time for information on these meetings. The EEOC provides sign language interpretation and Communication Access Realtime Translation (CART) services at Commission meetings for the hearing impaired. Requests for other reasonable accommodations may be made by using the voice and TTY numbers listed above.

CONTACT PERSON FOR MORE INFORMATION: Stephen Llewellyn, Executive Officer on (202) 663–4070.

Dated: July 15, 2011.

Stephen Llewellyn,

Executive Officer, Executive Secretariat.

[FR Doc. 2011–18308 Filed 7–15–11; 4:15 pm]

BILLING CODE 6570–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 3, 2011.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *Cooper Investments, Inc.; Teresa A. Grindstaff and Greg E. Allen, Trustees of the William H. Cooper General Trust; Teresa A. Grindstaff and Greg E. Allen, Trustees of the William H. Cooper Marital Trust; Greg E. Allen Trustee of the Greg E. Allen Trust U/I William H. Cooper; Greg E. Allen and Jane Allen, Trustees of the Greg Allen and Jane Allen Trust; Teresa A. Grindstaff, and Greg E. Allen,* all of Farmington, Missouri; to acquire control of First State Bancshares, Inc., and thereby indirectly acquire control of First State Community Bank, both in Farmington, Missouri.

Board of Governors of the Federal Reserve System, July 14, 2011.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2011–18081 Filed 7–18–11; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0155; Docket 2011–0079; Sequence 13]

Submission for OMB Review; Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), the Regulatory Secretariat (MVCB) will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding prohibition on acquisition of products produced by forced or indentured child labor.

DATES: Submit comments on or before: August 18, 2011.

ADDRESSES: Submit comments identified by Information Collection 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting ''Information Collection 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor'' under the heading ''Enter Keyword or ID'' and selecting ''Search''. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0155, Prohibition on Acquisition of Products Produced by

Forced or Indentured Child Labor''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor.

Instructions: Please submit comments only and cite Information Collection 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Clare McFadden, Procurement Analyst, Acquisition Policy Division, GSA (202) 501–0044 or e-mail *clare.mcfadden@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

This information collection complies with Executive Order 13126, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor. Executive Order 13126 requires that this prohibition be enforced within the federal acquisition system by means of: (1) A provision that requires the contractor to certify to the contracting officer that the contractor or, in the case of an incorporated contractor, a responsible official of the contractor has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract and that, on the basis of those efforts, the contractor is unaware of any such use of child labor; and (2) A provision that obligates the contractor to cooperate fully in providing reasonable access to the contractor's records, documents, persons, or premises if reasonably requested by authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice, for the purpose of determining whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under the contract.

The information collection requirements of the Executive Order are evidenced via the certification requirements delineated at FAR 22.1505, 52.212–3, 52.222–18, and 52.222–19.

To eliminate some of the administrative burden on offerors who must submit the same information to various contracting offices, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) decided to amend the Federal Acquisition Regulation (FAR) to require offerors to submit representations and certifications electronically via the Business Partner Network (BPN), unless certain exceptions apply. Online Representations and Certifications Application (ORCA) is the specific application on the BPN to replace the paper based Representations and Certifications (Reps and Certs) process. The change to the FAR was accomplished by FAR Case 2002–024. The clearance associated with this case referenced this OMB Control No. 9000–0155 and reduced the hours of burden by 35%—attributable to mandated use of ORCA. This reduction is already reflected in the figures below.

B. Annual Reporting Burden

Respondents: 500.
Responses per Respondent: 1.
Hours per Response: 0.325.
Total Burden Hours: 162.
Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Branch (MVCB), 1275 First Street, NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0155, Prohibition on Acquisition of Products Produced by Forced or Indentured Child Labor, in all correspondence.

Dated: July 7, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

[FR Doc. 2011–18088 Filed 7–18–11; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Statement of Organization, Functions, and Delegations of Authority

Part A, Office of the Secretary, Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services is being amended at Chapter AA, Immediate Office of the Secretary, as last amended at 76 FR 4703, dated January 26, 2011, and at Chapter ABC, Office for Intergovernmental Affairs, as last amended at 61 FR 24311–12, dated May 14, 1996, and 62 FR 5009–10, dated February 3, 1997 2010, and most recently amended at 66 FR 40288, dated August 2, 2001, as follows:

I. Under Chapter AA, Section AA.10 Organization, replace ''Office for Intergovernmental Affairs (ABC)'' with ''Office of Intergovernmental and External Affairs (ABC)''.

II. Under Chapter ABC, retitle all references to the ''Office for Intergovernmental Affairs'' as the ''Office of Intergovernmental and External Affairs,'' all references to the ''Director for Intergovernmental Affairs'' as the ''Director of Intergovernmental and External Affairs,'' and all references to ''IGA'' as ''IEA''.

III. Under Chapter ABC, Section ABC.00 Mission, 1st sentence, replace ''headquarters, regional, State, tribal, local and community levels'' with ''headquarters, regional, State, tribal, territorial, local and community levels''.

IV. Under Chapter ABC, Section ABC.10 Organization, insert the following at the end of the first sentence: ''The Director of Intergovernmental and External Affairs provides leadership and oversight to the following components:

- Office of the Regional Directors (AD).
- Office of External Affairs (ABC1).

V. Under Chapter ABC, Section ABC.20 Functions, 2nd paragraph, replace ''State, tribal, and local impact'' with ''State, tribal, territorial and local impact'' and ''regional, State, and local implications'' with ''regional, State, territorial and local implications''.

VI. Under Chapter ABC, Section ABC.20 Functions, 3rd paragraph, replace ''delivery of services to States and communities'' with ''delivery of services to States, territories and communities''.

VII. Under Chapter ABC, Section ABC.20 Functions, 4th paragraph, replace ''Represents the Secretary and Deputy Secretary with officials of other Federal agencies, officials of State, tribal and local governments, and nongovernmental organizations'' with ''Represents the Secretary and Deputy Secretary with officials of other Federal agencies, officials of State, tribal, territorial and local governments, and nongovernmental organizations''.

VIII. Under Chapter ABC, Section ABC.20 Functions, insert the following after the last paragraph:

1. Office of the Regional Directors (AD). *See* Chapter AD.

2. Office of External Affairs (ABC1). The Office of External Affairs (OEA) plays an important role in the implementation of the Affordable Care Act (ACA) by developing, maintaining, and enhancing relationships with a wide range of national organizations and non-governmental stakeholders to promote an understanding of HHS policies and activities related to the ACA. OEA will keep external stakeholders abreast of key developments during implementation; solicit their feedback on policies and outreach; and tap into their collective ability to disseminate information to their colleagues and the public. OEA also will serve as an internal resource within the Administration by providing guidance and information on external stakeholder needs, environmental trends, and issues.

Dated: June 20, 2011.

Kathleen Sebelius,

Secretary.

[FR Doc. 2011–17918 Filed 7–18–11; 8:45 am]

BILLING CODE 4150–04–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day–11–11IY]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Daniel L. Holcomb, CDC Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Formative Research to Support the Development of Sickle Cell Disease Educational Messages and Materials for the Division of Blood Disorders. New—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC seeks to improve the quality of life of people living with sickle cell disease (SCD). To accomplish this goal, CDC aims to address the need for educational messages and materials for adolescents, young adults, adults, and older adults living with SCD. CDC is interested in understanding the informational needs of these audiences related to the adoption of healthy behaviors and the prevention of complications associated with sickle cell disease. To develop valuable messages and materials, CDC will conduct formative focus groups with people with SCD across the country. Participants will stem from four urban centers as well as more remote, rural areas. Based on the findings from the formative focus groups, CDC will develop and test draft messages.

A total of 10 focus groups will be conducted. Eight focus groups with people with SCD would be held in four cities: Atlanta, GA; Detroit, MI; Oakland, CA; and Philadelphia, PA. Two in-person focus groups—one with males and one with females—will be conducted in each city with each target audience: Adolescents aged 15–17, young adults aged 18–25, adults aged 26–35, and older adults 36 and over. To reach more rural participants, two telephone focus groups will be conducted: One with female adolescents aged 15–17 and a second with male older adults aged 36 and older.

The focus groups will be conducted with eight to nine participants in each and will last 2 hours. As part of the focus group, participants will complete an informed consent or adolescent assent form before discussion begins. The parents of the expected 27 adolescent participants (three groups of 9 each) will fill out a permission form to provide their consent in advance of the groups. The use of trained moderators and a structured moderator's guide will ensure that consistent data are collected across the groups. In total, up to 90 people with SCD will participate in the focus group data collection. It is estimated that 120 potential participants will need to be screened to reach the target of 90 participants. The estimated time per response for screening and recruitment is 12 minutes, for a total annualized burden of 204 hours.

This request is submitted to obtain OMB clearance for one year. There is no cost to respondents other than their time.

Estimated Annualized Burden Hours

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Parents of adolescents (aged 15–17) living with SCD.	Participant Screener and Recruitment Script.	120	1	12/60	24
Young adults (aged 18–25) living with SCD.					
Adults (aged 26–35) living with SCD					
Older adults (aged 36+) living with SCD.					
Adolescents (aged 15–17) living with SCD.	Focus Group Moderator's Guide	90	1	2	180
Young adults (aged 18–25) living with SCD.					
Adults (aged 26–35) living with SCD					

Type of respondent	Form name	Number of respondents	Number responses per respondent	Average burden per response (in hours)	Total burden hours
Older adults (aged 36+) living with SCD.					
Total					204

Dated: July 13, 2011.

Daniel L. Holcomb,

Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2011–18075 Filed 7–18–11; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Announcement of Grant Award

AGENCY: Office of Community Services, ACF, HHS.

ACTION: Announcement of the Award of an Assets for Independence Grant to the United Way of Abilene, Inc., Abilene, TX.

CFDA Number: 93.602.

Statutory Authority: Authorized under the Assets for Independence Act in Title IV of the Community Opportunities, Accountability, and Training and Educational Services Human Services Reauthorization Act of 1998, Public Law 105–285, as amended.

SUMMARY: The Administration for Children and Families (ACF), Office of Community Services (OCS), Division of Community Demonstration Programs announces the award of an Assets for Independence (AFI) demonstration grant to the United Way of Abilene, Inc. of Abilene, TX in the amount of $126,974.

The purpose of this award is to enable the United Way of Abilene, Inc. to implement an Assets for Independence (AFI) project helping program participants save earned income in special-purpose, matched savings accounts called Individual Development Accounts (IDAs). Every dollar in savings deposited into an IDA by participants is matched, from $1 to $8 combined Federal and non-Federal funds, promoting savings and enabling participants to acquire a lasting economic asset. AFI project families use their IDA savings, including the matching funds, to achieve any of three objectives: Acquiring a first home; capitalizing a small business; or enrolling in postsecondary education or training.

Additionally, the United Way of Abilene, Inc. provides basic financial management training and supportive services, such as financial education on owning and managing a bank account; credit counseling and repair; guidance in accessing refundable tax credits, including the Earned Income Tax Credit and the Child Tax Credit; and specialized training in owning particular economic assets for the long term.

DATES: The project period for this award is November 1, 2011 through March 31, 2013.

FOR FURTHER INFORMATION CONTACT: James Gatz, Program Manager, Assets for Independence, Office of Community Services, Administration for Children and Families, U.S. Department of Health and Human Services, 901 D Street, SW., 5th floor East, Washington, DC 20047. Telephone: 202–401–5284; E-mail: *james.gatz@acf.hhs.gov*.

Dated: July 13, 2011.

Lynda E. Perez,

Acting Director, Division of Community Demonstration Programs, Office of Community Services.

[FR Doc. 2011–18127 Filed 7–18–11; 8:45 am]

BILLING CODE 4184–26–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Advisory Committee on Head Start Research and Evaluation

AGENCY: Office of Planning, Research and Evaluation, ACF, HHS.

ACTION: Notice.

SUMMARY: This notice announces a forthcoming meeting of a public advisory committee of ACF. The meeting will be open to the public.

Name of Committee: Advisory Committee for Head Start Research and Evaluation.

General Function of Committee: The Advisory Committee for Head Start Research and Evaluation will provide feedback on the published final report for the Head Start Impact Study, offering interpretations of the findings, discussing implications for practice and policy, and providing recommendations on follow-up research, including additional analysis of the Head Start Impact Study data. The Committee will also be asked to provide recommendations to the Secretary regarding how to improve Head Start and other early childhood programs by enhancing the use of research-informed practices in early childhood. Finally, the Committee will be asked to provide recommendations on the overall Head Start research agenda, including—but not limited to—how the Head Start Impact Study fits within this agenda. The Committee will provide advice regarding future research efforts to inform HHS about how to guide the development and implementation of best practices in Head Start and other early childhood programs around the country.

DATES: The meeting will be held from 8:30 a.m. to 5 p.m. September 21–22, 2011.

ADDRESSES: Crowne Plaza Washington National Airport, 1480 Crystal Drive, Arlington, VA 22202, Phone: (703) 416–1600.

FOR FURTHER INFORMATION CONTACT: Jennifer Brooks, Office of Planning, Research, and Evaluation, e-mail *jennifer.brooks@acf.hhs.gov* or call (202) 205–8212.

Agenda: The Committee will review information on the federal and Early Head Start programs and the children and families they serve, and learn about the latest research in the area of health and mental health, cultural and linguistic responsiveness, and other topic areas related to early childhood education and development.

Procedure: Interested persons may present data, information or views, in writing, on issues pending before the Committee. Written submissions may be made to Jennifer Brooks at *jennifer.brooks@acf.hhs.gov* on or before September 1, 2011. All written materials provided to the contact person will be shared with the Committee members.

ACF welcomes the attendance of the public at this advisory committee

meeting and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Jennifer Brooks at least seven days in advance of the meeting. Information about the Committee and this meeting can be found at the Committee Web site, *http://www.acf.hhs.gov/programs/opre/hs/advisory_com/.*

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: June 29, 2011.

George H. Sheldon,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–18098 Filed 7–18–11; 8:45 am]

BILLING CODE 4184–22–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Notice of Meeting; Administration for Native Americans

AGENCY: Administration for Children and Families, Department of Health and Human Services.

ACTION: Notice of Tribal Consultation.

SUMMARY: The Department of Health and Human Services (HHS), Administration for Children and Families (ACF) will host a tribal consultation to solicit input on the agency's programs.

DATES: August 18, 2011.

ADDRESSES: Room 800, 200 Independence Avenue, SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Lillian A. Sparks, Commissioner, Administration for Native Americans, at 202–401–5590, by e-mail at *Lillian.sparks@acf.hhs.gov* or by mail at 370 L'Enfant Promenade, SW., 2 West, Washington, DC 20447.

SUPPLEMENTARY INFORMATION:

On September 29, 2010, ACF held its first Tribal Consultation Session in 5 years. The purpose of that session was to receive input to ACF's draft Tribal Consultation Policy and ACF has been working hard to finalize that policy. ACF Principals will once again be available to speak with tribal leaders to discuss issues important to the tribes. This year's session will focus on ACF tribal program priorities and will include a listening session on tribal self-governance. Testimonies may be submitted no later than August 5, 2011, to: Lillian Sparks, Commissioner, Administration for Native Americans, 370 L'Enfant Promenade, SW., Washington, DC 20447, *anacommissioner@acf.hhs.gov.*

In addition to the Tribal Consultation Session, ACF will be hosting a Tribal Training and Technical Assistance Day to provide information about ACF programs, the grants process and financial management, technical assistance available from ACF, and ACF's Interoperability Innovation Initiative. The Tribal Training and Technical Assistance Day will take place on August 17, 2011, at the same address as the Tribal Consultation Session, listed above.

ACF is encouraging tribes to send their tribal planning officers or comparable employee to attend the Tribal Training and Technical Assistance Day. Registration for both the Tribal Training and Technical Assistance Day and the Tribal Consultation Session can be made at the following Web site address: *http://www.acfconsultation.com/.*

The Office of Child Support Enforcement (OCSE) also will be extending an invitation to tribal leaders to engage in an additional day of consultation and dialogue concerning tribal child support issues. This consultation will take place on August 19, 2011, the day after the ACF Tribal Consultation Session. It will be held in the multipurpose room on the 7th Floor of the Aerospace Building, located at 901 D Street, SW., Washington, DC 20447. Additional information will be sent out by OCSE under separate cover.

Dated: July 11, 2011.

George H. Sheldon,

Acting Assistant Secretary for Children and Families.

[FR Doc. 2011–18096 Filed 7–18–11; 8:45 am]

BILLING CODE 4184–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0341]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Applications for Food and Drug Administration Approval To Market a New Drug; Postmarketing Reports; Reporting Information About Authorized Generic Drugs; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of Friday, July 8, 2011 (76 FR 40374). The document announced that a proposed collection information had been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995. The document was published with an incorrect docket number. This document corrects that error.

FOR FURTHER INFORMATION CONTACT: Joyce Strong, Office of Policy, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3208, Silver Spring, MD 20993–0002, 301–796–9148.

SUPPLEMENTARY INFORMATION: In FR Doc. 2011–17141, appearing on page 40374 in the **Federal Register** of Friday, July 8, 2011, the following correction is made:

1. On page 40374, in the first column, in the heading of the document, ''[Docket No. FDA–2011–N–0237]'' is corrected to read ''[Docket No. FDA–2008–N–0341]''.

Dated: July 14, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18143 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0478]

General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee; Amendment of Notice

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

The Food and Drug Administration (FDA) is announcing an amendment to the notice of meeting of the General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee. This meeting was announced in the **Federal Register** of July 7, 2011 (76 FR 39882). The amendment is being made to reflect a change in the *Contact Person* portion of the document. There are no other changes.

FOR FURTHER INFORMATION CONTACT: James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1609, Silver Spring, MD 20993–0002, 301–796–6313, or FDA Advisory Committee Information Line,

1–800–741–8138 (301–443–0572 in the Washington DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 7, 2011, FDA announced that a meeting of the General and Plastic Surgery Devices Panel of the Medical Devices Advisory Committee would be held on August 30 and 31, 2011. On page 39883, in the first column, the *Contact Person* portion of the document is changed to read as follows:

Contact Person: James Swink, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1609, Silver Spring, MD 20993–0002, 301–796–6313, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to the advisory committees.

Dated: July 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18064 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Science Board Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Science Board to the Food and Drug Administration (Science Board).

General Function of the Committee: The Science Board provides advice primarily to the Commissioner of Food and Drugs and other appropriate officials on specific complex and technical issues, as well as emerging issues within the scientific community in industry and academia. Additionally, the Science Board provides advice to the Agency on keeping pace with technical and scientific evolutions in the fields of regulatory science, on formulating an appropriate research agenda, and on upgrading its scientific and research facilities to keep pace with these changes. It will also provide the means for critical review of Agency-sponsored intramural and extramural scientific research programs.

Date and Time: The meeting will be held on Friday, August 19, 2011, from 9 a.m. to 3 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (rm. 1503), Silver Spring, MD 20993–0002. For those unable to attend in person, the meeting will also be Web cast. The link for the Web cast is available at *https://collaboration.fda.gov/scienceboard/*. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm*; under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Martha Monser, Office of the Chief Scientist, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 4286, Silver Spring, MD 20993–0002, 301–796–4627, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On August 19, 2011, the Science Board will discuss the FDA's draft Strategic Plan for Regulatory Science. The Board will be provided with an update on the FDA's Medical Countermeasures Initiative program plans. The Board will also initiate the charges to the subcommittees for: (1) A science review of the Center for Devices and Radiological Health, and (2) a Medical and Biological Engineering review.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting.

Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before Friday, August 12, 2011. Oral presentations from the public will be scheduled between approximately 1 and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before Thursday, August 4, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by Friday, August 5, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Martha Monser, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/oc/advisory/default.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 12, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18063 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Arthritis Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Arthritis Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 13, 2011, from 8 a.m. to 5:30 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Building 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Philip A. Bautista, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, e-mail: *AAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), and follow the prompts to the desired center or product area. Please call the Information Line for up-to-date information on this meeting. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site and call the appropriate advisory committee hot line/phone line to learn about possible modifications before coming to the meeting.

Agenda: On September 13, 2011, the committee will discuss the anti-nerve growth factor (Anti-NGF) drug class that is currently under development and the safety issues possibly related to these drugs. These drugs are being developed for the treatment of a variety of chronic painful conditions including osteoarthritis, chronic lower back pain, diabetic peripheral neuropathy, post-herpetic neuralgia, chronic pancreatitis, endometriosis, interstitial cystitis, vertebral fracture, thermal injury, and cancer pain. The committee will be asked to determine whether reports of joint destruction represent a safety signal related to the Anti-NGF class of drugs, and whether the risk benefit balance for these drugs favors continued development of the drugs as analgesics.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before August 29, 2011. Oral presentations from the public will be scheduled between approximately 1:30 and 2:30 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before August 19, 2011. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by August 22, 2011.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Philip A. Bautista at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18062 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Quarantine Release Errors in Blood Establishments; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled: ''Quarantine Release Errors in Blood Establishments.'' The purpose of this public workshop is to provide a forum for discussion of quarantine release errors (QREs) and provide FDA and industry with information necessary to reduce the rates of QREs. The workshop will focus on the extent and characteristics of QREs in blood establishments and the specifications of blood establishment computer software

(BECS) as they relate to inventory control. The public workshop has been planned in partnership with the Department of Health and Human Services (HHS) Office of the Assistant Secretary for Health, America's Blood Centers, and AABB. This public workshop will include presentations and panel discussions by experts knowledgeable in this field from government Agencies and industry.

Date and Time: The public workshop will be held on September 13, 2011, from 8:30 a.m. to 5 p.m.

Location: The public workshop will be held at the Universities at Shady Grove Conference Center, 9630 Gudelsky Dr., Rockville, MD 20850–5820, 301–738–6000.

Contact Person: Rhonda Dawson, Center for Biologics Evaluation and Research (HFM–302), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6129, FAX: 301–827–2843, e-mail: *rhonda.dawson@fda.hhs.gov.*

Registration: Mail, fax, or e-mail your registration information (including name, title, firm name, address, telephone, and fax numbers) to Rhonda Dawson (see *Contact Person*) by September 1, 2011. There is no registration fee for the public workshop. Early registration is recommended because seating is limited. Registration on the day of the public workshop will be provided on a space available basis beginning at 7:30 a.m.

If you need special accommodations due to a disability, please contact Rhonda Dawson (see *Contact Person*) at least 7 days in advance.

SUPPLEMENTARY INFORMATION: QREs refer to the inadvertent release of blood or blood components either before completion of testing and determination that all other criteria affecting the safety, purity, or potency of the product have been met, or despite findings that would render the blood or blood components unsuitable for release. Although QREs that result in the distribution of blood or blood components are required to be reported to FDA as biologic product deviation reports (BPDRs), the amount of information provided in BPDRs varies and often represents a summary of information rather than a detailed description and analysis of the problem. Thus, the root causes of QREs are not known with certainty. Further, the rates of QREs are also not known with certainty, and actions necessary to correct and prevent them are unclear.

There has been a recent focus on QREs related to the release of units with incomplete or absent testing for transfusion-transmitted infectious diseases. On June 10 and 11, 2010, the HHS Advisory Committee on Blood Safety and Availability (the Committee) met to discuss the current FDA blood donor deferral policy on men who have sex with other men. While the Committee recommended that the current deferral policy not be changed at the present time, it found the current policy to be suboptimal in permitting some potentially high risk donations while preventing some low risk donations. The Committee made a number of recommendations and indicated that HHS should take action to investigate and reduce the risk of QREs in blood collection establishments.

This public workshop will serve as a forum for discussion of QREs and provide FDA and industry with information necessary to reduce the rates of QREs. The public workshop presentations and panel discussions will: (1) Review recent BPDR data to better determine the root causes for QREs and identify activities that could address those causes; (2) evaluate the use of 510(k) cleared BECS or implementation of BECS performance standards in reducing the rate of QREs; and (3) explore other potential strategies to address QREs. The public workshop will conclude with a summary of the issues discussed.

Transcripts: Please be advised that as soon as possible after a transcript of the public workshop is available, it will be accessible on the Internet at: *http://www.fda.gov/BiologicsBloodVaccines/NewsEvents/WorkshopsMeetingsConferences/TranscriptsMinutes/default.htm.* Transcripts of the public workshop may also be requested in writing from the Division of Freedom of Information (ELEM–1029), Food and Drug Administration, 12420 Parklawn Dr., Rockville, MD 20857.

Dated: July 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18093 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0002]

Effects of Ischemia Reperfusion Injury on Outcomes in Kidney Transplantation; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop to discuss the effects of ischemia/reperfusion injury (IRI) on outcomes in kidney transplantation. This public workshop is intended to obtain information from health care providers, academia, and industry on various aspects of the pathophysiology, clinical management, and outcomes following IRI. The meeting will include a discussion of animal models, devices, and clinical trial design. The input from this public workshop will help in developing topics for further discussion and may serve to inform recommendations on clinical trial design for products for the mitigation of IRI and/or for the prophylaxis and/or treatment of delayed graft function (DGF) and related conditions in kidney transplant recipients.

Date and Time: The public workshop will be held on September 8, 2011, from 9 a.m. to 6 p.m. and on September 9, 2011, from 8 a.m. to 3 p.m.

Location: The public workshop will be held at the Crowne Plaza, 8777 Georgia Ave., Silver Spring, MD 20910, 301–589–0800. Seating is available only on a first-come-first-served basis.

Contact Persons: Christine Moser or Ramou Mauer, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6209, Silver Spring, MD 20993–0002, 301–796–1300 or 301–796–1600.

Registration: Registration is free for the public workshop. Interested parties are encouraged to register early because space is limited. Seating will be available on a first-come-first-served basis. To register electronically, e-mail registration information (including name, title, firm name, address, telephone, and fax number) to *IRIworkshop@fda.hhs.gov.* Persons without access to the Internet can call Christine Moser, 301–796–1300, or Ramou Mauer, 301–796–1600, to register.

Persons needing a sign language interpreter or other special accommodations should notify Christine Moser or Ramou Mauer (see *Contact Persons*) at least 7 days in advance.

SUPPLEMENTARY INFORMATION: FDA is announcing a public workshop regarding effects of IRI on outcome in kidney transplantation and medical product development for the prevention and/or treatment of DGF in kidney transplant recipients. This public workshop will include scientific discussion on the following topics:

• Pathophysiology and contributing factors to IRI,
• Downstream measures of response to IRI,
• Current management strategies and outcomes in patients with DGF,
• Animal models in IRI and DGF,
• Device issues related to DGF, and
• Clinical trial issues related to the recipient in development of medical products for the management of DGF and related conditions in kidney transplantation.

The Agency encourages individuals, patient advocates, industry, consumer groups, health care professionals, researchers, and other interested persons to attend this public workshop.

Transcripts: Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, Rm. 6–30, Rockville, MD 20857.

Transcripts will also be available on the Internet at *http://www.fda.gov/Drugs/NewsEvents/ucm206132.htm* approximately 45 days after the workshop.

Dated: July 13, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–18095 Filed 7–18–11; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Correction

In notice document 2011–16127 appearing on page 37821 in the issue of Tuesday, June 28, 2011, make the following correction:

In the table on page 37821, in column one, row three, ''4353''should read ''2353.'' A corrected table should appear as set forth below.

The annual estimate of burden is as follows:

Respondents	Number of respondents	Number of responses/ respondent	Average hours per response	Total burden hours
Survey respondents	2000	1	.166	332
Screened households	2353	1	.016	38
Total	2353			370

[FR Doc. C1–2011–16127 Filed 7–18–11; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, e-mail *paperwork@hrsa.gov* or call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) The proposed collection of information for the proper performance of the functions of the Agency; (b) the accuracy of the Agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Proposed Project: Maternal and Child Health Services Title V Block Grant Program Guidance and Forms for the Title V Application/Annual Report (OMB No. 0915–0172)—[Revision]

The Health Resources and Services Administration (HRSA) proposes to revise the *Maternal and Child Health Services Title V Block Grant Program—Guidance and Forms for the Application/Annual Report.* The guidance is used annually by the 50 states and 9 jurisdictions in making application for Block Grants under Title V of the Social Security Act and in preparing the required annual report. The proposed revisions follow and build on extensive consultation received from a workgroup convened to provide suggestions to improve the guidance and forms.

The changes in this edition of the Maternal and Child Health Services Title V Block Grant Program Guidance and Forms for the Title V Application/Annual Report include the following proposed revisions: (1) The requirements for reporting on the health status indicators and health systems capacity indicators were rewritten to reduce the reporting burden to the states; (2) instructions for completing Form 7, Number of Individuals Served, have been clarified to assist states in more accurately estimating the number of individuals who receive Title V services; (3) a resource tool has been added to assist states in assessing the level of family participation in Children with Special Health Care Needs Programs (Form 13); and (4) the detail sheets for the performance measures, outcome measures, health systems capacity indicators and health status indicators have been updated with corresponding Healthy People 2020 Objectives. In addition, efficiencies through use of the electronic application are identified for states to reduce their efforts in completing the application.

The estimated average annual burden is as follows:

Reporting document	Number of respondents	Responses per respondent	Total responses	Burden per response	Total burden hours
Application and Report without Needs Assessment (2012, 2013 & 2014)	59	1	59	246	14,514
Total	59	1	59	246	14,514

E-mail comments to *paperwork@hrsa.gov* or mail the HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of this notice.

Dated: July 13, 2011.

Reva Harris,

Acting Director, Division of Policy and Information Coordination.

[FR Doc. 2011–18105 Filed 7–18–11; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel, Consortium of Lung Repair and Regeneration: Building the Foundation, Administration and Coordination Center.

Date: August 5, 2011.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: YingYing Li-Smerin, MD, PhD, Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7184, Bethesda, MD 20892–7924, 301–435–0277, *lismerin@nhlbi.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18147 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health Cancellation of Meeting

Notice is hereby given of the cancellation of the National Institute of Mental Health Special Emphasis Panel, July 20, 2011, 1:30 p.m. to July 20, 2011, 2:30 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD, 20852 which was published in the **Federal Register** on July 7, 2011, 76FR39884.

This meeting is being canceled due to the lone application being withdrawn.

Dated: July 12, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18059 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Cancer Therapies.

Date: October 13–14, 2011.

Time: 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/DC Rockville, Hotel and Executive Meeting Center, 1750 Rockville Pike, Rockville, MD 20582.

Contact Person: Delia Tang, MD, Scientific Review Officer, National Cancer Institute, National Institutes of Health, 6116 Executive Blvd., Room 8123, MSC 8328, Bethesda, MD 20892, 301–496–2330, *tangd@mail.nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel, K08 Grant Applications.

Date: October 13, 2011.

Time: 5 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Sergei Radaev, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 8113, Bethesda, MD 20892, 301–435–5655, *sradaev@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18142 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2) 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 purpose of this meeting is to evaluate requests for preclinical development resources for potential new therapeutics for the treatment of cancer. The outcome of the evaluation will provide information to internal NCI committees that will decide whether NCI should support requests and make available contract resources for development of the potential therapeutic to improve the treatment of various forms of cancer. The research proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the proposed research projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, NCI Experimental Therapeutics Program (NExT).

Date: August 10–11, 2011.

Time: 8:30 a.m.– 4:30 p.m.

Agenda: To evaluate the NCI Experimental Therapeutics Program Portfolio.

Place: Marriott North Conference Center, 5701 Marinelli Road, Rockville, MD 20852.

Contact Person: Dr. Barbara Mroczkowski, Executive Secretary, NCI Experimental Therapeutics Program, National Cancer Institute, NIH, 31 Center Drive, Room 3A44, Bethesda, MD 20817, (301) 496–4291, *mroczkowskib@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18141 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, The NIA Health and Retirement Study.

Date: August 18, 2011.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alfonso R. Latoni, PhD, Deputy Chief and Scientific Review Officer, Scientific Review Branch, National Institute on Aging, 7201 Wisconsin Avenue, Suite 2C218, Bethesda, MD 20892, 301–402–7702, *Alfonso.Latoni@nih.gov*.

Name of Committee: National Institute on Aging Special Emphasis Panel, Aging Bone and Muscle.

Date: October 14, 2011.

Time: 12:15 p.m. to 4:15 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rebecca J. Ferrell, PhD, Scientific Review Officer, National Institute on Aging, Gateway Building Rm. 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, 301–402–7703, *ferrellrj@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18140 Filed 7–18–11; 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, Molecular Therapeutics for the CNS.

Date: August 8, 2011.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Deborah L Lewis, PhD, 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*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: HIV and Opportunistic Infections.

Date: August 9–10, 2011.

Time: 10 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Robert Freund, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, 301–435–1050, *freundr@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: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18148 Filed 7–18–11; 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 Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Menopause and Metabolic Disorders.

Date: August 2, 2011.

Time: 1 to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact: Suzanne Ryan, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3139, MSC 7770, Bethesda, MD 20892, (301) 435–1712, *ryansj@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: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18146 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Initial Review Group, Subcommittee I—Career Development.

Date: October 12–13, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Crystal City, 2799 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Sergei Radaev, PhD, Scientific Review Officer, Resources and Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd, Rm 8113, Bethesda, MD 20892, 301–435–5655, *sradaev@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: July 13, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18145 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Anticonvulsant Screening Program.

Date: July 22, 2011.

Time: 1 p.m. to 5 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–5388, *wiethorp@ninds.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 11, 2011.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2011–18058 Filed 7–18–11; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–3318–EM; Docket ID FEMA–2011–0001]

North Dakota; Amendment No. 5 to Notice of an Emergency Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of an emergency declaration for the State of North Dakota (FEMA–3318–EM), dated April 7, 2011, and related determinations.

DATES: *Effective Date:* July 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this emergency is closed effective July 1, 2011.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used

for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–18102 Filed 7–18–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1975–DR; Docket ID FEMA–2011–0001]

Arkansas; Amendment No. 10 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Arkansas (FEMA–1975–DR), dated May 2, 2011, and related determinations.

DATES: *Effective Date:* July 1, 2011.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Office of Response and Recovery, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Arkansas is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of May 2, 2011.

Craighead County for Public Assistance, including direct Federal Assistance.

Pulaski County for Public Assistance [Categories A–G], including direct Federal Assistance (already designated for Individual Assistance and assistance for emergency protective measures [Category B], limited to direct Federal Assistance).

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.)

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2011–18103 Filed 7–18–11; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Automated Commercial Environment (ACE): Announcement of a New Start Date for the National Customs Automation Program Test of Automated Manifest Capabilities for Ocean and Rail Carriers

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: General notice.

SUMMARY: U.S. Customs and Border Protection (CBP) is announcing that the National Customs Automation Program (NCAP) test concerning the transmission of required advance ocean and rail data through the Automated Commercial Environment is scheduled to begin no earlier than August 1, 2011. CBP previously announced that this test would begin no earlier than December 22, 2010. This notice advises the public of the updated timeline for the test and announces that applications are still being accepted.

DATES: The test will commence no earlier than August 1, 2011 and will run for no less than 90 days. CBP is currently accepting applications to participate and will continue to accept applications throughout the duration of the test. Selected applicants will be notified by CBP and will then undergo a certification process prior to beginning the test. Comments concerning this notice and all aspects of the announced test may be submitted at any time during the test period.

ADDRESSES: Applications to participate in the test should be sent to Susan Maskell at *Susan.Maskell@dhs.gov.* Please describe in the body of the e-mail any past electronic data interchange (EDI) history with CBP. Written comments concerning program and policy issues should be sent to *ACEM1POLICY@cbp.dhs.gov.* Please indicate in the subject line whether the comment relates to ocean carriers, rail carriers, or both.

FOR FURTHER INFORMATION CONTACT: Interested parties should direct any questions to their assigned Client Representative. Interested parties without an assigned Client Representative should direct their questions to the Client Representative Branch at 571–468–5500.

SUPPLEMENTARY INFORMATION:

Background

Certain ocean and rail data is required to be transmitted in advance of arrival through a CBP-approved electronic data interchange (EDI).The data includes the advance cargo information required by section 343 of the Trade Act of 2002, as amended by the Maritime Transportation Security Act of 2002 (*See* 68 FR 68140, December 5, 2003), and the advance data ocean carriers are required to provide pursuant to the importer security filing and additional carrier requirements interim final rule, commonly known as 10+2 (*See* 73 FR 71730, November 25, 2008).[1] Currently, the Automated Commercial System (ACS) is the CBP-approved EDI through which this required data must be transmitted.

New Start Date for NCAP Test

On October 20, 2010, CBP issued a **Federal Register** notice announcing a National Customs Automation Program (NCAP) test to allow ocean and rail data to be transmitted through the Automated Commercial Environment (ACE) and scheduled the test to commence no earlier than December 22, 2010. *See* 75 FR 64737. Due to programming delays, the test will begin no earlier than August 1, 2011.

For complete information on the test, including specifics on eligibility criteria, test procedures, and the application process, which is still ongoing, please refer to the October 20, 2010 notice.

[1] For specific information about the requirements to provide advance cargo information to CBP, please see the following sections of title 19 of the Code of Federal Regulations (CFR): 4.7 Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration; 4.7a Inward manifest; information required; alternative forms; 4.7c Vessel stow plan; 4.7d Container status messages, 123.91 Electronic information for rail cargo required in advance of arrival; and part 149 Importer Security Filing.

Next Steps

After the successful completion of the test, CBP plans to publish a document in the **Federal Register** announcing that ACE will be the only CBP-approved EDI for transmitting required advance ocean and rail data. CBP plans to provide an appropriate transitional period to allow all affected users adequate time to transition to ACE.

Dated: July 13, 2011.

Thomas Winkowski,

Assistant Commissioner, Office of Field Operations.

[FR Doc. 2011–18089 Filed 7–18–11; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5480–N–67]

Notice of Submission of Proposed Information Collection to OMB Indian Housing Block Grants (IHBG) Program Reporting

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Recipients of Indian Housing Block Grant (IHBG) funds provide plans for low-income housing programs in their communities and submit quarterly reports on funds drawn. Recipients may submit information to correct and/or challenge data used in annual housing assistance formula allocations. Additional requirements have been added: Recipients may purchase insurance from a nonprofit insurance entity approved by HUD. These entities must submit annual audit and actuarial reviews to HUD annually.

DATES: *Comments Due Date: August 18, 2011.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2577–0218) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; e-mail *OIRA-Submission@omb.eop.gov fax:* 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Indian Housing Block Grants (IHBG) Program Reporting.

OMB Approval Number: 2577–0218.

Form Numbers: HUD–4117, HUD–52735–AS, HUD–52737, HUD–4119.

Description of the Need for the Information and its Proposed Use:

Recipients of Indian Housing Block Grant (IHBG) funds provide plans for low-income housing programs in their communities and submit quarterly reports on funds drawn. Recipients may submit information to correct and/or challenge data used in annual housing assistance formula allocations. Additional requirements have been added: Recipients may purchase insurance from a nonprofit insurance entity approved by HUD. These entities must submit annual audit and actuarial reviews to HUD annually.

Frequency of Submission: On occasion, Annually.

	Number of respondents	Annual responses	×	Hours per response	=	Burden hours
Reporting Burden	366	1		144.65		52,941

Total Estimated Burden Hours: 52,941.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: July 13, 2011.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2011–18048 Filed 7–18–11; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Compact.

SUMMARY: This notice publishes approval of the Tribal-State Compact between the State of Oklahoma and Kialegee Tribal Town of Oklahoma.

DATES: *Effective Date:* July 19, 2011.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Assistant Secretary—Indian Affairs, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA), Public Law 100–497, 25 U.S.C. 2710, the Secretary of the Interior shall publish in the **Federal Register** notice of the approved Tribal-State Compact for the purpose of engaging in Class III gaming activities on Indian lands. This Compact authorizes the Kialegee Tribal Town of Oklahoma to engage in certain Class III gaming activities, provides for certain geographical exclusivity, limits the number of gaming machines at existing

racetracks, and prohibits non-tribal operation of certain machines and covered games.

Dated: July 8, 2011.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. 2011–18079 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Osage Nation of Oklahoma

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final agency determination.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately 7.5 acres of land, known as the Skiatook Parcel, into trust for the Osage Nation of Oklahoma on July 8, 2011.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS–3657 MIB, 1849 C Street, NW., Washington, DC 20240; Telephone (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1 and is published to comply with the requirements of 25 CFR part 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On July 8, 2011, the Assistant Secretary—Indian Affairs decided to accept approximately 7.5 acres of land into trust for the Osage Nation of Oklahoma under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465. The 7.5 acres are located within the former reservation boundaries of the Osage Nation in Osage County, Oklahoma. The parcel is currently used for gaming.

The 7.5 acre parcel located in Osage County, Oklahoma is described as follows:

A tract of land lying in the SE/4 NE/4 of Section 19, Township 22 North, Range 12 East, of the Indian Meridian, Osage County, Oklahoma, more particularly described as follows: Commencing at the Southwest Corner of the SE/4 NE/4 of Section 19; thence N0°03′32″ W along the West line of the SE/4 NE/4 a distance of 46.44 feet to a point intersecting the North Right-Of-Way line of Oklahoma State Highway No. 20 and the Point of Beginning. Thence continuing N0°03′32″ W a distance of 442.25 feet; thence S89°52′15″ E a distance of 738.93 feet; thence S0°01′46″ E a distance of 442.25 feet to the point on the North right-of-way line of said Highway 20; thence N89°52′15″ W along said right-of-way line a distance of 738.71 feet to the Point of Beginning.

Containing 7.5 acres, more or less. SURFACE ONLY

Dated: July 8, 2011.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. 2011–18072 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Osage Nation of Oklahoma

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final agency determination.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately 15 acres of land, known as ''OMDE Ponca City,'' into trust for the Osage Nation of Oklahoma on July 8, 2011.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS–3657 MIB, 1849 C Street, NW., Washington, DC 20240; Telephone (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1 and is published to comply with the requirements of 25 CFR 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On July 8, 2011, the Assistant Secretary—Indian Affairs decided to accept approximately 15 acres of land into trust for the Osage Nation of Oklahoma under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465.

The 15 acres are located in Osage County, Oklahoma and described as follows:

A tract of land lying in the South Half of the Southwest Quarter (SW/4) of Section Thirty-six (36), Township Twenty-six (26) North, Range Two (2) East of the Indian Meridian, described as beginning at a point Twenty-five (25) feet West of the Southeast corner of the South Half of said Southwest Quarter (SW/4), thence North along the West line of the roadway theretofore granted to Osage County, Oklahoma, a distance of 808 feet, thence West 808 feet; thence South 808 feet; thence East along the South line of said South half of the Southwest Quarter (SW/4) distance of 808 feet to the place of beginning (together with the perpetual right of ingress and egress over and across the 25 foot strip of ground adjoining on the East and now used as a public road under recorded easement held by Osage County), less and except the portion of property deeded to the State of Oklahoma as described in the deed recorded in Warranty Deed Book 106, Page 631, Osage County.

Dated: July 8, 2011.

Larry Echo Hawk,

Assistant Secretary, Indian Affairs.

[FR Doc. 2011–18076 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–04–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Land Acquisitions; Osage Nation of Oklahoma

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of final agency determination.

SUMMARY: The Assistant Secretary—Indian Affairs made a final agency determination to acquire approximately 27.66 acres of land, known as ''OMDE Tulsa,'' into trust for the Osage Nation of Oklahoma on July 8, 2011.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Bureau of Indian Affairs, MS–3657 MIB, 1849 C Street, NW., Washington, DC 20240; Telephone (202) 219–4066.

SUPPLEMENTARY INFORMATION: This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.1 and is published to comply with the requirements of 25 CFR part 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust at least 30 days prior to signatory acceptance of the land into trust. The purpose of the 30-day waiting period in 25 CFR 151.12(b) is to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes and individual Indians before transfer of title to the property occurs. On July 8, 2011, the Assistant Secretary—Indian Affairs decided to accept approximately 27.66 acres of land into trust for the Osage Nation of Oklahoma under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. 465. The 27.66 acres are located within the former reservation boundaries of the Osage Nation in Osage County, Oklahoma. The parcel is currently used for gaming. The 27.66 acre parcel located in Osage County, Oklahoma is described as follows:

Surface Only In and To:

All of lot 3 (NW/4 SW/4) in Section fourteen (14), Township twenty (20) North, Range twelve (12) East of the Indian Base and Meridian, Osage County, State of Oklahoma, According to the United States Government survey thereof, Less and Except the South two hundred twenty-eight and five tenths (228.5) feet thereof and any overlapping portion of the deed recorded in Book 616 at Page 295:

AND

TRACT OF LAND LOCATED IN Section fifteen (15), Township twenty (20) North, Range twelve (12) East of the Indian Base and Meridian, Osage County, State of Oklahoma, according to the United States Government survey thereof, described as follows: Commencing at the Northwest corner of the SE/4 NE/4; Thence East along the North line of the SE/4 NE/4 a distance of 413 feet; Thence South and parallel to the West line of the SE/4 NE/4 a distance of 1319.11 feet to a point on the South line of the SE/4 NE/4, said point also being the point of beginning of said tract of land; Thence continuing South and parallel to the West line of the NE/4 SE/4 a distance of 869.92 feet; Thence East and parallel to the South line of the NE/4 SE/4 a distance of 30 feet; Thence South and parallel to the West line of the NE/4 SE/4 a distance of 300 feet; Thence West and parallel to the South line of the NE/4 SE/4 a distance of 80 feet; Thence South and parallel to the West line of the NE/4 SE/4 a distance of 150 feet to a point on the South line of the NE/4 SE/4 363 feet East of the Southwest corner of the NE/4 SE/4; Thence in a Northeasterly direction on a straight line a distance of 631.7 feet more or less to a point 370 feet West and 228.5 feet North of the Southeast corner of the NE/4 SE/4; Thence East and parallel with the South line of the NE/4 SE/4 a distance of 370 feet to a point on the East line of the NE/4 SE/4, said point being a distance of 228.5 feet North of the Southeast corner of the NE/4 SE/4; Thence North along the East line of the NE/4 SE/4 a distance of 1092.27 feet to the Northeast corner of the NE/4 SE/4; Thence West along the North line of the NE/4 SE/4 a distance of 906.11 feet to the point of Beginning of said tract of land according to the survey of May 8, 2003, as revised as of October 29, 2010, by Sisemore, Weisz and Associates, Less and except any overlapping portions of deeds recorded in Book 91 at page 479, Book 616 at page 295, and Book 1311 at page 513.

To have and to hold said described premises unto the said party of the second part, heirs and assigns forever, free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature. Grantor warrants title to the above described property.

Dated: July 8, 2011.

Larry Echo Hawk,

Assistant Secretary—Indian Affairs.

[FR Doc. 2011–18071 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLID9570000.LL14200000.BJ0000]

Idaho: Filing of Plats of Survey

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of surveys.

SUMMARY: The Bureau of Land Management (BLM) has officially filed the plats of survey of the lands described below in the BLM Idaho State Office, Boise, Idaho, effective 9 a.m., on the dates specified.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho, 83709–1657.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Land Management to meet their administrative needs. The lands surveyed are:

The plat constituting the entire survey record of the dependent resurvey and the subdivision of sections 10 and 15, T. 14 N., R. 28 E., Boise Meridian, Idaho, Group Number 1332, was accepted April 27, 2011.

The plat constituting the entire survey record of the dependent resurvey and the subdivision of section 7, T. 13 N., R. 39 E., Boise Meridian, Idaho, Group Number 1329, was accepted April 27, 2011.

The field notes representing the remonumentation of the cor. of secs. 16, 17, 20, and 21, T. 8 N., R. 3 E., Boise Meridian, Idaho, Group Number 1000, was approved April 29, 2011.

The plats constituting the dependent resurvey of a portion of the east boundary, T. 34 N., R. 3 E., and the dependent resurvey of portions of the south boundary and subdivisional lines, T. 35 N., R. 3 E., Boise Meridian, Idaho, Group Number 1220, were accepted May 4, 2011.

The plat representing the dependent resurvey of a portion of the subdivisional lines and the 1910 meanders of the right bank of the Snake River in section 8, and the subdivision of sections 8 and 17, and the survey of the 2009–2010 meanders of the full pool elevation line of Brownlee Reservoir in section 8, T. 11 N., R. 7 W., Boise Meridian, Idaho, Group Number 1313, was accepted May 9, 2011.

The supplemental plats prepared to show amended lottings in secs. 12 and 13, T. 17 N., R. 4 W. and sec. 7, T. 17 N., R. 3 W., Boise Meridian, Idaho, Group Number 1341, were accepted June 24, 2011.

Dated: July 12, 2011.

Bruce E. Ogonowski,

Acting Chief Cadastral Surveyor for Idaho.

[FR Doc. 2011–18128 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[L58820000.PH0000.LXRSMA990000; HAG 11–0261]

Notice of Public Meeting, Medford District Resource Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Secure Schools and Community Self-Determination Act and the Federal Advisory Committee Act, the U.S.

Department of the Interior, Bureau of Land Management (BLM) Medford District Resource Advisory Committee (RAC) will meet as indicated below.

DATES: The meetings will begin 8:30 a.m., P.D.T., on August 10, August 24, August 31, and/or September 7, 2011, as required by workload.

ADDRESS: The Medford RAC will meet at the Medford Interagency Office, 3040 Biddle Road in Medford, Oregon.

FOR FURTHER INFORMATION CONTACT: Jim Whittington, BLM Medford District Public Affairs Officer, 3040 Biddle Road, Medford, Oregon 97504 or via phone at (541) 618–2220 or via electronic mail at *jim_whittington@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1 (800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The meeting agenda includes decisions on Title II project submissions and other matters as may reasonably come before the council. The public is welcome to attend all portions of the meeting and may make oral comments to the Council at 9:30 a.m., P.D.T., on August 10, 2011, at the meeting location. Those who verbally address the Medford RAC are asked to provide a *written* statement of their comments or presentation. Unless otherwise approved by the RAC Chair, the public comment period will last no longer than 30 minutes, and each speaker may address the RAC for a maximum of three minutes. If reasonable accommodation is required, please contact the BLM's Medford District Public Affairs Officer at (541) 618–2220 as soon as possible.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dayne Barron,

District Manager, BLM Medford District Office.

[FR Doc. 2011–18129 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO922000–L13100000–FI0000; COC64399]

Notice of Proposed Reinstatement of Terminated Oil and Gas Lease COC64399

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of proposed reinstatement of terminated oil and gas lease.

SUMMARY: Under the provisions of 30 U.S.C. 188(d) and (e), and 43 CFR 3108.2–3(a) and (b)(1), the Bureau of Land Management (BLM) received a petition for reinstatement of oil and gas lease COC64399 from Encana Oil and Gas (USA), for lands in Garfield County, Colorado. The petition was filed on time and was accompanied by all the rentals due since the date the lease terminated under the law.

FOR FURTHER INFORMATION CONTACT: Milada Krasilinec, BLM Land Law Examiner, Fluid Minerals Adjudication, at (303) 239–3767.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The lessee has agreed to the amended lease terms for rentals and royalties at rates of $10 per acre or fraction thereof, per year and 16 ⅔ percent, respectively. The lessee has paid the required $500 administrative fee and $163 to reimburse the Department for the cost of this **Federal Register** notice. The lessee has met all the requirements for reinstatement of the lease as set out in Section 31(d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), and the BLM is proposing to reinstate lease COC64399 effective March 1, 2011, under the original terms and conditions of the lease and the increased rental and royalty rates cited above.

Anna Marie Burden,

Acting State Director.

[FR Doc. 2011–18110 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CACA–17905, LLCAD06000 L51010000 ER0000 LVRWB09B1820]

Notice of Availability of the Record of Decision for the Southern California Edison Company Devers-Palo Verde No. 2 Transmission Line Project, California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) and the Department of Agriculture United States Forest Service (USFS) announces the availability of the Record of Decision (ROD) for the Devers-Palo Verde No. 2 Transmission Line Project located in southern California. The Palm Springs Field Manager signed the ROD, which constitutes the final decision of the BLM and makes the right-of-way decision effective immediately.

ADDRESSES: Copies of the ROD are available upon request from the Field Manager, Palm Springs-South Coast Field Office, 1201 Bird Center Drive, Palm Springs, California 92262–8001. The ROD is also available upon request from the San Bernardino National Forest Supervisor's Office, 602 S. Tippecanoe Avenue, San Bernardino, California 92408 or at the following Web site: *http://www.blm.gov/ca/st/en/fo/palmsprings.html.*

FOR FURTHER INFORMATION CONTACT: Holly L. Roberts at (760) 833–7100, e-mail *holly_roberts@ca.blm.gov,* address 1201 Bird Center Drive, Palm Springs, California 92262–8001; or Robert H. Hawkins at (707) 562–9143 or e-mail: *rhawkins@fs.fed.us*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: In 2005, Southern California Edison Company (SCE) proposed to construct a new 230-mile-long, 500-kilovolt (kV) electrical transmission line between the SCE's Devers substation located near Palm Springs, California, and the Harquahala generating station switchyard, located near the Palo Verde Nuclear Generating Station west of Phoenix, Arizona. A 50-mile 230-kV transmission line upgrade was included between the Devers

Substation west to San Bernardino, California. A Notice of Intent to prepare an Environmental Impact Report (EIR)/ Environmental Impact Statement (EIS) was published in the **Federal Register** on December 7, 2005. The BLM, together with the California Public Utilities Commission (CPUC) and the USFS prepared a joint EIR/EIS for this project. The Final EIR/EIS was completed in late October, 2006, with the EPA's Notice of Availability (NOA) published on November 3, 2006. The preferred alternative rejected the 230-kV transmission line upgrades west of the Devers Substation in favor of a 500-kV transmission line extension originating at the Devers Substation and terminating at the Valley Substation near Romoland, California. On December 22, 2006, the CPUC issued a Certificate of Public Convenience and Necessity approving the California portion of the project under their jurisdiction.

The BLM's ROD was delayed, however, pending approval of the Arizona portion of the project by the Arizona Corporations Commission (ACC). Negotiations between the ACC and SCE continued until May 15, 2009, when SCE announced it was no longer pursuing construction of the Arizona portion of the project. The SCE, however, continues to pursue completion of the California portion of the project. The rationale for this 157-mile-long, California-only project includes anticipated future renewable energy development and generator interconnection requests in the vicinity of Blythe, in Riverside County, California. This ROD addresses the California-only project.

Any party adversely affected by the ROD decision may appeal within 30 days of publication of this NOA pursuant to 43 CFR, part 4, subpart E. The appeal must be filed with the Palm Springs Field Manager at the above listed address. Please consult the appropriate regulations (43 CFR part 4, subpart E) for further appeal requirements.

Authority: 40 CFR 1506.6.

Karla Norris,

Assistant Deputy State Director, Natural Resources.

[FR Doc. 2011–18186 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–NACA–0411–7317; 2031–A155–422]

Intent To Prepare an Environmental Impact Statement for a Deer Management Plan, Antietam National Battlefield and Monocacy National Battlefield, MD, and Manassas National Battlefield Park, VA

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) is preparing an Environmental Impact Statement for a Deer Management Plan (EIS and Plan) covering Antietam National Battlefield and Monocacy National Battlefield, Maryland, and Manassas National Battlefield Park, Virginia. The purpose of this EIS and Plan is to develop a deer management strategy that supports preservation of the cultural and natural landscapes through the protection and restoration of native vegetation and other natural and cultural resources, and that provides for management of Chronic Wasting Disease at the parks.

DATES: The NPS will accept comments from the public through September 2, 2011.

The NPS intends to hold public scoping meetings at Antietam National Battlefield, Monocacy National Battlefield and Manassas National Battlefield Park during the scoping period. Details regarding the exact times and locations of these meetings will be announced through local media at least 15 days in advance of the meetings. Information about public meetings will also be provided on the three parks' planning Web site: *http://parkplanning.nps.gov/battlefielddeerplan* (click on the link to the Deer Management Plan).

ADDRESSES: Information will be available for public review and comment online at *http://parkplanning.nps.gov/battlefielddeerplan* and at all three park headquarters listed below.

FOR FURTHER INFORMATION CONTACT:

Office of the Superintendent, Antietam National Battlefield, P.O. Box 158, Sharpsburg, Maryland 21782, *Telephone:* (301) 432–2243.

Office of the Superintendent, Monocacy National Battlefield, 4801 Urbana Pike, Frederick, Maryland 21704, *Telephone:* (301) 694–3147.

Office of the Superintendent, Manassas National Battlefield Park, 12521 Lee Highway, Manassas, Virginia 20109, *Telephone:* (703) 754–1861; and;

SUPPLEMENTARY INFORMATION: This plan is needed for the following reasons: Attainment of the parks' cultural landscape preservation goals and mandates are compromised by the high density of white-tailed deer in the parks.

Browsing of and other damage to native seedlings, saplings and understory vegetation by deer in the parks has prevented successful forest regeneration.

An increasing number of deer in the parks has resulted in adverse impacts to native vegetation and wildlife.

Opportunities to coordinate with other jurisdictional entities currently implementing deer management actions to benefit the protection of park resources and values can be expanded (Bull Run Regional Park and Conway Robinson State Park in Manassas, Virginia, *etc.*).

Chronic Wasting Diseases is proximate to the parks and represents an imminent threat to resources in the parks. There are opportunities to evaluate and plan responses to threats from Chronic Wasting Disease over the long term. The NPS has invited several other government agencies to participate in the development of the EIS and Plan as cooperating agencies, including the U.S. Fish and Wildlife Service, the State of Maryland and the Commonwealth of Virginia.

A scoping newsletter will be prepared that details the issues identified to date and includes the purpose, need, and objectives of the EIS and Plan. Copies of that information may be obtained online at *http://parkplanning.nps.gov/battlefielddeerplan* or at one of the three parks' headquarters addresses above.

If you wish to comment on the purpose, need, objectives, alternatives, or on any other issues associated with the EIS and Plan, you may submit your comments via the Internet at *http://parkplanning.nps.gov/battlefielddeerplan* or by mail or hand-delivery to one of the three parks' headquarters addresses above.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: April 19, 2011.

Woody Smeck,

Acting Regional Director, National Capital Region.

[FR Doc. 2011–18150 Filed 7–18–11; 8:45 am]

BILLING CODE 4310–JK–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–MANA–0411–7316; 3840–SZM]

Notice of Availability of a Record of Decision on the Final Environmental Impact Statement for the General Management Plan, Manassas National Battlefield Park

AGENCY: National Park Service, Interior.

SUMMARY: Pursuant to § 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 852, 853, codified as amended at 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of the Record of Decision for the Final Environmental Impact Statement for the General Management Plan (FEIS/GMP), Manassas National Battlefield Park, Virginia.

FOR FURTHER INFORMATION CONTACT: Ed W. Clark, Superintendent, Manassas National Battlefield Park, at Manassas National Battlefield Park, 12521 Lee Highway, Manassas, Virginia 20109–2005, by telephone at (703) 754–1861, or by e-mail at *EdWClark @NPS.gov.*

SUPPLEMENTARY INFORMATION: On January 25, 2011, the Regional Director of the National Capital Region, NPS, approved the Record of Decision for the project. As soon as practicable, the NPS will begin to implement the Preferred Alternative contained in the FEIS/GMP issued on September 19, 2008. The following course of action will occur under the Alternative B, the selected alternative.

Alternative B is the NPS-selected alternative. Under this alternative, the park would focus on interpreting the two battles of Manassas as distinct military events. This alternative has been modified from the Alternative B presented in the FEIS/GMP as discussed below. The initial stop in the park will be a new visitor center; where visitors will receive their first orientation to the battlefield. The interpretive information will focus on putting the two battles into context. Visitors will receive a more thorough orientation to each battle from two visitor contact areas—Henry Hill for First Manassas and Brawner Farm for Second Manassas. From these access points, visitors may explore the many historic sites associated with each event throughout the park. The experience for each battle will be distinct, with stand-alone visitor areas and automobile tour routes. Separate, chronological automobile and bicycle tours will be developed for each battle. In this alternative, the rehabilitation of the historic landscape will be critical to visitor understanding of the events and military tactics associated with each battle. Development of a visitor center near Stone Bridge was discussed as part of Alternative C in the FEIS/GMP. By including it in the selected alternative, the NPS believes the park can provide a more comprehensive approach to interpretation of both battles that will enhance the visitor experience. It should be noted that while Alternative C places the visitor center near Stone Bridge, future planning and compliance may determine a more appropriate location for such a facility. The new visitor center will provide context for the battles of First and Second Manassas battles; the visitor contact station at Henry Hill will continue its sole focus on the battle of First Manassas, while the visitor contact station at Brawner Farm will focus solely on the battle of Second Manassas. Given its location within the cultural landscape and space limitations, expanding the interpretive focus at Henry Hill is not feasible. By constructing a new visitor center the park can more effectively achieve the management goals of the park. Site-specific analysis, compliance with the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA) will be conducted as appropriate before development of the new visitor center. As part of this planning effort, due to the sensitive nature of the cultural landscape and resources in the park, the NPS will explore a range of alternatives regarding the potential site of the new facility (both inside and outside of the park boundaries), and would seek sites that minimize impacts to park resources especially those resources related to the two battles. In addition, the NPS will consider the operational needs of the park and how a new visitor center could meet those needs more efficiently (i.e., office space, interpretation, cooperative agreements, curatorial requirements, and utilization of the current visitor facilities within the park); potentially allowing for a reduction in the size of the current visitor facilities within the park in the future.

Full implementation of this alternative assumes the completion of the Manassas National Battlefield Park Bypass (Bypass). The Bypass will permit the removal of heavy commuter and commercial truck traffic from the portions of U.S. Route 29 and VA Route 234 that run through the park. Through traffic will be further limited with the addition of controlled access points. Visitors will experience a battlefield landscape that resembles its wartime appearance. Key interpretive views will be preserved and re-created to help visitors understand how the battles unfolded and the importance of certain locations. Wartime structures will be preserved and other historic structures will be retained to mark the site of wartime buildings.

Key Actions

Under the selected alternative, the following actions will occur: Separate automobile and bike paths will be developed for each battle. The NPS will upgrade current trails and interpretive media along the First Manassas and Second Manassas hiking trails as necessary. New portions of the Second Manassas hiking trail will be created as necessary. Because of safety concerns posed by the high traffic volumes on U.S. Route 29 and VA Route 234, separate automobile and bicycle tour routes will not be implemented until the completion of the Bypass. Once the Bypass is completed, through traffic will be limited in the park with the addition of controlled access facilities at the park's four main entry points.

A new visitor center will be constructed, designed as the initial stop and primary orientation point for the park. The visitor contact station at Henry Hill will focus entirely on First Manassas.

The battle of Second Manassas visitor contact station will be located at Brawner Farm. The site will be open for year-round visitation once necessary improvements have been completed.

The cultural landscape will reflect conditions in 1861–1862 in several key areas of the park through a combination of tree removal, clearing, and reforestation. The cleared areas will be managed as grassland communities (or in a few instances as shrub communities) that will provide desirable habitat and restore historic vistas for visitors. Maintaining the historic appearance of some of these areas with a lawnmower or other machinery may be prohibited because of terrain. In those cases, following appropriate compliance, other approved methods will be utilized to maintain the landscape. Prescribed fire may be considered as a potential management tool; however, this will require extensive compliance to ensure that it be used safely and have the expected results. The park staff will continue to

work cooperatively with neighboring jurisdictions related to rehabilitation of the historic scene. In addition, plans detailing how the various landscapes will be managed will be developed prior to the implementation of any rehabilitation activities. The following rehabilitation activities have been identified; the highest priority tasks are listed first:

- Approximately 45 acres of woods along the west side of Chinn Ridge will be cleared and replaced with open fields and grasslands to reestablish the view between the ridge and the site of the New York Monuments.
- Approximately 35 acres of trees will be removed from Matthews Hill and the open fields will be rehabilitated.
- Trees will be thinned at the top of the slope along the east side of the Chinn Ridge to reestablish the view between Chinn Ridge and Henry Hill while minimizing the amount of vegetation removed. The riparian buffer along Chinn Branch will be retained.
- Approximately 15 acres of land on Stuart's Hill that is currently open space will be reforested.
- Approximately 20 acres of land that is currently open space south of Stuart's Hill will be reforested.
- Approximately 20 acres along the north-central portion of Dogan Ridge will be reforested, and a small area of 3 acres along the curve of the Sudley-Manassas Road will be cleared and managed as open fields.
- To the north of the Matthews Hill area, an area of approximately 25 acres will be reforested.
- An additional 5 acres of land along Bull Run to the west of Poplar Ford will be reforested.
- The current Stuart's Hill clearing will be expanded by approximately 30 acres to the east. The clearing will restore the view from General Lee's headquarters toward Centreville during the Second Battle of Manassas.
- The historic landscape around the Cundiff House will be rehabilitated to wartime conditions. Approximately 40 acres of trees will be removed and converted to grassland and/or scrubland.

The NPS will continue to preserve historic structures and features, including those that date from the battles, such as Stone House, L. Dogan House, Thornberry House, and the Unfinished Railroad. Buildings and structures that do not date from the battles, but are historic or mark the site of wartime structures, will be stabilized and rehabilitated to function as important interpretive sites or will be maintained for park uses. These structures include the Brawner Farm House, Henry House, J. Dogan House, Pringle House, and Stone Bridge.

In addition to continuing to protect these structures, the NPS will initiate several actions:

- Complete work necessary to support year round visitation of the Brawner Farm House as part of the Second Battle of Manassas tour route.
- Explore a range of options to support interpretation of the Robinson House ruins from the Civil War period.
- Preserve and stabilize the J. Dogan House. This preservation effort will include removing nonconforming structural elements such as siding, and removing the nonconforming modern garage.
- As part of the Bypass, the existing U.S. Route 29 Bridge over Bull Run will be removed to eliminate modern intrusions from the battlefield landscape and to return the site to a more historic appearance. In addition, a new bridge will be constructed to allow continued access along U.S. Route 29. The new location will be chosen so there will be fewer impacts to the cultural landscape.

In the selected alternative, a boundary adjustment to the park will be necessary to include the four tracts of land; the Davis Tract, the Stonewall Memory Garden Tract, the Conservation Trust Parcel, and the Dunklin Monument. These tracts are described in detail in the FEIS and in the Record of Decision. This adjustment will require Congressional action to amend the existing boundary.

Implementation of each of these specific actions will require additional site-specific planning and compliance with NHPA and NEPA.

The Preferred Alternative and two other alternatives were analyzed in the Draft Environmental Impact Statement on the General Management Plan (DEIS/GMP) and FEIS/GMP. The full range of foreseeable environmental consequences was assessed, and appropriate mitigating measures were identified.

The Record of Decision includes a statement of the decision made, synopses of other alternatives considered, the basis for the decision, a description of the environmentally preferable alternative, a finding on impairment of park resources and values, a listing of measures to minimize environmental harm, an overview of public involvement in the decision-making process, and comments received on the DEIS/GMP.

Copies of the Record of Decision may be obtained from the contact listed above or online at *http://parkplanning.nps.gov/MANA.*

Dated: April 19, 2011.

Woody Smeck,

Acting Regional Director, National Capital Region.

[FR Doc. 2011–18149 Filed 7–18–11; 8:45 am]

BILLING CODE 4312–49–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–789]

In the Matter of Certain Digital Televisions and Components Thereof; Notice of Institution of Investigation Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 16, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Vizio, Inc. of Irvine, California. Letters supplementing the complaint were filed on June 29 and July 6, 2011. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain digital televisions and components thereof by reason of infringement of certain claims of U.S. Patent No. 5,511,096 (''the '096 patent''); U.S. Patent No. 5,621,761 (''the '761 patent''); U.S. Patent No. 5,703,887 (''the '887 patent''); U.S. Patent No. 5,745,522 (''the '522 patent''); and U.S. Patent No. 5,511,082 (''the '082 patent''). The complaint further alleges that an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is 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., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will

need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on July 13, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital television and components thereof that infringe one or more of claims 22–25 of the '096 patent; claim 11 of the '761 patent; claims 22 and 23 of the '887 patent; claims 1–15 of the '522 patent; and claim 1 of the '082 patent, and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Vizio, Inc., 39 Tesla, Irvine, CA 92618.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Coby Electronics Corp., 1991 Marcus Avenue, Suite 301, Lake Success, NY 11042;

Curtis International Ltd., 315 Attwell Drive, Etobicoke, Ontario M9W 5C1, Canada;

E&S International Enterprises, Inc., d/b/a Viore, 7801 Hayvenhurst Avenue, Van Nuys, CA 91406;

MStar Semiconductor, Inc., 4F–1, No. 26, Tai-Yuan St., ChuPei Hsinchu Hsien, Taiwan 302;

ON Corp US, Inc., 4370 La Jolla Village Drive, Suite 400, San Diego, CA 92122;

Renesas Electronics Corporation, 1753 Shimonumabe, Nakahara-Ku, Kawasaki, Kanagawa 211–8668, Japan;

Renesas Electronics America, Inc., 2880 Scott Boulevard, Santa Clara, CA 95050–2554;

Sceptre, Inc., 16800 East Gale Avenue, City of Industry, CA 91745;

Westinghouse Digital, LLC, 500 North State College Boulevard, Suite 1300, Orange, CA 92868.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: July 13, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18047 Filed 7–18–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–790]

Certain Coenzyme Q10 Products and Methods of Making Same; Notice of Institution of Investigation; Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 17, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Kaneka Corporation of Japan. Supplementary materials were filed on June 24 and 27, 2011. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain coenzyme Q10 products and methods of making same by reason of infringement of certain claims of U.S. Patent No. 7,910,340 (''the '340 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are 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., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on July 13, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain coenzyme Q10 products and methods of making same that infringe one or more of claims 1–45 of the '340 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Kaneka Corporation, 3–2–4 Nakanoshima, Kita-ku, Osaka 530–8288, Japan.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Zhejiang Medicine Co., Ltd., No. 268 Dengyun Road, Gongshu District, Hangzhou, Zhejiang 310011, China.

ZMC–USA, L.L.C., 1776 Woodstead Court Suite 215, The Woodlands, TX 77380.

Xiamen Kingdomway Group Company, No. 33–35 Xinchang Road, Haicang, Xiamen 361022, China.

Pacific Rainbow International Inc., 19905 Harrison Avenue, City of Industry, CA 91789.

Mitsubishi Gas Chemical Company, Inc., Mitsubishi Building, 5–2, Marunouchi 2-chome, Chiyoda-ku, Tokyo 100–8324, Japan.

Maypro Industries, Inc., 2975 Westchester Avenue, Purchase, NY 10577.

Shenzhou Biology & Technology Co., Ltd., No. 61 Zhichun Road, Haidian District, Beijing, 100190, China.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: July 14, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18070 Filed 7–18–11; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–663 (Third Review)]

Paper Clips From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on paper clips from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on January 3, 2011 (76 F.R. 171) and determined on April 8, 2011, that it would conduct an expedited review.

The Commission transmitted its determination in this review to the Secretary of Commerce on July 12, 2011. The views of the Commission are contained in USITC Publication 4242 (July 2011), entitled *Paper Clips from China: Investigation No. 731–TA–663 (Third Review).*

By order of the Commission.

Issued: July 14, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18087 Filed 7–18–11; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–788]

In the Matter of Certain Univeral Serial Bus (''USB'') Portable Storage Devices, Including USB Flash Drives and Components Thereof; Notice of Institution of Investigation; Institution of Investigation Pursuant to 19 U.S.C. 1337

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 14, 2011, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Trek 2000 International Ltd., of Singapore; Trek Technology (Singapore) Pte. Ltd. of Singapore; and S–Com System (S) Pte. Ltd. of Singapore. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain universal serial bus (''USB'') portable storage devices, including USB flash drives and components thereof by reason of infringement of certain claims of U.S. Patent No. 6,880,054 (''the '054 patent''); U.S. Patent No. 7,039,759 (''the '759 patent''); U.S. Patent No. D463,426 (''the '426 patent'') and U.S. Patent No. 7,549,161 (''the '161 patent''). The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainants request that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained

therein, is 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., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2560.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2011).

SCOPE OF INVESTIGATION: Having considered the complaint, the U.S. International Trade Commission, on July 13, 2011, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain universal serial bus (''USB'') portable storage devices, including USB flash drives and components thereof that infringe one or more of claims 3–5 of the '054 patent; claims 1 and 10 of the '759 patent; claims 1–3 of the '161 patent; and the claim of the '426 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are:

Trek 2000 International Ltd., 30 Loyang Way #07—13/14/15, Loyang Industrial Estate, Singapore;

Trek Technology (Singapore) Pte. Ltd., 3 Lim Teck Kim Road #01–03, Genting Centre, Singapore;

S–Com System (S) Pte. Ltd., 3 Lim Teck Kim Road #01–03, Genting Centre, Singapore.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Imation Corporation, 1 Imation Way, Oakdale, MN 55128;

IronKey, Inc., 600 West California Avenue, Sunnyvale, CA 94086;

Kingston Technology Company, Inc., 17600 Newhope Street, Fountain Valley, CA 92708;

Patriot Memory, LLC, 47027 Benicia Street, Fremont, CA 94538;

RITEK Corporation, No. 42, Kuan-Fu North Road, Hsin-Chu Industrial Park, Hsinchu, Taiwan 30316;

Advanced Media, Inc./RITEK USA, 1440 Bridgegate Drive, Suite 395, Diamond Bar, CA 91765;

Verbatim Corporation, Inc., 1200 West W.T. Harris Boulevard, Charlotte, NC 28262;

Verbatim Americas, LLC, 1200 West W.T. Harris Boulevard, Charlotte, NC 28262.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)-(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: July 13, 2011.

James R. Holbein,

Secretary to the Commission.

[FR Doc. 2011–18049 Filed 7–18–11; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with Title 21 Code of Federal Regulations (CFR), 1301.34(a), this is notice that on February 18, 2011, Roche Diagnostics Operations Inc., Attn: Import/Export Compliance, 9115 Hague Road, Indianapolis, Indiana 46250, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Methaqualone (2565)	I
Lysergic acid diethylamide (7315)	I
Tetrahydrocannabinols (7370)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Secobarbital (2315)	II
Phencyclidine (7471)	II
Codeine (9050)	II
Ecgonine (9180)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II

The company plans to import the listed controlled substances as a finished kit (for final use) products which will be distributed to its customers. The company will import the controlled substance in bulk or dispense form when needed for analytical testing purposes.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or

objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 18, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, (40 FR 43745–46), all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: July 11, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–18099 Filed 7–18–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on April 4, 2011, United States Pharmacopeial Convention, 12601 Twinbrook Parkway, Rockville, Maryland 20852, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Cathinone (1235)	I
Methaqualone (2565)	I
Lysergic acid diethylamide (7315)	I
Marihuana (7360)	I
Tetrahydrocannabinols (7370)	I
4-Methyl-2,5-dimethoxyamphetamine (7395).	I
3,4-Methylenedioxyamphetamine (7400).	I
Codeine-N-Oxide (9053)	I
Heroin (9200)	I
Morphine-N-oxide (9307)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Phenmetrazine (1631)	II
Methylphenidate (1724)	II
Amobarbital (2125)	II
Pentobarbital (2270)	II
Secobarbital (2315)	II
Glutethimide (2550)	II
Phencyclidine (7471)	II
4-Anilino-N-phenethyl-4-piperidine (8333).	II
Phenylacetone (8501)	II
Alphaprodine (9010)	II
Anileridine (9020)	II
Cocaine (9041)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Diphenoxylate (9170)	II
Hydrocodone (9193)	II
Levorphanol (9220)	II
Meperidine (9230)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II
Thebaine (9333)	II
Oxymorphone (9652)	II
Alfentanil (9737)	II
Sufentanil (9740)	II

The company plans to import reference standards for sale to researchers and analytical labs.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 18, 2011.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR § 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the Federal Register on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: July 11, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–18097 Filed 7–18–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated June 7, 2011 and published in the **Federal Register** on June 16, 2011, 76 FR 35239, Penick Corporation, 33 Industrial Park Road, Pennsville, New Jersey 08070, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Coca Leaves (9040)	II
Opium, raw (9600)	II
Poppy Straw (9650)	II
Concentrate of Poppy Straw (9670).	II

The company plans to import the listed controlled substances to manufacture bulk controlled substance intermediates for sale to its customers.

As explained in the Correction to Notice of Application pertaining to Rhodes Technologies, 72 FR 2417 (2007), comments and requests for hearings on applications to import narcotic raw material are not appropriate.

DEA has considered the factors in 21 U.S.C. 823(a) and 952(a) and determined that the registration of Penick Corporation to import 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, at this time. DEA has investigated Penick Corporation to ensure that the company's registration is

consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of 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 the basic classes of controlled substances listed.

Dated: July 11, 2011.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2011–18094 Filed 7–18–11; 8:45 am]

BILLING CODE 4410–09–P

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting and Hearing Notice No. 6–11]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR part 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of oral hearings, as follows:

Thursday, July 28, 2011: 10 a.m. Claim No. LIB–II–125, Claim No. LIB–II–126 and Claim No. LIB–II–127; 1 p.m. Claim No. LIB–I–044; 1:45 p.m. Claim No. LIB–I–049; 2:30 p.m. Claim No. LIB–II–046; 3:30 p.m. Claim No. LIB–I–037.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Judith H. Lock,

Executive Officer.

[FR Doc. 2011–18198 Filed 7–15–11; 11:15 am]

BILLING CODE 4410–BA–P

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting Notice No. 7–11]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 503) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business and other matters specified, as follows:

DATE AND TIME: Friday, July 29, 2011, at 10 a.m.

SUBJECT MATTER: Issuance of Proposed Decisions in claims against Albania and Libya.

STATUS: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street, NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street, NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Judith H. Lock,

Executive Officer.

[FR Doc. 2011–18261 Filed 7–15–11; 11:15 am]

BILLING CODE 4410–BA–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Employment and Training Administration Disaster Unemployment Assistance Handbook

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Employment and Training Administration Disaster Unemployment Assistance Handbook,'' (Form ETA–902 and ETA–902–A) to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before August 18, 2011.

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 from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Unemployment compensation claims, financial management, and data on disaster unemployment assistance activity are needed for timely program evaluation necessary for competent administration of sections 410 and 423 of the Stafford Disaster Relief and Emergency Act. Workload items are also used with fiscal reports to estimate the cost of administering the Act. Form ETA 902–A collects data on claims due to the 2010 Gulf Oil Spill.

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 if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1205–0051. The current OMB approval is scheduled to expire on July 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on May 8 2011 (76 FR 12760).

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 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1205–

0051. 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: Employment and Training Administration (ETA).

Title of Collection: Employment and Training Administration Disaster Unemployment Assistance Handbook.

OMB Control Number: 1205–0051.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 212.

Total Estimated Annual Burden Hours: 212.

Total Estimated Annual Other Costs Burden: $0.

Dated: July 13, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–18144 Filed 7–18–11; 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; Unemployment Insurance Facilitation of Claimant Reemployment

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) titled, ''Unemployment Insurance Facilitation of Claimant Reemployment,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before August 18, 2011.

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 from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Employment and Training Administration (ETA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: This information is collected at the State level to determine the percentage of individuals who become reemployed in the calendar quarter subsequent to the quarter in which they received their first unemployment insurance (UI) payment. The data will be used to measure performance under the Government Performance and Results Act of 1993, with the goal of facilitating the reemployment of UI claimants.

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 if the collection of information does not display a valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1205–0452. The current OMB approval is scheduled to expire on July 31, 2011; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on February 16, 2011 (76 FR 9052).

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 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should reference OMB Control Number 1205–0452. 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: Employment and Training Administration (ETA).

Title of Collection: Unemployment Insurance Facilitation of Claimant Reemployment.

OMB Control Number: 1205–0452.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 53.

Total Estimated Number of Responses: 212.

Total Estimated Annual Burden Hours: 2120.

Total Estimated Annual Other Costs Burden: $0.

Dated: July 13, 2011.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2011–18077 Filed 7–18–11; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for State Integrated Workforce Plan Requirements for Workforce Investment Act of 1998 (WIA), Wagner-Peyser Act, and Department of Labor Workforce Programs, and for Unified Plan Requirements; Extension with Revisions

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format; the reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment and Training Administration (ETA) is soliciting comments concerning the collection of data for State Integrated Workforce Plan Requirements for Workforce Investment Act/Wagner-Peyser Act and Department of Labor Workforce Programs, and for Unified Plan Requirements. The State Integrated Workforce Plan Requirements substantially revise and replace the former WIA/Wagner-Peyser ''stand-alone'' planning guidance, formerly entitled ''Planning Guidance and Instructions for Submission of the Strategic State Plan for title I of the Workforce Investment Act of 1998 (WIA) and the Wagner-Peyser Act.'' The new requirements also include data collection for the Migrant and Seasonal Farmworker (MSFW) Annual Outreach Plan (AOP), Trade Adjustment Assistance (TAA), and Senior Community Service Employment Program (SCSEP) State Plans. SCSEP plans may now be optionally included in the State Integrated Workforce Plan submission. While these new requirements provide an option for states to integrate DOL-funded programs into a single plan, it does not replace Unified Plan guidance that exists under this same control number 1205–0398.

A copy of the proposed information collection request (ICR) can be obtained at *http://www.doleta.gov/usworkforce/wia-planning* or by contacting the office listed below in the addressee section of this notice.

DATES: Written comments must be submitted to the office listed in the addressee's section below on or before September 19, 2011.

ADDRESSES: Submit written comments to Kimberly Vitelli, Office of Workforce Investment, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C–4510, Washington, DC 20210, Telephone number: (202) 693–3045 (this is not a toll-free number). Fax: (202) 693–3015. E-mail: *Vitelli.Kimberly@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Workforce Investment Act of 1998 (WIA) requires states to submit either a ''stand-alone'' strategic plan for title I of the Workforce Investment Act of 1998 and the Wagner-Peyser Act (WIA Section 112), or a Unified Plan with partner programs (WIA Section 192). States also may submit requests for waivers and work-flex as parts of the Strategic State Plan. The State Integrated Workforce Plan requirements provide a framework for the collaboration of governors, local elected officials, businesses, and other partners to continue the development of workforce investment systems that address customer needs, deliver integrated user-friendly services, and are accountable to the customers and the public. This proposed data collection extension revises and replaces ''stand-alone'' planning guidance last published December 1, 2008, in the **Federal Register**. Training and Employment Guidance Letter (TEGL) No. 17–10 (Instructions for Submitting Workforce Investment Act and Wagner-Peyser Act State Plans and Waiver Requests for Program Year 2011) described ETA's intention to update and redesign the plan guidance, and to publish revised guidance for use in Program Year 2012, which begins July 1, 2012. In consultation with multiple stakeholders, ETA revised that guidance and now seeks public comment on it. The Unified Plan guidance that is part of this proposed data collection extension contains minor revisions, and may be revised in future years.

The changes to this collection include:

(1) In both the Integrated Workforce Plan and Unified Plan requirements, removed the national strategic direction. ETA now publishes the agency's strategic direction in guidance letters. ETA's strategic direction was comprehensively discussed in TEGL No. 14–08, and policy direction was further communicated in additional TEGLs since.

(2) In the Integrated Workforce Plan requirements, streamlined and reduced the state plan collection elements to those required by statute or regulation.

(3) In the Integrated Workforce Plan requirements, reorganized the State Plan requirements into three key sections: the Strategic Plan, the Operational Plan, and Assurances. A significant portion of previously required narrative elements have been replaced by Assurances and allow for inclusion of state policy attachments or Web links.

(4) In the Integrated Workforce Plan requirements, added optional planning requirements for SCSEP to allow states to better integrate planned workforce activities with WIA and Wagner-Peyser programs and to optionally submit only one plan to ETA for its programs. State Integrated Workforce Plan submissions that include SCSEP with the WIA/Wagner-Peyser State Plan submission do not need to submit a standalone plan for that program.

(5) In the Integrated Workforce Plan guidance, included the Wagner-Peyser Agricultural Outreach Plan for provision of equivalent and quantitatively proportionate services for MSFWs, as required by Wagner-Peyser regulations, and TAA planning requirements.

(6) In both the Integrated Workforce Plan and Unified Plan requirements, added instructions on how to submit waiver and work-flex requests.

(7) In both the Integrated Workforce Plan and Unified Plan guidance, eliminated assurances that were duplicative of those that states sign in annual grant agreements, such as uniform administrative requirements.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility, and clarity of the information to be collected; and

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

III. Current Actions

Type of Review: Extension with revisions.

Title: State Integrated Workforce Plan Requirements for Workforce Investment Act of 1998 (WIA), Wagner-Peyser Act, and Department of Labor Workforce Programs, and for Unified Plan Requirements.

OMB Number: 1205–0398.

Affected Public: State and local governments.

Form: See above instructions. There is no form.

Total Estimated Annual Respondents: 57.

Estimates Annual Frequency: Once per year.

Average Time per Response: 40 hours.

Estimated Total Burden Hours: 2,280 Hours.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: July 12, 2011.

Jane Oates,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 2011–18137 Filed 7–18–11; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL CREDIT UNION ADMINISTRATION

Sunshine Act; Notice of Agency Meeting

TIME AND DATE: 10 a.m., Thursday, July 21, 2011.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street (All visitors must use Diagonal Road Entrance), Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED

1. Final Rule—Parts 700, 701, 702, and 741 of NCUA's Rules and Regulations, Net Worth and Equity Ratio Definitions.

2. Interim Final Rule—Section 701.30 of NCUA's Rules and Regulations, Remittance Transfers.

3. Proposed Rule—Part 712 of NCUA's Rules and Regulations, Credit Union Service Organizations.

4. Appointment of Deputy Executive Director as the Agency Chief Operating Officer.

5. Clarification and Standardization of Corporate Credit Union Calculations of Moving Daily Average Net Assets and Moving Monthly Average Net Risk-Weighted Assets.

6. Stabilization Fund Borrowing.

7. Reprogramming of NCUA's Operating Budget for 2011.

8. Insurance Fund Report.

RECESS: 11:15 a.m.

TIME AND DATE: 11:30 a.m., Thursday, July 21, 2011.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Closed.

MATTERS TO BE CONSIDERED

1. Consideration of Supervisory Activity. Closed pursuant to some or all of the following: exemptions (8), (9)(A)(ii) and 9(B).

FOR FURTHER INFORMATION CONTACT: Mary Rupp, Secretary of the Board, Telephone: 703–518–6304.

Mary Rupp,

Board Secretary.

[FR Doc. 2011–18243 Filed 7–15–11; 11:15 am]

BILLING CODE 7535–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities, National Foundation on the Arts and the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended), notice is hereby given that the following meetings of Humanities Panels will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c) (4), and (6) of section 552b of Title 5, United States Code.

1. *Date:* August 1, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Art History II in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

2. *Date:* August 1, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Communication, Rhetoric and Linguistics in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

3. *Date:* August 2, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American History I in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

4. *Date:* August 2, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Musicology and Dance History in Fellowships, submitted to the Division of Research Programs at the May 3, 2011 deadline.

5. *Date:* August 2, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for Colleges & Universities II, submitted to the Office of Challenge Grants at the May 4, 2011 deadline.

6. *Date:* August 2, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 527.
Program: This meeting will review applications for Research and

Development I in Preservation and Access Research and Development Program, submitted to the Division of Preservation and Access at the May 19, 2011 deadline.

7. *Date:* August 3, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American Studies I in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

8. *Date:* August 3, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for American Studies II in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

9. *Date:* August 4, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American History III in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

10. *Date:* August 4, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for African Studies & Middle Eastern Studies in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

11. *Date:* August 4, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 421.
Program: This meeting will review applications for History II, submitted to the Office of Challenge Grants at the May 4, 2011 deadline.

12. *Date:* August 4, 2011
Time: 9 a.m. to 5 p.m.
Location: Room 527.
Program: This meeting will review applications for Research and Development II in Preservation and Access Research and Development Program, submitted to the Division of Preservation and Access at the May 19, 2011 deadline.

13. *Date:* August 5, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for South and Southeast Asian Studies in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

14. *Date:* August 8, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Romance Studies in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

15. *Date:* August 8, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Ancient and Classical Studies & Archaeology in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

16. *Date:* August 9, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for New World Archaeology and Anthropology in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

17. *Date:* August 9, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Political Science and Jurisprudence in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

18. *Date:* August 10, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for American Literature in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

19. *Date:* August 10, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for American Literature and Film in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

20. *Date:* August 11, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Sociology and Psychology in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

21. *Date:* August 11, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for American History and Studies in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

22. *Date:* August 15, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Fellowships for Advanced Research on Japan: Advanced Research on Japan, submitted to the Division of Research Programs at the May 3, 2011 deadline.

23. *Date:* August 15, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Religious Studies II in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

24. *Date:* August 16, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Modern European History II in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

25. *Date:* August 17, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 315.
Program: This meeting will review applications for Early Modern European History in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

26. *Date:* August 17, 2011.
Time: 8:30 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Medieval and Renaissance Studies in Fellowships Program, submitted to the Division of Research Programs at the May 3, 2011 deadline.

27. *Date:* August 25, 2011.
Time: 9 a.m. to 5 p.m.
Location: Room 415.
Program: This meeting will review applications for Education & Training in Preservation and Access Education & Training Program, submitted to the Division of Preservation and Access at the June 30, 2011 deadline.

Michael P. McDonald,
Advisory Committee, Management Officer.

[FR Doc. 2011–18117 Filed 7–18–11; 8:45 am]
BILLING CODE 7536–01–P

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Privacy Act of 1974; System of Records

AGENCY: Office of the Director of National Intelligence.

ACTION: Notice to establish, amend and rescind systems of records.

SUMMARY: The Office of the Director of National Intelligence (ODNI) provides notice that it is establishing six (6) new Privacy Act systems of records, updating and amending four (4) existing

Privacy Act systems of records and rescinding one Privacy Act system of records. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of records maintained by the agency (5 U.S.C. 552a(e)(4)).

DATES: This action will be effective on August 29, 2011, unless comments are received that result in a contrary determination.

ADDRESSES: You may submit comments, identified by [RIN number] by any of the following methods:

Federal eRulemaking Portal: *http://www.regulations.gov*.

Mail: Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

FOR FURTHER INFORMATION CONTACT: Mr. John F. Hackett, Director, Information Management Office, 703–275–2215.

SUPPLEMENTARY INFORMATION: The ODNI was created by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, 118 Stat. 3638 (Dec. 17, 2004). ODNI published its final Privacy Act Regulation on March 28, 2008 (73 FR 16531), codified at 32 CFR part 1701. It published; twelve (12) Privacy Act systems of records notices on December 28, 2007 (72 FR 73887); fourteen (14) Privacy Act systems of records notices on April 2, 2010 (75 FR 16853) and now adds six (6) systems of records to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a). These new systems of records are: Human Resource Records (ODNI–16); Personnel Security Records (ODNI–17); Freedom of Information Act, Privacy Act, and Mandatory Declassification Review Request Records (ODNI–18); IT Systems Activity and Access Records (ODNI–19); Security Clearance Reciprocity Hotline Records (ODNI–20) and IT Network Support, Administration and Analysis Records (ODNI–21). To protect classified and sensitive personnel or law enforcement information contained in these systems, the Director of National Intelligence is proposing to exempt these systems of records from certain portions of the Privacy Act where necessary, as permitted by law. As required by the Privacy Act, a proposed rule is being published concurrently with this notice seeking public comment regarding exemption of these systems. The ODNI has previously established a rule that it will preserve the exempt status of records it receives when the reason for the exemption remains valid. See 32 CFR 1701.20 (a)(2) (73 FR at 16537).

The four existing systems of records being amended are: Office of Inspector General Investigation and Interview Records (ODNI/OIG–003), originally published at 72 FR 73902 (December 28, 2007); National Counterterrorism Center Knowledge Repository (ODNI/NCTC–004), originally published at 72 FR 73891 (December 28, 2007); IC Security Clearance and Access Approval Repository (ODNI–12), originally published at 75 FR 16863 (April 2, 2010); and National Intelligence Council (NIC) Consultation Records (ODNI–15), originally published at 75 FR 16867 (April 2, 2010) and now renamed Mission Outreach and Collaboration Records. ODNI/NCTC–004, ODNI–12, and ODNI–15 are being updated to reflect some combination of changes in the categories of record subjects, categories of records maintained, purposes for which the records are used, or the technology applied. ODNI/OIG–003 is being amended to add subsection (k)(5) of the Privacy Act as an additional basis for exempting records in that system from those provisions of the Act enumerated at 5 U.S.C. 552a(k). A proposed rulemaking supporting this notice addresses ODNI's intention to amend the exemption language of ODNI/OIG–003. This is the sole amendment to ODNI/OIG–003.

The six new systems of records and the four amended systems of records are subject to the General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, subpart C of ODNI's Privacy Act Regulation published at 32 CFR Part 1701 (73 FR 16531, 16541).

Finally, ODNI provides notice that the system of records entitled National Counterterrorism Center Human Resources Management System (ODNI/NCTC–001), published at 72 FR 73888 (December 28, 2007), has been subsumed under the new Human Resource Records system (ODNI–16) and therefore is rescinded.

In accordance with 5 U.S.C. 552(r), the ODNI has provided a report of these new and altered systems of records to the Office of Management and Budget and to Congress.

Dated: July 14, 2011.

John F. Hackett,

Director, Information Management Office.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Human Resource Records (ODNI–16)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former staff of the Office of the Director of National Intelligence (ODNI), to include ODNI employees, and military and civilian personnel detailed or assigned to the ODNI from other U.S. government departments and agencies; applicants for employment with the ODNI; and participants or beneficiaries designated by ODNI employees as part of a Federal benefit program.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographic information and employment history including military service; education, to include certifications and special qualifications; and emergency point of contacts. Application materials such as interview reports; test results; resumes; Knowledge, Skills and Abilities (KSAs); performance reviews; and qualifications and skills assessment data. ODNI assignments and positions descriptions, to include memorandums of agreement; security clearance information; time and attendance records; leave records; fitness for duty and performance appraisal reports; awards and commendations; personnel actions; travel records; training records; joint duty credit; employee grievances; records documenting disabilities or job-related injuries; and general in processing and out processing records. Financial information and entitlements including payroll; authorized or required deductions or contributions for Federal, state and local taxes; financial institution data; financial disclosure forms; medical leave bank claims; worker's compensation record; medical and life insurance records, including dependent and beneficiary designations; records regarding retirement status, eligibility, benefits and retirement savings accounts. This system also contains the Official Personnel Files of current and former ODNI staff, containing identifying and biographic data (name(s), date of birth, place of birth, citizenship, social security number, and contact information); records of military service; employment history (applications for Federal employment, personnel actions, performance appraisals, and other personnel documents); documentation

of awards and training; investigative notices; and records relating to Federal benefit program participation, to include insurance, savings, and retirement programs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; the Central Intelligence Agency Retirement Act, 50 U.S.C. 2001 *et seq.;* The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* Executive Order 9397, as amended (73 FR 70239); Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

To serve as the central human resources management system for the ODNI. Records in this system are used to provide a comprehensive and continuing record of each staff member's service, status, skills and personnel history; to perform centralized personnel functions to include hiring, performance management, time and attendance, leave earnings, Federal benefits, retirement programs, and separation; to maintain applicant and employee biographic and demographic data; to generate reports for workforce analysis and manpower requirements; and to support personnel training and career development programs.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name, social security number, or other unique employee identifier. Information may be retrieved from this system of records by automated or hand search based on indices and automated capabilities utilized in the normal course of business.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR chapter 12, subchapter b, part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or unless such records are covered by NARA's General Records Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Human Resources, c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals covered by this system; educational institutions; medical practitioners; private organizations; and other U.S. government departments and agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1),(2),(3),(4); (e)(1); (e)(4)(G),(H),(I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2),(3),(5),(8),(12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Personnel Security Records (ODNI–17)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

ODNI staff; civilian and military personnel detailed or assigned to the ODNI; applicants who have been presented with and accepted offers of employment with the ODNI; government contractors; and other personnel nominated or investigated for security clearances and facility or program accesses.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographic data to include Social Security Numbers; employment history; personnel security forms; information documenting an individual's security eligibility for access to classified information, projects, or facilities, and suitability for ODNI assignment or affiliation; documentation of initial and final actions relating to the granting, denial, suspension, or revocation of security clearance or access approvals; and non-disclosure and other agreements executed by individuals covered by this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* Executive Order 9397, as amended (73 FR 70239); Executive Order 10450, as amended (44 FR 1055); Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE:

Records in this system are used to document personnel suitability, eligibility and qualification decisions; initial and continued access approvals to classified information and facilities; and other personnel security actions and determinations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR Part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name, social security number, or other personal identifier. Information may be retrieved from this system of records by automated or hand search based on indices and automated capabilities utilized in the normal course of business.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR Chapter 12, Subchapter B, Part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or unless such records are covered by NARA's General Records Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Mission Support Directorate/Security, c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals covered by this system of records and any sponsoring entities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2) and (k)(5). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Freedom of Information Act, Privacy Act, and Mandatory Declassification Review Request Records (ODNI–18).

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who submit Freedom of Information Act (FOIA), Privacy Act (PA), and Mandatory Declassification Review (MDR) requests and administrative appeals to the Office of the Director of National Intelligence (ODNI); individuals whose requests and/or appeals have been referred to the ODNI by other Federal agencies; and individuals requesting assistance in connection with the filing of a FOIA/PA/MDR request or appeal on behalf of another.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records created or compiled in response to FOIA/PA/MDR requests and administrative appeals, to include the requester's name, mailing address, and any other information voluntarily submitted by the requester such as telephone numbers and e-mail addresses; subject of the request; case numbers; responses to such requests and appeals; all related or supporting memoranda, correspondence, and notes; and copies of responsive records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* The Freedom of Information Act, as amended, 5 U.S.C. 552; The Privacy Act, as amended, 5 U.S.C. 552a; Executive Order 12333, as amended (73 FR 45325); and Executive Order 13526 (75 CFR 707).

PURPOSE(S):

To process requests for information and administrative appeals under the FOIA; for access, amendment, and administrative appeals under the Privacy Act; for requests and administrative appeals for MDR pursuant to applicable Executive Orders governing classified national security information; and to assist the ODNI in carrying out any other responsibilities relating to the FOIA, Privacy Act, and applicable Executive Orders, including production of program data in response to Congressional requests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*). In addition, a record from this system of records maintained by ODNI may be disclosed as follows:

a. To a Federal, state, local, or private entity for the purpose of consulting with that entity to enable ODNI to make a determination as to the propriety of access to or correction of information, or for the purpose of verifying the identity of an individual or the accuracy of information submitted by an individual who has requested access to or amendment of information.

b. To a Federal agency or entity that furnished the record or information for the purpose of permitting that agency or entity to make a decision as to access to or correction of the record or information, or to a Federal agency or entity for purposes of providing guidance or advice regarding the handling of particular requests.

c. To a submitter or subject of a record or information in order that ODNI may obtain assistance in making a determination as to access or amendment.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name and case number. Information may be retrieved from this system of records by automated or hand search based on indices and automated capabilities utilized in the normal course of business. All searches of this system of records will be performed in ODNI offices by authorized staff.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government or contractor facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR chapter 12, subchapter B, part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or unless such records are covered by NARA's General Records Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records, or for appealing an initial

determination concerning access to records, are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Records Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access to or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals who have submitted requests and administrative appeals pursuant to the FOIA, the Privacy Act, or applicable executive orders governing classification of national security information; ODNI records searched in the process of responding to such requests and appeals; ODNI personnel assigned to handle such requests and appeals; other Federal agencies or entities that have referred requests to the ODNI concerning ODNI records or that have consulted with the ODNI regarding the handling of particular requests and administrative appeals; and third parties entitled by law to assert privileges that bear upon access or amendment determinations.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records pertaining to requests under the Privacy Act contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (2) and (5). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Information Technology Systems Activity and Access Records (ODNI–19)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who are authorized to use ODNI and Intelligence Community (IC) enterprise information technology resources.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system include data on the use and attempted use of enterprise information technology resources by all individuals with access to these resources, to include full content of audited events and activities on such resources.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Counterintelligence Enhancement Act of 2002, as amended, 50 U.S.C. 402b; The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* The Computer Security Act of 1987, 40 U.S.C. 1441 note; Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

Data in this system will be used for evaluating the operational status, security and performance of the information environment and for identifying usage trends, capabilities, and misuse of or threats to ODNI and IC enterprise information technology resources or the information residing thereon. This data will support business analytics, information security, counterintelligence, and law enforcement requirements (to include civil, criminal, and administrative investigative requirements).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541) and incorporated by reference (see also *http://www.dni.gov*). In addition, records from this system of records may be disclosed to authorized individuals within Executive Branch departments or agencies for the purpose of identifying usage trends, capabilities, misuse of or threats to enterprise information technology resources or the information residing thereon, and for evaluating the operational status, security, and performance of the information environment.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name, user ID, e-mail address, or other unique identifying search term.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR chapter 12, subchapter B, part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or when applicable, GRS 24 and 27.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director of National Intelligence and IC Chief Information Officer; and Director of Information Technology, Mission Support Division; c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

ODNI and IC enterprise audit data.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(2). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Security Clearance Reciprocity Hotline Records (ODNI–20)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who hold a security clearance granted by a U.S. government agency, to include U.S. Government officials; employees of private sector organizations; members of the academic community; members of scientific and other professional organizations; and other individuals with a current security clearance.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographic information including name; social security number; date of birth; place of birth; status as civilian, contractor or consultant; current clearance level to include special accesses; and sponsoring/gaining agency.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Federal Records Act, as amended, 44 U.S.C. 3101 *et seq.;* Executive Order 9397, as amended (73 FR 70239); Executive Order 10450, as amended (44 FR 1055); Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

The records in this system are used by authorized ODNI security personnel to facilitate and document resolution of issues relating to the transfer or recognition of individual clearances between U.S. Government entities and/or between the U.S. Government and the private, academic, and scientific sectors.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name or uniquely assigned case number. Information may be retrieved from this system of records by automated or hand search based on indices and automated capabilities utilized in the normal course of business.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government or contractor facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR chapter 12, subchapter B, part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or unless such records are covered by NARA's General Records Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Community Services Group c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Individual complainants who are the subject of records in this system; U.S. Government and private sector security offices; and ODNI security personnel engaged in facilitating reciprocity on behalf of complainants.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(5). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of the Director of National Intelligence (ODNI) Information Technology Network Support, Administration and Analysis Records (ODNI–21)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons possessing appropriate security clearances and holding accounts/access authorizations for ODNI and/or IC information technology resources and, when records are provided to ODNI for strategic integration purposes, for persons holding accounts/access authorizations for other government networks, systems and applications.

CATEGORIES OF RECORDS IN THE SYSTEM:

Biographic and job-related data to support user account authorization, including combinations of the following data elements: name, Social Security Number, date of birth, citizenship, home address, personal phone/cell numbers, employing entity and location, job title and phone number, role-based accesses and permissions, and supervisory point of contact.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; the Federal Records Act of 1950, as amended; 44 U.S.C. 3101 *et seq.;* Executive Order 9397, as amended (73 FR 70239); Executive Order 12333, as amended (73 FR 45325); and Executive Order 13388 (70 FR 62023).

PURPOSE(S):

Records in this system are used to administer user accounts and accesses for ODNI and IC information systems, applications, databases, Web sites, and networks, and for strategic resource management, to include analysis to deconflict redundancies and achieve interoperability and efficiencies with respect to government networks and systems.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR Part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

By name, social security number, or other identifier. Information may be retrieved by automated searches based on capabilities utilized in the normal course of business. Only authorized personnel may search this system.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government or contractor facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and who have a valid business reason to access the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. Backup tapes are maintained in a secure, off-site location.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a and 36 CFR Chapter 12, Subchapter B, Part 128—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and

Records Administration (NARA) approves an applicable ODNI Records Control Schedule, or unless such records are covered by NARA's General Records Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Director of National Intelligence and IC Chief Information Officer; and Director of Information Technology, Mission Support Division, c/o Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them (''notification'') should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access to non-exempt records shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Each request must provide the requester's full name and complete address. The requester must sign the request and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and acknowledging that obtaining records under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Sponsoring and approving government agencies; and private sector entities.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Records contained within this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Intelligence Community Security Clearance and Access Approval Repository (ODNI–12)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Subjects of security clearance and access approval investigations, including current and former U.S. government employees, applicants for employment in the Intelligence Community (IC), military personnel, personal service independent contractors and industrial contractors to U.S. government programs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Revise current paragraph to read as follows:

Biographic data of individuals covered by the system (including name, date and place of birth, social security number, and sponsoring agency); mission and security-related attributes, including current status of security clearances and security access approvals, date and source of background investigation and, if applicable, of polygraph examination; and electronic logs of manual and electronic searches of the system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Revise current paragraph to read as follows:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Counterintelligence Enhancement Act of 2002, as amended, 50 U.S.C. 402b; The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* Executive Order 13526 (75 FR 707); Executive Order 12333, as amended (73 FR 45325); and Executive Order 9397, as amended (73 FR 70239).

PURPOSE(S):

Revise current paragraph to read as follows:

Records in this system enable authorized personnel of the ODNI and other IC elements, other Federal government agencies, and U.S. Government-sponsored entities to reciprocally share information about individuals who are currently cleared or individuals where some processing was previously conducted for a clearance/access. Such information supports clearance reciprocity and automated security business processes for protecting physical and logical resources as well as audit of access to controlled facilities and classified information.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Revise current paragraph to read as follows:

Records in this system are made accessible to elements of the IC and authorized personnel and automated capabilities of the Federal agencies and U.S. Government-sponsored entities to verify and audit individuals' security clearances and access approvals. *See also* General Routine Uses Applicable to More Than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541) and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Revise current paragraph to read as follows:

Electronic records are stored in secure file-servers located within ODNI facilities. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

Revise current paragraph to read as follows:

By name, social security number, or other unique identifier. Information may be retrieved from this system of records by automated search based on indices and automated capabilities utilized in the normal course of business. All searches of the system are conducted by authorized staff of Federal government agencies or U.S. Government-sponsored entities.

SAFEGUARDS:

Revise current paragraph to read as follows:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed and provided to authorized personnel who require such information in the performance of their official duties and responsibilities. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Revise current paragraph to read as follows:

Pursuant to 44 U.S.C. 3303a and 36 CFR Chapter 12 Subchapter B, Part 1228–Disposition of Federal Records, records will not disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Personnel Security Databases Program Manager, c/o Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access to non-exempt records shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Each request must provide the requester's full name and complete address. The requester must sign the request and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and acknowledging that obtaining records under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Revise current paragraph to read as follows:

Records in this system derive from background investigations conducted or maintained by government agencies and U.S. Government-sponsored organizations, and from mission-based identity and attribute management sources.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Revise current paragraph to read as follows:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (2) and (5). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Revise current system name to read as follows:

Mission Outreach and Collaboration Records (ODNI–15)

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Director of National Intelligence, Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Revise current paragraph to read as follows:

U.S. Government personnel, personal services independent contractors, industrial contractors, or others who serve in liaison or contractual relationships with the ODNI or with Intelligence Community (IC) elements; and individuals in academia and the private sector with expertise on matters of intelligence interest.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system include biographic, administrative, and contact information for individuals covered by the system; records about intelligence products and activities in which covered individuals collaborated or participated.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Revise current paragraph to read as follows:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

Revise current paragraph to read as follows:

Records in this system enable the ODNI and IC analysts to enlist the expertise of and collaborate with subject matter experts from outside of the IC in government, non-profit organizations, academia, and the private sector in producing strategic intelligence products.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR part 1701 (73 FR 16531, 16541) and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records are stored in secured areas within ODNI facilities. Electronic records are stored in secure file-servers located within ODNI facilities.

RETRIEVABILITY:

By name or other key word. Information may be retrieved from this system of records by automated or hand search based on indices and automated capabilities utilized in the normal course of business.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government and government-sponsored facilities with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and whose official duties require access to the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. System backup is maintained separately.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a(d) and 36 CFR chapter 12, subchapter B, part 1228–Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Revise current paragraph to read as follows:

Senior Advisor for Analytic Outreach, Mission Integration Division, and Director, Plans and Production, National Intelligence Council, c/o Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Requesters shall provide their full name and complete address. The requester must sign the request; and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and understanding that obtaining a record under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system are exempt from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals covered by this system; U.S. Government employees, agencies and organizations; private sector entities, academia, media, libraries and commercial databases.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Revise current paragraph to read as follows:

Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), (4); (e)(1); (e)(4)(G), (H), (I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1). Additionally, records may be exempted from the requirements of subsections (c)(4); (e)(2), (3), (5), (8), (12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Revise current system name to reads as follows:

National Counterterrorism Center Knowledge Repository (ODNI/NCTC–004).

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

National Counterterrorism Center (NCTC), Office of the Director of National Intelligence (ODNI), Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Revise current paragraph to read as follows:

Individuals known or suspected to be or have been engaged in conduct constituting, in preparation for, in aid of or related to terrorism, and individuals whose conduct will be assessed for such nexus to terrorism.

CATEGORIES OF RECORDS IN THE SYSTEM:

Revise current paragraph to read as follows:

Classified and unclassified information residing in diplomatic, financial, military, homeland security, intelligence, law enforcement or other databases of potential counterterrorism value. Records include, but are not limited to, intelligence reports, message traffic, biographic data, biometrics, relationships and associations, travel data, or other information potentially relevant to counterterrorism efforts.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Revise current paragraph to read as follows:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Federal Records Act of 1950, as amended, 44 U.S.C. 3101 *et seq.;* Executive Order 12333, as amended (73

FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

Revise current paragraph to read as follows:

The NCTC Knowledge Repository facilitates secure sharing and assessment of terrorism information and potential terrorism information using an integrated information technology architecture and knowledge base, and provides a centralized repository of information needed to fight terrorism to which is applied a set of common services to access, manage, enrich, and deliver this information to end users and mission-oriented applications.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More Than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published at 32 CFR Part 1701 (73 FR 16531, 16541), and incorporated by reference (see also *http://www.dni.gov*).

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Revise current paragraph to read as follows:

Electronic records are stored in secure file-servers located within secure facilities under the control of NCTC. Paper records and other media are stored in secured areas within such facilities.

RETRIEVABILITY:

Revise current paragraph to read as follows:

By name or other identifier. Information will be retrieved from this System of Records by automated capabilities utilized in the normal course of business. All searches of this System of Records will be performed in ODNI/NCTC facilities by authorized staff.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are maintained in a secure government facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and who have a valid business reason to access the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. Backup tapes are maintained in a secure, off-site location.

RETENTION AND DISPOSAL:

Revise current paragraph to read as follows:

Pursuant to 44 U.S.C. 3303a and 36 CFR Chapter 12, Subchapter B, Part 1228—Disposition of Federal Records, terrorism-related records owned and maintained by ODNI/NCTC will be disposed of in accordance with the applicable National Archives and Records Administration (NARA)-approved ODNI/NCTC Records Control Schedule. Records not reasonably believed to constitute terrorism information are temporary records and will be dispositioned consistent with specific agreements with data providers and in accordance with Attorney General-approved procedures implementing Section 2.3 of Executive Order 12333 for NCTC's access to, retention, and dissemination of information concerning United States persons. ODNI/NCTC will seek additional NARA approval, as necessary, consistent with Attorney General-approved procedures, to address the disposition of records related to non-terrorist identities.

SYSTEM MANAGER(S) AND ADDRESS:

Revise current paragraph to read as follows:

NCTC Knowledge Repository System Manager, c/o Director, Information Management, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains non-exempt information about them (''notification'') should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access to non-exempt records shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Each request must provide the requester's full name and complete address. The requester must sign the request and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and acknowledging that obtaining records under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act.

RECORD SOURCE CATEGORIES:

Revise current paragraph to read as follows:

Federal, state, local, and foreign government entities; private sector entities; and commercial and public sources.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Revise current paragraph to read as follows:

Records contained within this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1),(2),(3),(4); (e)(1); (e)(4)(G),(H),(I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1) and (k)(2). Additionally, records may be exempted from the requirements of subsections (c)(4);(e)(2),(3),(5),(8),(12); and (g) of the Privacy Act consistent with any exemptions claimed under 5 U.S.C. 552a(j) or (k) by the originator of the record, provided the reason for the exemption remains valid and necessary.

SYSTEM NAME:

Office of Inspector General (OIG) Investigation and Interview Records (ODNI/OIG–003).

SECURITY CLASSIFICATION:

The classification of records in this system can range from UNCLASSIFIED to TOP SECRET.

SYSTEM LOCATION:

Office of the Inspector General (OIG), Office of the Director of National Intelligence (ODNI), Washington, DC 20511.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons who are interviewed by or provide information to the OIG; persons who are the subjects of OIG reviews, inquiries, or investigations; persons involved with matters under investigation by the OIG, and persons who have filed grievances with the OIG or with other elements of the Intelligence Community (IC), as defined by 401a(4) of the National Security Act of 1947, as amended.

CATEGORIES OF RECORDS IN THE SYSTEM:

Reports of interviews, signed statements, correspondence, reports of investigations, forms, cables, internal memoranda of the ODNI and other IC elements, criminal records of individuals covered by the system, and materials relating to employee grievances and other matters of interest to or inspected by the OIG.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Revise current paragraph to read as follows:

The National Security Act of 1947, as amended, 50 U.S.C. 401–442; The Inspector General Act of 1978, as amended, 5 U.S.C. App. 1; Executive Order 13354 (69 FR 53589); Executive Order 12333, as amended (73 FR 45325); Executive Order 12968, as amended (73 FR 38103); and Executive Order 13526 (75 FR 707).

PURPOSE(S):

Records in this system detail the OIG's conduct of personnel grievance and misconduct-related investigations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See General Routine Uses Applicable to More Than One ODNI Privacy Act System of Records, Subpart C of ODNI's Privacy Act Regulation published concurrently with this notice and incorporated by reference (see also *http://www.dni.gov*). In addition, the following routine uses may apply:

a. A record from this system of records maintained by the OIG may be disclosed as a routine use to officials within the IC where the investigation of a grievance, allegation of misconduct or other personnel issue is a matter within their administrative or supervisory responsibility and there is a need to know, or where the data is necessary to conduct management responsibilities including evaluation of current and proposed programs, policies and activities, selected assignments, and requests for awards or promotions.

b. Unclassified records in the system, or unclassified portions thereof, including information identifying individuals covered by the system, may be disclosed as a routine use to the public or to the media for release to the public when the matter under investigation has become public knowledge or the Inspector General determines that such disclosure is necessary to preserve confidence in the integrity of the Inspector General process, or is necessary to publicly demonstrate the accountability of Intelligence Community employees, officers, or individuals covered by the system, unless it is determined that release of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy.

c. Records in the system may be disclosed to members of the President's Council on Integrity and Efficiency or the Executive Council on Integrity and Efficiency for peer reviews and the preparation of reports to the President and Congress on the activities of the Inspectors General.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are stored in secure file-servers located within secure facilities under the control of the Central Intelligence Agency. Paper records and other hard-copy records are stored in secured areas within the control of the OIG and maintained in separate folders in a locked filing cabinet dedicated exclusively to OIG investigative files.

RETRIEVABILITY:

By name, social security number, or other identifier. Information may be retrieved from this system of records by automated or hand searches based on existing indices, and by automated means utilized in the normal course of business. Only authorized personnel with a need to know may search this system.

SAFEGUARDS:

Information in this system is safeguarded in accordance with recommended and/or prescribed administrative, physical, and technical safeguards. Records are stored in a secure government or contractor facility with access to the facility limited to authorized personnel only and authorized and escorted visitors. Physical security protections include guards and locked facilities requiring badges and passwords for access. Paper files are maintained in a locked file cabinet. Electronic files are maintained in secure, limited-access file-servers. Records are accessed only by authorized government personnel and contractors holding appropriate security clearances and who have a valid investigative or business reason to access the records. Communications are encrypted where required and other safeguards are in place to monitor and audit access and to detect intrusions. Backup tapes are maintained in a secure, off-site location.

RETENTION AND DISPOSAL:

Pursuant to 44 U.S.C. 3303a(d) and 36 CFR chapter 12, subchapter B, part 1228—Disposition of Federal Records, records will not be disposed of until such time as the National Archives and Records Administration (NARA) approves an applicable ODNI Records Control Schedule.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Officer, Office of the Inspector General, Office of the Director of National Intelligence, Washington, DC 20511.

NOTIFICATION PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. Individuals seeking to learn whether this system contains information about them (''notification'') should address inquiries to the ODNI at the address and according to the requirements set forth below under the heading ''Record Access Procedures.''

RECORD ACCESS PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. A request for access to non-exempt records shall be made in writing with the envelope and letter clearly marked ''Privacy Act Request.'' Each request must provide the

requester's full name and complete address. The requester must sign the request, and have it verified by a notary public. Alternately, the request may be submitted under 28 U.S.C. 1746, certifying the requester's identity and acknowledging that obtaining records under false pretenses constitutes a criminal offense. Requests for access to information must be addressed to the Director, Information Management Office, Office of the Director of National Intelligence, Washington, DC 20511. Regulations governing access to one's records or for appealing an initial determination concerning access to records are contained in the ODNI regulation implementing the Privacy Act published concurrently with this notice.

CONTESTING RECORD PROCEDURES:

As specified below, records in this system have been exempted from certain notification, access, and amendment procedures. Individuals seeking to correct or amend non-exempt records should address their requests to the ODNI at the address and according to the requirements set forth above under the heading ''Record Access Procedures.'' Regulations governing access to and amendment of one's records or for appealing an initial determination concerning access or amendment of records are contained in the ODNI regulation implementing the Privacy Act published concurrently with this notice.

RECORD SOURCE CATEGORIES:

Information is obtained from Federal, state, local and foreign government entities, as well as from individuals, including U.S. citizens and foreign nationals, pursuant to the authorized activities of investigatory staff of the ODNI, of other IC elements and of Federal contractors performing investigatory functions.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Revise current paragraph to read as follows:

Records in this System of Records pertaining to the enforcement of criminal laws may be exempted from the requirements of subsections (c)(3) and (4); (d)(1),(2),(3),(4); (e)(1),(2),(3),(5),(8); and (g) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2) as claimed by ODNI or by the originator of the record. Records constituting classified or non-criminal investigatory records may be exempted from the requirements of subsections (c)(3); (d)(1),(2),(3),(4); (e)(1); (e)(4)(G),(H),(I); (f) and (h) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1), (k)(2) and (k)(5) as claimed by ODNI or by the originator of the records, provided the reason for the exemption remains valid and necessary.

[FR Doc. 2011–18193 Filed 7–18–11; 8:45 am]

BILLING CODE P

NATIONAL SCIENCE FOUNDATION

National Science Board: Sunshine Act Meetings; Notice

The National Science Board, 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 meetings for the transaction of National Science Board business and other matters specified, as follows:

AGENCY HOLDING MEETING: National Science Board.

DATE AND TIME: July 28, 2011 at 7:40 a.m., and July 29, 2011 at 7:30 a.m.

PLACE: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230. All visitors must report to the NSF visitor desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge. Public visitors must arrange for a visitor's badge in advance. Call 703–292–7000 or e-mail *NationalScienceBrd@nsf.gov* and leave your name and place of business to request your badge, which will be ready for pickup at the visitor's desk on the day of the meeting.

STATUS: Some portions open, some portions closed.

Open Sessions

July 28, 2011

7:40–7:45 a.m.
7:45–10:15 a.m.
11:15 a.m.–12 p.m.
1–2 p.m.
2–3 p.m.
3–3:45 p.m.
4–4:30 p.m.

July 29, 2011

8–8:45 a.m.
8:45–10 a.m.
10–10:45 a.m.
10:45–11:45 a.m.
1:30–2:45 p.m.

Closed Sessions

July 28, 2011

10:30–11:15 a.m.
3:45–4 p.m.
4:30–5:15 p.m.

July 29, 2011

7:30–8 a.m.
11:45 a.m.–12:15 p.m.
1:15–1:30 p.m.

UPDATES: Please refer to the National Science Board Web site *http://www.nsf.gov/nsb* for additional information and schedule updates (time, place, subject matter or status of meeting) may be found at *http://www.nsf.gov/nsb/notices/.*

AGENCY CONTACT: Jennie L. Moehlmann, *jmoehlma@nsf.gov,* (703) 292–7000.

PUBLIC AFFAIRS CONTACT: Dana Topousis, *dtopousi@nsf.gov,* (703) 292–7750.

MATTERS TO BE DISCUSSED:

Thursday, July 28, 2011

Chairman's Introduction

Open Session: 7:40–7:45 a.m., Room 1235.

Committee on Programs and Plans (CPP)

Open Session: 7:45–10:15 a.m., Room 1225

- Approval of Open Minutes
- Committee Chairman's Remarks
- Discussion Item: CPP Program Portfolio Planning
- NSB Information Item: iPlant Annual Report on Award Progress
- NSB Information Item: National Ecological Observatory Network (NEON) Update
- NSB Information Item: Network for Earthquake Engineering Simulation (NEES) Update
- NSB Information Item: LIGO—Data Management Plan
- NSB Information Item: IceCube Data Management Plan
- NSB Information Item: Gemini Cooperative Agreement

Closed Session: 10:30–11:15 a.m., Room 1235

- Committee Chairman's Remarks
- Approval of Closed Minutes
- NSB Information Item: Update on HPC Award
- NSB Action Item: Authorization to Fund Petascale Computing

Committee on Science and Engineering Indicators (SEI)

Open Session: 11:15 a.m.–12 p.m., Room 1235

- Committee Chairman's Remarks
- Approval of Minutes
- Discussion of Orange Book
- Update on Indicators Digest
- Update on State Data Tool
- Discussion of Companion Piece

Task Force on Merit Review (MR)

Open Session: 1–2 p.m., Room 1235

- Approval of Minutes

• Task Force Chairman's Remarks
• Discussion of Proposed Review Criteria
• Task Force Chairman's Closing Remarks

CSB Task Force on Data Policies (DP)

Open Session: 2–3 p.m., Room 1235

• Task Force Chairman's Remarks
• Discussion of Recommendations for Changes to NSF's Policies
• Closing Remarks from the Chairman

Committee on Audit and Oversight (A&O)

Open Session: 3–3:45 p.m., Room 1235

• Approval of Open Minutes
• Committee Chairman's Opening Remarks
• Discussion of Management and Oversight of Construction Contingency Budgeting and Expenditures
• Inspector General's Update
• Chief Financial Officer's Update
• Human Capital Management Update
• Committee Chairman's Closing Remarks

Closed Session: 3:45–4 p.m., Room 1235

• Approval of Closed Minutes
• Committee Chair's Opening Remarks
• Procurement Activities
• Continued Discussion of February 2011 Chief Information Officer Item

Committee on Strategy and Budget (CSB)

Open Session: 4–4:30 p.m., Room 1235

• Committee Chairman's Remarks
• Approval of Minutes
• NSF FY 2011 and 2012 Budget Update
• Review and Approval of Data Policies Task Force Recommendation
• Other Committee Business

Closed Session: 4:30–5:15 p.m.

• NSF FY 2013 Budget Development

Friday, July 29, 2011

Ad hoc Committee on Nominations for NSB Class of 2012–2018 (NOMS)

Closed Session 7:30–8 a.m.

• Approval of Minutes
• Committee Chairman's Remarks
• Review of June 28, 2011 Open Teleconference Discussion on the Timeline, Process and Procedures for Evaluating Nominees
• Update on Committee Activities

Committee on Education and Human Resources (CEH)

Open Session: 8 a.m.–8:45 a.m., Room 1235

• Approval of Minutes
• Discussion and Approval of the CEH STEM Education Prospective Horizon ''Action Items''
• Discussion on challenges and opportunities for NSF's education agenda: Issues in developing a strategic vision for the Directorate for Education and Human Resources
• Updates from the Education and Human Resources Directorate

CPP Subcommittee on Polar Issues (SOPI)

Open Session: 8:45–10 a.m., Room 1235

• Subcommittee Chairman's Remarks/Approval of Minutes
• OPP Director's Remarks
• Report NRC & Blue Ribbon Panel USAP studies
• Interagency Arctic Policy Coordination
• McMurdo Station Resupply Issues

CPP Task Force on Unsolicited Mid-Scale Research (MS)

Open Session: 10–10:45 a.m., Room 1235

• Approval of Minutes
• Synopsis of June 5–7, 2011 mid-scale research workshop and discussion of workshop emerging themes
• Update and discussion on the ongoing and future plans of the Task Force

CSB Subcommittee on Facilities (SCF)

Open Session: 10:45–11:45 a.m., Room 1235

• Committee Chairman's Remarks
• Discuss and approve findings and recommendations from May Annual Portfolio Review
• Discuss COMPETES Mid-scale Instrumentation task

Closed Session 11:45 a.m.–12:15 p.m.

• Review, Discuss, Approve 2011 Annual Portfolio Review Document
• Discuss FY 2013 Facility Budget Issues

Plenary

Closed Session: 1:15–1:30 p.m., Room 1235

• Approval of Plenary Closed Minutes
• Awards and Agreements
• Closed Committee Reports

Plenary

Open Session: 1:30–2:45 p.m., Room 1235

• Approval of Plenary Open Session Minutes
• Chairman's Report
• Director's Report
• Open Committee Reports

Meeting Adjourns 2:45 p.m.

Ann Ferrante,

Writer-Editor.

[FR Doc. 2011–18323 Filed 7–15–11; 4:15 pm]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2011–0006]

Sunshine Federal Register Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission.

DATE: Weeks of July 18, 25, August 1, 8, 15, 22, 2011.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of July 18, 2011

Tuesday, July 19, 2011

9:30 a.m. Briefing on the Task Force Review of NRC Processes and Regulations Following Events in Japan (Public Meeting); (Contact: Nathan Sanfilippo, 301–415–3951).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of July 25, 2011—Tentative

Thursday, July 28, 2011

9 a.m. Briefing on Severe Accidents and Options for Proceeding with Level 3 Probabilistic Risk Assessment Activities (Public Meeting); (Contact: Daniel Hudson, 301–251–7919).

This meeting will be webcast live at the Web address—*http://www.nrc.gov.*

Week of August 1, 2011—Tentative

There are no meetings scheduled for the week of August 1, 2011.

Week of August 8, 2011—Tentative

There are no meetings scheduled for the week of August 8, 2011.

Week of August 15, 2011—Tentative

There are no meetings scheduled for the week of August 15, 2011.

Week of August 22, 2011—Tentative

There are no meetings scheduled for the week of August 22, 2011.

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—(301) 415–1292. Contact person for more information: Rochelle Bavol, (301) 415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (*e.g.* braille, large print), please notify Bill Dosch, Chief, Work Life and Benefits Branch, at 301–415–6200, TDD: 301–415–2100, or by e-mail at *william.dosch@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an e-mail to *darlene.wright@nrc.gov.*

Dated: July 14, 2011.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2011–18267 Filed 7–15–11; 4:15 pm]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, July 21, 2011 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting scheduled for Thursday, July 21, 2011 will be:

Consideration of amicus participation;

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

An adjudicatory matter; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551–5400.

Dated: July 14, 2011.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18218 Filed 7–15–11; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64883; File No. SR–OCC–2011–06]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Clearing and Settling a Price Differential Spread Futures Transaction

July 14, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on June 30, 2011, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[2] and Rule 19b–4(f)(4) thereunder[3] so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

The proposed rule change would accommodate the clearing and settling of a transaction type called a Price Differential Spread for purposes of effecting exchange transactions in futures contracts.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this proposed rule change is to amend OCC's By-Laws and Rules to accommodate the proposed introduction by ELX Futures L.P. (''ELX''), an electronic futures market that is designated as a contract market by the Commodity Futures Trading Commission (''CFTC''), of a transaction type called a Price Differential Spread (''Price Differential Spread'') for purposes of effecting exchange transactions in futures contracts.[4] A Price Differential Spread is a pair of transactions resulting from a type of order where the party placing the order seeks to simultaneously buy and sell futures contracts on the same underlying interest but with different contract months (each such transaction referred to herein as a ''leg'' of the Price Differential Spread), provided that the price at which contracts are bought in one leg less the price at which contracts are sold in the other leg (the ''price differential'') is no greater than the limit specified by such party (such limit referred to herein as the ''maximum price differential''). Price Differential Spreads are principally used to roll futures positions forward into futures with the same underlying interest but with a later delivery date. In such a transaction, the cost to the party rolling the positions forward is determined solely by the difference between the prices at which the two legs of the Price Differential Spread are executed. The price of either leg alone is not relevant. As discussed below, by allowing a Clearing Member to use contract prices that are based on the previous day's exchange-reported closing price, the actual price differential is highlighted and allocation of equivalent transactions

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78s(b)(3)(A)(iii).

[3] 17 CFR 240.19b–4(f)(4).

[4] OCC understands that similar transactions are used by at least one other futures exchange.

among different customers is facilitated. For purposes of illustration, assume that the ''front leg'' of a Price Differential Spread (*i.e.,* the leg with the nearer contract month) is the sale of futures contracts and that the ''back leg'' (*i.e.,* the leg with the more distant contract month) is the purchase of futures contracts.

When submitting a Price Differential Spread order to ELX, the trader will specify the maximum price differential, and ELX will attempt to match the two legs of the Price Differential Spread based on available orders (not limited to Price Differential Spread orders) from other traders. Assume that a Clearing Member submits a Price Differential Spread order (such Clearing Member referred to herein as the ''Price Differential Spread Executor'') to sell a March SYM contract and buy a June SYM contract with a maximum price differential of $1.00 and that ELX matches the front leg to counterparty A, that buys the March SYM contract at $118.00, and the back leg to counterparty B, that sells the June SYM contract at $118.95. In this case, the price differential between the two legs, based on matched trade prices, is $0.95, which is lower than the $1.00 maximum price differential that the Price Differential Spread Executor has specified.

Price Differential Spreads are differentiated from other futures transactions cleared by OCC in that the Price Differential Spread Executor may choose at the time it submits the order to (1) Record the contract prices of both legs of a Price Differential Spread at the prices at which the contracts are matched on the exchange (''Spread Engine Prices'') or (2) record the contract price of the front leg at the exchange-reported closing price on the immediately preceding trading day for the contracts bought or sold (''prior day closing price'') and record the contract price of the back leg at (a) the contract price of the front leg plus the price differential, if the front leg is the sale of futures contracts or (b) the contract price of the front leg less the price differential if the front leg is the purchase of futures contracts (''Spread Settle Prices'').

After matching both legs of a Price Differential Spread, ELX will send to OCC a pair of matched trade reports, each of which will identify the buyer, the seller, the futures contract traded, the exchange-assigned identification number (''Price Differential Spread ID'') connecting the two legs of the Price Differential Spread, the Spread Engine Price, and the Spread Settle Price. The matched trade reports also will indicate the price type (*i.e.,* the Spread Engine Price or the Spread Settle Price) that OCC should use to record the trades on behalf of the Price Differential Spread Executor.[5] Continuing the example, assume that the prior day closing price for the March SYM contract was $117.90. If the Price Differential Spread Executor elects to use the Spread Engine Prices at the time it submits the order, OCC will initially record the front leg at $118.00 and the back leg at $118.95. Alternatively, if the Price Differential Spread Executor elects to use the Spread Settle Prices at the time it submits the order, OCC will initially record the front leg at $117.90 and the back leg at $118.85 (which is the sum of the $117.90 contract price for the front leg plus the price differential of $0.95 because the front leg is the sale of a futures contract).[6] In addition, after the two legs of the Price Differential Spread have been accepted by OCC for clearance and prior to a deadline established by OCC, which deadline would occur before the initial variation payment, the Price Differential Spread Executor may access OCC's systems to change its initial election with respect to such trades as between using the Spread Engine Prices and using the Spread Settle Prices. ELX has informed OCC that Price Differential Spread traders require the flexibility to choose between the prices being used for clearing their Price Differential Spreads for purposes of allowing them to allocate trades among multiple customers at an equitable price similar to the average pricing functionality that already exists in OCC's trade allocation process and that the implementation of this new post-trade process will be consistent with existing practices in the futures industry. ELX also has informed OCC that Price Differential Spread transactions will not affect the prices at which trades are publicly reported.

Except in the case where the counterparty to a leg of a Price Differential Spread enters into the trade as part of its own Price Differential Spread and elects to record the trade using the Spread Settle Price, the counterparty sees the trade as an ordinary stand-alone futures transaction, and OCC will record the trade on behalf of the counterparty using the Spread Engine Price. Therefore, continuing the example, in a case where the Price Differential Spread Executor chooses to use the Spread Settle Prices for clearing a Price Differential Spread, the trades as recorded on OCC's books and records for the Price Differential Spread Executor will use a different set of prices (*i.e.,* $117.90 and $118.85) from those recorded for counterparty A and counterparty B (*i.e.,* $118.00 and $118.95). However, the aggregate amount of the variation payments that the Price Differential Spread Executor will pay to or collect from OCC will be the same (except for very small discrepancies due to rounding differences as described below) regardless of which set of prices is used to calculate variation payments because the price differential between the two legs of the Price Differential Spread is the same (*i.e.,* $0.95). Accordingly, and subject to the treatment of rounding differences as described in the following paragraphs, OCC's clearing system will be in balance because the variation payments due to or from the Price Differential Spread Executor on the futures contracts executed as part of the Price Differential Spread will equal the amount due to or from the counterparties to those transactions on an aggregate basis even if not on a contract-by-contract basis.

When the Price Differential Spread Executor records the trades using the Spread Settle Prices, rounding the Spread Settle Prices to the nearest applicable minimum price increment when the initial variation payments on the trades are calculated may result in the Price Differential Spread Executor paying slightly more or receiving slightly less than it would have paid or received if it had elected to record the trades using the Spread Engine Prices. In either case the amount will be no more than one cent per contract. The amount by which the Price Differential Spread Executor receives slightly less or pays slightly more than it would have otherwise paid or received with respect to the trades will fund the amount by which other Price Differential Spread Executors are entitled to receive more or pay less as a result of OCC's rounding procedures.

While all such discrepancies in variation payments due to OCC's rounding procedures should net to zero when averaged over time, they may not net to precisely zero on any business day. Any net excess received by OCC on

[5] In the case where each counterparty to the trade has entered into the trade as part of its own Price Differential Spread, the matched trade report will identify separately with respect to each counterparty the price to be initially recorded as the contract price and the Price Differential Spread ID.

[6] Assume instead that the front leg is the purchase of a futures contract at $118.95 and the back leg is the sale of a futures contract at $118.00. The price differential is still $0.95. If the Price Differential Spread Executor elects to use the Spread Settle Prices at the time it submits the order, OCC will initially record the front leg at $117.90 and the back leg at $116.95 (which is the $117.90 contract price minus the price differential of $0.95 because the front leg is the purchase of a futures contract).

any business day will be contributed to a ''Rounding Fund'' and will be carried forward to fund any net amount that OCC may be required to pay on subsequent days. In order to ensure that there is always a sufficient positive balance in the Rounding Fund to fund any such net amount that may be owed by OCC, a cushion is needed. Accordingly, ELX has agreed in an amendment to the Clearing Agreement between OCC and ELX to provide OCC an initial amount of $5,000 as a contribution to the Rounding Fund and to contribute additional amounts as reasonably required by OCC to provide a larger cushion should growth in product volume indicate such additional amounts are required. The Rounding Fund will be held by OCC in one or more bank accounts used by OCC to make daily cash settlements with Clearing Members so that it will be automatically available to fund variation payments as needed and to eliminate the expense and operational risk of unnecessary funds transfers. OCC will maintain a record of the amount held in the Rounding Fund on OCC's own books and records. If at any time ELX ceases to clear transactions through OCC or ceases to permit Price Differential Spread transactions, OCC will pay any amount left in the Rounding Fund to ELX.

OCC proposes to make the following amendments to its By-Laws and Rules in order to accommodate clearance of Price Differential Spreads. OCC proposes to add a new Rule 1301A to (1) Define Price Differential Spreads,[7] (2) require the listing exchange to include the Spread Engine Price and the Spread Settle Price and to identify (separately with respect to each counterparty to the trade, if applicable) which of the two prices is to be initially recorded as the contract price and the Price Differential Spread ID in each of the matched trade reports that the listing exchange sends to OCC with respect to Price Differential Spreads, (3) permit a Clearing Member to choose post trade the contract prices to be used for clearing its Price Differential Spread trades, and (4) highlight the rounding situation described above. OCC would also make a minor conforming amendment to Rule 1301.

In addition, OCC and ELX would enter into Amendment 1 to the Agreement for Clearing and Settlement Services dated December 5, 2008, between OCC and ELX to accommodate Price Differential Spreads. A copy of Amendment 1 is attached hereto as Exhibit 5.

OCC states that the proposed changes to OCC's By-Laws and Rules are consistent with the purposes and requirements of Section 17A of the Act[8] because they effect a change in an existing service of OCC that does not adversely affect the safeguarding of securities or funds in OCC's custody or control or for which OCC is responsible or significantly affect the respective rights or obligations of OCC or persons using its securities clearing services. The proposed rule change is not inconsistent with any rules of OCC including any rules proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

OCC has not solicited or received written comments relating to the proposed rule change. OCC will notify the Commission of any written comments it receives.

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)(iii) of the Act[9] and Rule 19b–4(f)(4)[10] because it effects a change in an existing service of a registered clearing agency that does not adversely affect the safeguarding of securities or funds in the custody or control of the clearing agency or for which it is responsible and does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*) or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–OCC–2011–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–OCC–2011–06. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings also will be available for inspection and copying at OCC's principal office and OCC's Web site (*http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_11_06.pdf*). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–OCC–2011–06 and should be submitted on or before August 9, 2011.

[7] OCC also proposes to add the term ''Price Differential Spread'' to Article I of its By-Laws as a cross reference to Rule 1301A where the term is actually defined.

[8] 15 U.S.C. 78q–1.

[9] *Supra* note 2.

[10] *Supra* note 3.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18118 Filed 7–18–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64884; File No. SR–FINRA–2011–033]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt FINRA Rule 0180 (Application of Rules to Security-Based Swaps)

July 14, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 8, 2011, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been substantially prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to adopt FINRA Rule 0180 (Application of Rules to Security-Based Swaps). The proposed rule change would, with certain exceptions, temporarily limit the application of FINRA rules with respect to security-based swaps.

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room.

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act''),[4] Title VII of which established a comprehensive new regulatory framework for swaps and security-based swaps. The new legislation was intended among other things to enhance the authority of regulators to implement new rules designed to reduce risk, increase transparency, and promote market integrity with respect to such products. Generally, the Dodd-Frank Act provides that the Commodity Futures Trading Commission (''CFTC'') will regulate ''swaps'' and the SEC will regulate ''security-based swaps.''[5] The Dodd-Frank Act contemplates certain self-regulatory organization responsibilities in this area as well.[6]

Title VII of the Dodd-Frank Act generally becomes effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act, *i.e.* the ''Effective Date''), unless a provision requires a rulemaking.[7] The Commission has recently taken a number of actions in furtherance of Title VII, including the issuance of a release to provide guidance in connection with the effectiveness of Exchange Act provisions related to security-based swaps added by subtitle B of Title VII (which generally creates, and relates to, the regulatory regime for security-based swaps), and to provide temporary exemptions in connection with certain of those provisions.[8] In addition, the Commission has recently acted to address a change to an existing definition in the Act resulting from the effectiveness of the Title VII amendments.[9] Specifically, as of the July 16 Effective Date, the Act's definition of ''security'' will expressly encompass security-based swaps.[10] In making this change, Congress intended for security-based swaps to be treated as securities under the Act and the underlying rules and regulations. Nonetheless, this expansion of the general scope of the Act raises certain complex issues of interpretation, including issues as to the application of those provisions to registered broker-dealers. Absent additional time to analyze those issues, and to consider whether to provide interpretive or operational guidance, these changes may lead to unnecessary market uncertainty.

FINRA notes that the Act's definition of ''security'' has similar implications for numerous provisions under FINRA rules.[11] FINRA notes that, pending the final implementation of new rules and guidance that would provide greater regulatory clarity in relation to security-based swap activities, it is in the public interest to propose a rule that would provide relief from certain FINRA requirements so as to help avoid undue market disruptions resulting from the change to the definition of ''security''

[4] Pub. L. No. 111–203, 124 Stat. 1376 (2010).

[5] The terms ''swap'' and ''security-based swap'' are defined in Sections 721 and 761 of the Dodd-Frank Act. The Commission and the CFTC jointly have proposed to further define these terms. *See* Securities Exchange Act Release No. 64372 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011) (Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping); Securities Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant'' and ''Eligible Contract Participant'').

[6] *See, e.g.,* Sections 712 and 763 of the Dodd-Frank Act.

[7] The Dodd-Frank Act provides that if a Title VII provision requires a rulemaking, the provision will go into effect ''not less than'' 60 days after the publication of the related final rule or on July 16, 2011, whichever is later. *See* Sections 754 and 774 of the Dodd-Frank Act.

[8] *See, e.g.,* Securities Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (Compliance Dates Release).

[9] *See* Securities Exchange Act Release No. 64795 (July 1, 2011) (Order Granting Temporary Exemptions) (the ''Exemptive Release'').

[10] *See* Exchange Act Section 3(a)(10) (15 U.S.C. 78c(a)(10)), as revised by Section 761 of the Dodd-Frank Act.

[11] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

under the Act. In its Exemptive Release, the Commission determined that it is appropriate to provide market participants with additional time to consider the potential impact on their businesses and the interpretive questions raised, and to provide the Commission with any related requests for guidance or relief, along with the underlying analysis.

In its Exemptive Release, the Commission noted that the relief it is granting is targeted and does not include, for instance, relief from the Act's antifraud and anti-manipulation provisions. FINRA notes that proposed new FINRA Rule 0180 is similarly targeted. Specifically, proposed FINRA Rule 0180(a) provides that FINRA rules shall not apply to members' activities and positions with respect to security-based swaps, except for: FINRA Rule 2010 (standards of commercial honor and principles of trade); FINRA Rule 2020 (use of manipulative, deceptive or other fraudulent devices); FINRA Rule 3310 (anti-money laundering program); and FINRA Rule 4240 (margin requirements for credit default swaps). Paragraph (b) of the proposed rule provides that the following rules apply to members' activities and positions with respect to security-based swaps only to the extent they would have applied as of July 15, 2011: NASD Rule 3110 (books and records) and all successor FINRA Rules to such NASD Rule; [12] the FINRA Rule 4500 Series (books, records and reports); and the FINRA Rule 4100 Series (financial condition). Paragraph (c) provides that the following rules apply as necessary to effectuate members' compliance with paragraphs (a) and (b) of the rule: the FINRA Rule 0100 Series (general standards); the NASD Rule 1000 Series (membership, registration and qualification requirements) and all successor FINRA Rules to such NASD Rule Series; the FINRA Rule 1000 and 1100 Series (member application); NASD Rules 3010 (supervision) and 3012 (supervisory control system) and IM–3010–1 (standards for reasonable review) and all successor FINRA Rules to such NASD Rules and Interpretive Material; FINRA Rule 3130 (annual certification of compliance and supervisory processes); the FINRA Rule 8000 Series (investigations and sanctions); and the FINRA Rule 9000 Series (code of procedure). Paragraph (d) of the proposed rule provides that the rule will expire on January 17, 2012. Lastly, proposed FINRA Rule 0180.01 provides that, for purposes of the rule, ''security-based swap'' shall be as defined pursuant to Exchange Act Section 3(a)(68)[13] and the rules and guidance of the SEC or its staff.

FINRA notes that, though the proposed rule change suspends on a temporary basis certain member conduct rules that may otherwise apply to members' activities and positions with respect to security-based swaps, conduct of a serious nature that would call into question the principles underlying such rules may be addressed by FINRA under FINRA Rules 2010 and 2020.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change immediately. The implementation date of the proposed rule change will be July 8, 2011. The proposed rule change will expire by its terms on January 17, 2012. FINRA will amend the expiration date of the proposed rule in subsequent filings as necessary such that the expiration date will be coterminous with the termination of relevant provisions of the SEC's Exemptive Release, as defined herein.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[14] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would further the purposes of the Act because, consistent with the goals set forth by the Commission when it issued the Exemptive Release, the proposed rule change will help to avoid undue market disruption resulting from the change to the definition of ''security'' under the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) thereunder.[16]

A proposed rule change filed under Rule 19b–4(f)(6) [17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

FINRA has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission hereby grants that request. The proposed rule is consistent with the goals set forth by the Commission when it issued the Exemptive Release and will help avoid undue market interruption resulting from the change to the definition of ''security'' under the Act. Therefore, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day delay and designates the proposal as operative upon filing.[19]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of

[12] The SEC recently approved the adoption of certain consolidated FINRA rules governing books and records, which will become effective on December 5, 2011. *See Regulatory Notice* 11–19 (April 2011).

[13] 15 U.S.C. 78c(a)(68).

[14] 15 U.S.C. 78*o*–3(b)(6).

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has fulfilled this requirement.

[17] 17 CFR 240.19b–4(f)(6).

[18] 17 CFR 240.19b–4(f)(6)(iii).

[19] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. *See* 15 U.S.C. 78c(f).

investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2011–033 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2011–033. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2011–033 and should be submitted on or before August 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18091 Filed 7–18–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64876; File No. SR–CBOE–2011–061]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Fees Schedule Concerning Certain Orders of Certain Affiliates for Purposes of a Fee Cap and Sliding Scale

July 13, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on June 30, 2011, the Chicago Board Options Exchange, Incorporated (the ''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, 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 its Fees Schedule to apply the Multiply-Listed Options Fee Cap (the ''Fee Cap'') and the CBOE Proprietary Products Sliding Scale for Clearing Trading Permit Holder Proprietary Orders (the ''Sliding Scale'') to orders of certain non-Trading Permit Holder affiliates of a Clearing Trading Permit Holder (''CTPH''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule to apply the Fee Cap and the Sliding to orders of certain non-Trading Permit Holder affiliates of a CTPH.

Under the Fee Cap, the Exchange caps CTPH Proprietary transaction fees in all products except options on OEX, XEO, SPX, and volatility indexes, in the aggregate, at $75,000 per month per CTPH, except that any AIM Execution Fees incurred by a CTPH do not count towards the cap. The Sliding Scale reduces the standard CTPH Proprietary transaction fee in OEX, XEO, SPX, and volatility indexes provided a CTPH reaches certain volume thresholds in multiply-listed options on the Exchange in a month.[3]

The Exchange proposes to amend its Fees Schedule to apply the Fee Cap and the Sliding Scale to orders of certain ''Non-Trading Permit Holder Affiliates'' (as defined below) of a CTPH. Specifically, a CTPH may request that the Exchange aggregate its trading activity with certain trading activity (as described below) of a Non-Trading Permit Holder Affiliate for purposes of calculating the Fee Cap and Sliding Scale. For this purpose, a ''Non-Trading Permit Holder Affiliate'' would be defined as a 100% wholly-owned affiliate or subsidiary of a CTPH that is registered as a United States or foreign broker-dealer and that is not a CBOE Trading Permit Holder. In other words, a Non-Trading Permit Holder Affiliate for this purpose must be either a wholly-owned subsidiary of a CTPH or a wholly-owned subsidiary of the parent company of a CTPH.

[20] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Fee Cap and Sliding Scale apply to CTPH proprietary orders (''F'' origin code), except for orders of joint back-office (''JBO'') participants. *See,* CBOE Fees Schedule, Footnote 11.

Only proprietary orders of a Non-Trading Permit Holder Affiliate (''B'' origin code) effected for purposes of hedging the proprietary over-the-counter trading of the CTPH or its affiliates would be included in calculating the Fee Cap and Sliding Scale. Such orders must be marked with a code approved by the Exchange identifying the orders as eligible for the Fee Cap and Sliding Scale. The Exchange would aggregate a CTPH's transaction fees [4] in multiply-listed options on the Exchange with the transaction fees of its Non-Trading Permit Holder Affiliates in multiply-listed options on the Exchange [5] for purposes of determining whether the CTPH has reached the $75,000 Fee Cap. The Exchange would aggregate the contracts traded by a CTPH and its Non-Trading Permit Holder Affiliates in multiply-listed options on the Exchange for purposes of determining whether the CTPH has reached the Sliding Scale volume thresholds and qualified for the reduced fees for CBOE Proprietary Products set forth in the Sliding Scale.[6]

A CTPH would be required to certify the affiliate status of any a Non-Trading Permit Holder Affiliate whose trading activity it seeks to aggregate and to certify that the trades identified as eligible for the Fee Cap and Sliding Scale were made for the purposes of hedging proprietary over-the-counter trading of the CTPH or its affiliates. In addition, each CTPH would be required to inform the Exchange immediately of any event that causes an entity to cease to be an affiliate.

Other exchanges have rules that permit the aggregation of the trading activity of affiliated entities for the purposes of calculating and assessing certain fees.[7] Similarly, the International Securities Exchange, LLC (''ISE'') includes certain non-ISE Market-Maker transaction fees in calculating its Firm Proprietary transaction fee cap.[8]

The proposed rule change will take effect on July 1, 2011.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(4) [10] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE Trading Permit Holders and other persons using Exchange facilities, and the objectives of Section 6(b)(5) [11] of the Act in particular in that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Specifically, the Exchange believes the proposed rule change is equitable, reasonable and not unfairly discriminatory because it would allow aggregation of the trading activity of a CTPH and its Non-Trading Permit Holder Affiliates for purposes of the Fee Cap and Sliding Scale only in very narrow circumstances, namely, where (i) the Non-Trading Permit Holder Affiliate is registered as a United States or foreign broker-dealer, (ii) the trading activity of the Non-Trading Permit Holder Affiliate that would be included in the calculation of the Fee Cap and Sliding Scale is limited to proprietary orders of the Non-Trading Permit Holder Affiliate effected for purposes of hedging the proprietary over-the-counter trading of the CTPH or its affiliates, and (iii) the CTPH and the Non-Trading Permit Holder Affiliate have a complete identity of common ownership. Any CTPH may request that the Exchange aggregate its trading activity with the trading activity of its Non-Trading Permit Holder Affiliates for purposes of calculating the Fee Cap and Sliding Scale. Other exchanges have rules that permit the aggregation of the trading activity of affiliated entities for the purposes of calculating and assessing certain fees.[12] Similarly, the International Securities Exchange includes certain non-ISE Market-Maker transaction fees in calculating its Firm Proprietary transaction fee cap.[13]

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is designated by the Exchange as establishing or changing a due, fee, or other charge, thereby qualifying for effectiveness on filing pursuant to Section 19(b)(3)(A) of the Act [14] and subparagraph (f)(2) of Rule 19b–4 [15] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

In particular, the Commission is interested in receiving comment as to whether the Exchange's proposal is consistent with the Act and the rules and regulations issued thereunder that are applicable to the Exchange, including Section 6 of the Act and Sections 6(b)(4) and 6(b)(5) in particular. In addition, the Commission is interested in receiving comment as to whether the Exchange has carried its burden to demonstrate such consistency.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2011–061 on the subject line.

[4] The CTPH transaction fee is $.20 per contract in all products except OEX, XEO, SPX, and Volatility Index options, which are proprietary products and are assessed $.25 per contract. *See,* CBOE Fees Schedule, Section 1.

[5] Broker-Dealer transaction fees apply to orders of a Non-Trading Permit Holder Affiliate as defined herein: $.25 per contract for manual executions and $.45 per contract for electronic executions in all products except OEX, XEO, SPX, S&P 500 Dividend Index and Volatility Index options, which are proprietary products and are assessed $.40 per contract. *See,* CBOE Fees Schedule, Section 1, and Footnote 16.

[6] The CTPH transaction fee for OEX, XEO, SPX, and Volatility Index options is $.25 per contract. The Broker-Dealer transaction fee applicable to orders of a Non-Trading Permit Holder Affiliate in OEX, XEO, SPX, S&P 500 Dividend Index and Volatility Index options is $.40 per contract. *See,* CBOE Fees Schedule, Section 1 (Index Options), and Footnote 16. These fees would be reduced to the fees set forth in the Sliding Scale once a CTPH reaches the volume thresholds set forth in the Sliding Scale.

[7] *See, e.g.,* Nasdaq Rule 7027 and Chicago Stock Exchange Fees Schedule, Section P.

[8] *See* ISE Schedule of Fees, footnote 2.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78f(b)(5).

[12] *See, e.g.,* Nasdaq Rule 7027 and Chicago Stock Exchange Fees Schedule, Section P.

[13] *See* ISE Schedule of Fees, footnote 2.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(2).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2011–061. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro/shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2011–061 and should be submitted on or before August 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18074 Filed 7–18–11; 8:45 am]

BILLING CODE 8011–01–P

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64875; File No. SR–NYSEArca–2011–43]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Fee Schedule by Adding Definitions for the Strategy Executions That Qualify for Transaction Fee Caps

July 13, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on June 30, 2011, 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, 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 its Fee Schedule by adding definitions for the Strategy Executions that qualify for transaction fee caps. The text of the proposed rule change is available at the Exchange, at *http://www.nyse.com,* at the Commission's Public Reference Room, and at the Commission's Web site at *http://www.sec.gov.*

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

NYSE Arca proposes to amend its Fee Schedule by adding definitions for the Strategy Executions that qualify for transaction fee caps. The Exchange does not propose to change any fees in the Fee Schedule.

In 2003, the Exchange amended its Fee Schedule to cap transaction fees for Strategy Executions involving reversals and conversions, dividend spreads, and box spreads.[3] The Exchange subsequently expanded the Strategy Executions eligible for the transaction fee cap to include short stock interest spreads, merger spreads and jelly rolls.[4] In its previous rule filings, the Exchange described the requirements that Strategy Executions must meet to qualify for the transaction fee cap; however these Strategy Executions were not defined in the Fee Schedule. The Exchange is now proposing to define the Strategy Executions in order to provide additional clarity and transparency in the Fee Schedule.[5]

The Exchange proposes to define each of the six Strategy Executions that qualify for the cap in new endnote 9:[6]

• A ''reversal'' is established by combining a short security position with a short put and a long call position that shares the same strike and expiration. A ''conversion'' is established by combining a long position in the underlying security with a long put and a short call position that shares the same strike and expiration.

• A ''dividend spread'' is defined as transactions done to achieve a dividend arbitrage involving the purchase, sale and exercise of in-the-money options of the same class, executed prior to the date on which the underlying stock goes ex-dividend.

• A ''box spread'' is defined as transactions involving a long call option and a short put option at one strike, combined with a short call option and long put at a different strike, to create synthetic long and synthetic short stock positions, respectively.

• A ''short stock interest spread'' is defined as transactions done to achieve a short stock interest arbitrage involving

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 48363 (August 19, 2003), 68 FR 51625 (August 27, 2003) (SR–PCX–2003–39) (the ''2003 Release'').

[4] *See* Exchange Act Release No. 51787 (June 6, 2005), 70 FR 34174 (June 13, 2005) (SR–PCX–2005–65) (the ''2005 Release'') and Exchange Act Release No. 60101 (June 11, 2009), 74 FR 29249 (June 19, 2009) (SR–NYSEArca–2009–49) (the ''2009 Release'').

[5] The Commission notes that the definitions proposed by the Exchange in the instant filing slightly differ from the definitions set forth in the 2003 Release, the 2005 Release, and the 2009 Release.

[6] The Chicago Board Options Exchange, Incorporated (''CBOE'') already has these strategies, with the exception of the box spread, defined in its fee schedule. *See* (*http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf*).

the purchase, sale and exercise of in-the-money options of the same class.

• A ''merger spread'' is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, each executed prior to the date on which shareholders of record are required to elect their respective form of consideration, i.e., cash or stock.

A ''jelly roll'' is created by entering into two separate positions simultaneously. One position involves buying a put and selling a call with the same strike price and expiration. The second position involves selling a put and buying a call, with the same strike price, but with a different expiration from the first position.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act''),[7] in general, and Section 6(b)(5) of the Act,[8] in particular, in that it is designed to promote just and equitable principles of trade, 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. In this respect, the Exchange is not proposing any changes to the fees within its Fee Schedule, but rather adding definitions for the Strategy Executions that qualify for the transaction fee caps. This change will better inform investors and the public of the necessary requirements for a Strategy Execution to qualify for the fee caps.

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)(i)[9] of the Act and Rule 19b–4(f)(1)[10] thereunder, as constituting a stated interpretation of the meaning, administration and enforcement of an existing rule of the Exchange. The proposed rule change provides definitions for existing terms in the Fee Schedule, and the definitions are consistent with the manner in which the Exchange interpreted those terms. 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or

• Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2011–43 on the subject line.

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2011–43. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (*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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2011–43 and should be submitted on or before August 9, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–18040 Filed 7–18–11; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(i).

[10] 17 CFR 240.19b–4(f)(1).

[11] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

SBA Council on Underserved Communities Meeting

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of Federal advisory committee meeting.

SUMMARY: The SBA is issuing this notice to announce the location, date, time, and agenda for the first meeting of the SBA Council on Underserved Communities. The meeting will be open to the public.

DATES: The meeting will be held on Thursday, August 4, 2011 from 9:30 a.m. to 12:30 p.m. Eastern Standard Time.

ADDRESSES: The meeting will be held at the U.S. Small Business Administration: 409 3rd St SW., Eisenhower Conference Room, Second Floor, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), SBA announces the meeting of the SBA Council on Underserved Communities (the ''Council''). The Council is tasked with providing advice, ideas and opinions on SBA programs and services and issues of interest to small businesses in underserved communities. For more information, please visit *http://www.sba.gov/content/council-underserved-communities-cuc.*

The purpose of the meeting is to provide the Council with information on SBA's efforts to support small businesses in underserved communities, as well as provide an opportunity for the Council to discuss its goals for the coming months. SBA Deputy Administrator Marie Johns will make a presentation to the Council. The Council will provide insights on based on information learned in what they've heard from their communities as well as discuss areas of interest for further research and recommendation development.

FOR FURTHER INFORMATION CONTACT: The meeting is open to the public however advance notice of attendance is requested. Anyone wishing to attend and/or make a presentation to the SBA Council on Underserved Communities must contact Chrystal Christian by August 2nd, 2011, by fax or email in order to be placed on the agenda. Chrystal Christian, SBA, Office of the Administrator, 409 Third Street, SW., Washington, DC 20416, *Chrystal.Christian@sba.gov*, phone 202–205–6605, fax 202–292–3865.

Additionally, if you need accommodations because of a disability or require additional information, please contact Chrystal Christian, SBA, Office of the Administrator, 409 Third Street, SW., Washington, DC 20416, 202–205–6605 or *Chrystal.Christian@sba.gov.*

Dated: July 13, 2011.

Dan Jones,

SBA Committee Management Officer.

[FR Doc. 2011–18209 Filed 7–18–11; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 7528]

Extension of Agreement Between the United States Department of State and the Council on Accreditation

The United States Department of State and the Council on Accreditation agree that the Agreement Between the U.S. Department of State and the Council on Accreditation Regarding Performance of Duties as an Accrediting Entity Under the Intercountry Adoption Act of 2000 will remain in effect until July 11, 2016.

Dated: July 11, 2011.

Janice Jacobs,

Assistant Secretary, Consular Affairs, U.S. Department of State.

[FR Doc. 2011–18197 Filed 7–18–11; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2011–0057]

Agency Information Collection Activities: Request for Comments of a Previously Approved Information Collection: Procedures for Transportation Drug and Alcohol Testing Programs

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection Request abstracted below is being forwarded to the Office of Management and Budget for review and comments. A **Federal Register** Notice with a 60-day comment period soliciting comments on renewing the same information collection was published on April 13, 2011 [76 FR 20805]. There were no comments to the docket.

DATES: Comments must be submitted on or before August 18, 2011.

ADDRESSES: Send comments regarding the burden estimate, including suggestions for reducing the burden, to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of the U.S. Department of Transportation, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Bohdan Baczara, Office of Drug and Alcohol Policy and Compliance, Office of the Secretary, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W62–317, Washington, DC 20590; 202–366–3784 (voice), 202–366–3897 (fax), or *bohdan.baczara@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2105–0529.

Title: Procedures for Transportation Drug and Alcohol Testing Programs.

Type of Request: Renewal of a Previously Approved Information Collection.

Background: Under the Omnibus Transportation Employee Testing Act of 1991, DOT is required to implement a drug and alcohol testing program in various transportation-related industries. This specific requirement is elaborated in 49 CFR part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs. This request for a renewal of the information collection for the program includes 43 burden items among which are the U.S. Department of Transportation Alcohol Testing Form (ATF) and the DOT Drug and Alcohol Testing Management Information System (MIS) Data Collection Form. The ATF includes the employee's name, the type of test taken, the date of the test, and the name of the employer. Custody and control is essential to the basic purpose of the alcohol testing program. Data on each test conducted, including test results, are necessary to document tests conducted and actions taken to ensure safety in the workplace.

The MIS form includes employer specific drug and alcohol testing information such as the reason for the test and the cumulative number of positive, negative and refusal test results. The MIS data is used by each of the affected DOT Agencies (*i.e.,* Federal Aviation Administration, Federal Transit Administration, Federal Railroad Administration, Federal Motor Carrier Safety Administration, and the Pipeline and Hazardous Materials Safety Administration) and the United States Coast Guard when calculating their random testing rates.

Estimated Number of Respondents: The information will be used by transportation employers, Department representatives, and a variety of service agents. Estimated total number of respondents is 2,620,309.

Estimated Number of Responses: 5,692,496.

Frequency: The information will be collected annually.

Annual Estimated Total Number Burden Hours: 584,841.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. chapter 35, as amended; and 49 CFR 1:48.

Issued in Washington, DC on July 12, 2011.

Authority and Issuance.

Patricia Lawton,

DOT PRA Clearance Officer.

[FR Doc. 2011–18120 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–9–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) During the Week Ending June 25, 2011

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2011–0118.

Date Filed: June 22, 2011.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope:

July 13, 2011.

Description: Application of Corsair S.A., d/b/a/Corsairfly (''Corsairfly'') requesting an amended foreign air carrier permit authorizing Corsairfly to conduct operations to and from the United States to the full extent authorized by the United States-European Union Air Transport Agreement (''U.S.–E.U. Agreement''), including authority to engage in: (i) Scheduled and charter foreign air transportation of persons, property and mail from any point(s) behind any Member State(s) of the European Community, via any point(s) in any Member State(s) and via intermediate points to any point(s) in the United States and beyond; (ii) scheduled and charter foreign air transportation of persons, property and mail between any point(s) in the United States and any point(s) in any member of the European Common Aviation Area; (iii) other charters pursuant to the prior approval requirements; and (iv) transportation authorized by any additional route or other right(s) made available to European Community carriers in the future.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011–18119 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending July 9, 2011

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2011–0124.

Date Filed: July 7, 2011.

Parties: Members of the International Air Transport Association.

Subject: TC2 Within Africa, Within Middle East, between Middle East and Africa, Mail Vote 685 Adoption, Composite Resolution 071c, e-Tariffs, 6–24 June 2011.

Intended Effective Date: October 1, 2011.

Renee V. Wright,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2011–18123 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Final Written Re-Evaluation for Environmental Impact Statement: Sikorsky Memorial Airport, Stratford, CT

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability.

SUMMARY: The FAA is issuing this notice to advise the public that a Writetn Re-Evaluation of a Final Environmental Impact Statement (FEIS) has been completed for Sikorsky Memorial Airport in Stratford, Connecticut.

ADDRESSES: The Written Re-Evaluation document is available for review during normal business hours at the following locations:

FAA New England Region, 12 New England Executive Park, Burlington, MA, 781–238–7613.

Stratford Public Library, 2203 Main St., Stratford, CT, 203–385–4161.

Bridgeport Public Library, Borroughs Bldg., 925 Broad St., Bridegport, CT, 203–576–7777.

Igor Sikorsky Memorial Airport, Administration Bldg., 1000 Great Meadow Dr., Stratford, CT, 203–576–8162.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Environmental Program Manager, Federal Aviation Administration New England, 12 New England Executive Park, Burlington, MA. (781) 238–7613.

SUPPLEMENTARY INFORMATION: In October 1999 the FAA issued a Record of Decision (ROD) approving actions associated with proposed improvments to the Sikorsky Memorial Airport, Stratford, Connecticut. That ROD was based on information and analysis contained in a Final Environmental Impact Statement (FEIS) that the FAA issued in May 1999. No action was taken on the October 1999 ROD. Recently, the FAA evaluated the suitability of applying the May 1999 FEIS to a substantially similar project at Sikorsky Memorial Airport involving Runway Safety Areas and other airfield improvements. This Written Re-Evaluation documents the FAA's assessment of the suitability of using the information and analysis in the May 1999 FEIS for the current project.

A Record of Decision is anticipated, no sooner than 30 days from this notice.

Issued in Burlington, Massachusetts, on July 1, 2011.

Michel Hovan,

Acting Manager, Airports Division.

[FR Doc. 2011–18196 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Supplemental Environmental Impact Statement for Transit Improvements in the Mid-Coast Corridor of San Diego County, CA

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Intent to Prepare a Supplemental Environmental Impact Statement.

SUMMARY: The FTA and the San Diego Association of Governments (SANDAG) intend to prepare a Supplemental Environmental Impact Statement (SEIS) for transit improvements for the Mid-Coast Corridor Transit Project in San Diego, California. The SEIS will be prepared in accordance with regulations implementing the National Environmental Policy Act (NEPA), and all applicable environmental laws, regulations, and executive orders. The purpose of this Notice of Intent is to alert interested parties regarding the plan to prepare the SEIS, and to provide information on the nature of the proposed transit project, to invite

participation in the SEIS process, including comments on the scope of the SEIS proposed in this notice.

DATES: *Comment Due Date:* Written comments on the scope of the SEIS should be sent to Leslie Blanda, SANDAG New Starts/Environmental/Planning Project Manager, by August 15, 2011.

ADDRESSES: Written comments on the scope of the SEIS should be sent to Leslie Blanda, New Starts/Environmental/Planning Project Manager, San Diego Association of Governments, 401 B Street, Suite 800, San Diego, CA 92101, or e-mailed to her at *midcoast@sandag.org.* No additional scoping meetings are proposed.

FOR FURTHER INFORMATION CONTACT: Hymie Luden, Transportation Program Specialist, or Debra Jones, Environmental Protection Specialist, Federal Transit Administration, Region IX, 201 Mission Street, Room 1650, San Francisco, CA 94105; telephone: (415) 744–3133; fax: (415) 744–2726; e-mail *hymie.luden@dot.gov* or *debra.jones@dot.gov*.

SUPPLEMENTARY INFORMATION:

I. Scoping

The FTA, in cooperation with SANDAG, will examine improved transit service in the Mid-Coast Corridor. Located entirely within the City of San Diego (City), the Mid-Coast Corridor centers on Interstate 5 (I–5) and extends from Downtown San Diego on the south to University City on the north; it is bound by the Pacific Ocean on the west and I–805 and State Route 163 (SR 163) on the east. SANDAG and FTA invite interested individuals, organizations, Native American Tribes and Federal, state, and local agencies to participate in defining the purpose and need for, and refining the scope of the Mid-Coast Corridor Transit Project SEIS.

SANDAG is the lead agency for compliance with the California Environmental Quality Act (CEQA), and a Subsequent Environmental Impact Report (SEIR) is being prepared jointly with the SEIS. During May 2010, SANDAG conducted scoping under CEQA to solicit public and agency comments on the project alternatives to be carried forward. All comments received during the CEQA scoping process will be considered during the preparation of the SEIS and do not need to be resubmitted. A copy of the scoping summary report is available on the SANDAG Web site at: *http://www.sandag.org/midcoast.* Additional comments should focus on identifying any significant social, economic, or environmental issues related to the proposed alternatives that have not previously been identified.

II. Description of Study Area and Project Need

The study area is located entirely within the City of San Diego (City), centering on Interstate 5 (I–5) extending from Downtown San Diego on the south to University City on the north, bounded by the Pacific Ocean on the west and I–805 and State Route 163 (SR 163) on the east.

Dense population and employment centers currently anchor both the northern and southern ends of the Mid-Coast Corridor, with existing, planned, or potential smart growth centers in between. The SANDAG *Regional Comprehensive Plan* (July 2004) and the 2030 Regional Transportation Plan (RTP) reference the regional growth forecast that estimates population, housing, land use, and economic growth. Increased density is forecast in Downtown San Diego and in the University of California, San Diego (UCSD) and University Towne Centre (UTC) areas. Increased population and employment will lead to increased travel demand in the corridor.

The existing transit system in the Mid-Coast Corridor does not offer the level of service needed to meet the region's goals for mobility, accessibility, reliability, and efficiency. The COASTER commuter rail service passes through the corridor, but its stations are widely spaced and it does not have a station in close proximity to UCSD or UTC. The existing San Diego Trolley Blue Line currently terminates at the Old Town Transit Center (OTTC). While transit mobility and accessibility are provided by express and local buses, the speed and reliability of bus service are hindered by roadway congestion. With congestion projected to increase in the future, the level of service, reliability, and efficiency of the transit system will all decrease. To meet regional goals, the study area needs a transit system that focuses on key destinations and has the frequency, speed, and reliability to attract new riders.

The purpose of the Mid-Coast Corridor Transit Project is to improve public transit services between University City and Old Town and Downtown San Diego and connect corridor residents with other Trolley lines serving Mission Valley, South County communities to the U.S.-Mexico International Border, and East County communities to Santee, thereby enhancing direct public access to other regional activity centers. The project will improve travel options to employment, education, medical, and retail centers for corridor residents, commuters, and visitors.

III. Alternatives

The transportation alternatives proposed for consideration in this study area include:

- *No-Build Alternative*—the No Build Alternative would include all of the highway and transit facility improvements identified in the Revenue Constrained Scenario of the SANDAG 2030 RTP except for the extension of the Trolley System to University City.
- *Build Alternative*—the Build Alternative includes the extension of the Trolley Blue Line from the Santa Fe Depot in Downtown San Diego to UTC, which will provide continuous service on the Trolley Blue Line from San Ysidro Transit Center at the U.S.-Mexico International Border to University City. The Locally Preferred Alternative (LPA) was approved by the SANDAG Board of Directors on July 23, 2010.

The Mid-Coast Corridor Transit Project has been under study and in various phases of state and Federal environmental review since 1990. The project was originally to be developed in two sections. An EIS for the extension from the OTTC north to University City was completed in 2001, and FTA issued the Record of Decision in August 2001.

In April 2005, SANDAG recombined the Balboa Extension with the University City Extension into a single project, extending from the OTTC to University City. The FTA concurred with the SANDAG decision on July 24, 2006.

During 2009 and 2010, SANDAG updated the prior studies and reconsidered a broad range of transit alternatives through a public process. This analysis is documented in the *Comparative Evaluation of Alternatives Report* (SANDAG, 2010). SANDAG conducted scoping under CEQA. All comments received during the CEQA scoping process will be considered during the preparation of this SEIS/SEIR. Following the conclusion of the CEQA scoping process, the SANDAG Board reconfirmed the LPA as an extension of the Trolley system from the OTTC to UTC on July 23, 2010.

The 1995 AA/DEIS/DEIR and the 2010 *Comparative Evaluation of Alternatives Report* are available for public and agency review on the SANDAG Web site at *http://www.sandag.org/midcoast.* They are also available for inspection at the SANDAG office, or a CD may be requested by calling (619) 595–5620 or by e-mailing *midcoast@sandag.org.*

Advanced Scoping Alternatives—As a result of the Alternatives Analysis and updated alternatives evaluation, the LPA includes:

- New double-track alignment extending from a point just south of the San Diego River and north of the existing OTTC to a terminus at the UTC Transit Center in University City, with three alignment variations along Voigt Drive in University City;
- Eight new LRT stations, located at Tecolote Road, Clairemont Drive, Balboa Avenue, Nobel Drive, UCSD West, UCSD East, Executive Drive, and the UTC Transit Center, and a possible additional station at the VA Medical Center; and
- Upgrades to existing systems (including traction power, signaling system, and crossovers) to accommodate all-day 7.5-minute Trolley Blue Line service within the existing right-of-way.

No new maintenance facilities or expansion of existing maintenance facilities would be required to accommodate the new service.

IV. The SEIS Process and the Role of Participating Agencies and the Public

The purpose of the SEIS process is to explore in a public setting potentially significant effects of implementing the proposed action and alternatives on the physical, human, and natural environment. Areas of investigation include, but are not limited to, land use, residential and business displacements, parklands, economic development, community disruptions, environmental justice, aesthetics, noise, wildlife, vegetation, endangered species, air and water quality, energy, electromagnetic fields, wetlands, waterways, floodplains, hazardous waste and materials, and cultural, historic, and archaeological resources. The Draft SEIS will also consider practicable alternatives to proposed fill of Federal waters in accordance with the Clean Water Act and U.S. Army Corps of Engineers regulations. At the conclusion of scoping, SANDAG and FTA will work together to prepare an annotated outline for the SEIS, based on information obtained during the scoping process.

Measures to avoid, minimize, or mitigate any significant adverse impacts will be identified. Regulations implementing NEPA, as well as provisions of the recently enacted Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), call for public involvement in the EIS process. Section 6002 of SAFETEA–LU requires that FTA and SANDAG do the following: (1) Extend an invitation to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project to become ''participating agencies,'' (2) provide an opportunity for involvement by participating agencies and the public in helping to define the purpose and need for a proposed project, as well as the range of alternatives for consideration in the impact statement, and (3) establish a plan for coordinating public and agency participation in and comment on the environmental review process. An invitation to become a participating agency, with the scoping information packet appended, will be extended to other Federal and non-Federal agencies and Indian tribes that may have an interest in the proposed project. It is possible that we may not be able to identify all Federal and non-Federal agencies and Indian tribes that may have such an interest. Any Federal or non-Federal agency or Indian tribe interested in the proposed project that does not receive an invitation to become a participating agency should notify at the earliest opportunity the Project Manager identified above under **ADDRESSES**.

A comprehensive public involvement program has been developed and a public and agency involvement Coordination Plan will be created. The program includes a project Web site (*http://www.sandag.org/midcoast*); establishment of a project working group and organizing periodic meetings with that committee; a public hearing on release of the Draft SEIS; and development and distribution of project newsletters. In 2010, SANDAG conducted scoping under CEQA to solicit public and agency comments on the project alternatives to be carried forward. All comments received during the CEQA scoping process will be considered during the preparation of the SEIS and do not need to be resubmitted.

The purposes of and need for the proposed project have been preliminarily identified in this notice. We invite the public and participating agencies to consider the preliminary statement of purposes of and need for the proposed project, as well as the alternatives proposed for consideration. Suggestions for modifications to the statement of purposes of and need for the proposed project and any other alternatives that have not previously been identified and that meet the purposes of and need for the proposed project are welcomed and will be given serious consideration. Comments on potentially significant environmental impacts that may be associated with the proposed project and alternatives that have not previously been identified are also welcomed.

SANDAG is seeking New Starts Funding for the proposed project under 49 U.S.C. 5309 and will therefore be subject to New Starts regulations (49 CFR Part 611). The New Starts regulation requires the submission of specific information in support of a request to initiate preliminary engineering, and this information is normally developed in conjunction with the NEPA process. Pertinent New Start evaluation criteria will be included in the Final SEIS.

V. FTA Procedures

In accordance with 23 CFR 771.105 (a) and 771.133, FTA will comply with all Federal environmental laws, regulations and executive orders applicable to the proposed project during the environmental review process to the maximum extent practicable. These requirements include, but are not limited to, the regulations of the Council on Environmental Quality (CEQ) and FTA implementing NEPA(40 CFR Parts 1500–1508, and 23 CFR Part 771), the project-level air quality conformity regulation of the U.S. Environmental Protection Agency (EPA) (40 CFR part 93), the Section 404(b)(1) of EPA (40 CFR part 230), the regulation implementing Section 106 of the National Historic Preservation Act (36 CFR Part 800); the regulation implementing Section 7 of the Endangered Species Act (50 CFR Part 402); Section 4(f) of the DOT Act (23 CFR 771.135); and the Executive Orders 12898 on environmental justice, 11988 on floodplain management, and 11990 on wetlands.

VI. Paperwork Reduction

The Paperwork Reduction Act seeks, in part, to minimize the cost to the taxpayer of the creation, collection, maintenance, use, dissemination, and disposition of information. Consistent with this goal and with principles of economy and efficiency in government, it is FTA policy to limit insofar as possible distribution of complete printed sets of environmental documents. Accordingly, unless a specific request for a complete printed set of environmental documents is received (preferably at the conclusion of scoping), FTA and its grantees will distribute only the executive summary of the environmental document together with a Compact Disc of the complete environmental document. A complete printed set of the environmental document will be available for review at SANDAG's offices and elsewhere; an

electronic copy of the complete environmental document will also be available on SANDAG's Web site.

Issued on: July 12, 2011.

Leslie T. Rogers,

Regional Administrator, Region IX, Federal Transit Administration.

[FR Doc. 2011–17975 Filed 7–18–11; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF THE TREASURY

Departmental Offices; Renewal of the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association

ACTION: Notice of Renewal of Committee's Charter.

SUMMARY: In accordance with the Federal Advisory Committee Act, as amended (Pub. L. 92–463; 5 U.S.C. App. 2), with the concurrence of the General Services Administration, the Secretary of the Treasury has determined that renewal of the Treasury Borrowing Advisory Committee of the Securities Industry and Financial Markets Association (the ''Committee'') is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Treasury by law.

FOR FURTHER INFORMATION CONTACT: Colin Kim, Director, Office of Debt Management (202) 622–7087.

SUPPLEMENTARY INFORMATION: The purpose of the Committee is to provide informed advice as representatives of the financial community to the Secretary of the Treasury and Treasury staff, upon the Secretary of the Treasury's request, in carrying out Treasury responsibilities for Federal financing and public debt management. The Committee meets to consider special items on which its advice is sought pertaining to immediate Treasury funding requirements and pertaining to longer term approaches to manage the national debt in a cost effective manner. The Committee usually meets immediately before the Treasury announces each mid-calendar quarter funding operation, although special meetings also may be held. Membership consists of up to 20 representative members, appointed by Treasury. The members are senior level officials who are employed by primary dealers, institutional investors, and other major participants in the government securities and financial markets.

The Designated Federal Official for the Advisory Committee is the Director of the Office of Debt Management. The Treasury Department has filed copies of the Committee's renewal charter with appropriate committees in Congress and also furnished a copy of the renewal charter to the Library of Congress.

Dated: July 5, 2011.

Colin Kim,

Director of the Office of Debt Management.

[FR Doc. 2011–18200 Filed 7–18–11; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF THE TREASURY

Privacy Act of 1974; Amended System of Records

AGENCY: Financial Management Service, Treasury.

ACTION: Notice of amendment to system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, the Financial Management Service gives notice of a proposed amendment to its Privacy Act system of records entitled ''Treasury/FMS .006—Direct Deposit Enrollment Records—Treasury/ Financial Management Service.''

DATES: Comments must be received no later than August 18, 2011. The proposed new system of records will become effective August 29, 2011 unless comments are received that would result in a contrary determination.

ADDRESSES: You should send your comments to Peter Genova, Deputy Chief Information Officer, Financial Management Service, 401 14th Street, SW., Washington, DC 20227. Comments received will be available for inspection at the same address between the hours of 9 a.m. and 4 p.m. Monday through Friday. You may send your comments by electronic mail to *peter.genova@fms.treas.gov* or *http://www.regulations.gov.* All comments, including attachments and other supporting materials, received are subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Peter Genova, Deputy Chief Information Officer, (202) 874–1736.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Privacy Act of 1974, as amended, 5 U.S.C. 552a, notice is given that the Financial Management Service (FMS), a bureau of the Department of the Treasury (Treasury), proposes to amend its system of records entitled ''Direct Deposit Enrollment Records—Treasury/Financial Management Service'' (Treasury/FMS .006). FMS is adding additional categories of records in the system and is amending its routine uses to allow for the processing of waivers related to the requirement that all Federal payments, other than tax payments, be made electronically. On December 22, 2010, FMS published an amendment to its regulation at 31 CFR part 208 (Part 208) (*see,* 75 FR 80315), which implements 31 U.S.C. 3332 (Section 3332). Section 3332 generally requires that all Federal payments, other than tax payments, be made by electronic funds transfer (EFT), unless waived by the Secretary of the Treasury. Direct deposit is the primary method used to make EFT Federal payments to individuals.

Part 208 requires recipients of Federal payments, other than tax payments, to receive payment by EFT, effective May 1, 2011. The effective date is delayed until March 1, 2013, for individuals receiving Federal payments by check on May 1, 2011; and for individuals who file claims for Federal benefits before May 1, 2011 and request check payments when they file. Individuals who do not choose direct deposit of their payments to an account at a financial institution will be enrolled in the Direct Express® Debit MasterCard® card [1] program, a prepaid card program established pursuant to terms and conditions approved by FMS. Treasury waives the EFT requirement for recipients born prior to May 1, 1921, who are receiving payments by paper check on March 1, 2013; for payments not eligible for deposit to a Direct Express® prepaid card account; and for recipients whose Direct Express® card has been suspended or cancelled. In addition, payment recipients may request a waiver if the EFT requirement creates a hardship due to his or her mental impairment or remote geographic location.

The proposed amendments to this system are necessary to process waivers of the EFT requirement. In some cases, FMS automatically applies the waivers based on information FMS will receive into its system of records from its own existing payment records, direct deposit enrollment records of its fiscal or financial agents and their contractors, or from Federal agencies. For example, FMS will receive information about a check payment recipient's date of birth from the Social Security Administration

[1] Direct Express® is a registered service mark of the Financial Management Service, U.S. Department of the Treasury. The Direct Express® Debit MasterCard® card is issued by FMS's financial agent, Comerica Bank, pursuant to a license by MasterCard International Incorporated. MasterCard® and the MasterCard® Brand Mark are registered trademarks of MasterCard International Incorporated.

in order to apply the waiver from the EFT requirement for recipients born prior to May 1, 1921. FMS also will receive information from its financial agent when a Federal payment recipient's Direct Express® card has been suspended or cancelled by the financial agent (but not when the individual cancels his or her own card) in order to process the applicable automatic waiver.

For waivers based on a hardship due to a payment recipient's mental impairment or remote geographic location, individual payment recipients must submit an application to FMS, or its agent, to request the waiver. In these cases, individuals will voluntarily submit to FMS information already covered in the categories of records in the system, such as name, social security number, and home address. In addition, to claim a hardship based on mental impairment or geographic location, the individual will state that the waiver application is based on his or her inability to manage a bank account or prepaid debit card due to a mental impairment or remote geographic location.

Therefore, FMS is amending the paragraph under ''Categories of records in the system'' to add ''date of birth'' as an example of identifying information, and the following additional categories: ''information related to the cancellation or suspension of an individual's Direct Express® debit card by FMS's financial agent'' and ''information provided by an individual due to a remote geographic location or about his or her inability to manage a bank account or prepaid debit card due to mental impairment.''

FMS also is amending the ''Routine uses of records maintained in the system'' section of its system of record revising routine use (4) to reflect the need to process waivers from the requirement to receive Federal payments electronically, as follows:

(4) Fiscal agents, financial agents, financial institutions, and contractors for the purposes of (a) Processing Direct Deposit enrollment applications, including, but not limited to, processing Direct Deposit enrollment forms and implementing programs related to Direct Deposit; investigating and rectifying possible erroneous information; creating and reviewing statistics to improve the quality of services provided; conducting debt collection services for debts arising from Direct Deposit activities; or developing, testing and enhancing computer systems; and (b) processing waivers from the requirement to receive payments electronically, including, but not limited to, processing automatic waivers and applications for waivers, as well as implementing the waivers; investigating and rectifying possible erroneous information or fraud; creating and reviewing statistics to improve the quality of services provided; or developing, testing and enhancing computer systems.

Finally, FMS is adding ''Treasury financial agents'' under the heading ''Record source category'' for information about the cancellation or suspension of a recipient's Direct Express® card by a financial agent. Without these amendments to its system of records, FMS, its fiscal agents and contractors, would not be able to process the waivers from the EFT requirements, as required under Part 208, and as requested by individuals.

FMS recognizes the sensitive nature of the confidential information it obtains when collecting financial institution account information from the public and has many safeguards in place to protect the information from theft or inadvertent disclosure. When appropriate, FMS's arrangements with its fiscal agents and contractors include requirements that preclude them from retaining, disclosing, and using the information for purposes other than the processing of waivers. In addition to various procedural and physical safeguards, access to computerized records is limited, through the use of access codes, encryption techniques and/or other internal mechanisms. Access to records is granted only as authorized by a business line manager at FMS or FMS's fiscal agent to those whose official duties require access solely for the purposes outlined in the proposed system. The amendments to the Direct Deposit Enrollment Records system will allow the public to obtain and seek waivers, as authorized by FMS's regulations.

The notice for the system of records was last published in its entirety on May 15, 2009, at 74 FR 23012.

The altered system of records report, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Government Reform and Oversight of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate and the Office of Management and Budget, pursuant to Appendix I to OMB Circular A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated November 30, 2000.

For the reasons set forth in the preamble, FMS proposes to amend its system of records entitled ''Direct Deposit Enrollment Records—Treasury/Financial Management Service'' (Treasury/FMS .006), as follows:

Treasury/FMS .006

SYSTEM NAME:

Direct Deposit Enrollment Records—Treasury/Financial Management Service.

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Description of the change: Remove current entry and in its place add the following:

''The records may contain identifying information, such as an individual's name(s), social security number, home address, home and work telephone number, personal e-mail address (home and work), and date of birth; information about an individual's bank account(s) and other types of accounts to which payments are made, such as the individual's bank account number and the financial institution routing and transit number; information about an individual's payments received from the United States, including the type of payment received and the Federal agency responsible for authorizing the payment; information related to the cancellation or suspension of an individual's Direct Express® debit card [2] by FMS's financial agent; and information provided by an individual regarding a hardship due to a remote geographic location or about his or her inability to manage a bank account or prepaid debit card due to mental impairment.''

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

* * * * *

Description of the change: Remove current routine use (4) and in its place add the following: '(4) Fiscal agents, financial agents, financial institutions, and contractors for the purposes of (a) Processing Direct Deposit enrollment applications, including, but not limited to, processing Direct Deposit enrollment forms and implementing programs related to Direct Deposit; investigating and rectifying possible erroneous information; creating and reviewing statistics to improve the quality of services provided; conducting debt collection services for debts arising from Direct Deposit activities; or developing, testing and enhancing computer systems; and (b) processing waivers from the requirement to receive payments electronically, including, but

[2] Direct Express® is a registered service mark of the Financial Management Service, U.S. Department of the Treasury. The Direct Express® debit card is issued by FMS's financial agent, Comerica Bank.

not limited to, processing automatic waivers and applications for waivers, as well as implementing the waivers; investigating and rectifying possible erroneous information or fraud; creating and reviewing statistics to improve the quality of services provided; or developing, testing and enhancing computer systems.''

* * * * *

RECORD SOURCE CATEGORIES:

Description of change: Remove current entry and in its place add the following: ''Information in this system is provided by the individual on whom the record is maintained (or by his or her authorized representative), other persons who electronically authorize payments from the Federal government, Federal agencies responsible for authorizing payments, Federal agencies responsible for disbursing payments, Treasury financial agents, and Treasury fiscal agents that process Direct Deposit enrollment applications, and contractors.''

* * * * *

Dated: July 1, 2011.

Melissa Hartman,

Deputy Assistant Secretary for Privacy, Transparency, and Records.

[FR Doc. 2011–18207 Filed 7–18–11; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Application for Issuance of Subordinated Debt Securities/Notice of Issuance of Subordinated Debt or Mandatorily Redeemable Preferred Stock

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 19, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this information collection by sending an e-mail to *ira.mills@ots.treas.gov.*

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Application for Issuance of Subordinated Debt Securities/Notice of Issuance of Subordinated Debt or Mandatory Redeemable Preferred Stock.

OMB Number: 1550–0030.

Form Numbers: 1344 and 1561.

Description: The information collection provides the OTS with necessary details to determine if the proposed issuance of securities will benefit the savings association or create unreasonable risks. If the information required were not collected, the OTS would not be able to properly evaluate whether the request to issue securities conforms to the applicable statutory and regulatory requirements.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 3.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 3 hours.

Dated: July 13, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18174 Filed 7–18–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Management Officials Interlocks

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 19, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; (202) 906–6518.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection by sending an e-mail to *ira.mills@ots.treas.gov.*

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Management Officials Interlocks.

OMB Number: 1550–0051.

Form Number: N/A.

Description: OTS uses the requested information to evaluate the merits of interlocks exemption applications. In evaluating the merits, OTS uses the information to determine: (a) Whether the services to be performed by the person in question are necessary or desirable for the purpose of preserving safe and sound operations, thereby protecting the insurance risk to the Deposit Insurance Fund; (b) if the institution is well managed and served by other fully competent directors, officers or employees; (c) if the person's background, including any past history in dealing with regulatory authorities, indicates an ability to operate a savings association in a safe and sound manner; (d) if the credentials of the person in question are such that the services to be performed would be particularly valuable to the savings association; and (e) if the service of the individual in management positions at unaffiliated depository organizations is likely to result in a monopoly or substantial lessening of competition.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 3.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 12 hours.

Dated: July 13, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18177 Filed 7–18–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Capital Distribution

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 19, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection by sending an e-mail to *ira.mills@ots.treas.gov.*

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Capital Distribution.

OMB Number: 1550–0059.

Form Number: 1583.

Description: The OTS reviews the information to determine whether the request of savings associations is in accordance with existing statutory and regulatory criteria. In addition, the information provides the OTS with a mechanism for monitoring capital distributions since these distributions can reduce an association's capital and perhaps places it at risk.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 366.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 657 hours.

Dated: July 13, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18178 Filed 7–18–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Electronic Operations

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 19, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief

Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; or send an e-mail to *infocollection.comments@ots.treas.gov*.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection by sending an e-mail to *ira.mills@ots.treas,gov*.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Electronic Operations.

OMB Number: 1550–0095.

Form Number: N/A.

Description: Federal savings associations may use, or participate with others to use, electronic means or facilities to perform any function, or provide any product or service, as part of an authorized activity. Electronic means or facilities include, but are not limited to, automated teller machines, automated loan machines, personal computers, the Internet, the World Wide Web, telephones, and other similar electronic devices. 12 CFR 555.200(a). The regulation also requires each savings association to notify OTS at least 30 days before establishing a transactional Web site. Savings associations that present supervisory or compliance concerns may be subject to additional procedural requirements. 12 CFR 555.300(b)–(c).

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 9.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 18 hours.

Dated: July 13, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18184 Filed 7–18–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Recordkeeping and Confirmation Requirements for Securities Transactions

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before September 19, 2011.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552; or send an e-mail to *infocollection.comments@ots.treas.gov.*

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection by sending an e-mail to *ira.mills@ots.treas.gov.*

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Recordkeeping and Confirmation Requirements for Securities Transactions.

OMB Number: 1550–0109.

Form Number: N/A.

Description: The regulation found at 12 CFR part 551 imposes recordkeeping and confirmation requirements for savings associations that effect securities transactions.

The recordkeeping and confirmation regulation ensures that savings association customers receive the same protections and disclosures provided to brokerage customers; ensures savings associations effect securities transactions safely and soundly; and provides savings associations with formal guidance when they effect securities transactions.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 714.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 3,570 hours.

Dated: July 13, 2011.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2011–18180 Filed 7–18–11; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF VETERANS AFFAIRS

Privacy Act of 1974; Report of Matching Program

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Department of Veterans Affairs (VA)

intends to continue a recurring computer program matching Internal Revenue Service (IRS) records with VA pension and parents' dependency and indemnity compensation (DIC) records.

The goal of this match is to compare income and employment status as reported to VA with wage and income records maintained by IRS.

VA plans to match records of veterans, surviving spouses and children who receive pension, and parents who receive DIC, with IRS income tax return information and Federal Tax Information (FTI) as it relates to earned income. VA will also match records of veterans receiving disability compensation at the 100 percent rate based on unemployability with IRS income tax return information as it relates to earned income.

VA will use this information to adjust VA benefit payments as prescribed by law. The proposed matching program will enable VA to ensure accurate reporting of income and employment status.

The authority for this matching program is 38 U.S.C. 5317, which requires Federal agencies to furnish VA with information necessary to determine eligibility for or amount of benefits. In addition, 26 U.S.C. 6103(l)(7) authorizes the disclosure of tax return information to VA.

Records to be Matched: VA records involved in the match are the VA system of records, ''Compensation, Pension, Education, and Vocational Rehabilitation and Employment Records-VA (58VA21/22/28),'' published at 75 FR 22187 (April 27, 2010). The IRS records will come from the Information Return Master File (IRMF)/IRS 22.061, as published at 73 FR13302 (March 12, 2008), through the disclosure of Information to Federal, State and Local Agencies (DIFSLA) program. In accordance with Title 5 U.S.C. subsection 552a(o)(2) and (r), copies of the agreement are being sent to both Houses of Congress and to the Office of Management and Budget (OMB).

This notice is provided in accordance with the provisions of the Privacy Act of 1974 as amended by Public Law 100–503.

DATES: The match will start no sooner than 30 days after publication of this Notice in the **Federal Register**, or 40 days after copies of this Notice and the agreement of the parties are submitted to Congress and OMB, whichever is later, and end not more than 18 months after the agreement is properly implemented by the parties. The involved agencies' Data Integrity Boards (DIB) may extend this match for 12 months provided the agencies certify to their DIBs within three months of the ending date of the original match that the matching program will be conducted without change and that the matching program has been conducted in compliance with the original matching program.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov*; by mail or hand-delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m. Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Pamela Zaroff (212C), (202) 461–9700.

SUPPLEMENTARY INFORMATION: This information is required by Title 5 U.S.C. subsection 552a(e)(12), the Privacy Act of 1974. A copy of this notice has been provided to both Houses of Congress and OMB.

Approved: June 30, 2011.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

[FR Doc. 2011–18166 Filed 7–18–11; 8:45 am]

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Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 410, 414, 415 et al.
Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2012; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 410, 414, 415, and 495

[CMS–1524–P]

RIN 0938–AQ25

Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2012

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule addresses changes to the physician fee schedule and other Medicare Part B payment policies to ensure that our payment systems are updated to reflect changes in medical practice and the relative value of services. It also addresses, implements or discusses certain provisions of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 (collectively known as the Affordable Care Act) and the Medicare Improvements for Patients and Providers Act of 2008. In addition, this proposed rule discusses payments for Part B drugs; Physician Quality Reporting System; the Electronic Prescribing (eRx) Incentive Program; the Physician Resource-Use Feedback Program and the value modifier; productivity adjustment for ambulatory surgical center payment system and the ambulance, clinical laboratory, and durable medical equipment prosthetics orthotics and supplies (DMEPOS) fee schedules; and other Part B related issues. (See the Table of Contents for a listing of the specific issues addressed in this proposed rule.)

DATES: *Comment date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 30, 2011.

ADDRESSES: In commenting, please refer to file code CMS–1524–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions for ''submitting a comment.''

2. *By regular mail.* You may mail written comments to the following address only:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1524–P, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only:

Centers for Medicare & Medicaid Services,Department of Health and Human Services,Attention: CMS–1524–P,Mail Stop C4–26–05,7500 Security Boulevard,Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services,Department of Health and Human Services,Room 445–G, Hubert H. Humphrey Building,200 Independence Avenue, SW.,Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services,Department of Health and Human Services,7500 Security Boulevard,Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–1066 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT:

Ryan Howe, (410) 786–3355, for issues related to the physician fee schedule practice expense methodology, direct practice expense inputs, and telehealth services.

Elizabeth Truong, (410) 786–6005, or Sara Vitolo, (410) 786–5714, for issues related to potentially misvalued services.

Ken Marsalek, (410) 786–4502, for issues related the multiple procedure payment reduction and pathology services.

Sara Vitolo, (410) 786–5714, for issues related to malpractice RVUs.

Michael Moore, (410) 786–6830, for issues related to geographic practice cost indices.

Elizabeth Truong, (410) 786–6005, for issues related to the sustainable growth rate, or the anesthesia or physician fee schedule conversion factors.

Bonny Dahm, (410) 786–4006, for issues related to payment for covered outpatient drugs and biologicals.

Claudia Lamm, (410) 786–3421, for issues related to the chiropractic services demonstration budget neutrality issue.

Jamie Hermansen, (410) 786–2064, or Stephanie Frilling, (410) 786–4507 for issues related to the annual wellness visit.

Christine Estella, (410) 786–0485, for issues related to the physician quality reporting system, incentives for Electronic Prescribing (eRx) and Physician Compare.

Gift Tee, (410) 786–9316, for issues related to the Physician Resource Use Feedback Program and physician value modifier.

Stephanie Frilling, (410) 786–4507 for issues related to the 3-day Payment Window.

Pam West, (410) 786–2302, for issues related to the technical corrections.

Rebecca Cole or Erin Smith, (410) 786–4497, for issues related to physician payment not previously identified.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the regulations.gov Web site (*http://www.regulations.gov*) as soon as possible after they have been received: Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

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To assist readers in referencing sections contained in this preamble, we are providing a table of contents. Some of the issues discussed in this preamble affect the payment policies, but do not require changes to the regulations in the Code of Federal Regulations (CFR). Information on the regulations impact appears throughout the preamble and, therefore, is not discussed exclusively in section VII. of this proposed rule.

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Regulations Text

Acronyms

In addition, because of the many organizations and terms to which we refer by acronym in this proposed rule, we are listing these acronyms and their corresponding terms in alphabetical order as follows:

AA—Anesthesiologist assistant
AACE—American Association of Clinical Endocrinologists
AACVPR—American Association of Cardiovascular and Pulmonary Rehabilitation
AADE—American Association of Diabetes Educators
AANA—American Association of Nurse Anesthetists
ABMS—American Board of Medical Specialties
ABN—Advanced Beneficiary Notice
ACC—American College of Cardiology
ACGME—Accreditation Council on Graduate Medical Education
ACLS—Advanced cardiac life support
ACP—American College of Physicians
ACR—American College of Radiology
ACS—American Community Survey
ADL—Activities of daily living
AED—Automated external defibrillator
AFROC—Association of Freestanding Radiation Oncology Centers
AFS—Ambulance Fee Schedule
AHA—American Heart Association
AHFS–DI—American Hospital Formulary Service-Drug Information
AHRQ—[HHS] Agency for Healthcare Research and Quality
AMA—American Medical Association
AMA RUC—[AMA's Specialty Society] Relative (Value) Update Committee
AMA–DE—American Medical Association Drug Evaluations
AMI—Acute Myocardial Infarction
AMP—Average Manufacturer Price
AO—Accreditation organization
AOA—American Osteopathic Association
APA—American Psychological Association
APC—Administrative Procedures Act
APTA—American Physical Therapy Association
ARRA—American Recovery and Reinvestment Act (Pub. L. 111–5)
ASC—Ambulatory surgical center
ASP—Average Sales Price
ASPE—Assistant Secretary of Planning and Evaluation (ASPE)
ASRT—American Society of Radiologic Technologists
ASTRO—American Society for Therapeutic Radiology and Oncology
ATA—American Telemedicine Association
AWP—Average wholesale price
AWV—Annual Wellness Visit
BBA—Balanced Budget Act of 1997 (Pub. L. 105–33)
BBRA—[Medicare, Medicaid and State Child Health Insurance Program] Balanced Budget Refinement Act of 1999 (Pub. L. 106–113)
BIPA—Medicare, Medicaid, and SCHIP Benefits Improvement Protection Act of 2000 (Pub. L. 106–554)
BLS—Bureau of Labor and Statistics
BMD—Bone mineral density
BMI—Body mass index
BN—Budget neutrality
BPM—Benefit Policy Manual
CABG—Coronary artery bypass graft
CAD—Coronary artery disease
CAH—Critical Access Hospital
CAHEA—Committee on Allied Health Education and Accreditation
CAP—Competitive acquisition program
CARE—Continuity Assessment Record and Evaluation
CBIC—Competitive Bidding Implementation Contractor
CBP—Competitive Bidding Program
CBSA—Core-Based Statistical Area
CDC—Centers for Disease Control and Prevention
CEM—Cardiac Event Monitoring
CF—Conversion Factor
CFC—Conditions for Coverage
CFR—Code of Federal Regulations
CKD—Chronic kidney disease
CLFS—Clinical laboratory fee schedule
CMA—California Medical Association
CMD—Contractor Medical Director
CME—Continuing medical education
CMHC—Community Mental Health Center
CMPs—Civil money penalties
CMS—Centers for Medicare & Medicaid Services
CNS—Clinical Nurse Specialist
CoP—Condition of participation
COPD—Chronic obstructive pulmonary disease
CORF—Comprehensive Outpatient Rehabilitation Facility
COS—Cost of service
CPEP—Clinical Practice Expert Panel
CPI—Consumer Price Index
CPI–U Consumer price index for urban consumers
CPR—Cardiopulmonary resuscitation
CPT—[Physicians] Current Procedural Terminology (4th Edition, 2002, copyrighted by the American Medical Association)
CQM—Clinical quality measures
CR—Cardiac rehabilitation
CRF—Chronic Renal Failure
CRNA—Certified registered nurse anesthetist
CROs—Clinical research organizations
CRP—Canalith repositioning
CRT—Certified respiratory therapist
CSC—Computer Sciences Corporation
CSW—Clinical social worker
CT—Computed Tomography
CTA—Computed Tomography Angography
CWF—Common Working File
CY—Calendar Year
D.O.—Doctor of Osteopathy
DEA—Drug Enforcement Agency
DHHS—Department of Health and Human Services
DHS—Designated health services

DME—Durable Medical Equipment
DMEPOS—Durable medical equipment, prosthetics, orthotics, and supplies
DOJ—Department of Justice
DOQ—Doctors Office Quality
DOS—Date of service
DOTPA—Development of Outpatient Therapy Alternatives
DRA—Deficit Reduction Act of 2005 (Pub. L. 109–171)
DSMT—Diabetes Self-Management Training Services
DXA CPT—Dual energy X-ray absorptiometry
E/M—Evaluation and Management Medicare Services
ECG—Electrocardiogram
EDI—Electronic data interchange
EEG—Electroencephalogram
EGC—Electrocardiogram
EHR—Electronic health record
EKG—Electrocardiogram
EMG—Electromyogram
EMTALA—Emergency Medical Treatment and Active Labor Act
EOG—Electro-oculogram
EPO—Erythopoeitin
EPs—Eligible Professional
eRx—Electronic Prescribing
ESO—Endoscopy Supplies
ESRD—End-Stage Renal Disease
FAA—Federal Aviation Administration
FAX—Facsimile
FDA—Food and Drug Administration (HHS)
FFS—Fee-for-service
FISH—In Situ Hybridization Testing
FOTO—Focus On Therapeutic Outcomes
FQHC—Federally Qualified Health Center
FQHC—Federally Qualified Health Center
FR—**Federal Register**
FTE—full time equivalent
GAF—Geographic adjustment factor
GAFs—Geographic Adjustment Factors
GAO—Government Accountability Office
GEM—Generating Medicare [Physician Quality Performance Measurement Results]
GFR—Glomerular filtration rate
GME—Graduate Medical Education
GPCIs—Geographic Practice Cost Indices
GPO—Group purchasing organization
GPOs—Group purchasing organizations
GPRO—Group Practice Reporting Option
GPS—Geographic Positioning System
GQ—Via asynchronous telecommunications system
GSA—General Services Administration
GT—Growth Target
HAC—Hospital-acquired conditions
HBAI—Health and Behavior Assessment and Intervention
HCC—Hierarchal Condition Category
HCPAC—Health Care Professionals Advisory Committee
HCPCS—Healthcare Common Procedure Coding System
HCRIS—Healthcare Cost Report Information System
HDL/LDL—High-density lipoprotein/Low-density lipoprotein
HDRT—High dose radiation therapy
HEMS—Helicopter Emergency Medical Services
HH PPS—Home Health Prospective Payment System
HHA—Home health agency
HHRG—Home health resource group
HHS—[Department of] Health and Human Services
HIPAA—Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191)
HIT—Health information technology
HITECH—Health Information Technology for Economic and Clinical Health Act (Title IV of Division B of the Recovery Act, together with Title XIII of Division A of the Recovery Act)
HITSP—Healthcare Information Technology Standards Panel
HIV—Human immunodeficiency virus
HMO—Health Maintenance Organization
HOPD—Hospital outpatient department
HPSA—Health Professional Shortage Area
HRA—Health Risk Assessment
HRSA—Health Resources Services Administration (HHS)
HSIP—HPSA Surgical Incentive Program
HUD—Department of Housing and Urban Development
HUD—Housing and Urban Development
IACS—Individuals Access to CMS Systems
IADL—Instrumental activities of daily living
ICD—International Classification of Diseases
ICF—Intermediate care facilities
ICF—International Classification of Functioning, Disability and Health
ICR—Intensive cardiac rehabilitation
ICR—Information collection requirement
IDE—Investigational device exemption
IDTF—Independent diagnostic testing facility
IFC—Interim final rule with comment period
IGI—IHS Global Insight, Inc.
IME—Indirect Medical Education
IMRT—Intensity-Modulated Radiation Therapy
INR—International Normalized Ratio
IOM—Institute of Medicine
IOM—Internet Only Manual
IPCI—indirect practice cost index
IPPE—Initial preventive physical examination
IPPS—Inpatient prospective payment system
IRS—Internal Revenue Service
ISO—Insurance services office
IVD—Ischemic Vascular Disease
IVIG—Intravenous immune globulin
IWPUT—Intra-service work per unit of time
JRCERT—Joint Review Committee on Education in Radiologic Technology
KDE—Kidney Disease Education
LCD—Local coverage determination
LOPS—loss of protective sensation
LUGPA—Large Urology Group Practice Association
M.D.—Doctor of Medicine
MA—Medicare Advantage program
MAC—Medicare Administrative Contractor
MA–PD—Medicare Advantage-Prescription Drug Plans
MAV—Measure Applicability Validation
MCMP—Medicare Care Management Performance
MCP—Monthly Capitation Payment
MDRD—Modification of Diet in Renal Disease
MedCAC—Medicare Evidence Development and Coverage Advisory Committee (formerly the Medicare Coverage Advisory Committee (MCAC))
MedPAC—Medicare Payment Advisory Commission
MEI—Medicare Economic Index
MGMA—Medical Group Management Association
MIEA–TRHCA—Medicare Improvements and Extension Act of 2006 (that is, Division B) of the Tax Relief and Health Care Act of 2006 (TRHCA) (Pub. L. 109–432)
MIPPA—Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. 110–275)
MMA—Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173)
MMEA—Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111–309)
MMSEA—Medicare, Medicaid, and SCHIP Extension Act of 2007 (Pub. L. 110–173)
MNT—Medical Nutrition Therapy
MOC—Maintenance of certification
MP—Malpractice
MPC—Multispecialty Points of Comparison
MPPR—Multiple Procedure Payment Reduction Policy
MQSA—Mammography Quality Standards Act of 1992 (Pub. L. 102–539)
MRA—Magnetic Resonance Angiography
MRI—Magnetic Resonance Imaging
MSA—Metropolitan Statistical Area
MSP—Medicare Secondary Payer
MUE—Medically Unlikely Edit
NAICS—North American Industry Classification System
NBRC—National Board for Respiratory Care
NCCI—National Correct Coding Initiative
NCD—National Coverage Determination
NCQA—National Committee for Quality Assurance
NCQDIS—National Coalition of Quality Diagnostic Imaging Services
NDC—National Drug Codes
NF—Nursing facility
NISTA—National Institute of Standards and Technology Act
NP—Nurse practitioner
NPI—National Provider Identifier
NPP—Nonphysician practitioner
NPPES—National Plan & Provider Enumeration System
NPPs—Nonphysician Practioners
NQF—National Quality Forum
NRC—Nuclear Regulatory Commission
NSQIP—National Surgical Quality Improvement Program
NTSB—National Transportation Safety Board
NUBC—National Uniform Billing Committee
OACT—[CMS] Office of the Actuary
OBRA—Omnibus Budget Reconciliation Act
OCR—Optical Character Recognition
ODF—Open door forum
OES—Occupational Employment Statistics
OGPE—Oxygen generating portable equipment
OIG—Office of the Inspector General
OMB—Office of Management and Budget
ONC—[HHS] Office of the National Coordinator for Health IT
OPPS—Outpatient prospective payment system
OSCAR—Online Survey and Certification and Reporting
PA—Physician Assistant
PACE—Program of All-inclusive Care for the Elderly
PACMBPRA—Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (Pub. L. 111–192)
PAT—Performance assessment tool

PC—Professional Components
PCI—Percutaneous coronary intervention
PCIP—Primary Care Incentive Payment Program
PDP—Prescription drug plan
PE—Practice Expense
PE/HR—Practice expense per hour
PEAC—Practice Expense Advisory Committee
PECOS—Provider Enrollment Chain and Ownership System
PERC—Practice Expense Review Committee
PFS—Physician Fee Schedule
PGP—[Medicare] Physician Group Practice
PHI—Protected health information
PHP—Partial hospitalization program
PIM—[Medicare] Program Integrity Manual
PLI—Professional liability insurance
POA—Present on admission
POC—Plan of care
PODs—Physician owned distributors
PPATRA—Physician Payment and Therapy Relief Act
PPI—Producer price index
PPIS—Physician Practice Expense Information Survey
PPPS—Personalized Prevention Plan Services
PPS—Prospective payment system
PPTA—Plasma Protein Therapeutics Association
PQRI—Physician Quality Reporting Initiative
PR—Pulmonary rehabilitation
PRA—Paperwork Reduction Act
PSA—Physician scarcity areas
PT—Physical therapy
PTA—Physical therapy assistant
PTCA—Percutaneous transluminal coronary angioplasty
PVBP—Physician and Other Health Professional Value-Based Purchasing Workgroup
QDCs—(Physician Quality Reporting System) Quality Data Codes
RA—Radiology assistant
RAC—Medicare Recovery Audit Contractor
RBMA—Radiology Business Management Association
RFA—Regulatory Flexibility Act
RHC—Rural Health Clinic
RHQDAPU—Reporting Hospital Quality Data Annual Payment Update Program
RIA—Regulatory impact analysis
RN—Registered nurse
RNAC—Reasonable net acquisition cost
RPA—Radiology practitioner assistant
RRT—Registered respiratory therapist
RUC—[AMA's Specialty Society] Relative (Value) Update Committee
RVRBS—Resource-Based Relative Value Scale
RVU—Relative Value Unit
SBA—Small Business Administration
SCHIP—State Children's Health Insurance Programs
SDW—Special Disability Workload
SGR—Sustainable growth rate
SLP—Speech-language pathology
SMS—Socioeconomic Monitoring Surveys
SMS—Monitoring Survey
SMS—[AMAs] Socioeconomic Monitoring System
SNF—Skilled Nursing Facility
SOR—System of record
SRS—Stereotactic radiosurgery
SSA—Social Security Administration
SSI—Social Security Income
STARS—Services Tracking and Reporting System
STATS—Short Term Alternatives for Therapy Services
STS—Society for Thoracic Surgeons
TC—Technical Components
TIN—Tax identification number
TJC—Joint Commission
TRHCA—Tax Relief and Health Care Act of 2006 (Pub. L. 109–432)
TTO—Transtracheal oxygen
UAF—Update Adjustment Factor
UPMC—University of Pittsburgh Medical Center
URAC—Utilization Review Accreditation Committee
USDE—United States Department of Education
USP–DI—United States Pharmacopoeia-Drug Information
VA—Department of Veterans Affairs
VBP—Value-based purchasing
WAC—Wholesale Acquisition Cost
WAMP—Widely available market price
WAMP—Widely Available Market Price
WHO—World Health Organization

Addenda Available Only Through the Internet on the CMS Web Site

In the past, the Addenda referred to throughout the preamble of our annual PFS proposed and final rules with comment period were included in the printed **Federal Register**. However, beginning with the CY 2012 PFS proposed rule, the PFS Addenda will no longer appear in the **Federal Register**. Instead these Addenda to the annual proposed and final rules with comment period will be available only through the Internet. The PFS Addenda along with other supporting documents and tables referenced in this proposed rule are available through the Internet on the CMS Web site at *http://www.cms.gov/PhysicianFeeSched/*. Click on the link on the left side of the screen titled, ''PFS Federal Regulations Notices'' for a chronological list of PFS **Federal Register** and other related documents. For the CY 2012 PFS proposed rule, refer to item CMS–1524–P. For complete details on the availability of the Addenda referenced in this proposed rule, we refer readers to section VIII. of this proposed rule. Readers who experience any problems accessing any of the Addenda or other documents referenced in this proposed rule and posted on the CMS Web site identified above should contact Erin Smith at (410) 786–4497.

CPT (Current Procedural Terminology) Copyright Notice

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I. Background

Since January 1, 1992, Medicare has paid for physicians' services under section 1848 of the Social Security Act (the Act), ''Payment for Physicians' Services.'' The Act requires that payments under the physician fee schedule (PFS) are based on national uniform relative value units (RVUs) based on the relative resources used in furnishing a service. Section 1848(c) of the Act requires that national RVUs be established for physician work, practice expense (PE), and malpractice expense. Before the establishment of the resource-based relative value system, Medicare payment for physicians' services was based on reasonable charges. We note that throughout this proposed rule, unless otherwise noted, the term ''practitioner'' is used to describe both physicians and nonphysician practitioners (such as physician assistants, nurse practitioners, clinical nurse specialists, certified nurse-midwives, psychologists, or social workers) that are permitted to furnish and bill Medicare under the PFS for their services.

A. Development of the Relative Value System

1. Work RVUs

The concepts and methodology underlying the PFS were enacted as part of the Omnibus Budget Reconciliation Act (OBRA) of 1989 (Pub. L. 101–239), and OBRA 1990, (Pub. L. 101–508). The final rule, published on November 25, 1991 (56 FR 59502), set forth the fee schedule for payment for physicians' services beginning January 1, 1992. Initially, only the physician work RVUs were resource-based, and the PE and malpractice RVUs were based on average allowable charges.

The physician work RVUs established for the implementation of the fee schedule in January 1992 was developed with extensive input from the physician community. A research team at the Harvard School of Public Health developed the original physician work RVUs for most codes in a cooperative agreement with the Department of Health and Human Services (DHHS). In constructing the code-specific vignettes for the original physician work RVUs, Harvard worked with panels of experts, both inside and outside the Federal government, and

obtained input from numerous physician specialty groups.

Section 1848(b)(2)(B) of the Act specifies that the RVUs for anesthesia services are based on RVUs from a uniform relative value guide, with appropriate adjustment of the conversion factor (CF), in a manner to assure that fee schedule amounts for anesthesia services are consistent with those for other services of comparable value. We established a separate CF for anesthesia services, and we continue to utilize time units as a factor in determining payment for these services. As a result, there is a separate payment methodology for anesthesia services.

We establish physician work RVUs for new and revised codes based, in part, on our review of recommendations received from the American Medical Association's (AMA's) Specialty Society Relative Value Update Committee (RUC).

2. Practice Expense Relative Value Units (PE RVUs)

Section 121 of the Social Security Act Amendments of 1994 (Pub. L. 103–432), enacted on October 31, 1994, amended section 1848(c)(2)(C)(ii) of the Act and required us to develop resource-based PE RVUs for each physicians service beginning in 1998. We were to consider general categories of expenses (such as office rent and wages of personnel, but excluding malpractice expenses) comprising PEs.

Section 4505(a) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33), amended section 1848(c)(2)(C)(ii) of the Act to delay implementation of the resource-based PE RVU system until January 1, 1999. In addition, section 4505(b) of the BBA provided for a 4-year transition period from charge-based PE RVUs to resource-based RVUs.

We established the resource-based PE RVUs for each physician's service in a final rule, published November 2, 1998 (63 FR 58814), effective for services furnished in 1999. Based on the requirement to transition to a resource-based system for PE over a 4-year period, resource-based PE RVUs did not become fully effective until 2002.

This resource-based system was based on two significant sources of actual PE data: The Clinical Practice Expert Panel (CPEP) data and the AMA's Socioeconomic Monitoring System (SMS) data. The CPEP data were collected from panels of physicians, practice administrators, and nonphysician health professionals (for example, registered nurses (RNs)) nominated by physician specialty societies and other groups. The CPEP panels identified the direct inputs required for each physician's service in both the office setting and out-of-office setting. We have since refined and revised these inputs based on recommendations from the AMA RUC. The AMA's SMS data provided aggregate specialty-specific information on hours worked and PEs.

Separate PE RVUs are established for procedures that can be performed in both a nonfacility setting, such as a physician's office, and a facility setting, such as a hospital outpatient department (HOPD). The difference between the facility and nonfacility RVUs reflects the fact that a facility typically receives separate payment from Medicare for its costs of providing the service, apart from payment under the PFS. The nonfacility RVUs reflect all of the direct and indirect PEs of providing a particular service.

Section 212 of the Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) directed the Secretary of Health and Human Services (the Secretary) to establish a process under which we accept and use, to the maximum extent practicable and consistent with sound data practices, data collected or developed by entities and organizations to supplement the data we normally collect in determining the PE component. On May 3, 2000, we published the interim final rule (65 FR 25664) that set forth the criteria for the submission of these supplemental PE survey data. The criteria were modified in response to comments received, and published in the **Federal Register** (65 FR 65376) as part of a November 1, 2000 final rule. The PFS final rules published in 2001 and 2003, respectively, (66 FR 55246 and 68 FR 63196) extended the period during which we would accept these supplemental data through March 1, 2005.

In the calendar year (CY) 2007 PFS final rule with comment period (71 FR 69624), we revised the methodology for calculating direct PE RVUs from the top-down to the bottom-up methodology beginning in CY 2007 and provided for a 4-year transition for the new PE RVUs under this new methodology. This transition ended in CY 2010 and direct PE RVUs are calculated in CY 2012 using this methodology, unless otherwise noted.

In the CY 2010 PFS final rule with comment period (74 FR 61749), we updated the PE/hour (PE/HR) data that are used in the calculation of PE RVUs for most specialties. For this update, we used the Physician Practice Information Survey (PPIS) conducted by the AMA. The PPIS is a multispecialty, nationally representative, PE survey of both physicians and nonphysician practitioners (NPPs) using a survey instrument and methods highly consistent with those of the SMS and the supplemental surveys used prior to CY 2010. We note that in CY 2010, for oncology, clinical laboratories, and independent diagnostic testing facilities (IDTFs), we continued to use the supplemental survey data to determine PE/HR values (74 FR 61752). Beginning in CY 2010, we provided for a 4-year transition for the new PE RVUs using the updated PE/HR data. In CY 2012, the third year of the transition, PE RVUs are calculated based on a 75/25 blend of the new PE RVUs developed using the PPIS data and the previous PE RVUs based on the SMS and supplemental survey data.

3. Resource-Based Malpractice RVUs

Section 4505(f) of the BBA amended section 1848(c) of the Act to require that we implement resource-based malpractice RVUs for services furnished on or after CY 2000. The resource-based malpractice RVUs were implemented in the PFS final rule published November 2, 1999 (64 FR 59380). The MP RVUs were based on malpractice insurance premium data collected from commercial and physician-owned insurers from all the States, the District of Columbia, and Puerto Rico. In the CY 2010 PFS final rule with comment period (74 FR 61758), we implemented the Second Five-Year Review and update of the malpractice RVUs. In the CY 2011 PFS final rule with comment period, we described our approach for determining malpractice RVUs for new or revised codes that become effective before the next Five Year Review and update (75 FR 73208). Accordingly, to develop the CY 2012 malpractice RVUs for new or revised codes we cross-walked the new or revised code to the malpractice RVUs of a similar source code and adjusted for differences in work (or, if greater, the clinical labor portion of the fully implemented PE RVUs) between the source code and the new or revised code.

4. Refinements to the RVUs

Section 1848(c)(2)(B)(i) of the Act requires that we review all RVUs no less often than every 5 years. The First Five-Year Review of Work RVUs was published on November 22, 1996 (61 FR 59489) and was effective in 1997. The Second Five-Year Review of Work RVUs was published in the CY 2002 PFS final rule with comment period (66 FR 55246) and was effective in 2002. The Third Five-Year Review of Work RVUs was published in the CY 2007 PFS final rule with comment period (71 FR 69624) and was effective on January 1,

2007. The Fourth Five-Year Review of Work RVUs was initiated in the CY 2010 PFS final rule with comment period where we solicited candidate codes from the public for this review (74 FR 61941). Proposed revisions to work RVUs and corresponding changes to PE and malpractice RVUs affecting payment for physicians' services for the Fourth Five-Year Review of Work RVUs were published in a separate notice (76 FR 32410). We will review public comments, make adjustments to our proposals in response to comments, as appropriate, and include final values in the CY 2012 PFS final rule with comment period, effective for services furnished beginning January 1, 2012.

In 1999, the AMA RUC established the Practice Expense Advisory Committee (PEAC) for the purpose of refining the direct PE inputs. Through March 2004, the PEAC provided recommendations to CMS for over 7,600 codes (all but a few hundred of the codes currently listed in the AMA's Current Procedural Terminology (CPT) codes). As part of the CY 2007 PFS final rule with comment period (71 FR 69624), we implemented a new bottom-up methodology for determining resource-based PE RVUs and transitioned the new methodology over a 4-year period. A comprehensive review of PE was undertaken prior to the 4-year transition period for the new PE methodology from the top-down to the bottom-up methodology, and this transition was completed in CY 2010. In CY 2010, we also incorporated the new PPIS data to update thespecialty specific PE/HR data used to develop PE RVUs, adopting a 4-year transition to PE RVUs developed using the PPIS data.

In the CY 2005 PFS final rule with comment period (69 FR 66236), we implemented the First Five-Year Review of the malpractice RVUs (69 FR 66263). Minor modifications to the methodology were addressed in the CY 2006 PFS final rule with comment period (70 FR 70153). The Second Five-Year Review and update of resource-based malpractice RVUs was published in the CY 2010 PFS final rule with comment period (74 FR 61758) and was effective in CY 2010.

In addition to the Five-Year Reviews, beginning for CY 2009, CMS and the AMA RUC have identified and reviewed a number of potentially misvalued codes on an annual basis based on various identification screens. This annual review of work and PE RVUs for potentially misvalued codes was supplemented by section 3134 of the Affordable Care Act, which requires the agency to periodically identify, review and adjust values for potentially misvalued codes with an emphasis on the following categories: (1) Codes and families of codes for which there has been the fastest growth; (2) codes or families of codes that have experienced substantial changes in practice expenses; (3) codes that are recently established for new technologies or services; (4) multiple codes that are frequently billed in conjunction with furnishing a single service; (5) codes with low relative values, particularly those that are often billed multiple times for a single treatment; (6) codes which have not been subject to review since the implementation of the RBRVS (the so-called 'Harvard valued codes'); and (7) other codes determined to be appropriate by the Secretary.

5. Application of Budget Neutrality to Adjustments of RVUs

Budget neutrality typically requires that expenditures not increase or decrease as a result of changes or revisions to policy. However, section 1848(c)(2)(B)(ii)(II) of the Act requires adjustment only if the change in expenditures resulting from the annual revisions to the PFS exceeds a threshold amount. Specifically, adjustments in RVUs for a year may not cause total PFS payments to differ by more than $20 million from what they would have been if the adjustments were not made. In accordance with section 1848(c)(2)(B)(ii)(II) of the Act, if revisions to the RVUs cause expenditures to change by more than $20 million, we make adjustments to ensure that expenditures do not increase or decrease by more than $20 million.

B. Components of the Fee Schedule Payment Amounts

To calculate the payment for every physician's service, the components of the fee schedule (physician work, PE, and malpractice RVUs) are adjusted by a geographic practice cost index (GPCI). The GPCIs reflect the relative costs of physician work, PE, and malpractice in an area compared to the national average costs for each component.

RVUs are converted to dollar amounts through the application of a CF, which is calculated by CMS' Office of the Actuary (OACT).

The formula for calculating the Medicare fee schedule payment amount for a given service and fee schedule area can be expressed as:

$$\text{Payment} = [(\text{RVU work} \times \text{GPCI work}) + (\text{RVU PE} \times \text{GPCI PE}) + (\text{RVU Malpractice} \times \text{GPCI Malpractice})] \times \text{CF}.$$

C. Most Recent Changes to the Fee Schedule

The CY 2011 PFS final rule with comment period (75 FR 73170) implemented changes to the PFS and other Medicare Part B payment policies. It also finalized many of the CY 2010 interim RVUs and implemented interim RVUs for new and revised codes for CY 2011 to ensure that our payment systems are updated to reflect changes in medical practice and the relative values of services. The CY 2011 PFS final rule with comment period also addressed other policies, as well as certain provisions of the Affordable Care Act and the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA).

In the CY 2011 PFS final rule with comment period, we announced the following for CY 2011: the total PFS update of −10.1 percent; the initial estimate for the sustainable growth rate of −13.4 percent; and the CF of $25.5217. These figures were calculated based on the statutory provisions in effect on November 2, 2010, when the CY 2011 PFS final rule was issued.

On December 30, 2010, we published a correction notice (76 FR 1670) to correct several technical and typographical errors that occurred in the CY 2011 PFS final rule with comment period. This correction notice announced a revised CF for CY 2011 of $25.4999.

On November 30, 2010, the Physician Payment and Therapy Relief Act of 2010 (PPATRA) (Pub. L. 111–286) was signed into law. Section 3 of Public Law 111–286 modified the policy finalized in the CY 2011 PFS final rule with comment period (75 FR 73241), effective January 1, 2011, regarding the payment reduction applied to multiple therapy services provided to the same patient on the same day in the office setting by one provider and paid for under the PFS (hereinafter, the therapy multiple procedure payment reduction (MPPR)). The PPATRA provision changed the therapy MPPR percentage from 25 to 20 percent of the PE component of payment for the second and subsequent ''always'' therapy services furnished in the office setting on the same day to the same patient by one provider, and excepted the payment reductions associated with the therapy MPPR from budget neutrality under the PFS.

On December 15, 2010, the Medicare and Medicaid Extenders Act of 2010 (MMEA) (Pub. L. 111–309) was signed into law. Section 101 of Public Law 111–309 provided for a 1-year zero percent update for the CY 2011 PFS. As a result of the MMEA, the CY 2011 PFS

conversion factor was revised to $33.9764.

II. Provisions of the Proposed Rule for the Physician Fee Schedule

A. Resource-Based Practice Expense (PE) Relative Value Units (RVUs)

1. Overview

Practice expense (PE) is the portion of the resources used in furnishing the service that reflects the general categories of physician and practitioner expenses, such as office rent and personnel wages but excluding malpractice expenses, as specified in section 1848(c)(1)(B) of the Act. Section 121 of the Social Security Amendments of 1994 (Pub. L. 103–432), enacted on October 31, 1994, required us to develop a methodology for a resource-based system for determining PE RVUs for each physician's service. We develop PE RVUs by looking at the direct and indirect physician practice resources involved in furnishing each service. Direct expense categories include clinical labor, medical supplies, and medical equipment. Indirect expenses include administrative labor, office expense, and all other expenses. The sections that follow provide more detailed information about the methodology for translating the resources involved in furnishing each service into service-specific PE RVUs. In addition, we note that section 1848(c)(2)(B)(ii)(II) of the Act provides that adjustments in RVUs for a year may not cause total PFS payments to differ by more than $20 million from what they would have been if the adjustments were not made. Therefore, if revisions to the RVUs cause expenditures to change by more than $20 million, we make adjustments to ensure that expenditures do not increase or decrease by more than $20 million. We refer readers to the CY 2010 PFS final rule with comment period (74 FR 61743 through 61748) for a more detailed history of the PE methodology.

2. Practice Expense Methodology

a. Direct Practice Expense

We use a bottom-up approach to determine the direct PE by adding the costs of the resources (that is, the clinical staff, equipment, and supplies) typically required to provide each service. The costs of the resources are calculated using the refined direct PE inputs assigned to each CPT code in our PE database, which are based on our review of recommendations received from the AMA RUC. For a detailed explanation of the bottom-up direct PE methodology, including examples, we refer readers to the Five-Year Review of Work Relative Value Units Under the PFS and Proposed Changes to the Practice Expense Methodology proposed notice (71 FR 37242) and the CY 2007 PFS final rule with comment period (71 FR 69629).

b. Indirect Practice Expense per Hour Data

We use survey data on indirect practice expenses incurred per hour worked (PE/HR) in developing the indirect portion of the PE RVUs. Prior to CY 2010, we primarily used the practice expense per hour (PE/HR) by specialty that was obtained from the AMA's Socioeconomic Monitoring Surveys (SMS). The AMA administered a new survey in CY 2007 and CY 2008, the Physician Practice Expense Information Survey (PPIS), which was expanded (relative to the SMS) to include nonphysician practitioners (NPPs) paid under the PFS.

The PPIS is a multispecialty, nationally representative, PE survey of both physicians and NPPs using a consistent survey instrument and methods highly consistent with those used for the SMS and the supplemental surveys. The PPIS gathered information from 3,656 respondents across 51 physician specialty and healthcare professional groups. We believe the PPIS is the most comprehensive source of PE survey information available to date. Therefore, we used the PPIS data to update the PE/HR data for almost all of the Medicare-recognized specialties that participated in the survey for the CY 2010 PFS.

When we changed over to the PPIS data beginning in CY 2010, we did not change the PE RVU methodology itself or the manner in which the PE/HR data are used in that methodology. We only updated the PE/HR data based on the new survey. Furthermore, as we explained in the CY 2010 PFS final rule with comment period (74 FR 61751), because of the magnitude of payment reductions for some specialties resulting from the use of the PPIS data, we finalized a 4-year transition (75 percent old/25 percent new for CY 2010, 50 percent old/50 percent new for CY 2011, 25 percent old/75 percent new for CY 2012, and 100 percent new for CY 2013) from the previous PE RVUs to the PE RVUs developed using the new PPIS data.

Section 303 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) added section 1848(c)(2)(H)(i) of the Act, which requires us to use the medical oncology supplemental survey data submitted in 2003 for oncology drug administration services. Therefore, the PE/HR for medical oncology, hematology, and hematology/oncology reflects the continued use of these supplemental survey data.

We do not use the PPIS data for reproductive endocrinology, sleep medicine, and spine surgery since these specialties are not separately recognized by Medicare, nor do we have a method to blend these data with Medicare-recognized specialty data.

Supplemental survey data on independent labs, from the College of American Pathologists, were implemented for payments in CY 2005. Supplemental survey data from the National Coalition of Quality Diagnostic Imaging Services (NCQDIS), representing independent diagnostic testing facilities (IDTFs), were blended with supplementary survey data from the American College of Radiology (ACR) and implemented for payments in CY 2007. Neither IDTFs nor independent labs participated in the PPIS. Therefore, we continue to use the PE/HR that was developed from their supplemental survey data.

Consistent with our past practice, the previous indirect PE/HR values from the supplemental surveys for medical oncology, independent laboratories, and IDTFs were updated to CY 2006 using the MEI to put them on a comparable basis with the PPIS data.

Previously, we have established PE/HR values for various specialties without SMS or supplemental survey data by crosswalking them to other similar specialties to estimate a proxy PE/HR. For specialties that were part of the PPIS for which we previously used a crosswalked PE/HR, we instead use the PPIS-based PE/HR. We continue previous crosswalks for specialties that did not participate in the PPIS. However, beginning in CY 2010 we changed the PE/HR crosswalk for portable x-ray suppliers from radiology to IDTF, a more appropriate crosswalk because these specialties are more similar to each other with respect to physician time.

For registered dietician services, the proposed resource-based PE RVUs have been calculated in accordance with the final policy that crosswalks the specialty to the ''All Physicians'' PE/HR data, as adopted in the CY 2010 PFS final rule with comment period (74 FR 61752) and discussed in more detail in the CY 2011 PFS final rule with comment period (75 FR 73183).

There are four specialties whose utilization data will be newly incorporated into ratesetting for CY 2012. We are proposing to use proxy

PE/HR values for these specialties by crosswalking values from other, similar specialties as follows: Speech Language Pathology from Physical Therapy; Hospice and Palliative Care from All Physicians; Geriatric Psychiatry from Psychiatry; and Intensive Cardiac Rehabilitation from Cardiology. Additionally, since section 1833(a)(1)(K) of the Act (as amended by section 3114 of the Affordable Care Act) requires that payment for services provided by a certified nurse midwife be paid at 100 percent of the PFS amount, this specialty will no longer be excluded from the ratesetting calculation. We are proposing to crosswalk the PE\HR data from Obstetrics/gynecology to Certified Nurse Midwife. These newly proposed changes are reflected in the ''PE HR'' file available on the CMS Web site under the supporting data files for the CY 2012 PFS proposed rule at *http://www.cms.gov/PhysicianFeeSched/*.

As provided in the CY 2010 PFS final rule with comment period (74 FR 61751), CY 2012 is the third year of the 4 year transition to the PE RVUs calculated using the PPIS data. Therefore, in general, the CY 2012 PE RVUs are a 25 percent/75 percent blend of the previous PE RVUs based on the SMS and supplemental survey data and the new PE RVUS developed using the PPIS data as described previously.

c. Allocation of PE to Services

To establish PE RVUs for specific services, it is necessary to establish the direct and indirect PE associated with each service.

(1) Direct Costs

The relative relationship between the direct cost portions of the PE RVUs for any two services is determined by the relative relationship between the sum of the direct cost resources (that is, the clinical staff, equipment, and supplies) typically required to provide the services. The costs of these resources are calculated from the refined direct PE inputs in our PE database. For example, if one service has a direct cost sum of $400 from our PE database and another service has a direct cost sum of $200, the direct portion of the PE RVUs of the first service would be twice as much as the direct portion of the PE RVUs for the second service.

(2) Indirect Costs

Section II.A.2.b. of this proposed rule describes the current data sources for specialty-specific indirect costs used in our PE calculations. We allocate the indirect costs to the code level on the basis of the direct costs specifically associated with a code and the greater of either the clinical labor costs or the physician work RVUs. We also incorporate the survey data described earlier in the PE/HR discussion. The general approach to developing the indirect portion of the PE RVUs is described as follows:

- For a given service, we use the direct portion of the PE RVUs calculated as previously described and the average percentage that direct costs represent of total costs (based on survey data) across the specialties that perform the service to determine an initial indirect allocator. For example, if the direct portion of the PE RVUs for a given service were 2.00 and direct costs, on average, represented 25 percent of total costs for the specialties that performed the service, the initial indirect allocator would be 6.00 since 2.00 is 25 percent of 8.00.
- We then add the greater of the work RVUs or clinical labor portion of the direct portion of the PE RVUs to this initial indirect allocator. In our example, if this service had work RVUs of 4.00 and the clinical labor portion of the direct PE RVUs was 1.50, we would add 6.00 plus 4.00 (since the 4.00 work RVUs are greater than the 1.50 clinical labor portion) to get an indirect allocator of 10.00. In the absence of any further use of the survey data, the relative relationship between the indirect cost portions of the PE RVUs for any two services would be determined by the relative relationship between these indirect cost allocators. For example, if one service had an indirect cost allocator of 10.00 and another service had an indirect cost allocator of 5.00, the indirect portion of the PE RVUs of the first service would be twice as great as the indirect portion of the PE RVUs for the second service.
- We next incorporate the specialty-specific indirect PE/HR data into the calculation. As a relatively extreme example for the sake of simplicity, assume in our previous example that, based on the survey data, the average indirect cost of the specialties performing the first service with an allocator of 10.00 was half of the average indirect cost of the specialties performing the second service with an indirect allocator of 5.00. In this case, the indirect portion of the PE RVUs of the first service would be equal to that of the second service.

d. Facility and Nonfacility Costs

For procedures that can be furnished in a physician's office, as well as in a hospital or facility setting, we establish two PE RVUs: facility and nonfacility. The methodology for calculating PE RVUs is the same for both the facility and nonfacility RVUs, but is applied independently to yield two separate PE RVUs. Because Medicare makes a separate payment to the facility for its costs of furnishing a service, the facility PE RVUs are generally lower than the nonfacility PE RVUs.

e. Services With Technical Components (TCs) and Professional Components (PCs)

Diagnostic services are generally comprised of two components: a professional component (PC) and a technical component (TC), each of which may be performed independently or by different providers, or they may be performed together as a ''global'' service. When services have PC and TC components that can be billed separately, the payment for the global component equals the sum of the payment for the TC and PC. This is a result of using a weighted average of the ratio of indirect to direct costs across all the specialties that furnish the global components, TCs, and PCs; that is, we apply the same weighted average indirect percentage factor to allocate indirect expenses to the global components, PCs, and TCs for a service. (The direct PE RVUs for the TC and PC sum to the global under the bottom-up methodology.)

f. PE RVU Methodology

For a more detailed description of the PE RVU methodology, we refer readers to the CY 2010 PFS final rule with comment period (74 FR 61745 through 61746).

(1) Setup File

First, we create a setup file for the PE methodology. The setup file contains the direct cost inputs, the utilization for each procedure code at the specialty and facility/nonfacility place of service level, and the specialty-specific PE/HR data from the surveys.

(2) Calculate the Direct Cost PE RVUs

Sum the costs of each direct input.

Step 1: Sum the direct costs of the inputs for each service.

Apply a scaling adjustment to the direct inputs.

Step 2: Calculate the current aggregate pool of direct PE costs. This is the product of the current aggregate PE (aggregate direct and indirect) RVUs, the CF, and the average direct PE percentage from the survey data.

Step 3: Calculate the aggregate pool of direct costs. This is the sum of the product of the direct costs for each service from Step 1 and the utilization data for that service.

Step 4: Using the results of Step 2 and Step 3 calculate a direct PE scaling adjustment so that the aggregate direct cost pool does not exceed the current aggregate direct cost pool and apply it to the direct costs from Step 1 for each service.

Step 5: Convert the results of Step 4 to an RVU scale for each service. To do this, divide the results of Step 4 by the CF. Note that the actual value of the CF used in this calculation does not influence the final direct cost PE RVUs, as long as the same CF is used in Step 2 and Step 5. Different CFs will result in different direct PE scaling factors, but this has no effect on the final direct cost PE RVUs since changes in the CFs and changes in the associated direct scaling factors offset one another.

(3) Create the Indirect Cost PE RVUs

Create indirect allocators.

Step 6: Based on the survey data, calculate direct and indirect PE percentages for each physician specialty.

Step 7: Calculate direct and indirect PE percentages at the service level by taking a weighted average of the results of Step 6 for the specialties that furnish the service. Note that for services with TCs and PCs, the direct and indirect percentages for a given service do not vary by the PC, TC, and global components.

Step 8: Calculate the service level allocators for the indirect PEs based on the percentages calculated in Step 7. The indirect PEs are allocated based on the three components: the direct PE RVUs, the clinical PE RVUs, and the work RVUs.

For most services the indirect allocator is: indirect percentage * (direct PE RVUs/direct percentage) + work RVUs.

There are two situations where this formula is modified:

- If the service is a global service (that is, a service with global, professional, and technical components), then the indirect allocator is: indirect percentage (direct PE RVUs/direct percentage) + clinical PE RVUs + work RVUs.
- If the clinical labor PE RVUs exceed the work RVUs (and the service is not a global service), then the indirect allocator is: indirect percentage (direct PE RVUs/direct percentage) + clinical PE RVUs.

Note: For global services, the indirect allocator is based on both the work RVUs and the clinical labor PE RVUs. We do this to recognize that, for the PC service, indirect PEs will be allocated using the work RVUs, and for the TC service, indirect PEs will be allocated using the direct PE RVUs and the clinical labor PE RVUs. This also allows the global component RVUs to equal the sum of the PC and TC RVUs.

For presentation purposes in the examples in Table 2, the formulas were divided into two parts for each service.

- The first part does not vary by service and is the indirectpercentage (direct PE RVUs/direct percentage).
- The second part is either the work RVUs, clinical PE RVUs, or both depending on whether the service is a global service and whether the clinical PE RVUs exceed the work RVUs (as described earlier in this step).

Apply a scaling adjustment to the indirect allocators.

Step 9: Calculate the current aggregate pool of indirect PE RVUs by multiplying the current aggregate pool of PE RVUs by the average indirect PE percentage from the survey data.

Step 10: Calculate an aggregate pool of indirect PE RVUs for all PFS services by adding the product of the indirect PE allocators for a service from Step 8 and the utilization data for that service.

Step 11: Using the results of Step 9 and Step 10, calculate an indirect PE adjustment so that the aggregate indirect allocation does not exceed the available aggregate indirect PE RVUs and apply it to indirect allocators calculated in Step 8.

Calculate the indirect practice cost index.

Step 12: Using the results of Step 11, calculate aggregate pools of specialty-specific adjusted indirect PE allocators for all PFS services for a specialty by adding the product of the adjusted indirect PE allocator for each service and the utilization data for that service.

Step 13: Using the specialty-specific indirect PE/HR data, calculate specialty-specific aggregate pools of indirect PE for all PFS services for that specialty by adding the product of the indirect PE/HR for the specialty, the physician time for the service, and the specialty's utilization for the service across all services performed by the specialty.

Step 14: Using the results of Step 12 and Step 13, calculate the specialty-specific indirect PE scaling factors.

Step 15: Using the results of Step 14, calculate an indirect practice cost index at the specialty level by dividing each specialty-specific indirect scaling factor by the average indirect scaling factor for the entire PFS.

Step 16: Calculate the indirect practice cost index at the service level to ensure the capture of all indirect costs. Calculate a weighted average of the practice cost index values for the specialties that furnish the service. (**Note:** For services with TCs and PCs, we calculate the indirect practice cost index across the global components, PCs, and TCs. Under this method, the indirect practice cost index for a given service (for example, echocardiogram) does not vary by the PC, TC, and global component.)

Step 17: Apply the service level indirect practice cost index calculated in Step 16 to the service level adjusted indirect allocators calculated in Step 11 to get the indirect PE RVUs.

(4) Calculate the Final PE RVUs

Step 18: Add the direct PE RVUs from Step 6 to the indirect PE RVUs from Step 17 and apply the final PE budget neutrality (BN) adjustment.

The final PE BN adjustment is calculated by comparing the results of Step 18 to the current pool of PE RVUs. This final BN adjustment is required primarily because certain specialties are excluded from the PE RVU calculation for ratesetting purposes, but all specialties are included for purposes of calculating the final BN adjustment. (See ''Specialties excluded from ratesetting calculation'' later in this section.)

(5) Setup File Information

- Specialties excluded from ratesetting calculation: For the purposes of calculating the PE RVUs, we exclude certain specialties, such as certain nonphysician practitioners paid at a percentage of the PFS and low-volume specialties, from the calculation. These specialties are included for the purposes of calculating the BN adjustment. They are displayed in Table 1. We note that since specialty code 97 (physician assistant) is paid at a percentage of the PFS and therefore excluded from the ratesetting calculation, this specialty has been added to the table for CY 2012.

TABLE 1—SPECIALTIES EXCLUDED FROM RATESETTING CALCULATION

Specialty code	Specialty description
49	Ambulatory surgical center.
50	Nurse practitioner.
51	Medical supply company with certified orthotist.
52	Medical supply company with certified prosthetist.
53	Medical supply company with certified prosthetist-orthotist.
54	Medical supply company not included in 51, 52, or 53.
55	Individual certified orthotist.
56	Individual certified prosthestist.
57	Individual certified prosthetist-orthotist.
58	Individuals not included in 55, 56, or 57.

TABLE 1—SPECIALTIES EXCLUDED FROM RATESETTING CALCULATION—Continued

Specialty code	Specialty description
59	Ambulance service supplier, e.g., private ambulance companies, funeral homes, etc.
60	Public health or welfare agencies.
61	Voluntary health or charitable agencies.
73	Mass immunization roster biller.
74	Radiation therapy centers.
87	All other suppliers (e.g., drug and department stores).
88	Unknown supplier/provider specialty.
89	Certified clinical nurse specialist.
95	Competitive Acquisition Program (CAP) Vendor.
96	Optician.
97	Physician assistant.
A0	Hospital.
A1	SNF.
A2	Intermediate care nursing facility.
A3	Nursing facility, other.
A4	HHA.
A5	Pharmacy.
A6	Medical supply company with respiratory therapist.
A7	Department store.
1	Supplier of oxygen and/or oxygen related equipment.
2	Pedorthic personnel.
3	Medical supply company with pedorthic personnel.

• Crosswalk certain low volume physician specialties: Crosswalk the utilization of certain specialties with relatively low PFS utilization to the associated specialties.

• Physical therapy utilization: Crosswalk the utilization associated with all physical therapy services to the specialty of physical therapy.

• Identify professional and technical services not identified under the usual TC and 26 modifiers: Flag the services that are PC and TC services, but do not use TC and 26 modifiers (for example, electrocardiograms). This flag associates the PC and TC with the associated global code for use in creating the indirect PE RVUs. For example, the professional service, CPT code 93010 (Electrocardiogram, routine ECG with at least 12 leads; interpretation and report only), is associated with the global service, CPT code 93000 (Electrocardiogram, routine ECG with at least 12 leads; with interpretation and report).

• Payment modifiers: Payment modifiers are accounted for in the creation of the file. For example, services billed with the assistant at surgery modifier are paid 16 percent of the PFS amount for that service; therefore, the utilization file is modified to only account for 16 percent of any service that contains the assistant at surgery modifier.

• Work RVUs: The setup file contains the work RVUs from this final rule with comment period.

(6) Equipment Cost per Minute

The equipment cost per minute is calculated as:

*(1/(minutes per year * usage)) * price * ((interest rate/(1 − (1/((1 + interest rate) ∧ life of equipment)))) + maintenance)*

Where:

minutes per year = maximum minutes per year if usage were continuous (that is, usage = 1); generally 150,000 minutes.

usage = equipment utilization assumption; 0.75 for certain expensive diagnostic imaging equipment (see 74 FR 61753 through 61755 and section II.A.3. of the CY 2011 PFS final rule with comment period) and 0.5 for others.

price = price of the particular piece of equipment.

interest rate = 0.11.

life of equipment = useful life of the particular piece of equipment.

maintenance = factor for maintenance; 0.05.

This interest rate was proposed and finalized during rulemaking for CY 1998 PFS (62 FR 33164). We solicit comment regarding reliable data on current prevailing loan rates for small businesses.

Note: The use of any particular conversion factor (CF) in Table 2 to illustrate the PE calculation has no effect on the resulting RVUs.

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TABLE 2: CALCULATION OF PE RVUS UNDER METHODOLOGY FOR SELECTED CODES

	Step	Source	Formula	99213 Office visit, est nonfacility	33533 CABG, arterial, single facility	71020 Chest x-ray nonfacility	71020-TC Chest xray nonfacility	71020-26 Chest xray nonfacility	93000 ECG, complete nonfacility	93005 ECG, tracing nonfacility	93010 ECG, report nonfacility
(1) Labor cost (Lab)	Step 1	DPEIdb		13.32	77.52	5.74	5.74	0.00	6.12	6.12	0.00
(2) Supply cost (Sup)	Step 1	DPEIdb		2.98	7.34	3.39	3.39	0.00	1.19	1.19	0.00
(3) Equipment cost (Eqp.)	Step 1	DPEIdb		0.19	0.65	8.17	8.17	0.00	0.12	0.12	0.00
(4) Direct cost (Dir)	Step 1		=(1)+(2)+(3)	16.50	85.51	17.31	17.31	0.00	7.43	7.43	0.00
(5) Direct adjustment (Dir. Adj).	Steps 2-4	See footnote*		0.55	0.55	0.55	0.55	0.55	0.55	0.55	0.55
(6) Adjusted Labor	Steps 2-4	=Lab * Dir Adj	=(1)*(5)	7.26	42.27	3.13	3.13	0.00	3.34	3.34	0.00
(7) Adjusted Supplies	Steps 2-4	= Sup * Dir Adj	=(2)*(5)	1.63	4.00	1.85	1.85	0.00	0.65	0.65	0.00
(8) Adjusted Equipment	Steps 2-4	= Eqp * Dir Adj	=(3)*(5)	0.11	0.36	4.46	4.46	0.00	0.06	0.06	0.00
(9) Adjusted direct	Steps 2-4		=(6)+(7)+(8)	9.00	46.63	9.44	9.44	0.00	4.05	4.05	0.00
(10) Conversion Factor (CF)	Step 5	PFS		33.9764	33.9764	33.9764	33.9764	33.9764	33.9764	33.9764	33.9764
(11) Adj. labor cost converted	Step 5	=(Lab * Dir Adj)/CF	=(6)/(10)	0.21	1.24	0.09	0.09	0.00	0.10	0.10	0.00
(12) Adj. supply cost converted	Step 5	=(Sup * Dir Adj)/CF	=(7)/(10)	0.05	0.12	0.05	0.05	0.00	0.02	0.02	0.00
(13) Adj. equipment cost converted	Step 5	=(Eqp * Dir Adj)/CF	=(8)/(10)	0.00	0.01	0.13	0.13	0.00	0.00	0.00	0.00
(14) Adj. direct cost converted	Step 5		=(11)+(12)+(13)	0.26	1.37	0.28	0.28	0.00	0.12	0.12	0.00
(15) Work RVU	Setup File	PFS		0.97	33.75	0.22	0.00	0.22	0.17	0.00	0.17
(16) Dir_pct	Steps 6,7	Surveys		0.26	0.18	0.29	0.29	0.29	0.29	0.29	0.29
(17) Ind_pct	Steps 6,7	Surveys		0.74	0.82	0.71	0.71	0.71	0.71	0.71	0.71
(18) Ind. Alloc. Formula (1st part).	Step 8	See Step 8		((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)	((14)/(16)) * (17)
(19) Ind. Alloc. (1st part).	Step 8		See (18)	0.77	6.40	0.68	0.68	0.00	0.29	0.29	0.00
(20) Ind. Alloc. Formulas (2nd part).	Step 8	See Step 8		(15)	(15)	(15)	(11)	(15)	(15)	(11)	(15)
(21) Ind. Alloc. (2nd part).	Step 8		See (20)	0.97	33.75	0.31	0.09	0.22	0.27	0.10	0.17
(22) Indirect Allocator (1st + 2nd)	Step 8		=(19)+(21)	1.74	40.15	0.99	0.77	0.22	0.56	0.39	0.17
(23) Indirect Adjustment (Ind. Adj.)	Steps 9-11	See footnote**		0.41	0.41	0.41	0.41	0.41	0.41	0.41	0.41
(24) Adjusted indirect allocator	Steps 9-11	=Ind Alloc * Ind Adj		0.71	16.30	0.40	0.31	0.09	0.23	0.16	0.07
(25) Ind. Practice Cost Index (IPCI)	Steps 12-16	See Steps 12 - 16		1.12	0.82	0.90	0.90	0.90	0.93	0.93	0.93
(26) Adjusted Indirect	Step 17	= Adj.Ind Alloc * PCI	=(24) * (25)	0.79	13.32	0.36	0.28	0.08	0.21	0.15	0.06
(29) PE RVU	Step 18	=(Adj Dir + Adj Ind) * budn	=((14)+(26)) * budn	1.05	14.68	0.64	0.56	0.08	0.33	0.27	0.06

Note: PE RVUs in Table 2, row 29, may not match the values in Addendum B due to rounding.

* The direct adj = [current pe rvus * CF * avg dir pct]/[sum direct inputs] = [Step 2]/[Step 3]

** The indirect adj = [current pe rvus * avg ind pct]/[sum of ind allocators] = [Step 9]/[Step 10]

3. Changes to Direct PE Inputs

In this section, we discuss other specific CY 2012 proposals and changes related to direct PE inputs. The proposed changes that follow are included in the proposed CY 2012 direct PE database, which is available on the CMS Web site under the supporting data files for the CY 2012 PFS proposed rule at *http://www.cms.gov/PhysicianFeeSched/.*

a. Inverted Equipment Minutes

It has come to our attention that the minutes allocated for two particular equipment items have been inverted. This inversion affects three codes: 37232 (Revascularization, endovascular, open or percutaneous, tibial/peroneal artery, unilateral, each additional vessel; with transluminal angioplasty (List separately in addition to code for primary procedure)), 37233 (Revascularization, endovascular, open or percutaneous, tibial/peroneal artery, unilateral, each additional vessel; with atherectomy, includes angioplasty within the same vessel, when performed (List separately in addition to code for primary procedure)), and 37234 (Revascularization, endovascular, open or percutaneous, tibial/peroneal artery, unilateral, each additional vessel; with transluminal stent placement(s), includes angioplasty within the same vessel, when performed (List separately in addition to code for primary procedure)). In each case, the number of minutes allocated to the ''printer, dye sublimation (photo, color)'' (ED031) should be appropriately allocated to the ''stretcher'' (EF018). The number of minutes allocated to the stretcher should be appropriately allocated to the printer. Therefore, the proposed CY 2012 database includes direct PE input corrections to the times associated with the two equipment items in the three codes.

b. Labor and Supply Input Duplication

We recently identified a number of CPT codes with inadvertently duplicated labor and supply inputs in the PE database. We are proposing to remove the duplicate labor and supply inputs in the proposed CY 2012 database as detailed in Table 3.

TABLE 3—LABOR AND SUPPLY INPUT DUPLICATION

CPT Code	Short code descriptor	CMS Labor/ supply code	Description of labor/supply
12011	Repair superficial wound(s)	SA048	pack, minimum multi-specialty visit
15360	Apply cult derm sub t/a/l	SA054	pack, post-op incision care (suture)
19361	Breast reconstr w/lat flap	L037D	RN/LPN/MTA
21147	Reconstruct midface lefort	SA054	pack, post-op incision care (suture)
23515	Treat clavicle fracture	SA052	pack, post-op incision care (staple)
25415	Repair radius & ulna	SA052	pack, post-op incision care (staple)
	Repair radius & ulna	SA052	pack, post-op incision care (staple)
28005	Treat foot bone lesion	SA054	pack, post-op incision care (suture)
28456	Treat midfoot fracture	SA054	pack, post-op incision care (suture)
28485	Treat metatarsal fracture	SA054	pack, post-op incision care (suture)
32998	Perq rf ablate tx pul tumor	SG079	tape, surgical paper 1in (Micropore)
35501	Artery bypass graft	L037D	RN/LPN/MTA
	Artery bypass graft	SA048	pack, minimum multi-specialty visit
35509	Artery bypass graft	L037D	RN/LPN/MTA
	Artery bypass graft	SA048	pack, minimum multi-specialty visit
35601	Artery bypass graft	L037D	RN/LPN/MTA
	Artery bypass graft	SA048	pack, minimum multi-specialty visit
36147	Access av dial grft for eval	SB008	drape, sterile, c-arm, fluoro
	Access av dial grft for eval	SH026	Conray Inj (iothalamate 43%)
	Access av dial grft for eval	SK093	x-ray ID card (flashcard)
37231	Tib/per revasc stent & ather	SK034	film, x-ray 14in × 17in
45541	Correct rectal prolapse	SJ032	lubricating jelly (K–Y) (5gm uou)
45550	Repair rectum/remove sigmoid	SJ032	lubricating jelly (K–Y) (5gm uou)
46258	Remove in/ex hem grp w/fistu	SD003	anoscope
	Remove in/ex hem grp w/fistu	SD003	anoscope
	Remove in/ex hem grp w/fistu	SD003	anoscope
46261	Remove in/ex hem grps & fiss	SD003	anoscope
	Remove in/ex hem grps & fiss	SD003	anoscope
	Remove in/ex hem grps & fiss	SD003	anoscope
58563	Hysteroscopy ablation	SB027	gown, staff, impervious
64704	Revise hand/foot nerve	SA054	pack, post-op incision care (suture)
64726	Release foot/toe nerve	SA054	pack, post-op incision care (suture)
64782	Remove limb nerve lesion	SA054	pack, post-op incision care (suture)
65810	Drainage of eye	SA082	pack, ophthalmology visit (w-dilation)
67228	Treatment of retinal lesion	L038A	COMT/COT/RN/CST
	Treatment of retinal lesion	SA082	pack, ophthalmology visit (w-dilation)
	Treatment of retinal lesion	SH049	lidocaine 2% w-epi inj (Xylocaine w-epi)
76813	Ob us nuchal meas 1 gest	SK022	film, 8in × (ultrasound, MRI)
78730	Urinary bladder retention	SB044	underpad 2ft × 3ft (Chux)
88365	Insitu hybridization (fish)	SM016	eye shield, splash protection
91038	Esoph imped funct test > 1h	SJ016	denture cup
95875	Limb exercise test	SC051	syringe 10–12ml

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c. AMA RUC Recommendations for Moderation Sedation Direct PE Inputs

For services described by certain codes, the direct PE database includes nonfacility inputs that reflect the assumption that moderation sedation is inherent in the procedure. These codes are listed in Table 4. The AMA RUC has recently provided CMS with a recommendation that standardizes the nonfacility direct PE inputs that account for moderate sedation as typically furnished as part of these services. Specifically, the RUC recommended that the direct PE inputs allocated for moderate sedation include the following:

Clinical Labor Inputs: Registered Nurse (L051A) time that includes two minutes of time to initiate sedation, the number of minutes associated with the physician intra-service work time, and 15 minutes for every hour of patient recovery time for post-service patient monitoring.

Supply Inputs: ''Pack, conscious sedation'' (SA044) that includes: an angiocatheter 14g–24g, bandage, strip 0.75in × 3in, catheter, suction, dressing, 4in × 4.75in (Tegaderm), electrode, ECG (single), electrode, ground, gas, oxygen, gauze, sterile 4in × 4in, gloves, sterile, gown, surgical, sterile, iv infusion set, kit, iv starter, oxygen mask (1) and tubing (7 ft), pulse oximeter sensor probe wrap, stop cock, 3-way, swab-pad, alcohol, syringe 1ml, syringe-needle 3ml 22–26g, tape, surgical paper 1in (Micropore), tourniquet, and non-latex 1in × 18in.

Equipment Inputs: ''table, instrument, mobile'' (EF027), ''ECG, 3-channel (with SpO2, NIBP, temp, resp)'' (EQ011), ''IV infusion pump'' (EQ032), ''pulse oxymetry recording software (prolonged monitoring)'' (EQ212), and ''blood pressure monitor, ambulatory, w-battery charger'' (EQ269).

We have reviewed this recommendation and generally agree with these inputs. However, we note that the equipment item ''ECG, 3-channel (with SpO2, NIBP, temp, resp)'' (EQ011) incorporates the functionality of the equipment items ''pulse oxymetry recording software (prolonged monitoring)'' (EQ212), and ''blood pressure monitor, ambulatory, w-battery charger'' (EQ269). Therefore we have not included these two items as standard nonfacility inputs for moderation sedation.

We propose to accept the AMA RUC recommendation with the refinement as stated. The CY 2012 direct PE database reflects these proposed changes and is available on the CMS Web site under the supporting data files for the CY 2012 PFS proposed rule at *http://www.cms.gov/PhysicianFeeSched/.*

TABLE 4—INHERENT MODERATE SEDATION CODES VALUED IN THE NONFACILITY SETTING

CPT Code	Short descriptor
19298	Place breast rad tube/caths
20982	Ablate bone tumor(s) perq
22520	Percut vertebroplasty thor
22521	Percut vertebroplasty lumb
22526	Idet single level
22527	Idet 1 or more levels
31615	Visualization of windpipe
31620	Endobronchial us add-on
31622	Dx bronchoscope/wash
31623	Dx bronchoscope/brush
31624	Dx bronchoscope/lavage
31625	Bronchoscopy w/biopsy(s)
31626	Bronchoscopy w/markers
31627	Navigational bronchoscopy
31628	Bronchoscopy/lung bx each
31629	Bronchoscopy/needle bx each
31634	Bronch w/balloon occlusion
31635	Bronchoscopy w/fb removal
31645	Bronchoscopy clear airways
31646	Bronchoscopy reclear airway
31656	Bronchoscopy inj for x-ray
32201	Drain percut lung lesion
32550	Insert pleural cath
32553	Ins mark thor for rt perq
35471	Repair arterial blockage
35472	Repair arterial blockage
35475	Repair arterial blockage
35476	Repair venous blockage
36147	Access av dial grft for eval
36148	Access av dial grft for proc
36200	Place catheter in aorta
36245	Place catheter in artery
36481	Insertion of catheter vein
36555	Insert non-tunnel cv cath
36557	Insert tunneled cv cath
36558	Insert tunneled cv cath
36560	Insert tunneled cv cath
36561	Insert tunneled cv cath
36563	Insert tunneled cv cath
36565	Insert tunneled cv cath
36566	Insert tunneled cv cath
36568	Insert picc cath
36570	Insert picvad cath
36571	Insert picvad cath
36576	Repair tunneled cv cath
36578	Replace tunneled cv cath
36581	Replace tunneled cv cath
36582	Replace tunneled cv cath
36583	Replace tunneled cv cath
36585	Replace picvad cath
36590	Removal tunneled cv cath
36870	Percut thrombect av fistula
37183	Remove hepatic shunt (tips)
37184	Prim art mech thrombectomy
37185	Prim art m-thrombect add-on
37186	Sec art m-thrombect add-on
37187	Venous mech thrombectomy
37188	Venous m-thrombectomy add-on
37203	Transcatheter retrieval
37210	Embolization uterine fibroid
37220	Iliac revasc
37221	Iliac revasc w/stent
37222	Iliac revasc add-on
37223	Iliac revasc w/stent add-on
37224	Fem/popl revas w/tla
37225	Fem/popl revas w/ather
37226	Fem/popl revasc w/stent
37227	Fem/popl revasc stnt & ather
37228	Tib/per revasc w/tla
37229	Tib/per revasc w/ather
37230	Tib/per revasc w/stent
37231	Tib/per revasc stent & ather
37232	Tib/per revasc add-on
37233	Tibper revasc w/ather add-on
37234	Revsc opn/prq tib/pero stent
37235	Tib/per revasc stnt & ather
43200	Esophagus endoscopy
43201	Esoph scope w/submucous inj
43202	Esophagus endoscopy biopsy
43216	Esophagus endoscopy/lesion
43217	Esophagus endoscopy
43234	Upper gi endoscopy exam
43235	Uppr gi endoscopy diagnosis
43236	Uppr gi scope w/submuc inj
43239	Upper gi endoscopy biopsy
43453	Dilate esophagus
43456	Dilate esophagus
43458	Dilate esophagus
44385	Endoscopy of bowel pouch
44386	Endoscopy bowel pouch/biop
44388	Colonoscopy
44389	Colonoscopy with biopsy
44390	Colonoscopy for foreign body
44391	Colonoscopy for bleeding
44392	Colonoscopy & polypectomy
44393	Colonoscopy lesion removal
44394	Colonoscopy w/snare
44901	Drain app abscess percut
45303	Proctosigmoidoscopy dilate
45305	Proctosigmoidoscopy w/bx
45307	Proctosigmoidoscopy fb
45308	Proctosigmoidoscopy removal
45309	Proctosigmoidoscopy removal
45315	Proctosigmoidoscopy removal
45317	Proctosigmoidoscopy bleed
45320	Proctosigmoidoscopy ablate
45332	Sigmoidoscopy w/fb removal
45333	Sigmoidoscopy & polypectomy
45335	Sigmoidoscopy w/submuc inj
45338	Sigmoidoscopy w/tumr remove
45339	Sigmoidoscopy w/ablate tumr
45340	Sig w/balloon dilation
45378	Diagnostic colonoscopy
45379	Colonoscopy w/fb removal
45380	Colonoscopy and biopsy
45381	Colonoscopy submucous inj
45382	Colonoscopy/control bleeding
45383	Lesion removal colonoscopy
45384	Lesion remove colonoscopy
45385	Lesion removal colonoscopy
45386	Colonoscopy dilate stricture
47000	Needle biopsy of liver
47382	Percut ablate liver rf
47525	Change bile duct catheter
48511	Drain pancreatic pseudocyst
49021	Drain abdominal abscess
49041	Drain percut abdom abscess
49061	Drain percut retroper absc
49411	Ins mark abd/pel for rt perq
49418	Insert tun ip cath perc
49440	Place gastrostomy tube perc
49441	Place duod/jej tube perc
49442	Place cecostomy tube perc

TABLE 4—INHERENT MODERATE SEDATION CODES VALUED IN THE NONFACILITY SETTING—Continued

CPT Code	Short descriptor
49446	Change g-tube to g-j perc
50021	Renal abscess percut drain
50200	Renal biopsy perq
50382	Change ureter stent percut
50384	Remove ureter stent percut
50385	Change stent via transureth
50386	Remove stent via transureth
50387	Change ext/int ureter stent
50592	Perc rf ablate renal tumor
50593	Perc cryo ablate renal tum
57155	Insert uteri tandems/ovoids
58823	Drain pelvic abscess percut
66720	Destruction ciliary body
69300	Revise external ear
77371	Srs multisource
77600	Hyperthermia treatment
77605	Hyperthermia treatment
77610	Hyperthermia treatment
77615	Hyperthermia treatment
92960	Cardioversion electric ext
93312	Echo transesophageal
93314	Echo transesophageal
93451	Right heart cath
93452	Left hrt cath w/ventrclgrphy
93453	R&I hrt cath w/ventriclgrphy
93454	Coronary artery angio s&i
93455	Coronary art/grft angio s&i
93456	Rhrt coronary artery angio
93457	Rhrt art/grft angio
93458	Lhrt artery/ventricle angio
93459	Lhrt art/grft angio
93460	R&I hrt art/ventricle angio
93461	R&I hrt art/ventricle angio
93464	Exercise w/hemodynamic meas
93505	Biopsy of heart lining
93566	Inject r ventr/atrial angio
93568	Inject pulm art hrt cath
93642	Electrophysiology evaluation

d. Updates to Price and Useful Life for Existing Direct Inputs

In the CY 2011 PFS final rule with comment period (75 FR 73205), we finalized a process to act on public requests to update equipment and supply price and equipment useful life inputs through annual rulemaking beginning with the CY 2012 PFS proposed rule.

During 2010, we received a request to update the price of ''tray, bone marrow biopsy-aspiration'' (SA062) from $24.27 to $34.47. The request included multiple invoices that documented updated prices for the supply item. We also received a request to update the useful life of ''holter monitor'' (EQ127) from 7 years to 5 years, based on its entry in the AHA's publication, ''Estimated Useful Lives of Depreciable Hospital Assets,'' which we use as a standard reference. In each of these cases, we are proposing to accept the updated inputs, as requested. The CY 2012 direct PE database reflects these proposed changes and is available on the CMS Web site under the supporting data files for the CY 2012 PFS proposed rule at *http://www.cms.gov/PhysicianFeeSched/.*

4. Development of Code-Specific PE RVUs

When creating G codes, we often develop work, PE, and malpractice RVUs by crosswalking the RVUs from similar (reference) codes. In most of these cases, the PE RVUs are directly crosswalked pending the availability of utilization data. Once that data is available, we crosswalk the direct PE inputs and develop PE RVUs using the regular practice expense methodology, including allocators that are derived from utilization data. For CY 2012, we are using this process to develop PE RVUs for the following services: G0245 (Initial physician evaluation and management of a diabetic patient with diabetic sensory neuropathy resulting in a loss of protective sensation (LOPS) which must include: (1) The diagnosis of LOPS, (2) a patient history, (3) a physical examination that consists of at least the following elements: (a) Visual inspection of the forefoot, hindfoot and toe web spaces, (b) evaluation of a protective sensation, (c) evaluation of foot structure and biomechanics, (d) evaluation of vascular status and skin integrity, and (e) evaluation and recommendation of footwear and (4) patient education); G0246 (Follow-up physician evaluation and management of a diabetic patient with diabetic sensory neuropathy resulting in a loss of protective sensation (LOPS) to include at least the following: (1) A patient history, (2) a physical examination that includes: (a) Visual inspection of the forefoot, hindfoot and toe web spaces, (b) evaluation of protective sensation, (c) evaluation of foot structure and biomechanics, (d) evaluation of vascular status and skin integrity, and (e) evaluation and recommendation of footwear, and (3) patient education); G0247 (Routine foot care by a physician of a diabetic patient with diabetic sensory neuropathy resulting in a loss of protective sensation (LOPS) to include, the local care of superficial wounds (for example, superficial to muscle and fascia) and at least the following if present: (1) Local care of superficial wounds, (2) debridement of corns and calluses, and (3) trimming and debridement of nails); G0341 (Percutaneous islet cell transplant, includes portal vein catheterization and infusion); G0342 (Laparoscopy for islet cell transplant, includes portal vein catheterization and infusion); G0343 (Laparotomy for islet cell transplant, includes portal vein catheterization and infusion); and G0365 (Vessel mapping of vessels for hemodialysis access (services for preoperative vessel mapping prior to creation of hemodialysis access using an autogenous hemodialysis conduit, including arterial inflow and venous outflow)). The values in Addendum B reflect the updated PE RVUs.

In addition, there is a series of G-codes describing surgical pathology services with PE RVUs historically valued outside of the regular PE methodology. These codes are: G0416 (Surgical pathology, gross and microscopic examination for prostate needle saturation biopsy sampling, 1–20 specimens); G0417 (Surgical pathology, gross and microscopic examination for prostate needle saturation biopsy sampling, 21–40 specimens); G0418 (Surgical pathology, gross and microscopic examination for prostate needle saturation biopsy sampling, 41–60 specimens); and G0419 (Surgical pathology, gross and microscopic examination for prostate needle saturation biopsy sampling, greater than 60 specimens.) The PE RVUs for these codes were established as described in the CY 2009 PFS final rule with comment period (73 FR 69751). In reviewing these values for CY 2012, we noted that because the PE RVUs established through rulemaking in CY 2009 were neither developed using the regular PE methodology nor directly crosswalked from other codes, the PE RVUs for these codes were not adjusted to account for the CY 2011 MEI rebasing and revising, which is discussed in the CY 2011 PFS final rule with comment period (75 FR 73262). While it was technically appropriate to insulate the PE RVUs from that adjustment in CY 2011, upon further review, we believe adjusting these PE RVUs would result in more accurate payment rates relative to the RVUs for other PFS services. Therefore, we are proposing to adjust the PE RVUs for these codes by 1.182, the adjustment rate that accounted for the MEI rebasing and revising for CY 2011. The PE RVUs in Addendum B reflect the proposed updates.

5. Physician Time for Select Services

As we describe in section II.A.2.f. of this proposed rule with comment period, in creating the indirect practice cost index, we calculate specialty-specific aggregate pools of indirect PE for all PFS services for that specialty by adding the product of the indirect PE/HR for the specialty, the physician time for the service, and the specialty's utilization for the service across all services performed by the specialty.

During a review of the physician time data for the CY 2012 PFS rulemaking, we noted an anomaly regarding the physician time allotted to a series of group service codes that are listed in Table 5. We believe that the time associated with these codes reflects the typical amount of time spent by the practitioner in furnishing the group service. However, because the services are billed per patient receiving the service, the time for these codes should be divided by the typical number of patients per session. In reviewing the data used in the valuation of work RVUs for these services, we noted that in one vignette for these services, the typical group session consisted of 6 patients. Therefore we are proposing adjusted times for these services based on 6 patients. However, we seek comment on the typical number of patients seen per session for each of these services.

As a result of our review, we are also proposing to update our physician time file to reflect the physician time associated with certain G-codes that were previously missing from the file. Our proposed time values for these G-codes as well as the group service codes described previously can be found in the proposed CY 2012 Physician Time file, which is available on the CMS Web site under the supporting data files for the CY 2012 PFS proposed rule at *http://www.cms.gov/PhysicianFeeSched/.*

TABLE 5—GROUP EDUCATION AND THERAPY CODES WITH PROPOSED TIME CHANGES

CPT Code	Short descriptor
90849	Multiple family group psytx
90853	Group psychotherapy
90857	Intac group psytx
92508	Speech/hearing therapy
96153	Intervene hlth/behave group
97150	Group therapeutic procedures
97804	Medical nutrition group
G0271	Group mnt 2 or more 30 mins
G0421	Ed svc ckd grp per session
G0109	Diab manage trn ind/group

B. Potentially Misvalued Services Under the Physician Fee Schedule

1. Valuing Services Under the PFS

As discussed in section I. of this proposed rule, in order to value services under the PFS, section 1848(c) of the Act requires the Secretary to determine relative values for physicians' services based on three components: Work, practice expense (PE), and malpractice. Section 1848(c)(1)(A) of the Act defines the work component to include ''the portion of the resources used in furnishing the service that reflects physician time and intensity in furnishing the service.'' Additionally, the statute provides that the work component shall include activities that occur before and after direct patient contact. Furthermore, the statute specifies that with respect to surgical procedures, the valuation of the work component for the code must reflect a ''global'' concept in which pre-operative and post-operative physicians' services related to the procedure are also included.

In addition, section 1848(c)(2)(C)(i) of the Act specifies that ''the Secretary shall determine a number of work relative value units (RVUs) for the service based on the relative resources incorporating physician time and intensity required in furnishing the service.'' As discussed in detail in sections I.A.2. and I.A.3. of this proposed rule, the statute also defines the PE and malpractice components and provides specific guidance in the calculation of the RVUs for each of these components. Section 1848(c)(1)(B) of the Act defines the PE component as ''the portion of the resources used in furnishing the service that reflects the general categories of expenses (such as office rent and wages of personnel, but excluding malpractice expenses) comprising practice expenses.''

Section 1848(c)(2)(C)(ii) of the Act specifies that the ''Secretary shall determine a number of practice expense relative value units for the services for years beginning with 1999 based on the relative practice expense resources involved in furnishing the service.'' Furthermore, section 1848(c)(2)(B) of the Act directs the Secretary to conduct a periodic review, not less often than every 5 years, of the RVUs established under the PFS. On March 23, 2010, the Affordable Care Act was enacted, further requiring the Secretary to periodically identify and review and identify potentially misvalued codes, and make appropriate adjustments to the relative values of those services identified as being potentially misvalued. Section 3134(a) of the Affordable Care Act added a new section 1848(c)(2)(K) of the Act which requires the Secretary to periodically identify potentially misvalued services using certain criteria, and to review and make appropriate adjustments to the relative values for those services. Section 3134(a) of the Affordable Care Act also added a new section 1848(c)(2)(L) of the Act which requires the Secretary to develop a validation process to validate the RVUs of certain potentially misvalued codes under the PFS, identified using the same categorical criteria used to identify potentially misvalued codes, and to make appropriate adjustments.

As discussed in section I.A.1. of this proposed rule, we generally establish physician work RVUs for new and revised codes based on our review of recommendations received from the AMA RUC. We also receive recommendations from the AMA RUC regarding direct PE inputs for services, which we evaluate in order to develop the PE RVUs under the PFS. The AMA RUC also provides recommendations to us on the values for codes that have been identified as potentially misvalued. To respond to concerns expressed by MedPAC, the Congress, and other stakeholders regarding accurate valuation of services under the PFS, the AMA RUC created the Five-Year Review Identification Workgroup in 2006. In addition to providing recommendations to us for work RVUs and physician times, the AMA RUC's Practice Expense Subcommittee reviews direct PE inputs (clinical labor, medical supplies, and medical equipment) for individual services.

In accordance with section 1848(c) of the Act, we determine appropriate adjustments to the RVUs, taking into account the recommendations provided by the AMA RUC and MedPAC, explain the basis of these adjustments, and respond to public comments in the PFS proposed and final rules. We note that section 1848(c)(2)(A)(ii) of the Act authorizes the use of extrapolation and other techniques to determine the RVUs for physicians' services for which specific data are not available, in addition to taking into account the results of consultations with organizations representing physicians.

2. Identifying, Reviewing, and Validating the RVUs of Potentially Misvalued Services under the PFS

a. Background

In its March 2006 Report to the Congress, MedPAC noted that ''misvalued services can distort the price signals for physicians' services as well as for other health care services that physicians order, such as hospital services.'' In that same report MedPAC postulated that physicians' services under the PFS can become misvalued over time for a number of reasons: For example, MedPAC stated, ''when a new service is added to the physician fee schedule, it may be assigned a relatively high value because of the time, technical skill, and psychological stress that are often required to furnish that service. Over time, the work required for certain services would be expected to

decline as physicians become more familiar with the service and more efficient in furnishing it.'' That is, the amount of physician work needed to furnish an existing service may decrease when new technologies are incorporated. Services can also become overvalued when practice expenses decline. This can happen when the costs of equipment and supplies fall, or when equipment is used more frequently, reducing its cost per use. Likewise, services can become undervalued when physician work increases or practice expenses rise. In the ensuing years since MedPAC's 2006 report, additional groups of potentially misvalued services have been identified by the Congress, CMS, MedPAC, the AMA RUC, and other stakeholders.

In recent years CMS and the AMA RUC have taken increasingly significant steps to address potentially misvalued codes. As MedPAC noted in its March 2009 Report to the Congress, in the intervening years since MedPAC made the initial recommendations, ''CMS and the AMA RUC have taken several steps to improve the review process.'' Most recently, section 1848(c)(2)(K)(ii) of the Act (as added by section 3134(a) of the Affordable Care Act) directed the Secretary to specifically examine, as determined appropriate, potentially misvalued services in seven categories as follows:

- Codes and families of codes for which there has been the fastest growth.
- Codes or families of codes that have experienced substantial changes in practice expenses.
- Codes that are recently established for new technologies or services.
- Multiple codes that are frequently billed in conjunction with furnishing a single service.
- Codes with low relative values, particularly those that are often billed multiple times for a single treatment.
- Codes which have not been subject to review since the implementation of the RBRVS (the so-called ''Harvard-valued codes'').
- Other codes determined to be appropriate by the Secretary.

Section 1848(c)(2)(K)(iii) of the Act also specifies that the Secretary may use existing processes to receive recommendations on the review and appropriate adjustment of potentially misvalued services. In addition, the Secretary may conduct surveys, other data collection activities, studies, or other analyses, as the Secretary determines to be appropriate, to facilitate the review and appropriate adjustment of potentially misvalued services. This section also authorizes the use of analytic contractors to identify and analyze potentially misvalued codes, conduct surveys or collect data, and make recommendations on the review and appropriate adjustment of potentially misvalued services. Additionally, this section provides that the Secretary may coordinate the review and adjustment of the RVUs with the periodic review described in section 1848(c)(2)(B) of the Act. Finally, section 1848(c)(2)(K)(iii)(V) of the Act specifies that the Secretary may make appropriate coding revisions (including using existing processes for consideration of coding changes) which may include consolidation of individual services into bundled codes for payment under the physician fee schedule.

b. Progress in Identifying and Reviewing Potentially Misvalued Codes

Over the last several years, CMS, in conjunction with the AMA RUC, has identified and reviewed numerous potentially misvalued codes in all seven of the categories specified in section 1848(c)(2)(K)(ii) of the Act, and we plan to continue our work examining potentially misvalued codes in these areas over the upcoming years, consistent with the new legislative requirements on this issue. In the current process, we request the AMA RUC to review potentially misvalued codes that we identify and make recommendations on revised work RVUs and/or direct PE inputs for those codes to us. The AMA RUC, through its own processes, also might identify and review potentially misvalued procedures. We then assess the recommended revised work RVUs and/or direct PE inputs and, in accordance with section 1848(c) of the Act, we determine if the recommendations constitute appropriate adjustments to the RVUs under the PFS.

Since CY 2009, as a part of the annual potentially misvalued code review, we have reviewed over 700 potentially misvalued codes to refine work RVUs and direct PE inputs in addition to continuing the comprehensive Five-Year Review process. We have adopted appropriate work RVUs and direct PE inputs for these services as a result of these reviews.

Our prior reviews of codes under the potentially misvalued codes initiative has included codes in all seven categories specified in section 1848(c)(2)(K)(ii) of the Act. That is, we have reviewed and assigned more appropriate values to—

- Codes and families of codes for which there has been the fastest growth;
- Codes or families of codes that have experienced substantial changes in practice expenses;
- Codes that were recently established for new technologies or services;
- Multiple codes that are frequently billed in conjunction with furnishing a single service;
- Codes with low relative values, particularly those that are often billed multiple times for a single treatment;
- Codes which had not been subject to review since the implementation of the RBRVS (''Harvard valued''); and
- Codes potentially misvalued as determined by the Secretary.

In this last category, we have previously proposed policies in CYs 2009, 2010, and 2011, and requested that the AMA RUC review codes for which there have been shifts in the site-of-service (that is, codes that were originally valued as being furnished in the inpatient setting, but that are now predominantly furnished on an outpatient basis), as well as codes that qualify as ''23-hour stay'' outpatient services (these services typically have lengthy hospital outpatient recovery periods). We note that a detailed discussion of the extensive prior reviews of potentially misvalued codes is included in the CY 2011 PFS final rule with comment period (75 FR 73215 through 73216).

In CY 2011, we identified additional codes under section 1848(c)(2)(K)(ii) of the Act that we believe are ripe for review and referred them to the AMA RUC (75 FR 73215 through 73216). Specifically, we identified potentially misvalued codes in the category of ''Other codes determined to be appropriate by the Secretary,'' referring lists of codes with low work RVUs but that are high volume based on claims data as well as targeted key codes that the AMA RUC uses as reference services for valuing other services, termed ''multispecialty points of comparison'' services.

Since the publication of the CY 2011 PFS final rule with comment period, we released the Fourth Five-Year Review of Work (76 FR 32410), which discussed the identification and review of an additional 173 potentially misvalued codes. We initiated the Fourth Five-Year Review of work RVUs by soliciting public comments on potentially misvalued codes for all services included in the CY 2010 PFS final rule with comment period that was published in the **Federal Register** on November 25, 2009. In addition to the codes submitted by the commenters, we identified a number of potentially misvalued codes and requested the AMA RUC to review and provide recommendations. Our identification of potentially misvalued codes for the

Fourth Five-Year Review focused on two Affordable Care Act categories: Site-of-service anomaly codes and ''Harvard valued'' codes. As discussed in the Fourth Five-Year Review of Work (76 FR 32410), we sent the AMA RUC an initial list of 219 codes for review. Consistent with our past practice, we requested the AMA RUC to review codes on a ''family'' basis rather than in isolation in order to ensure that appropriate relativity in the system was retained. Consequently, the AMA RUC included additional codes for review, resulting in a total of 290 codes for the Fourth Five-Year Review of Work. Of those 290 codes, 53 were subsequently sent to the CPT Editorial Panel to consider coding changes, 14 were not reviewed by the AMA RUC (and subsequently not reviewed by us) because the specialty society that had originally requested the review in its public comments on the CY 2010 PFS final rule with comment period elected to withdraw the codes, 36 were not reviewed by the AMA RUC because their values were set as interim final in the CY 2011 PFS final rule with comment period, and 14 were not reviewed by us because they were noncovered services under Medicare. Therefore, the AMA RUC reviewed 173 of the 290 codes initially identified for the Fourth Five-Year Review of Work, and provided the recommendations that were addressed in detail in the Fourth Five-Year Review of Work (76 FR 32410). In addition, under the Fourth Five-Year Review of Work, we reviewed recommendations for five additional potentially misvalued codes from the Health Care Professionals Advisory Committee (HCPAC), a deliberative body of nonphysician practitioners that also convenes during the AMA RUC meeting. The HCPAC represents physician assistants, chiropractors, nurses, occupational therapists, optometrists, physical therapists, podiatrists, psychologists, audiologists, speech pathologists, social workers, and registered dieticians.

In summary, since CY 2009, CMS and the AMA RUC have addressed a number of potentially misvalued codes. For CY 2009, the AMA RUC recommended revised work values and/or PE inputs for 204 misvalued services (73 FR 69883). For CY 2010, an additional 113 codes were identified as misvalued and the AMA RUC provided us new recommendations for revised work RVUs and/or PE inputs for these codes to us as discussed in the CY 2010 PFS final rule with comment period (74 FR 61778). For CY 2011, CMS reviewed and adopted more appropriate values for 209 codes under the annual review of potentially misvalued codes. For CY 2012, we recently released the Fourth Five-Year Review of Work, which discussed the review of 173 potentially misvalued codes and proposed appropriate adjustments to RVUs. In section II.B.5.of this proposed rule, we also provide a list of codes identified for future consideration as part of the potentially misvalued codes initiative, that is, in addition to the codes that are part of the Fourth Five-Year Review of Work, as discussed in that section, we are requesting the AMA RUC review these codes and submit recommendations to us.

c. Validating RVUs of Potentially Misvalued Codes

In addition to identifying and reviewing potentially misvalued codes, section 3134(a) of the Affordable Care Act added a new section 1848(c)(2)(L) of the Act, which specifies that the Secretary shall establish a formal process to validate RVUs value units under the PFS. The validation process may include validation of work elements (such as time, mental effort and professional judgment, technical skill and physical effort, and stress due to risk) involved with furnishing a service and may include validation of the pre-, post-, and intra-service components of work. The Secretary is directed to validate a sampling of the work RVUs of codes identified through any of the seven categories of potentially misvalued codes specified by section 1848(c)(2)(K)(ii) of the Act. Furthermore, the Secretary may conduct the validation using methods similar to those used to review potentially misvalued codes, including conducting surveys, other data collection activities, studies, or other analyses as the Secretary determines to be appropriate to facilitate the validation of RVUs of services.

In the CY 2011 PFS proposed rule (75 FR 40068), we solicited public comments on possible approaches and methodologies that we should consider for a validation process. We received a number of comments regarding possible approaches and methodologies for a validation process. As discussed in the CY 2011 PFS final rule with comment period (75 FR 73217), some commenters were skeptical that there could be viable alternative methods to the existing AMA RUC code review process for validating physician time and intensity that would preserve the appropriate relativity of specific physician's services under the current payment system. These commenters generally urged us to rely solely on the AMA RUC to provide valuations for services under the PFS.

While a number of commenters strongly opposed our plans to develop a formal validation process, many other commenters expressed support for the development and establishment of a system-wide validation process of the work RVUs under the PFS. As noted in the CY 2011 PFS final rule with comment period (75 FR 73217 through 73218), these commenters commended us for seeking new approaches to validation, as well as being open to suggestions from the public on this process. A number of commenters submitted technical advice and offered their time and expertise as resources for us to draw upon in any examination of possible approaches to developing a formal validation process.

However, in response to our solicitation of comments regarding time and motion studies, a number of commenters opposed the approach of using time and motion studies to validate estimates of physician time and intensity, stating that properly conducted time and motion studies are extraordinarily expensive and, given the thousands of codes paid under the PFS, it would be unlikely that all codes could be studied. As we stated in the CY 2011 PFS final rule with comment period (75 FR 73218), we understand that these studies would require significant resources and we remain open to suggestions for other approaches to developing a formal validation process. We note that MedPAC suggested in its comment letter (75 FR 73218) that we should consider ''collecting data on a recurring basis from a cohort of practices and other facilities where physicians and nonphysician clinical practitioners work.'' As we stated previously, we intend to establish a more extensive validation process of RVUs in the future in accordance with the requirements of section 1848(c)(2)(L) of the Act.

While we received a modest number of comments specifically addressing technical and methodological aspects of developing a validation system, we believe it would be beneficial to provide an additional opportunity for stakeholders to submit comments on data sources and possible methodologies for developing a system-wide validation system. We are particularly interested in comments regarding data sources and studies which may be used to validate estimates of physician time and intensity that could be factored into the work RVUs, especially for services with rapid growth in Medicare expenditures, which is one of the Affordable Care Act

categories that the statute specifically directs us to examine. We are also soliciting comments regarding MedPAC's suggestion of ''collecting data on a recurring basis from a cohort of practices and other facilities where physicians and nonphysician clinical practitioners work.''

We plan to discuss the validation process in more detail in a future PFS rule once we have considered the matter further in conjunction with the public comments received on the CY 2011 rulemaking, as well as this proposed rule. We note that any proposals we would make on the formal validation process would be subject to public comment, and we would consider those comments before finalizing the policies.

3. Consolidating Reviews of Potentially Misvalued Codes

As previously discussed, we are statutorily required to review the RVUs of services paid under the PFS no less often than every 5 years. In the past, we have satisfied this requirement by conducting periodic reviews of work, PE, and malpractice RVUs for established services every 5 years in what is commonly known as CMS' Five-Year Reviews of Work, PE, and Malpractice RVUs. Recently, on May 24, 2011, we released the proposed notice regarding the Fourth Five-Year Review of Work RVUs. The most recent comprehensive Five-Year Review of PE RVUs occurred for CY 2010; the same year we began using the Physician Practice Information Survey (PPIS) data to update the PE RVUs. The last Five-Year Review of Malpractice RVUs also occurred for CY 2010. These Five-Year Reviews have historically included codes identified and nominated by the public for review, as well as those identified by CMS and the AMA RUC.

In addition to the Five-Year Reviews, beginning for CY 2009, CMS and the AMA RUC have identified and reviewed a number of potentially misvalued codes on an annual basis using various identification screens, such as codes with high growth rates, codes that are frequently billed together in one encounter, and codes that are valued as inpatient services but that are now predominately furnished as outpatient services. These annual reviews have not included codes identified by the public as potentially misvalued since historically, the public has the opportunity to submit potentially misvalued codes during the Five-Year Review process.

With the enactment of the Affordable Care Act in 2010, which endorsed our initiative to identify and review potentially misvalued codes and emphasized the importance of our ongoing work in this area to improve accuracy and appropriateness of payments under the PFS, we believe that continuing the annual identification and review of potentially misvalued codes is necessary. Given that we are engaging in extensive reviews of work RVUs and direct PE inputs of potentially misvalued codes on an annual basis, we believe that separate and ''freestanding'' Five-Year Reviews of Work and PE may have become redundant with our annual efforts. Therefore, for CY 2012 and forward, we propose to consolidate the formal Five-Year Review of Work and PE with the annual review of potentially misvalued codes. That is, we would begin meeting the statutory requirement to review work and PE RVUs for potentially misvalued codes at least once every 5 years through an annual process, rather than once every 5 years. Furthermore, to allow for public input and to preserve the public's ability to identify and nominate potentially misvalued codes for review, we are proposing a process by which the public could submit codes for our potential review, along with supporting documentation, on an annual basis. Our review of these codes would be incorporated into our potentially misvalued codes initiative. This proposal is further discussed in section II.B.4. of this proposed rule. We are soliciting comments on our proposal to consolidate the formal Five-Year Reviews of Work and PE with the annual review of potentially misvalued codes.

We note that while we are proposing to review the physician work RVUs and direct PE inputs of potentially misvalued codes on an annual basis, we are not proposing at this time to review malpractice RVUs on an annual basis. As discussed in section II.D. of this proposed rule, in general, malpractice RVUs are based on malpractice insurance premium data on a specialty level. The last comprehensive review and update of the malpractice RVUs occurred for CY 2010 using data obtained from the PPIS data. Since it is not feasible to conduct such extensive physician surveys to obtain updated specialty level malpractice insurance premium data on an annual basis, we believe the comprehensive review of malpractice RVUs should continue to occur at 5-year intervals.

Furthermore, in identifying and reviewing potentially misvalued codes on an annual basis, we note that this new proposed process presents us with the opportunity to review simultaneously both the work RVUs and the direct PE inputs, in conjunction, for each code. Heretofore, the work RVUs and direct PE inputs of potentially misvalued codes were commonly reviewed separately and at different times. For example, a code may have been identified as potentially misvalued based solely on its work RVUs so the AMA RUC would have reviewed the code and provided us with recommendations on the physician times and work RVUs. However, the code's direct PE inputs would not have necessarily been reviewed concurrently and therefore, the AMA RUC would not have necessarily provided us with recommendations for any changes in the direct PE inputs of the code that could have been necessary to ensure that the PE RVUs of the code are determined more appropriately. Therefore, while this code may have been recently reviewed and revised under the potentially misvalued codes initiative for physician work, the PE component of the code could still be potentially misvalued. Going forward, we believe combining the review of both physician work and PE for each code under our potentially misvalued codes initiative will more accurately align the review of these codes and lead to more accurate and appropriate payments under the PFS.

Finally, it is important to note that the code-specific resource based relative value framework under the PFS system is one in which services are ranked relative to each other. That is, the work RVUs assigned to a code are based on the physician time and intensity expended on that particular service as compared to the physician time and intensity of the other services paid under the PFS. This concept of relativity to other services also applies to the PE RVUs, particularly when it comes to reviewing and assigning correct direct PE inputs that are relative to other similar services. Consequently, we are emphasizing the need to review codes that are identified as part of the potentially misvalued initiative to ensure that appropriate relativity is constructed and maintained in several key relationships:

- The work and PE RVUs of codes are ranked appropriately within the code family. That is, the RVUs of services within a family should be ranked progressively so that less intensive services and/or services that require less physician time and/or require fewer or less expensive direct PE inputs should be assigned lower work or PE RVUs relative to other codes within the family. For example, if a code for treatment of elbow fracture is under review under the potentially misvalued

codes initiative, we would expect the work and PE RVUs for all the codes in the family also be reviewed in order to ensure that relativity is appropriately constructed and maintained within this family. Furthermore, as we noted in the CY 2010 PFS final rule with comment period (74 FR 61941), when we submit codes to the AMA RUC and request their review, in order to maintain relativity, we emphasized the importance of reviewing the base code of a family. The base code is the most important code to review because it is the basis for the valuation of other codes within the family and allows for all related codes to be reviewed at the same time (74 FR 61941).

- The work and PE RVUs of codes are appropriately relative based on comparison of physician time and/or intensity and/or direct inputs to other services furnished by physicians in the same specialty. To continue the example shown previously, if a code for treatment of elbow fracture is under review, we would expect this code to be compared to other codes, such as codes for treatment of humerus fracture, or other codes furnished by physicians in the same specialty, in order to ensure that the work and PE RVUs are appropriately relative within the specialty.
- The work and PE RVUs of codes are appropriately relative when compared to services across specialties. While it may be challenging to compare codes that describe completely unrelated services, since the entire PFS is a budget neutral system where payment differentials are dependent on the relative differences between services, it is essential that services across specialties are appropriately valued relative to each other. To illustrate the point, if a service furnished primarily by dermatology is analogous in physician time and intensity to another service furnished primarily by allergy/immunology, then we would expect the work RVUs for the two services to be similar, even though the two services may be otherwise unrelated.

4. Proposed Public Nomination Process

Under the previous Five-Year Reviews, the public was provided with the opportunity to nominate potentially misvalued codes for review. To allow for public input and to preserve the public's ability to identify and nominate potentially misvalued codes for review under our annual potentially misvalued codes initiative, we are proposing a process by which on an annual basis the public could submit codes, along with documentation supporting the need for review. We are proposing that stakeholders may nominate potentially misvalued codes by submitting the code with supporting documentation during the 60-day public comment period following the release of the annual PFS final rule with comment period. We would evaluate the supporting documentation and decide whether the nominated code should be reviewed as potentially misvalued during the following year. If we were to receive an overwhelming number of nominated codes that qualified as potentially misvalued in any given year, we would prioritize the codes for review and could decide to hold our review of some of the potentially misvalued codes for a future year. We note that we may identify additional potentially misvalued codes for review by the AMA RUC based on the seven statutory categories under section 1848(c)(2)(K)(ii) of the Act.

We encourage stakeholders who believe they have identified a potentially misvalued code, supported by documentation, to nominate codes through the public process. We emphasize that in order to ensure that a nominated code will be fully considered to qualify as a potentially misvalued code to be reviewed under our annual process, accompanying documentation must be provided to show evidence of the code's inappropriate valuation, either in terms of inappropriate physician times, work RVUs, and/or direct PE inputs. The AMA RUC developed certain ''Guidelines for Compelling Evidence'' for the Third Five-Year Review which we believe could be applicable for members of the public as they gather supporting documentation for codes they wish to publicly nominated for the annual review of potentially misvalued codes. The specific documentation that we would seek under this proposal includes the following:

- Documentation in the peer reviewed medical literature or other reliable data that there have been changes in physician work due to one or more of the following:
  - ++ Technique.
  - ++ Knowledge and technology.
  - ++ Patient population.
  - ++ Site-of-service.
  - ++ Length of hospital stay.
  - ++ Physician time.
- An anomalous relationship between the code being proposed for review and other codes. For example, if code ''A'' describes a service that requires more work than codes ''B,'' ''C,'' and ''D,'' but is nevertheless valued lower. The commenter would need to assemble evidence on service time, technical skill, patient severity, complexity, length of stay and other factors for the code being considered and the codes to which it is compared. These reference services may be both inter- and intra-specialty.
- Evidence that technology has changed physician work, that is, diffusion of technology.
- Analysis of other data on time and effort measures, such as operating room logs or national and other representative databases.
- Evidence that incorrect assumptions were made in the previous valuation of the service, such as a misleading vignette, survey, or flawed crosswalk assumptions in a previous evaluation;
- Prices for certain high cost supplies or other direct PE inputs that are used to determine PE RVUs are inaccurate and do not reflect current information.
- Analyses of physician time, work RVU, or direct PE inputs using other data sources (for example, Department of Veteran Affairs (VA) National Surgical Quality Improvement Program (NSQIP), the Society for Thoracic Surgeons (STS), and the Physician Quality Reporting Initiative (PQRI) databases).
- National surveys of physician time and intensity from professional and management societies and organizations, such as hospital associations.

We note that when a code is nominated, and supporting documentation is provided, we would expect to receive a description of the reasons for the code's misvaluation with the submitted materials. That is, we would require a description and summary of the evidence is required that shows how the service may have changed since the original valuation or may have been inappropriately valued due to an incorrect assumption. We would also appreciate specific **Federal Register** citations, if they exist, where commenters believe the nominated codes were previously valued erroneously. We are also proposing to consider only nominations of active codes that are covered by Medicare at the time of the nomination.

After we receive the nominated codes during the 60-day comment period following the release of the annual PFS final rule with comment period, we intend to review the supporting documentation and determine whether they appear to be potentially misvalued codes appropriate for review under the annual process. We are proposing that, in the following PFS proposed rule, we would publish a list of the codes received under the public nomination process during the previous year and

indicate whether the codes would be included in our annual review of potentially misvalued codes. We would also indicate the codes that we would not be including in our annual review, whether due to insufficient documentation or for other reasons. Under this proposed process, the first opportunity for the public to nominate codes would be during the public comment period for the CY 2012 PFS final rule with comment period. We would publish in the CY 2013 PFS proposed rule, the list of nominated codes, and whether they will be reviewed as potentially misvalued codes. We would request the AMA RUC review these potentially misvalued codes identified by the public, along with any other codes identified by us, and provide to us recommendations for appropriate physician times, work RVUs, and direct PE inputs. We are soliciting public comments on this proposed code nomination process and we will consider any suggestions to modify and improve the proposed process.

5. CY 2012 Identification and Review of Potentially Misvalued Services

a. Code Lists

While we anticipate receiving nominations from the public for potentially misvalued codes in conjunction with rulemaking, we believe it is imperative that we continue the work of the review initiatives over the last several years and drive the agenda forward to identify, review, and adjust values for potentially misvalued codes for CY 2012.

In the CY 2011 PFS proposed rule (75 FR 40068 through 40069), we identified, and referred to the AMA RUC, a list of potentially misvalued codes in three areas:

- Codes on the AMA RUC's multi-specialty points of comparison (MPC) list (used as reference codes in the valuation of other codes),
- Services with low work RVUs that are billed in multiples (a statutory category); and
- Codes that have low work RVUs for which CMS claims data show high volume (that is, high utilization of these codes represents a significant dollar impact in the payment system).

Our understanding is that the AMA RUC is currently working towards reviewing these codes at our request. We intend to provide an update and discuss any RVU adjustments to codes that have been identified as potentially misvalued in the CY 2012 PFS final rule, as they move through the review process.

Meanwhile, for CY 2012, we are continuing with the work to identify and review additional services under the potentially misvalued codes initiative. Stakeholders have noted that many of the services previously identified under the potentially misvalued codes initiative were concentrated in certain specialties. To develop a robust and representative list of codes for review under the potentially misvalued codes initiative, we examined the highest PFS expenditure services by specialty (based on our most recently available claims data and using the specialty categories listed in the PFS specialty impact table, see Table 64 in section VII.B. of this proposed rule) and identified those that have not been reviewed since CY 2006 (which was the year we completed the Third Five-Year Review of Work and before we began our potentially misvalued codes initiative).

In our examination of the highest PFS expenditure codes for each specialty (we used the specialty categories listed in the PFS specialty impact table, see Table 64 in section VII.B. of this proposed rule), we noted that E/M services consistently appeared in the top 20 high PFS expenditure services. We noted as well that most of the E/M services have not been reviewed since the comprehensive review of services for the Third Five-Year Review of Work in CY 2006. Therefore, after an examination of the highest PFS expenditure codes for each specialty, we have developed two code lists of potentially misvalued codes which we are proposing to refer to the AMA RUC for review.

First, we are requesting that the AMA RUC conduct a comprehensive review of all E/M codes, including the codes listed in Table 6. During the intervening years, there has been significant interest in delivery system reform, such as patient-centered medical homes and making the primary care physician the focus of managing the patient's chronic conditions. The chronic conditions challenging the Medicare population include heart disease, diabetes, respiratory disease, breast cancer, allergy, Alzheimer's disease, and factors associated with obesity. Thus, as the focus of primary care has evolved from an episodic treatment-based orientation to a focus on comprehensive patient-centered care management in order to meet the challenges of preventing and managing chronic disease, we believe a more current review of E/M codes is warranted. We note that although physicians in primary care specialties bill a high percentage of their services using the E/M codes, physicians in non-primary care specialties also bill these codes for some of their services.

Since we believe the focus of primary care has evolved to meet the challenges of preventing and managing chronic disease since the last comprehensive review of the E/M codes, we would like the AMA RUC to prioritize review of the E/M codes and provide us with recommendations on the physician times, work RVUs and direct PE inputs of at least half of the E/M codes listed in Table 6 by July 2012 in order for us to include any revised valuations for these codes in the CY 2013 PFS final rule with comment period. We would expect the AMA RUC to review the remaining E/M codes listed in Table 6 by July 2013 in order for us to complete the comprehensive re-evaluation of E/M services and include the revised valuations for these codes in the CY 2014 PFS final rule with comment period.

TABLE 6—E/M CODES REFERRED FOR AMA RUC REVIEW

CPT Code	Short descriptor
99201	Office/outpatient visit new
99202	Office/outpatient visit new
99203	Office/outpatient visit new
99204	Office/outpatient visit new
99205	Office/outpatient visit new
99211	Office/outpatient visit est
99212	Office/outpatient visit est
99213	Office/outpatient visit est
99214	Office/outpatient visit est
99215	Office/outpatient visit est
99217	Observation care discharge
99218	Initial observation care
99219	Initial observation care
99220	Initial observation care
99221	Initial hospital care
99222	Initial hospital care
99223	Initial hospital care
99224	Subsequent observation care
99225	Subsequent observation care
99226	Subsequent observation care
99231	Subsequent hospital care
99232	Subsequent hospital care
99233	Subsequent hospital care
99234	Observ/hosp same date
99235	Observ/hosp same date
99236	Observ/hosp same date
99238	Hospital discharge day
99239	Hospital discharge day
99281	Emergency dept visit
99282	Emergency dept visit
99283	Emergency dept visit
99284	Emergency dept visit
99285	Emergency dept visit
99291	Critical care first hour
99292	Critical care addl 30 min
99304	Nursing facility care init
99305	Nursing facility care init
99306	Nursing facility care init
99307	Nursing fac care subseq
99308	Nursing fac care subseq
99309	Nursing fac care subseq
99310	Nursing fac care subseq

TABLE 6—E/M CODES REFERRED FOR AMA RUC REVIEW—Continued

CPT Code	Short descriptor
99315	Nursing fac discharge day
99316	Nursing fac discharge day
99318	Annual nursing fac assessmnt
99324	Domicil/r-home visit new pat
99325	Domicil/r-home visit new pat
99326	Domicil/r-home visit new pat
99327	Domicil/r-home visit new pat
99328	Domicil/r-home visit new pat
99334	Domicil/r-home visit est pat
99335	Domicil/r-home visit est pat
99336	Domicil/r-home visit est pat
99337	Domicil/r-home visit est pat
99341	Home visit new patient
99342	Home visit new patient
99343	Home visit new patient
99344	Home visit new patient
99345	Home visit new patient
99347	Home visit est patient
99348	Home visit est patient
99349	Home visit est patient
99350	Home visit est patient
99354	Prolonged service office
99355	Prolonged service office
99356	Prolonged service inpatient
99357	Prolonged service inpatient
99406	Behav chng smoking 3–10 min
99407	Behav chng smoking > 10 min
99460	Init nb em per day hosp
99461	Init nb em per day non-fac
99462	Sbsq nb em per day hosp
99463	Same day nb discharge
99464	Attendance at delivery
99465	Nb resuscitation
99466	Ped crit care transport
99467	Ped crit care transport addl
99468	Neonate crit care initial
99469	Neonate crit care subsq
99471	Ped critical care initial
99472	Ped critical care subsq
99475	Ped crit care age 2–5 init
99476	Ped crit care age 2–5 subsq
99477	Init day hosp neonate care
99478	Ic lbw inf < 1500 gm subsq
99479	Ic lbw inf 1500–2500 g subsq
99480	Ic inf pbw 2501–5000 g subsq
92002	Eye exam new patient
92004	Eye exam new patient
92012	Eye exam established pat
92014	Eye exam & treatment

Second, we are also providing a select list of high PFS expenditure procedural codes representing services furnished by an array of specialties, as listed in Table 7. These procedural codes have not been reviewed since CY 2006 (before we began our potentially misvalued codes initiatives in CY 2008) and, based on the most recently available data, have CY 2010 allowed charges of greater than $10 million at the specialty level (based on the specialty categories listed in the PFS specialty impact table and CY 2010 Medicare claims data). A number of the codes in Table 7 would not otherwise be identified as potentially misvalued services using the screens we have used in recent years with the AMA RUC or based on one of the six specific statutory categories under section 1848(c)(2)(k)(ii) of the Act. However, we identified the potentially misvalued codes listed in Table 7 under the seventh statutory category, ''other codes determined to be appropriate by the Secretary.'' We selected these codes based on the fact that they have not been reviewed for at least 6 years, and in many cases the last review occurred more than 10 years ago. They represent high Medicare expenditures under the PFS; thus, we believe that a review to assess changes in physician work and update direct PE inputs is warranted. Furthermore, since these codes have significant impact on PFS payment on a specialty level, a review of the relativity of the code to ensure that the work and PE RVUs are appropriately relative within the specialty and across specialties, as discussed previously, is essential. For these reasons, we have identified these codes as potentially misvalued and are requesting that the AMA RUC review the codes listed in Table 7 and provide us with recommendations on the physician times, work RVUs and direct PE inputs in a timely manner. That is, similar to our request for the AMA RUC to review E/M codes in a timely manner, we are requesting that the AMA RUC review at least half of the procedural codes listed in Table 7 by July 2012 in order for us to include any revised valuations for these codes in the CY 2013 PFS final rule with comment period.

TABLE 7—SELECT LIST OF PROCEDURAL CODES REFERRED FOR AMA RUC REVIEW

CPT Code	Short descriptor
95117	Immunotherapy Injections
33533	Cabg, Arterial, Single
33405	Replacement Of Aortic Valve
33430	Replacement Of Mitral Valve
93015	Cardiovascular Stress Test
93880	Extracranial Study
93000	Electrocardiogram, Complete
17311	Mohs, 1 Stage, H/N/Hf/G
17312	Mohs Addl Stage
17004	Destroy Premlg Lesions 15+
45378	Diagnostic Colonoscopy
43235	Uppr Gi Endoscopy, Diagnosis
47562	Laparoscopic Cholecystectomy
47563	Laparo Cholecystectomy/Graph
49505	Prp I/Hern Init Reduc > 5 Yr
96413	Chemo, Iv Infusion, 1 Hr
96367	Tx/Proph/Dg Addl Seq Iv Inf
96365	Ther/Proph/Diag Iv Inf, Init
62311	Inject Spine L/S (Cd)
35476	Repair Venous Blockage
36870	Percut Thrombect Av Fistula
35475	Repair Arterial Blockage
95903	Motor Nerve Conduction Test
95819	Eeg, Awake And Asleep
95861	Muscle Test, 2 Limbs
22612	Lumbar Spine Fusion
63047	Removal Of Spinal Lamina
22851	Apply Spine Prosth Device
76830	Transvaginal Us, Non-Ob
67028	Injection Eye Drug
92235	Eye Exam With Photos
66982	Cataract Surgery, Complex
27447	Total Knee Arthroplasty
27130	Total Hip Arthroplasty
27236	Treat Thigh Fracture
69210	Remove Impacted Ear Wax
31237	Nasal/Sinus Endoscopy, Surg
88342	Immunohistochemistry
88112	Cytopath, Cell Enhance Tech
88312	Special Stains Group 1
97140	Manual Therapy
90862	Medication Management
90801	Psy Dx Interview
90805	Psytx, Off, 20-30 Min W/E&M
94720	Monoxide Diffusing Capacity
94240	Residual Lung Capacity
77014	Ct Scan For Therapy Guide
77301	Radiotherapy Dose Plan, Imrt
77421	Stereoscopic X-Ray Guidance
70450	Ct Head/Brain W/O Dye
70553	Mri Brain W/O & W/Dye
72148	Mri Lumbar Spine W/O Dye
20610	Drain/Inject, Joint/Bursa
53850	Prostatic Microwave Thermotx
50590	Fragmenting Of Kidney Stone
76872	Us, Transrectal
35301	Rechanneling Of Artery
98941	Chiropractic Manipulation
98940	Chiropractic Manipulation
98942	Chiropractic Manipulation
90806	Psytx, Off, 45–50 Min
90818	Psytx, Hosp, 45–50 Min
90808	Psytx, Office, 75–80 Min
72141	Mri Neck Spine W/O Dye
73221	Mri Joint Upr Extrem W/O Dye
70551	Mri Brain W/O Dye
92083	Visual Field Examination(S)
97530	Therapeutic Activities
97112	Neuromuscular Reeducation
97001	Pt Evaluation

b. Specific Codes

On an ongoing basis, public stakeholders (including physician specialty societies, beneficiaries, and other members of the public) bring concerns to us regarding direct PE inputs and physician work. In the past, we would consider these concerns and address them through proposals in annual rulemaking, technical corrections, or by requesting that the AMA RUC consider the issue.

Since last year's rulemaking, the public has brought a series of issues to our attention that relate directly to direct PE inputs and physician work. We believe that some of these issues will serve as examples of codes that might be brought forward by the public

as potentially misvalued in the proposed nomination process as discussed previously in section II.B.4. of this proposed rule.

(1) Codes Potentially Requiring Updates to Direct PE Inputs

Abdomen and Pelvis CT. For CY 2011, AMA CPT created a series of new codes that describe combined CTs of the abdomen and pelvis. Prior to 2011, these services would have been billed using multiple stand-alone codes for each body region. The new codes are: 74176 (Computed tomography, abdomen and pelvis; without contrast material); 74177 (Computed tomography, abdomen and pelvis; with contrast material); and 74178 (Computed tomography, abdomen and pelvis; without contrast material in one or both body regions, followed by with contrast material(s) and further sections in one or both body regions.)

As stated in the CY 2011 PFS final rule with comment period (75 FR 73350), we accepted the AMA RUC-recommended direct PE inputs for these codes, with refinements to the equipment minutes to assure that the time associated with the equipment items reflected the time during the intra-service period when a clinician is using the piece of equipment, plus any additional time the piece of equipment is not available for use for another patient due to its use during the designated procedure. We believe that the direct PE inputs of the new codes reflect the typical resources required to furnish the services in question.

However, stakeholders have alerted us that the resulting PE RVUs for the new codes reflect an anomalous rank order in comparison to the previously existing stand-alone codes. Specifically, the PE RVUs for the codes that describe CT scans without contrast for either body region are greater than the PE RVUs for 74176, which describes a CT scan of both body regions. We believe that the anomalous rank order of the PE RVUs for this series of codes may be the result of outdated direct PE inputs for the previously existing stand-alone codes. The physician work for those codes was last reviewed by the AMA RUC during the Third Five-Year Review of Work for CY 2007. However, the direct PE inputs for the codes have not been reviewed since 2003. Therefore, we are requesting that the AMA RUC review both the direct PE inputs and work values of the following codes in accordance with the consolidated approach to reviewing potentially misvalued codes as outlined in section II.B.2.c. of this proposed rule:

- 72192 Computed tomography, pelvis; without contrast material
- 72193 Computed tomography, pelvis; with contrast material(s)
- 72194 Computed tomography, pelvis; without contrast material, followed by contrast material(s) and further sections
- 74150 Computed tomography, abdomen; without contrast material
- 74160 Computed tomography, abdomen; with contrast material(s)
- 74170 Computed tomography, abdomen; without contrast material, followed by contrast material(s) and further sections

Tissue Pathology. A stakeholder informed us that the direct PE inputs associated with a particular tissue examination code are atypical. Specifically, the stakeholder suggested that the AMA RUC relied upon an atypical clinical vignette in identifying the direct PE inputs for the service associated with CPT code 88305 (Level IV—Surgical pathology, gross and microscopic examination Abortion—spontaneous/missed, Artery, biopsy, Bone marrow, biopsy, Bone exostosis, Brain/meninges, other than for tumor resection, Breast, biopsy, not requiring microscopic evaluation of surgical margins, Breast, reduction mammoplasty, Bronchus, biopsy, Cell block, any source, Cervix, biopsy, Colon, biopsy, Duodenum, biopsy, Endocervix, curettings/biopsy, Endometrium, curettings/biopsy, Esophagus, biopsy, Extremity, amputation, traumatic, Fallopian tube, biopsy, Fallopian tube, ectopic pregnancy, Femoral head, fracture, Fingers/toes, amputation, non-traumatic, Gingiva/oral mucosa, biopsy, Heart valve, Joint, resection, Kidney, biopsy, Larynx, biopsy, Leiomyoma(s), uterine myomectomy—without uterus, Lip, biopsy/wedge resection, Lung, transbronchial biopsy, Lymph node, biopsy, Muscle, biopsy, Nasal mucosa, biopsy, Nasopharynx/oropharynx, biopsy, Nerve, biopsy, Odontogenic/dental cyst, Omentum, biopsy, Ovary with or without tube, non-neoplastic, Ovary, biopsy/wedge resection, Parathyroid gland, Peritoneum, biopsy, Pituitary tumor, Placenta, other than third trimester, Pleura/pericardium—biopsy/tissue, Polyp, cervical/endometrial, Polyp, colorectal, Polyp, stomach/small intestine, Prostate, needle biopsy, Prostate, TUR, Salivary gland, biopsy, Sinus, paranasal biopsy, Skin, other than cyst/tag/debridement/plastic repair, Small intestine, biopsy, Soft tissue, other than tumor/mass/lipoma/debridement, Spleen, Stomach, biopsy, Synovium, Testis, other than tumor/biopsy/castration, Thyroglossal duct/brachial cleft cyst, Tongue, biopsy, Tonsil, biopsy, Trachea, biopsy, Ureter, biopsy, Urethra, biopsy, Urinary bladder, biopsy, Uterus, with or without tubes and ovaries, for prolapse, Vagina, biopsy, Vulva/labia, biopsy).

The stakeholder claims that in furnishing the typical service, the required material includes a single block of tissue and 1–3 slides. The stakeholder argues that the typical costs for the service amount is approximately $18, but the PE RVUs for 2011 result in a national payment rate of $69.65 for the technical component of the service. Because the direct PE inputs associated with this code have not been reviewed since 1999, we are asking that the AMA RUC review both the direct PE inputs and work values of this code as soon as possible in accordance with the consolidated approach to reviewing potentially misvlaued codes as outlined in section II.B.2.c. of this proposed rule though the work for this code was reviewed in April 2010.

In Situ Hybridization Testing. We received comments from the Large Urology Group Practice Association (LUGPA) regarding two new cytopathology codes that describe in situ hybridization testing of urine specimens. Prior to CY 2011, all in situ hybridization testing was coded and billed using CPT Codes 88365 (In situ hybridization (eg, FISH), each probe), 88367 (Morphometric analysis, in situ hybridization (quantitative or semi-quantitative) each probe; using computer-assisted technology) and 88368 (Morphometric analysis, in situ hybridization (quantitative or semi-quantitative) each probe; manual). The appropriate CPT code listed would be billed one time for each probe used in the performance of the test, regardless of the medium of the specimen (that is, blood, tissue, tumor, bone marrow or urine).

For CY 2011, the AMA's CPT Editorial Panel created two new cytopathology codes that describe in situ hybridization testing using urine samples: CPT code 88120 (Cytopathology, in situ hybridization (eg, FISH), urinary tract specimen with morphometric analysis, 3–5 molecular probes, each specimen; manual) and CPT code 88121 (Cytopathology, in situ hybridization (eg, FISH), urinary tract specimen with morphometric analysis, 3–5 molecular probes, each specimen; using computer-assisted technology).

Because the descriptors indicate that the new codes account for approximately 4 probes, whereas 88367 and 88368 describe each probe, there are more PE RVUs associated with the new codes than with the previously existing codes that are currently still used for any specimen except for urine.

However, because the previously existing codes are billed per probe, the payment for a test using a different specimen type could vary depending upon the number of probes. For example, a practitioner furnishing a test involving a blood specimen and using two probes would bill CPT code 88368 (total RVUs: 6.28) three times with the result of 18.84 RVUs. A practitioner furnishing the same test but using a urine sample instead of a blood sample would receive payment based on the 13.47 RVUs associated with CPT code 88120.

CMS accepted the RUC-recommended work values and direct PE inputs, without refinement, for the two new cytopathology codes that describe in situ hybridization testing using urine samples. We have reviewed the direct PE recommendations made by the AMA RUC and, at this time, believe that these inputs are appropriate.

However, we share LUGPA's concerns regarding the potential payment discrepancies between the codes that describe the same test using different specimen media. Therefore, we are asking the AMA RUC to review the both the direct PE inputs and work values of the following codes in accordance with the consolidated approach to reviewing potentially misvlaued codes as outlined in section II.B.2.c. of this proposed rule: CPT codes 88365 (In situ hybridization (e.g., FISH), each probe); 88367 (Morphometric analysis, in situ hybridization (quantitative or semi-quantitative) each probe; using computer-assisted technology); and 88368 (Morphometric analysis, in situ hybridization (quantitative or semi-quantitative) each probe; manual.)

(2) Codes Without Direct Practice Expense Inputs in the Non-Facility Setting

Certain stakeholders have requested that we create nonfacility PE values for a series of kyphoplasty services CPT codes:

- 22523 (Percutaneous vertebral augmentation, including cavity creation (fracture reduction and bone biopsy included when performed) using mechanical device, 1 vertebral body, unilateral or bilateral cannulation (e.g., kyphoplasty); thoracic),
- 22524 (Percutaneous vertebral augmentation, including cavity creation (fracture reduction and bone biopsy included when performed) using mechanical device, 1 vertebral body, unilateral or bilateral cannulation (e.g., kyphoplasty); lumbar).
- 22525 (Percutaneous vertebral augmentation, including cavity creation (fracture reduction and bone biopsy included when performed) using mechanical device, 1 vertebral body, unilateral or bilateral cannulation (e.g., kyphoplasty); each additional thoracic or lumbar vertebral body (List separately in addition to code for primary procedure).

In the case of these codes, we are asking the RUC to make recommendations regarding the appropriateness of creating nonfacility direct PE inputs. If the RUC were to recommend direct PE recommendations, we would review those recommendations as part of the annual process.

Ultrasound Equipment. A stakeholder has raised concern about potential inconsistencies with the inputs and the prices related to ultrasound equipment in the direct PE database. Upon reviewing inputs and prices for ultrasound equipment, we have noted that there are 17 different pieces of ultrasound and ultrasound-related equipment in the database that are associated with 110 CPT Codes. The price inputs for ultrasound equipment range from $1,304.33 to $466,492.00. Therefore, we are asking the AMA RUC to review the ultrasound equipment included in those codes as well as how the way the equipment is described and priced in the direct PE database.

In the past, the AMA RUC has provided us with valuable recommendations regarding particular categories of equipment and supply items that are used as direct PE inputs for a range of codes. For example, in the 2011 PFS final rule (75 FR 73204), we made changes to a series of codes following the RUC's review of services that include the radiographic fluoroscopic room (CMS Equipment Code EL014) as a direct PE input. The RUC review revealed the use of the item to no longer be typical for certain services in which it had been specified within the direct cost inputs. These recommendations have often prompted our proposals that have served to maintain appropriate relativity within the PFS, and we hope that the RUC will continue to address issues relating to equipment and supply inputs that affect many codes. Furthermore, we believe that in these kinds of cases, it may be appropriate to make changes to the related direct PE inputs for a series of codes without reevaluating the physician work or other direct PE inputs for the individual codes. In other words, while we generally believe that both the work and the direct practice expense inputs should be reviewed whenever the RUC makes recommendations regarding either component of a code's value, we recognize the value of discrete RUC reviews of direct PE items that serve as inputs for a series of service codes.

(3) Codes Potentially Requiring Updates to Physician Work

Cholecystectomy. We received a comment regarding a potential relativity problem between two cholecystectomy (gall bladder removal) CPT codes. CPT code 47600 (Cholecystectomy;) has a work RVU of 17.48, and CPT code 47605 (Cholecystectomy; with cholangiography) has a work RVU of 15.98. Upon examination of the physician time and visits associated with these codes, we found that CPT code 47600 includes 115 minutes of intra-service time and a total time of 420 minutes, including 3 office visits, 3 subsequent hospital care days, and 1 hospital discharge management day. CPT code 47605 includes 90 minutes of intra-service time and a total time of 387 minutes, including 2 office visits, 3 subsequent hospital care days, and 1 hospital discharge management day. We believe that the difference in physician time and visits is the cause for the difference in work RVU for these codes. However, upon clinical review, it does not appear that these visits appropriately reflect the relativity of these two services, as CPT code 47600 should not have more time and visits associated with the service than CPT code 47605. Therefore, we are asking the AMA RUC to review these two cholecystectomy CPT codes, 47600 and 47605.

We thank the public for bringing these issues to our attention and kindly request that the public continue to do so. Please see section II.B.4. of this proposed notice for more information on the proposed public process for the nomination of potentially misvalued codes.

6. Code-Specific Issues

a. CY 2012 Codes With Site-of-Service Anomalies

(1) Background

The AMA RUC reviewed a number of site-of-service anomaly codes for CY 2012, many of which are site-of-service anomaly codes that have had interim values in place since CY 2009. These are CPT codes that have experienced a change in the typical site-of-service since the original valuation of the codes. Specifically, these codes were originally furnished in the inpatient setting, but Medicare claims data show that the typical case has shifted to being furnished in the outpatient setting. Since the procedures were typically furnished in the inpatient setting when the codes were originally valued, the work RVUs for these codes would have

been valued to include the inpatient physician work furnished, as well as to reflect the intensive follow-up care normally associated with an inpatient procedure. As we discussed in the CY 2011 final rule with comment period (75 FR 73221), when the typical case for a service has shifted from the inpatient setting to an outpatient or physician's office setting, we do not believe the inclusion of inpatient hospital visits in the post-operative period is appropriate. For example, inpatient E/M visit codes such as CPT codes 99231 (Level 1 subsequent hospital care, per day); 99232 (Level 2 subsequent hospital care, per day); and 99233 (Level 3 subsequent hospital care, per day), should not be included in the valuation of these services. Additionally, we believe that it is reasonable to expect that there have been changes in medical practice for these services, and that such changes would represent a decrease in physician time or intensity or both. The AMA RUC reviewed 40 CPT codes that were identified as having site-of-service anomalies and recommended revised RVUs to CMS for 29 codes for CY 2009 and 11 codes for CY 2010. In the CY 2010 PFS proposed rule and final rule with comment period (74 FR 33556 and 74 FR 61777, respectively), we encouraged the AMA RUC to utilize the building block methodology when revaluing services with site-of-service anomalies. In the CY 2011 PFS final rule with comment period (75 FR 73221), we also stated that in the CYs 2009 and 2010 PFS final rules with comment period (73 FR 69883 and 74 FR 61776 through 61778, respectively), we indicated that although we would accept the AMA RUC valuations for these site-of-service anomaly codes on an interim basis through CY 2010, we had ongoing concerns about the methodology used by the AMA RUC to value these services. We requested that the AMA RUC re-examine the site-of-service anomaly codes and adjust the work RVU, time, and post-service visits to reflect those typical of a service furnished in an outpatient or physician's office setting.

Following our request in the CY 2011 PFS final rule with comment period, the AMA RUC re-reviewed these site-of-service anomaly codes and recommended work RVUs to us. Of the 40 CPT codes on the CY 2009 and CY 2010 site-of-service anomaly code lists in the CY 2011 PFS final rule with comment period, 1 CPT code was not re-reviewed, as it was addressed in the CY 2011 PFS final rule with comment period as a part of the vagal nerve stimulator family of services. Ten of the remaining 39 site-of-service anomaly codes were addressed in the Five-Year Review of Work, published in the **Federal Register** on June 6, 2011 (76 FR 32410). The remaining 29 CPT codes are addressed in this CY 2012 PFS proposed rule. We will summarize and respond to public comments, and adopt final work RVUs for all 40 CPT codes on the CY 2009 and CY 2010 site-of-service anomaly lists in the CY 2012 PFS final rule with comment period. In addition, several other CPT codes have since been identified as having site-of-service anomalies and were addressed in the Five-Year Review of Work (76 FR 32410). We will respond to public comments and adopt final work values for these codes in the CY 2012 PFS final rule with comment period. A complete list of the 40 CPT codes with site-of-service anomalies identified in CY 2009 and CY 2010, the rule in which each code was addressed, the AMA RUC-recommended work RVU, and the CMS proposed or interim work RVU can be found in Table 8.

When Medicare claims data show that the typical setting for a CPT code has shifted from the inpatient setting to the outpatient setting, we continue to believe that the work RVU, time, and post-service visits of the code should reflect the current outpatient setting. For many of the site-of-service anomaly CPT codes, we believe that the AMA RUC appropriately accounted for this site-of-service shift in its recommendations to us, and we agree with the AMA RUC-recommended work RVU for 19 of the 40 CY 2009 and CY 2010 site-of-service anomaly codes. However, we found that for the remainder of these site-of-service anomaly codes (21 of 40), the AMA RUC often recommended maintaining inpatient visits or removing inpatient visits and/or time without a corresponding decrease in work RVU. In those cases, we disagreed with the AMA RUC-recommended work RVU and adjusted the work RVU, time, and visits to reflect those typical of a service furnished in an outpatient or physician's office setting. In the Fourth Five-Year Review of Work (76 FR 32410), we discussed in detail our methodology for revaluing the site-of-service anomaly codes addressed in that proposed notice. We continue that discussion here, and a full description of our methodology for revaluing the site-of-service anomaly codes for CY 2012 is included later in this section.

TABLE 8—CMS DECISIONS ON CODES WITH SITE-OF-SERVICE ANOMALIES

CPT Code	Short descriptor	CMS Work RVU decision publication	AMA RUC Recommended work RVU	CMS Work RVU decision	CMS Proposed/interim Work RVU
21025	Excision of bone, lower jaw	CY 2012 PFS NPRM	10.03	Agree	10.03
23415	Release of shoulder ligament	CY 2012 PFS NPRM	9.23	Agree	9.23
25116	Remove wrist/forearm lesion	CY 2012 PFS NPRM	7.56	Agree	7.56
28120	Part removal of ankle/heel	Fourth Five-Year Review of Work	8.27	Disagree	7.31
28122	Partial removal of foot bone	Fourth Five-Year Review of Work	7.72	Disagree	6.76
28725	Fusion of foot bones	CY 2012 PFS NPRM	12.18	Disagree	11.22
28730	Fusion of foot bones	CY 2012 PFS NPRM	12.42	Disagree	10.70
36825	Artery-vein autograft	Fourth Five-Year Review of Work	15.13	Disagree	14.17
42415	Excise parotid gland/lesion	Fourth Five-Year Review of Work	18.12	Disagree	17.16
42420	Excise parotid gland/lesion	Fourth Five-Year Review of Work	21.00	Disagree	19.53
42440	Excise submaxillary gland	CY 2012 PFS NPRM	7.13	Disagree	6.14
49507	Prp i/hern init block >5 yr	Fourth Five-Year Review of Work	10.05	Disagree	9.09
49521	Rerepair ing hernia, blocked	Fourth Five-Year Review of Work	12.44	Disagree	11.48
49587	Rpr umbil hern, block > 5 yr	Fourth Five-Year Review of Work	8.04	Disagree	7.08
52341	Cysto w/ureter stricture tx	CY 2012 PFS NPRM	5.35	Agree	5.35
52342	Cysto w/up stricture tx	CY 2012 PFS NPRM	5.85	Agree	5.85
52343	Cysto w/renal stricture tx	CY 2012 PFS NPRM	6.55	Agree	6.55
52344	Cysto/uretero, stricture tx	CY 2012 PFS NPRM	7.05	Agree	7.05
52345	Cysto/uretero w/up stricture	CY 2012 PFS NPRM	7.55	Agree	7.55

TABLE 8—CMS DECISIONS ON CODES WITH SITE-OF-SERVICE ANOMALIES—Continued

CPT Code	Short descriptor	CMS Work RVU decision publication	AMA RUC Recommended work RVU	CMS Work RVU decision	CMS Proposed/ interim Work RVU
52346	Cystouretero w/renal strict	CY 2012 PFS NPRM	8.58	Agree	8.58
52400	Cystouretero w/congen repr	CY 2012 PFS NPRM	8.69	Agree	8.69
52500	Revision of bladder neck	CY 2012 PFS NPRM	8.14	Agree	8.14
52640	Relieve bladder contracture	Fourth Five-Year Review of Work	4.79	Agree	4.79
53445	Insert uro/ves nck sphincter	CY 2012 PFS NPRM	15.39	Disagree	13.00
54410	Remove/replace penis prosth	CY 2012 PFS NPRM	15.18	Agree	15.18
54530	Removal of testis	CY 2012 PFS NPRM	8.46	Agree	8.46
57287	Revise/remove sling repair	Fourth Five-Year Review of Work	11.15	Agree	11.15
61885	Insrt/redo neurostim 1 array	CY 2011 PFS Final Rule	6.44	Disagree	6.05
62263	Epidural lysis mult sessions	CY 2012 PFS NPRM	6.54	Disagree	5.00
62350	Implant spinal canal cath	CY 2012 PFS NPRM	6.05	Agree	6.05
62355	Remove spinal canal catheter	CY 2012 PFS NPRM	4.35	Disagree	3.55
62360	Insert spine infusion device	CY 2012 PFS NPRM	4.33	Agree	4.33
62361	Implant spine infusion pump	CY 2012 PFS NPRM	5.65	Disagree	5.00
62362	Implant spine infusion pump	CY 2012 PFS NPRM	6.10	Disagree	5.60
62365	Remove spine infusion device	CY 2012 PFS NPRM	4.65	Disagree	3.93
63650	Implant neuroelectrodes	CY 2012 PFS NPRM	7.20	Disagree	7.15
63685	Insrt/redo spine n generator	CY 2012 PFS NPRM	6.05	Disagree	5.19
64708	Revise arm/leg nerve	CY 2012 PFS NPRM	6.36	Agree	6.36
64831	Repair of digit nerve	CY 2012 PFS NPRM	9.16	Agree	9.16
65285	Repair of eye wound	CY 2012 PFS NPRM	16.00	Disagree	15.36

(2) Revised Work RVUs for Codes With Site-of-Service Anomalies

(A) Foot Arthrodesis

CPT Code	Short descriptor	AMA RUC Recommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
28725	Fusion of foot bones	12.18	Disagree	11.22
28730	Fusion of foot bones	12.42	Disagree	10.70

For CPT code 28725 (Arthrodesis; subtalar) and 28730 (Arthrodesis, midtarsal or tarsometatarsal, multiple or transverse) the most recently available Medicare claims data suggests that these site-of-service anomaly codes could be ''23-hour stay'' outpatient services. As we discussed in the CY 2011 PFS final rule with comment period (75 FR 73226 through 73227) and the Five-Year Review of Work (76 FR 32410), the ''23-hour stay service'' is a term of art describing services that typically have lengthy hospital outpatient recovery periods. For these 23-hour stay services, the typical patient is commonly at the hospital for less than 24-hours, but often stays overnight at the hospital. Unless a treating physician has written an order to admit the patient as an inpatient, the patient is considered for Medicare purposes to be a hospital outpatient, not an inpatient, and our claims data support that the typical 23-hour stay service is billed as an outpatient service.

As we discussed in the Five-Year Review of Work (76 FR 32410), we believe that the values of the codes that fall into the 23-hour stay category should not reflect work that is typically associated with an inpatient service. However, as we stated in the CY 2011 PFS final rule with comment period (75 FR 73226 through 73227), we find it is plausible that while the patient receiving the outpatient 23-hour stay service remains a hospital outpatient, the patient would typically be cared for by a physician during that lengthy recovery period at the hospital. While we do not believe that post-procedure hospital visits would be at the inpatient level since the typical case is an outpatient who would be ready to be discharged from the hospital in 23-hours or less, we believe it is generally appropriate to include the intra-service time of the inpatient hospital visit in the immediate post-service time of the 23-hour stay code under review. In addition, we indicated that we believe it is appropriate to include a half day, rather than a full day, of a discharge day management service. We finalized this policy in the CY 2011 PFS final rule with comment period (75 FR 73226 through 73227) and encouraged the AMA RUC to apply this methodology in developing the recommendations it provides to us for valuing 23-hour stay codes, in order to ensure the consistent and appropriate valuation of the physician work for these services.

For CY 2010, CPT codes 28725 and 28730 were identified as potentially misvalued through the site-of-service anomaly screen and were reviewed by the AMA RUC. For both of these services, based on reference services and specialty survey data, the AMA RUC recommended maintaining the current (CY 2009) work RVU, which we then increased slightly based on the redistribution of RVUs that resulted from the CY 2010 policy to no longer recognize the CPT consultation codes (74 FR 61775). The AMA RUC re-reviewed CPT codes 28725 and 28730 for CY 2012 and, contrary to the 23-hour stay policy we finalized in the CY 2011 PFS final rule with comment period (75 FR 73226 through 73227), recommended replacing the hospital inpatient post-operative visit in the

current work values with a subsequent observation care service, specifically CPT code 99224 (Level 1 subsequent observation care, per day) and recommended maintaining the current interim value of the two CPT codes. Specifically, for CY 2012 the AMA RUC recommended a work RVU of 12.18 for CPT code 28725 and a work RVU of 12.42 for CPT code 28730.

We disagree with the AMA RUC-recommended values for CPT codes 28725 and 28730. We believe the appropriate methodology for valuing these codes entails accounting for the removal of the inpatient visits in the work value for the site-of-service anomaly codes since these services are no longer typically furnished in the inpatient setting. We do not believe it is appropriate to simply exchange the inpatient post-operative visits in the original value with subsequent observation care visits and maintain the current work RVUs.

As the data suggests, these two site-of-service anomaly codes resemble 23-hour stay outpatient services, and since the AMA RUC's recommended value continues to include inpatient visits (or subsequent observation care codes) in the post-operative period, we applied the 23-hour stay policy described previously. Specifically, we removed the subsequent observation care service, reduced the one day of discharge management service to one-half day, and adjusted physician work RVUs and times accordingly. As a result, for CY 2012 we are proposing a work RVU of 11.22 for CPT code 28725, and a work RVU of 10.70 for CPT code 28730, with aforementioned refinements to time. A complete list of CMS time refinements can be found in Table 9.

(B) Submandibular Gland Excision

CPT Code	Short descriptor	AMA RUC Rec-ommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
42440	Excise submaxillary gland	7.13	Disagree	6.14

For CY 2009, CPT code 42440 (Excision of submandibular (submaxillary) gland) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended maintaining the current (CY 2008) work RVU of 7.05 for this service and removing the inpatient subsequent hospital care visit blocks to reflect the current outpatient place of service. In CY 2010, while CMS adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 42440 used under the PFS was increased to 7.13 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC resubmitted its previous recommendation and again recommended that the current work RVU of 7.13 for CPT code 42440 be maintained.

We disagree with the AMA RUC-recommended work RVU of 7.13 for CPT code 42440 and believe a work RVU of 6.14 is more appropriate for this service. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. To appropriately revalue this CPT code to reflect an outpatient service we started with the original CY 2008 work RVU of 7.05 then, in accordance with the policy discussed in section II.B. of this proposed notice, we removed the value of the subsequent hospital care service and one-half discharge day management service, and added back the subsequent hospital care intra-service time to the immediate post-operative care service. As a result, we are proposing an alternative work RVU of 6.14 with refinements to the time for CPT code 42440 for CY 2012. A complete list of CMS time refinements can be found in Table 9.

(C) Urological Procedures

CPT Code	Short descriptor	AMA RUC Rec-ommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
53445	Insert uro/ves nck sphincter	15.39	Disagree	13.00
54410	Remove/replace penis prosth	15.18	Agree	15.18
54530	Removal of testis	8.46	Agree	8.46

For CY 2009, CPT code 53445 (Insertion of inflatable urethral/bladder neck sphincter, including placement of pump, reservoir, and cuff) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. The AMA RUC recommended that CPT code 53445 should be removed from the site-of-service anomaly screen and that the current work RVU of 15.21 should be maintained because, although the Medicare claims data indicated that this service is predominately furnished in the outpatient setting, survey respondents indicated this service is typically furnished in the facility setting. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 53445 used under the PFS was increased to 15.39 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation. Despite Medicare claims data showing that this service is typically furnished in the outpatient setting, the AMA RUC believes it is appropriate for CPT code 53445 to have inpatient visits because the specialty society that most commonly furnishes these procedures asserts that the typical patient spends at least one night in the hospital. The AMA RUC has requested that the specialty society conduct an additional survey to address more specifically whether an overnight stay is

typical for CPT code 53445 and 54410. The AMA RUC recommended that the current work RVU of 15.39 for CPT code 53445 be maintained.

We disagree with the AMA RUC-recommended work RVU of 15.39 for CPT code 53445 and believe a work RVU of 13.00 is more appropriate for this service. As stated previously in our discussion of 23-hour stay codes, as well as in the CY 2010 PFS final rule with comment period (74 FR 61777), even though a service may typically have a lengthy hospital outpatient recovery period, it should not reflect work that is typically associated with an inpatient service. Upon clinical review of this service and the time and visits associated with it, we believe that the survey 25th percentile work RVU of 13.00 appropriately accounts for the work required to furnish this service. Therefore, we are proposing a work RVU of 13.00 for CPT code 53445 for CY 2012.

(D) Epidural Lysis

CPT Code	Short descriptor	AMA RUC Recommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
62263	Epidural lysis mult sessions	6.54	Disagree	5.00

For CY 2009, CPT code 62263 (Percutaneous lysis of epidural adhesions using solution injection (eg, hypertonic saline, enzyme) or mechanical means (eg, catheter) including radiologic localization (includes contrast when administered), multiple adhesiolysis sessions; 2 or more days,) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended maintaining the current (CY 2008) work RVU of 6.41 for this service and removing the inpatient subsequent hospital care visits to reflect the current outpatient place of service. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 62263 used under the PFS was increased to 6.54 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and recommended that the current work RVU of 6.54 for CPT code 62263 be maintained.

We disagree with the AMA RUC-recommended work RVU of 6.45 for CPT code 62263. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. Upon clinical review, we believe that the survey median work RVU of 5.00 appropriately accounts for the removal of the inpatient visits as well as the increase in intra-service time and post-operative office visits in this service. Therefore, we are proposing a work RVU of 5.00 for CPT code 62263 for CY 2012.

(E) Intrathecal Epidural Catheters and Pumps

CPT Code	Short descriptor	AMA RUC Recommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
62350	Implant spinal canal cath	6.05	Agree	6.05
62355	Remove spinal canal catheter	4.35	Disagree	3.55
62360	Insert spine infusion device	4.33	Agree	4.33
62361	Implant spine infusion pump	5.65	Disagree	5.00
62362	Implant spine infusion pump	6.10	Disagree	5.60
62365	Remove spine infusion device	4.65	Disagree	3.93

For CY 2009, CPT code 62355 (Removal of previously implanted intrathecal or epidural catheter) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended a work RVU of 4.30, approximately midway between the survey median and 75th percentile. The AMA RUC recommended removing the inpatient building blocks to reflect the outpatient site-of-service, removing all but 1 of the post-procedure office visits to reflect the shift in global period from 90 days to 10 days, and reducing the physician time associated with this service. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 62355 used under the PFS was increased to 4.35 based on the redistribution of RVUs that resulted from the CMS policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 4.35 for CPT code 62355 be maintained.

We disagree with the AMA RUC-recommended work RVU of 4.35 for CPT code 62355. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. We do not believe that the reduction from the CY 2008 work RVU of 6.60 to the CY 2009 work RVU of 4.30 adequately accounts for the removal of 3 subsequent hospital care visits and half a discharge management day, which together represent a work RVU of 5.40. Also, the time required to furnish this service dropped significantly, even after considering the global period change. Upon clinical review, we believe that the survey median work RVU of 3.55 appropriately accounts for the removal of the inpatient visits and decreased

time for this service. Therefore, we are proposing a work RVU of 3.55 for CPT code 62355 for CY 2012.

For CY 2009, CPT code 62361 (Implantation or replacement of device for intrathecal or epidural drug infusion; nonprogrammable pump) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended a work RVU of 5.60, approximately midway between the survey median and 75th percentile. The AMA RUC recommended removing the inpatient visits to reflect the outpatient site-of-service, removing all but 1 of the post-procedure office visits to reflect the shift in global period from 90 days to 10 days, and reducing the physician time associated with this service. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 62361 used under the PFS was increased to 5.65 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 5.65 for CPT code 62361 be maintained.

We disagree with the AMA RUC-recommended work RVU of 5.65 for CPT code 62361. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. We do not believe that the reduction from the CY 2008 work RVU of 6.59 to the CY 2009 work RVU of 5.60 adequately accounts for the removal of 3 subsequent hospital care visits and half a discharge management day, which together represent a work RVU of 5.40. Also, the time required to furnish this service dropped significantly, even after considering the global period change. Upon clinical review, we believe that the survey 25th percentile work RVU of 5.00 appropriately accounts for the removal of the inpatient visits and decreased time for this service. Therefore, we are proposing a work RVU of 5.00 for CPT code 62361 for CY 2012.

For CY 2009, CPT code 62362 (Implantation or replacement of device for intrathecal or epidural drug infusion; programmable pump, including preparation of pump, with or without programming) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended a work RVU of 6.05, approximately midway between the survey median and 75th percentile. The AMA RUC recommended removing the inpatient visits to reflect the outpatient site-of-service, removing all but 1 of the post-procedure office visits to reflect the shift in global period from 90 days to 10 days, and reducing the physician time associated with this service. In CY 2010, while CMS adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 62362 used under the PFS was increased to 6.10 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 6.10 for CPT code 62362 be maintained.

We disagree with the AMA RUC-recommended work RVU of 6.10 for CPT code 62362. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. We do not believe that the reduction from the CY 2008 work RVU of 8.58 to the CY 2009 work RVU of 6.05 adequately accounts for the removal of 3 subsequent hospital care visits and half a discharge management day, which together represent a work RVU of 5.40. Also, the time required to furnish this service dropped significantly, even after considering the global period change. Upon clinical review, we believe that the survey median work RVU of 5.60 appropriately accounts for the removal of the inpatient visits and decreased time for this service. Therefore, we are proposing a work RVU of 5.60 for CPT code 62362 for CY 2012.

For CY 2009, CPT code 62365 (Removal of subcutaneous reservoir or pump, previously implanted for intrathecal or epidural infusion) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended a work RVU of 4.60, the survey median. The AMA RUC recommended removing the inpatient visits to reflect the outpatient site-of-service, removing all but 1 of the post-procedure office visits to reflect the shift in global period from 90 days to 10 days, and reducing the physician time associated with this service. In CY 2010, while CMS adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 62365 used under the PFS was increased to 4.65 based on the redistribution of RVUs that resulted from our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 4.65 for CPT code 62365 be maintained.

We disagree with the AMA RUC-recommended work RVU of 4.65 for CPT code 62365. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. We do not believe that the reduction from the CY 2008 work RVU of 6.57 to the CY 2009 work RVU of 4.60 adequately accounts for the removal of 3 subsequent hospital care visits and half a discharge management day, which together represent a work RVU of 5.40. Also, the time required to furnish this service dropped significantly, even after considering the global period change. We believe that this service is similar to that of CPT code 33241 (Subcutaneous removal of single or dual chamber pacing cardioverter-defibrillator pulse generator) which has a work RVU of 3.29 but does not include a half day of discharge management service. Upon clinical review, we believe that a work RVU of 3.93, that is a work RVU of 3.29 plus a work RVU of 0.64 to account for the half day of discharge management service, appropriately accounts for the removal of the inpatient visits and decreased time for this service. Therefore, we are proposing a work RVU of 3.93 for CPT code 62365 for CY 2012.

(F) Neurostimulators

CPT Code	Short descriptor	AMA RUC Rec-ommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
63650	Implant neuroelectrodes	7.20	Disagree	7.15
63685	Insrt/redo spine n generator	6.05	Disagree	5.19

For CY 2009, CPT code 63650 (Percutaneous implantation of neurostimulator electrode array, epidural) or mechanical means (such as, catheter) including radiologic localization (includes contrast when administered), multiple adhesiolysis sessions; 2 or more days, was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended the survey median work RVU of 7.15, and removing the inpatient subsequent hospital care visits to reflect the current outpatient place of service. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 63650 used under the PFS was increased to 7.20 based on the redistribution of RVUs that resulted from the our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 7.20 for CPT code 63650 be maintained.

We disagree with the AMA RUC-recommended work RVU of 7.20 for CPT code 63650. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. Upon clinical review, we believe that the survey median work RVU of 7.15 appropriately accounts for the removal of the inpatient visits, as well as the physician time and post-operative office visit changes. Therefore, we are proposing a work RVU of 7.15 for CPT code 63650 for CY 2012.

For CY 2009, CPT code 63685 (Insertion or replacement of spinal neurostimulator pulse generator or receiver, direct or inductive coupling) was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on reference services and specialty survey data, the AMA RUC recommended the survey median work RVU of 6.00, and removing the inpatient subsequent hospital care visits to reflect the current outpatient place of service. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 63685 used under the PFS was increased to 7.05 based on the redistribution of RVUs that resulted from the our policy to no longer recognize the CPT consultation codes (74 FR 61775). Upon re-review for CY 2012, the AMA RUC reaffirmed its previous recommendation and ultimately recommended that the current work RVU of 6.05 for CPT code 63685 be maintained.

We disagree with the AMA RUC-recommended work RVU of 6.05 for CPT code 63685. As stated previously, we believe the appropriate methodology for valuing site-of-service anomaly codes entails not just removing the inpatient visits, but also accounting for the removal of the inpatient visits in the work value of the CPT code. Upon clinical review, we believe that the survey 25th percentile work RVU of 5.19 appropriately accounts for the removal of the inpatient visits, as well as the physician time and post-operative office visit changes. Therefore, we are proposing a work RVU of 5.19 for CPT code 63685 for CY 2012.

(G) Repair of Eye Wound

CPT Code	Short descriptor	AMA RUC Rec′ommended work RVU	CMS Work RVU decision	CMS Proposed work RVU
65285	Repair of eye wound	16.00	Disagree	15.36

Data suggest that CPT code 65285 (Repair of laceration; cornea and/or sclera, perforating, with reposition or resection of uveal tissue) is a ''23-hour stay'' outpatient service. For these 23-hour stay services, the typical patient is commonly at the hospital for less than 24 hours, but often stays overnight at the hospital. As we discussed previously and in the Five-Year Review of Work (76 FR 32410), we believe that the values of the codes that fall into the 23-hour stay category should not reflect work that is typically associated with an inpatient service.

For CY 2009, CPT code 65285 was identified as potentially misvalued through the site-of-service anomaly screen and was reviewed by the AMA RUC. Based on specialty survey data indicating that this service typically requires an overnight stay, the AMA RUC recommended removing the CPT code from the site-of-service anomaly list and maintaining the current (CY 2008) work RVU of 14.43, as well as current physician times and visits. In CY 2010, while we adopted the AMA RUC-recommended work value on an interim final basis and referred the service back to the AMA RUC to be reexamined, the work RVU for CPT code 65285 used under the PFS was increased to 14.71 based on the redistribution of RVUs that resulted from the our policy to no longer recognize the CPT consultation codes (74 FR 61775).

The AMA RUC re-reviewed CPT code 65285 for CY 2012 and recommended removing the half day of subsequent hospital care service, but contrary to the 23-hour stay policy we finalized in the CY 2011 PFS final rule with comment period (75 FR 73226 through 73227), recommended maintaining the one full day of discharge management service. The AMA RUC also recommended an increase in intra-service time and post-procedure office visits. Ultimately, the AMA RUC recommended a work RVU of 16.00 for CPT code 65285 for CY 2012.

We disagree with the AMA RUC recommended value for CPT code 65285. As the most recently available Medicare claims data suggest these two site-of-service anomaly codes resemble 23-hour stay outpatient services, and since the AMA RUC's recommended value continues to include one full day of discharge management service, we applied the 23-hour stay policy described previously. That is, we reduced the one day of discharge management service to one-half day, and adjusted physician work RVUs and times accordingly. As a result, we are proposing an alternative work RVU of 15.36 with refinements to the time for CPT code 65285 for CY 2012.

A complete list of CMS time refinements can be found in Table 9.

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TABLE 9: PHYSICIAN TIME AND WORK VALUES FOR CY 2009 AND 2010 SITE-OF-SERVICE ANOMALY CODES ADDRESSED IN THIS CY 2012 PFS PROPOSED RULE

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
21025	Excision of bone, lower jaw	CY 2008	11.07	75	0	0	120	43	1	1	0	1	0	2	2	2
21025	Excision of bone, lower jaw	CY 2009	9.87	60	10	15	90	30	0	0	0	0	0	0	2	2
21025	Excision of bone, lower jaw	Current	10.03	60	10	15	90	30	0	0	0	0	0	0	2	2
21025	Excision of bone, lower jaw	RUC Rec	10.03	60	10	15	90	30	0	0	0	0	0	0	2	2
21025	**Excision of bone, lower jaw**	**CMS Rec**	**10.03**	**60**	**10**	**15**	**90**	**30**	**0**	**0**	**0**	**0**	**0**	**0**	**2**	**2**
23415	Release of shoulder ligament	CY 2008	10.09	24	0	25	62	23	0.5	0	0	1	0	0	3.5	0
23415	Release of shoulder ligament	CY 2009	9.07	40	15	15	60	20	0	0	0	0.5	0	0	2	2
23415	Release of shoulder ligament	Current	9.23	40	15	15	60	20	0	0	0	0.5	0	0	2	2
23415	Release of shoulder ligament	RUC Rec	9.23	40	15	15	60	20	0	0	0	0	0	0	0	0
23415	**Release of shoulder ligament**	**CMS Rec**	**9.23**	**40**	**15**	**15**	**60**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
25116	Remove wrist/forearm lesion	CY 2008	7.38	21	0	15	78	21	1.5	0	0	1	0	0	5	0
25116	Remove wrist/forearm lesion	CY 2009	7.38	40	10	15	60	20	0	0	0	0.5	0	0	1	3
25116	Remove wrist/forearm lesion	Current	7.56	40	10	15	60	20	0	0	0	0.5	0	0	1	3
25116	Remove wrist/forearm lesion	RUC Rec	7.56	40	10	15	60	20	0	0	0	0.5	0	0	1	3
25116	**Remove wrist/forearm lesion**	**CMS Rec**	**7.56**	**40**	**10**	**15**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**1**	**3**
28725	Fusion of foot bones	CY 2008	11.97	25	0	25	89	22	2.5	0	0	1	0	0	4	0
28725	Fusion of foot bones	CY 2009	11.97	25	0	25	89	22	2.5	0	0	1	0	0	4	0
28725	Fusion of foot bones	Current	12.18	45	10	15	90	20	1	0	0	1	0	0	2	3
28725	Fusion of foot bones	RUC Rec	12.18	33	10	15	90	20	0	0	0	1	1	0	2	3
28725	**Fusion of foot bones**	**CMS Rec**	**11.22**	**33**	**10**	**15**	**90**	**30**	**0**	**0**	**0**	**0.5**	**0**	**0**	**2**	**0**
28730	Fusion of foot bones	CY 2008	12.21	60	0	0	120	30	1	0	0	1	0	0	0	5
28730	Fusion of foot bones	CY 2009	12.21	60	0	0	120	30	1	0	0	1	0	0	0	5
28730	Fusion of foot bones	Current	12.42	45	10	15	100	20	1	0	0	1	0	0	2	3

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
28730	Fusion of foot bones	RUC Rec	12.42	33	10	15	100	20	0	0	0	1	1	0	2	3
28730	**Fusion of foot bones**	**CMS Rec**	**10.70**	**33**	**10**	**15**	**100**	**30**	**0**	**0**	**0**	**0.5**	**0**	**0**	**2**	**3**
42440	Excise submaxillary gland	CY 2008	7.05	22	0	25	71	19	0.5	0	0	1	0	0	1.5	0
42440	Excise submaxillary gland	CY 2009	7.05	30	10	15	60	20	0	0	0	0.5	0	0	1	1
42440	Excise submaxillary gland	Current	7.13	30	10	15	60	20	0	0	0	0.5	0	0	1	1
42440	Excise submaxillary gland	RUC Rec	7.13	30	10	15	60	20	0	0	0	0.5	0	0	1	1
42440	**Excise submaxillary gland**	**CMS Rec**	**6.14**	**30**	**10**	**15**	**60**	**25**	**0**	**0**	**0**	**0.5**	**0**	**0**	**1**	**1**
52341	Cysto w/ureter stricture tx	CY 2008	6.11	47.5	0	0	60	30	1	0	0	0	0	0	0	0
52341	Cysto w/ureter stricture tx	CY 2009	5.35	45	10	15	45	20	0	0	0	0	0	0	0	0
52341	Cysto w/ureter stricture tx	Current	5.35	45	10	15	45	20	0	0	0	0	0	0	0	0
52341	Cysto w/ureter stricture tx	RUC Rec	5.35	45	10	15	45	20	0	0	0	0	0	0	0	0
52341	**Cysto w/ureter stricture tx**	**CMS Rec**	**5.35**	**45**	**10**	**15**	**45**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
52342	Cysto w/up stricture tx	CY 2008	6.61	60	0	0	65	30	1	0	0	0	0	0	0	0
52342	Cysto w/up stricture tx	CY 2009	5.85	40	10	10	60	20	0	0	0	0	0	0	0	0
52342	Cysto w/up stricture tx	Current	5.85	40	10	10	60	20	0	0	0	0	0	0	0	0
52342	Cysto w/up stricture tx	RUC Rec	5.85	40	10	10	60	20	0	0	0	0	0	0	0	0
52342	**Cysto w/up stricture tx**	**CMS Rec**	**5.85**	**40**	**10**	**10**	**60**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
52343	Cysto w/renal stricture tx	CY 2008	7.31	60	0	0	90	30	1	0	0	0	0	0	0	0
52343	Cysto w/renal stricture tx	CY 2009	6.55	45	10	10	60	25	0	0	0	0	0	0	0	0
52343	Cysto w/renal stricture tx	Current	6.55	45	10	10	60	25	0	0	0	0	0	0	0	0
52343	Cysto w/renal stricture tx	RUC Rec	6.55	45	10	10	60	25	0	0	0	0	0	0	0	0
52343	**Cysto w/renal stricture tx**	**CMS Rec**	**6.55**	**45**	**10**	**10**	**60**	**25**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
52344	Cysto/uretero, stricture tx	CY 2008	7.81	60	0	0	77.5	30	1	0	0	0	0	0	0	0
52344	Cysto/uretero, stricture tx	CY 2009	7.05	40	10	10	45	20	0	0	0	0	0	0	0	0
52344	Cysto/uretero, stricture tx	Current	7.05	40	10	10	45	20	0	0	0	0	0	0	0	0
52344	Cysto/uretero, stricture tx	RUC Rec	7.05	40	10	10	45	20	0	0	0	0	0	0	0	0
52344	**Cysto/uretero, stricture tx**	**CMS Rec**	**7.05**	**40**	**10**	**10**	**45**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
52345	Cysto/uretero w/up stricture	CY 2008	8.31	50	0	0	90	30	1	0	0	0	0	0	0	0
52345	Cysto/uretero w/up stricture	CY 2009	7.55	45	10	15	45	20	0	0	0	0	0	0	0	0
52345	Cysto/uretero w/up stricture	Current	7.55	45	10	15	45	20	0	0	0	0	0	0	0	0
52345	Cysto/uretero w/up stricture	RUC Rec	7.55	45	10	15	45	20	0	0	0	0	0	0	0	0
52345	**Cysto/uretero w/up stricture**	**CMS Rec**	**7.55**	**45**	**10**	**15**	**45**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
52346	Cystouretero w/renal strict	CY 2008	9.34	45	0	0	120	30	1	0	0	0	0	0	0	0
52346	Cystouretero w/renal strict	CY 2009	8.58	40	10	10	60	20	0	0	0	0	0	0	0	0
52346	Cystouretero w/renal strict	Current	8.58	40	10	10	60	20	0	0	0	0	0	0	0	0
52346	Cystouretero w/renal strict	RUC Rec	8.58	40	10	10	60	20	0	0	0	0	0	0	0	0
52346	**Cystouretero w/renal strict**	**CMS Rec**	**8.58**	**40**	**10**	**10**	**60**	**20**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**
52400	Cystouretero w/congen repr	CY 2008	10.06	90	0	0	60	30	1	0	0	1	0	0	0	1
52400	Cystouretero w/congen repr	CY 2009	8.66	72.5	10	15	40	25	0	0	0	0.5	0	0	1	0
52400	Cystouretero w/congen repr	Current	8.69	72.5	10	15	40	25	0	0	0	0.5	0	0	1	0
52400	Cystouretero w/congen repr	RUC Rec	8.69	72.5	10	15	40	25	0	0	0	0.5	0	0	1	0
52400	**Cystouretero w/congen repr**	**CMS Rec**	**8.69**	**72.5**	**10**	**15**	**40**	**25**	**0**	**0**	**0**	**0.5**	**0**	**0**	**1**	**0**
52500	Revision of bladder neck	CY 2008	9.39	40	0	0	45	35	1	0	0	1	0	0	0	3
52500	Revision of bladder neck	CY 2009	7.99	45	10	15	45	27.5	0	0	0	0.5	0	0	0	3
52500	Revision of bladder neck	Current	8.14	45	10	15	45	27.5	0	0	0	0.5	0	0	0	3
52500	Revision of bladder neck	RUC Rec	8.14	45	10	15	45	27.5	0	0	0	0.5	0	0	0	3
52500	**Revision of bladder neck**	**CMS Rec**	**8.14**	**45**	**10**	**15**	**45**	**27.5**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**3**
53445	Insert uro/ves nck sphincter	CY 2008	15.21	50	0	25	126	24	3	0	0	1	0	0	0	3
53445	Insert uro/ves nck sphincter	CY 2009	15.21	50	15	20	90	25	0	1	1	1	0	0	1	3
53445	Insert uro/ves nck sphincter	Current	15.39	50	15	20	90	25	0	1	1	1	0	0	1	3
53445	Insert uro/ves nck sphincter	RUC Rec	15.39	50	15	20	90	25	0	0	0	1	1	0	1	3
53445	**Insert uro/ves nck sphincter**	**CMS Rec**	**13.00**	**50**	**15**	**20**	**90**	**25**	**0**	**0**	**0**	**1**	**1**	**0**	**1**	**3**
54410	Remove/replace penis prosth	CY 2008	16.48	50	0	0	145	30	1	0	0	1	0	0	0	2
54410	Remove/replace penis prosth	CY 2009	15.00	40	10	15	120	30	0	0	0	1	0	0	1	3

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
54410	Remove/replace penis prosth	Current	15.18	40	10	15	120	30	0	0	0	1	0	0	1	3
54410	Remove/replace penis prosth	RUC Rec	15.18	40	10	15	120	30	0	0	0	1	1	0	1	3
54410	**Remove/replace penis prosth**	**CMS Rec**	**15.18**	**40**	**10**	**15**	**120**	**30**	**0**	**0**	**0**	**1**	**0**	**0**	**1**	**3**
54530	Removal of testis	CY 2008	9.31	33	0	25	58	17	0.5	0	0	1	0	0	0	2.5
54530	Removal of testis	CY 2009	8.35	57.5	10	15	60	30	0	0	0	0.5	0	0	2	1
54530	Removal of testis	Current	8.46	57.5	10	15	60	30	0	0	0	0.5	0	0	2	1
54530	Removal of testis	RUC Rec	8.46	57.5	10	15	60	30	0	0	0	0.5	0	0	2	1
54530	**Removal of testis**	**CMS Rec**	**8.46**	**57.5**	**10**	**15**	**60**	**30**	**0**	**0**	**0**	**0.5**	**0**	**0**	**2**	**1**
62263	Epidural lysis mult sessions	CY 2008	6.41	40	0	0	30	20	2	0	0	1	0	0	2	0
62263	Epidural lysis mult sessions	CY 2009	6.41	33	10	5	45	20	0	0	0	0.5	0	0	1	2
62263	Epidural lysis mult sessions	Current	6.54	33	10	5	45	20	0	0	0	0.5	0	0	1	2
62263	Epidural lysis mult sessions	RUC Rec	6.54	33	10	5	45	20	0	0	0	0.5	0	0	1	2
62263	**Epidural lysis mult sessions**	**CMS Rec**	**5.00**	**33**	**10**	**5**	**45**	**40**	**0**	**0**	**0**	**0.5**	**0**	**0**	**1**	**2**
62350	Implant spinal canal cath	CY 2008	8.04	70	0	0	60	125	1	0	2	1	0	0	4	0
62350	Implant spinal canal cath	CY 2009	6.00	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62350	Implant spinal canal cath	Current	6.05	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62350	Implant spinal canal cath	RUC Rec	6.05	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62350	**Implant spinal canal cath**	**CMS Rec**	**6.05**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
62355	Remove spinal canal catheter	CY 2008	6.60	60	0	0	40	130	1	0	2	1	0	0	3	0
62355	Remove spinal canal catheter	CY 2009	4.30	33	10	5	30	20	0	0	0	0.5	0	0	0	1
62355	Remove spinal canal catheter	Current	4.35	33	10	5	30	20	0	0	0	0.5	0	0	0	1
62355	Remove spinal canal catheter	RUC Rec	4.35	33	10	5	30	20	0	0	0	0.5	0	0	0	1
62355	**Remove spinal canal catheter**	**CMS Rec**	**3.55**	**33**	**10**	**5**	**30**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
62360	Insert spine infusion device	CY 2008	3.68	60	0	0	55	123	0	0	2	1	0	0	4	0
62360	Insert spine infusion device	CY 2009	4.28	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62360	Insert spine infusion device	Current	4.33	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62360	Insert spine infusion device	RUC Rec	4.33	33	10	5	60	20	0	0	0	0.5	0	0	0	1

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
62360	**Insert spine infusion device**	**CMS Rec**	**4.33**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
62361	Implant spine infusion pump	CY 2008	6.59	60	0	0	60	130	1	0	2	1	0	0	4	0
62361	Implant spine infusion pump	CY 2009	5.60	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62361	Implant spine infusion pump	Current	5.65	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62361	Implant spine infusion pump	RUC Rec	5.65	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62361	**Implant spine infusion pump**	**CMS Rec**	**5.00**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
62362	Implant spine infusion pump	CY 2008	8.58	75	0	0	90	150	0	0	3	1	0	0	4	0
62362	Implant spine infusion pump	CY 2009	6.05	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62362	Implant spine infusion pump	Current	6.10	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62362	Implant spine infusion pump	RUC Rec	6.10	33	10	5	60	20	0	0	0	0.5	0	0	0	1
62362	**Implant spine infusion pump**	**CMS Rec**	**5.60**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
62365	Remove spine infusion device	CY 2008	6.57	60	0	0	45	125	1	0	2	1	0	0	3	0
62365	Remove spine infusion device	CY 2009	4.60	33	10	5	45	20	0	0	0	0.5	0	0	0	1
62365	Remove spine infusion device	Current	4.65	33	10	5	45	20	0	0	0	0.5	0	0	0	1
62365	Remove spine infusion device	RUC Rec	4.65	33	10	5	45	20	0	0	0	0.5	0	0	0	1
62365	**Remove spine infusion device**	**CMS Rec**	**3.93**	**33**	**10**	**5**	**45**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
63650	Implant neuroelectrodes	CY 2008	7.57	26	5	25	74	19	2.5	0	0	1	0	0	0	2
63650	Implant neuroelectrodes	CY 2009	7.15	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63650	Implant neuroelectrodes	Current	7.20	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63650	Implant neuroelectrodes	RUC Rec	7.20	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63650	**Implant neuroelectrodes**	**CMS Rec**	**7.15**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
63685	Insrt/redo spine n generator	CY 2008	7.87	28	0	25	62	18	2.5	0	0	1	0	0	0	2
63685	Insrt/redo spine n generator	CY 2009	6.00	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63685	Insrt/redo spine n generator	Current	6.05	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63685	Insrt/redo spine n generator	RUC Rec	6.05	33	10	5	60	20	0	0	0	0.5	0	0	0	1
63685	**Insrt/redo spine n generator**	**CMS Rec**	**5.19**	**33**	**10**	**5**	**60**	**20**	**0**	**0**	**0**	**0.5**	**0**	**0**	**0**	**1**
64708	Revise arm/leg nerve	CY 2008	6.22	21	0	25	76	18	0.5	0	0	1	0	0	2.5	0

HCPCS Code	Short Descriptor	Source	Work RVU	Pre-Service Evaluation Minutes	Pre-Service Positioning Minutes	Pre-Service Dress, Scrub, Wait Minutes	Intra-Service Minutes	Same Day Post-Service Minutes	Subsequent Hospital Care- 99231	Subsequent Hospital Care- 99232	Subsequent Hospital Care- 99233	Hospital Discharge Day-99238	Subsequent Observation Care- 99224	Office/Outpatient Visit, Est- 99211	Office/Outpatient Visit, Est- 99212	Office/Outpatient Visit, Est- 99213
64708	Revise arm/leg nerve	CY 2009	6.22	35	10	10	60	15	0	0	0	0.5	0	0	3	1
64708	Revise arm/leg nerve	Current	6.36	35	10	10	60	15	0	0	0	0.5	0	0	3	1
64708	Revise arm/leg nerve	RUC Rec	6.36	35	10	10	60	15	0	0	0	0.5	0	0	3	1
64708	**Revise arm/leg nerve**	**CMS Rec**	**6.36**	**35**	**10**	**10**	**60**	**15**	**0**	**0**	**0**	**0.5**	**0**	**0**	**3**	**1**
64831	Repair of digit nerve	CY 2008	10.23	25	0	25	74	21	1	0	0	1	0	0	0	2.5
64831	Repair of digit nerve	CY 2009	9.00	40	10	15	60	15	0	0	0	0.5	0	0	2	2
64831	Repair of digit nerve	Current	9.16	40	10	15	60	15	0	0	0	0.5	0	0	2	2
64831	Repair of digit nerve	RUC Rec	9.16	40	10	15	60	15	0	0	0	0.5	0	0	2	2
64831	**Repair of digit nerve**	**CMS Rec**	**9.16**	**40**	**10**	**15**	**60**	**15**	**0**	**0**	**0**	**0.5**	**0**	**0**	**2**	**2**
65285	Repair of eye wound	CY 2008	14.43	37	0	15	79	32	0.5	0	0	1	0	0	0	5.5
65285	Repair of eye wound	CY 2009	14.43	37	0	15	79	32	0.5	0	0	1	0	0	0	5.5
65285	Repair of eye wound	Current	14.71	37	0	15	79	32	0.5	0	0	1	0	0	0	5.5
65285	Repair of eye wound	RUC Rec	16.00	30	10	20	90	30	0	0	0	1	0	0	1	6
65285	**Repair of eye wound**	**CMS Rec**	**15.36**	**30**	**10**	**20**	**90**	**30**	**0**	**0**	**0**	**0.5**	**0**	**0**	**1**	**6**

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b. Payment for Bone Density Tests

Section 1848(b)(6) of the Act (as amended by section 3111(a) of the Affordable Care Act) changed the payment calculation for dual-energy x-ray absorptiometry (DXA) services described by two specified DXA CPT codes for CYs 2010 and 2011. This provision required payment for these services at 70 percent of the product of the CY 2006 RVUs for these DXA codes, the CY 2006 CF, and the geographic adjustment for the relevant payment year.

Effective January 1, 2007, the CPT codes for DXA services were revised. The former DXA CPT codes 76075 (Dual energy X-ray absorptiometry (DXA), bone density study, one or more sites;

axial skeleton (eg, hips, pelvis, spine)); 76076 (Dual energy X-ray absorptiometry (DXA), bone density study, one or more sites; appendicular skeleton (peripheral) (for example, radius, wrist, heel)); and 76077 (Dual energy X-ray absorptiometry (DXA), bone density study, one or more sites; vertebral fracture assessment) were deleted and replaced with new CPT codes 77080, 77081, and 77082 that have the same respective code descriptors as the predecessor codes. Section 1848(b) of the Act, as amended, specifies that the revised payment applies to two of the predecessor codes (CPT codes 76075 and 76077) and ''any succeeding codes,'' which are, in this case, CPT codes 77080 and 77082.

As mentioned previously, section 1848(b) of the Act revised the payment for CPT codes 77080 and 77082 during CY 2010 and CY 2011. We provided for payment in CYs 2010 and 2011 under the PFS for CPT codes 77080 and 77082 at the specified rates (70 percent of the product of the CY 2006 RVUs for these DXA codes, the CY 2006 conversion factor (CF), and the geographic adjustment for the relevant payment year). Because the statute specifies a payment calculation for these services for CYs 2010 and 2011 as described previously, for those years we implemented the payment provision by imputing RVUs for these services that would provide the specified payment amount for these services when multiplied by the current year's conversion factor.

For CY 2012, the payment rate for CPT codes 77080 and 77082 will be based upon resource-based, rather than imputed, RVUs, and the current year's conversion factor. The CY 2012 work, PE, and malpractice RVUs for these codes are shown in Table 10, as well as in Addendum B of this proposed rule.

TABLE 10—CY 2012 RVUS FOR DXA CPT CODES 77080 AND 77082

CPT Code	Modifier	Physician work RVU	Fully implemented non-facility PE RVU	Transitional non-facility PE RVU	Fully implemented facility PE RVU	Transitional facility PE RVU	Malpractice RVU
77080		0.20	1.26	1.44	NA	NA	0.02
77080	TC	0.00	1.18	1.36	NA	NA	0.01
77080	26	0.20	0.08	0.08	0.08	0.08	0.01
77082		0.17	0.63	0.65	NA	NA	0.02
77082	TC	0.00	0.56	0.58	NA	NA	0.01
77082	26	0.17	0.07	0.07	0.07	0.07	0.01

In addition to temporarily changing the payment rate for the two DXA CPT codes, section 3111(b) of the Affordable Care Act also authorizes the Secretary to enter into agreement with the Institute of Medicine of the National Academies to conduct a study on the ramifications of Medicare payment reductions for dual-energy x-ray absorptiometry (as described in section 1848(b)(6) of the Act) during years 2007, 2008, and 2009 on beneficiary access to bone mass density tests. This study has not yet been conducted. In the absence of this study, we request that the AMA RUC review CPT codes 77080 and 77082 during CY 2012.

C. Expanding the Multiple Procedure Payment Reduction (MPPR) Policy

1. Background

Medicare has a longstanding policy to reduce payment by 50 percent for the second and subsequent surgical procedures furnished to the same patient by the same physician on the same day, largely based on the presence of efficiencies in the practice expense (PE) and pre- and post-surgical physician work. Effective January 1, 1995, the MPPR policy, with the same percentage reduction, was extended to nuclear medicine diagnostic procedures (CPT codes 78306, 78320, 78802, 78803, 78806, and 78807). In the CY 1995 PFS final rule with comment period (59 FR 63410), we indicated that we would consider applying the policy to other diagnostic tests in the future.

Consistent with recommendations of MedPAC in its March 2005 Report to the Congress on Medicare Payment Policy, under the CY 2006 PFS, the MPPR policy was extended to the technical component (TC) of certain diagnostic imaging procedures performed on contiguous areas of the body in a single session (70 FR 70261). The reduction recognizes that, for the second and subsequent imaging procedures, there are some efficiencies in clinical labor, supplies, and equipment time. In particular, certain clinical labor activities and supplies are not duplicated for subsequent procedures and, because equipment time and indirect costs are allocated based on clinical labor time, those would also be reduced accordingly.

The imaging MPPR policy originally applied to computed tomography (CT) and computed tomographic angiography (CTA), magnetic resonance imaging (MRI) and magnetic resonance angiography (MRA), and ultrasound services within 11 families of codes based on imaging modality and body region. When we adopted the policy in CY 2007, we stated that we believed efficiencies were most likely to occur when imaging procedures are performed on contiguous body areas because the patient and equipment have already been prepared for the second and subsequent procedures, potentially yielding resource savings in areas such as clerical time, technical preparation, and supplies (70 FR 45850). The MPPR policy originally applied only to procedures furnished in a single session involving contiguous body areas within a family of codes, not across families. Additionally, while the MPPR policy applies to TC-only services and to the TC of global services, it does not apply to professional component (PC) services.

Under the current imaging MPPR policy, full payment is made for the TC of the highest paid procedure, and payment is reduced by 50 percent of the TC for each additional procedure when an MPPR scenario applies. We originally planned to phase in the imaging MPPR policy over a 2-year period, with a 25 percent reduction in CY 2006 and a 50 percent reduction in CY 2007 (70 FR 70263). However, the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171) amended the statute to place a cap on the PFS payment amount for most imaging procedures at the amount paid under the hospital outpatient prospective payment system (OPPS). In view of the new OPPS payment cap added by the DRA, we decided in the PFS final rule with comment period for 2006 that it would be prudent to retain the imaging MPPR at 25 percent while we continued to examine the appropriate payment levels (71 FR 69659). The DRA also exempted reduced expenditures attributable to the imaging MPPR policy from the PFS

budget neutrality provision. Effective July 1, 2010, section 3135(b) of the Affordable Care Act amended the statute to increase the MPPR on the TC of imaging services under the policy established in the CY 2006 PFS final rule with comment period from 25 to 50 percent, and exempted the reduced expenditures attributable to this further change from the PFS budget neutrality provision.

In the July 2009 GAO report entitled, ''Medicare Physician Payments: Fees Could Better Reflect Efficiencies Achieved when Services are Provided Together,'' the GAO recommended that we take further steps to ensure that fees for services paid under the PFS reflect efficiencies that occur when services are furnished by the same physician to the same beneficiary on the same day. The GAO recommended the following: (1) Expanding the existing imaging MPPR policy for certain services to the PC to reflect efficiencies in physician work for certain imaging services; and (2) expanding the MPPR to reflect PE efficiencies that occur when certain nonsurgical, nonimaging services are furnished together. The GAO report also encouraged us to focus on service pairs that have the most impact on Medicare spending.

In its March 2010 report, MedPAC noted its concerns about mispricing of services under the PFS. MedPAC indicated that it would explore whether expanding the unit of payment through packaging or bundling would improve payment accuracy and encourage more efficient use of services.

In the CYs 2009 and 2010 PFS proposed rules (73 FR 38586 and 74 FR 33554, respectively), we stated that we planned to analyze nonsurgical services commonly furnished together (for example, 60 to 75 percent of the time) to assess whether an expansion of the MPPR policy could be warranted. MedPAC encouraged us to consider duplicative physician work, as well as PE, in any expansion of the MPPR policy.

Section 1848(c)(2)(K) of the Act (as added by section 3134(a) of the Affordable Care Act) specifies that the Secretary shall identify potentially misvalued codes by examining multiple codes that are frequently billed in conjunction with furnishing a single service, and review and make appropriate adjustments to their relative values. As a first step in applying this provision, in the CY 2010 final rule with comment period, we implemented a limited expansion of the imaging MPPR policy to additional combinations of imaging services.

Effective January 1, 2011 the imaging MPPR applies regardless of code family; that is, the policy applies to multiple imaging services furnished within the same family of codes or across families. This policy is consistent with the standard PFS MPPR policy for surgical procedures that does not group procedures by body region. The current imaging MPPR policy applies to CT and CTA, MRI and MRA, and ultrasound procedures services furnished to the same patient in the same session, regardless of the imaging modality, and is not limited to contiguous body areas.

We note that section 1848(c)(2)(B)(v)(VI) of the Act (as added by section 3135(b) of the Affordable Care Act) specifies that reduced expenditures attributable to the increase in the imaging MPPR from 25 to 50 percent (effective for fee schedules established beginning with 2010 and for services furnished on or after July 1, 2010) are excluded from the PFS budget neutrality adjustment. That is, the reduced payments for code combinations within a family of codes (contiguous body areas) are excluded from budget neutrality. However, this exclusion only applies to reduced expenditures attributable to the increase in the MPPR percentage from 25 to 50 percent, and not to reduced expenditures attributable to our policy change regarding additional code combinations across code families (non-contiguous body areas) that are subject to budget neutrality under the PFS.

The complete list of codes subject to the CY 2011 MPPR policy for diagnostic imaging services is included in Addendum F.

As a further step in applying the provisions of section 3134(a) of the Affordable Care Act, effective January 1, 2011, we implemented an MPPR for therapy services. The MPPR applies to separately payable ''always therapy'' services, that is, services that are only paid by Medicare when furnished under a therapy plan of care. Contractor-priced codes, bundled codes, and add-on codes are excluded because an MPPR would not be applicable for ''always therapy'' services furnished in combination with these codes. The complete list of codes subject to the MPPR policy for therapy services is included in Addendum H.

In the CY 2011 proposed rule (75 FR 44075), we proposed to apply a 50 percent payment reduction to the PE component of the second and subsequent therapy services for multiple ''always therapy'' services furnished to a single patient in a single day. However, in response to public comments, in the CY 2011 PFS final rule with comment period (75 FR 73232), we adopted a 25 percent payment reduction to the PE component of the second and subsequent therapy services for multiple ''always therapy'' services furnished to a single patient in a single day.

Subsequent to publication of the CY 2011 PFS final rule with comment period, section 3 of the Physician Payment and Therapy Relief Act of 2010 (Pub. L. 111–286) revised the payment reduction percentage from 25 percent to 20 percent for therapy services furnished in office settings. The payment reduction percentage remains at 25 percent for services furnished in institutional settings. Section 4 of the Physician Payment and Therapy Relief Act of 2010 exempted the reduced expenditures attributable to the therapy MPPR policy from the PFS budget neutrality provision. Under our current policy as amended by the Physician Payment and Therapy Relief Act, for institutional services, full payment is made for the service or unit with the highest PE and payment for the PE component for the second and subsequent procedures or additional units of the same service is reduced by 25 percent. For non-institutional services, full payment is made for the service or unit with the highest PE and payment for the PE component for the second and subsequent procedures or additional units of the same service is reduced by 20 percent.

The MPPR policy applies to multiple units of the same therapy service, as well as to multiple different services, when furnished to the same patient on the same day. It applies to services furnished by an individual or group practice or ''incident to'' a physician's service. The MPPR applies when multiple therapy services are billed on the same date of service for one patient by the same practitioner or facility under the same National Provider Identifier (NPI), regardless of whether the services are furnished in one therapy discipline or multiple disciplines, including, physical therapy, occupational therapy, or speech-language pathology.

The MPPR policy applies in all settings where outpatient therapy services are paid under Part B. This includes both services paid under the PFS that are furnished in the office setting, as well as to institutional services paid at the PFS rates that are furnished by outpatient hospitals, home health agencies, comprehensive outpatient rehabilitation facilities (CORFs), and other entities that are paid under Medicare Part B for outpatient therapy services.

2. CY 2012 Proposed Expansion of the MPPR Policy to the Professional Component of Advanced Imaging Services

Over the past 3 years, as part of the potentially misvalued service initiative, the AMA RUC has examined several services that are billed together at least 90 percent of the time as part of the potentially misvalued service initiative. In several cases, the AMA RUC recommended work values for new codes that describe the combined services, and those recommended values reflected the expected efficiencies. For example, for CY 2011, the AMA RUC valued the work for a series of new codes that describe CT of the abdomen and pelvis, specifically CPT codes:

- 74176 (Computed tomography, abdomen and pelvis; without contrast material).
- 74177 (Computed tomography, abdomen and pelvis; with contrast material).
- 74178 (Computed tomography, abdomen and pelvis; without contrast material in one or both body regions, followed by with contrast material(s) and further sections in one or both body regions).

We accepted the AMA RUC-recommended work values for these codes in the CY 2011 PFS final rule with comment period (75 FR 73229). The AMA RUC-recommended work values reflected an expected efficiency for the typical combined service that paralleled the reductions that would typically result from a MPPR adjustment. For example, in support of the recommended work value of 1.74 RVUs for 74176, the AMA RUC explained that the full value of 74150 (Computed tomography, abdomen; without contrast material) (Work RVU = 1.19) plus half the value of 72192 (Computed tomography, pelvis; without contrast material) (½ Work RVU = 0.55) equals 1.74 work RVUs. The AMA RUC stated that its recommended valuation was appropriate even though the combined current work RVUs for 74150 and 72192 would result in a total work RVU of 2.28. Furthermore, the AMA RUC validated its estimation of work efficiency for the combined service by comparing the code favorably with the work value associated with 74182 (Magnetic resonance, for example, proton imaging, abdomen; with contrast material(s)) (Work RVU = 1.73), which has a similar intra-service time, 20 minutes. Thus, we believe our current and proposed MPPR formulations are consistent with the AMA RUC's work to review code pairs for unaccounted-for efficiencies and to appropriately value comprehensive codes for a bundle of component services.

We continue to believe that there may be additional imaging and other diagnostic services for which there are efficiencies in work when furnished together, resulting in potentially excessive payment for these services under current policy.

As noted, Medicare has a longstanding policy to reduce payment by 50 percent for the second and subsequent surgical procedures and nuclear medicine diagnostic procedures furnished to the same patient by the same physician on the same day. In continuing to apply the provisions of section 3134(a) of the Affordable Care Act, for CY 2012 we are proposing to expand the MPPR to the PC of Advanced Imaging Services (CT, MRI, and Ultrasound), that is, the same list of codes to which the MPPR on the TC of advanced imaging already applies (see Addendum F). Thus, the MPPR would apply to the PC and the TC of the codes. Specifically, we propose to expand the 50 percent payment reduction currently applied to the TC to apply also to the PC of the second and subsequent advanced imaging services furnished in the same session. Full payment would be made for the PC and TC of the highest paid procedure, and payment would be reduced by 50 percent for the PC and TC for each additional procedure furnished to the same patient in the same session. This proposal is based on the expected efficiencies in furnishing multiple services in the same session due to duplication of physician work—primarily in the pre- and post-service periods, with smaller efficiencies in the intraservice period.

This proposal is consistent with the statutory requirement for the Secretary to identify, review, and adjust the relative values of potentially misvalued services under the PFS as specified by section 3134(a) of the Affordable Care Act. The proposal is also consistent both with our longstanding policy on surgical and nuclear medicine diagnostic procedures, which apply a 50 percent reduction to second and subsequent procedures. Furthermore, it is responsive to continued concerns about significant growth in imaging spending, and to MedPAC (March 2010) and GAO (July 2009) recommendations regarding the expansion of MPPR policies under the PFS to account for additional efficiencies.

Finally, as noted, the proposal is consistent with the RUC's recent methodology and rationale in valuing the work for a combined CT of the pelvis (CPT codes 72192, 72193 and 72194), and abdomen (CPT codes 74150, 74160 and 74170) where the RUC assumed the work efficiency for the second service was 50 percent. Savings resulting from this proposal would be redistributed to other PFS services as required by the general statutory PFS budget neutrality provision.

3. Further Expansion of the MPPR Under Consideration for Future Years

Currently, the MPPR focuses only on a select number of codes. We will be aggressively looking for efficiencies in other sets of codes during the following years and will consider implementing more expansive reduction policies in CY 2013 and beyond. We invite public comment on the following MPPR policies which are under consideration. Any proposals would be presented in future rulemaking and subject to further public comment:

- Apply the MPPR to the TC of All Imaging Services. This approach would apply a payment reduction to the TC of the second and subsequent imaging services performed in the same session. Such an approach could define imaging consistent with our existing definition of imaging for purposes of the statutory cap on payment at the OPPS rate (including x-ray, ultrasound (including echocardiography), nuclear medicine (including positron emission tomography), magnetic resonance imaging, computed tomography, and fluoroscopy, but excluding diagnostic and screening mammography). Add-on codes that are always furnished with another service and have been valued accordingly could be excluded.

Such an approach would be based on the expected efficiencies due to duplication of clinical labor activities, supplies, and equipment time. This approach would apply to approximately 530 HCPCS codes, including the 119 codes to which the current imaging MPPR applies. Savings would be redistributed to other PFS services as required by the statutory PFS budget neutrality provision.

- Apply the MPPR to the PC of All Imaging Services. This approach would apply a payment reduction to the PC of the second or subsequent imaging services furnished in the same encounter. Such an approach could define imaging consistent with our existing definition of imaging for the cap on payment at the OPPS rate. Add-on codes that are always furnished with another service and have been valued accordingly could be excluded.

This approach would be based on efficiencies due to duplication of physician work primarily in the pre- and post-service periods, with smaller

efficiencies in the intraservice period. This approach would apply to approximately 530 HCPCS codes, including the 119 codes to which the current imaging MPPR applies. Savings would be redistributed to other PFS services as required by the statutory PFS budget neutrality provision.

• Apply the MPPR to the TC of All Diagnostic Tests. This approach would apply a payment reduction to the TC of the second and subsequent diagnostic tests (such as radiology, cardiology, audiology, etc.) furnished in the same encounter. Add-on codes that are always furnished with another service and have been valued accordingly could be excluded.

The approach would be based on the expected efficiencies due to duplication of clinical labor activities, supplies, and equipment time. The approach would apply to approximately 700 HCPCS codes, including the approximately 560 HCPCS codes subject to the OPPS cap. The savings would be redistributed to other PFS services as required by the statutory PFS budget neutrality provision.

D. Malpractice RVUs

1. Overview of the Methodology for Calculation of Malpractice RVUs

Section 1848(c) of the Act requires that each service paid under the PFS be comprised of three components: work, PE, and malpractice. From 1992 to 1999, malpractice RVUs were charge-based, using weighted specialty-specific malpractice expense percentages and 1991 average allowed charges. Malpractice RVUs for new codes after 1991 were extrapolated from similar existing codes or as a percentage of the corresponding work RVU. Section 4505(f) of the BBA amended section 1848(c) of the Act which required us to implement resource-based malpractice RVUs for services furnished beginning in 2000. Therefore, initial implementation of resource-based malpractice RVUs occurred in 2000.

The statute also requires that we review, and if necessary adjust, RVUs no less often than every 5 years. The first review and update of resource-based malpractice RVUs was addressed in the CY 2005 PFS final rule with comment period (69 FR 66263). Minor modifications to the methodology were addressed in the CY 2006 PFS final rule with comment period (70 FR 70153). In the CY 2010 PFS final rule with comment period, we implemented the second review and update of malpractice RVUs. For a discussion of the second review and update of malpractice RVUs, see the CY 2010 PFS proposed rule (74 FR 33537) and final rule with comment period (74 FR 61758).

As explained in the CY 2011 PFS final rule with comment period, malpractice RVUs for new and revised codes effective before the next Five-Year Review (for example, effective CY 2011 through CY 2014, assuming that the next review of malpractice RVUs occurs for CY 2015) are determined either by a direct crosswalk to a similar source code or by a modified crosswalk to account for differences in work RVUs between the new/revised code and the source code (75 FR 73208). For the modified crosswalk approach, we adjust (or ''scale'') the malpractice RVU for the new/revised code to reflect the difference in work RVU between the source code and the new/revised work value (or, if greater, the clinical labor portion of the fully implemented PE RVU) for the new code. For example, if the proposed work RVU for a revised code is 10 percent higher than the work RVU for its source code, the malpractice RVU for the revised code would be increased by 10 percent over the source code RVU. This approach presumes the same risk factor for the new/revised code and source code but uses the work RVU for the new/revised code to adjust for risk-of-service. For codes reviewed in this proposed rule the source code for each code is the code itself. Therefore, we calculated the revised malpractice RVU for these codes by scaling the current malpractice RVU by the percent difference in work RVU between the current (CY 2011) work RVU and the work RVU proposed in section II.B. of this proposed rule. Typically, the assigned malpractice RVUs for new/revised codes effective between updates remain in place until the next Five-Year Review of Malpractice, which is expected to occur for CY 2015. We anticipate soliciting public comments in the CY 2013 PFS proposed rule on matters relating to the CY 2015 Five-Year Review of Malpractice.

2. Proposed Revisions to Malpractice RVUs for Certain Cardiothoracic Surgery Services

In addition to the scaling of malpractice RVUs to account for the proportionate difference between current and proposed work RVUs (proposed work RVU changes are discussed previously in section II.B.of this proposed rule) there are 19 cardiothoracic surgery codes for which we propose to scale the malpractice RVUs to account for the proportionate difference between the current and proposed revised specialty risk factor. These codes and their short descriptors are listed below in Table 11. As discussed in the CY 2010 PFS proposed rule (74 FR 33539), we assign malpractice RVUs to each service based upon a weighted average of the malpractice risk factors of all specialties that furnish the service. For the CY 2010 review of malpractice RVUs, we used CY 2008 Medicare claims data on allowed services to establish the frequency of a service by specialty. For a number of cardiothoracic surgery CPT codes representing major open heart procedures performed primarily on neonates and infants, CY 2008 Medicare claims data showed zero allowed services. Therefore, our contractor set the number of services to 1, and assigned a risk factor according to the average risk factor for all services that do not explicitly have a separate technical or professional component (average risk factor = 1.95). In the CY 2010 PFS final rule with comment period, we published interim final malpractice RVUs for these codes calculated using the average physician risk factor, and finalized them in the CY 2011 PFS final rule with comment period.

However, since publication of the CY 2010 PFS final rule with comment period, stakeholders have expressed concern that the average risk factor is not appropriate for these services, and that a cardiac surgery risk factor would be more appropriate (cardiac surgery risk factor = 6.93). While these CPT codes continue to have little to no Medicare claims data, upon clinical review we agree that these CPT codes represent cardiac surgery services and that the malpractice RVUs should be calculated using the cardiac surgery risk factor. Accordingly, we propose to scale the malpractice RVUs for these CPT codes to reflect the proportionate difference between the average risk factor and the cardiac surgery risk factor. To scale the malpractice RVU we used the following formula: (cardiac surgery risk factor/average risk factor) * CY 2011 malpractice RVU = Proposed CY 2012 malpractice RVU. For example, CPT code 33471 (Valvotomy, pulmonary valve, closed heart; via pulmonary artery) has a CY 2011 malpractice RVU of 1.62 which was calculated using the average risk factor of 1.95. To scale this malpractice RVU to reflect the cardiac surgery risk factor of 6.93 we used the following calculation: (6.93 RF/1.95 RF)*1.62 MP RVU = 5.76 MP RVU.

CPT code 33692 (Complete repair tetralogy of Fallot without pulmonary atresia;) has a CY 2011 work RVU of 31.54 and a malpractice RVU of 2.23. However, in the Fourth Five-Year Review of Work (76 FR 32410) we have

proposed an interim final work RVU of 36.15 and adjusted the malpractice RVU to 2.56 for this service. Therefore, the starting value for calculating the proposed revised malpractice RVU based on the cardiac surgery risk factor is the Five-Year Review malpractice RVU instead of the CY 2011 malpractice RVU. Similar to the example shown previously, the formula for this adjustment is as follows: (cardiac surgery risk factor/average risk factor) * Five-Year Review malpractice RVU = Proposed CY 2012 malpractice RVU.

Table 11 shows the proposed CY 2012 malpractice RVUs for these cardiothoracic surgery codes.

We also propose to scale the malpractice RVU to reflect a change in risk factor for CPT code 32442 (Removal of lung, total pneumonectomy; with resection of segment of trachea followed by broncho-tracheal anastomosis (sleeve pneumonectomy)). In the CY 2010 review of malpractice RVUs we assigned CPT code 32442 the pulmonary disease risk factor (2.09) and published the interim final malpractice RVU calculated from this risk factor in the CY 2010 PFS final rule with comment period. This value was finalized in the CY 2011 PFS final rule with comment period.

Since finalizing this value, stakeholders have suggested that a blended risk factor of thoracic surgery (6.49) and general surgery (5.91) would be more appropriate for this service. As described in the CY 2010 PFS final rule with comment period (74 FR 61760), we do not use a blended risk factor for services with Medicare utilization under 100; instead, we use the malpractice risk factor of the specialty that performs the given service the most (the dominant specialty). As CPT code 32442 has Medicare utilization well below the 100 occurrences threshold, and current Medicare claims data show that the dominant specialty for CPT code 32442 is thoracic surgery, we believe that the thoracic surgery risk factor is the appropriate risk factor for this service at this time. Applying the formula described previously to adjust the malpractice RVU to reflect the thoracic surgery risk factor rather than the pulmonary disease risk factor results in a malpractice RVU of 13.21 for CPT code 32442. Therefore, we propose a malpractice RVU of 13.21 for CPT code 32442 for CY 2012. Table 11 shows the proposed CY 2012 malpractice RVUs for the cardiothoracic surgery codes described in this section. All malpractice RVUs are listed in Addendum B of this proposed rule, including those that are proposed to be revised and those for which there is no proposed change for CY 2012.

TABLE 11—CY 2012 PROPOSED MALPRACTICE (MP) RVUS FOR SELECTED CARDIOTHORACIC SURGERY SERVICES

CPT Code	Short descriptor	CY 2012 proposed specialty risk factor	CY 2011 MP RVU	Proposed CY 2012 MP RVU
33471	Valvotomy pulmonary valve	Cardiac Surgery: 6.93	1.62	5.76
33472	Revision of pulmonary valve	Cardiac Surgery: 6.93	1.63	5.80
33676	Close mult vsd w/resection	Cardiac Surgery: 6.93	2.63	9.36
33677	Cl mult vsd w/rem pul band	Cardiac Surgery: 6.93	2.74	9.75
33692	Repair of heart defects	Cardiac Surgery: 6.93	*2.56	9.11
33762	Major vessel shunt	Cardiac Surgery: 6.93	1.61	5.73
33768	Cavopulmonary shunting	Cardiac Surgery: 6.93	0.56	1.99
33771	Repair great vessels defect	Cardiac Surgery: 6.93	2.90	10.32
33775	Repair great vessels defect	Cardiac Surgery: 6.93	2.33	8.29
33776	Repair great vessels defect	Cardiac Surgery: 6.93	2.45	8.72
33777	Repair great vessels defect	Cardiac Surgery: 6.93	2.42	8.61
33778	Repair great vessels defect	Cardiac Surgery: 6.93	3.05	10.85
33779	Repair great vessels defect	Cardiac Surgery: 6.93	3.09	10.99
33780	Repair great vessels defect	Cardiac Surgery: 6.93	3.13	11.14
33781	Repair great vessels defect	Cardiac Surgery: 6.93	3.09	10.99
33786	Repair arterial trunk	Cardiac Surgery: 6.93	2.98	10.60
33788	Revision of pulmonary artery	Cardiac Surgery: 6.93	1.93	6.87
33822	Revise major vessel	Cardiac Surgery: 6.93	1.25	4.45
32442	Sleeve pneumonectomy	Thoracic Surgery: 6.49	4.25	13.21

*The malpractice RVU listed for CPT code 33692 is the Five-Year Review of Work-adjusted malpractice RVU, not the CY 2011 malpractice RVU. Please see above for additional detail.

E. Geographic Practice Cost Indices (GPCIs)

1. Background

Section 1848(e)(1)(A) of the Act requires us to develop separate Geographic Practice Cost Indices (GPCIs) to measure resource cost differences among localities compared to the national average for each of the three fee schedule components (that is, physician work, practice expense (PE), and malpractice). While requiring that the PE and malpractice GPCIs reflect the full relative cost differences, section 1848(e)(1)(A)(iii) of the Act requires that the physician work GPCIs reflect only one-quarter of the relative cost differences compared to the national average. In addition, section 1848(e)(1)(G) of the Act sets a permanent 1.5 work GPCI floor for services furnished in Alaska beginning January 1, 2009, and section 1848(e)(1)(I) of the Act sets a permanent 1.0 PE GPCI floor for services furnished in frontier States beginning January 1, 2011.

Section 1848(e)(1)(E) of the Act provides for a 1.0 floor for the work GPCIs which was set to expire at the end of 2009 until it was extended through December 31, 2010 by section 3102(a) of the Affordable Care Act. Because the work GPCI floor was set to expire at the end of 2010, the GPCIs published in Addendum E of the CY 2011 PFS final rule with comment period did not reflect the 1.0 physician work floor. However, section 1848(e)(1)(E) of the Act was amended on December 15, 2010, by section 103 of the Medicare and Medicaid Extenders Act (MMEA) of 2010 (Pub. L. 111–309) to extend the 1.0 work GPCI floor through December 31, 2011. Appropriate changes to the CY 2011 GPCIs were made to reflect the 1.0

physician work floor required by section 103 of the MMEA. Since the work GPCI floor provided in section 1848(e)(1)(E) of the Act is set to expire prior to the implementation of the CY 2012 PFS, the CY 2012 physician work GPCIs, and summarized geographic adjustment factors (GAFs), presented in this proposed rule do not reflect the 1.0 work GPCI floor. As required by sections 1848(e)(1)(G) and (I) of the Act, the 1.5 work GPCI floor for Alaska and the 1.0 PE GPCI floor for frontier States will be applicable in CY 2012. Moreover, the limited recognition of cost differences in employee compensation and office rent for the PE GPCIs, and the related hold harmless provision, required under section 1848(e)(1)(H) of the Act was only applicable for CY 2010 and CY 2011 (75 FR 73253) and, therefore, is no longer effective beginning in CY 2012.

Section 1848(e)(1)(C) of the Act requires us to review and, if necessary, adjust the GPCIs not less often than every 3 years. This section also specifies that if more than 1 year has elapsed since the last GPCI revision, we must phase in the adjustment over 2 years, applying only one-half of any adjustment in the first year.

As noted in the CY 2011 PFS final rule with comment period (75 FR 73252 through 73262), for the sixth GPCI update, we updated the data used to compute all three GPCI components. Specifically, we utilized the 2006 through 2008 Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) to calculate the physician work GPCIs (75 FR 73252). In addition, we used the 2006 through 2008 BLS OES data to calculate the employee compensation sub-component of practice expense (75 FR 73255). Consistent with previous updates, we used the 2-bedroom residential apartment rent data from HUD (2010) at the 50th percentile as a proxy for the relative cost differences in physician office rents (75 FR 73256). Lastly, we calculated the malpractice GPCIs using malpractice premium data from 2006 through 2007 (75 FR 73256).

Since more than 1 year had elapsed since the fifth GPCI update, the sixth GPCI update changes are being phased in over a 2-year period as required by law. The current CY 2011 GPCIs reflect the first year of the transition. The proposed CY 2012 GPCIs reflect the full implementation.

The Affordable Care Act requires that we analyze the current methodology and data sources used to calculate the PE GPCI component. Specifically, section 1848(e)(1)(H)(iv) of the Act (as added by section 3102(b) of the Affordable Care Act) requires the Secretary to ''analyze current methods of establishing practice expense adjustments under subparagraph (A)(i) and evaluate data that fairly and reliably establishes distinctions in the cost of operating a medical practice in different fee schedule areas.'' Section 1848(e)(1)(H)(iv) of the Act also requires that such analysis shall include an evaluation of the following:

- The feasibility of using actual data or reliable survey data developed by medical organizations on the costs of operating a medical practice, including office rents and non-physician staff wages, in different fee schedule areas.
- The office expense portion of the practice expense geographic adjustment; including the extent to which types of office expenses are determined in local markets instead of national markets.
- The weights assigned to each area of the categories within the practice expense geographic adjustment.

In addition, the weights for different categories of practice expense in the GPCIs have historically matched the weights developed by the CMS Office of the Actuary (OACT) for use in the Medicare Economic Index (MEI), the measure of inflation used as part of the basis for the annual update to the physician fee schedule payment rates. In response to comments received on the CY 2011 Physician Fee Schedule proposed rule, however, we delayed moving to the new MEI weights developed by OACT for CY 2011 pending further analysis.

Lastly, we asked the Institute of Medicine (IOM) to evaluate the accuracy of the geographic adjustment factors used for Medicare physician payment. IOM will prepare three reports for the Congress and the Secretary of the Department of Health and Human Services. The first report (Phase I) was released on June 1, 2011, and includes an evaluation of the accuracy of geographic adjustment factors for the hospital wage index and the GPCIs, and the methodology and data used to calculate them. In addition, IOM is expected to release a supplemental GPCI report in the summer of 2011. The third report, expected in spring 2012, will evaluate the effects of the adjustment factors on the distribution of the health care workforce, quality of care, population health, and the ability to provide efficient, high value care. Given the timing of the release of IOM's first report and the fact that we do not yet have the second supplemental report on the GPCIs, we are unable to address the full scope of the IOM recommendations in this proposed rule. The report can be accessed on the IOM's Web site at *http://www.iom.edu/Reports/2011/Geographic-Adjustment-in-Medicare-Payment-Phase-I-Improving-Accuracy.aspx.* Additionally, we have included a summary of GPCI-specific recommendations in section 4 below.

2. Proposed GPCI Revisions for CY 2012

The revised GPCI values we are proposing were developed by Acumen, LLC (Acumen) under contract to us. As mentioned previously, there are three GPCI components (physician work, PE, and malpractice), and all GPCIs are developed through comparison to a national average for each component. Additionally, each of the three GPCIs relies on its own data source(s) and methodology for calculating its value, as described more fully later in this section. As discussed in more detail later in this section, we are proposing to revise the PE GPCIs for CY 2012, as well as the cost share weights which correspond to all three GPCIs.

a. Physician Work GPCIs

The physician work GPCIs are designed to capture the relative cost of physician labor by Medicare PFS locality. Previously, the physician work GPCIs were developed using the median hourly earnings from the 2000 Census of workers in seven professional specialty occupation categories which we used as a proxy for physicians' wages. Physicians' wages are not included in the occupation categories because Medicare payments are a key determinant of physicians' earnings. Including physicians' wages in the physician work GPCIs would, in effect, have made the indices dependent upon Medicare payments. As required by law, the physician work GPCI reflects one-quarter of the relative wage differences for each locality compared to the national average.

The physician work GPCI updates in CYs 2001, 2003, 2005, and 2008 were based on professional earnings data from the 2000 Census. For the sixth GPCI update in CY 2011, we used the 2006 through 2008 Bureau of Labor Statistics (BLS) Occupational Employment Statistics (OES) data as a replacement for the 2000 Census data. We are not proposing to revise the physician work GPCI data source for CY 2012. However, we note that the work GPCIs will be revised to account for the expiration of the statutory work floor. The 1.5 work floor for Alaska is permanent and will be applicable in CY 2012. In addition, we are proposing to revise the physician work cost share weight from 52.466 to 48.266 in line with the 2011 MEI weights, which are

based on 2006 data (referred to hereinafter as the 2006-based MEI).

b. Practice Expense GPCIs

(1) Affordable Care Act Analysis and Revisions for PE GPCIs

(A) General Analysis for the CY 2012 PE GPCIs

As previously mentioned, section 1848(e)(1)(H)(iv) of the Act (as added by section 3102(b) of the Affordable Care Act) requires the Secretary to ''analyze current methods of practice expense adjustments under subparagraph (A)(i) and evaluate data that fairly and reliably establishes distinctions in the cost of operating a medical practice in different fee schedule areas.''

Moreover, section 1848(e)(1)(H)(v) of the Act requires the Secretary to make appropriate adjustments to the PE GPCIs as a result of the required analysis no later than by January 1, 2012. We are proposing to make four revisions to the PE data sources and cost share weights discussed herein effective January 1, 2012. Specifically, we are proposing to: (1) Revise the occupations used to calculate the employee wage component of PE using BLS wage data specific to the office of physicians' industry; (2) utilize two bedroom rental data from the 2006–2008 American Community Survey as the proxy for physician office rent; (3) create a purchased service index that accounts for regional variation in labor input costs for contracted services from industries comprising the ''all other services'' category within the MEI office expense and the stand alone ''other professional expenses'' category of the MEI and; (4) use the 2006-based MEI (most recent MEI weights finalized in the CY 2011 final rule with comment period) to determine the GPCI cost share weights. These proposals are based on analyses we conducted to address commenter concerns in the CY 2011 final rule with comment period. The main comments were related to: (1) The occupational groups used to calculate the employee wage component of PE, and (2) concerns by commenters stating that regional variation in purchased services such as legal and accounting are not sufficiently included in the employee wage index.

We began analyzing the current methods and data sources used in the establishment of the PE GPCIs during the CY 2011 rulemaking process (75 FR 40084). With respect to our CY 2011 analysis, we began with a review of the Government Accountability Office's (GAO) March 2005 Report entitled, ''Medicare Physician Fees: Geographic Adjustment Indices Are Valid in Design, but Data and Methods Need Refinement'' (GAO–05–119). While we have raised concerns in the past about some of the GAO's GPCI recommendations, we noted that with respect to the PE GPCIs, the GAO did not indicate any significant issues with the methods underlying the PE GPCIs. Rather, the report focused on some of the data sources used in the method. For example, the GAO stated that the wage data used for the PE GPCIs are not current. Similarly, commenters on previous PE GPCI updates predominantly focused on either the data sources used in the method or raised issues such as incentivizing the provision of care in different geographic areas. However, the latter issue (incentivizing the provision of care) is outside the scope of the statutory requirement that the PE GPCIs reflect the relative costs of the mix of goods and services comprising practice expenses in the different fee schedule areas relative to the national average.

To further analyze the PE office expense in accordance with section 1848(e)(1)(H)(iv) of the Act, we examined the following issues: the appropriateness of expanding the number of occupations included in the employee wage index; the appropriateness of replacing rental data from the Department of Housing and Urban Development (HUD) with data from the 2006–2008 American Community Survey (ACS) two bedroom rental data as a proxy for the office rent subcomponent of PE; and the appropriateness of adjusting the ''all other services'' and ''other professional expenses'' MEI categories for geographic variation in labor-related costs. We also examined available ACS occupational group data for potential use in determining geographic variation in the employee wage component of PE.

An additional component of the analysis under section 1848(e)(1)(H)(iv) of the Act is to evaluate the weights assigned to each of the categories within the practice expense geographic adjustment. As discussed in the CY 2011 final rule with comment period (75 FR 73256), in response to concerns raised by commenters and to allow us time to conduct additional analysis, we did not revise the GPCI cost share weights to reflect the weights used in the revised and rebased 2006 MEI that we adopted beginning in CY 2011. In response to those commenters, whom raised many points regarding the appropriateness of assigning labor-related costs in the medical equipment and supplies and miscellaneous component which do not reflect locality cost differentials, we agreed to address the GPCI cost share weights again in the CY 2012 PFS proposal. These issues are discussed in greater detail in the section of this rule that discusses our determination of the cost share weights.

We also stated in the CY 2011 final rule with comment period that we would review the findings of the Secretary's Medicare Geographic Payment Summit and the MEI technical advisory panel during future rulemaking (75 FR 73256). The Secretary convened the National Summit on Health Care Quality and Value on October 4, 2010. This Summit was attended by a number of policy experts that engaged in detailed discussions regarding geographic adjustment factors and geographic variation in payment and the promotion of high quality care. This National Summit was useful to informing us on issues which we are studying further through three Institute of Medicine studies (including the recently released first of three reports on Geographic Adjustment Factors and a separate report on Geographic Variation in Health Care Spending and the Promotion of High Value Care). In accordance with Section 3102(b) of the Affordable Care Act, we are also continuing to consider these issues in the course of notice and comment rulemaking for the CY 2012 PFS, which includes revisions to the GPCI, and through preparation of a report to the Congress that we will be submitting later this year in accordance with section 3137(b) of the Affordable Care Act on a plan for reforming the hospital wage index. In addition, the Agency is currently working through the various administrative requirements to formally organize the MEI technical advisory panel. We expect that this panel will be convened in the near future. We look forward to examining the recommendations of this panel once it has issued its report.

(B) Analysis of ACS Rental Data

In the CY 2011 final rule with comment period, we finalized our policy to use the 2010 apartment rental data produced by HUD at the 50th percentile as the proxy for relative cost differences in physician office rents. However, as part of our analysis required by section 1848(e)(1)(H)(iv) of the Act, we have now examined the suitability of utilizing 3-year (2006–2008) ACS rental data to serve as a proxy for physician office rents We believe that the ACS rental data provide a sufficient degree of reliability and are an appropriate source on which to base our PE GPCI office rent proxy. We also believe that the ACS data provide a higher degree of accuracy than the HUD data since the ACS is updated annually

and is not based on data collected by the 2000 Census long form. Moreover, it is our understanding that the Census long form, which is utilized to collect the necessary base year rents for the HUD Fair Market Rent (FMR) data, will no longer be available in future years. Therefore, we are proposing to use the available 2006 through 2008 ACS rental data for two bedroom residential units as the proxy for physician office rent. We were not able to collect and analyze 5-year ACS rental data in time for this proposed rule. We may use 5-year ACS data in future rulemaking decisions and would welcome public comments regarding utilization of the 5-year ACS rental data as a proxy for physician office rent.

We believe the ACS data will more accurately reflect geographic variation in the office rent component. As in past GPCI updates, we propose to apply a nationally uniform weight to the office rent component. Although we investigated varying the weight of the office rent index for different localities, we could not find a comprehensive data source that provides office rent information that would allow direct measurement of the variation in this expense among fee schedule areas. Therefore, we are proposing to use the 2006-based MEI weight for fixed capital and utilities as the weight for the office rent category in the PE GPCI, and using the ACS residential rent data to develop the practice expense GPCI value. We welcome public comments on whether there are potential data sources (especially publicly available sources) that would readily provide comprehensive office rent information that would allow us to accurately measure the geographic variation in this expense among fee schedule areas.

(C) Employee Wage Analysis

Accurately evaluating the relative price that physicians pay for labor inputs requires both a mechanism for selecting the occupations to include in the employee wage index and identifying an accurate measure of the wages for each occupation. We received comments during the CY 2011 rulemaking cycle noting that the current employee wage methodology may omit key occupational categories for which cost varies significantly across regions. Commenters suggested including occupations such as accounting, legal, and information technology in the employee wage component of the PE GPCI. To address these concerns, we propose to revise the employee wage index framework within the practice expense (PE) GPCI. Under this new methodology, we would only select occupational categories relevant to a physician's practice. We would use a comprehensive set of wage data from the Bureau of Labor Statistics Occupational Employment Statistics (BLS OES) specific to the offices of physicians industry. Utilizing wage and national cost share weight data from the BLS OES would not only provide a more systematic approach to determining which occupations should be included in the non-physician employee wage category of the PE GPCI, but would also enable us to determine how much weight each occupation should receive within the index.

Due to its reliability, public availability, level of detail, and national scope, we propose to use BLS OES data to estimate both occupation cost shares and hourly wages for purposes of the non-physician employee wage component of the PE GPCI. The OES panel data are collected from approximately 200,000 establishments, and provide employment and wage estimates for about 800 occupations. At the national level, OES provides estimates for over 450 industry classifications (using the 3, 4, and 5 digit North American Industry Classification System (NAICS)), including the Offices of Physicians industry (NAICS 621100). As described in the census, the Offices of Physicians industry comprises establishments of health practitioners having the degree of M.D. (Doctor of Medicine) or D.O. (Doctor of Osteopathy) primarily engaged in the independent practice of general or specialized medicine (except psychiatry or psychoanalysis) or surgery. These practitioners operate private or group practices in their own offices (such as, centers, clinics) or in the facilities of others, such as hospitals or Health Maintenance Organization (HMO) medical centers. The OES data provide significant detail on occupational categories and offer national level cost share estimates for the offices of physicians industry.

We also evaluated available ACS occupational data as a potential data source for the non-physician employee wage PE GPCI subcomponent. Based on the occupations currently used to calculate employee wages, the BLS OES captures occupations with greater relevancy to physician office practices and is a more appropriate data source than the currently available ACS data. However, we intend to study an expanded mix of occupations utilizing 5-year ACS data as that data become available. We welcome comments on our proposal to use the BLS OES specific to the office of physicians industry. In this proposed methodology, we weight each occupation based on its share of total labor cost within the offices of physician industry. Specifically, each occupation's weight is proportional to the product of its occupation's employment share and average hourly wage. In this calculation, we use each occupation's employment level rather than hours worked, because the BLS OES does not contain industry-specific information describing the number of hours worked in each occupation (see: *http://www.bls.gov/oes/current/naics4_621100.htm*). This proposed methodology would account for 90 percent of the total wage share in the office of physicians industry. Additionally, this strategy produces 33 individual occupations with the highest wage shares and would account for many of the occupations commenters have stated were historically excluded from the employee wage calculation (for example, accounting, auditors, and medical transcriptionists), We also welcome public comments on the potential use of the 5-year ACS data to calculate the employee wage component of the PE GPCI.

(D) Purchased Services Analysis

For CY 2012, we are proposing to geographically adjust the labor-related industries within the ''all other services'' and ''other professional expenses'' categories of the MEI. In response to commenters who stated that these purchased services were labor-related and should be adjusted geographically, we agreed to examine this issue further in the CY 2011 final rule with comment period and refrained from making any changes. Based on our subsequent examination of this issue, we believe it would be appropriate to geographically adjust for the labor-related component of purchased services within the ''All Other Services'' and ''Other Professional Expenses'' categories using BLS wage data. In total, there are 63 industries, or cost categories, accounted for within the ''all other services'' and ''other professional services'' categories of the 2006-based MEI. As we established for purposes of the hospital wage index in 74 FR 43845, we define a cost category as labor-related if the cost category is defined as being both labor intensive and its costs vary with, or are influenced by the local labor market. The total proposed purchased services component accounts for 8.095 percent of total practice cost. However, only 5.011 percentage points (of the total 8.095 percentage points assigned to purchased services) are defined as labor-related and thus adjusted for locality cost differences. These 5.011 percentage points represent

cost categories that we believe are labor intensive and have costs that vary with, or are influenced by, the local labor market. The labor-related cost categories include but are not limited to building services (such as janitorial and landscaping), security services, and advertising services. The remaining weight assigned to the non-labor-related industries (3.084 percentage points) represent industries that do not meet the criteria of being labor intensive or having their costs vary with the local labor market.

In order to calculate the labor-related and non-labor-related shares, we would use a similar methodology that is employed in estimating the labor-related share of various CMS market baskets. A more detailed explanation of this methodology can be found under the supporting documents section of the CY 2012 PFS proposed rule web page at *http://www.cms.gov/PhysicianFeeSched/*.

We believe our analysis, during 2010 and this year, of the current methods of establishing PE GPCIs and our evaluation of data that fairly and reliably establish distinctions in the cost of operating a medical practice in the different fee schedule areas meet the statutory requirements of section 1848(e)(1)(H)(iv) of the Act. A more detailed discussion of our analysis of current methods of establishing PE GPCIs and evaluation of data sources is included in Acumen's draft report entitled, ''Proposed Revisions to the Sixth Update of the Geographic Practice Cost Index.'' Acumen's draft report and associated analysis of the proposed GPCI revisions, including the PE GPCIs, will be made publicly available on the CMS Web site. The draft report may be accessed from the PFS Web site at: *http://www.cms.gov/PhysicianFeeSched/* under the ''Downloads'' section of the CY 2012 PFS proposed rule web page.

Additionally, see section VII.B. of this proposed rule for Table 66, which reflects the GAF impacts resulting from these proposals. As the table demonstrates, the primary driver of the CY 2012 impact is the expiration of the work GPCI floor which had produced non-budget neutral increases to the CY 2011 GPCIs for lower cost areas as authorized under the Affordable Care Act the Medicare and Medicaid Extenders Act (MMEA).

(E) Determining the PE GPCI Cost Share Weights

To determine the cost share weights for the CY 2012 GPCIs, we are proposing to use the weights established in the 2006-based MEI. The MEI was rebased and revised in the CY 2011 final rule with comment period to reflect the weighted-average annual price change for various inputs needed to provide physicians' services. As discussed in detail in that section (75 FR 73262 through 73277), the proposed expense categories in the MEI, along with their respective weights, were primarily derived from data collected in the 2006 AMA PPIS for self-employed physicians and selected self-employed non-medical doctor specialties. Since we have historically updated the GPCI cost share weights consistent with the most recent update to the MEI, and because we have addressed commenter concerns regarding the inclusion of the weight assigned to utilities with office rent and geographically adjusted for the labor intensive industries within the ''all other services'' and ''other professional expenses'' MEI categories, we believe it is appropriate to adopt the 2006-based MEI cost share weights.

(i) Practice Expense

For the cost share weight for the proposed CY 2012 PE GPCIs, we would use the 2006-based MEI weight for the PE category of 51.734 percent minus the professional liability insurance category weight of 4.295 percent. Therefore, we propose a cost share weight for the PE GPCIs of 47.439 percent.

(ii) Employee Compensation

For the employee compensation portion of the PE GPCIs, we would use the non-physician employee compensation category weight of 19.153 percent reflected in the 2006-based MEI.

(iii) Office Rent

We are proposing that the weight for the office rent component be revised from 12.209 percent to 10.223 percent. The 12.209 percent office rent GPCI weight was set equal to the 2000-based MEI cost weight for office expenses, which was calculated using the American Medical Association's (AMA) Socioeconomic Monitoring Survey (SMS). The 12.209 percent reflected the expenses for rent, depreciation on medical buildings, mortgage interest, telephone, and utilities. We are proposing to set the GPCI office rent equal to 10.223 percent reflecting the 2006-based MEI cost weights (75 FR 73263) for fixed capital (reflecting the expenses for rent, depreciation on medical buildings and mortgage interest) and utilities. We are no longer including telephone costs in the GPCI office rent cost weight because we believe these expenses do not vary by geographic area.

Consistent with the revised and rebased 2006-based MEI which was adopted in the CY 2011 final rule with comment period (75 FR 73263), we disaggregated the broader office expenses component for the PE GPCI into 10 new cost categories. In this disaggregation, the fixed capital component is the office expense category applicable to the office rent component of the PE GPCI. As discussed in the section dealing with office rent, we are proposing to use 2006–2008 ACS rental data as the proxy for physician office rent. This data represents a gross rent amount and includes data on utilities expenditures. Since it is not possible to separate the utilities component of rent for all ACS survey respondents, it was necessary to combine these two components to calculate office rent and by extension, we propose combining those two cost categories when assigning a weight to the office rent component.

(iv) Purchased Services

As discussed in the previous paragraphs, a new purchased services index was created to geographically adjust the labor-related components of the ''All Other Services'' and ''Other Professional Expenses'' categories of the MEI office expense. In order to calculate the purchased services index, we are proposing to merge the corresponding weights of these two categories to form a combined purchased services weight of 8.095 percent. However, we are proposing to only adjust for locality cost differences of the labor-related share of the industries comprising the ''All Other Services'' and ''Other Professional Expenses'' categories. We have determined that only 5.011 percentage points of the 8.095 percentage points would be adjusted for locality cost differences (5.011 adjusted purchased service + 3.084 non-adjusted purchased services = 8.095 total cost share weight).

(v) Equipment, Supplies, and Other Misc Expenses

To calculate the proposed medical equipment, supplies, and other miscellaneous expenses component, we removed professional liability (4.295 percentage points), non-physician employee compensation (19.153 percentage points), fixed capital/utilities (10.223 percentage points), and purchased services (8.095 percentage points) from the PE category weight (51.734 percent). Therefore, we are proposing a cost share weight for the medical equipment, supplies, and other miscellaneous expenses component of 9.968 percent. Consistent with previous methodology, this component of the PE

GPCI is not adjusted for geographical variation.

(vi) Physician Work and Malpractice GPCIs

Furthermore, we propose to use the physician compensation cost category weight of 48.266 percent as the proposed work GPCI cost share weight; and we propose to use the professional liability insurance weight of 4.295 percent for the malpractice GPCI cost share weight. We believe our analysis and evaluation of the weights assigned to each of the categories within the PE GPCIs satisfies the statutory requirements of section 1848(e)(1)(H)(iv) of the Act.

The proposed cost share weights for the CY 2012 GPCIs are displayed in Table 12. For a detailed discussion regarding the GPCI cost share weights and how the weights account for local and national adjustments, see Acumen's ''Proposed Revisions to the Sixth Update of the Geographic Practice Cost Index'' draft report at (*http://www.cms.gov/PhysicianFeeSched/*)

TABLE 12—COST SHARE WEIGHTS FOR CY 2012 GPCI UPDATE

Expense category	Current cost share weights %	Proposed cost share weights %
Physician Work	52.466	48.266
Practice Expense	43.669	47.439
Employee Compensation	18.654	19.153
Office Rent	12.209	[1] 10.223
Purchased Services	N/A	[2] 8.095
Equipment, Supplies, and Other	12.806	9.968
Malpractice Insurance	3.865	4.295

[1] ACS rental data is a measurement of gross rent and includes utilities. In order to accurately capture the utility measurement present in the ACS two bedroom gross rent data, the cost share weight for utilities is combined with the fixed capital portion to form the office rent index.
[2] The cost share weight for purchased services contains both an adjusted and non-adjusted portion. (5.011 percentage points geographically adjusted purchased services + 3.084 percentage points non-adjusted purchased services).

(F) PE GPCI Floor for Frontier States

Section 10324(c) of the Affordable Care Act added a new subparagraph (I) under section 1848(e) (1) of the Act to establish a 1.0 PE GPCI floor for physicians' services furnished in frontier States effective January 1, 2011. In accordance with section 1848(e)(1)(I) of the Act, beginning in CY 2011, we applied a 1.0 PE GPCI floor for physicians' services furnished in States determined to be frontier States. There are no proposed changes to those states identified as ''frontier States'' for the CY 2012 proposed rule. The qualifying States are reflected in Table 13. In accordance with statute, we will apply a 1.0 GPCI floor for these states in CY 2012.

TABLE 13—FRONTIER STATES UNDER SECTION 1848(E)(1)(I) OF THE ACT

[As added by section 10324(c) of the Affordable Care Act]

State	Total counties	Frontier counties	Percent frontier counties (relative to counties in the State)
Montana	56	45	80
Wyoming	23	17	74
North Dakota	53	36	68
Nevada	17	11	65
South Dakota	66	34	52

(2) Summary of CY 2012 PE GPCI Proposal

The PE GPCIs include four components: Employee compensation, office rent, purchased services, and medical equipment, supplies and miscellaneous expenses. Our proposals relating to each of these components are as follows:

- Employee Compensation: We are proposing to geographically adjust the employee compensation using the 2006 through 2008 BLS OES data specific to the offices of physicians industry along with nationwide wage data to determine the employee compensation component of the PE GPCIs. The proposed employee compensation component accounts for 19.153 percent of total practice costs or 40.4 percent of the total PE GPCIs.
- Office Rents: We are proposing to geographically adjust office rent using the 2006–2008 ACS residential rental data for two bedroom units as a proxy for the relative cost differences in physician office rents. In addition, we are proposing to consolidate the utilities into the office rent weight to account for the utility data present in ACS gross rent data. The proposed office rent component accounts for 10.223 percent of total practice cost or 21.5 percent of the PE GPCIs.
- Purchased Services: We are proposing to geographically adjust the labor-related component of purchased services within the ''All Other Services'' and ''Other Professional Expenses ''categories using BLS wage data. The methodology employed to estimate purchased services expenses is based on the same data used to estimate the employee wage index. Specifically, the proposed purchased services framework relies on BLS OES wage data to estimate the price of labor in industries that physician offices frequently rely upon for contracted services. As previously mentioned, the labor-related share adjustment for each industry was derived using a similar methodology as is employed for estimating the labor-related shares of CMS' market baskets.

Furthermore, the weight assigned to each industry within the purchased services index was based on the 2006-based MEI. A more detailed discussion regarding CMS market baskets, as well as the corresponding definitions of a ''labor- related share'' and a ''non -labor-related share'' can be viewed at (74 FR 43845). The total proposed purchased services component accounts for 8.095 percent of total practice cost or 17.1 percent of the PE GPCI. However, the proportion of purchased services that is geographically adjusted for locality cost difference is 5.011 percentage points of the 8.095 percentage points or 10.6 percent of the PE GPCI.

• Medical Equipment, Supplies, and other Miscellaneous Expenses: We continue to believe that items such as medical equipment and supplies have a national market and that input prices do not vary appreciably among geographic areas. As discussed in previous GPCI updates in the CY 2008 and CY 2011 PFS proposed rules, specifically the fifth GPCI update (72 FR 38138) and sixth GPCI update (75 FR 73256), respectively, some price differences may exist, but we believe these differences are more likely to be based on volume discounts rather than on geographic market differences. For example, large physicians' practices may utilize more medical equipment and supplies and therefore may or may not receive volume discounts on some of these items. To the extent that such discounting may exist, it is a function of purchasing volume and not geographic location. The proposed medical equipment, supplies, and miscellaneous expenses component was factored into the PE GPCIs with a component index of 1.000. The proposed medical equipment, supplies, and other miscellaneous expense component account for 9.968 percent of total practice cost or 21.0 percent of the PE GPCI.

c. Malpractice GPCIs

The malpractice GPCIs are calculated based on insurer rate filings of premium data for $1 million to $3 million mature ''claims-made'' policies (policies for claims made rather than services furnished during the policy term). We chose claims-made policies because they are the most commonly used malpractice insurance policies in the United States. We used claims-made policy rates rather than occurrence policies because a claims-made policy covers physicians for the policy amount in effect when the claim is made, regardless of the date of event in question; whereas an occurrence policy covers a physician for the policy amount in effect at the time of the event in question, even if the policy is expired. Based on the data we analyzed, we are proposing to revise the cost share weight for the malpractice GPCI from 3.865 percent to 4.295 percent.

3. Payment Localities

The current PFS locality structure was developed and implemented in 1997. There are currently 89 total PFS localities; 34 localities are Statewide areas (that is, only one locality for the entire State). There are 52 localities in the other 18 States, with 10 States having 2 localities, 2 States having 3 localities, 1 State having 4 localities, and 3 States having 5 or more localities. The District of Columbia, Maryland, Virginia suburbs, Puerto Rico, and the Virgin Islands are additional localities that make up the remainder of the total of 89 localities. The development of the current locality structure is described in detail in the CY 1997 PFS proposed rule (61 FR 34615) and the subsequent final rule with comment period (61 FR 59494).

As we have previously noted in the CYs 2008 and 2009 proposed rules (72 FR 38139 and 73 FR 38513), any changes to the locality configuration must be made in a budget neutral manner within a State and can lead to significant redistributions in payments. For many years, we have not considered making changes to localities without the support of a State medical association in order to demonstrate consensus for the change among the professionals whose payments would be affected (since such changes would be redistributive, with some increasing and some decreasing). However, we have recognized that, over time, changes in demographics or local economic conditions may lead us to conduct a more comprehensive examination of existing payment localities.

For the past several years, we have been involved in discussions with physician groups and their representatives about recent shifts in relative demographics and economic conditions. We explained in the CY 2008 PFS final rule with comment period that we intended to conduct a thorough analysis of potential approaches to reconfiguring localities and would address this issue again in future rulemaking. For more information, we refer readers to the CY 2008 PFS proposed rule (72 FR 38139) and subsequent final rule with comment period (72 FR 66245).

As a follow-up to the CY 2008 PFS final rule with comment period, we contracted with Acumen to conduct a preliminary study of several options for revising the payment localities on a nationwide basis. The contractor's interim report was posted on the CMS Web site on August 21, 2008, and we requested comments from the public. The report entitled, ''Review of Alternative GPCI Payment Locality Structures,'' remains accessible from the CMS PFS Web page under the heading ''Interim Study of Alternative Payment Localities under the PFS.'' The report may also be accessed directly from the following link: *http://www.cms.hhs.gov/PhysicianFeeSched/10_Interim_Study.asp#TopOfPage.*

We note that the discussion of PFS payment localities and our preliminary study of alternative payment locality configurations in the CY 2011 PFS proposed rule was intended for informational purposes only. We are not making any proposals regarding the PFS locality configurations for CY 2012.

4. Report From the Institute of Medicine

At our request, the Institute of Medicine is conducting a study of the geographic adjustment factors in Medicare payment. It is a comprehensive empirical study of the geographic adjustment factors established under sections 1848(e) (GPCI) and 1886(d)(3)(E) (hospital wage index) of the Act. These adjustments are designed to ensure Medicare payment fees and rates reflect differences in input costs across geographic areas. The factors IOM is evaluating include the—

• Accuracy of the adjustment factors;

• Methodology used to determine the adjustment factors, and

• Sources of data and the degree to which such data are representative.

Within the context of the U.S. health care marketplace, the IOM is also evaluating and considering the—

• Effect of the adjustment factors on the level and distribution of the health care workforce and resources, including—

++ Recruitment and retention taking into account mobility between urban and rural areas;

++ Ability of hospitals and other facilities to maintain an adequate and skilled workforce; and

++ Patient access to providers and needed medical technologies;

• Effect of adjustment factors on population health and quality of care; and

• Effect of the adjustment factors on the ability of providers to furnish efficient, high value care.

The first report ''Geographic Adjustment in Medicare Payment, Phase I: Improving Accuracy'' is a ''Phase I report'' that was released June 1, 2011 and is available on the IOM Web site

http://www.iom.edu/Reports/2011/Geographic-Adjustment-in-Medicare-Payment-Phase-I–Improving-Accuracy.aspx. It evaluates the accuracy of geographic adjustment factors and the methodology and data used to calculate them. The IOM is conducting further study on GPCI payment issues, and a supplemental report is expected to be issued in the summer of 2011 to address those issues. In its final report, scheduled to be released in the spring of 2012, the IOM will consider the role of Medicare payments in addressing matters such as the distribution of the health care workforce, population health, and the ability of providers to produce high-value, high-quality health care.

The recommendations specifically related to the GPCI included in IOM'sfirst phase report are summarized below:

- Recommendation 2–1: The same labor market definition should be used for both the hospital wage index and the physician geographic adjustment factor. Metropolitan statistical areas and Statewide non-metropolitan statistical areas should serve as the basis for defining these labor markets.
- Recommendation 5–1: The IOM recommends constructing the geographic practice cost indexes with the full range of occupations employed in physicians' offices, each with a fixed national weight based on the hours of each occupation employed in physicians' offices nationwide.
- Recommendation 5–2. The committee recommends that the Centers for Medicare and Medicaid Services and the Bureau of Labor Statistics develop an agreement allowing the Bureau of Labor Statistics to analyze confidential data for the Centers for Medicare and Medicaid Services.
- Recommendation 5–3: The committee recommends that a new source of information be identified to obtain data on commercial office rent per square foot.

Because of the timeline related to the release of the PFS proposed rule, we did not have adequate time to fully evaluate these recommendations in the CY 2012 proposed rule. As previously discussed, the IOM will be releasing a supplemental report in the summer of 2011 that will address additional analysis related to the physician work GPCI. We will address the IOM recommendations once we are able to assess the IOM's full recommendations and have given our stakeholders an opportunity to evaluate them. Any changes to the GPCIs in response to the aforementioned IOM recommendations will be proposed through the rulemaking process to allow an opportunity for public notice comment before making revisions.

III. Medicare Telehealth Services for the Physician Fee Schedule

A. Billing and Payment for Telehealth Services

1. History

Prior to January 1, 1999, Medicare coverage for services delivered via a telecommunications system was limited to services that did not require a face-to-face encounter under the traditional model of medical care. Examples of these services included interpretation of an x-ray, or electrocardiogram, or electroencephalogram tracing, and cardiac pacemaker analysis.

Section 4206 of the BBA provided for coverage of, and payment for, consultation services delivered via a telecommunications system to Medicare beneficiaries residing in rural health professional shortage areas (HPSAs) as defined by the Public Health Service Act. Additionally, the BBA required that a Medicare practitioner (telepresenter) be with the patient at the time of a teleconsultation. Further, the BBA specified that payment for a teleconsultation had to be shared between the consulting practitioner and the referring practitioner and could not exceed the fee schedule payment which would have been made to the consultant for the service provided. The BBA prohibited payment for any telephone line charges or facility fees associated with the teleconsultation. We implemented this provision in the CY 1999 PFS final rule with comment period (63 FR 58814).

Effective October 1, 2001, section 223 of the Medicare, Medicaid and SCHIP Benefits Improvement Protection Act of 2000 (Pub. L. 106–554)(BIPA) added a new section 1834(m) to the Act which significantly expanded Medicare telehealth services. Section 1834(m)(4)(F)(i) of the Act defines Medicare telehealth services to include consultations, office visits, office psychiatry services, and any additional service specified by the Secretary, when delivered via a telecommunications system. We first implemented this provision in the CY 2002 PFS final rule with comment period (66 FR 55246). Section 1834(m)(4)(F)(ii) of the Act required the Secretary to establish a process that provides for annual updates to the list of Medicare telehealth services. We established this process in the CY 2003 PFS final rule with comment period (67 FR 79988).

As specified in regulations at § 410.78(b), we generally require that a telehealth service be furnished via an interactive telecommunications system. Under § 410.78(a)(3), an interactive telecommunications system is defined as multimedia communications equipment that includes, at a minimum, audio and video equipment permitting two-way, real time interactive communication between the patient and the practitioner at the distant site. Telephones, facsimile machines, and electronic mail systems do not meet the definition of an interactive telecommunications system. An interactive telecommunications system is generally required as a condition of payment; however, section 1834(m)(1) of the Act does allow the use of asynchronous ''store-and-forward'' technology in delivering these services when the originating site is a Federal telemedicine demonstration program in Alaska or Hawaii. As specified in regulations at § 410.78(a)(1), store and forward means the asynchronous transmission of medical information from an originating site to be reviewed at a later time by the practitioner at the distant site.

Medicare telehealth services may be provided to an eligible telehealth individual notwithstanding the fact that the individual practitioner providing the telehealth service is not at the same location as the beneficiary. An eligible telehealth individual means an individual enrolled under Part B who receives a telehealth service furnished at an originating site. As specified in BIPA, originating sites are limited under section 1834(m)(3)(C) of the Act to specified medical facilities located in specific geographic areas. The initial list of telehealth originating sites included the office of a practitioner, a critical access hospital (CAH), a rural health clinic (RHC), a federally qualified health center (FQHC) and a hospital (as defined in Section 1861(e)). More recently, section 149 of the Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. 110–275) (MIPPA) expanded the list of telehealth originating sites to include hospital-based renal dialysis centers, skilled nursing facilities (SNFs), and community mental health centers (CMHCs). In order to serve as a telehealth originating site, these sites must be located in an area designated as a rural health professional shortage area (HPSA), in a county that is not in a metropolitan statistical area (MSA), or must be an entity that participates in a Federal telemedicine demonstration project that has been approved by (or receives funding from) the Secretary of Health and Human Services as of

December 31, 2000. Finally, section 1834(m) of the Act does not require the eligible telehealth individual to be presented by a practitioner at the originating site.

2. Current Telehealth Billing and Payment Policies

As noted above, Medicare telehealth services can only be furnished to an eligible telehealth beneficiary in an originating site. An originating site is defined as one of the specified sites where an eligible telehealth individual is located at the time the service is being furnished via a telecommunications system. In general, originating sites must be located in a rural HPSA or in a county outside of an MSA. The originating sites authorized by the statute are as follows:

- Offices of a physician or practitioner
- Hospitals
- CAHs
- RHCs
- FQHCs
- Hospital-Based Or Critical Access Hospital-Based Renal Dialysis Centers (including Satellites)
- SNFs
- CMHCs

Currently approved Medicare telehealth services include the following:

- Initial inpatient consultations
- Follow-up inpatient consultations
- Office or other outpatient visits
- Individual psychotherapy
- Pharmacologic management
- Psychiatric diagnostic interview examination
- End-stage renal disease (ESRD) related services
- Individual and group medical nutrition therapy (MNT)
- Neurobehavioral status exam
- Individual and group health and behavior assessment and intervention (HBAI)
- Subsequent hospital care
- Subsequent nursing facility care
- Individual and group kidney disease education (KDE)
- Individual and group diabetes self-management training services (DSMT)

In general, the practitioner at the distant site may be any of the following, provided that the practitioner is licensed under State law to furnish the service being furnished via a telecommunications system:

- Physician;
- Physician assistant (PA);
- Nurse practitioner (NP);
- Clinical nurse specialist (CNS);
- Nurse-midwife;
- Clinical psychologist;
- Clinical social worker; or a
- Registered dietitian or nutrition professional.

Practitioners furnishing Medicare telehealth services are located at a distant site, and they submit claims for telehealth services to the Medicare contractors that process claims for the service area where their distant site is located. Section 1834(m)(2)(A) of the Act requires that a practitioner who furnishes a telehealth service to an eligible telehealth individual be paid an amount equal to the amount that the practitioner would have been paid if the service had been furnished without the use of a telecommunications system. Distant site practitioners must submit the appropriate HCPCS procedure code for a covered professional telehealth service, appended with the –GT (Via interactive audio and video telecommunications system) or –GQ (Via asynchronous telecommunications system) modifier. By reporting the –GT or –GQ modifier with a covered telehealth procedure code, the distant site practitioner certifies that the beneficiary was present at a telehealth originating site when the telehealth service was furnished. The usual Medicare deductible and coinsurance policies apply to the telehealth services reported by distant site practitioners.

Section 1834(m)(2)(B) of the Act provides for payment of a facility fee to the originating site. To be paid the originating site facility fee, the provider or supplier where the eligible telehealth individual is located must submit a claim with HCPCS code Q3014 (Telehealth originating site facility fee), and the provider or supplier is paid according to the applicable payment methodology for that facility or location. The usual Medicare deductible and coinsurance policies apply to HCPCS code Q3014. By submitting HCPCS code Q3014, the originating site authenticates that it is located in either a rural HPSA or non-MSA county or is an entity that participates in a Federal telemedicine demonstration project that has been approved by (or receives funding from) the Secretary of Health and Human Services as of December 31, 2000 as specified in section 1834(m)(4)(C)(i)(III) of the Act.

As previously described, certain professional services that are commonly furnished remotely using telecommunications technology, but that do not require the patient to be present in-person with the practitioner when they are furnished, are covered and paid in the same way as services delivered without the use of telecommunications technology when the practitioner is in-person at the medical facility furnishing care to the patient. Such services typically involve circumstances where a practitioner is able to visualize some aspect of the patient's condition without the patient being present and without the interposition of a third person's judgment. Visualization by the practitioner can be possible by means of x-rays, electrocardiogram or electroencephalogram tracings, tissue samples, etc. For example, the interpretation by a physician of an actual electrocardiogram or electroencephalogram tracing that has been transmitted via telephone (that is, electronically, rather than by means of a verbal description) is a covered physician's service. These remote services are not Medicare telehealth services as defined under section 1834(m) of the Act. Rather, these remote services that utilize telecommunications technology are considered physicians' services in the same way as services that are furnished in-person without the use of telecommunications technology; they are paid under the same conditions as in-person physicians' services (with no requirements regarding permissible originating sites), and should be reported in the same way (that is, without the –GT or –GQ modifier appended).

B. Requests for Adding Services to the List of Medicare Telehealth Services

As noted above, in the December 31, 2002 **Federal Register** (67 FR 79988), we established a process for adding services to or deleting services from the list of Medicare telehealth services. This process provides the public with an ongoing opportunity to submit requests for adding services. We assign any request to make additions to the list of Medicare telehealth services to one of the following categories:

- Category 1: Services that are similar to professional consultations, office visits, and office psychiatry services that are currently on the list of telehealth services. In reviewing these requests, we look for similarities between the requested and existing telehealth services for the roles of, and interactions among, the beneficiary, the physician (or other practitioner) at the distant site and, if necessary, the telepresenter. We also look for similarities in the telecommunications system used to deliver the proposed service, for example, the use of interactive audio and video equipment.
- Category 2: Services that are not similar to the current list of telehealth services. Our review of these requests includes an assessment of whether the use of a telecommunications system to deliver the service produces similar

diagnostic findings or therapeutic interventions as compared with the in-person delivery of the same service. Requestors should submit evidence showing that the use of a telecommunications system does not affect the diagnosis or treatment plan as compared to in-person delivery of the requested service.

Since establishing the process to add or remove services from the list of approved telehealth services, we have added the following to the list of Medicare telehealth services: individual and group HBAI services; psychiatric diagnostic interview examination; ESRD services with 2 to 3 visits per month and 4 or more visits per month (although we require at least 1 visit a month to be furnished in-person by a physician, CNS, NP, or PA in order to examine the vascular access site); individual and group MNT; neurobehavioral status exam; initial and follow-up inpatient telehealth consultations for beneficiaries in hospitals and skilled nursing facilities (SNFs); subsequent hospital care (with the limitation of one telehealth visit every 3 days); subsequent nursing facility care (with the limitation of one telehealth visit every 30 days); individual and group KDE; and individual and group DSMT services (with a minimum of 1 hour of in-person instruction to ensure effective injection training).

Requests to add services to the list of Medicare telehealth services must be submitted and received no later than December 31 of each calendar year to be considered for the next rulemaking cycle. For example, requests submitted before the end of CY 2011 will be considered for the CY 2013 proposed rule. Each request for adding a service to the list of Medicare telehealth services must include any supporting documentation the requester wishes us to consider as we review the request. Because we use the annual PFS rulemaking process as a vehicle for making changes to the list of Medicare telehealth services, requestors should be advised that any information submitted is subject to public disclosure for this purpose. For more information on submitting a request for an addition to the list of Medicare telehealth services, including where to mail these requests, we refer readers to the CMS Web site at *http://www.cms.gov/telehealth/*.

C. Submitted Requests for Addition to the List of Telehealth Services for CY 2012

We received requests in CY 2010 to add the following services as Medicare telehealth services effective for CY 2012: (1) Smoking cessation services; (2) critical care services; (3) domiciliary or rest home evaluation and management services; (4) genetic counseling services; (5) online evaluation and management services; (6) data collection services; and (7) audiology services. The following presents a discussion of these requests, including our proposals for additions to the CY 2012 telehealth list.

1. Smoking Cessation Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add smoking cessation services, reported by CPT codes 99406 (Smoking and tobacco use cessation counseling visit; intermediate, greater than 3 minutes up to 10 minutes) and 99407 (Smoking and tobacco use cessation counseling visit; intensive, greater than 10 minutes) to the list of approved telehealth services for CY 2012 on a category 1 basis.

Smoking Cessation services are defined as face-to-face behavior change interventions. We believe the interaction between a practitioner and a beneficiary receiving smoking cessation services is similar to the education, assessment, and counseling elements of individual KDE reported by HCPCS code G0420 (Face-to-face educational services related to the care of chronic kidney disease; individual, per session, per 1 hour), and individual MNT services, reported by HCPCS code G0270 (Medical nutrition therapy; reassessment and subsequent intervention(s) following second referral in the same year for change in diagnosis, medical condition or treatment regimen (including additional hours needed for renal disease), individual, face-to-face with the patient, each 15 minutes); CPT code 97802 (Medical nutrition therapy; initial assessment and intervention, individual, face-to-face with the patient, each 15 minutes); and CPT code 97803 (Medical nutrition therapy; re-assessment and intervention, individual, face-to-face with the patient, each 15 minutes), all services that are currently on the telehealth list.

Therefore, we are proposing to add CPT codes 99406 and 99407 to the list of telehealth services for CY 2012 on a category 1 basis. Additionally, we are proposing to add HCPCS codes G0436 (Smoking and tobacco cessation counseling visit for the asymptomatic patient; intermediate, greater than 3 minutes, up to 10 minutes) and G0437 (Smoking and tobacco cessation counseling visit for the asymptomatic patient; intensive, greater than 10 minutes) to the list of telehealth services for CY 2012 since these related services are similar to the codes for which we received formal public requests.

Consistent with this proposal, we are also proposing to revise our regulations at § 410.78(b) and § 414.65(a)(1) to include these smoking cessation services as Medicare telehealth services.

2. Critical Care Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add critical care service CPT codes 99291 (Critical care, evaluation and management of the critically ill or critically injured patient; first 30–74 minutes) and 99292 (Critical care, evaluation and management of the critically ill or critically injured patient; each additional 30 minutes) to the list of approved telehealth services. We previously received this request for the CY 2009 and CY 2010 PFS rulemaking cycles (73 FR 38517, 73 FR 69744–5, 74 FR 33548, and 74 FR 61764) and did not add the codes on a category 1 basis due to the acute nature of the typical patient. We continue to believe that patients requiring critical care services are more acutely ill than those patients typically receiving any service currently on the list of telehealth services. Therefore, we cannot consider critical care services on a category 1 basis.

In the CY 2009 PFS proposed rule (73 FR 38517), we explained that we had no evidence suggesting that the use of telehealth could be a reasonable surrogate for the in-person delivery of critical care services; therefore, we would not add the services on a category 2 basis. Requestors submitted new studies for CY 2012, but none demonstrated that comparable outcomes to a face-to-face encounter can be achieved using telehealth to deliver these services. The studies we received primarily addressed other issues relating to telehealth services. Some studies addressed the cost benefits and cost savings of telehealth services. Others focused on the positive outcomes of telehealth treatment when compared with no treatment at all. One submitted study addressed the equivalency of patient outcomes for telehealth services delivered to patients in emergency rooms, but the study's authors specifically restricted their population to patients whose complaints were not considered to be genuine emergencies. Given that limitation, it seems unlikely that any of these patients would have required critical care services as defined by CPT codes 99291 and 99292.

We note that consultations are included on the list of Medicare telehealth services and may be billed by practitioners furnishing services to critically ill patients. These services are described by the following HCPCS codes: G0425 (Initial inpatient

telehealth consultation, typically 30 minutes communicating with the patient via telehealth), G0426 (Initial inpatient telehealth consultation, typically 50 minutes communicating with the patient via telehealth), G0427 (Initial inpatient telehealth consultation, typically 70 minutes or more communicating with the patient via telehealth), G0406 (Follow-up inpatient telehealth consultation, limited, physicians typically spend 15 minutes communicating with the patient via telehealth), G0407 (Follow-up inpatient telehealth consultation, intermediate, physicians typically spend 25 minutes communicating with the patient via telehealth), and G0408 (Follow-up inpatient telehealth consultation, complex, physicians typically spend 35 minutes or more communicating with the patient via telehealth). Critical care services, as reported by the applicable CPT codes and described in the introductory language in the CPT book, consist of direct delivery by a physician of medical care for a critically ill or injured patient, including high complexity decision-making to assess, manipulate, and support vital system functions. Critical care requires interpretation of multiple physiologic parameters and/or application of advanced technologies, including temporary pacing, ventilation management, and vascular access services. The payment rates under the PFS reflect this full scope of physician work. To add the critical services to the telehealth list would require the physician to be able to deliver this full scope of services via telehealth. Based on the code descriptions, we have previously believed that it is not possible to deliver the full range of critical care services without a physical physician presence with the patient.

We note that there are existing Category III CPT codes (temporary codes for emerging services that allow data collection) for remote real-time interactive video conferenced critical care services that, consistent with our treatment of other Category III CPT codes, are not nationally priced under the PFS. The fact that the CPT Editorial Panel created these additional Category III CPT codes suggests to us that these video-conferenced critical care services are not the same as the in-person critical care services requested for addition to the telehealth list.

Because we did not find evidence that use of a telecommunications system to deliver critical care services produces similar diagnostic or therapeutic outcomes as compared with the face-to-face deliver of the services, we are not proposing to add critical care services (as described by CPT codes 99291 and 99292) to the list of approved telehealth services. We reiterate that our decision not to propose to add critical care services to the list of approved telehealth services does not preclude physicians from furnishing telehealth consultations to critically ill patients using the consultation codes that are on the list of Medicare telehealth services.

3. Domiciliary or Rest Home Evaluation and Management Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add the following domiciliary or rest home evaluation and management CPT codes to the telehealth list for CY 2012:

- 99334 (Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A problem focused interval history; a problem focused examination; or straightforward medical decision making. Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are self-limited or minor. Physicians typically spend 15 minutes with the patient and/or family or caregiver).
- 99335 (Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: An expanded problem focused interval history; An expanded problem focused examination; Medical decision making of low complexity. Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of low to moderate severity. Physicians typically spend 25 minutes with the patient and/or family or caregiver).
- 99336 (Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: a detailed interval history; a detailed examination; medical decision making of moderate complexity. Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 40 minutes with the patient and/or family or caregiver).
- 99337 (Domiciliary or rest home visit for the evaluation and management of an established patient, which requires at least 2 of these 3 key components: A comprehensive interval history; a comprehensive examination; medical decision making of moderate to high complexity. Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. The patient may be unstable or may have developed a significant new problem requiring immediate physician attention. Physicians typically spend 60 minutes with the patient and/or family or caregiver).

A domiciliary or rest home is not permitted under current statute to serve as an originating site for Medicare telehealth services. Therefore, we are not proposing to add domiciliary or rest home evaluation and management services to the list of Medicare telehealth services for CY 2012.

4. Genetic Counseling Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add CPT code 96040 (Medical genetics and genetic counseling services, each 30 minutes face-to-face with patient/family) to the telehealth list for CY 2012. We note that CPT guidance regarding reporting genetic counseling and education furnished by a physician to an individual directs physicians to evaluation and management (E/M) CPT codes and that services described by CPT code 96040 are provided by trained genetic counselors. Physicians and nonphysician practitioners who may independently bill Medicare for their service and who are counseling individuals would generally report office or other outpatient evaluation and management (E/M) CPT codes for office visits that involve significant counseling, including genetic counseling, and these office visit CPT codes are already on the list of telehealth services. CPT code 96040 would only be reported by genetic counselors for genetic counseling services. These practitioners cannot bill Medicare directly for their professional services and they are also not on the list of practitioners who can furnish telehealth services (specified in section 1834(m)(4)(E) of the Act). As such, we do not believe that it would be necessary or appropriate to add CPT code 96040 to the list of Medicare telehealth services. Therefore, we are not proposing to add genetic counseling

services to the list of Medicare telehealth services for CY 2012.

5. Online Evaluation and Management Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add CPT code 99444 (Online evaluation and management service provided by a physician to an established patient, guardian, or health care provider not originating from a related E/M service provided within the previous 7 days, using the Internet or similar electronic communications network) to the list of Medicare telehealth services.

As we explained in the CY 2008 PFS final rule with comment period (72 FR 66371), we assigned a status indicator of ''N'' (Non-covered service) to these services because: (1) These services are non-face-to-face; and (2) the code descriptor includes language that recognizes the provision of services to parties other than the beneficiary and for whom Medicare does not provide coverage (for example, a guardian).

According to section 1834(m)(2)(A) of the Act, Medicare is required to pay for telehealth services at an amount equal to the amount that a practitioner would have been paid had such service been furnished without the use of a telecommunications system. As such, we do not believe it would be appropriate to make payment for services furnished via telehealth when those services would not otherwise be covered under Medicare. Because CPT code 99444 is currently noncovered, we are not proposing to add online evaluation and management services to the list of Medicare Telehealth Services for CY 2012.

6. Data Collection Services

The American Telemedicine Association and the Marshfield Clinic submitted requests to add CPT codes 99090 (Analysis of clinical data stored in computers (e.g., ECGs, blood pressures, hematologic data)) and 99091(Collection and interpretation of physiologic data (e.g., ECG, blood pressure, glucose monitoring) digitally stored and/or transmitted by the patient and/or caregiver to the physician or other qualified health care professional, requiring a minimum of 30 minutes of time) to the list of Medicare telehealth services.

As we explained in the CY 2002 PFS final rule with comment period (66 FR 55309), we assigned a status indicator of ''B'' (Payment always bundled into payment for other services not specified) to these services because the associated work is considered part of the pre- and post-service work of an E/M service. We note that many E/M codes are on the list of Medicare telehealth services.

According to section 1834(m)(2)(A) of the Act, Medicare is required to pay for telehealth services an amount equal to the amount that a practitioner would have been paid had such service been furnished without the use of a telecommunications system. Similar to the point noted above for online E/M services, we do not believe it would be appropriate to make separate payment for services furnished via telehealth when Medicare would not otherwise make separate payment for the services. Moreover, we believe the payment for these data collection services should be bundled into the payment for E/M services, many of which are already on the Medicare telehealth list. Because CPT codes 99090 and 99091 are currently bundled, we are not proposing to add data collection services to the list of Medicare telehealth services for CY 2012.

7. Audiology Services

The American Academy of Audiology submitted a request that CMS add services that audiologists provide for balance disorders and hearing loss to the list of Medicare telehealth services. The request did not include specific HCPCS codes. Nevertheless, it is not within our administrative authority to pay audiologists for services furnished via telehealth. The statute authorizes the Secretary to pay for telehealth services only when furnished by a physician or a practitioner as physician or practitioner are defined in sections 1834(m)(4)(D) and (E) of the Act. Therefore, we are not proposing to add services that are primarily provided by audiologists to the list of Medicare telehealth services for CY2012.

D. The Process for Adding HCPCS Codes as Medicare Telehealth Services

Along with its submission of codes for consideration as additions to the Medicare telehealth list for CY 2012, the American Telemedicine Association (ATA) also requested that CMS consider revising the annual process for adding to or deleting services from the list of telehealth services. The existing process, adopted in the CY 2003 PFS rulemaking cycle (67 FR 43862 through 43863 and 67 FR 79988 through 79989), is described in section III.B. of this proposed rule. The following discussion includes a summary of recent requests by the ATA and other stakeholders for changes to the established process for adding services to the telehealth list, an assessment of our historical experience with the current process including the request review criteria, and our proposed refinement to the process for adding services to the telehealth list that would be used in our evaluation of candidate telehealth services beginning for CY 2013.

The ATA asked CMS to consider two specific changes to the process, including:

- Broadening the factors for consideration to include shortages of health professionals to provide in-person services, speed of access to in-person services, and other barriers to care for beneficiaries; and
- Equalizing the standard for adding telehealth services with the standard for deleting telehealth services by adopting a standard that allows services that are safe, effective or medically beneficial when furnished via telehealth to be added to the list of Medicare telehealth services. Similarly, we have received recommendations that CMS place all codes payable under the PFS on the telehealth list and allow physicians and practitioners to make a clinical determination in each case about whether a medically reasonable and necessary service could be appropriately furnished to a beneficiary through telehealth. Under this scenario, stakeholders have argued that CMS would only remove services from the telehealth list under its existing policy for service removal; specifically, that a decision to remove a service from the list of telehealth services would be made using evidence-based, peer-reviewed data which indicate that a specific service is not safe, effective, or medically beneficial when furnished via telehealth (67 FR 79988).

While we share the interests of stakeholders in reducing barriers to health care access faced by some beneficiaries, given that section 1834(m)(2)(F)(ii) of the Act requires the Secretary to establish a process that provides, on an annual basis, for the addition or deletion of telehealth services (and HCPCS codes), as appropriate, we do not believe it would be appropriate to add all services for which payment is made under the PFS to the telehealth list without explicit consideration as to whether the candidate service could be effectively furnished through telehealth. For example, addition of all codes to the telehealth list could result in a number of services on the list that could never be furnished by a physician or nonphysician practitioner who was not physically present with the beneficiary, such as major surgical procedures and interventional radiology services. Furthermore, we do not believe it would

be appropriate to add services to the telehealth list without explicit consideration as to whether or not the nature of the service described by a candidate code allows the service to be furnished as effectively through telehealth as in a face-to-face encounter. Section 1834(m)(2)(A) of the Act requires that the distant site physician or practitioner furnishing the telehealth service must be paid an amount equal to the amount the physician or practitioner would have been paid under the PFS has such service been furnished without the use of a telecommunications system. Therefore, we believe that candidate telehealth services must also be covered when furnished in-person; and that any service that would only be furnished through a telecommunications system would be a new service and, therefore, not a candidate for addition to the telehealth list. In view of these considerations, we will continue to consider candidate additions to the telehealth list on a HCPCS code-specific basis based on requests from the public and our own considerations.

We also believe it continues to be most appropriate to consider candidate services for the telehealth list based on the two mutually exclusive established categories into which all services fall—specifically, services that are similar to services currently on the telehealth list (category 1) and services that are not similar to current telehealth services (category 2). Under our existing policy, we add services to the telehealth list on a category 1 basis when we determine that they are similar to services on the existing telehealth list with respect to the roles of, and interactions among, the beneficiary, physician (or other practitioner) at the distant site and, if necessary, the telepresenter (67 FR 43862). Since CY 2003, we have added 35 services to the telehealth list on a category 1 basis based on public requests and our own identification of such services. We believe it is efficient and valuable to maintain the existing policy that allows us to consider requests for additions to the telehealth list on a category 1 basis and propose to add them to the telehealth list if the existing criteria are met. This procedure expedites our ability to identify codes for the telehealth list that resemble those services already on this list, streamlining our review process and the public request and information-submission process for services that fall into this category. Therefore, we believe that any changes to the process for adding codes to the telehealth list should be considered with respect to category 2 additions, rather than category 1 additions.

Our existing criteria for consideration of codes that would be category 2 additions, specifically those candidate telehealth services that are not similar to any current telehealth services, include an assessment of whether the use of a telecommunications system to deliver the services produces similar diagnostic findings or therapeutic interventions as compared with a face-to-face in-person delivery of the same service (67 FR 43682). In other words, the discrete outcome of the interaction between the clinician and patient facilitated by a telecommunications system should correlate well with the discrete outcome of the clinician-patient interaction when performed face to-face. In the CY 2003 PFS proposed rule (67 FR 43862), we explained that requestors for category 2 additions to the telehealth list should submit evidence that the use of a telecommunications system does not affect the diagnosis or treatment plan as compared to in-person delivery of the service. We indicated that if evidence shows that the candidate telehealth service is equivalent when furnished in person or through telehealth, we would add it to the list of telehealth services. We refer to this criterion in further discussion in this proposed rule as the ''comparability standard.'' We stated in the CY 2003 PFS proposed rule (67 FR 43862) that if we determine that the use of a telecommunications system changes the nature or outcome of the service, for example, as compared with the in-person delivery of the service, we would review the telehealth service addition request as a request for a new service, rather than a different method of delivering an existing Medicare service. For coverage and payment of most services, Medicare requires that a new service must: (1) Fall into a Medicare benefit category; (2) be reasonable and necessary in accordance with section 1862(a)(1)(A) of the Act; and (3) not be explicitly excluded from coverage. In such a case, the requestor would have the option of applying for a national coverage determination for the new service.

We believe it is most appropriate to address the ATA and other stakeholder requests to broaden the current factors we consider when deciding whether to add candidate services to the telehealth list—to include factors such as the effects of barriers to in-person care and the safety, effectiveness, or medical benefit of the service furnished through telehealth, as potential refinements to our category 2 criteria. We initially established these category 2 criteria in the interest of ensuring that the candidate services were safe, effective, medically beneficial, and still accurately described by the corresponding codes when delivered via telehealth, while also ensuring that beneficiaries furnished telehealth services receive high quality care that is comparable to in-person care. We believed that the demonstration of comparable clinical outcomes (diagnostic findings and/or therapeutic interventions) from telehealth and in-person services would prove to be the best indicator that all of these conditions were met. While we continue to believe that safety, effectiveness, and medical benefit, as well as accurate description of the candidate telehealth services by the CPT or HCPCS codes, are necessary conditions for adding codes to the list of Medicare telehealth services, our recent experience in reviewing public requests for telehealth list additions and our discussions with stakeholders regarding contemporary medical practice and potential barriers to care, have led us to conclude that the comparability standard for category 2 requests should be modified.

In our annual evaluation of category 2 requests since we adopted the process for evaluating additions to the telehealth list almost 10 years ago, we have consistently observed that requestors have difficulty demonstrating that clinical outcomes of a service delivered via telehealth are comparable to the outcomes of the in-person service. The medical literature frequently does not include studies of the outcomes of many types of in-person services that allow for comparison to the outcomes demonstrated for candidate telehealth services. Furthermore, we know that in some cases the alternative to a telehealth service may be no service rather than an in-person service. The comparability standard may not sufficiently allow for the opportunity to add candidate services to the telehealth list that may be safe, effective, and medically beneficial when delivered via telehealth, especially to beneficiaries who experience significant barriers to in-person care. While we continue to believe that beneficiaries receiving services through telehealth are deserving of high quality health care and that in-person care may be very important and potentially preferable for some services when in-person care is possible, we are concerned that we have not added any services to the telehealth list on a category 2 basis as a result of our reviews. While some candidate services appear to have the potential for clinical benefit when furnished through

telehealth, the requests have not met the comparability standard.

Therefore, we are proposing to refine our category 2 review criteria for adding codes to the list of Medicare telehealth services beginning in CY 2013 by modifying the current requirement to demonstrate similar diagnostic findings or therapeutic interventions with respect to a candidate service delivered through telehealth compared to in-person delivery of the service (the comparability standard). We propose to establish a revised standard of demonstrated clinical benefit (the clinical benefit standard) when the service is furnished via telehealth. To support our review using this revised standard, we would ask requestors to specify in their request how the candidate telehealth service is still accurately described by the corresponding HCPCS or CPT code when delivered via telehealth as opposed to in-person.

We are proposing that our refined criteria for category 2 additions would be as follows:

• Category 2: Services that are not similar to the current list of telehealth services. Our review of these requests would include an assessment of whether the service is accurately described by the corresponding code when delivered via telehealth and whether the use of a telecommunications system to deliver the service produces demonstrated clinical benefit to the patient. Requestors should submit evidence indicating that the use of a telecommunications system in delivering the candidate telehealth service produces clinical benefit to the patient.

The evidence submitted should include both a description of relevant clinical studies that demonstrate the service furnished by telehealth to a Medicare beneficiary improves the diagnosis or treatment of an illness or injury or improves the functioning of a malformed body part, including dates and findings and a list and copies of published peer-reviewed articles relevant to the service when furnished via telehealth. Some examples of clinical benefit include the following:

• Ability to diagnose a medical condition in a patient population without access to clinically appropriate in-person diagnostic services.

• Treatment option for a patient population without access to clinically appropriate in-person treatment options.

• Reduced rate of complications.

• Decreased rate of subsequent diagnostic or therapeutic interventions (for example, due to reduced rate of recurrence of the disease process).

• Decreased number of future hospitalizations or physician visits.

• More rapid beneficial resolution of the disease process treatment.

• Decreased pain, bleeding, or other quantifiable symptom.

• Reduced recovery time.

We believe the adoption of this clinical benefit standard for our review of candidate telehealth services on a category 2 basis is responsive to the requests of stakeholders that we broaden the factors taken into consideration to include barriers to care for beneficiaries. It allows us to consider the demonstrated clinical benefit of telehealth services for beneficiaries who might otherwise have no access to certain diagnostic or treatment services. Furthermore, we believe the focus on demonstrated clinical benefit in our review of category 2 requests for addition to the telehealth lists is equivalent to our standard for deleting services from the telehealth list that rests upon evidence that a service is not safe, not effective, or not medically beneficial. Finally, we believe the proposed clinical benefit standard for our review of candidate telehealth services on a category 2 basis is fully consistent with our responsibility to ensure that telehealth services are safe, effective, medically beneficial, and still accurately described by the corresponding codes that would be used for the services when delivered in-person.

We are soliciting public comments on this proposed refinement to our established process for adding codes to the telehealth list, including the information that requestors should furnish to facilitate our full review of requests in preparation for the next calendar year's rulemaking cycle. We will respond to comments on our proposal and finalize any changes to the process for addition codes to the telehealth list in the CY 2012 PFS final rule with comment period. We would use the revised category 2 review criteria to review requested additions to the telehealth list submitted during CY 2011 and under consideration for CY 2013.

E. Telehealth Consultations in Emergency Departments

We have recently been asked to clarify instructions regarding appropriate reporting of telehealth services that, prior to our policy change regarding consultation codes, would have been reported as consultations furnished to patients in an emergency department. When we eliminated the use of all consultation codes beginning in CY 2010, we instructed practitioners, when furnishing a service that would have been reported as a consultation service, to report the E/M code that is most appropriate to the particular service for all office/outpatient or inpatient visits. Since section 1834(m) of the Act includes ''professional consultations'' (including the initial inpatient consultation codes ''as subsequently modified by the Secretary'') in the definition of telehealth services, we established several HCPCS codes to describe the telehealth delivery of initial inpatient consultations. For inpatient hospital and skilled nursing facility care telehealth services, we instructed practitioners to use the inpatient telehealth consultation G-codes listed in table 14 to report those telehealth services (74 FR 61763, 61774). However, we neglected to account for the fact that E/M emergency department visit codes (99281–99285) are not on the telehealth list. As such, there has not been a clear means for practitioners to bill a telehealth consultation furnished in an emergency department. In order to address this issue, we are proposing to change the code descriptors for the inpatient telehealth consultation G-codes to include emergency department telehealth consultations effective January 1, 2012. However, we are seeking public comment regarding other options, including creating G-codes specific to these services when furnished to patients in the emergency department.

TABLE 14—INPATIENT TELEHEALTH CONSULTATION G–CODES

HCPCS Code	CY 2011 Long code descriptor
G0425	Initial inpatient telehealth consultation, typically 30 minutes communicating with the patient via telehealth.
G0426	Initial inpatient telehealth consultation, typically 50 minutes communicating with the patient via telehealth.
G0427	Initial inpatient telehealth consultation, typically 70 minutes or more communicating with the patient via telehealth.
G0406	Follow-up inpatient telehealth consultation, limited, physicians typically spend 15 minutes communicating with the patient via telehealth.

TABLE 14—INPATIENT TELEHEALTH CONSULTATION G–CODES—Continued

HCPCS Code	CY 2011 Long code descriptor
G0407	Follow-up inpatient telehealth consultation, intermediate, physicians typically spend 25 minutes communicating with the patient via telehealth.
G0408	Follow-up inpatient telehealth consultation, complex, physicians typically spend 35 minutes or more communicating with the patient via telehealth.

IV. Other Provisions of the Proposed Regulation

A. Part B Drug Payment: Average Sales Price (ASP) Issues

Section 1847A of the Act requires use of the average sales price (ASP) payment methodology for payment for drugs and biologicals described in section 1842(o)(1)(C) of the Act furnished on or after January 1, 2005. The ASP methodology applies to most drugs furnished incident to a physician's service, drugs furnished under the DME benefit, certain oral anti-cancer drugs, and oral immunosuppressive drugs.

1. Widely Available Market Price (WAMP)/Average Manufacturer Price (AMP)

Section 1847A(d)(1) of the Act states that ''The Inspector General of HHS shall conduct studies, which may include surveys, to determine the widely available market prices (WAMP) of drugs and biologicals to which this section applies, as the Inspector General, in consultation with the Secretary, determines to be appropriate.'' Section 1847A (d)(2) of the Act states, ''Based upon such studies and other data for drugs and biologicals, the Inspector General shall compare the ASP under this section for drugs and biologicals with—

- The widely available market price (WAMP) for these drugs and biologicals, (if any); and
- The average manufacturer price (AMP) (as determined under section 1927(k) (1) of the Act) for such drugs and biologicals.''

Section 1847A(d)(3)(A) of the Act states that, ''The Secretary may disregard the ASP for a drug or biological that exceeds the WAMP or the AMP for such drug or biological by the applicable threshold percentage (as defined in subparagraph (B)).'' Section 1847A(d)(3)(C) of the Act states that if the Inspector General (OIG) finds that the ASP for a drug or biological is found to have exceeded the WAMP or AMP by this threshold percentage, the OIG ''shall inform the Secretary (at such times as the Secretary may specify to carry out this subparagraph) and the Secretary shall, effective as of the next quarter, substitute for the amount of payment otherwise determined under this section for such drug or biological, the lesser of—

- the widely available market price for the drug or biological (if any); or
- 103 percent of the average manufacturer price as determined under section 1927(k)(1) of the Act for the drug or biological.''

The applicable threshold percentage is specified in section 1847A(d)(3)(B)(i) of the Act as 5 percent for CY 2005. For CY 2006 and subsequent years, section 1847A(d)(3)(B)(ii) of the Act establishes that the applicable threshold percentage is ''the percentage applied under this subparagraph subject to such adjustment as the Secretary may specify for the WAMP or the AMP, or both.'' In the CY 2006 (70 FR 70222), CY 2007 (71 FR69680), CY 2008 (72 FR 66258), CY 2009 (73 FR 69752), and CY 2010 (74 FR 61904) PFS final rules with comment period, we specified an applicable threshold percentage of 5 percent for both the WAMP and AMP. We based this decision on the fact that data was too limited to support an adjustment to the current applicable threshold percentage.

For CY 2011, we proposed to specify two separate adjustments to the applicable threshold percentages. When making comparisons to the WAMP, we proposed the applicable threshold percentage to remain at 5 percent. The applicable threshold percentage that we proposed for the AMP is addressed below in this section of the preamble. The latest WAMP comparison was published in 2008, and the OIG is continuing to perform studies comparing ASP to WAMP. Based on available OIG reports that have been published comparing WAMP to ASP, we did not have sufficient information at the time to determine that the 5 percent threshold percentage is inappropriate and should be changed. As a result, we believed that continuing the 5 percent applicable threshold percentage for the WAMP was appropriate for CY 2011. Therefore, we proposed to revise § 414.904(d)(3) to specify the 5 percent WAMP threshold for CY 2011. After soliciting and reviewing comments, we finalized our proposal to continue the 5 percent WAMP threshold for CY 2011 (75 FR 73469).

For CY 2012, we again propose to specify a separate adjustment to the applicable threshold percentage for WAMP comparisons. When making comparisons to the WAMP, we propose the applicable threshold percentage to remain at 5 percent. We still do not have sufficient information to determine that the 5 percent threshold percentage is inappropriate and, as a result, we believe that continuing the 5 percent applicable threshold percentage for the WAMP is appropriate for CY 2012. As we noted in the CY 2011 PFS final rule with comment period (75 FR 73470), we understand that there are complicated operational issues associated with this policy. We continue to proceed cautiously in this area. We remain committed to providing stakeholders, including providers and manufacturers of drugs impacted by potential price substitutions with adequate notice of our intentions regarding such, including the opportunity to provide input with regard to the processes for substituting the WAMP for the ASP.

2. AMP Threshold and Price Substitutions

As mentioned previously in section V.A.1. of this proposed rule, when making comparisons of ASP to AMP, the applicable threshold percentage for CY 2005 was specified in statute as 5 percent. Section 1847A(d)(3) of the Act allows the Secretary to specify adjustments to this threshold percentage for years subsequent to 2005. For CY 2006 (70 FR 70222), CY 2007 (71 FR 69680), CY 2008 (72 FR 66258), CY 2009 (73 FR 69752), and CY 2010 (74 FR 61904), the Secretary made no adjustments to the threshold percentage; it remained at 5 percent.

For CY 2011, we proposed, with respect to AMP substitution, to apply the applicable percentage subject to certain adjustments such that substitution of AMP for ASP will only be made when the ASP exceeds the AMP by 5 percent in two consecutive quarters immediately prior to the current pricing quarter, or three of the previous four quarters immediately prior to the current quarter. We further proposed to apply the applicable AMP

threshold percentage only for those situations where AMP and ASP comparisons are based on the same set of National Drug Codes (NDCs) for a billing code (that is, ''complete'' AMP data).

Furthermore, we proposed a price substitution policy to substitute 103 percent of AMP for 106 percent of ASP for both multiple and single source drugs and biologicals as defined respectively at section 1847(A)(c)(6)(C) and (D) of the Act. Specifically, we proposed that this substitution:

- Would occur when the applicable threshold percentage has been met for two consecutive quarters immediately prior to the current pricing quarter, or three of the previous four quarters immediately prior to the current quarter.
- Would permit for a final comparison between the OIG's volume-weighted 103 percent of AMP for a billing code (calculated from the prior quarter's data) and the billing code's volume weighted 106 percent ASP (as calculated by CMS for the current quarter) to avoid a situation in which the AMP-based price substitution would exceed that quarter's ASP; and
- That the duration of the price substitution would last for only one quarter.

We also sought comment on other issues related to the comparison between ASP and AMP, such as the following:

- Any effect of definitional differences between AMP and ASP, particularly in light of the definition of AMP as revised by section 2503 of the Affordable Care Act.
- The impact of any differences in AMP and ASP reporting by manufacturers on price substitution comparisons.
- Whether and/or how general differences and similarities between AMP and manufacturer's ASP would affect comparisons between these two.

In the CY 2011 PFS final rule with comment, we did not finalize our proposed adjustments to the 5 percent AMP threshold or our price substitution policy because of legislative changes, regulatory changes, and litigation that affected this issue. Specifically—

- A preliminary injunction issued by the United States District Court for the District of Columbia in *National Association of Chain Drug Stores et al.* v. *Health and Human Services*, Civil Action No. 1:07–cv–02017 (RCL) was still in effect;
- We were continuing to expect to develop regulations to implement section 2503 of the Affordable Care Act, which amended the definition of AMP, and section 202 of the Federal Aviation Administration Air Transportation Modernization and Safety Improvement Act (Pub. L. 111–226) as enacted on August 10, 2010, which further amended section 1927(k) of the Act;
- We proposed to withdraw certain provisions of the AMP final rule published on July 17, 2007 (75 FR 54073).

As a result, we finalized the portion of our proposal that sets the AMP threshold at 5 percent for CY 2011 and revised the regulation text accordingly (75 FR 73470).

The preliminary injunction was vacated by the United States District Court for the District of Columbia on December 15, 2010. Currently, we continue to expect to develop regulations to implement section 2503 of the Affordable Care Act and section 202 of the Federal Aviation Administration Air Transportation Modernization and Safety Improvement Act. However, these statutory amendments became effective on October 1, 2010 without regard to whether or not final regulations to carry out such amendments have been promulgated by such date. Moreover, our Medicaid final rule published on November 15, 2010 finalized regulations requiring manufacturers to calculate AMP in accordance with section 1927(k)(1) of the Act (75 FR 69591). Since statutory and regulatory provisions exist and are currently utilized by manufacturers for the calculation and submission of AMP data, we are revisiting the AMP threshold and price substitution issues.

a. AMP Threshold

Section 1847A(d)(3) of the Act allows the Secretary to specify adjustments to this threshold percentage for years subsequent to 2005, and to specify the timing for any price substitution. Therefore, for CY 2012, with respect to AMP substitution, we propose to apply the applicable percentage subject to certain adjustments. Specifically, a price substitution of AMP for ASP will be made only when the ASP exceeds the AMP by 5 percent in two consecutive quarters immediately prior to the current pricing quarter, or three of the previous four quarters immediately prior to the current quarter.

In general, the ASP methodology reflects average market prices for Part B drugs for a quarter. The ASP is based on the average sales price to all purchasers for a calendar quarter; the AMP, in turn, represents the average price paid by wholesalers for drugs distributed to retail community pharmacies and by retail community pharmacies that purchase drugs directly from the manufacturers. Accordingly, while the ASP payment amount for a billing code may exceed its AMP for that billing code for any given quarter, this may reflect only a temporary fluctuation in market prices that would be corrected in a subsequent quarter. We believe this fluctuation is demonstrated by how few billing codes exceed the applicable threshold percentage over multiple quarters. For example, in the Inspector General's report ''Comparison of Average Sales Prices and Average Manufacturer Prices: An Overview of 2009,'' only 11 of 493 examined billing codes exceeded the applicable threshold percentage over multiple quarters (OEI–03–10–00380). We are concerned that substitutions based on a single quarter's ASP to AMP comparison will not appropriately or accurately account for temporary fluctuations. We believe that applying this threshold percentage adjusted to reflect data from multiple quarters will account for continuing differences between ASP and AMP, and allow us to more accurately identify those drugs that consistently trigger the substitution threshold and thus warrant price substitution.

We further propose to apply the applicable AMP threshold percentage only for those situations where AMP and ASP comparisons are based on the same set of NDCs for a billing code (that is, ''complete'' AMP data). Prior to 2008, the OIG calculated a volume-weighted AMP and made ASP and AMP comparisons only for billing codes with such ''complete'' AMP data. In such comparisons, a volume-weighted AMP for a billing code was calculated when NDC-level AMP data was available for the same NDCs used by us to calculate the volume-weighted ASP. Beginning in the first quarter of 2008, the OIG also began to make ASP and AMP comparisons based on ''partial'' AMP data (that is, AMP data for some, but not all, NDCs in a billing code). For these comparisons, the volume-weighted AMP for a billing code is calculated even when only such limited AMP data is available. That is, the volume-weighted AMP calculated by the Inspector General is based on fewer NDCs than the volume-weighted ASP calculated by CMS. Moreover, volume-weighted ASPs are not adjusted by the Inspector General to reflect the fewer number of NDCs in the volume-weighted AMP.

Because the OIG's partial AMP data comparison did not reflect all the NDCs used in our volume-weighted ASP calculations, we discussed our concern about using the volume-weighted AMP in the CY 2011 PFS proposed rule. We believed that such AMP data may not

adequately account for market-related drug price changes and may lead to the substitution of incomplete and inaccurate volume-weighted prices. Payment amount reductions that result from potentially inaccurate substitutions may impact physician and beneficiary access to drugs. Therefore, consistent with our authority as set forth in section 1847A(d)(1) and (3) of the Act, we proposed in the CY 2011 PFS proposed rule that the substitution of 103 percent of AMP for 106 percent of ASP should be limited to only those drugs with ASP and AMP comparisons based on the same set of NDCs.

In response to our CY 2011 proposed rule, the OIG changed its methodology for ''partial'' AMP data comparisons beginning with its report titled ''Comparison of First-Quarter 2010 Average Sales Prices and Average Manufacturer Prices: Impact on Medicare Reimbursement for Third Quarter 2010.'' Specifically, in addition to calculating a volume-weighted AMP based on ''partial'' data and identifying billing codes that exceeded the price substitution threshold, the OIG began to replace each missing NDC-level AMP with corresponding NDC-level ASP data. The OIG then calculated a volume-weighted AMP for the billing code. If the volume-weighted AMP continued to exceed the price substitution threshold, the report attributed this to an actual difference between ASPs and AMPs in the marketplace (OEI–03–10–00440).

We appreciate that the Inspector General has acknowledged the importance of protecting beneficiary and physician access in its methodology change. However, section 1847(A)(d)(2)(B) of the Act specifically indicates that the comparison be made to AMP as determined under section 1927(k)(1) of the Act. Moreover, we continue to be concerned that comparisons based on partial AMP data may not adequately account for market-related drug price changes and may lead to the substitution of incomplete and inaccurate volume-weighted prices. Therefore, for CY 2012, we propose to apply the applicable AMP threshold percentage only for those situations where AMP and ASP comparisons are based on the same set of NDCs for a billing code (that is, ''complete'' AMP data). Furthermore, we are proposing to revise § 414.904(d)(3) to reflect corresponding regulatory text changes, and we welcome comments on all aspects of this proposal.

b. AMP Price Substitution

(1) Inspector General Studies

Section 1847A(d) of the Act requires the Inspector General to conduct studies of the widely available market price for drugs and biologicals to which section 1847A of the Act applies. However, it does not specify the frequency of when such studies should be conducted. The Inspector General has conducted studies comparing AMP to ASP for essentially each quarter since the ASP system has been implemented. Since 2005, the OIG has published 23 reports pertaining to the price substitution issue (see Table 15), of which 21 have identified billing codes with volume-weighted ASPs that have exceeded their volume-weighted AMPs by the applicable threshold percentage.

TABLE 15—PUBLISHED OIG REPORTS ON PRICE SUBSTITUTIONS

Date	Report title
5/2011	Comparison of Third–Quarter 2010 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for First Quarter 2011 (OEI–03–11–00160).
4/2011	Comparison of Average Sales Prices and Average Manufacturer Prices: An overview of 2009 (OEI–03–10–00380).
2/2011	Comparison of Second–Quarter 2010 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Fourth Quarter 2010 (OEI–03–11–00030).
11/2010	Comparison of First–Quarter 2010 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Third Quarter 2010 (OEI–03–10–00440).
7/2010	Comparison of Fourth–Quarter 2009 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Second Quarter 2010 (OEI–03–10–00350).
4/2010	Comparison of Third–Quarter 2009 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for First Quarter 2010 (OEI–03–10–00150).
2/2010	Comparison of Average Sales Prices and Average Manufacturer Prices: An overview of 2008 (OEI–03–09–00350).
1/2010	Comparison of Second–Quarter 2009 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Fourth Quarter 2009 (OEI–03–09–00640).
8/2009	Comparison of First–Quarter 2009 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Third Quarter 2009 (OEI–03–09–00490).
8/2009	Comparison of Fourth–Quarter 2008 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Second Quarter 2009 (OEI–03–09–00340).
4/2009	Comparison of Third-Quarter 2008 Average Sales Prices and Average Manufacturer Prices: Impact on Medicare Reimbursement for first Quarter 2009 (OEI–03–09–00150).
2/2009	Comparison of Second-Quarter 2008 Average Sales Prices and Average Manufacturer Prices: Impact on Medicare Reimbursement for Fourth Quarter 2008 (OEI–03–09–00050).
12/2008	Comparison of First-Quarter 2008 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Third Quarter 2008 (OEI–03–08–00530).
12/2008	Comparison of Average Sales Prices and Average Manufacturer Prices: An Overview of 2007 (OEI–03–08–00450).
8/2008	Comparison of Fourth–Quarter 2007 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Second Quarter 2008 (OEI–03–08–00340).
7/2008	A comparison of average sales price to widely available market prices for inhalation drugs (OEI–03–07–00190).
5/2008	Comparison of Third–Quarter 2007 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for First Quarter 2008 (OEI–03–08–00130).
12/2007	Comparison of Second–Quarter 2007 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Fourth Quarter 2007 (OEI–03–08–00010).
9/2007	Comparison of First–Quarter 2007 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Third Quarter 2007 (OEI–03–07–00530).
7/2007	Comparison of Third–Quarter 2006 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for First Quarter 2007 (OEI–03–07–00140).

TABLE 15—PUBLISHED OIG REPORTS ON PRICE SUBSTITUTIONS—Continued

Date	Report title
7/2006	Comparison of Fourth–Quarter 2005 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for Second Quarter 2006 (OEI–03–06–00370).
6/2006	A Comparison of Average Sales Price to Widely Available Market Prices: Fourth Quarter 2005 (OEI–03–05–00430).
4/2006	Monitoring Medicare Part B Drug Prices: A Comparison of Average Sales Price to Average Manufacturer Prices (OEI–03–04–00430).

In the latest quarterly report comparing AMP to ASP, titled ''Comparison of Third-Quarter 2010 Average Sales Price and Average Manufacturer Prices: Impact on Medicare Reimbursement for First Quarter 2011'' (OEI–03–11–00160), the Inspector General found that of 365 billing codes with complete AMP data in the third quarter of 2010, only 14 met the 5 percent threshold; that is, ASP exceeded AMP by at least 5 percent. 8 of these 14 billing codes also exceeded the AMP by at least 5 percent in one or more of the previous four quarters; only two drugs had ASPs that exceeded the 5 percent threshold in all four quarters under review. This Inspector General report further indicates that, ''If reimbursement amounts for all 14 codes with complete AMP data had been based on 103 percent of the AMPs during the first quarter of 2011, we estimate that Medicare expenditures would have been reduced $10.3 million in that quarter alone.'' The savings found by the Inspector General constitute potential savings for the Medicare program and beneficiaries.

(2) Proposal

As discussed previously, section 1847A(d)(3) of the Act provides authority for us to determine the applicable percentage subject to ''such adjustment as the Secretary may specify for the widely available market price or the average manufacturer price, or both.'' We also have authority to specify the timing of any ASP substitution. Consistent with this authority, we are proposing a policy to substitute 103 percent of AMP for 106 percent of ASP where the applicable percentage threshold has been satisfied for the two consecutive quarters immediately prior to the current pricing quarter, or for three of the previous four quarters immediately prior to the current pricing quarter. This policy would apply to single source drugs and biologicals, multiple source drugs, and biosimilar biological products as defined at section 1847A(c)(6)(C), (D), and (H) of the Act.

Because of the lack of data regarding WAMP to ASP comparisons, we are explicitly excluding WAMP from this price substitution proposal, though we are proposing to maintain the WAMP threshold at 5 percent for CY 2012 in section V.A.1. of this rule. We believe that the proposed policy reflects market-related pricing changes and focuses on those drugs that consistently exceed the applicable percentage threshold over multiple quarters. Unlike the OIG's AMP studies, the published WAMP studies do not show whether the prices for the examined groups of drugs consistently exceed the applicable percentage threshold across multiple quarters like the AMP studies. We will consider proposing a policy for the substitution of WAMP at a later date.

(3) Timeframe for and Duration of Price Substitutions

As stated in § 414.804(a)(5), a manufacturer's average sales price must be submitted to CMS within 30 days of the close of the quarter. We then calculate an ASP for each billing code in accordance with the process outlined at § 414.904. Then, as described in our CY 2005 PFS final rule (69 FR 66300), we implement these new prices through program instructions or otherwise at the first opportunity after we receive the data, which is the calendar quarter after receipt.

Section 1847A(d)(3)(C) of the Act indicates that a price substitution would be implemented ''effective as of the next quarter'' after the OIG has informed us that the ASP for a drug or biological exceeds its AMP by the applicable percentage threshold. The OIG does not receive new ASPs for a given quarter until after we have finalized our calculations for the quarter. Also, the results of the OIG's pricing comparisons are not available until after the ASPs for a given quarter have gone into effect. Therefore, we anticipate that there will be a three-quarter lag for substituted prices from the quarter in which manufacturer sales occurred, though this will depend in great part upon the timeframe in which we obtain comparison data from the OIG. Table 16 provides an example of this timeframe.

TABLE 16—EXAMPLE PRICE SUBSTITUTION TIMEFRAME

	Q2–11	Q3–11	Q4–11	Q1–12
ASP Process	Manufacturer sells drug.	Manufacturer submits Q2–11 pricing data. CMS calculates ASP payment limits for Q4–11 and publishes Q4–11 payment limits.	Q4–11 payment limits apply. CMS calculates ASP payment limits for Q1–12. Compares calculated payment limits to OIG substitute prices. Publishes Q1–12 prices that may include OIG substitute prices.	Q1–12 payment limits apply, including any adjusted payment limit resulting from the price substitution.
OIG Process		OIG receives Q4–11 payment limits from CMS and compares them to Q2–11 volume-weighted AMP data.	OIG notifies CMS of HCPCS for which Q4–11 ASP exceeds Q2–11 AMP by the applicable percentage threshold.	

Given this lag in time, the ASP for a billing code may have decreased since the OIG's comparison. Therefore, consistent with our authorities in section 1847A(d)(3) of the Act and our desire to provide accurate payments consistent with these provisions, we believe that the timing of any substitution policy should permit a final

comparison between the OIG's volume-weighted 103 percent AMP for a billing code (calculated from the data from sales three quarters prior) and the billing code's volume-weighted 106 percent ASP (as calculated by CMS for the upcoming quarter). In Table 16, for example, this comparison would be done between the HCPCS payment limits calculated for Q1–12, and the OIG's volume-weighted AMPs from their examination of Q4–11 payment limits. This final comparison would assure the Secretary that the 106 percent ASP payment limit for the current pricing quarter continues to exceed 103 percent of the OIG's calculated AMP in order to avoid a situation in which the Secretary would inadvertently raise the Medicare payment limit through this price substitution policy. We specifically request comments on this proposal.

ASP payment limits are calculated on a quarterly basis as per section 1847A(c)(5)(A) of the Act, and we are particularly mindful that the ASP-based payment allowance for a billing code may change from quarter to quarter. As such, we propose that any price substitution based on the comparison that triggered its application would last for one quarter. We note that in a subsequent quarter, the OIG may identify that a volume-weighted ASP continues to exceed the volume-weighted AMP for a billing code that previously triggered a price substitution. In this scenario, if the criteria for the price substitution policy are met, we would substitute 103 percent of the OIG's updated volume-weighted AMP for that billing code.

Overall, we believe that our proposal as previously outlined to substitute 103 percent of AMP for 106 percent of ASP provides us with a viable mechanism for generating savings for the Medicare program and its beneficiaries because it will allow Medicare to pay based on lower market prices for those drugs and biologicals that consistently exceed the applicable threshold percentage. Moreover, it will enable us to address a programmatic vulnerability identified by the OIG. We welcome comments on all aspects of our proposal.

In the CY 2011 proposed rule, we sought comment on other issues related to the comparison between ASP and AMP, specifically:

- Any effect of definitional differences between AMP and ASP, particularly in light of the definition of AMP as revised by section 2503 of the Affordable Care Act.
- The impact of any differences in AMP and ASP reporting by manufacturers on price substitution comparisons.
- Whether and/or how general differences and similarities between AMP and manufacturer's ASP would affect comparisons between these two.

For the CY 2012 proposed rule, we again seek comment on other matters pertaining to this issue.

3. ASP Reporting Update

a. ASP Reporting Template Update

For purposes of this part, unless otherwise specified, the term ''drugs'' will hereafter refer to both drugs and biologicals. Sections 1847A and 1927(b) of the Act specify quarterly ASP data reporting requirements for manufacturers. Specific ASP reporting requirements are set forth in section 1927(b)(3) of the Act. For the purposes of reporting under section 1847A of the Act, the term ''manufacturer'' is defined in section 1927(k)(5) of the Act and means any entity engaged in the following: Production; preparation, propagation, compounding, conversion or processing of prescription drug products; either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis; or packaging, repackaging, labeling, relabeling, or distribution of prescription drug products. The term manufacturer does not include a wholesale distributor of drugs or a retail pharmacy licensed under State law. However, manufacturers that also engage in certain wholesaler activities are required to report ASP data for those drugs that they manufacture. Note that the definition of manufacturers for the purposes of ASP data reporting includes repackagers.

Section 1927(b)(3)(A)(iii) of the Act specifies that manufacturers must report their average sales price and the number of units by NDC. As established by 42 CFR part 414 subpart J, manufacturers are required to report data at the NDC level, which includes the following elements: (1) The manufacturer ASP; (2) the Wholesale Acquisition Cost (WAC) in effect on the last day of the reporting period; (3) the number of units sold; and (4) the NDC. The reported ASP data are used to establish the Medicare payment amounts.

Section 1927(b)(3)(A)(iii)(II) of the Act specifies that the manufacturer must report the WAC, if it is required in order for payment to be made under section 1847A of the Act. In the 2004 IFC that implemented the ASP reporting requirements for Medicare Part B drugs and biologicals (66 FR 17935), we specified that manufacturers must report the ASP data to CMS using our Addendum A template. In 2005, we expanded the template to include WAC and additional product description details (70 FR 70221). We also initiated additional changes to the template in 2008 (73 FR 76032).

In order to facilitate more accurate and consistent ASP data reporting from manufacturers, we are now proposing additional revisions to the Addendum A template. Specifically, we propose to revise existing reporting fields and add new fields to the Addendum A template, as follows:

- To split the current NDC column into three separate reporting fields, corresponding to the three segments of an NDC.
- To add a new field to collect an Alternate ID for products without an NDC.
- To expand the current FDA approval number column to account for multiple entries and supplemental numbers.

We have also added a macro to the Addendum A template that will allow manufacturers to validate the format of their data prior to submission. This will help verify that data are complete and submitted to CMS in the correct format, thereby minimizing time and resources spent on identifying mistakes or errors. We note that the use of this macro does not preclude or supersede manufacturers' responsibility to provide accurate and timely ASP data in accordance with the reporting obligation under section 1927(b)(3) of the Act. We also note that manufacturers who misrepresent or fail to report manufacturer ASP data will remain subject to civil monetary penalties, as applicable and described in sections 1847A and 1927(b) of the Act and codified in regulations at § 414.806.

b. Reporting of ASP Units and Sales Volume for Certain Products

As required by 42 CFR part 414 subpart J, manufacturers report ASP price and volume data at the NDC level. This is appropriate for most drug and biological products because an NDC is usually associated with a consistent amount of product that is being sold. Our experience with manufacturer reporting of ASPs has revealed that a limited number of drug products, as defined by an NDC, might contain a variable amount of active ingredient. This situation is common for plasma derived clotting factors; for example, we are aware of one product where a vial described as nominally containing 250 international units (IUs) of clotting factor activity might actually contain

between 220 and 400 IUs. Although the exact factor activity is specified on the label, the amount of IUs contained in an NDC might vary between manufacturing lots. For these types of products, it is possible that vials with the same NDC but different amounts of clotting factor activity (as measured in IUs) might be sold during the same ASP reporting period. For drugs paid under Medicare Part B, such variability in the amount of drug product within an NDC appears to apply mostly to clotting factors that are prepared from plasma sources; it also applies to a few other products, including a plasma protein product used to treat antitrypsin deficiency.

As stated in the Section 1847A(b)(2) of the Act, for years after 2004, the Secretary has the authority to ''establish the unit for a manufacturer to report and methods for counting units as the Secretary determines appropriate to implement.'' There are limited situations when ASP price and volume reporting by product NDC may affect the accuracy of subsequent pricing calculations done by us, for example, when an NDC is associated with a variable amount of drug product as described in the paragraph previously. We believe that in such cases it is appropriate to amend the definition of the ASP unit associated with the NDC that is reported to us by manufacturers for the purposes of calculating ASP. Under the authority in the section 1847A(b)(2) of the Act, we propose that we will maintain a list of HCPCS codes for which manufacturers report ASPs for NDCs on the basis of a specified unit. The specified unit will account for situations where labeling indicates that the amount of drug product represented by an NDC varies. Our initial list appears in Table 17 and is limited to items with variable amounts of drug product per NDC as described previously. However, we propose to update this list as appropriate through program instruction or otherwise because we believe that the ability to make changes in a subregulatory manner will provide us with the flexibility to quickly and appropriately react to sales and marketing practices for specific drug products, including the introduction of new drugs or drug products. We plan to amend the list as necessary and to keep updates on the CMS ASP Web site at: *http://www.cms.gov/McrPartBDrugAvgSalesPrice/01_overview.asp.* Our proposals would be effective for ASP reports received on or after January 1, 2012 and would be reflected in our April 1, 2012 quarterly update.

In conjunction with the proposals in the preceding paragraph and the expectation that nearly all ASP price and sales volume reporting will continue to be at the NDC level (that is, the reported ASP sales and volume will be associated with a non-variable amount that is represented by the NDC), we are also proposing a clarification to existing regulation text at § 414.802. Current regulation text states that ''Unit means the product represented by the 11-digit National Drug Code.'' We propose to update the definition to account for situations when an alternative unit of reporting must be used; the definition of the term unit will continue to be based on reporting of ASP data per NDC unless otherwise specified by CMS to account for situations where the amount of drug product represented by an NDC varies.

TABLE 17—HCPCS CODES FOR WHICH ASP REPORTING IS DONE IN UNITS OF MEASURE OTHER THAN AN NDC

2011 Code	2011 Long descriptor	Proposed reporting unit
J0256	INJECTION, ALPHA 1—PROTEINASE INHIBITOR—HUMAN, 10 MG	1MG
J1680	INJECTION, HUMAN FIBRINOGEN CONCENTRATE, 100 MG	1MG
J7184	INJECTION, VON WILLEBRAND FACTOR COMPLEX (HUMAN), WILATE, PER 100 IU VWF:RCO	1 IU VWF:RCO
J7185	INJECTION, FACTOR VIII (ANTIHEMOPHILIC FACTOR, RECOMBINANT) (XYNTHA), PER I.U	1 IU
J7186	INJECTION, ANTIHEMOPHILIC FACTOR VIII/VON WILLEBRAND FACTOR COMPLEX (HUMAN), PER FACTOR VIII I.U.	1 IU
J7187	INJECTION, VON WILLEBRAND FACTOR COMPLEX (HUMATE–P), PER IU VWF:RCO	1 IU VWF:RCO
J7190	FACTOR VIII (ANTIHEMOPHILIC FACTOR, HUMAN) PER I.U	1 IU
J7192	FACTOR VIII (ANTIHEMOPHILIC FACTOR, RECOMBINANT) PER I.U., NOT OTHERWISE SPECIFIED.	1 IU
J7193	FACTOR IX (ANTIHEMOPHILIC FACTOR, PURIFIED, NON–RECOMBINANT) PER I.U	1 IU
J7194	FACTOR IX, COMPLEX, PER I.U	1 IU
J7195	FACTOR IX (ANTIHEMOPHILIC FACTOR, RECOMBINANT) PER I.U	1 IU
J7197	ANTITHROMBIN III (HUMAN), PER I.U	1 IU
J7198	ANTI–INHIBITOR, PER I.U. INJECTION, ANTITHROMBIN RECOMBINANT, 50 I.U	1 IU

The instructions for reporting products with variable amounts of drug product, along with general instructions on completing the revised ASP Data Form (Addendum A), will be delineated in a User Guide that will be available on the ASP Web site. In the user guide, we will also be revising our instructions for the reporting of dermal grafting products as follows:

- If an NDC is not associated with a dermal grafting product, manufacturers should enter the UPC or other unique identifier (such as an internal product number) in the alternate ID column.
- Manufacturers should report ASP prices and sales volumes for dermal grafting products in units of area by square centimeter. The User Guide will be available on the CMS ASP Web site at: *http://www.cms.hhs.gov/McrPartBDrugAvgSalesPrice/01_overview.asp.* The Web site will also contain the revised ASP Data Form (Addendum A) and examples of how ASP data must be reported and formatted for submission.

We would also like to remind manufacturers that additional information about reporting ASP data to us is available (for examples, see the following: (69 FR 17936), (69 FR 66299), (70 FR 70215), (71 FR 69665), (72 FR 66256), (73 FR 69751), and (74 FR 61904)). Also, a link to the ASP Frequently Asked Questions (FAQs) is posted in the ''Related Links Inside CMS'' section of the ASP Overview Web page. We welcome comments on the ASP reporting proposals that are described in this section.

B. Discussion of Budget Neutrality for the Chiropractic Services Demonstration

Section 651 of MMA requires the Secretary to conduct a demonstration for up to 2 years to evaluate the feasibility and advisability of expanding coverage for chiropractic services under Medicare. Current Medicare coverage for chiropractic services is limited to manual manipulation of the spine to correct a subluxation described in section 1861(r)(5) of the Act. The demonstration expanded Medicare coverage to include: ''(A) care for neuromusculoskeletal conditions typical among eligible beneficiaries; and (B) diagnostic and other services that a chiropractor is legally authorized to perform by the State or jurisdiction in which such treatment is provided'' and was conducted in four geographically diverse sites, two rural and two urban regions, with each type including a Health Professional Shortage Area (HPSA). The two urban sites were 26 counties in Illinois and Scott County, Iowa, and 17 counties in Virginia. The two rural sites were the States of Maine and New Mexico. The demonstration, which ended on March 31, 2007, was required to be budget neutral as section 651(f)(1)(B) of MMA mandates the Secretary to ensure that ''the aggregate payments made by the Secretary under the Medicare program do not exceed the amount which the Secretary would have paid under the Medicare program if the demonstration projects under this section were not implemented.''

In the CY 2006, 2007, and 2008 PFS final rules with comment period (70 FR 70266, 71 FR 69707, 72 FR 66325, respectively), we included a discussion of the strategy that would be used to assess budget neutrality (BN) and the method for adjusting chiropractor fees in the event the demonstration resulted in costs higher than those that would occur in the absence of the demonstration. We stated BN would be assessed by determining the change in costs based on a pre-post comparison of total Medicare costs for beneficiaries in the demonstration and their counterparts in the control groups and the rate of change for specific diagnoses that are treated by chiropractors and physicians in the demonstration sites and control sites. We also stated that our analysis would not be limited to only review of chiropractor claims because the costs of the expanded chiropractor services may have an impact on other Medicare costs for other services.

In the CY 2010 PFS final rule with comment period (74 FR 61926), we discussed the evaluation of this demonstration conducted by Brandeis University and the two sets of analyses used to evaluate budget neutrality. In the ''All Neuromusculoskeletal Analysis,'' which compared the total Medicare costs of all beneficiaries who received services for a neuromusculoskeletal condition in the demonstration areas with those of beneficiaries with similar characteristics from similar geographic areas that did not participate in the demonstration, the total effect of the demonstration to Medicare was an $114 million increase in costs. In the ''Chiropractic User Analysis,'' which compared the Medicare costs of beneficiaries who used expanded chiropractic services to treat a neuromusculoskeletal condition in the demonstration areas, with those of beneficiaries with similar characteristics who used chiropractic services as was currently covered by Medicare to treat a neuromusculoskeletal condition from similar geographic areas that did not participate in the demonstration, the total effect of the demonstration to Medicare was a $50 million increase in costs.

As explained in the CY 2010 PFS final rule, we based the BN estimate on the ''Chiropractic User Analysis'' because of its focus on users of chiropractic services rather than all Medicare beneficiaries with neuromusculoskeletal conditions, including those who did not use chiropractic services and who may not have become users of chiropractic services even with expanded coverage for them (74 FR 61926 through 61927). Users of chiropractic services are most likely to have been affected by the expanded coverage provided by this demonstration. Cost increases and offsets, such as reductions in hospitalizations or other types of ambulatory care, are more likely to be observed in this group.

As explained in the CY 2010 PFS final rule (74 FR 61927), because the costs of this demonstration were higher than expected and we did not anticipate a reduction to the PFS of greater than 2 percent per year, we finalized a policy to recoup $50 million in expenditures from this demonstration over a 5-year period, from CYs 2010 through 2014 (74 FR 61927). Specifically, we are recouping $10 million for each such year through adjustments to the chiropractic CPT codes. Payment under the PFS for these codes will be reduced by approximately 2 percent. We believe that spreading this adjustment over a longer period of time will minimize its potential negative impact on chiropractic practices.

We are continuing the implementation of the required budget neutrality adjustment by recouping $10 million in CY 2012. Our Office of the Actuary estimates chiropractic expenditures in CY 2012 to be approximately $470 million based on actual Medicare spending for chiropractic services for the most recent available year. To recoup $10 million in CY 2012, the payment amount under the PFS for the chiropractic CPT codes (that is, CPT codes 98940, 98941, and 98942) will be reduced by approximately 2 percent. We are reflecting this reduction only in the payment files used by the Medicare contractors to process Medicare claims rather than through adjusting the relative value units (RVUs). Avoiding an adjustment to the RVUs would preserve the integrity of the PFS, particularly since many private payers also base payment on the RVUs.

C. Proposed Productivity Adjustment for the Ambulatory Surgical Center Payment System, and the Ambulance, Clinical Laboratory and DMEPOS Fee Schedules

Section 3401 of the Affordable Care Act requires that the update factor under certain payment systems be annually adjusted by changes in economy-wide productivity. The year that the productivity adjustment is effective varies by payment system. Specifically, section 3401 of the Affordable Care Act requires that in CY 2011 (and in subsequent years) update factors under the ambulatory surgical center (ASC) payment system, the ambulance fee schedule (AFS), the clinical laboratory fee schedule (CLFS) and the DMEPOS fee schedule be adjusted by changes in economy-wide productivity. Section 3401(a) of the Affordable Care Act amends section 1886(b)(3)(B) of the Act to add clause (xi)(II) which sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide private nonfarm business multifactor productivity (MFP) (as projected by the Secretary for the 10-year period ending with the applicable fiscal year, year, cost reporting period, or other annual period). Historical published data on the measure of MFP is available on the Bureau of Labor Statistics' (BLS) Web site at *http://www.bls.gov/mfp.*

As stated in the CY 2011 PFS final rule with comment period (75 FR 73394), the projection of MFP is currently produced by IHS Global Insight, Inc. (IGI). The methodology for calculating MFP for the ASC payment system, and the Ambulance, CLFS, and DMEPOS fee schedules was finalized in

the CY 2011 PFS final rule with comment period (75 FR 73394 through 73399). As described in the CY 2011 PFS final rule with comment period, IGI replicates the MFP measure calculated by the BLS using a series of proxy variables derived from the IGI U.S. macro-economic models. For CY 2012, we are proposing to revise the IGI series used to proxy the labor index used in the MFP forecast calculation from man-hours in private nonfarm establishments (billions of hours—annual rate) to hours of all persons in private nonfarm establishments, (2005 = 100.00), adjusted for labor composition effects. We are proposing this revision after further analysis showed that the proposed series is a more suitable proxy for the BLS Private nonfarm business sector labor input series since it accounts for the changes in skill-mix of the workforce over time (referred to above as labor composition effects). The BLS labor input series includes labor composition effects. We are proposing no additional changes to the IGI MFP forecast methodology or its application to the CPI–U update factors for the ASC payment system, and the Ambulance, CLFS, and DMEPOS fee schedules.

D. Section 105: Extension of Payment for Technical Component of Certain Physician Pathology Services

1. Background and Statutory Authority

Section 542(c) of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554), as amended by section 732 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173), section 104 of division B of the Tax Relief and Health Care Act of 2006 (MIEA–TRHCA) (Pub. L. 109–432), section 104 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA) (Pub. L. 110–173), section 136 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) (Pub. L. 110–275) and section 3104 of the Affordable Care Act (Pub. L. 111–148), is amended by section 105 of the Medicare and Medicaid Extenders Act of 2010 (MMEA) (Pub. L. 111–309) to continue payment to independent laboratories for the TC of physician pathology services for fee-for-service Medicare beneficiaries who are inpatients or outpatients of a covered hospital through CY 2011. The technical component (TC) of physician pathology services refers to the preparation of the slide involving tissue or cells that a pathologist interprets. The professional component (PC) of physician pathology services refers to the pathologist's interpretation of the slide.

When the hospital pathologist furnishes the PC service for a hospital patient, the PC service is separately billable by the pathologist. When an independent laboratory's pathologist furnishes the PC service, the PC service is usually billed with the TC service as a combined service.

Historically, any independent laboratory could bill the Medicare contractor under the PFS for the TC of physician pathology services for hospital patients even though the payment for the costs of furnishing the pathology service (but not its interpretation) was already included in the bundled inpatient stay payment to the hospital. In the CY 2000 PFS final rule with comment period (64 FR 59408 through 59409), we stated that this policy has contributed to the Medicare program paying twice for the TC service: (1) To the hospital, through the inpatient prospective payment rate, when the patient is an inpatient; and (2) to the independent laboratory that bills the Medicare contractor, instead of the hospital, for the TC service. While the policy also permits the independent laboratory to bill for the TC of physician pathology services for hospital outpatients, in this case, there generally would not be duplicate payment because we would expect the hospital to not also bill for the pathology service, which would be paid separately to the hospital only if the hospital were to specifically bill for it. We further indicated that we would implement a policy to pay only the hospital for the TC of physician pathology services furnished to its inpatients.

Therefore, in the CY 2000 PFS final rule with comment period, we revised § 415.130(c) to state that for physician pathology services furnished on or after January 1, 2001 by an independent laboratory, payment is made only to the hospital for the TC of physician pathology services furnished to a hospital inpatient. Ordinarily, the provisions in the PFS final rule with comment period are implemented in the following year. However, the change to § 415.130 was delayed 1 year (until January 1, 2001), at the request of the industry, to allow independent laboratories and hospitals sufficient time to negotiate arrangements.

Full implementation of § 415.130 was further delayed by section 542 of BIPA and section 732 of the MMA, which directed us to continue payment to independent laboratories for the TC of physician pathology services for hospital patients for a 2-year period beginning on January 1, 2001 and for CYs 2005 and 2006, respectively. In the CY 2007 PFS final rule with comment period (71 FR 69788), we amended § 415.130 to provide that, for services furnished after December 31, 2006, an independent laboratory may not bill the carrier for the TC of physician pathology services furnished to a hospital inpatient or outpatient. However, section 104 of the MIEA–TRHCA continued payment to independent laboratories for the TC of physician pathology services for hospital patients through CY 2007, and section 104 of the MMSEA further extended such payment through the first 6 months of CY 2008.

Section 136 of the MIPPA extended the payment through CY 2009. Section 3104 of the Affordable Care Act amended the prior legislation to extend the payment through CY 2010. Subsequent to publication of the CY 2011 PFS final rule with comment period, section 105 of the MMEA extended the payment through CY 2011.

2. Proposed Revisions to Payment for TC of Certain Physician Pathology Services

Consistent with this statutory change, we are proposing to revise § 415.130(d) to specify that for services furnished after December 31, 2011, an independent laboratory may not bill the Medicare contractor for the TC of physician pathology services furnished to a hospital inpatient or outpatient. We would implement this provision effective for TC services furnished on or after January 1, 2012.

E. Section 4103 of the Affordable Care Act: Medicare Coverage and Payment of the Annual Wellness Visit Providing a Personalized Prevention Plan Covered Under Medicare Part B

1. Incorporation of a Health Risk Assessment as Part of the Annual Wellness Visit

a. Background and Statutory Authority—Medicare Part B Coverage of an Annual Wellness Visit Providing Personalized Prevention Plan Services

Preventive care and beneficiary wellness are important to the Medicare program and have become an increasing focus. In section 4103 of the Affordable Care Act, the Congress expanded Medicare coverage under Part B to include an annual wellness visit providing personalized prevention plan services (hereinafter referred to as the annual wellness visit or AWV). The AWV is described more fully in section 1861(hhh) of the Act, and coverage was effective for services furnished on or after January 1, 2011. Regulations for Medicare coverage of the AWV are

established at 42 CFR 410.15. The AWV may be performed by a physician, nonphysician practitioner (physician assistant, nurse practitioner, or clinical nurse specialist), or a medical professional (including a health educator, a registered dietitian, or a nutrition professional, or other licensed practitioner) or a team of such medical professionals, working under the direct supervision of a physician. In summary, for CY 2011, the first AWV includes—

- Establishment of an individual's medical and family history;
- Establishment of a list of current medical providers and suppliers involved in providing medical care to the individual;
- Measurement of an individual's height, weight, body mass index (or waist circumference, if appropriate), blood pressure, and other routine measurements as deemed appropriate, based on the beneficiary's medical and family history;
- Detection of any cognitive impairment that the individual may have;
- Review of the individual's potential (risk factors) for depression;
- Review of the individual's functional ability and level of safety;
- Establishment of a written screening schedule for the individual such as a checklist for the next 5 to 10 years, as appropriate, based on recommendations of the United States Preventive Services Task Force, the Advisory Committee on Immunization Practices, and the individual's health status, screening history, and age-appropriate preventive services covered by Medicare;
- Establishment of a list of risk factors for which primary, secondary or tertiary interventions are recommended or underway for the individual, including any mental health conditions or any such risk factors or conditions that have been identified through an initial preventive physical examination, and a list of treatment options and their associated risks and benefits;
- Furnishing of personalized health advice to the individual and a referral, as appropriate, to health education or preventive counseling services or programs aimed at reducing identified risk factors and improving self management; and
- Any other element determined appropriate through the national coverage determination process (NCD).

In summary, for CY 2011, subsequent AWVs include—

- An update of the individual's medical and family history;
- An update of the list of current providers and suppliers that are regularly involved in providing medical care to the individual;
- Measurement of an individual's weight (or waist circumference), blood pressure and other routine measurements as deemed appropriate, based on the individual's medical and family history;
- Detection of any cognitive impairment that the individual may have;
- An update to the written screening schedule for the individual;
- An update to the list of risk factors and conditions for which primary, secondary, or tertiary interventions are recommended or are underway for the individual;
- Furnishing of personalized health advice to the individual and a referral, as appropriate, to health education or preventive counseling services;
- Any other element determined appropriate through the NCD process.

The AWV is specifically designed as a wellness visit that focuses on identification of certain risk factors, personalized health advice, and referral for additional preventive services and lifestyle interventions (which may or may not be covered by Medicare). The elements included in the AWV differ from comprehensive physical examination protocols with which some providers may be familiar with since it is a visit that is specifically designed to provide personalized prevention plan services as defined in the Act.

Section 1861(hhh)(1)(A) of the Act specifies that a personalized prevention plan for an individual includes a health risk assessment (HRA) that meets the guidelines established by the Secretary. In general, an HRA is an evaluation tool designed to provide a systematic approach to obtaining accurate information about the patient's health status, injury risks, modifiable risk factors, and urgent health needs. This evaluation tool is completed prior to, or as part of, an AWV. The information from the HRA is reflected in the personalized prevention plan that is created for the individual.

Although the AWV was effective on January 1, 2011, section 4103 of the Affordable Care Act provided the Secretary additional time to establish guidelines for HRAs after consulting with relevant groups and entities (see section 1861 (hhh)(4)(A) of the Act). A technology assessment from the Agency for Healthcare Research and Quality (AHRQ) was commissioned to describe key features of HRAs, to examine which features were associated with successful HRAs, and to discuss the applicability of HRAs to the Medicare population. A draft of the technology assessment dated January 19, 2011 is publically available on the CMS Web site at *http://www.cms.gov/determinationprocess/downloads/id79ta.pdf.*

We collaborated with the Centers for Disease Control and Prevention (CDC), due to their in-depth knowledge of HRAs, and because the CDC was directed by section 4004(f) of the Affordable Care Act to develop guidelines for a personalized prevention plan tool. In the November 16, 2010 **Federal Register** (75 FR 70009), CDC issued a notice to solicit feedback regarding HRA guidance development. Public comments were received from numerous relevant groups and entities including: The American Academy of Family Physicians; the American Dietetic Association; the American Geriatrics Society; the American College of Cardiology; Care Continuum Alliance, physician practices; public health agencies; healthcare research groups; and the general public.

The CDC convened a public meeting in Atlanta, Georgia in February 2011 to facilitate the development of guidance for HRAs. (See the December 30, 2010 **Federal Register** (75 FR 82400)—announcement for ''Development of Health Risk Assessment Guidance, Public Forum''). This meeting allowed broad public input from stakeholders and the general public into the development of guidelines for evidence-based HRAs. The Interim Guidance for Health Risk Assessments developed by the CDC is available on the CMS Web site at *http://www.cms.gov/coverage geninfo/downloads/healthrisk assessmentsCDCfinal.pdf.* The CDC guidance resulted from a review and compilation of the current scientific evidence, the technology assessment, expert advice from those working in the field of HRA and wellness, and takes into account public feedback from the request for information and the public meeting. The CDC guidance includes questions and topics to be addressed as deemed appropriate for the beneficiary's age. Additional information regarding the CDC guidance development process is included as part of the guidance document. The CDC plans to publish ''A Framework for Patient-Centered Health Assessments, a Morbidity and Mortality Weekly Report (MMWR).'' The MMWR will include additional information applicable for the successful implementation of the HRA, such as the CDC interim guidance document, as well as information related to implementation, feedback, and follow-up that evidence suggests is critical for improving health outcomes using this process. We are interested in receiving feedback regarding the availability of

HRAs that are available for use by the general public.

b. Implementation

Consistent with section 1861(hhh) of the Act and the initial CDC guidance document, we propose to amend 42 CFR 410.15 by: (1) Adding the term ''health risk assessment'' and its definition; (2) revising the definitions of ''first annual wellness visit providing personalized prevention plan services'' and ''subsequent annual wellness visit providing personalized prevention plan services;'' and (3) incorporating the use and results of an HRA into the provision of personalized prevention plan services during the AWV. We believe that incorporation of the HRA supports a systematic approach to patient wellness and is integral to providing personalized prevention plan services. The results of the HRA will provide the foundation for and facilitate development of the personalized prevention plan. We believe that the results of the HRA will aid in developing the personalized prevention plan and, once fully implemented, will increase the efficiency of the physician's effort during the AWV.

(1) Definition of a ''Health Risk Assessment''

We propose to revise § 410.15 by adding the term ''health risk assessment'' and defining such term as an evaluation tool that meets the following requirements:

- Collects self-reported information about the beneficiary.
- Can be administered independently by the beneficiary or administered by a health professional prior to or as part of the AWV encounter.
- Is appropriately tailored to and takes into account the communication needs of underserved populations, persons with limited English proficiency, and persons with health literacy needs,
- Takes no more than 20 minutes to complete.
- Addresses, at a minimum, the following topics:

++ Demographic data, including but not limited to age, gender, race, and ethnicity.

++ Self assessment of health status, frailty, and physical functioning.

++ Psychosocial risks, including but not limited to depression/life satisfaction, stress, anger, loneliness/social isolation, pain, or fatigue.

++ Behavioral risks, including but not limited to tobacco use, physical activity, nutrition and oral health, alcohol consumption, sexual practices, motor vehicle safety (seat belt use), and home safety.

++ Activities of daily living (ADLs), including but not limited to dressing, feeding, toileting, grooming, physical ambulation (including balance/risk of falls), and bathing.

++ Instrumental activities of daily living (IADLs), including but not limited to shopping, food preparation, using the telephone, housekeeping, laundry, mode of transportation, responsibility for own medications, and ability to handle finances.

The CDC guidance describes an HRA as ''a collection of health-related data a medical provider can use to evaluate the health status and the health risk of an individual. An HRA will identify health behaviors and risk factors known only to the patient (such as, smoking, physical activity and nutritional habits) for which the medical provider can provide tailored feedback in an approach to reduce the risk factors'' as well as the potential for diseases for which those risk factors are related.

The CDC guidance further explains that the ''questions/topics to be addressed in the HRA is a compilation of the current scientific evidence and are intended for Medicare beneficiaries as appropriate for their age.'' These include collection of demographic data; self assessment of health status, frailty, and physical functioning; biometric assessments obtained by the provider; psychosocial risks; and behavioral risks. The guidance document suggests, based on current evidence that the following domains specific to the greater than or equal to a 65-year-old Medicare population be included in the HRA: Memory, activities of daily living, and instrumental activities of daily living.

With regard to memory, the CDC guidance states ''that cognition assessment is not part of the HRA itself, but rather an additional aspect of the AWV * * *''. We note that the definitions of both the first and subsequent annual wellness visit include the detection of any cognitive impairment. The CDC guidance, consistent with section 1861(hhh)(4)(A) of the Act, specifies that an HRA should be made available to all Medicare beneficiaries who are eligible to receive an AWV, as defined in § 410.15; can be furnished in a number of ways, including during an encounter with a health professional or through an interactive telephonic or web-based program, while ensuring the privacy of the beneficiary; be provided in a patient's preferred language; and take no longer than 20 minutes to complete. We believe that the health professional should consider the beneficiary's needs when determining whether assistance would be needed for the beneficiary to complete the HRA. Factors a health professional may wish to consider include vision, hearing, or language limitations; the communication needs of underserved populations; persons with limited English proficiency; and persons with health literacy needs.

The completed HRA and results would be provided to the health professional as that term is defined in § 410.15(a), as a foundation for completing the elements included in the definitions of first and subsequent AWVs during the AWV encounter. The CDC guidance document explains that ''during the visit, the HRA information, and other biometrics available are utilized by the practitioner in a thought process intended to develop a prevention plan for the patient to improve health status and delay the onset of disease known to be caused by the reported behavioral risks or the patient's current health status. The practitioner can, in a shared decisionmaking process with the patient provide feedback in the form of educational messages, counseling or referrals related to changing high risk behaviors and health habits. This feedback can potentially improve health behaviors and/or alter one's risk of disease, improve chronic disease management or likelihood of premature death.'' For instance, the HRA may collect aspects of the beneficiary's medical and family history, such as history of tobacco use, that would provide a foundation for personalized health advice, and if deemed appropriate, referral for additional preventive services after completion of the AWV. We note that the standards outlined in the proposed definition of the term health risk assessment represent a minimum set of topics that need to be addressed as part of an HRA, while allowing the health professional the flexibility to evaluate additional topics, as appropriate, to provide a foundation for development of a personalized prevention plan.

(2) Proposed Changes to the Definitions of ''First Annual Wellness Visit'' and ''Subsequent Annual Wellness Visit''

In § 410.15, we adopted the components of the AWV, consistent with the statutory elements described in section 1861(hhh)(2) of the Act. The first and subsequent annual wellness visits, as defined in § 410.15(a), are meant to represent a beneficiary visit focused on prevention. Among other things, the annual wellness visit encourages beneficiaries to obtain the preventive services covered by Medicare

that are appropriate for them. First and subsequent AWVs also include elements that focus on the furnishing of personalized health advice and referral, as appropriate, to health education, preventive counseling services, programs aimed at improving self-management, and community-based lifestyle interventions.

We are proposing that the definitions of ''first annual wellness visit providing personalized prevention plan services'' and ''subsequent annual wellness visit providing personalized prevention plan services'' be revised to incorporate the use and results of an HRA. The HRA is an integral part of the provision of personalized prevention plan services, consistent with section 1861(hhh) of the Act. We propose to incorporate the HRA by revising the definitions of first and subsequent AWVs as follows:

- Specify that the AWV take into account the results of an HRA.
- Add the review (and administration, if needed) of an HRA as an element of both first and subsequent AWVs.
- Specify that the establishment of a written screening schedule for the individual, such as a checklist, includes and takes into account the HRA.

The HRA facilitates a systematic method for identifying health behaviors and risk factors known to the patient (such as: Smoking, physical activity, and nutritional habits) for which the medical provider can discuss and provide tailored feedback aimed at reducing risk factors as well as reducing the potential for developing the diseases to which they are related.

During the AWV encounter, the HRA information is utilized by the health professional in a thought process intended to develop a personalized prevention plan for the patient to improve health status and delay the onset of disease. For instance, if the information provided by the HRA indicated that the beneficiary had a current or past history of tobacco use, the health professional may deem it appropriate to perform those commonly used aspects of a clinical evaluation (for instance, listening to (auscultation) the heart and lungs) in order to provide the appropriate personalized health advice and referrals for additional preventive services such as tobacco cessation counseling.

The CDC guidance document provides a list of questions/topics to be addressed in an HRA, including biometric assessments of height, weight, body mass index (BMI), systolic/diastolic blood pressure, blood lipids (HDL/LDL and total cholesterol, triglycerides), and blood glucose. Additionally, the CDC guidance document suggested that the information collected via the HRA would be reconciled with biometric assessments obtained by the provider. Consistent with section 1861(hhh)(2) of the Act, the definitions for first AWV and subsequent AWVs address most of the biometric assessments suggested in the CDC guidance document. We are requesting public comment on the applicability and impact of including additional elements and biometric assessments to first and subsequent AWVs, per the Secretary's authority under section 1861(hhh)(2)(G) of the Act.

We believe that the incorporation of the HRA would increase the efficiency of the health professional's effort during the AWV. For instance, during the AWV encounter, the health professional furnishing the AWV would review the information reported in the HRA, which would serve as the basis for a personalized prevention plan provided during the AWV encounter. The beneficiary would leave the visit with personalized health advice, appropriate referrals, and a written individualized screening schedule, such as a check list. We would not expect that the health professional would provide only general recommendations during the AWV encounter and then mail a personalized prevention plan that incorporates an HRA to the beneficiary outside of the AWV encounter. While the AWV is a wellness visit that focuses on wellness and disease prevention, a follow-up visit to treat an identified illness may be needed to address an urgent health issue. For example, if a beneficiary is determined to have high blood pressure, a follow-up visit for further review of symptoms and evaluation and management, along with determining whether additional interventions are necessary, may be performed after the completion of the AWV as a separate service.

We are requesting public comment on the overall impact and burden of the AWV on health professional practices, including the impact that incorporation of the use of an HRA will have on health professionals and their practices. Specifically, we are seeking public comment on the following:

- The impact of use of an HRA on health professional practices;
- The burden on health professional practices of incorporating an HRA into subsequent AWVs as well as the first AWV;
- The impact of the elements included in the definitions of first and subsequent AWV.
- Modification of those AWV elements for which the Secretary has authority to determine appropriateness.

We are also proposing changes to the definition of the term ''subsequent annual wellness visit providing personalized prevention plan services'' to clarify that the health professional should furnish personalized prevention plan services and updated information if there have been changes since the beneficiary's last AWV, whether that was a first AWV or a subsequent AWV. In the CY 2011 PFS final rule with comment period, we stated in the definition of ''subsequent annual wellness visit providing personalized prevention plan services'' that certain elements should be updated based on information developed during the first AWV (for example, lists of risk factors and screening schedules). Since all AWVs that follow the first AWV are considered subsequent AWVs, the health professional should update elements that were developed during the previous AWV if there have been changes. The proposed changes to the definition of the term ''subsequent annual wellness visit providing personalized prevention plan services'' are as follows:

- We propose that newly redesignated paragraph (iii) state ''an update of the list of current providers and suppliers that are regularly involved in providing medical care to the individual as that list was developed for the first annual wellness visit providing personalized prevention plan services or the previous subsequent annual wellness visit providing personalized prevention plan services.''
- We propose that newly redesignated paragraph (vi)(B), state ''the list of risk factors and conditions for which primary, secondary or tertiary interventions are recommended or are underway for the individual as that list was developed at the first annual wellness visit providing personalized prevention plan services or the previous subsequent annual wellness visit providing personalized prevention plan services.''

2. The Addition of a Health Risk Assessment as a Required Element for the Annual Wellness Visit Beginning in 2012

Section 4103 of the Affordable Care Act created a new benefit for an ''annual wellness visit'' (AWV) providing personalized prevention plan services (PPPS). The Affordable Care Act amended section 1861(s)(2) of the Act by adding new subparagraph (FF) to provide for coverage of the AWV beginning January 1, 2011. Section 4103

of the Affordable Care Act also added new subsection (hhh) to section 1861 of the Act to define ''personalized prevention plan services'' and to specify who may furnish these services. Finally, section 4103 of the Affordable Care Act amended section 1848(j)(3) of the Act and provided for payment of AWVs under the PFS, and specifically excluded the AWV from the hospital OPPS. As discussed in the CY 2011 PFS final rule with comment period (75 FR 73401), a single Medicare payment is made when an AWV is furnished by a physician, physician assistant, nurse practitioner, or clinical nurse specialist, or by a medical professional or team of medical professionals, under the direct supervision of a physician.

In the CY 2011 PFS final rule with comment period (75 FR 73409), we established two HCPCS G-codes for reporting the AWV beginning in CY 2011: G0438 (Annual wellness visit; includes a personalized prevention plan of service (PPPS), first visit) and G0439 (Annual wellness visit; includes a personalized prevention plan of service (PPPS), subsequent visit).

A beneficiary is eligible for only one first AWV (HCPCS code G0438) covered by Medicare that must include all of the required elements that we adopted in our final policy for the CY 2011 PFS final rule with comment period (75 FR 73399). All subsequent AWVs (HCPCS code G0439) include the required elements for those visits as finalized in the CY 2011 PFS final rule with comment period (75 FR 73399). All AWVs other than the beneficiary's first AWV shall be reported as subsequent visits, even if a different practitioner furnished the subsequent AWV. We expect there to be continuity and communication among the practitioners caring for beneficiaries over time with respect to AWVs, and this would include the case where a different practitioner furnishing a subsequent AWV would update the information in the patient's medical record based on the patient's interval history since the previous AWV.

As we stated in the CY 2011 PFS final rule with comment period (75 FR 73409), we believe that the first AWV described by HCPCS code G0438 is similar to the IPPE that is currently reported with HCPCS code G0402 (Initial preventive physical examination; face-to-face visit, services limited to new beneficiary during the first 12 months of Medicare enrollment). We note that in the CY 2010 PFS final rule with comment period discussion of payment for the IPPE (74 FR 61767), we stated that in the context of physician work and intensity, HCPCS code G0402 was most equivalent to CPT code 99204 (Level 4 new patient office or other outpatient visit). In addition, in the CY 2011 PFS final rule with comment period (75 FR 73410), we indicated that subsequent AWV's described by HCPCS code G0439 are most similar, from the perspectives of physician work and PE, to CPT code 99214 (Level 4 established patient office or other outpatient visit). Therefore, we valued HCPCS codes G0438 and G0439 for payment under the PFS using a crosswalk methodology for the work RVUs and direct PE inputs from the level 4 new and established patient office or other outpatient visit CPT codes, respectively.

a. Payment for AWV services with the inclusion of an HRA element

In the CY 2011 PFS final rule with comment period (75 FR 73411), we stated ''that when the HRA is incorporated in the AWV, we will reevaluate the values for HCPCS codes G0438 and G0439''. As discussed in the CY 2011 PFS final rule with comment period, the services described by CPT codes 99204 and 99214 already include 'preventive assessment' forms. For CY 2012, we believe that the current payment crosswalk for HCPCS codes G0438 and G0439 continue to be most accurately equivalent to a level 4 E/M new or established patient visit; and therefore, we are proposing to continue to crosswalk HCPCS codes G0438 and G0439 to CPT codes 99204 and 99214, respectively.

F. Quality Reporting Initiatives

1. Physician Payment, Efficiency, and Quality Improvements—Physician Quality Reporting System

a. Program Background and Statutory Authority

The Physician Quality Reporting System is a quality reporting program that provides incentive payments and payment adjustments to identified eligible professionals who satisfactorily report data on quality measures for covered professional services furnished during a specified reporting period. The Physician Quality Reporting System was initially implemented in 2007 as a result of section 101 of Division B of the Tax Relief and Health Care Act of 2006. The Physician Quality Reporting System was extended and further enhanced as a result of the Medicare Improvements for Patients and Providers Act of 2009 (MIPPA), which was enacted on July 15, 2008, and the Affordable Care Act, which was enacted on March 23, 2010.

Changes to the Physician Quality Reporting System as a result of these laws, as well as information about the Physician Quality Reporting System in 2007, 2008, 2009, 2010, and 2011 are discussed in detail in the CY 2008 PFS proposed and final rules (72 FR 38196 through 38204 and 72 FR 66336 through 66353, respectively), CY 2009 PFS proposed and final rules (73 FR 38558 through 38575 and 73 FR 69817 through 69847, respectively), CY 2010 PFS proposed and final rules (74 FR 33559 through 33600 and 74 FR 61788 through 61861, respectively), and CY 2011 PFS proposed and final rules (75 FR 73487 through 73552). Further detailed information, about the Physician Quality Reporting System, related laws, and help desk resources, is available on the CMS Web site at *http://www.cms.gov/PQRS.*

In the CY 2011 PFS final rule (75 FR 73618), we established 42 CFR 414.90 governing the Physician Quality Reporting System.

b. Methods of Participation

There are two ways an eligible professional may participate in the Physician Quality Reporting System: (1) As an individual eligible professional or (2) as part of a group practice under the Physician Quality Reporting System group practice reporting option (GPRO). The details of each proposed method of participation are described in this section.

(1) Individual Eligible Professionals

As defined at 42 CFR 414.90(b) the term ''eligible professional'' means any of the following: (1) A physician; (2) a practitioner described in section 1842(b)(18)(C) of the Act; (3) a physical or occupational therapist or a qualified speech-language pathologist; or (4) a qualified audiologist. For more information on which professionals are eligible to participate in the Physician Quality Reporting System, we refer readers to the ''List of Eligible Professionals'' download located in the ''How to Get Started section of the Physician Quality Reporting CMS Web site at: *http://www.cms.gov/PQRS/03_How_To_Get_Started.asp#TopOfPage.*

(2) Group Practices

(A) Background and Authority

As required by section 1848(m)(3)(C)(i) of the Act, we established and have had in place since January 1, 2010, a process under which eligible professionals in a group practice are treated as satisfactorily submitting data on quality measures under the Physician Quality Reporting System if, in lieu of reporting measures under the Physician Quality Reporting System, the group practice reports measures

determined appropriate by the Secretary, for example measures that target high-cost chronic conditions and preventive care, in a form and manner, and at a time specified by the Secretary. Section 1848(m)(3)(C)(ii) of the Act requires that this process provide for the use of a statistical sampling model to submit data on measures, for example the model used under the Medicare Physician Group Practice (PGP) demonstration project under section 1866A of the Act. We established a group practice reporting option (GPRO) for the Physician Quality Reporting System under 42 CFR 414.90(g).

(B) Proposed Definition of Group Practice

Under 42 CFR 414.90(b), a ''group practice'' means ''a single Tax Identification Number (TIN) with two or more eligible professionals, as identified by their individual National Provider Number (NPI), who have reassigned their Medicare billing rights to the TIN''. We propose to change the definition of ''group practice'' under 42 CFR 414.90(b). Specifically, we propose that under the Physician Quality Reporting System, a ''group practice'' would consist of a physician group practice, as defined by a TIN, with 25 or more individual eligible professionals (or, as identified by NPIs) who have reassigned their billing rights to the TIN. This proposed definition of group practice is different from the definition of group practice that was applicable for the 2011 Physician Quality Reporting System, which defined a group practice as two or more eligible professionals.

For the 2010 Physician Quality Reporting System, our definition of ''group practice'' was limited to practices with 200 or more eligible professionals because our intent was to model the Physician Quality Reporting System GPRO after a quality reporting program that group practices may already be familiar with—the Physician Group Practice (PGP) demonstration. Since participation in the PGP demonstration was limited to large group practices, we wanted to initially limit participation in the Physician Quality Reporting System GPRO to similar large group practices. In 2011, we expanded this definition to include practices with 2–199 eligible professionals because we developed a second reporting option (GPRO II) specifically for smaller group practices that was based largely on the Physician Quality Reporting System reporting options for individual eligible professionals. We have since observed that many of these smaller group practices that self-nominated to participate in GPRO II for 2011 subsequently elected to opt out of participation in the GPRO II for 2011 so that members of the group practices can participate in the Physician Quality Reporting System individually instead. Out of 107 total groups that self-nominated for GPRO II, only 25 group practices comprised of 2–10 eligible professionals and 15 group practices comprised of 11–25 eligible professionals are still participating in GPRO II for 2011 at this time.

Since the GPRO II seems to be a less attractive reporting option than GPRO I, we are proposing in section IV.F.1.b.2 of this proposed rule to consolidate GPRO I and II into a single GPRO. However, since our experience with using the GPRO submission web interface under the Physician Quality Reporting System has been limited to larger practices or practices participating in demonstration projects, we hesitate to expand what we referred to as GPRO I to all group practices until we gain some experience with smaller practices on a larger scale. For example, we believe that participation under the Physician Quality Reporting System GPRO is a more effective method of participation for larger as opposed to smaller group practices. As described in section IV.F.1.e.6 of this proposed rule, a group practice must take extra steps to participate in the Physician Quality Reporting System GPRO, for example reporting on more measures overall than is required for individual eligible professionals. In contrast, members of a group practice who choose to participate in the Physician Quality Reporting System as individual eligible professionals could satisfactorily report by reporting as few as 3 measures. We believe the additional reporting burden associated with participating under the Physician Quality Reporting System GPRO may make the GPRO less attractive for smaller practices. For these reasons, we propose to change the definition of ''group practice'' at 42 CFR 414.90(b) to groups with 25 or more eligible professionals.

Our proposal to change the definition of group practice would not preclude individual eligible professionals in group practices of less than 25 eligible professionals from participating in the Physician Quality Reporting System, since members of these group practices may still participate as individual eligible professionals. We believe that smaller group practices are more closely akin to individual eligible professionals with respect to participation under the Physician Quality Reporting System. We request comments on the proposed change to the definition of ''group practice'' under 42 CFR 414.90(b) under the Physician Quality Reporting System and also, whether we should retain the existing definition under the regulation despite our proposal to retain only the GPRO I for 2012.

We recognize that a group's size can fluctuate throughout the year as professionals move from practice to practice. We allow for fluctuation of the group practice's size throughout the reporting period. However, the group practice's size after the group practice's participation is approved by CMS must continue to meet the definition of a group practice as proposed in 42 CFR 414.90(b) for the entire reporting period.

We also note that under 42 CFR 414.90(g)(1), a group practice of any size (including solo practitioners) or comprised of multiple TINs participating in a Medicare approved demonstration project of other programs would also be deemed to be participating in the Physician Quality Reporting System GPRO. For example, the PGP demonstration, as well as the Medicare Shared Savings Program (governing accountable care organizations (ACOs)), Pioneer ACO, and EHR demonstrations have incorporated or proposed to incorporate aspects of the Physician Quality Reporting System reporting requirements and incentives under those respective programs.

Our intention to recognize (deem) group practices participating in such other programs or demonstration projects as having participated in the Physician Quality Reporting System was to ensure that such groups would not be barred from participating in the group practice reporting option under the eRx Incentive program, since we previously required that group practices interested in participating in the eRx Incentive Program also participate in the Physician Quality Reporting System GPRO. We are not proposing to change the eligibility for group practices, including those participating in the programs mentioned above, to participate in the eRx Incentive program. As discussed in the proposed changes to the eRx Incentive Program in section IV.F.1.e.2 later in this proposed rule, however, we are proposing that a group practice must self-nominate to participate under the eRx Incentive Program's group practice reporting option. In addition, we are proposing to make a technical change to 42 CFR 414.90(g)(1) to eliminate the reference to group practices in demonstrations that are deemed to have participated in the Physician Quality Reporting System. We believe that this language is unnecessary given the regulation at 42 CFR

414.92(b). In addition, we believe that retaining the reference at 42 CFR 414.90(g)(1) may cause confusion with regard to participation under the Physician Quality Reporting System or inappropriately suggest that duplicate Physician Quality Reporting System incentive payments are available to group practices under both the Physician Quality Reporting System and the other types of programs mentioned previously. We also propose to make a technical change to 42 CFR 414.92(b) to more broadly address group practices in other types of programs that incorporate Physician Quality Reporting System reporting requirements and incentives, so that the regulation does not solely reference demonstrations. We seek comments on these proposed technical changes to the regulations.

Since the introduction of the Physician Quality Reporting System GPRO in 2010, eligible professionals within a group practice were required to assign their billing rights to a single TIN. For 2012, as stated previously, we are proposing to retain this requirement. However, in an effort to align the Physician Quality Reporting System with other CMS quality reporting group programs, we considered amending the definition of ''group practice'' to allow participation in the Physician Quality Reporting System GPRO by groups with 25 or more individual eligible professionals (or, as identified by NPIs) who practice using multiple TINs. We believe that changing the definition of group practice in the Physician Quality Reporting System for future program years to align with other quality reporting group programs may be beneficial to providers who wish to participate in multiple CMS quality reporting programs that apply to group practices. Although we are not proposing to do so at this time, we invite public comment on possibly expanding the definition of group practice to be comprised of multiple TINs in future years of the program.

We believe that to the extent we changed the definition of group practice in future years to allow for participation by group practices that use multiple TINs, it would require us to create additional parameters related to the relationship between the various TINs. As such, we also invite public comment on parameters that should be set to ensure that these multiple TINs represent a single integrated practice, such as but not limited to:

- Must eligible professionals in a group practice share certain common characteristics in order to be eligible for participation under the Physician Quality Reporting System GPRO, such as geographic location or specialty?
- Should there be a limit to how many TINs may be comprised in a single group practice?

We invite public comment on parameters that may be set should we decide to amend the definition of group practice to include multiple TINs in future program years.

(C) Proposed Process for Physician Group Practices to Participate as Group Practices

In order to participate in the Physician Quality Reporting System GPRO for 2012 and subsequent years, we propose to require group practices to complete a self-nomination process and to meet certain technical and other requirements described later in this section in greater detail. As in prior years, we are proposing to require these self-nomination and additional process requirements so that we may identify which group practices are interested in participating in the Physician Quality Reporting System as a GPRO as well as to ensure that group practices participating in the GPRO understand the process for satisfactorily reporting Physician Quality Reporting System quality measures under the GPRO method of reporting.

We propose to require that group practices interested in participating in the Physician Quality Reporting System GPRO for the first time submit a self-nomination statement for the respective year the group practice wishes to participate as a Physician Quality Reporting System GPRO via a Web-based tool that includes the group practice's TIN(s) and name of the group practice, the name and e-mail address of a single point of contact for handling administrative issues, as well as the name and e-mail address of a single point of contact for technical support purposes. A group practice that submits an incomplete self-nomination statement, such as a valid e-mail address is not provided, would not be considered for inclusion in the Physician Quality Reporting System GPRO. We would notify any group practice that submits an incomplete self-nomination statement.

If it is not operationally feasible for us to collect self-nomination statements via a Web-based tool for 2012, we propose to require that group practices interested in participation in the Physician Quality Reporting System GPRO submit a self-nomination statement via a letter accompanied by an electronic file submitted in a format specified by us (such as a Microsoft Excel file) that includes the group practice's TIN(s) and name of the group practice, the name and e-mail address of a single point of contact for handling administrative issues, as well as the name and e-mail address of a single point of contact for technical support purposes. Under this proposed submission mechanism, a group practice that submits an incomplete self-nomination statement (such as, a valid e-mail address is not provided), would not be considered for inclusion in the 2012 Physician Quality Reporting System GPRO.

For the Physician Quality Reporting System GPRO, we propose that the self-nomination statement must also indicate the group practice's compliance with the following requirements:

- Agree to attend and participate in all mandatory GPRO training sessions.
- Is an established Medicare provider that has billed Medicare Part B on or after January 1 and prior to October 29 of the year prior to the reporting period for the respective year. For example, for purposes of participating in the 2012 Physician Quality Reporting System GPRO, the group practice must have billed Medicare Part B on or after January 1, 2011 and prior to October 29, 2011.
- Agree to have the results on the performance of their Physician Quality Reporting System measures publicly posted on the Physician Compare Web site.
- Obtain and/or have access to the identity management system specified by CMS (such as, but not limited to, the Individuals Authorized Access to CMS Computer Systems, or IACS) to submit Medicare clinical quality data to a CMS clinical data warehouse.
- Provide CMS access (upon request for validation purposes) to review the Medicare beneficiary data on which Physician Quality Reporting System GPRO submissions are founded or provide to CMS a copy of the actual data (upon request).

Furthermore, to ensure that accurate data is being reported, we reserve the right to validate the data submitted by GPROs.

We propose that, for 2012 and future years, a group practice that wishes to participate in both the Physician Quality Reporting System and eRx GPRO (see the eRx Incentive Program's section IV.F.2.(b).(2).(B). of this proposed rule) must indicate its desire to participate in both programs in its self-nomination statement.

In 2012, the GPRO is interested in testing the extraction of EHR data submitted by group practices through the GPRO Web interface. We propose that those group practices wishing to participate in this test must state their

interest to participate in the group practice's self-nomination letter.

We further propose that group practices that wish to self-nominate must do so by January 31 of the calendar year in which the group practice wishes to participate in the Physician Quality Reporting System GPRO. For example, in order to participate in the GPRO for the 2012 Physician Quality Reporting System, the group practice would need to self-nominate by January 31, 2012. Upon receipt of the self-nomination statements, we would assess whether the participation requirements for the respective reporting period were met by each group practice using Medicare claims data from the year prior to the respective reporting period. We would not preclude a group practice from participating in the GPRO if we discover, from analysis of the Medicare claims data, that there are some eligible professionals (identified by NPIs) that are not established Medicare providers (that is, have not billed Medicare Part B on or after January 1 and prior to or on October 29 of the year prior to the respective reporting period) as long as the group has at least the minimum proposed number (that is, 25) of established Medicare providers required to participate in the Physician Quality Reporting System as a group practice. Eligible professionals, as classified by their NPIs, who do not submit Medicare Part B claims for PFS covered professional services during the reporting period, however, would not be included in our incentive payment calculations.

Furthermore, we propose to allow group practices who have previously participated in the Physician Quality Reporting System GPRO to automatically be qualified to participate in the GPRO in 2012 and future program years. For example, group practices that were selected to participate in the 2011 Physician Quality Reporting System GPRO I or GPRO II (provided the group practice is still comprised of at least 25 eligible professionals) would automatically be qualified to participate in the 2012 Physician Quality Reporting System GPRO and would not need to complete the 2012 Physician Quality Reporting System GPRO qualification process. These practices would, however, need to notify CMS in writing of their desire to continue participation in the Physician Quality Reporting System GPRO for the respective program year.

We recognize that, for various reasons, there potentially could be a discrepancy between the number of eligible professionals (that is, NPIs) submitted by the practice during the self-nomination process and the number of eligible professionals billing Medicare under the practice's TIN as people move in and out of practices. Therefore, if we find more NPIs in the Medicare claims than the number of NPIs submitted by the practice during the self-nomination process and this would result in the practice being subject to different criteria for satisfactory reporting, we propose to notify the practice of this finding as part of the self-nomination process. At this point, the practice would have the option of either agreeing to be subject to the different criteria for satisfactory reporting or opting out of participation in the Physician Quality Reporting System GPRO to enable the members of their practice to participate in the Physician Quality Reporting System as individual eligible professionals.

We invite public comment on our proposals regarding the process for physician group practices to participate in the Physician Quality Reporting System GPRO.

c. Proposed Reporting Period

Since the implementation of the Physician Quality Reporting System in 2007, depending on an eligible professional's chosen reporting mechanism, we have offered up to two different reporting periods for satisfactorily reporting Physician Quality Reporting System quality measures: A 12-month reporting period (from January 1 through December 31 of the respective program year) and a 6-month reporting period (from July 1 through December 31 of the respective program year). Section 1848(m)(5)(F) of the Act requires CMS to provide alternative reporting periods and criteria for measures groups and registry reporting. To comply with this provision, for 2012 and subsequent years, CMS is proposing to retain the 6-month reporting period option for the reporting of Physician Quality Reporting System measures groups via registry.

In addition, for 2012 and subsequent years, we propose to modify 42 CFR 414.90(f)(1) to specify a 12-month reporting period (that is, January 1 through December 31 of the respective program year), consistent with section 1848(m)(6)(C)(i)(II) of the Act, for the satisfactory reporting of Physician Quality Reporting System quality measures for claims, registry, and EHR-Based reporting. Additionally, we propose to modify 42 CFR 414.90(g)(1) to specify a 12-month reporting period (that is, January 1 through December 31 of the respective program year) for the Physician Quality Reporting System GPRO. We understand that in proposing these modifications to 42 CFR 414.90, we are proposing to eliminate the 6-month reporting period for claims and registry previously available under the Physician Quality Reporting System (with the exception of reporting measures groups via registry). Although we are not proposing a 6-month reporting period for claims and registry reporting (for reporting individual measures via registry), we note that the 12-month reporting period aligns with other CMS quality reporting programs. In addition, the elimination of the 6-month reporting period for claims and registry reporting (for reporting individual measures via registry) will align the reporting periods of these mechanisms with the EHR reporting mechanism. We further believe that the elimination of the 6-month reporting period for claims and registry reporting (for reporting individual measures via registry) will help to streamline and simplify the reporting requirements for the Physician Quality Reporting System without substantial burden to eligible professionals who may still satisfactorily report using the 12-month reporting period.

d. Proposed Reporting Mechanisms—Individual Eligible Professionals

For the purpose of reporting quality measures under the Physician Quality Reporting System, we propose to retain the claims-based, registry-based, and EHR-Based reporting mechanism for 2012 and beyond. Accordingly, we propose to modify 42 CFR 414.9(f) to reflect this proposal. We are proposing to retain these reporting mechanisms in order to provide eligible professionals with multiple mechanisms from which to satisfactorily report Physician Quality Reporting System quality measures. We hope that offering multiple reporting mechanisms will aid in encouraging participation in the Physician Quality Reporting System.

As in previous years, the individual quality measures or measures groups an eligible professional selects will dictate the applicable reporting mechanism(s). In addition, while eligible professionals can attempt to qualify for a Physician Quality Reporting System incentive under multiple reporting mechanisms, the eligible professional must satisfy the criteria for satisfactory reporting proposed for the respective program year, with respect to a single reporting mechanism to qualify for an incentive. We further propose that we would not combine data submitted via multiple reporting mechanisms to determine incentive eligibility. We invite public comment concerning the general, proposed reporting mechanisms for the

Physician Quality Reporting System for 2012 and beyond.

(1) Claims-Based Reporting

As we noted previously, we propose to retain the claims-based reporting mechanism for the Physician Quality Reporting System for 2012 and beyond. For eligible professionals who choose to participate in the Physician Quality Reporting System by submitting data on individual quality measures or measures groups through the claims-based reporting mechanism, we propose that the eligible professional be required to submit the appropriate Physician Quality Reporting System quality data codes (QDCs) on the professionals' Medicare Part B claims. QDCs for the eligible professional's selected individual Physician Quality Reporting System quality measures or measures group may be submitted to CMS at any time during the reporting period for the respective program year. However, as required by section 1848(m)(1)(A) of the Act, all claims for services furnished during the reporting period would need to be processed by no later than 2 months after the end of the reporting period, to be included in the program year's Physician Quality Reporting System analysis. For example, all claims for services furnished for the 2012 Physician Quality Reporting System would need to be processed by no later than 2 months after the end of the reporting period for the 2012 Physician Quality Reporting System, that is, processed by February 28, 2013 for the reporting period that ends December 31, 2012. We invite public comment on our proposed requirements for eligible professionals who choose the claims-based reporting mechanism for 2012 and beyond.

(2) Registry-Based Reporting

(A) Proposed Requirements for the Registry-Based Reporting Mechanism—Individual Eligible Professionals

As stated previously, we propose to retain the registry-based reporting mechanism via a qualified registry (as defined in section (2)(B) of this section) for the Physician Quality Reporting System for 2012 and beyond. With regard to specific requirements for registry-based reporting for individual eligible professional reporters under the Physician Quality Reporting System, we propose that in order to report quality data on the Physician Quality Reporting System individual quality measures or measures groups for the respective program year through a qualified registry, an eligible professional or group practice must enter into and maintain an appropriate legal arrangement with a qualified Physician Quality Reporting System registry. Such arrangements would provide for the registry's receipt of patient-specific data from the eligible professional and the registry's disclosure of quality measures results and numerator and denominator data on Physician Quality Reporting System quality measures or measures groups on behalf of the eligible professional to CMS. Thus, the registry would act as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) (HIPAA) Business Associate and agent of the eligible professional. Such agents are referred to as ''data submission vendors.'' The ''data submission vendors'' would have the requisite legal authority to provide clinical quality measures results and numerator and denominator data on individual quality measures or measures groups on behalf of the eligible professional for the Physician Quality Reporting System.

We propose that the registry, acting as a data submission vendor, would submit CMS-defined registry-derived measures information to our designated database for the Physician Quality Reporting System, using a CMS-specified record layout, which would be provided to the registry by CMS. Similarly, we propose that eligible professionals choosing to participate in the Physician Quality Reporting System through the registry-based reporting mechanism for the respective program year must select a qualified Physician Quality Reporting System registry and submit information on Physician Quality Reporting System individual quality measures or measures groups to the selected registry in the form and manner and by the deadline specified by the registry.

We propose to post a list of qualified registries for the Physician Quality Reporting System for the respective program year on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.gov/pqrs,* which would include the registry name, contact information, the measures and/or measures group (if qualified) for which the registry is qualified and intends to report for the respective program year, and information regarding the cost of the registry to eligible professionals. However, we do not anticipate making this list available prior to the start of the respective program year. That is, we do not anticipate making the list of qualified registries for the 2012 Physician Quality Reporting System available prior to the start of the 2012 program year. We propose to post the names of the Physician Quality Reporting System qualified registries for the respective reporting period in the following 3 phases based on: (1) The registry's success in submitting Physician Quality Reporting System quality measures results and numerator and denominator data on the quality measures in a prior Physician Quality Reporting System program year (2008, 2009, 2010, 2011, etc.); (2) the registry's submission of a letter indicating their continued interest in being a Physician Quality Reporting System registry by October 31 of the year prior to the program year (that is, by October 31, 2011 for the 2012 program year); and (3) the registry's compliance with the Physician Quality Reporting System registry requirements for the respective program year as indicated by CMS' registry vetting process. The listing of a qualified registry will depend on which of the 3 proposed phases is most applicable to the registry. The manner in which we post the list of qualified registries is based on prior experience with participation in the Physician Quality Reporting System as a registry vendor.

(B) 2012 Proposed Qualification Requirements for Registries

Although we are proposing to establish the registry-based reporting mechanism as a way to report Physician Quality Reporting System quality measures for 2012 and beyond, we propose that the following proposed qualification requirements only apply for the 2012 program year. For the Physician Quality Reporting System in 2012, as in prior program years, we propose to require a self-nomination process for registries wishing to submit Physician Quality Reporting System quality measures or measures groups on behalf of eligible professionals for services furnished during the applicable reporting periods in 2012. This qualification process allows us to ensure that registries are fully informed of the Physician Quality Reporting System reporting process and to ensure the registry is qualified, thereby improving the likelihood of accurate reporting.

We note that third party intermediaries may participate in various capacities under the Physician Quality Reporting System. In addition, in an effort to encourage the electronic submission of quality measures data from eligible professionals' EHRs, we are proposing EHR-Based reporting, as discussed later in this section. As a result, we believe it is important to distinguish entities that collect their data from an EHR from those entities that collect their data from other sources. As such, as discussed here and below, we propose, the following two

categories of third party intermediaries that would be able to submit Physician Quality Reporting System measures data on behalf of eligible professional: (1) A registry, as defined at 42 CFR 414.90(b), which would be any data submission vendor submitting data from a source other than an EHR on behalf of eligible professionals that meets the proposed registry qualification requirements later in this section; and (2) EHR data submission vendors, which would be a data submission vendor that obtains its data from an eligible professional's EHR and that meets the 2012 EHR qualification requirements. However, for operational reasons, we may reserve the right to limit such entities to a single role such that the entity would need to decide whether it wants to serve as a registry or EHR data submission vendor but not both. We note that a registry could serve as an ''EHR data submission vendor'' to the extent that it obtains data from an eligible professional's EHR, but would need to meet the proposed 2012 EHR qualification requirements. To be considered a qualified registry for purposes of serving as a registry under the program and submitting individual quality measures on behalf of eligible professionals who choose the registry reporting mechanism for 2012, we propose that both registries new to the Physician Quality Reporting System and those previously qualified must:

- Be in existence as of January 1, 2012.
- Have at least 25 participants by January 1, 2012.
- Provide at least 1 feedback report, based on the data submitted to them for the 2012 Physician Quality Reporting System incentive reporting period, and if technically feasible, provide at least 2 feedback reports throughout the year to participating eligible professionals. Although it is not a requirement that registries provide interim feedback reports, we believe it is in the stakeholder's interest to require early registry collection of data for purposes of providing a feedback report to eligible professionals before the end of the 2012 Physician Quality Reporting System incentive reporting period to determine what steps, if any, an eligible professional should take to meet the criteria for satisfactory reporting.
- For purposes of distributing feedback reports to eligible professionals, collect an eligible professional's e-mail addresses and have documentation from the eligible professional authorizing the release of his or her e-mail address.
- Not be owned and managed by an individual locally-owned single-specialty group (in other words, single-specialty practices with only 1 practice location or solo practitioner practices would be prohibited from self-nominating to become a qualified Physician Quality Reporting System registry).
- Participate in ongoing 2012 Physician Quality Reporting System mandatory support conference calls hosted by CMS (approximately 1 call per month), including an in-person registry kick-off meeting to be held at CMS headquarters in Baltimore, MD. Registries that miss more than one meeting would be precluded from submitting Physician Quality Reporting System data for the reporting year (2012).
- Be able to collect all needed data elements and transmit to CMS the data at the TIN/NPI level for at least 3 measures, which is the minimum amount of measures on which an eligible professional is required to report, in the 2012 Physician Quality Reporting System (according to the posted 2012 Physician Quality Reporting System Measure Specifications);
- Be able to calculate and submit measure-level reporting rates or, upon request, the data elements needed to calculate the reporting rates by TIN/NPI.
- Be able to calculate and submit, by TIN/NPI, a performance rate (that is, the percentage of a defined population who receive a particular process of care or achieve a particular outcome based on a calculation of the measure's numerator and denominator specifications) for each measure on which the TIN/NPI reports or, upon request the Medicare beneficiary data elements needed to calculate the reporting rates.
- Be able to separate out and report on Medicare Part B FFS patients.
- Provide the name of the registry.
- Provide the reporting period start date the registry will cover.
- Provide the reporting period end date the registry will cover.
- Provide the measure numbers for the Physician Quality Reporting System quality measures on which the registry is reporting.
- Provide the measure title for the Physician Quality Reporting System quality measures on which the registry is reporting.
- Report the number of eligible instances (reporting denominator).
- Report the number of instances a quality service is performed (reporting numerator).
- Report the number of performance exclusions, meaning the quality action was not performed for a valid reason as defined by the measure specification.
- Report the number of reported instances, performance not met (eligible professional receives credit for reporting, not for performance), meaning the quality action was not performed for no valid reason as defined by the measure specification.
- Be able to transmit this data in a CMS-approved XML format.
- Comply with a CMS-specified secure method for data submission, such as submitting the registry's data in an XML file through an identity management system specified by CMS or another approved method, such as use of appropriate NwHIN (Nationwide Health Information Network) specifications, if technically feasible.
- Submit an acceptable ''validation strategy'' to CMS by March 31, 2012. A validation strategy ascertains whether eligible professionals have submitted accurately and on at least the minimum number (80 percent) of their eligible patients, visits, procedures, or episodes for a given measure, which, as described in section (e)(2) of this section, is the minimum percentage of patients on which an eligible professional must report on any given measure. Acceptable validation strategies often include such provisions as the registry being able to conduct random sampling of their participant's data, but may also be based on other credible means of verifying the accuracy of data content and completeness of reporting or adherence to a required sampling method.
- Perform the validation outlined in the strategy and send the results to CMS by June 30, 2013 for the 2012 reporting year's data.
- Enter into and maintain with its participating professionals an appropriate Business Associate agreement that provides for the registry's receipt of patient-specific data from the eligible professionals, as well as the registry's disclosure of quality measure results and numerator and denominator data and/or patient-specific data on Medicare beneficiaries on behalf of eligible professionals who wish to participate in the Physician Quality Reporting System.
- Obtain and keep on file signed documentation that each holder of an NPI whose data are submitted to the registry has authorized the registry to submit quality measure results and numerator and denominator data and/or patient-specific data on Medicare beneficiaries to CMS for the purpose of Physician Quality Reporting System participation. This documentation must be obtained at the time the eligible professional signs up with the registry to submit Physician Quality Reporting

System quality measures data to the registry and must meet any applicable laws, regulations, and contractual business associate agreements.

- Provide CMS access (upon request for health oversight purposes like validation) to review the Medicare beneficiary data on which 2012 Physician Quality Reporting System registry-based submissions are founded or provide to CMS a copy of the actual data (upon request).
- Provide CMS a signed, written attestation statement via mail or e-mail which states that the quality measure results and any and all data including numerator and denominator data provided to CMS are accurate and complete.
- Use Physician Quality Reporting System measure specifications and the CMS provided measure calculation algorithm, or logic, to calculate reporting rates or performance rates unless otherwise stated. CMS would provide registries a standard set of logic to calculate each measure and/or measures group they intend to report in 2012.
- Provide a calculated result using the CMS supplied measure calculation logic and XML file for each measure that the data submission vendor intends to calculate. The registries would be required to show that they can calculate the proper measure results (that is, reporting and performance rates) using the CMS-supplied logic and send the calculated data back to CMS in the specified format.
- Provide the individual data elements used to calculate the measures upon request by CMS under its health oversight authority, if aggregated data submission is still the selected method of data collection. Registries that are subject to validation will be asked to send discrete Medicare beneficiary data elements for a measure (determined by CMS) in the required data format for us to recalculate the registries' reported results. Validation would be conducted for several measures at a randomly selected sample of registries in order to validate their data submissions.
- Provide CMS with beneficiary-level data provided to the registry by the eligible professional in the CMS-approved format, upon request by CMS. CMS intends to use the data to calculate the eligible professional's measure results (that is, reporting and performance rates).

In addition to meeting all the requirements specified previously for the reporting of individual quality measures via registry, for registries that intend to report on 2012 Physician Quality Reporting System measures groups, we propose that both registries new to the Physician Quality Reporting System and those previously qualified must:

- Indicate the reporting period chosen for each eligible professional who chooses to submit data on measures groups.
- Base reported information on measures groups only on patients to whom services were furnished during the 2012 reporting period.
- Agree that the registry's data may be inspected or a copy requested by CMS and provided to CMS under our oversight authority.
- Be able to report consistent with the proposed reporting criteria requirements, as specified in section (e)(2) of this section.

We intend to post the final 2012 Physician Quality Reporting System registry requirements on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.gov/pqrs* by November 15, 2011 or shortly thereafter. We anticipate that new registries that wish to self-nominate for 2012 would be required to do so by January 31, 2012.

We propose that registries that were ''qualified'' for 2011 and wish to continue to participate in 2012 will not need to be ''re-qualified'' for 2012, but instead would only be required to demonstrate that they can meet the new 2012 data submission requirements. For technical reasons, however, we do not expect to be able to complete this vetting process for the new 2012 data submission requirements until mid-2012. Therefore, for 2012, we may not be able to post the names of registries that are qualified for the 2012 Physician Quality Reporting System until we have determined the previously qualified registries that wish to be qualified for the 2012 Physician Quality Reporting System are in compliance with the new registry requirements.

We propose that registries ''qualified'' for 2011, who are successful in submitting 2011 Physician Quality Reporting System data, and wish to continue to participate in 2012 would need to indicate their desire to continue participation for 2012 by submitting a self-nomination statement via a web-based tool to CMS indicating their continued interest in being a Physician Quality Reporting System registry for 2012 and their compliance with the 2012 Physician Quality Reporting System registry requirements by no later than October 31, 2011. Additionally, registries that were qualified but unsuccessful in submitting 2011 Physician Quality Reporting System data (that is, fail to submit 2011 Physician Quality Reporting System data per the 2011 Physician Quality Reporting System registry requirements) would need to go through a full self-nomination vetting process for 2012.

We further propose that by March 31, 2012, registries that are unsuccessful at submitting registry data in the correct data format for 2011 would need to be able to meet the 2012 Physician Quality Reporting System registry requirements and go through the full vetting process again. This would include CMS receiving the registry's self-nomination by March 31, 2012. We propose that the aforementioned registry requirements will also apply for the purpose of a registry qualifying to submit the electronic prescribing measure for the 2012 eRx Incentive Program. We anticipate finalizing the list of 2012 Physician Quality Reporting System registries by Summer 2012.

For eligible professionals considering this reporting mechanism, we point out that even though a registry is listed as ''qualified,'' we cannot guarantee or assume responsibility for the registry's successful submission of the required Physician Quality Reporting System quality measures results or measures group results or required data elements submitted on behalf of a given eligible professional. We invite public comment on our proposed 2012 requirements for the registry-based reporting mechanism for individual eligible professional reporters.

Furthermore, in an effort to ensure that registries provide accurate reporting of Physician Quality Reporting System data, in program years after 2012, we seek to disallow previously-qualified registries from submitting data on Physician Quality Reporting System quality measures if it is found that the data registries provide are significantly inaccurate. We believe this is important because we have noticed many calculation and data submission errors in reporting from registries in past program years. Alternatively, for years after 2012, we may require registries to submit all the individual data elements for CMS to calculate an eligible professional's reporting and performance rates as well as require registries to submit patient-level data on Medicare beneficiaries rather than aggregate data. We seek public comment on disallowing previously-qualified registries to submit data on Physician Quality Reporting System quality measures in future program years if it is found that the data the registries provide are significantly inaccurate.

(3) EHR-Based Reporting

For 2012 and beyond, we propose that eligible professionals who choose to participate in the Physician Quality Reporting System via the EHR-Based reporting mechanism have the option of submitting quality measure data obtained from their Physician Quality Reporting System qualified EHR to CMS either:
(1) Directly from his or her qualified EHR, in the CMS-specified manner, or
(2) indirectly from a qualified EHR data submission vendor (on the eligible professional's behalf), in the CMS-specified manner.

(A) Direct EHRs

(i) Proposed Requirements for the Direct EHR-Based Reporting Mechanism—Individual Eligible Professionals

For 2012 and beyond, we propose to retain the EHR-Based reporting mechanism via a qualified EHR (as defined in section (3)(b) of this section) for the purpose of satisfactorily reporting Physician Quality Reporting System quality measures. We propose the following requirements for individual eligible professionals associated with EHR-Based reporting: (1) Selection of a Physician Quality Reporting System qualified EHR product and (2) submission of Medicare clinical quality data extracted from the EHR directly to CMS, in the CMS-specified manner.

We propose that, in addition to meeting the appropriate criteria for satisfactory reporting of individual measures for the 2012 Physician Quality Reporting System EHR reporting option, eligible professionals who choose the EHR-Based reporting mechanism for the 2012 Physician Quality Reporting System would be required to have a Physician Quality Reporting System qualified EHR product. We understand that eligible professionals may have purchased Certified EHR Technology for purposes of reporting under the Medicare and Medicaid EHR Incentive Programs. Such Certified EHR Technology may or may not be qualified for purposes of the 2012 Physician Quality Reporting System. Eligible professionals would need to ensure that their Certified EHR Technology is also qualified for purposes of the 2012 Physician Quality Reporting System to participate in the Physician Quality Reporting System via the EHR-Based reporting mechanism for 2012. The certification process for EHR technology does not test the EHR product's ability to output a file that meets the Physician Quality Reporting System measures file specifications. We are currently exploring ways to further align these two programs' reporting requirements for future years so that Certified EHR Technology may be used to satisfy both the Medicare EHR Incentive Program and the Physician Quality Reporting System without any additional testing. For 2012, we propose to modify the current list of EHR vendors qualified under the Physician Quality Reporting System to indicate which of the qualified vendors' products have also received a certification for the purposes of the EHR Incentive Programs. We invite public comment on the 2012 proposed qualifications for direct EHRs.

(ii) 2012 Proposed Qualification Requirements for Direct EHR Products

For direct EHR products who wish to report 2012 Physician Quality Reporting System quality measures data on behalf of eligible professionals, we propose that a test of quality data submission from eligible professionals who wish to report 2012 quality measure data directly from their qualified EHR product would be required and we anticipate that this testing would occur in late 2012, immediately followed by the submission of the eligible professional's actual 2012 Physician Quality Reporting System data in early 2013. This entire final test/production data submission timeframe for 2012 is expected to be December 2012 through February 2013. We are currently vetting newly self-nominated EHR vendor products for possible qualification for the 2012 Physician Quality Reporting System program year. Similar to prior years, we expect to list the 2012 Physician Quality Reporting System qualified EHR products by January 2012. We will also be vetting those self-nominated EHR data submission vendors for possible qualification to submit 2012 Physician Quality Reporting System measures on eligible professionals' behalf under the EHR-Based reporting mechanism. We expect to list the entities that are EHR data submission vendors qualified to submit 2012 Physician Quality Reporting System EHR measures on eligible professionals' behalf by mid-2012.

For direct EHR vendors wishing to qualify for participation in the 2012 Physician Quality Reporting System-Medicare Incentive Pilot for the Medicare EHR Incentive Program (discussed in section IV.H. of this proposed rule), we propose a separate, accelerated vetting process for EHR vendors and their products. This vetting process will be the same process as the vetting process for EHR vendor products for the 2012 Physician Quality Reporting System that is currently underway. We will begin the vetting process for these additional EHR data submission vendors in the beginning of 2012 and anticipate that the vetting process be completed by Summer/Fall 2012.

We further propose that any EHR direct vendor interested in being ''qualified'' to submit quality data extracted from an EHR to CMS on eligible professionals' behalf for the 2012 Physician Quality Reporting System would be required to self-nominate. We anticipate that the self-nomination deadline will occur no later than December 31, 2011. We expect to post instructions for self-nomination by the 4th quarter of CY 2011 on the Physician Quality Reporting System section of CMS Web site.

(B) EHR Data Submission Vendors

(i) Proposed Requirements for the EHR Data Submission Vendor-based Reporting Mechanism—Individual Eligible Professionals

For 2012 and beyond, we propose to retain the EHR-Based reporting mechanism via a qualified EHR (as defined in 42 CFR 414.90(b)) for the purpose of satisfactorily reporting Physician Quality Reporting System quality measures. We propose the following requirements for individual eligible professionals associated with indirect EHR-Based reporting: (1) Selection of a Physician Quality Reporting System qualified EHR product and (2) submission of Medicare clinical quality data extracted from the EHR to a qualified ''EHR data submission vendor'' (which may include some current registries, EHR vendors, and other entities that are able to receive and transmit clinical quality data extracted from an EHR) to CMS, in the CMS-specified manner. For eligible professionals who choose to electronically submit Medicare clinical quality data extracted from their EHR to a qualified EHR data submission vendor, the EHR data submission vendor would then submit the Physician Quality Reporting System measures data to CMS in a CMS-specified manner on the eligible professional's behalf for the respective program year.

For 2012, we propose that in order for an eligible professional to submit Medicare clinical quality data extracted from his or her EHR to CMS via an EHR data submission vender, the eligible professional must enter into and maintain an appropriate legal arrangement with a qualified 2012 EHR data submission vendor that is capable of receiving and transmitting Medicare

clinical quality data extracted from an EHR. Such arrangements would provide for the EHR data submission vendor's receipt of beneficiary-specific data from the eligible professional and the EHR data submission vendor's disclosure of the beneficiary-specific data on behalf of the eligible professional to CMS. Thus, the EHR data submission vendor would act as a Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) (HIPAA) Business Associate and agent of the eligible professional. Such agents are referred to as ''EHR data submission vendors.'' The ''EHR data submission vendors'' would have the requisite legal authority to provide beneficiary-specific data on the 2012 Physician Quality Reporting System EHR measures on behalf of the eligible professional to CMS for the Physician Quality Reporting System.

We also propose that eligible professionals choosing to participate in the 2012 Physician Quality Reporting System through the EHR-Based reporting mechanism via an EHR data submission vendor for 2012 must select a qualified Physician Quality Reporting System EHR data submission vendor and submit information on Physician Quality Reporting System EHR measures to the selected EHR data submission vendor in the form and manner, and by the deadline specified by the EHR data submission vendor. We invite public comment on the proposed qualification requirements on the 2012 proposed qualification requirements for individual eligible professionals using EHR data submission vendors to submit Physician Quality Reporting System quality measures data.

(i) 2012 Proposed Qualification Requirements for EHR Data Submission Vendors

Similar to our 2012 qualification requirements for direct EHR vendors, we propose that qualified EHR data submission vendors that wish to submit 2012 quality measures data obtained from an eligible professional's qualified EHR product to CMS on the eligible professional's behalf would be required to submit test data in late 2012 followed by the submission of the eligible professional's actual 2012 Physician Quality Reporting System data in early 2013. For data submission vendors wishing to qualify for participation in the 2012 Physician Quality Reporting System-Medicare Incentive Pilot for the Medicare EHR Incentive Program (discussed in section IV.H. of this proposed rule), we propose a separate, accelerated vetting process for EHR vendors and their products. This vetting process will be the same process as the vetting process for EHR vendor products for the 2012 Physician Quality Reporting System that is currently underway. We will begin the vetting process for these additional EHR data submission vendors in the beginning of 2012 and anticipate that the vetting process be completed by Summer/Fall 2012.

We further propose that any EHR data submission vendor interested in being ''qualified'' to submit quality data extracted from an EHR to CMS on eligible professionals' behalf for the 2012 Physician Quality Reporting System would be required to self-nominate. We anticipate that the self-nomination deadline will occur no later than December 31, 2011. We expect to post instructions for self-nomination by the 4th quarter of CY 2011 on the Physician Quality Reporting System section of CMS Web site.

We propose the following qualification requirements for EHR data submission vendors who wish to submit 2012 Physician Quality Reporting System quality measure data:

- Not be in a beta test form.
- Be in existence as of January 1, 2012.
- Have at least 25 active users.
- Participate in ongoing Physician Quality Reporting mandatory support conference calls hosted by CMS (approximately one call per month). Failure to attend more than one call per year would result in the removal of the EHR data submission vendor from the 2012 EHR qualification process.
- Have access to the identity management system specified by CMS (such as, but not limited to, the Individuals Authorized Access to CMS Computer Systems, or IACS) to submit clinical quality data extracted to a CMS clinical data warehouse.
- Submit a test file containing dummy Medicare clinical quality data to a CMS clinical data warehouse via an identity management system specified by CMS during a timeframe specified by CMS. In 2011, the requirement to submit a test file could have contained real or dummy data. However, for privacy reasons, we have decided to only provide for the submission of test files containing dummy data. We have proposed revisions to 42 CFR 414.90 to reflect this change.
- Submit a file containing the eligible professional's 2012 Physician Quality Reporting System Medicare clinical quality data extracted from the EHR for the entire 12-month reporting period via the CMS-specified identify management system during the timeframe specified by us in early 2013.
- Provide at least 1 feedback report, based on the data submitted to them for the 2012 Physician Quality Reporting System incentive reporting period, and if technically feasible, provide at least 2 feedback reports throughout the year to participating eligible professionals.
- Be able to collect all needed data elements and transmit to CMS the data at the beneficiary level.
- Be able to separate out and report on Medicare Part B FFS patients.
- Provide the measure numbers for the quality measures on which the data submission vendor is reporting.
- Be able to transmit this data in a CMS-approved XML format utilizing a Clinical Document Architecture (CDA) standard such as Quality Reporting Data Architecture (QRDA).
- Comply with a CMS-specified secure method for data submission, such as submitting the EHR data submission vendor's data in an XML file through an identity management system specified by CMS or another approved method, such as use of appropriate NwHIN (Nationwide Health Information Network) specifications, if technically feasible.
- Enter into and maintain with its participating professionals an appropriate Business Associate agreement that provides for the data submission vendor's receipt of patient-specific data from the eligible professionals, as well as the data submission vendor's disclosure of patient-specific data on Medicare beneficiaries on behalf of eligible professionals who wish to participate in the Physician Quality Reporting System.
- Obtain and keep on file signed documentation that each holder of an NPI whose data are submitted to the data submission vendor has authorized the data submission vendor to submit patient-specific data on Medicare beneficiaries to CMS for the purpose of Physician Quality Reporting System participation. This documentation must be obtained at the time the eligible professional signs up with the data submission vendor to submit Physician Quality Reporting System quality measures data to the data submission vendor and must meet any applicable laws, regulations, and contractual business associate agreements.
- Provide CMS access (upon request for health oversight purposes like validation) to review the Medicare beneficiary data on which 2012 Physician Quality Reporting System EHR-Based submissions are founded or provide to CMS a copy of the actual data (upon request).
- Provide CMS a signed, written attestation statement via mail or e-mail

which states that the quality measure results and any and all data including numerator and denominator data provided to CMS are accurate and complete.

• Use Physician Quality Reporting System measure specifications and the CMS provided measure calculation algorithm, or logic, to calculate reporting rates or performance rates unless otherwise stated. CMS would provide EHR data submission vendors a standard set of logic to calculate each measure and/or measures group they intend to report in 2012.

• Provide a calculated result using the CMS supplied measure calculation logic and XML file for each measure that the EHR data submission vendor intends to calculate. The data submission vendors would be required to show that they can calculate the proper measure results (that is, reporting and performance rates) using the CMS-supplied logic and send the calculated data back to CMS in the specified format.

For EHR data submission vendors participating in the Physician Quality Reporting System-Medicare EHR Incentive Pilot for 2012 (discussed in section IV.H. of this proposed rule) and wish to also submit Medicare clinical quality data extracted from an EHR for the purposes of the 2012 Physician Quality Reporting System incentive, we propose that these EHR data submission vendors meet the following below requirements in addition to the requirements stated above:

• Be able to collect all needed data elements and transmit to CMS the data at the TIN/NPI level.

• Be able to calculate and submit measure-level reporting rates or, upon request, the data elements needed to calculate the reporting rates by TIN/NPI.

• Be able to calculate and submit, by TIN/NPI, a performance rate (that is, the percentage of a defined population who receive a particular process of care or achieve a particular outcome based on a calculation of the measure's numerator and denominator specifications) for each measure on which the TIN/NPI reports or, upon request the Medicare beneficiary data elements needed to calculate the reporting rates.

• Report the number of eligible instances (reporting denominator).

• Report the number of instances a quality service is performed (reporting numerator).

• Report the number of performance exclusions, meaning the quality action was not performed for a valid reason as defined by the measure specification.

• Report the number of reported instances, performance not met (eligible professional receives credit for reporting, not for performance), meaning the quality action was not performed for no valid reason as defined by the measure specification.

• Be able to transmit this data in a CMS-approved XML format.

• Submit an acceptable ''validation strategy'' to CMS by March 31, 2012. A validation strategy ascertains whether eligible professionals have submitted accurately and on at least the minimum number (80 percent) of their eligible patients, visits, procedures, or episodes for a given measure, which, as described in section (e)(2) of this section, is the minimum percentage of patients on which an eligible professional must report on any given measure. Acceptable validation strategies often include such provisions as the EHR data submission vendor being able to conduct random sampling of their participant's data, but may also be based on other credible means of verifying the accuracy of data content and completeness of reporting or adherence to a required sampling method.

• Perform the validation outlined in the strategy and send the results to CMS by June 30, 2013 for the 2012 reporting year's data.

• Enter into and maintain with its participating professionals an appropriate Business Associate agreement that provides for the data submission vendor's receipt of patient-specific data from the eligible professionals, as well as the data submission vendor's disclosure of quality measure results and numerator and denominator data on Medicare beneficiaries on behalf of eligible professionals who wish to participate in the Physician Quality Reporting System.

• Obtain and keep on file signed documentation that each holder of an NPI whose data are submitted to the data submission vendor has authorized the data submission vendor to submit quality measure results and numerator and denominator data on Medicare beneficiaries to CMS for the purpose of Physician Quality Reporting System participation. This documentation must be obtained at the time the eligible professional signs up with the data submission vendor to submit Physician Quality Reporting System quality measures data to the data submission vendor and must meet any applicable laws, regulations, and contractual business associate agreements.

• Use Physician Quality Reporting System measure specifications and the CMS provided measure calculation algorithm, or logic, to calculate reporting rates or performance rates unless otherwise stated.

• Provide a calculated result using the CMS supplied measure calculation logic and XML file for each measure that the EHR data submission vendor intends to calculate. The data submission vendors would be required to show that they can calculate the proper measure results (that is, reporting and performance rates) using the CMS-supplied logic and send the calculated data back to CMS in the specified format.

We cannot, however, assume responsibility for the successful submission of data from eligible professionals' EHRs. In addition, eligible professionals who decide to submit the Physician Quality Reporting System measures directly from his or her EHR should begin attempting submission soon after the opening of the clinical data warehouse in order to assure the eligible professional has a reasonable period of time to work with his or her EHR and/or its vendors to correct any problems that may complicate or preclude successful quality measures data submission through that EHR.

We propose that for 2012, the EHR data submission vendor would submit clinical quality data on Medicare beneficiaries extracted from eligible professionals' EHRs to our designated database for the Physician Quality Reporting System using a CMS-specified record layout, which would be provided to the EHR data submission vendor by CMS. In addition, for purposes of also reporting 2012 Physician Quality Reporting System quality measures, the EHR data submission vendor would be required to submit patient level Medicare clinical quality data extracted from the eligible professional's EHR using the same CMS-specified record layout that qualified EHR products must be able to produce for purposes of an eligible professional directly submitting the 2012 Physician Quality Reporting System EHR measures to CMS.

We invite public comment on the proposed qualification requirements for EHR data submission vendors.

(C) Proposed Qualification Requirements for EHR Direct and Data Submission Vendors and Their Products for the 2013 Physician Quality Reporting System

As in prior years, unlike the qualification process for registries, EHR vendors, which include direct EHR vendors and EHR data submission vendors, are tested for qualification a year ahead of the program year in which the EHR vendor intends to submit Physician Quality Reporting System quality measures on behalf of individual

eligible professionals or where its product(s) are available for use by eligible professionals to submit Physician Quality Reporting System measures directly to CMS.

We propose EHR vendor testing for the 2013 Physician Quality Reporting System program year to qualify new EHR vendors and EHR data submission vendors and their EHR products for submission of Medicare beneficiary quality data extracted from EHR products to the CMS Medicare clinical quality data warehouse for the 2013 Physician Quality Reporting System. Specifically, we propose that in order for EHR vendors to be qualified to report 2013 Physician Quality Reporting System data to CMS, EHR vendors must meet the following requirements:

- Not be in a beta test form.
- Be in existence as of January 1, 2012.
- Have at least 25 active users.
- Participate in ongoing Physician Quality Reporting mandatory support conference calls hosted by CMS (approximately one call per month). Failure to attend more than one call per year would result in the removal of the EHR data submission vendor from the 2012 EHR qualification process.
- Indicate the reporting option the vendor seeks to qualify for its users to submit in addition to individual measures.
- Have access to the identity management system specified by CMS (such as, but not limited to, the Individuals Authorized Access to CMS Computer Systems, or IACS) to submit Medicare clinical quality data extracted to a CMS clinical data warehouse.
- Submit a test file containing dummy Medicare clinical quality data to a CMS clinical data warehouse via an identity management system specified by CMS during a timeframe specified by CMS. In 2011, the requirement to submit a test file could have contained real or dummy data. However, for privacy reasons, we have decided to only provide for the submission of test files containing dummy data. We have proposed revisions to 42 CFR 414.90 to reflect this change.
- Submit a file containing the eligible professional's 2012 Physician Quality Reporting System Medicare clinical quality data extracted from the EHR for the entire 12-month reporting period via the CMS-specified identify management system during the timeframe specified by us in early 2013.
- Provide at least 1 feedback report, based on the data submitted to them for the 2012 Physician Quality Reporting System incentive reporting period, and if technically feasible, provide at least two feedback reports throughout the year to participating eligible professionals.
- Be able to collect all needed data elements and transmit to CMS the data at the beneficiary level.
- Be able to separate out and report on Medicare Part B FFS patients.
- Provide the measure numbers for the quality measures on which the data submission vendor is reporting.
- Be able to transmit this data in a CMS-approved XML format utilizing a Clinical Document Architecture (CDA) standard such as Quality Reporting Data Architecture (QRDA).
- Comply with a CMS-specified secure method for data submission, such as submitting the EHR vendor's data in an XML file through an identity management system specified by CMS or another approved method, such as use of appropriate NwHIN (Nationwide Health Information Network) specifications, if technically feasible.
- Enter into and maintain with its participating professionals an appropriate Business Associate agreement that provides for the data submission vendor's receipt of patient-specific data from the eligible professionals, as well as the data submission vendor's disclosure of patient-specific data on Medicare beneficiaries on behalf of eligible professionals who wish to participate in the Physician Quality Reporting System.
- Obtain and keep on file signed documentation that each holder of an NPI whose data are submitted to the data submission vendor has authorized the data submission vendor to submit patient-specific data on Medicare beneficiaries to CMS for the purpose of Physician Quality Reporting System participation. This documentation must be obtained at the time the eligible professional signs up with the data submission vendor to submit Physician Quality Reporting System quality measures data to the data submission vendor and must meet any applicable laws, regulations, and contractual business associate agreements.
- Provide CMS access (upon request for health oversight purposes like validation) to review the Medicare beneficiary data on which 2012 Physician Quality Reporting System EHR-Based submissions are founded or provide to CMS a copy of the actual data (upon request).
- Provide CMS a signed, written attestation statement via mail or e-mail which states that the quality measure results and any and all data including numerator and denominator data provided to CMS are accurate and complete.
- Use Physician Quality Reporting System measure specifications and the CMS provided measure calculation algorithm, or logic, to calculate reporting rates or performance rates unless otherwise stated. CMS would provide EHR vendors a standard set of logic to calculate each measure and/or measures group they intend to report in 2012.
- Provide a calculated result using the CMS supplied measure calculation logic and XML file for each measure that the EHR vendor intends to calculate. The data submission vendors would be required to show that they can calculate the proper measure results (that is, reporting and performance rates) using the CMS-supplied logic and send the calculated data back to CMS in the specified format.

This is the same self-nomination process described in the ''Requirements for Electronic Health Record (EHR) Vendors to Participate in the 2012 Physician Quality Reporting System EHR Program,'' posted on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.gov/PQRS/20_AlternativeReportingMechanisms.asp#TopOfPage.* For 2013, we propose that these requirements would apply not only for the purpose of a vendor's EHR product being qualified so that the product's users may submit 2013 Medicare beneficiary data extracted from the EHR for the 2013 Physician Quality Reporting System in 2014, but also for the purpose of a vendor's EHR product being qualified to electronically submit Medicare beneficiary data extracted from the EHR for reporting the electronic prescribing measure for the eRx Incentive Program 2013 incentive and 2014 payment adjustment. Similarly, we propose that requirements would apply not only for the purposes of an EHR data submission vendor being qualified to submit 2013 Medicare beneficiary data from eligible professionals' EHRs for the 2013 Physician Quality Reporting System in 2014 but also for the purpose of an EHR data submission vendor being qualified to electronically submit Medicare beneficiary data extracted from the EHR for reporting the electronic prescribing measure for the eRx Incentive Program 2013 incentive and 2014 payment adjustment.

We propose that if an EHR vendor misses more than one mandatory support call or meeting, the vendor and their product and/or EHR data submission vendor would be disqualified for the Physician Quality Reporting System reporting year, which is covered by the call.

For the 2013 Physician Quality Reporting System, we propose that previously qualified and new vendors and/or EHR data submission vendors would need to incorporate any new EHR measures (that is, electronically-specified measures), as well as update their electronic measure specifications and data transmission schema should either or both change, finalized for to the Physician Quality Reporting System for 2013 if they wish to maintain their Physician Quality Reporting System qualification.

We further propose that any EHR vendor interested in having one or more of their EHR products ''qualified'' to submit quality data extracted from their EHR products to the CMS Medicare clinical quality data warehouse for the 2013 Physician Quality Reporting System would be required to submit their self-nomination statement by January 31, 2012. Whereas, in prior program years, EHR vendors have submitted self-nomination statements via mail, we propose to have EHR vendors submit self-nomination statements via a Web-based tool, if technically feasible for us to develop such a tool. We believe use of a Web-based tool to self-nominate is a more efficient method of collecting self-nomination statements. However, if use of a Web-based tool is not technically feasible, as in prior years, EHR vendors will submit self-nomination statements via e-mail. We expect to post instructions for submitting the self-nomination statement and the 2013 EHR vendor requirements in the 4th quarter of CY 2011. Specifically, for the 2013 Physician Quality Reporting System, in order to ensure EHR vendors' interest in participating in the 2013 Physician Quality Reporting System, we propose that only EHR vendors that self-nominate to participate in the EHR Program testing during calendar year 2012 would be considered qualified EHR vendors for the 2013 Physician Quality Reporting System.

We invite public comment on the proposed qualification requirements for EHR vendors and their products for the 2013 Physician Quality Reporting System.

e. Incentive Payments for the 2012 Physician Quality Reporting System

In accordance with 42 CFR 414.90(c)(3), eligible professionals that satisfactorily report 2012 Physician Quality Reporting System measures can qualify for an incentive equal to 0.5 percent of the total estimated part B allowed charges for all covered professional services furnished by the eligible professional (or, in the case of a group practice participating in the GPRO, the group practice) during the applicable reporting period. We are proposing to modify the incentive payment language in 42 CFR 414.90 to provide language more consistent with section 1848(k) of the Act.

(1) Proposed Criteria for Satisfactory Reporting of Individual Quality Measures for Individual Eligible Professionals via Claims

Section 1848(m)(3)(A) of the Act established the criteria for satisfactorily submitting data on individual quality measures as at least three measures in at least 80 percent of the cases in which the measure is applicable. For claims-based reporting, if fewer than three measures are applicable to the services of the professional, the professional may meet the criteria by submitting data on one or two measures for at least 80 percent of applicable cases where the measures are reportable. For years after 2009, section 1848(m)(3)(D) of the Act authorizes the Secretary, in consultation with stakeholders and experts, to revise the criteria for satisfactorily reporting data on quality measures. Accordingly, we propose the following criteria for satisfactory reporting via the claims-based reporting mechanism for individual eligible professionals specializing in internal medicine, family practice, general practice, or cardiology:

- Report on at least one Physician Quality Reporting System core measure as identified in Table 29.
- Report on at least two additional measures that apply to the services furnished by the professional.
- Report each measure for at least 50 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

For all other eligible professionals, we propose the following criteria for satisfactory reporting via the claims-based reporting mechanism:

- Report on at least three measures that apply to the services furnished by the professional.
- Report each measure for at least 50 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

We believe it would be easier for eligible professionals to find applicable measures on which to report if measures were grouped according its applicability to medical specialties. We then seek to move towards having specialties report on certain measures that are relevant to the respective specialty. We have recognized the promotion of the prevention of cardiovascular conditions as a top priority and therefore propose to start to group individual measures with measures that promote cardiovascular care. As such, the Physician Quality Reporting System core measures that we propose in Table 29 are aimed at promoting the prevention of cardiovascular conditions. In an effort to promote the prevention of cardiovascular conditions, we are proposing that eligible professionals specializing in internal medicine, family practice, general practice, or cardiology be required to report on at least one proposed Physician Quality Reporting System core measure. We chose the aforementioned specialties because we believe the Physician Quality Reporting System core measures are most relevant to those specialties. Since we believe that eligible professionals in those specialties would likely report on the proposed Physician Quality Reporting System core measures regardless of the proposed requirement to report on at least one Physician Quality Reporting System core measure, we believe that the this requirement would not result in an increased burden to these specialties. In future years, we hope to develop a similar reporting requirement and core set of measures for other specialties.

We also considered including geriatricians in the proposed Physician Quality Reporting System core measure reporting requirement for 2012. However, we would like to ensure that the proposed 2012 Physician Quality Reporting System core measures would be sufficiently applicable to geriatric physicians before making such a proposal. We seek public comment as to whether geriatricians should be included as a specialty required to report at least one proposed 2012 Physician Quality Reporting System core measure. In addition, we invite public comment on whether other specialties should be included in the 2012 Physician Quality Reporting System proposed core measure reporting requirement.

As stated previously, we have proposed the requirement of the reporting of Physician Quality Reporting System core measures for certain specialties to introduce measures reporting according to specialty for eligible professionals specializing in internal medicine, family practice, general practice, or cardiology. However, we are not proposing this core measure requirement for all other specialties. Therefore, for all other specialties, we are proposing to retain similar reporting criteria as finalized for the in the 2011 MPFS final rule.

Specifically, under our authority under section 1848(m)(3)(D) of the Act to revise the reporting criteria for satisfactory reporting, for all other eligible professionals, we propose the following criteria for satisfactory reporting via the claims-based reporting mechanism:

- Report on at least three measures that apply to the services furnished by the professional. Report each measure for at least 50 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

To the extent that an eligible professional has fewer than three Physician Quality Reporting System measures that apply to the eligible professional's services and the eligible professional is reporting via the claims-based reporting mechanism, we propose that the eligible professional would be able to meet the criteria for satisfactorily reporting data on individual quality measures by meeting the following two criteria—

- Report on all measures that apply to the services furnished by the professional (that is one to two measures); and
- Report each measure for at least 50 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

As in prior years, we also propose that, for 2012, an eligible professional may also report on fewer than three measures, if less than three apply. However, an eligible professional who reports on fewer than three measures through the claims-based reporting mechanism may be subject to the Measure Applicability Validation (MAV) process, which would allow us to determine whether an eligible professional should have reported quality data codes for additional measures. This process was applied in prior years, including the 2011 Physician Quality Reporting System. Under the proposed MAV process, when an eligible professional reports on fewer than 3 measures, we propose to review whether there are other closely related measures (such as those that share a common diagnosis or those that are representative of services typically provided by a particular type of eligible professional). We further propose that if an eligible professional who reports on fewer than 3 measures in 2012 reports on a measure that is part of an identified cluster of closely related measures and did not report on any other measure that is part of that identified cluster of closely related measures, then the eligible professional would not qualify as a satisfactory reporter in the 2012 Physician Quality Reporting System or earn an incentive payment. We propose that these criteria for satisfactorily reporting data on fewer than three individual quality measures would apply for the claims-based reporting mechanism only because, unlike registry and EHR-Based reporting, the reporting of Physician Quality Reporting System quality measures via claims is not handled by an intermediary but rather directly by the eligible professional.

For 2012, in order to encourage reporting on measures that are applicable to the eligible professional's practice as well as encourage eligible professionals to perform the clinical quality actions specified in the measures, we propose not to count measures that are reported through claims that have a 0 percent performance rate. That is, if the recommended clinical quality action, as indicated in the numerator of the quality measure, is not performed on at least one patient for a particular measure or measures group reported by the eligible professional via claims, we will not count the measure (or measures group) as a measure (or measures group) reported by an eligible professional. This requirement is also consistent with the proposed registry and EHR-Based reporting (see the following section (e)(3)) criteria for satisfactory reporting that are proposed in this section.

The proposed 2012 criteria for satisfactory reporting of data on individual Physician Quality Reporting System quality measures for individual eligible professionals are summarized in the following Tables 18 and 2, and are arranged by reporting mechanism and reporting period.

TABLE 18—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA CLAIMS FOR THE FOLLOWING SPECIALTIES: INTERNAL MEDICINE FAMILY PRACTICE, GENERAL PRACTICE, AND CARDIOLOGY

Reporting mechanism	Reporting criteria	Reporting period
Claims-based reporting.	• Report at least three Physician Quality Reporting System measures, which consist of one Physician Quality Reporting System core measure + 2 additional measures of the eligible professional's choosing; OR. • If less than three measures apply to the eligible professional, 1–2 measures, of which at least 1 measure must consist of a Physician Quality Reporting System core measure; AND • Report each measure for at least 50% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies. • Measures with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.

TABLE 19—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA CLAIMS FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 18

Reporting mechanism	Reporting criteria	Reporting period
Claims-based reporting.	• Report at least three Physician Quality Reporting System measures; OR • If less than three measures apply to the eligible professional, 1–2 measures; AND • Report each measure for at least 50% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies.. • Measures with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.

We invite public comment on the proposed criteria for satisfactory reporting of individual measures by individual eligible professionals via claims for the 2012 Physician Quality Reporting System.

(2) Proposed 2012 Criteria for Satisfactory Reporting of Individual Quality Measures for Individual Eligible Professionals via Registry

Under our authority of section 1848(m)(3)(D) of the Act to revise the reporting criteria for the satisfactory reporting of measures, we propose the following criteria for satisfactory reporting via the registry-based reporting mechanism: (1) Criteria for individual eligible professionals practicing in internal medicine, family practice, general practice, or cardiology and (2) criteria for all other eligible professionals. For the reasons stated previously, we are distinguishing eligible professionals in internal medicine, family practice, general practice, or cardiology from all other eligible professionals for the purposes of establishing criteria for satisfactory reporting. Therefore, for eligible professionals specializing in internal medicine, family practice, general practice, or cardiology, we propose the following criteria for satisfactory reporting:

• Report on at least one Physician Quality Reporting System core measure as identified in Table 29.

• Report on at least two additional measures that apply to the services furnished by the professional.

• Report each measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

For the same reasons stated for establishing different reporting criteria for all other eligible professionals under the claims-based reporting mechanism, we propose the following criteria for satisfactory reporting via the registry-based reporting mechanism:

• Report on at least three measures that apply to the services furnished by the professional.

• Report each measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

We also considered including geriatricians in the proposed Physician Quality Reporting System core measure reporting requirement via the registry-based reporting mechanism for 2012. However, as stated previously, we would like to ensure that the proposed 2012 Physician Quality Reporting System core measures would be sufficiently applicable to geriatric physicians before making such a proposal. We seek public comment as to whether geriatricians should be included as a specialty required to report at least one proposed 2012 Physician Quality Reporting System core measure. In addition, we seek public comment on whether other specialties should be included in the 2012 Physician Quality Reporting System proposed core measure reporting requirement.

In addition, as in prior years, for 2012, we propose not to count measures that are reported through registries that have a 0 percent performance rate, calculated by dividing the measure's numerator by the measure's denominator. That is, if the recommended clinical quality action, that is the action denoted in the quality measure's numerator, is not performed on at least one patient for a particular measure or measures group reported by the eligible professional via registry, we will not count the measure (or measures group) as a measure (or measures group) reported by an eligible professional. We propose to disregard measures (or measures groups) that are reported through a registry that have a 0 percent performance rate in the 2012 Physician Quality Reporting System, because we are assuming that the measure was not applicable to the eligible professional and was likely reported from EHR-derived data (or from data mining) and was unintentionally submitted from the registry to us. We also seek to avoid the possibility of intentional submission of spurious data solely for the purpose of receiving an incentive payment for reporting.

The proposed 2012 criteria for satisfactory reporting of data on individual Physician Quality Reporting System quality measures for individual eligible professionals are summarized in the following Tables 20 and 21, and are arranged by reporting mechanism and reporting period.

TABLE 20—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA REGISTRY FOR THE FOLLOWING SPECIALTIES: INTERNAL MEDICINE FAMILY PRACTICE, GENERAL PRACTICE, AND CARDIOLOGY

Reporting mechanism	Reporting criteria	Reporting period
Registry-based reporting.	• Report at least three Physician Quality Reporting System measures, which consist of 1 Physician Quality Reporting System core measure + 2 additional measures of the eligible professional's choosing AND • Report each measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies. • Measures with a 0% performance rate will not be counted.	January 1, 2012—December 31, 2012.

TABLE 21—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA REGISTRY FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 20

Reporting mechanism	Reporting criteria	Reporting period
Registry-based reporting.	• Report at least three Physician Quality Reporting System measures AND • Report each measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies. • Measures with a 0% performance rate will not be counted	January 1, 2012—December 31, 2012.

We invite public comment on the proposed criteria for satisfactory reporting of individual quality measures for individual eligible professionals via registry.(3) Proposed Criteria for Satisfactory Reporting of Individual Quality Measures for Individual Eligible Professionals via EHR

Section 1848(m)(3)(A) of the Act established the criteria for satisfactorily submitting data on individual quality measures as at least three measures in at least 80 percent of the cases in which the measure is applicable. For years after 2009, section 1848(m)(3)(D) of the Act authorizes the Secretary, in consultation with stakeholders and experts, to revise the criteria for satisfactorily reporting data on quality measures. Accordingly, we propose the following options for satisfactory reporting of individual quality measures by individual eligible professionals participating in the 2012 Physician Quality Reporting System via the EHR-Based reporting mechanism:

First, we propose that an eligible professional would meet the criteria for satisfactory reporting under the Physician Quality Reporting System if the eligible professional, using a Physician Quality Reporting System ''qualified'' EHR product (if the eligible professional is also participating in the EHR Incentive Program via the proposed Physician Quality Reporting System-EHR Incentive Pilot discussed in section IV.H. of this proposed rule, the eligible professional's EHR product must also be Certified EHR Technology), reports on three proposed core measures for 80 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which each measure applies as identified in Table 31 in this section of this proposed rule, which are identical to the Medicare EHR Incentive Program core measures included in Table 7 of the Medicare and Medicaid EHR Incentive Program final rule (75 FR 44410). Insofar as the denominator for one or more of the core measures is 0, implying that the eligible professional's patient population is not addressed by these measures, we propose that eligible professionals would be required to report up to three proposed alternate core measures as identified in Table 31 in this section of this proposed rule and which are identical to the Medicare EHR Incentive Program alternate core measures included in Table 7 of the Medicare and Medicaid EHR Incentive Program final rule (75 FR 44410). In addition, we propose that the eligible professional would be required to report on three additional measures of their choosing that are available for the Medicare EHR Incentive Program in Table 6 of the Medicare and Medicaid EHR Incentive Program final rule (75 FR 44398 through 44408) (as identified in Table 31 in this section of this proposed rule).

With respect to reporting on the proposed measure titled ''Preventive Care and Screening: Body Mass Index (BMI) Screening and Follow-up'', listed in Table 31 of this proposed rule, there are two parameters in the measure denominator description: Age 65 and older BMI and Age 18–64 BMI. For the purpose of reporting this measure under the Physician Quality Reporting System, we propose to count the reporting of this measure if at least one of the two parameters does not contain a 0 percent performance rate. In addition, with respect to reporting on the proposed measure titled ''Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention'', also listed in Table 31 of this proposed rule, the measure is divided into two pairs: a. Tobacco Use Assessment and b. Tobacco Cessation Intervention. For the purpose of reporting this measure under the Physician Quality Reporting System, we propose to count the reporting of this measure if at least one of the two pairs does not contain a 0 percent performance rate.

Section 1848(m)(7) of the Act (''Integration of Physician Quality Reporting and EHR Reporting''), as added by section 3002(d) of the Affordable Care Act, requires us to move towards the integration of EHR measures with respect to the Physician Quality Reporting System. Section 1848(m)(7) of the Act specifies that by no later than January 1, 2012, the Secretary shall develop a plan to integrate reporting on quality measures under the Physician Quality Reporting System with reporting requirements under subsection (o) of section 1848 of the Act relating to the meaningful use of EHRs. Such integration shall consist of the following:

(A) The selection of measures, the reporting of which would both demonstrate—

(i) Meaningful use of an EHR for purposes of the Medicare EHR Incentive Program; and

(ii) Quality of care furnished to an individual; and

(B) Such other activities as specified by the Secretary.

We propose the aforementioned criteria for satisfactory reporting via an EHR, which is identical to the criteria for achieving meaningful use for reporting clinical quality measures under the EHR Incentive Program as finalized in the Medicare and Medicaid Electronic Health Record Incentive Program final rule (75 FR 44409 through 44411), in an effort to align the Physician Quality Reporting System with the Medicare EHR Incentive Program.

In addition to the reporting criteria proposed previously, we propose alternative reporting criteria for satisfactory reporting using the EHR-Based reporting mechanism that is similar to the criteria finalized in the CY 2011 MPFS Final Rule with comment period (75 FR 73497 through 73500). For the reasons set forth for establishing different criteria for satisfactory reporting via claims and registry, we are adopting two different criteria for satisfactory reporting, depending on an eligible professional's specialty. For eligible professionals specializing in internal medicine, family practice, general practice, and cardiology, we propose the following criteria:

- Report on ALL proposed Physician Quality Reporting System core measure as identified in Table 29.
- Report each measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

We understand that by proposing to require eligible professionals specializing in internal medicine, family practice, general practice, and cardiology to report all Physician Quality Reporting System core measures, we would be requiring such professionals to report more measures than eligible professionals who do not practice within those specialties. We believe, however, that proposing to require these specialists to report of all Physician Quality Reporting System core measures would not add an additional burden to these eligible professionals because the reporting of measures is done entirely through the EHR. Furthermore, because we are proposing to require these specialties to report on all Physician Quality Reporting System core measures and recognize that some of the proposed Physician Quality Reporting System core measures may not be applicable to all of these eligible professionals' specialties, we propose to allow the reporting of these proposed Physician Quality Reporting System core measures with a 0 percent performance rate. That is, the reporting of a Physician Quality Reporting System core measure that is not applicable to the eligible professional's practice in this instance will not preclude an eligible professional from meeting the criteria for satisfactory reporting.

We also considered including geriatricians in the proposed Physician Quality Reporting System core measure reporting requirement for 2012. However, we would like to ensure that the proposed 2012 Physician Quality Reporting System core measures would be sufficiently applicable to geriatric physicians before making such a proposal. We seek public comment as to whether geriatricians should be included as a specialty required to report at least one proposed 2012 Physician Quality Reporting System core measure via EHR-Based reporting. In addition, we invite public comment on whether other specialties should be included in the 2012 Physician Quality Reporting System proposed core measure reporting requirement.

For the reasons we stated previously for creating separate reporting criteria all other eligible professionals for claims and registry reporting, we propose the following criteria for satisfactory reporting using the EHR-Based reporting mechanism:

- Report on at least three Physician Quality Reporting System EHR measures of the eligible professional's choosing; and
- Report each measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients for whom services were furnished during the reporting period to which the measure applies.

The proposed methods for satisfactory reporting via EHR for the 2012 Physician Quality Reporting System are described in the following Tables 22 and 23.

TABLE 22—2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA EHR FOR THE FOLLOWING SPECIALTIES: INTERNAL MEDICINE, FAMILY PRACTICE, GENERAL PRACTICE, AND CARDIOLOGY

Reporting mechanism	Reporting criteria	Reporting period
EHR—Aligning with the Medicare EHR Incentive Program.	• Reports on ALL three Medicare EHR Incentive Program core measures (as identified in Table 31 of this proposed rule). • If the denominator for one or more of the Medicare EHR Incentive Program core measures is 0, report on up to three Medicare EHR Incentive Program alternate core measures (as identified in Table 31 of this proposed rule); AND • Report on three (of the 38 additional measures available for the Medicare EHR Incentive Program.	January 1, 2012–December 31, 2012.
EHR	• Report on ALL Physician Quality Reporting System core measures AND • Report each measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies. • Measures with a 0% performance rate will not be counted, unless the measure is a Physician Quality Reporting System core measure.	January 1, 2012–December 31, 2012.

TABLE 23—2012 CRITERIA FOR SATISFACTORY REPORTING OF DATA ON INDIVIDUAL PHYSICIAN QUALITY REPORTING SYSTEM QUALITY MEASURES VIA EHR FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 22

Reporting mechanism	Reporting criteria	Reporting period
EHR—Aligning with the Medicare EHR Incentive Program.	• Reports on ALL three Medicare EHR Incentive Program core measures (as identified in Table 31 of this proposed rule). • If the denominator for one or more of the Medicare EHR Incentive Program core measures is 0, report on up to three Medicare EHR Incentive Program alternate core measures (as identified in Table 31 of this proposed rule); AND • Report on three (of the 38) additional measures available for the Medicare EHR Incentive Program.	January 1, 2012–December 31, 2012.
EHR	• Report at least three Physician Quality Reporting System measures AND • Report each measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to which the measure applies. • Measures with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.

We invite public comment on the proposed criteria for satisfactory reporting of individual quality measures by individual eligible professionals via an EHR-Based reporting mechanism in the 2012 Physician Quality Reporting System. (4) Proposed Criteria for Satisfactory Reporting of Measures Groups via Claims—Individual Eligible Professionals

At § 414.90(b) ''measures group'' is defined as ''a subset of four or more Physician Quality Reporting System measures that have a particular clinical condition or focus in common.'' For 2012 and beyond, we propose that individual eligible professionals have the option to report measures groups in addition to individual quality measures to qualify for the Physician Quality Reporting System incentive, using claims or registries.

For the reasons we are proposing different criteria for satisfactorily reporting individual quality measures depending on specialty, specifically our desire to introduce core measures applicable to certain specialties and promote cardiovascular care, we are proposing two different criteria for satisfactorily reporting measures groups. We propose the following criteria for satisfactory reporting of 2012 Physician Quality Reporting System measures groups:

We propose that eligible professionals specializing in internal medicine, family practice, general practice, and cardiology may meet the criteria for satisfactory reporting of Physician Quality Reporting System measures groups via claims by reporting in the following manner:

- Report at least one Physician Quality Reporting System measures group; and
- If the measures group does not contain at least one Physician Quality core measure, then one Physician Quality core measure; and
- For each measures group and, if applicable, Physician Quality Reporting System core measure reported, report on at least 30 Medicare Part B FFS patients for each measures group that is reported.
- Measures groups containing a measure with a 0 percent performance rate will not be counted.

We also propose that eligible professionals specializing in internal medicine, family practice, general practice, and cardiology may meet the criteria for satisfactorily reporting Physician Quality Reporting System measures groups via claims by reporting in the following manner:

- Report at least one Physician Quality Reporting System measures group; but
- If the measures group does not contain at least one Physician Quality Reporting System core measure, then one Physician Quality core measure.
- For each measures group and, if applicable, Physician Quality Reporting System core measure reported, report on at least 50 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; but report no less than 15 Medicare Part B PFS patients for each measures group reported.
- Measures groups containing a measure with a 0 percent performance rate will not be counted.

For all other eligible professionals, in order to meet the criteria for satisfactory reporting of Physician Quality Reporting measures groups via claims, we propose that the eligible professional must:

- Report at least one Physician Quality Reporting System measures group.
- Report on at least 30 Medicare Part B FFS patients for each measures group that is reported.
- Measures groups containing a measure with a 0 percent performance rate will not be counted.

Alternatively, eligible professionals not specializing in internal medicine, family practice, general practice, and cardiology may meet the criteria for satisfactorily reporting Physician Quality Reporting System measures groups via claims by reporting in the following manner:

- Report at least one Physician Quality Reporting System measures group.
- For each measures group reported, report each on at least 50 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; but
- Report no less than 15 Medicare Part B PFS patients for each measures group reported.
- Measures groups containing a measure with a 0 percent performance rate will not be counted.

Aside from the Physician Quality Reporting System core measure reporting requirement for eligible professionals specializing in internal medicine, family practice, general practice, or cardiology, we are proposing to retain the same criteria for satisfactory reporting of measures groups via claims as the 2011 criteria for satisfactory reporting of measures groups via claims for the 12-month reporting period that was finalized in the 2011 MPFS Final Rule with comment period. Therefore, as in 2011, an eligible professional must satisfactorily report on all individual measures within the measures group in order to meet the criteria for satisfactory reporting via measures groups. We are retaining the same criteria because

eligible professionals are already familiar with these reporting criteria, which we believe will in turn lead to a greater chance that eligible professionals meet the criteria for satisfactory reporting.

As with the reporting of Physician Quality Reporting System individual measures, we also considered including geriatricians as one of specialties we proposed previously with regard to the proposed Physician Quality Reporting System core measure reporting requirement for measures groups. However, we would like to ensure that the proposed 2012 Physician Quality Reporting System core measures are sufficiently applicable to geriatric physicians before proposing to include them under the proposed requirement. We seek public comment as to whether geriatricians should be included as a specialty required to report at least 1 proposed 2012 Physician Quality Reporting System core measure for measures group reporting. In addition, we seek public comment on whether other specialties should be included in the 2012 Physician Quality Reporting System core measure reporting requirement for measures groups.

For 2012, in order to ensure that the Physician Quality Reporting System measures on which eligible professionals report are applicable to their respective practices, we propose not to count measures within measures groups that are reported through claims or registry that have a 0 percent performance rate. That is, if the recommended clinical quality action is not performed on at least one patient for a particular measure reported by the eligible professional via claims or registry, we will not count the measures groups as a measures group reported by an eligible professional. Furthermore, this proposed requirement is consistent with the proposed reporting options for individual quality measures, which are discussed previously. Since we are proposing to retain the requirement that an eligible professional must satisfactorily report on all individual measures contained within a measures group in order to meet the criteria for satisfactory reporting via measures groups, if an eligible professional reports a measure contained within a measures group with a 0 percent performance rate, the eligible professional will fail to meet the criteria for the satisfactory reporting of measures groups.

The 2012 proposed criteria for satisfactory reporting of measures groups via claims for individual eligible professionals are described in the following Tables 24 and 25.

TABLE 24—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING ON MEASURES GROUPS VIA CLAIMS FOR THE FOLLOWING SPECIALTIES: INTERNAL MEDICINE, FAMILY PRACTICE, GENERAL PRACTICE, AND CARDIOLOGY

Reporting mechanism	Reporting criteria	Reporting period
Claims	• Report at least 1 Physician Quality Reporting System measures group; AND • If the measures group does not contain at least 1 Physician Quality core measure, then report 1 Physician Quality core measure; AND • Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 30 Medicare Part B FFS patients. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Claims	• Report at least 1 Physician Quality Reporting System measures group; AND • If the measures group does not contain at least 1 Physician Quality core measure, then report 1 Physician Quality core measure; AND • Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 50% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT • Report each measures group on no less than 15 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.

TABLE 25—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING ON MEASURES GROUPS VIA CLAIMS FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 24

Reporting mechanism	Reporting criteria	Reporting period
Claims	• Report at least 1 Physician Quality Reporting System measures group; AND • Report each measures group for at least 30 Medicare Part B FFS patients. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Claims	• Report at least 1 Physician Quality Reporting System measures group; • Report each measures group for at least 50% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT	January 1, 2012–December 31, 2012.

TABLE 25—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING ON MEASURES GROUPS VIA CLAIMS FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 24—Continued

Reporting mechanism	Reporting criteria	Reporting period
	• Report each measures group on no less than 15 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	

An eligible professional could also potentially qualify for the Physician Quality Reporting System incentive payment by satisfactorily reporting both individual measures and measures groups. However, only one incentive payment will be made to the eligible professional. We invite public comment on the proposed 2012 criteria for satisfactory reporting of measures groups via claims for individual eligible professionals.

(5) Proposed 2012 Criteria for Satisfactory Reporting of Measures Groups via Registry—Individual Eligible Professionals

As with the reporting of measures groups via claims, we are proposing different criteria for the satisfactory reporting of Physician Quality Reporting System measures groups via registry depending on the eligible professional's specialty. For eligible professionals specializing in internal medicine, family practice, general practice, or cardiology, in order to meet the criteria for the satisfactory reporting of Physician Quality Reporting measures groups via registry, during the proposed 12-month reporting period, we propose that the eligible professional must—

• Report at least 1 Physician Quality Reporting System measures group; AND

• If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND

• Report on at least 30 Medicare Part B FFS patients for each measures group and, if applicable, Physician Quality Reporting System core measure reported.

• Measures groups containing a measure with a 0% performance rate will not be counted.

Alternatively, we propose that the eligible professional specializing in internal medicine, family practice, general practice, or cardiology may meet the criteria for the satisfactory reporting of Physician Quality measures groups via registry by doing the following during the proposed 12-month reporting period:

• Report at least one Physician Quality Reporting System measures group; AND

• If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND

• Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT

• Report each measures group on no less than 15 Medicare Part B FFS patients seen during the reporting period to which the measures group applies.

• Measures groups containing a measure with a 0% performance rate will not be counted.

In order to meet the criteria for the satisfactory reporting of Physician Quality Reporting measures groups via registry, during the proposed 6-month reporting period, we propose that theeligible professional must—

• Report at least one Physician Quality Reporting System measures group; AND

• If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND

• Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 80 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT

• Report each measures group on no less than 8 Medicare Part B FFS patients seen during the reporting period to which the measures group applies.

• Measures groups containing a measure with a 0% performance rate will not be counted.

For all other eligible professionals, in order to meet the criteria for the satisfactory reporting of Physician Quality Reporting System measures groups via registry, we propose that, during the proposed 12-month reporting period, the eligible professional must—

• Report at least 1 Physician Quality Reporting System measures group; AND

• Report each measures group for at least 30 Medicare Part B FFS patients.

• Measures groups containing a measure with a 0% performance rate will not be counted.

Alternatively, we propose that an eligible professional not specializing in internal medicine, family practice, general practice, or cardiology may meet the criteria for the satisfactory reporting of Physician Quality Reporting System measures groups via registry by doing the following during the proposed 12-month reporting period:

• Report at least one Physician Quality Reporting System measures group; AND

• For each measures group reported, report on at least 80 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT

• Report no less than 15 patients for each measures group reported.

For all other eligible professionals, in order to meet the criteria for the satisfactory reporting of Physician Quality Reporting System measures groups via registry during the proposed 6-month reporting period, we propose that, during the proposed 6-month reporting period, the eligible professional must—

• Report at least 1 Physician Quality Reporting System measures group; AND

• For each measures group reported, report on at least 80 percent of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT

• Report each measures group on no less than least 8 Medicare Part B FFS patients for each measures group reported.

• Measures groups containing a measure with a 0% performance rate will not be counted.

Aside from the Physician Quality Reporting System core measure reporting requirement for eligible professionals specializing in internal medicine, family practice, general

practice, or cardiology, we are proposing to retain the same criteria for satisfactory reporting of measures groups via registry as the 2011 criteria for satisfactory reporting of measures groups via registry finalized in the 2011 MPFS Final Rule with comment period. Therefore, as in 2011, an eligible professional must satisfactorily report on all individual measures within the measures group in order to meet the criteria for satisfactory reporting via measures groups. We are retaining the same criteria because we eligible professionals are already familiar with this reporting criteria, which we believe will in turn lead to a greater chance that eligible professionals meet the criteria for satisfactory reporting.

As with the reporting of Physician Quality Reporting System individual measures, we also considered including geriatricians as one of specialties we proposed previously with regard to the proposed Physician Quality Reporting System core measure reporting requirement for measures groups. However, we would like to ensure that the proposed 2012 Physician Quality Reporting System core measures are sufficiently applicable to geriatric physicians before proposing to include them under the proposed requirement. We seek public comment as to whether geriatricians should be included as a specialty required to report at least 1 proposed 2012 Physician Quality Reporting System core measure for measures group reporting. In addition, we seek public comment on whether other specialties should be included in the 2012 Physician Quality Reporting System core measure reporting requirement for measures groups.

For 2012, in order to ensure that the Physician Quality Reporting System measures on which eligible professionals report are applicable to their respective practices, we propose not to count measures within measures groups that are reported through claims or registry that have a 0 percent performance rate. That is, if the recommended clinical quality action is not performed on at least one patient for a particular measure reported by the eligible professional via claims or registry, we will not count the measures groups as a measures group reported by an eligible professional. Furthermore, this proposed requirement is consistent with the proposed reporting options for individual quality measures, which are discussed previously. Since we are proposing to retain the requirement that an eligible professional must satisfactorily report on all individual measures contained within a measures group in order to meet the criteria for satisfactory reporting via measures groups, if an eligible professional reports a measure contained within a measures group with a 0 percent performance rate, the eligible professional will fail to meet the criteria for the satisfactory reporting of measures groups.

The proposed 2012 criteria for satisfactory reporting of data on measures groups are summarized in the following Tables 26 through 27 and are arranged by reporting mechanism and reporting period.

TABLE 26—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING ON MEASURES GROUPS VIA REGISTRY FOR THE FOLLOWING SPECIALTIES: INTERNAL MEDICINE, FAMILY PRACTICE, GENERAL PRACTICE AND CARDIOLOGY

Reporting mechanism	Reporting criteria	Reporting period
Registry	• Report at least 1 Physician Quality Reporting System measures group; AND • If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND • Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 30 Medicare Part B FFS patients. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Registry	• Report at least 1 Physician Quality Reporting System measures group; • If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND • Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT • Report each measures group on no less than 15 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Registry	• Report at least 1 Physician Quality Reporting System measures group; • If the measures group does not contain at least 1 Physician Quality core measure, then 1 Physician Quality core measure; AND • Report each measures group and, if applicable, Physician Quality Reporting System core measure for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT • Report each measures group on at least 8 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	July 1, 2012–December 31, 2012.

TABLE 27—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING ON MEASURES GROUPS VIA REGISTRY FOR ALL OTHER ELIGIBLE PROFESSIONALS NOT IDENTIFIED IN TABLE 26

Reporting mechanism	Reporting criteria	Reporting period
Registry	• Report at least 1 Physician Quality Reporting System measures group; AND • Report each measures group for at least 30 Medicare Part B FFS patients. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Registry	• Report at least 1 Physician Quality Reporting System measures group; AND • Report each measures group for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT • Report each measures group on at least 15 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	January 1, 2012–December 31, 2012.
Registry	• Report at least 1 Physician Quality Reporting System measures group; AND • Report each measures group for at least 80% of the eligible professional's Medicare Part B FFS patients seen during the reporting period to whom the measures group applies; BUT • Report each measures group on no less than 8 Medicare Part B FFS patients seen during the reporting period to which the measures group applies. • Measures groups containing a measure with a 0% performance rate will not be counted.	July 1, 2012–December 31, 2012.

An eligible professional could also potentially qualify for the Physician Quality Reporting System incentive payment by satisfactorily reporting both individual measures and measures groups. However, only one incentive payment will be made to the eligible professional. We invite public comment on the proposed criteria for satisfactory reporting of measures groups for individual eligible professionals.

(6) Proposed 2012 Criteria for Satisfactory Reporting on Physician Quality Reporting System Measures by Group Practices Under the GPRO

As stated previously, instead of participating as an individual eligible professional, an eligible professional in a group practice may participate in the Physician Quality Reporting System under the Physician Quality Reporting System GPRO. However, an individual eligible professional who is affiliated with a group practice participating in the Physician Quality Reporting System GPRO that satisfactorily submits Physician Quality Reporting System quality measures will only be able to earn an incentive as part of the group practice and not as an individual eligible professional.

As stated previously, we propose that group practices interested in participating in GPRO must self-nominate. As stated in the ''Proposed Reporting Period'' in section IV.F.2.c. of this proposed rule, for group practices selected to participate in the Physician Quality Reporting System GPRO for 2012, we propose a 12-month reporting period beginning January 1, 2012. For 2012, we propose to use the same GPRO reporting methods that we have used in prior years. Specifically, we propose that group practices participating in GPRO submit information on measures within a proposed common set of 40 NQF-endorsed quality measures using a web interface based on the GPRO Tool used in the 2011 Physician Quality Reporting System GPRO. As part of the data submission process for 2012 GPRO, we propose that during 2012, each group practice would be required to report quality measures with respect to services furnished during the 2012 reporting period (that is, January 1, 2012, through December 31, 2012) on an assigned sample of Medicare beneficiaries. Once the beneficiary assignment has been made for each group practice, which we anticipate will be done during the fourth quarter of 2012, we propose to provide each group practice selected to participate in the Physician Quality Reporting System GPRO with access to a web interface that would include the group's assigned beneficiary samples and the final GPRO quality measures. We propose to pre-populate the web interface with the assigned beneficiaries' demographic and utilization information based on all of their Medicare claims data. The group practice would be required to populate the remaining data fields necessary for capturing quality measure information on each of the assigned beneficiaries.

As specified in section IV.F.(b).(2).(B). of this proposed rule, we propose to change the definition of the group practices to those practices consisting of 25 or more eligible professionals. In 2011, to distinguish the criteria in GPRO I and II for satisfactory reporting between small vs. large groups, we established different reporting criteria dependent on the group's size. Although we are consolidating the GPRO for 2012, we still recognize the need to equalize the reporting burden by establishing different reporting criteria for small vs. large groups. Therefore, we propose to establish the following two criteria for the satisfactory reporting of Physician Quality Reporting System quality measures under the 2012 GPRO, based on the size of the group practice:

• For group practices comprised of 25–99 eligible professionals participating in the GPRO, we propose that the group practice must report on all GPRO measures included in the web interface (listed in Table 56 of this proposed rule). During the submission period, the group practice will need to access the web interface and populate the data fields necessary for capturing quality measure information on each of the assigned beneficiaries up to 218 beneficiaries (with an over-sample of 327 beneficiaries) for each disease

module and preventive care measure. We further propose that if the pool of eligible assigned beneficiaries for any disease module or preventive care measure is less than 218, then the group practice would need to populate the remaining data files for 100 percent of eligible assigned beneficiaries for that disease module or preventive care measure. For each disease module or preventive care measure, we propose that the group practice must report information on the assigned patients in the order in which they appear in the group's sample (that is, consecutively). We propose these criteria because they mirror the criteria for CMS' Medicare Care Management Performance (MCMP) demonstration. In determining the appropriate reporting criteria for group practices comprised of 25–99 eligible professionals, we sought to align the criteria for satisfactory reporting under the Physician Quality Reporting System with CMS' MCMP demonstration, which uses small to medium-sized group practices to analyze data aimed at improving the quality of care for beneficiaries with chronic conditions. We have an interest in aligning the reporting criteria for these two programs particularly as the MCMP demonstration also required its participants to report on measures similar to the PGP demonstration and using the same data collection vehicle. However, the statistical sampling methodology used in the MCMP demonstration also took into account that the group practices that participated in this demonstration were significantly smaller than those that participate in the PGP demonstration.

• For group practices comprised of 100 or more eligible professionals, we propose that the group practices must report on all Physician Quality Reporting System GPRO quality measures. During the submission period, the group practice would need to populate the remaining data fields in the web interface necessary for capturing quality measure information on each of the assigned beneficiaries up to 411 beneficiaries (with an over-sample of 616 beneficiaries) for each disease module and preventive care measure. We further propose that if the pool of eligible assigned beneficiaries for any disease module or preventive care measure is less than 411, then the group practice must populate the remaining data fields for 100 percent of eligible assigned beneficiaries for that disease module or preventive care measure. For each disease module or preventive care measure, we propose that the group practice must report information on the assigned patients in the order in which they appear in the group's sample (that is, consecutively).

Furthermore, although we are requiring that the group practices participating as GPROs report on a certain number of consecutive patients, such as either 218 or 411 beneficiaries depending on the group's size, we propose to allow the ''skipping'' of patients for valid reasons, such as a beneficiary's medical records not being found or not being able to confirm a diagnosis. However, excessive skipping of patients may cause us to question the accuracy or validity of the data being reported to us by the group practices. Due to the variance in group patterns, measures, and disease modules, however, it is difficult to establish a ''skip threshold'' for the satisfactory reporting of GPRO measures. Therefore, it is our intent to examine each group practice's skip patterns. We may request the group to provide additional information to help explain or support the skips to help better inform us on what levels of skipping could potentially be considered excessive skipping in a future year.

In determining the appropriate reporting criteria for group practices comprised of 100 or more eligible professionals, we sought to use the same criteria as we finalized in the 2011 MPFS Final Rule with comment period for GPRO I (75 FR 73506) because group practices are already familiar with this reporting process. We hope that establishing the same process for reporting under the GPRO as proposed in prior years will provide a likelier chance for meeting the criteria for satisfactory reporting under the GPRO. In addition, we sought to align the criteria for satisfactory reporting under the Physician Quality Reporting System with CMS' Physician Group Practice (PGP) demonstration, which collects data from large group practices in an effort to coordinate the overall care delivered to Medicare patients.

As we discussed previously with our proposed definition of group practice, we allow for fluctuation of the group practice's size throughout the reporting period, provided that the group size contains at least 25 eligible professionals, which is the proposed minimum group practice size for participation in the Physician Quality Reporting System GPRO. However, as we established in 2011, for purposes of determining which reporting criteria the group must satisfy, a group practice's size will be the size of the group at the time the group's participation is approved by CMS (75 FR 73504). For example, if a group practice is comprised of 100 eligible professionals at the time it self-nominates for participation as a GPRO in 2012, and the group practice's size then drops to 99 eligible professionals at the time the group practice's participation is approved by CMS, the group practice would need to meet the proposed reporting criteria for a group size of 99.

Table 28 summarizes the proposed criteria for the satisfactory reporting of data on quality measures by group practice under the proposed 2012 Physician Quality Reporting GPRO. We propose that group practices participating in the 2012 Physician Quality Reporting System GPRO, regardless of size, would be required to report on all of the proposed measures listed in Table 56 of this proposed rule. These quality measures are grouped into preventive care measures and five disease modules: heart failure, diabetes, coronary artery disease, hypertension, and chronic obstructive pulmonary disease (COPD).

TABLE 28—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING FOR GROUP PRACTICES PARTICIPATING IN THE PHYSICIAN QUALITY REPORTING SYSTEM GROUP PRACTICE REPORTING OPTION (GPRO)

Group practice size	Reporting mechanism	Reporting criteria	Reporting period
25–99 Eligible Professionals	A submission web interface provided by CMS.	• Report on all measures included in the web interface; and • Populate data fields for the first 218 consecutively ranked and assigned beneficiaries in the order in which they appear in the group's sample (with an over-sample of 327) for each disease module or preventive care measure. If the pool of eligible assigned beneficiaries is less than 218, then report on 100% of assigned beneficiaries.	January 1, 2012–December 31, 2012.

TABLE 28—PROPOSED 2012 CRITERIA FOR SATISFACTORY REPORTING FOR GROUP PRACTICES PARTICIPATING IN THE PHYSICIAN QUALITY REPORTING SYSTEM GROUP PRACTICE REPORTING OPTION (GPRO)—Continued

Group practice size	Reporting mechanism	Reporting criteria	Reporting period
100+ Eligible Professionals ..	A submission web interface provided by CMS.	• Report on all measures included in the web interface; and • Populate data fields for the first 411 consecutively ranked and assigned beneficiaries in the order in which they appear in the group's sample (with an over-sample of 616) for each disease module or preventive care measure. If the pool of eligible assigned beneficiaries is less than 411, then report on 100% of assigned beneficiaries.	January 1, 2012–December 31, 2012.

We intend to post the final 2012 Physician Quality Reporting System GPRO participation requirements for group practices, including instructions for submitting the self-nomination statement and other requested information, on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.gov/PQRS* by November 15, 2011 or shortly thereafter.

The Physician Quality Reporting System GPRO web interface will be updated as needed to include the 2012 Physician Quality Reporting System GPRO measures (i.e. to eliminate measures that have been retired as well as add additional measures that will be finalized for 2012). We believe that use of the GPRO web interface allows group practices the opportunity to calculate their own performance rates on the quality measures.

We intend to provide the selected physician groups with access to this pre-populated database by no later than the first quarter of 2013. For purposes of pre-populating this GPRO web interface, we propose to assign beneficiaries to each group practice using a patient assignment methodology modeled after the patient assignment methodology used in the PGP & MCMP demonstrations. Based on our desire to model the Physician Quality Reporting System GPRO after the PGP & MCMP demonstrations, we will also consider incorporating any methodologies used in the PGP demonstration prior to January 1, 2012 to the 2012 Physician Quality Reporting System. We propose using Medicare Part B claims data for dates of service on or after January 1, 2011 and submitted and processed by approximately October 31, 2011 to assign Medicare beneficiaries to each group practice. Assigned beneficiaries would be limited to those Medicare Part B FFS beneficiaries with Medicare Parts A and B claims for whom Medicare is the primary payer. Assigned beneficiaries would not include Medicare Advantage enrollees. A beneficiary would be assigned to the group practice that provides the plurality of a beneficiary's office or other outpatient office evaluation and management allowed charges. Beneficiaries with only one office visit to the group practice would be eliminated from the group practice's assigned patient sample for purposes of the 2012 Physician Quality Reporting System GPRO. We would pre-populate the GPRO web interface with the assigned beneficiaries' demographic and utilization information based on their Medicare claims data.

We invite public comment on the proposed requirements for satisfactory reporting via the Physician Quality Reporting System GPRO reporting option.

f. 2012 Physician Quality Reporting System Measures

(1) Statutory Requirements for the Selection of Proposed 2012 Physician Quality Reporting System Measures

Under section 1848(k)(2)(C)(i) of the Act, the Physician Quality Reporting System quality measures shall be such measures selected by the Secretary from measures that have been endorsed by the entity with a contract with the Secretary under subsection 1890(a) of the Act (currently, that is the National Quality Forum, or NQF). However, in the case of a specified area or medical topic determined appropriate by the Secretary for which a feasible and practical measure has not been endorsed by the NQF, section 1848(k)(2)(C)(ii) of the Act authorizes the Secretary to specify a measure that is not so endorsed as long as due consideration is given to measures that have been endorsed or adopted by a consensus organization identified by the Secretary, such as the AQA alliance. In light of these statutory requirements, we believe that, except in the circumstances specified in the statute, each proposed 2012 Physician Quality Reporting System quality measure would need to be endorsed by the NQF. Additionally, section 1848(k)(2)(D) of the Act requires that for each 2012 Physician Quality Reporting System quality measure, ''the Secretary shall ensure that eligible professionals have the opportunity to provide input during the development, endorsement, or selection of measures applicable to services they furnish.''

The statutory requirements under section 1848(k)(2)(C) of the Act, subject to the exception noted previously, require only that the measures be selected from measures that have been endorsed by the entity with a contract with the Secretary under section 1890(a) (that is, the NQF) and are silent with respect to how the measures that are submitted to the NQF for endorsement were developed. The basic steps for developing measures applicable to physicians and other eligible professionals prior to submission of the measures for endorsement may be carried out by a variety of different organizations. We do not believe there needs to be any special restrictions on the type or make-up of the organizations carrying out this basic process of development of physician measures, such as restricting the initial development to physician-controlled organizations. Any such restriction would unduly limit the basic development of quality measures and the scope and utility of measures that may be considered for endorsement as voluntary consensus standards for purposes of the Physician Quality Reporting System.

(2) Other Considerations for the Selection of Proposed 2012 Physician Quality Reporting System Measures

In addition to reviewing the 2011 Physician Quality Reporting System measures for purposes of developing the proposed 2012 Physician Quality Reporting System measures, we reviewed and considered measure suggestions for the 2012 Physician Quality Reporting System.

With respect to the selection of new measures, we applied the following

considerations, which include many of the same considerations applied to the selection of 2009, 2010 and 2011 Physician Quality Reporting System quality measures proposed for inclusion in the 2012 Physician Quality Reporting System quality measure set previously described:

• High Impact on Healthcare.

++ Measures that are high impact and support CMS and HHS priorities for improved quality and efficiency of care for Medicare beneficiaries. These current and long term priority topics include the following: Prevention; chronic conditions; high cost and high volume conditions; elimination of health disparities; healthcare-associated infections and other conditions; improved care coordination; improved outcomes; improved efficiency; improved patient and family experience of care; effective management of acute and chronic episodes of care; reduced unwarranted geographic variation in quality and efficiency; and adoption and use of interoperable HIT.

++ Measures that are included in, or facilitate alignment with, other Medicare, Medicaid, and CHIP programs in furtherance of overarching healthcare goals.

++ NQF Endorsement.

++ Measures must be NQF-endorsed by August 15, 2011, in order to be considered for inclusion in the 2012 Physician Quality Reporting System quality measure set except as provided under section 1848(k)(2)(C)(ii) of the Act.

++ Section 1848(k)(2)(C)(ii) of the Act provides an exception to the requirement that the Secretary select measures that have been endorsed by the entity with a contract under section 1890(a) of the Act (that is, the NQF).

• Address Gaps in the Physician Quality Reporting System Measure Set.

++ Measures that increase the scope of applicability of the Physician Quality Reporting System measures to services furnished to Medicare beneficiaries and expand opportunities for eligible professionals to participate in the Physician Quality Reporting System.

• Measures of various aspects of clinical quality including outcome measures, where appropriate and feasible, process measures, structural measures, efficiency measures, and measures of patient experience of care.

Other considerations that we applied to the selection of proposed measures for 2012, regardless of whether the measure was a 2011 Physician Quality Reporting System measure or not, were—

• Measures that are functional, which is to say measures that can be technically implemented within the capacity of the CMS infrastructure for data collection, analysis, and calculation of reporting and performance rates.

• Measures that address gaps in the quality of care delivered to Medicare beneficiaries;

• Measures impacting chronic conditions (chronic kidney disease, diabetes mellitus, heart failure, hypertension and musculoskeletal);

• Measures involving care coordination;

• Measures applicable across care settings (such as, outpatient, nursing facilities, domiciliary, etc.)

• Measures conducive to leveraging capabilities of an electronic health record (EHR)

• Measures whose detailed specifications will be completed and ready for implementation in the 2012 Physician Quality Reporting System

• Broadly applicable measures that could be used to create a core measure set required of all participating eligible professionals

• Measures groups that reflect the services furnished to beneficiaries by a particular specialty.

In the 2012 Physician Quality Reporting System, as in the 2011 Physician Quality Reporting System, for some measures that are useful, but where data submission is not feasible through all otherwise available Physician Quality Reporting System reporting mechanisms, we are proposing that a measure may be included for reporting solely through specific reporting mechanism(s) in which its submission is feasible.

As discussed previously, section 1848(k)(2)(D) of the Act requires that the public have the opportunity to provide input during the selection of measures. We also are required by other applicable statutes to provide opportunity for public comment on provisions of policy or regulation that are established via notice and comment rulemaking. Measures that are not included in the proposed rule for inclusion in the 2012 Physician Quality Reporting System that are recommended to us via comments on the proposed rule have not been placed before the public to comment on the selection of those measures within the rulemaking process. Even when measures have been published in the **Federal Register**, but in other contexts and not specifically proposed as Physician Quality Reporting System measures, such publication does not provide true opportunity for public comment on those measures' potential inclusion in the Physician Quality Reporting System. Thus, such additional measures recommended for selection for the 2012 Physician Quality Reporting System via comments on the CY 2012 PFS proposed rule cannot be included in the 2012 measure set. As such, while we welcome all constructive comments and suggestions, and may consider such recommended measures for inclusion in future measure sets for the Physician Quality Reporting System and other programs to which such measures may be relevant, we are not able to consider such additional measures for inclusion in the final 2012 Physician Quality Reporting System measure set.

In addition, as in prior years, we again note that we do not use notice and comment rulemaking as a means to update or modify measure specifications. Quality measures that have completed the consensus process have a designated party (usually, the measure developer/owner) who has accepted responsibility for maintaining the measure. In general, it is the role of the measure owner, developer, or maintainer to make changes to a measure. Therefore, comments requesting changes to a specific proposed Physician Quality Reporting System measure's title, definition, and detailed specifications or coding should be directed to the measure developer identified in Tables 29 through 55. Contact information for the 2011 Physician Quality Reporting System measure developers is listed in the ''2011 Physician Quality Reporting System Quality Measures List,'' which is available on the CMS Web site at *http://www.cms.gov/PQRS/15_MeasuresCodes.asp#TopOfPage.*

However, we stress that inclusion of measures that are not NQF endorsed or AQA adopted is an exception to the requirement under section 1848(k)(2)(C)(i) of the Act that measures be endorsed by the NQF. We may exercise this exception authority in a specified area or medical topic for which a feasible and practical measure has not been endorsed by NQF, so long as due consideration is given to measures that have been endorsed by the NQF.

Based on the criteria previously discussed, we propose to include the individual measures listed in Tables 29 through 31 in the 2012 Physician Quality Reporting System individual quality measure set. We believe that each measure we are proposing for reporting under the 2012 Physician Quality Reporting System meets at least one criterion for the selection of Physician Quality Reporting System measures described previously. We are also proposing to include 24 measures

groups in the 2012 Physician Quality Reporting System quality measure set, which are listed in Tables 29 through 31. The individual measures selected for the 2012 Physician Quality Reporting System can be categorized as follows—

- Proposed 2012 Physician Quality Reporting System Core Measures Available for Either Claims, Registry, and/or EHR-Based Reporting;
- Proposed 2012 Physician Quality Reporting System Individual Quality Measures Available for Either Claims-based Reporting and/or Registry-based Reporting; AND
- Proposed 2012 Physician Quality Reporting System Measures Available for EHR-Based Reporting.

Please note that some individual measures we are proposing in Tables 29 through 31 for reporting for the 2012 Physician Quality Reporting System may be available for reporting in other CMS programs, such as the Medicare and Medicaid EHR Incentive Program as well as the Medicare Shared Savings Program. We note that measure titles, in some instances, may vary from program to program. If an eligible professional intends to report the same measures for multiple CMS programs, it is important to check the full measure specifications, NQF measure number (if applicable), as well as any other identifying measure features to determine whether the measures are the same. We invite comments on our proposed approach in selecting measures.

(3) Proposed 2012 Physician Quality Reporting System Individual Measures

This section focuses on the proposed 2012 Physician Quality Reporting System Individual Measures available for reporting via claims and/or registry. For the proposed 2012 Physician Quality Reporting System measures that were selected for reporting in 2011, please note that detailed measure specifications, including the measure's title, for the proposed 2012 individual Physician Quality Reporting System quality measures may have been updated or modified during the NQF endorsement process or for other reasons prior to 2012. The 2012 Physician Quality Reporting System quality measure specifications for any given individual quality measure may, therefore, be different from specifications for the same quality measure used in prior years. Specifications for all 2012 individual Physician Quality Reporting System quality measures, whether or not included in the 2011 Physician Quality Reporting System program, must be obtained from the specifications document for 2012 individual Physician Quality Reporting System quality measures, which will be available on the Physician Quality Reporting System section of the CMS Web site on or before December 31, 2011.

(A) Proposed 2012 Physician Quality Reporting System Core Measures Available for Claims, Registry, and/or EHR-Based Reporting

The prevention of cardiovascular conditions is a top priority for CMS. Therefore, in an effort to encourage eligible professionals to monitor their performance with respect to the prevention of cardiovascular conditions, we propose to adopt a Physician Quality Reporting System set of core measures for CY 2012, which are specified later in this section in Table 29, which focuses on the prevention of cardiovascular conditions.

While we encourage reporting of these measures by all eligible professionals, as previously discussed in section IV.F.1.f. of this proposed rule, we are proposing that only certain specialties be required to report on the proposed 2012 Physician Quality Reporting System core measures.

TABLE 29—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM CORE MEASURES AVAILABLE FOR EITHER CLAIMS, REGISTRY, AND/OR EHR-BASED REPORTING

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
204	Ischemic Vascular Disease (IVD): Use of Aspirin or another Antithrombotic.	0068	NCQA	Claims, Registry, EHR.
236	Controlling High Blood Pressure	0018	NCQA	Claims, Registry, EHR.
2	Diabetes Mellitus: Low Density Lipoprotein (LDL-C) Control in Diabetes Mellitus.	0064	NCQA	Claims, Registry, EHR.
226	Measure pair: a. Tobacco Use Assessment, b. Tobacco Cessation Intervention.	0028	AMA-PCPI	Claims, Registry, EHR.
TBD	Ischemic Vascular Disease (IVD): Complete Lipid Profile and LDL Control < 100.	0075	NCQA	Claims, Registry, EHR.
TBD	Proportion of adults 18 years and older who have had their BP measured within the preceding 2 years.	N/A	CMS	Claims, Registry, EHR.
TBD	Preventative Care: Cholesterol-LDL test performed	N/A	CMS	EHR.

We invite public comment on the proposed 2012 Physician Quality Reporting System core measures.

(B) Proposed 2012 Physician Quality Reporting System Individual Measures for Claims and Registry Reporting

For 2012, we propose to retain all measures currently used in the 2011 Physician Quality Reporting System. We believe these 2011 Physician Quality Reporting System measures meet the statutory considerations as well as other factors we used in determining which measures to include for reporting under the 2012 Physician Quality Reporting System. The retention of these measures also promotes program consistency. These proposed measures include 55 registry-only measures currently used in the 2011 Physician Quality Reporting System, and 144 individual quality measures for either claims-based reporting or registry-based reporting (75 FR 40186 through 40190 and 52489 through 52490). These proposed measures do not include any measures that are proposed to be included as part of the Back Pain measures group. For 2012, we propose that any 2012 Physician Quality Reporting System measures that are included in the Back Pain measures group would not be reportable as individual measures through claims-based reporting or registry-based reporting.

In 2011, Physician Quality Reporting System measure # 197 was titled ''Coronary Artery Disease (CAD): Drug Therapy for Lowering LDL–Cholesterol''. For 2012, we are changing the title of measure # 197 to ''Coronary Artery Disease: Lipid Control'', because the measure owner, AMA–PCPI, has changed the title of the measure. Aside from the title change, measure # 197's NQF number as well as its NQF-endorsement status has not changed. However, as noted previously, please check the measure specifications for measure # 197, as the specifications on how to report on measure # 197 for the 2012 Physician Quality Reporting System may change from 2011.

In addition, we propose the 26 new individual measures below for inclusion in the 2012 Physician Quality Reporting System in order to provide eligible professionals with more Physician Quality Reporting System quality measures on which they can select from to report. The following 2 proposed measures are NQF-endorsed:

- Anticoagulation for Acute Pulmonary Embolus Patients.
- Pregnancy Test for Female Abdominal Pain Patients.

The remaining 24 measures are either pending NQF endorsement or would have to be adopted under the exception to NQF endorsement provided under section 1848(k)(2)(C)(ii) of the Act. In selecting these measures, we took into account other considerations listed in section IV.F.1.(f).(2). of this proposed rule. Specifically, we are proposing the following measures because the measures impact chronic conditions:

- Chronic Wound Care: Use of Wound Surface Culture Technique in Patients with Chronic Skin Ulcers.
- Chronic Wound Care: Use of Wet to Dry Dressings in Patients with Chronic Skin Ulcers.
- Hypertension: Blood Pressure Control.

We are proposing the following measures because these measures involve care coordination:

- Coronary Artery Disease (CAD): Symptom Management.

We are proposing the following measures because these measures are applicable across care settings:

- Substance Use Disorders: Counseling Regarding Psychosocial and Pharmacologic Treatment Options for Alcohol Dependence.
- Substance Use Disorders: Screening for Depression Among Patients with Substance Abuse or Dependence.
- Cardiac Rehabilitation Patient Referral From an Outpatient Setting.

We are proposing the following measures because we believe the measures address gaps in the Physician Quality Reporting System measure set:

- Barrett's Esophagus.
- Ultrasound Determination of Pregnancy Location for Pregnant Patients with Abdominal Pain.
- Rh Immunoglobulin (Rhogam) for Rh Negative Pregnant Women at Risk of Fetal Blood Exposure.
- Surveillance after Endovascular Abdominal Aortic Aneurysm Repair (EVAR).
- Referral for Otology Evaluation for Patients with Acute or Chronic Dizziness.
- Image Confirmation of Successful Excision of Image—Localized Breast Lesion.
- Improvement in Patient's Visual Function within 90-Days Following Cataract Surgery.
- Patient Satisfaction within 90-Days Following Cataract Surgery.

We are proposing the following measures because we believe the measures increase the scope of applicability of the Physician Quality Reporting System measures to services furnished to Medicare beneficiaries and expand opportunities for eligible professionals to participate in the Physician Quality Reporting System:

- Radical Prostatectomy Pathology Reporting.
- Immunohistochemical (IHC) Evaluation of HER2 for Breast Cancer Patients.

We are proposing the following measures because the measures are high impact and support CMS and HHS priorities for improved quality and efficiency of care for Medicare beneficiaries.

- Statin Therapy at Discharge after Lower Extremity Bypass (LEB).
- Rate of Open AAA Repair without Major Complications (discharged to home no later than post-operative day #7).
- Rate of EVAR without Major Complications (discharged to home no later than POD #2).
- Rate of Carotid Endarterectomy for Asymptomatic Patients, without Major Complications (discharged to home no later than post-operative day #2).

We are proposing the following measures because the measures have a high impact on health care:

- Preoperative Diagnosis of Breast Cancer.
- Sentinel Lymph Node Biopsy for Invasive Breast Cancer.
- Biopsy Follow-up.

We believe that the addition of Physician Quality Reporting System quality measures will encourage eligible professionals to participate in the Physician Quality Reporting System, as there are more measures that may be applicable to eligible professionals.

Of these measures, 13 would be reportable via registry-only. The remaining 13 measures would be available for claims and registry reporting. Although we are proposing to designate certain measures as registry-only measures, we cannot guarantee that there will be a registry qualified to submit each registry-only measure for 2012. We rely on registries to self-nominate and identify the measures for which they would like to be qualified to submit quality measures results and numerator and denominator data on quality measures. If no registry self-nominates to submit measure results and numerator and denominator data on a particular measure for 2012, then an eligible professional would not be able to report that particular measure.

Table 30 identifies the list of measures we propose to include for claims and/or registry-based reporting in the 2012 Physician Quality Reporting System. The proposed 2012 Physician Quality Reporting System individual measures for either claims-based reporting or registry-based reporting are listed by their Physician Quality Reporting System Measure Number (to the extent the measure is part of the 2011 Physician Quality Reporting System measure set) and Title in Table 30, along with the name of the measure's developer/owner and NQF measure number, if applicable. The Physician Quality Reporting System Measure Number is a unique identifier assigned by CMS to all measures in the Physician Quality Reporting System measure set. Once a Physician Quality Reporting System Measure Number is assigned to a measure, it will not be used again to identify a different measure, even if the original measure to which the number was assigned is subsequently retired from the Physician Quality Reporting System measure set. A description of the measures listed in Table 30 can be found in the ''2011 Physician Quality Reporting System Quality Measures List,'' which is available on the Measures and Codes page of the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/PQRS* to the extent the measure is part of the 2011 Physician Quality Reporting System measure set. New measures that we are proposing to add to the Physician Quality Reporting System measure set for 2012 are designated with a Physician Quality Reporting System Measure Number of ''TBD.''

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
1	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus.	0059	NCQA	Claims, Registry.
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus.	0064	NCQA	Claims, Registry.
3	Diabetes Mellitus: High Blood Pressure Control in Diabetes Mellitus.	0061	NCQA	Claims, Registry.
5	Heart Failure: Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0081	AMA–PCPI	Registry.
6	Coronary Artery Disease (CAD): Oral Antiplatelet Therapy Prescribed for Patients with CAD.	0067	AMA–PCPI	Claims, Registry.
7	Coronary Artery Disease (CAD): Beta-Blocker Therapy for CAD Patients with Prior Myocardial Infarction (MI).	0070	AMA–PCPI	Registry.
8	Heart Failure: Beta-Blocker Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0083	AMA–PCPI	Registry.
9	Major Depressive Disorder (MDD): Antidepressant Medication During Acute Phase for Patients with MDD.	0105	NCQA	Claims, Registry.
10	Stroke and Stroke Rehabilitation: Computed Tomography (CT) or Magnetic Resonance Imaging (MRI) Reports.	00246	AMA–PCPI/NCQA	Claims, Registry.
12	Primary Open Angle Glaucoma (POAG): Optic Nerve Evaluation.	0086	AMA–PCPI	Claims, Registry.
14	Age-Related Macular Degeneration (AMD): Dilated Macular Examination.	0087	AMA–PCPI/NCQA	Claims, Registry.
18	Diabetic Retinopathy	0088	AMA–PCPI	Claims, Registry.
19	Diabetic Retinopathy: Communication with the Physician Managing On-going Diabetes Care.	0089	AMA–PCPI	Claims, Registry.
20	Perioperative Care: Timing of Antibiotic Prophylaxis—Ordering Physician.	0270	AMA–PCPI/NCQA	Claims, Registry.
21	Perioperative Care: Selection of Prophylactic Antibiotic	0268	AMA–PCPI/NCQA	Claims, Registry.
22	Perioperative Care: Discontinuation of Prophylactic Antibiotics (Non-Cardiac Procedures).	0271	AMA–PCPI/NCQA	Claims, Registry.
23	Perioperative Care: Venous Thromboembolism (VTE) Prophylaxis (When Indicated in ALL Patients).	0239	AMA–PCPI/NCQA	Claims, Registry.
24	Osteoporosis: Communication with the Physician Managing On-going Care Post-Fracture of Hip, Spine or Distal Radius for Men and Women Aged 50 Years and Older.	0045	AMA–PCPI/NCQA	Claims, Registry.
28	Aspirin at Arrival for Acute Myocardial Infarction (AMI) ..	0092	AMA–PCPI/NCQA	Claims, Registry.
30	Perioperative Care: Timely Administration of Prophylactic Parenteral Antibiotics.	0270	AMA–PCPI/NCQA	Claims, Registry.
31	Stroke and Stroke Rehabilitation: Deep Vein Thrombosis Prophylaxis (DVT) for Ischemic Stroke or Intracranial Hemorrhage.	0240	AMA–PCPI/NCQA	Claims, Registry.
32	Stroke and Stroke Rehabilitation: Discharged on Antiplatelet Therapy.	0325	AMA–PCPI/NCQA	Claims, Registry.
33	Stroke and Stroke Rehabilitation: Anticoagulant Therapy Prescribed for Atrial Fibrillation at Discharge.	0241	AMA–PCPI/NCQA	Registry.
35	Stroke and Stroke Rehabilitation: Screening for Dysphagia.	0243	AMA–PCPI/NCQA	Claims, Registry.
36	Stroke and Stroke Rehabilitation: Consideration of Rehabilitation Services.	0244	AMA–PCPI/NCQA	Claims, Registry.
39	Screening or Therapy for Osteoporosis for Women Aged 65 Years and Older.	0046	AMA–PCPI/NCQA	Claims, Registry.
40	Osteoporosis: Management Following Fracture of Hip, Spine or Distal Radius for Men and Women Aged 50 Years and Older.	0045	AMA–PCPI/NCQA	Claims, Registry.
41	Osteoporosis: Pharmacologic Therapy for Men and Women Aged 50 Years and Older.	0049	AMA–PCPI/NCQA	Claims, Registry.
43	Coronary Artery Bypass Graft (CABG): Use of Internal Mammary Artery (IMA) in Patients with Isolated CABG Surgery.	0516	STS	Claims, Registry.
44	Coronary Artery Bypass Graft (CABG): Preoperative Beta-Blocker in Patients with Isolated CABG Surgery.	0235	STS	Claims, Registry.
45	Perioperative Care: Discontinuation of Prophylactic Antibiotics (Cardiac Procedures).	0637	AMA–PCPI/NCQA	Claims, Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
46	Medication Reconciliation: Reconciliation After Discharge from an Inpatient Facility.	0097	AMA–PCPI/NCQA	Claims, Registry.
47	Advance Care Plan	0326	AMA–PCPI/NCQA	Claims, Registry.
48	Urinary Incontinence: Assessment of Presence or Absence of Urinary Incontinence in Women Aged 65 Years and Older.	0098	AMA–PCPI/NCQA	Claims, Registry.
49	Urinary Incontinence: Characterization of Urinary Incontinence in Women Aged 65 Years and Older.	0099	AMA–PCPI/NCQA	Claims, Registry.
50	Urinary Incontinence: Plan of Care for Urinary Incontinence in Women Aged 65 Years and Older.	0100	AMA–PCPI/NCQA	Claims, Registry.
51	Chronic Obstructive Pulmonary Disease (COPD): Spirometry Evaluation.	0091	AMA–PCPI	Claims, Registry.
52	Chronic Obstructive Pulmonary Disease (COPD): Bronchodilator Therapy.	0102	AMA–PCPI	Claims, Registry.
53	Asthma: Pharmacologic Therapy	0047	AMA–PCPI	Claims, Registry.
54	12-Lead Electrocardiogram (ECG) Performed for Non-Traumatic Chest Pain.	0090	AMA–PCPI/NCQA	Claims, Registry.
55	12-Lead Electrocardiogram (ECG) Performed for Syncope.	0093	AMA–PCPI/NCQA	Claims, Registry.
56	Community-Acquired Pneumonia (CAP): Vital Signs	0232	AMA–PCPI/NCQA	Claims, Registry.
57	Community-Acquired Pneumonia (CAP): Assessment of Oxygen Saturation.	0094	AMA–PCPI/NCQA	Claims, Registry.
58	Community-Acquired Pneumonia (CAP): Assessment of Mental Status.	0234	AMA–PCPI/NCQA	Claims, Registry.
59	Community-Acquired Pneumonia (CAP): Empiric Antibiotic.	0096	AMA–PCPI/NCQA	Claims, Registry.
64	Asthma: Asthma Assessment	0001	AMA–PCPI	Claims, Registry.
65	Treatment for Children with Upper Respiratory Infection (URI): Avoidance of Inappropriate Use.	0069	NCQA	Claims, Registry.
66	Appropriate Testing for Children with Pharyngitis	0002	NCQA	Claims, Registry.
67	Myelodysplastic Syndrome (MDS) and Acute Leukemias: Baseline Cytogenetic Testing Performed on Bone Marrow.	0377	AMA–PCPI/ASH	Claims, Registry.
68	Myelodysplastic Syndrome (MDS): Documentation of Iron Stores in Patients Receiving Erythropoietin Therapy.	0378	AMA–PCPI/ASH	Claims, Registry.
69	Multiple Myeloma: Treatment with Bisphosphonates	0380	AMA–PCPI/ASH	Claims, Registry.
70	Chronic Lymphocytic Leukemia (CLL): Baseline Flow Cytometry.	0379	AMA–PCPI/ASH	Claims, Registry.
71	Breast Cancer: Hormonal Therapy for Stage IC-IIIC Estrogen Receptor/Progesterone Receptor (ER/PR) Positive Breast Cancer.	0387	AMA–PCPI/ASCO/NCCN	Claims, Registry.
72	Colon Cancer: Chemotherapy for Stage III Colon Cancer Patients.	0385	AMA–PCPI/ASCO/NCCN	Claims, Registry.
76	Prevention of Catheter-Related Bloodstream Infections (CRBSI): Central Venous Catheter (CVC) Insertion Protocol.	0464	AMA–PCPI	Claims, Registry.
79	End Stage Renal Disease (ESRD): Influenza Immunization in Patients with ESRD.	0227	AMA–PCPI	Claims, Registry.
81	End Stage Renal Disease (ESRD): Plan of Care for Inadequate Hemodialysis in ESRD Patients.	0323	AMA–PCPI	Registry.
82	End Stage Renal Disease (ESRD): Plan of Care for Inadequate Peritoneal Dialysis.	0321	AMA–PCPI	Registry.
83	Hepatitis C: Testing for Chronic Hepatitis C—Confirmation of Hepatitis C Viremia.	0393	AMA–PCPI	Registry.
84	Hepatitis C: Ribonucleic Acid (RNA) Testing Before Initiating Treatment.	0395	AMA–PCPI	Claims, Registry.
85	Hepatitis C: HCV Genotype Testing Prior to Treatment	0396	AMA–PCPI	Claims, Registry.
86	Hepatitis C: Antiviral Treatment Prescribed	0397	AMA–PCPI	Claims, Registry.
87	Hepatitis C: HCV Ribonucleic Acid (RNA) Testing at Week 12 of Treatment.	0398	AMA–PCPI	Claims, Registry.
89	Hepatitis C: Counseling Regarding Risk of Alcohol Consumption.	0401	AMA–PCPI	Claims, Registry.
90	Hepatitis C: Counseling Regarding Use of Contraception Prior to Antiviral Therapy.	0394	AMA–PCPI	Claims, Registry.
91	Acute Otitis Externa (AOE): Topical Therapy	0653	AMA–PCPI	Claims, Registry.
92	Acute Otitis Externa (AOE): Pain Assessment	N/A	AMA–PCPI	Claims, Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
93	Acute Otitis Externa (AOE): Systemic Antimicrobial Therapy—Avoidance of Inappropriate Use.	0654	AMA–PCPI	Claims, Registry.
94	Otitis Media with Effusion (OME): Diagnostic Evaluation—Assessment of Tympanic Membrane Mobility.	N/A	AMA–PCPI	Claims, Registry.
99	Breast Cancer Resection Pathology Reporting: pT Category (Primary Tumor) and pN Category (Regional Lymph Nodes) with Histologic Grade.	0391	AMA–PCPI/CAP	Claims, Registry.
100	Colorectal Cancer Resection Pathology Reporting: pT Category (Primary Tumor) and pN Category (Regional Lymph Nodes) with Histologic Grade.	0392	AMA–PCPI/CAP	Claims, Registry.
102	Prostate Cancer: Avoidance of Overuse of Bone Scan for Staging Low-Risk Prostate Cancer Patients.	0389	AMA–PCPI	Claims, Registry.
104	Prostate Cancer: Adjuvant Hormonal Therapy for High-Risk Prostate Cancer Patients.	0390	AMA–PCPI	Claims, Registry.
105	Prostate Cancer: Three-Dimensional (3D) Radiotherapy	0388	AMA–PCPI	Claims, Registry.
106	Major Depressive Disorder (MDD): Diagnostic Evaluation.	0103	AMA–PCPI	Claims, Registry.
107	Major Depressive Disorder (MDD): Suicide Risk Assessment.	0104	AMA–PCPI	Claims, Registry.
108	Rheumatoid Arthritis (RA): Disease Modifying Anti-Rheumatic Drug (DMARD) Therapy.	0054	NCQA	Claims, Registry.
109	Osteoarthritis (OA): Function and Pain Assessment	0050	AMA–PCPI	Claims, Registry.
110	Preventive Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old.	0041	AMA–PCPI	Claims, Registry.
111	Preventive Care and Screening: Pneumonia Vaccination for Patients 65 Years and Older.	0043	NCQA	Claims, Registry.
112	Preventive Care and Screening: Screening Mammography.	0031	NCQA	Claims, Registry.
113	Preventive Care and Screening: Colorectal Cancer Screening.	0034	NCQA	Claims, Registry.
116	Antibiotic Treatment for Adults with Acute Bronchitis: Avoidance of Inappropriate Use.	0058	NCQA	Claims, Registry.
117	Diabetes Mellitus: Dilated Eye Exam in Diabetic Patient	0055	NCQA	Claims, Registry.
118	Coronary Artery Disease (CAD): Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Patients with CAD and Diabetes and/or Left Ventricular Systolic Dysfunction (LVSD).	0066	AMA–PCPI	Registry.
119	Diabetes Mellitus: Urine Screening for Microalbumin or Medical Attention for Nephropathy in Diabetic Patients.	0062	NCQA	Claims, Registry.
121	Chronic Kidney Disease (CKD): Laboratory Testing (Calcium, Phosphorus, Intact Parathyroid Hormone (iPTH) and Lipid Profile).	N/A	AMA–PCPI	Claims, Registry.
122	Chronic Kidney Disease (CKD): Blood Pressure Management.	AQA adopted	AMA–PCPI	Claims, Registry.
123	Chronic Kidney Disease (CKD): Plan of Care—Elevated Hemoglobin for Patients Receiving Erythropoiesis-Stimulating Agents (ESA).	AQA adopted	AMA–PCPI	Claims, Registry.
124	Health Information Technology (HIT): Adoption/Use of Electronic Health Records (EHR).	0488	CMS/QIP	Claims, Registry.
126	Diabetes Mellitus: Diabetic Foot and Ankle Care, Peripheral Neuropathy—Neurological Evaluation.	0417	APMA	Claims, Registry.
127	Diabetes Mellitus: Diabetic Foot and Ankle Care, Ulcer Prevention—Evaluation of Footwear.	0416	APMA	Claims, Registry.
128	Preventive Care and Screening: Body Mass Index (BMI) Screening and Follow-Up.	0421	CMS/QIP	Claims, Registry.
130	Documentation of Current Medications in the Medical Record.	0419	CMS/QIP	Claims, Registry.
131	Pain Assessment Prior to Initiation of Patient Therapy and Follow-Up.	0420	CMS/QIP	Claims, Registry.
134	Screening for Clinical Depression and Follow-Up Plan	0418	CMS/QIP	Claims, Registry.
135	Chronic Kidney Disease (CKD): Influenza Immunization	AQA adopted	AMA–PCPI	Claims, Registry.
137	Melanoma: Continuity of Care—Recall System	0650	AMA–PCPI/NCQA	Registry.
138	Melanoma: Coordination of Care	0561	AMA–PCPI/NCQA	Registry.
140	Age-Related Macular Degeneration (AMD): Counseling on Antioxidant Supplement.	0566	AMA–PCPI/NCQA	Claims, Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
141	Primary Open-Angle Glaucoma (POAG): Reduction of Intraocular Pressure (IOP) by 15% OR Documentation of a Plan of Care.	0563	AMA–PCPI/NCQA	Claims, Registry.
142	Osteoarthritis (OA): Assessment for Use of Anti-Inflammatory or Analgesic Over-the-Counter (OTC) Medications.	0051	AMA–PCPI	Claims, Registry.
143	Oncology: Medical and Radiation—Pain Intensity Quantified.	0384	AMA–PCPI	Registry.
144	Oncology: Medical and Radiation—Plan of Care for Pain.	0383	AMA–PCPI	Registry.
145	Radiology: Exposure Time Reported for Procedures Using Fluoroscopy.	0510	AMA–PCPI/NCQA	Claims, Registry.
146	Radiology: Inappropriate Use of "Probably Benign" Assessment Category in Mammography Screening.	0508	AMA–PCPI/NCQA	Claims, Registry.
147	Nuclear Medicine: Correlation with Existing Imaging Studies for All Patients Undergoing Bone Scintigraphy.	0511	AMA–PCPI	Claims, Registry.
153	Chronic Kidney Disease (CKD): Referral for Arteriovenous (AV) Fistula.	AQA adopted	AMA–PCPI	Claims, Registry.
154	Falls: Risk Assessment	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
155	Falls: Plan of Care	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
156	Oncology: Radiation Dose Limits to Normal Tissues	0382	AMA–PCPI	Claims, Registry.
157	Thoracic Surgery: Recording of Clinical Stage for Lung Cancer and Esophageal Cancer Resection.	0455	STS	Claims, Registry.
158	Carotid Endarterectomy: Use of Patch During Conventional Carotid Endarterectomy.	0466	SVS	Claims, Registry.
159	HIV/AIDS: CD4+ Cell Count or CD4+ Percentage	0404	AMA–PCPI/NCQA	Registry.
160	HIV/AIDS: Pneumocystis Jiroveci Pneumonia (PCP) Prophylaxis.	0405	AMA–PCPI/NCQA	Registry.
161	HIV/AIDS: Adolescent and Adult Patients with HIV/AIDS Who Are Prescribed Potent Antiretroviral Therapy.	0406	AMA–PCPI/NCQA	Registry.
162	HIV/AIDS: HIV RNA Control After Six Months of Potent Antiretroviral Therapy.	0407	AMA–PCPI/NCQA	Registry.
163	Diabetes Mellitus: Foot Exam	0056	NCQA	Claims, Registry.
164	Coronary Artery Bypass Graft (CABG): Prolonged Intubation (Ventilation).	0129	STS	Registry.
165	Coronary Artery Bypass Graft (CABG): Deep Sternal Wound Infection Rate.	0130	STS	Registry.
166	Coronary Artery Bypass Graft (CABG): Stroke/Cerebrovascular Accident (CVA).	0131	STS	Registry.
167	Coronary Artery Bypass Graft (CABG): Postoperative Renal Insufficiency.	0114	STS	Registry.
168	Coronary Artery Bypass Graft (CABG): Surgical Re-exploration.	0115	STS	Registry.
169	Coronary Artery Bypass Graft (CABG): Antiplatelet Medications at Discharge.	0237	STS	Registry.
170	Coronary Artery Bypass Graft (CABG): Beta-Blockers Administered at Discharge.	0238	STS	Registry.
171	Coronary Artery Bypass Graft (CABG): Lipid Management and Counseling.	0118	STS	Registry.
172	Hemodialysis Vascular Access Decision-Making by Surgeon to Maximize Placement of Autogenous Arterial Venous (AV) Fistula.	0259	SVS	Claims, Registry.
173	Preventive Care and Screening: Unhealthy Alcohol Use—Screening.	AQA adopted	AMA–PCPI	Claims, Registry.
175	Pediatric End Stage Renal Disease (ESRD): Influenza Immunization.	AQA adopted	AMA–PCPI	Claims, Registry.
176	Rheumatoid Arthritis (RA): Tuberculosis Screening	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
177	Rheumatoid Arthritis (RA): Periodic Assessment of Disease Activity.	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
178	Rheumatoid Arthritis (RA): Functional Status Assessment.	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
179	Rheumatoid Arthritis (RA): Assessment and Classification of Disease Prognosis.	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
180	Rheumatoid Arthritis (RA): Glucocorticoid Management	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
181	Elder Maltreatment Screen and Follow-Up Plan	AQA adopted	CMS/QIP	Claims, Registry.
182	Functional Outcome Assessment in Chiropractic Care	AQA adopted	CMS/QIP	Claims, Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
183	Hepatitis C: Hepatitis A Vaccination in Patients with HCV.	0399	AMA–PCPI	Claims, Registry.
184	Hepatitis C: Hepatitis B Vaccination in Patients with HCV.	0400	AMA–PCPI	Claims, Registry.
185	Endoscopy & Polyp Surveillance: Colonoscopy Interval for Patients with a History of Adenomatous Polyps—Avoidance of Inappropriate Use.	0659	AMA–PCPI/NCQA	Claims, Registry.
186	Wound Care: Use of Compression System in Patients with Venous Ulcers.	AQA adopted	AMA–PCPI/NCQA	Claims, Registry.
187	Stroke and Stroke Rehabilitation: Thrombolytic Therapy	0437	AHA/ASA/TJC	Registry.
188	Referral for Otologic Evaluation for Patients with Congenital or Traumatic Deformity of the Ear.	N/A	AQC	Claims, Registry.
189	Referral for Otologic Evaluation for Patients with History of Active Drainage From the Ear Within the Previous 90 Days.	N/A	AQC	Claims, Registry.
190	Referral for Otologic Evaluation for Patients with a History of Sudden or Rapidly Progressive Hearing Loss.	N/A	AQC	Claims, Registry.
191	Cataracts: 20/40 or Better Visual Acuity Within 90 Days Following Cataract Surgery.	0565	AMA–PCPI/NCQA	Registry.
192	Cataracts: Complications within 30 Days Following Cataract Surgery Requiring Additional Surgical Procedures.	0564	AMA–PCPI/NCQA	Registry.
193	Perioperative Temperature Management	0454	AMA–PCPI	Claims, Registry.
194	Oncology: Cancer Stage Documented	0386	AMA–PCPI/ASCO	Claims, Registry.
195	Radiology: Stenosis Measurement in Carotid Imaging Studies.	0507	AMA–PCPI/NCQA	Claims, Registry.
196	Coronary Artery Disease (CAD): Symptom and Activity Assessment.	0065	AMA–PCPI	Registry.
197	Coronary Artery Disease (CAD): Lipid Control	0074	AMA–PCPI	Registry.
198	Heart Failure: Left Ventricular Function (LVF) Assessment.	0079	AMA–PCPI	Registry.
199	Heart Failure: Patient Education	0082	AMA–PCPI	Registry.
200	Heart Failure: Warfarin Therapy for Patients with Atrial Fibrillation.	0084	AMA–PCPI	Registry.
201	Ischemic Vascular Disease (IVD): Blood Pressure Management Control.	0073	NCQA	Claims, Registry.
202	Ischemic Vascular Disease (IVD): Complete Lipid Profile	0075	NCQA	Claims, Registry.
203	Ischemic Vascular Disease (IVD): Low Density Lipoprotein (LDL–C) Control.	0075	NCQA	Claims, Registry.
204	Ischemic Vascular Disease (IVD): Use of Aspirin or Another Antithrombotic.	0068	NCQA	Claims, Registry.
205	HIV/AIDS: Sexually Transmitted Disease Screening for Chlamydia and Gonorrhea.	0409	AMA–PCPI/NCQA	Registry.
206	HIV/AIDS: Screening for High Risk Sexual Behaviors	0413	AMA–PCPI/NCQA	Registry.
207	HIV/AIDS: Screening for Injection Drug Use	0415	AMA–PCPI/NCQA	Registry.
208	HIV/AIDS: Sexually Transmitted Disease Screening for Syphilis.	0410	AMA–PCPI/NCQA	Registry.
209	Functional Communication Measure-Spoken Language Comprehension.	0445	ASHA	Registry.
210	Functional Communication Measure-Attention	0449	ASHA	Registry.
211	Functional Communication Measure-Memory	0448	ASHA	Registry.
212	Functional Communication Measure-Motor Speech	0447	ASHA	Registry.
213	Functional Communication Measure-Reading	0446	ASHA	Registry.
214	Functional Communication Measure-Spoken Language Expression.	0444	ASHA	Registry.
215	Functional Communication Measure-Writing	0442	ASHA	Registry.
216	Functional Communication Measure-Swallowing	0443	ASHA	Registry.
217	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Knee Impairments.	0422	FOTO	Registry.
218	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Hip Impairments.	0423	FOTO	Registry.
219	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Lower Leg, Foot or Ankle Impairments.	0424	FOTO	Registry.
220	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Lumbar Spine Impairments.	0425	FOTO	Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
221	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Shoulder Impairments.	0426	FOTO	Registry.
222	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Elbow, Wrist or Hand Impairments.	0427	FOTO	Registry.
223	Functional Deficit: Change in Risk-Adjusted Functional Status for Patients with Neck, Cranium, Mandible, Thoracic Spine, Ribs, or Other General Orthopedic Impairments.	0428	FOTO	Registry.
224	Melanoma: Overutilization of Imaging Studies in Stage 0–IA Melanoma.	0562	AMA–PCPI	Registry.
225	Radiology: Reminder System for Mammograms	0509	AMA–PCPI	Claims, Registry.
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention.	0028	AMA–PCPI	Claims, Registry.
228	Heart Failure (HF): Left Ventricular Function (LVF) Testing.	0079	CMS	Registry.
231	Asthma: Tobacco Use: Screening-Ambulatory Care Setting.	N/A	AMA–PCPI	Claims, Registry.
232	Asthma: Tobacco Use: Intervention-Ambulatory Care Setting.	N/A	AMA–PCPI	Claims, Registry.
233	Thoracic Surgery: Recording of Performance Status Prior to Lung or Esophageal Cancer Resection.	0457	STS	Registry.
234	Thoracic Surgery: Pulmonary Function Tests Before Major Anatomic Lung Resection (Pneumonectomy, Lobectomy, or Formal Segmentectomy).	0458	STS	Registry.
235	Hypertension (HTN): Plan of Care	0017	AMA–PCPI	Claims, Registry.
TBD	Chronic Wound Care: Use of Wound Surface Culture Technique in Patients with Chronic Skin Ulcers.	N/A	ASPS–PCPI–NCQA	Claims, Registry.
TBD	Chronic Wound Care: Use of Wet to Dry Dressings in Patients with Chronic Skin Ulcers.	N/A	ASPS–PCPI–NCQA	Claims, Registry.
TBD	Substance Use Disorders: Counseling Regarding Psychosocial and Pharmacologic Treatment Options for Alcohol Dependence.	AQA adopted	ASPS–PCPI–NCQA	Claims, Registry.
TBD	Substance Use Disorders: Screening for Depression Among Patients with Substance Abuse or Dependence.	AQA adopted	ASPS–PCPI–NCQA	Claims, Registry.
TBD	Coronary Artery Disease (CAD): Symptom Management	N/A	ASPS–PCPI–NCQA	Registry.
TBD	Cardiac Rehabilitation Patient Referral From an Outpatient Setting.	N/A	ACCF–AHA	Registry.
TBD	Hypertension: Blood Pressure Control	N/A	ACC–AHA–PCPI	Registry.
TBD	Barrett's Esophagus	N/A	CAP	Claims, Registry.
TBD	Radical Prostatectomy Pathology Reporting	N/A	CAP	Claims, Registry.
TBD	Immunohistochemical (IHC) Evaluation of HER2 for Breast Cancer Patients.	N/A	College of American Pathologists.	Claims, Registry.
TBD	Anticoagulation for Acute Pulmonary Embolus Patients	0503	ACEP	Claims, Registry.
TBD	Pregnancy Test for Female Abdominal Pain Patients	0502	ACEP	Claims, Registry.
TBD	Ultrasound Determination of Pregnancy Location for Pregnant Patients with Abdominal Pain.	N/A	ACEP	Claims, Registry.
TBD	Rh Immunoglobulin (Rhogam) for Rh Negative Pregnant Women at Risk of Fetal Blood Exposure.	N/A	ACEP	Registry.
TBD	Surveillance after Endovascular Abdominal Aortic Aneurysm Repair (EVAR).	N/A	SVS	Registry.
TBD	Statin Therapy at Discharge after Lower Extremity Bypass (LEB).	N/A	SVS	Registry.
TBD	Rate of Open AAA Repair without Major Complications (discharged to home no later than post-operative day #7).	N/A	SVS	Registry.
TBD	Rate of EVAR without Major Complications (discharged to home no later than POD #2).	N/A	SVS	Registry.
TBD	Rate of Carotid Endarterectomy for Asymptomatic Patients, without Major Complications (discharged to home no later than post-operative day #2).	N/A	SVS	Registry.
TBD	Referral for Otology Evaluation for Patients with Acute or Chronic Dizziness.	N/A	AQC	Claims, Registry.
TBD	Image Confirmation of Successful Excision of Image-Localized Breast Lesion.	N/A	ASBS	Claims, Registry.
TBD	Preoperative Diagnosis of Breast Cancer	N/A	ASBS	Claims, Registry.

TABLE 30—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM INDIVIDUAL QUALITY MEASURES AVAILABLE FOR EITHER CLAIMS-BASED REPORTING AND/OR REGISTRY-BASED REPORTING—Continued

Physician quality reporting system measure No.	Measure title	NQF measure No.	Measure developer	Reporting mechanism
TBD	Sentinel Lymph Node Biopsy for Invasive Breast Cancer	N/A	ASBS	Registry.
TBD	Biopsy Follow-up	N/A	AAD	Registry.
TBD	Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery.	N/A	AAO	Registry.
TBD	Patient Satisfaction within 90 Days Following Cataract Surgery.	N/A	AAO	Registry.

(C) Proposed 2012 Measures Available for EHR-Based Reporting

For 2012, we propose to again accept Physician Quality Reporting System data from EHRs for a limited subset of 2012 Physician Quality Reporting System quality measures.

Section 1848(m)(7) of the Act (''Integration of Physician Quality Reporting and EHR Reporting''), as added by section 3002(d) of the Affordable Care Act, requires that by no later than January 1, 2012, the Secretary shall develop a plan to integrate reporting on quality measures under the Physician Quality Reporting System with reporting requirements under the EHR Incentive Program under section 1848(o) of the Act relating to the meaningful use of EHRs. Such integration shall consist of the following:

(A) The selection of measures, the reporting of which would both demonstrate—

(i) Meaningful use of an EHR for purposes of the Medicare EHR Incentive Program; and

(ii) Quality of care furnished to an individual; and

(B) Such other activities as specified by the Secretary.

To align the Physician Quality Reporting System with the Medicare EHR Incentive Program, we propose to include all clinical quality measures available for reporting under the Medicare EHR Incentive Program (75 FR 44398 through 44408) in the EHR-Based reporting option in the 2012 Physician Quality Reporting System for purposes of reporting data on quality measures under the EHR-reporting option. In 2011, we included 14 of the 44 EHR Incentive Program measures under the 2011 Physician Quality Reporting System EHR reporting mechanism. In order to better align Physician Quality Reporting System measures with those under the EHR Incentive Program, for 2012, we propose to have the rest of the 44 clinical quality measures in the Medicare EHR Incentive Program available for EHR-Based reporting under the 2012 Physician Quality Reporting System.

Furthermore, for 2012, we propose to retain the following 6 additional measures that were available for reporting under the EHR-Based reporting mechanism under the 2011 Physician Quality Reporting System:

- Measure # 39: Screening or Therapy for Osteoporosis for Women Aged 65 Years and Older.
- Measure # 47: Advance Care Plan.
- Measure # 48: Urinary Incontinence: Assessment of Presence or Absence of Urinary Incontinence in Women Aged 65 Years and Older.
- Measure # 124: Health Information Technology (HIT): Adoption/Use of Electronic Health Records (EHR).
- Measure # 173: Preventive Care and Screening: Unhealthy Alcohol Use—Screening.
- Measure # 238: Drugs to be Avoided in the Elderly.

We believe these measures meet the criteria listed previously for inclusion for reporting under the Physician Quality Reporting System.

Table 31 identifies the list of measures we propose to include for EHR-Based reporting under the 2012 Physician Quality Reporting System.

TABLE 31—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM MEASURES AVAILABLE FOR EHR-BASED REPORTING

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
MEASURES THAT ARE ALSO EHR INCENTIVE PROGRAM CORE MEASURES			
128	Preventive Care and Screening: Body Mass Index (BMI) Screening and Follow-up *	0421	CMS/QIP
237	Hypertension (HTN): Blood Pressure Measurement	0013	AMA–PCPI
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention **	0028	AMA–PCPI
MEASURES THAT ARE ALSO EHR INCENTIVE PROGRAM ALTERNATE CORE MEASURES			
110	Preventative Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old	0041	AMA–PCPI
239	Weight Assessment and Counseling for Children and Adolescents	0024	NCQA
TBD	Childhood Immunization Status	0038	NCQA
MEASURES THAT ARE ALSO EHR INCENTIVE PROGRAM MEASURES			
1	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus	0059	NCQA
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus	0064	NCQA
3	Diabetes Mellitus: High Blood Pressure Control in Diabetes Mellitus	0061	NCQA

TABLE 31—PROPOSED 2012 PHYSICIAN QUALITY REPORTING SYSTEM MEASURES AVAILABLE FOR EHR-BASED REPORTING—Continued

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
5	Heart Failure: Angiotensin Receptor Blocker (ARB) Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0081	AMA–PCPI
6	Coronary Artery Disease (CAD): Oral Antiplatelet Therapy Prescribed for Patients with CAD.	0067	AMA–PCPI
7	Coronary Artery Disease (CAD): Beta-Blocker Therapy for CAD Patients with Prior Myocardial Infarction (MI).	0070	AMA–PCPI
8	Heart Failure (HF): Beta-Blocker Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0083	AMA–PCPI
9	Anti-depressant medication management: (a) Effective Acute Phase Treatment, (b) Effective Continuation Phase Treatment.	0105	NCQA
12	Primary Open Angle Glaucoma (POAG): Optic Nerve Evaluation	0086	AMA–PCPI
18	Diabetic Retinopathy: Documentation of Presence or Absence of Macular Edema and Level of Severity of Retinopathy.	0088	AMA–PCPI
19	Diabetic Retinopathy: Communication with the Physician Managing Ongoing Diabetes Care.	0089	AMA–PCPI
53	Asthma Pharmacologic	0047	AMA–PCPI
64	Asthma Assessment	0001	AMA–PCPI
66	Appropriate Testing for Children with Pharyngitis	0002	NCQA
71	Oncology Breast Cancer: Hormonal Therapy for Stage IC–IIIC Estrogen Receptor/Progesterone Receptor (ER/PR) Positive Breast Cancer.	0387	AMA–PCPI
72	Oncology Colon Cancer: Chemotherapy for Stage III Colon Cancer Patients	0385	AMA–PCPI
102	Prostate Cancer: Avoidance of Overuse of Bone Scan for Staging Low Risk Prostate Cancer Patients.	0389	AMA–PCPI
111	Preventive Care and Screening: Screening Mammography	0043	NCQA
112	Preventive Care and Screening: Colorectal Cancer Screening	0031	NCQA
113	Colorectal Cancer Screening	0034	NCQA
114 & 115	Smoking and Tobacco Use Cessation, Medical Assistance: a. Advising Smokers to Quit, b. Discussing Smoking and Tobacco Use Cessation Medications, c. Discussing Smoking and Tobacco Use Cessation Strategies.	0027	NCQA
117	Diabetes: Eye Exam	0055	AMA–PCPI
119	Diabetes: Urine Screening	0062	NCQA
163	Diabetes: Foot Exam	0056	NCQA
197	Coronary Artery Disease (CAD): Lipid Control	0074	AMA–PCPI
200	Heart Failure: Warfarin Therapy Patients with Atrial Fibrillation	0084	AMA–PCPI
201	Ischemic Vascular Disease (IVD): Blood Pressure Management	0073	NCQA
204	Ischemic Vascular Disease (IVD): Use of Aspirin or Another Antithrombotic	0068	NCQA
TBD	Initiation and Engagement of Alcohol and Other Drug Dependence Treatment: (a) Initiation, (b) Engagement.	0004	NCQA
TBD	Prenatal Care: Screening for Human Immunodeficiency Virus (HIV)	0012	AMA–PCPI
TBD	Prenatal Care: Anti-D Immune Globulin	0014	AMA–PCPI
236	Controlling High Blood Pressure	0018	NCQA
TBD	Cervical Cancer Screening	0032	NCQA
TBD	Chlamydia Screening for Women	0033	NCQA
240	Use of Appropriate Medications for Asthma	0036	NCQA
TBD	Low Back Pain: Use of Imaging Studies	0052	NCQA
202 & 203	Ischemic Vascular Disease (IVD): Complete Lipid Panel and LDL Control	0075	NCQA
TBD	Diabetes: Hemoglobin A1c Control (< 8.0%)	0575	NCQA
OTHER PHYSICIAN QUALITY REPORTING SYSTEM EHR MEASURES			
39	Screening or Therapy for Osteoporosis for Women Aged 65 Years and Older	0046	AMA–PCPI/NCQA
47	Advance Care Plan	0326	AMA–PCPI/NCQA
48	Urinary Incontinence: Assessment of Presence or Absence of Urinary Incontinence in Women Aged 65 Years and Older.	0098	AMA–PCPI/NCQA
124	Health Information Technology (HIT): Adoption/Use of Electronic Health Records (EHR).	0488	CMS/QIP
173	Preventive Care and Screening: Unhealthy Alcohol Use—Screening	AQA Adopted	AMA–PCPI
238	Drugs to be Avoided in the Elderly	0022	NCQA

*For the purpose of reporting this measure under the Physician Quality Reporting System, the reporting of this measure will count if at least one of the two parameters does not contain a 0 percent performance rate.

**For the purpose of reporting this measure under the Physician Quality Reporting System, the reporting of this measure will count if at least one of the two pairs does not contain a 0 percent performance rate.

(4) 2012 Physician Quality Reporting System Measures Groups

We propose to retain the following 14 2011 Physician Quality Reporting System measures groups for the 2012 Physician Quality Reporting System: (1) Diabetes Mellitus; (2) CKD; (3) Preventive Care; (4) CABG; (5) Rheumatoid Arthritis; (6) Perioperative Care; (7) Back Pain; (8) CAD; (9) Heart Failure; (10) IVD; (11) Hepatitis C; (12) HIV/AIDS; (13) CAP, and (14) Asthma. For 2012, we propose that the CABG, CAD, Heart Failure, and HIV/AIDS measures groups would continue to be reportable through the registry-based reporting mechanism only, while the remaining Diabetes Mellitus, CKD, Preventive Care, Rheumatoid Arthritis, Perioperative Care, Back Pain, IVD, Hepatitis C, CAP, and Asthma measures groups would continue to be reportable through either claims-based reporting or registry-based reporting for the 2012 Physician Quality Reporting System. We are retaining these measures groups for the 2012 Physician Quality Reporting System particularly because we believe the measures groups reflect the services furnished to beneficiaries by a particular specialty. We also believe that retaining these measures groups will provide consistency from program year to program year.

In addition to the 14 measures groups previously, we propose the following 10 new measures groups for 2012 to provide eligible professionals with more measures groups on which to report:

- Chronic Obstructive Pulmonary Disease (COPD).
- Inflammatory Bowel Disease.
- Sleep Apnea.
- Epilepsy.
- Dementia.
- Parkinson's.
- Elevated Blood Pressure.
- Radiology.
- Cardiovascular Prevention, which contains individual measures from the proposed Physician Quality Reporting System core measure set previously discussed.
- Cataracts.

These are the measures groups that were presented to us for inclusion for reporting under the 2012 Physician Quality Reporting System. Section 1848(k)(2)(C)(ii) of the Act provides an exception to the requirement that measures be endorsed by the NQF. We may exercise this exception authority in a specified area or medical topic for which a feasible and practical measure has not been endorsed by NQF, so long as due consideration is given to measures that have been endorsed by the NQF. For the measures contained within these measures groups that are not currently NQF-endorsed, we are proposing to exercise this authority due to our interest in all of the proposed 10 measures group's topics. We believe that each of the proposed additional measures groups address gaps in the Physician Quality Reporting System measures groups and will also allow for greater reporting options for individual eligible professionals, thereby increasing participation in the Physician Quality Reporting System.

Finally, as in previous program years, for 2012, we propose that the measures included in any proposed 2012 measures group be reportable either as individual measures or as part of a measures group, except for the Back Pain measures group, which would continue to be reportable only as part of a measures group and not as individual measures in 2012.

As with measures group reporting in prior program years, we propose that each eligible professional electing to report a group of measures for 2012 must report all measures in the group that are applicable to each patient or encounter to which the measures group applies at least up to the minimum number of patients required by the applicable reporting criteria.

The measures proposed for inclusion in each of the 2012 measures groups are identified in Tables 32 through 55 of this proposed rule. Some measures proposed for inclusion in the 2012 measures groups are also 2011 individual Physician Quality Reporting System measures. The title of each such measure is preceded with its Physician Quality Reporting System Measure Number in Tables 32 through 55. As stated previously, the Physician Quality Reporting System Measure Number is a unique identifier assigned by us to all measures in the Physician Quality Reporting System measure set. Once a Physician Quality Reporting System Measure Number is assigned to a measure, it will not be used again, even if the measure is subsequently retired from the Physician Quality Reporting System measure set. Measures that are not preceded by a number (in other words, those preceded by ''TBD'') in Tables 32 through 55 were never part of a Physician Quality Reporting System measure set prior to 2012. A number will be assigned to such measures for 2012.

TABLE 32—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 DIABETES MELLITUS MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
1	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus	0059	NCQA
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus	0064	NCQA
3	Diabetes Mellitus: High Blood Pressure Control in Diabetes Mellitus	0061	NCQA
117	Diabetes Mellitus: Dilated Eye Exam in Diabetic Patient	0055	NCQA
119	Diabetes Mellitus: Urine Screening for Microalbumin or Medical Attention for Nephropathy in Diabetic Patients.	0062	NCQA
163	Diabetes Mellitus: Foot Exam	0056	NCQA

TABLE 33—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 CKD MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
121	Chronic Kidney Disease (CKD): Laboratory Testing (Calcium, Phosphorus, Intact Parathyroid Hormone (iPTH) and Lipid Profile).	Not applicable	AMA–PCPI
122	Chronic Kidney Disease (CKD): Blood Pressure Management	AQA adopted	AMA–PCPI

TABLE 33—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 CKD MEASURES GROUP—Continued

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
123	Chronic Kidney Disease (CKD): Plan of Care—Elevated Hemoglobin for Patients Receiving Erythropoiesis–Stimulating Agents (ESA).	AQA adopted	AMA–PCPI
153	Chronic Kidney Disease (CKD): Referral for Arteriovenous (AV) Fistula	AQA adopted	AMA–PCPI

TABLE 34—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 PREVENTATIVE CARE MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
39	Screening or Therapy for Osteoporosis for Women Aged 65 Years and Older	0046	AMA–PCPI/NCQA
48	Urinary Incontinence: Assessment of Presence or Absence of Urinary Incontinence in Women Aged 65 Years and Older.	0098	AMA–PCPI/NCQA
110	Preventive Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old	0041	AMA–PCPI
111	Preventive Care and Screening: Pneumonia Vaccination for Patients 65 Years and Older.	0043	NCQA
112	Preventive Care and Screening: Screening Mammography	0031	NCQA
113	Preventive Care and Screening: Colorectal Cancer Screening	0034	NCQA
128	Preventive Care and Screening: Body Mass Index (BMI) Screening and Follow-Up	0421	CMS/QIP
173	Preventive Care and Screening: Unhealthy Alcohol Use—Screening	AQA adopted	AMA–PCPI
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

TABLE 35—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 CABG MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
43	Coronary Artery Bypass Graft (CABG): Use of Internal Mammary Artery (IMA) in Patients with Isolated CABG Surgery.	0516	STS
44	Coronary Artery Bypass Graft (CABG): Preoperative Beta-Blocker in Patients with Isolated CABG Surgery.	0235	STS
164	Coronary Artery Bypass Graft (CABG): Prolonged Intubation (Ventilation)	0129	STS
165	Coronary Artery Bypass Graft (CABG): Deep Sternal Wound Infection Rate	0130	STS
166	Coronary Artery Bypass Graft (CABG): Stroke/Cerebrovascular Accident (CVA)	0131	STS
167	Coronary Artery Bypass Graft (CABG): Postoperative Renal Insufficiency	0114	STS
168	Coronary Artery Bypass Graft (CABG): Surgical Re-exploration	0115	STS
169	Coronary Artery Bypass Graft (CABG): Antiplatelet Medications at Discharge	0237	STS
170	Coronary Artery Bypass Graft (CABG): Beta-Blockers Administered at Discharge	0238	STS
171	Coronary Artery Bypass Graft (CABG): Lipid Management and Counseling	0118	STS

* This measures group is reportable through registry-based reporting only.

TABLE 36—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 RHEUMATOID ARTHRITIS MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
108	Rheumatoid Arthritis (RA): Disease Modifying Anti-Rheumatic Drug (DMARD) Therapy	0054	NCQA
176	Rheumatoid Arthritis (RA): Tuberculosis Screening	AQA adopted	AMA–PCPI/NCQA
177	Rheumatoid Arthritis (RA): Periodic Assessment of Disease Activity	AQA adopted	AMA–PCPI/NCQA
178	Rheumatoid Arthritis (RA): Functional Status Assessment	AQA adopted	AMA–PCPI/NCQA
179	Rheumatoid Arthritis (RA): Assessment and Classification of Disease Prognosis	AQA adopted	AMA–PCPI/NCQA
180	Rheumatoid Arthritis (RA): Glucocorticoid Management	AQA adopted	AMA–PCPI/NCQA

TABLE 37—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 PERIOPERATIVE CARE MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF Measure No.	Measure developer
20	Perioperative Care: Timing of Antibiotic Prophylaxis—Ordering Physician	0270	AMA–PCPI/NCQA

TABLE 37—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 PERIOPERATIVE CARE MEASURES GROUP—Continued

Physician quality reporting system No.	Measure title	NQF Measure No.	Measure developer
21	Perioperative Care: Selection of Prophylactic Antibiotic—First OR Second Generation Cephalosporin.	0268	AMA–PCPI/NCQA
22	Perioperative Care: Discontinuation of Prophylactic Antibiotics (Non-Cardiac Procedures).	0271	AMA–PCPI/NCQA
23	Perioperative Care: Venous Thromboembolism (VTE) Prophylaxis (When Indicated in ALL Patients).	0239	AMA–PCPI/NCQA

TABLE 38—PROPOSED MEASURES INCLUDED IN THE 2012 PROPOSED BACK PAIN MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
148	Back Pain: Initial Visit	0322	NCQA
149	Back Pain: Physical Exam	0319	NCQA
150	Back Pain: Advice for Normal Activities	0315	NCQA
151	Back Pain: Advice Against Bed Rest	0313	NCQA

TABLE 39—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 CAD MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
6	Coronary Artery Disease (CAD): Oral Antiplatelet Therapy Prescribed for Patients with CAD.	0067	AMA–PCPI
196	Coronary Artery Disease (CAD): Symptom and Activity Assessment	0065	AMA–PCPI
197	Coronary Artery Disease (CAD): Lipid Control	0074	AMA–PCPI
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

*This measures group is reportable through registry-based reporting only.

TABLE 40—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 HEART FAILURE MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
5	Heart Failure: Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0081	AMA–PCPI
8	Heart Failure: Beta–Blocker Therapy for Left Ventricular Systolic Dysfunction (LVSD)	0083	AMA–PCPI
198	Heart Failure: Left Ventricular Function (LVF) Assessment	0079	AMA–PCPI
199	Heart Failure: Patient Education	0082	AMA–PCPI
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

*This measures group is reportable through registry-based reporting only.

TABLE 41—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 IVD MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
201	Ischemic Vascular Disease (IVD): Blood Pressure Management Control	0073	NCQA
202	Ischemic Vascular Disease (IVD): Complete Lipid Profile	0075	NCQA
203	Ischemic Vascular Disease (IVD): Low Density Lipoprotein (LDL–C) Control	0075	NCQA
204	Ischemic Vascular Disease (IVD): Use of Aspirin or Another Antithrombotic	0068	NCQA
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

TABLE 42—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 HEPATITIS C MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
84	Hepatitis C: Ribonucleic Acid (RNA) Testing Before Initiating Treatment	0395	AMA–PCPI
85	Hepatitis C: HCV Genotype Testing Prior to Treatment	0396	AMA–PCPI
86	Hepatitis C: Antiviral Treatment Prescribed	0397	AMA–PCPI
87	Hepatitis C: HCV Ribonucleic Acid (RNA) Testing at Week 12 of Treatment	0398	AMA–PCPI
89	Hepatitis C: Counseling Regarding Risk of Alcohol Consumption	0401	AMA–PCPI
90	Hepatitis C: Counseling Regarding Use of Contraception Prior to Antiviral Therapy	0394	AMA–PCPI
183	Hepatitis C: Hepatitis A Vaccination in Patients with HCV	0399	AMA–PCPI
184	Hepatitis C: Hepatitis B Vaccination in Patients with HCV	0400	AMA–PCPI

TABLE 43—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 HIV/AIDS MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
159	HIV/AIDS: CD4+ Cell Count or CD4+ Percentage	0404	AMA–PCPI/NCQA
160	HIV/AIDS: Pneumocystis Jiroveci Pneumonia (PCP) Prophylaxis	0405	AMA–PCPI/NCQA
161	HIV/AIDS: Adolescent and Adult Patients with HIV/AIDS Who Are Prescribed Potent Antiretroviral Therapy.	0406	AMA–PCPI/NCQA
162	HIV/AIDS: HIV RNA Control After Six Months of Potent Antiretroviral Therapy	0407	AMA–PCPI/NCQA
205	HIV/AIDS: Sexually Transmitted Disease Screening for Chlamydia and Gonorrhea	0409	AMA–PCPI/NCQA
206	HIV/AIDS: Screening for High Risk Sexual Behaviors	0413	AMA–PCPI/NCQA
207	HIV/AIDS: Screening for Injection Drug Use	0415	AMA–PCPI/NCQA
208	HIV/AIDS: Sexually Transmitted Disease Screening for Syphilis	0410	AMA–PCPI/NCQA

* This measures group is selected to be reportable through registry-based reporting only.

TABLE 44—PROPOSED MEASURES INCLUDED IN THEPROPOSED 2012 CAP MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
56	Community–Acquired Pneumonia (CAP): Vital Signs	0232	AMA–PCPI/NCQA
57	Community–Acquired Pneumonia (CAP): Assessment of Oxygen Saturation	0094	AMA–PCPI/NCQA
58	Community–Acquired Pneumonia (CAP): Assessment of Mental Status	0234	AMA–PCPI/NCQA
59	Community–Acquired Pneumonia (CAP): Empiric Antibiotic	0096	AMA–PCPI/NCQA

TABLE 45—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 ASTHMA MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
53	Asthma: Pharmacologic Therapy	0047	AMA–PCPI
64	Asthma: Asthma Assessment	0001	AMA–PCPI
231	Asthma: Tobacco Use: Screening—Ambulatory Setting	N/A	AMA–PCPI
232	Asthma: Tobacco Use: Intervention—Ambulatory Screening	N/A	AMA–PCPI

TABLE 46—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 COPD MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
110	Preventive Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old	0041	AMA–PCPI
111	Preventive Care and Screening: Pneumonia Vaccination for Patients 65 Years and Older.	0043	AMA–PCPI
51	Chronic Obstructive Pulmonary Disease (COPD): Spirometry Evaluation	0091	AMA–PCPI
52	Chronic Obstructive Pulmonary Disease (COPD): Bronchodilator Therapy	0102	AMA–PCPI
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

TABLE 47—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 IBD MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Inflammatory Bowel Disease (IBD): Assessment of Inflammatory Bowel Disease Activity and Severity.	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Preventive Care: Steroid Sparing Therapy	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Preventive Care: Steroid Related Iatrogenic Injury—Bone Loss Assessment.	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Preventive Care: Influenza Immunization	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Preventive Care: Pneumococcal Immunization	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Screening for Latent TB Before Initiating Anti–TNF Therapy.	N/A	AGA/AMA–PCPI
TBD	Inflammatory Bowel Disease (IBD): Hepatitis B Assessment Before Initiating Anti–TNF Therapy.	N/A	AGA/AMA–PCPI
226	Preventative Care and Screening: Tobacco Use: Screening and Cessation Intervention	0028	AMA–PCPI

* This measures group is reportable thought registry-based reporting only.

TABLE 48—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 SLEEP APNEA MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Assessment of Sleep Symptoms	N/A	AMA/PCPI/AASM
TBD	Severity Assessment at Initial Diagnosis	N/A	AMA/PCPI/AASM
TBD	Positive Airway Pressure Therapy Prescribed	N/A	AMA/PCPI/AASM
TBD	Assessment of Adherence to Positive Airway Pressure Therapy	N/A	AMA/PCPI/AASM

* This measures group is reportable thought registry-based reporting only.

TABLE 49—PROPOSED MEASURES IN THE PROPOSED 2012 EPILEPSY MEASURES GROUP

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Seizure Type(s) and Current Seizure Frequency(ies)	N/A	AAN/AMA–PCPI
TBD	Documentation of Etiology of Epilepsy or Epilepsy Syndrome	N/A	AAN/AMA–PCPI
TBD	Querying and Counseling about Anti-Epileptic Drug (AED) Side-Effects	N/A	AAN/AMA–PCPI
TBD	Counseling about Epilepsy Specific Safety Issues	N/A	AAN/AMA–PCPI
TBD	Counseling for Women of Childbearing Potential with Epilepsy	N/A	AAN/AMA–PCPI

TABLE 50—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 DEMENTIA MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Dementia: Staging of Dementia	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Cognitive Assessment	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Functional Status Assessment	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Neuropsychiatric Symptom Assessment	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Management of Neuropsychiatric Symptoms	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Screening for Depressive Symptoms	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Counseling Regarding Safety Concerns	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Counseling Regarding Risks of Driving	N/A	AAN/AGS/AMDA/APA/AMA–PCPI
TBD	Dementia: Caregiver Education and Support	N/A	AAN/AGS/AMDA/APA/AMA–PCPI

* This measures group is reportable thought registry-based reporting only.

TABLE 51—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 PARKINSON'S MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Annual Parkinson's Disease Diagnosis Review	N/A	AAN
TBD	Psychiatric Disorders or Disturbances Assessment	N/A	AAN
TBD	Cognitive Impairment or Dysfunction Assessment	N/A	AAN
TBD	Querying about Sleep Disturbances	N/A	AAN
TBD	Parkinson's Disease Rehabilitative Therapy Options	N/A	AAN
TBD	Parkinson's Disease Related Safety Issues Counseling	N/A	AAN
TBD	Parkinson's Disease Medical and Surgical Treatment Options Reviewed	N/A	AAN

* This measures group is reportable thought registry-based reporting only.

TABLE 52—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 ELEVATED BLOOD PRESSURE MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Aspirin or Other Anti-Platelet or Anti-Coagulant Therapy	N/A	ABIM
TBD	Complete Lipid Profile	N/A	ABIM
TBD	Urine Protein Test	N/A	ABIM
TBD	Annual Serum Creatinine Test	N/A	ABIM
TBD	Diabetes Documentation or Screen Test	N/A	ABIM
TBD	Counseling for Diet and Physical Activity	N/A	ABIM
TBD	Blood Pressure Control	N/A	ABIM
TBD	LDL Control	N/A	ABIM
TBD	Overall Hypertension Care Satisfaction	N/A	ABIM
TBD	Patient Self-care Support	N/A	ABIM

* This measures group is reportable thought registry-based reporting only.

TABLE 53—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 RADIOLOGY MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Reporting to a Radiation Dose Index Registry	N/A	
TBD	Cumulative Count of Potential High Dose Radiation Imaging Studies: CT Scans and Cardiac Nuclear Medicine Scans	N/A	ABMS/ABR/ACR/PCPI
TBD	Utilization of a Standardized Nomenclature for CT Imaging Description	N/A	ABR
TBD	Appropriateness: Follow-up CT Imaging for Incidental Pulmonary Nodules According to Recommended Guidelines.	N/A	ABR
TBD	Overuse: Abdomen, Pelvis or Combined Abdomen/Pelvis CT Studies	N/A	ABR
TBD	Equipment Evaluation for Pediatric CT Imaging Protocols	N/A	ABR
TBD	Utilization of Pediatric CT Imaging Protocols	N/A	ABR
TBD	Search for Prior Imaging Studies through a Secure, Authorized Media-Free Shared Archive.	N/A	ABR
TBD	Images Available for Patient Follow-up and Comparison Purposes	N/A	ABR
TBD	Exposure Time Reported for Procedures Using Fluoroscopy	N/A	PCPI/ACR/NCQA

* This measures group is reportable thought registry-based reporting only.

TABLE 54—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 CARDIOVASCULAR PREVENTION MEASURES GROUP

Physician quality reporting system	Measure title	NQF measure No.	Measure developer
204	Ischemic Vascular Disease (IVD): Use of Aspirin or Another Antithrombotic	0068	NCQA
236	Controlling High Blood Pressure	0018	NCQA
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus	0064	NCQA
226	Measure pair: a. Tobacco Use Assessment, b. Tobacco Cessation Intervention	0028	AMA–PCPI
TBD	Ischemic Vascular Disease (IVD): Complete Lipid Profile and LDL Control < 100	0075	NCQA
TBD	Proportion of adults 18 years and older who have had their BP measured within the preceding 2 years.	N/A	CMS

TABLE 55—PROPOSED MEASURES INCLUDED IN THE PROPOSED 2012 CATARACTS MEASURES GROUP *

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
TBD	Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery ...	N/A ...	AAO
TBD	Cataracts: Improvement in Patient's Visual Function within 90 Days Following Cataract Surgery ...	N/A ...	AAO
191	Cataracts: 20/40 or Better Visual Acuity within 90 Days Following Cataract Surgery	0565	AMA–PCPI/NCQA
192	Cataracts: Complications within 30 Days Following Cataract Surgery Requiring Additional Surgical Procedures.	0564	AMA–PCPI/NCQA

* This measures group is reportable thought registry-based reporting only.

As with measures group reporting in the 2008, 2009, 2010, and 2011 Physician Quality Reporting System, we propose that each eligible professional electing to report a group of measures for 2012 must report all measures in the group that are applicable to each patient or encounter to which the measures group applies at least up to the minimum number of patients required by the applicable reporting criteria. We proposed that the measures proposed for the 2012 Back Pain Measures Group would continue to be reportable only as part of a measures group and not as individual measures for the 2012 Physician Quality Reporting System. Measures selected for inclusion in all other 2012 Physician Quality Reporting System measures groups would be reportable either as individual measures or as part of a measures group.

We note that the specifications for measures groups do not necessarily contain all the specification elements of each individual measure making up the measures group. This is based on the need for a common set of denominator specifications for all the measures making up a measures group in order to define the applicability of the measures group. Therefore, the specifications and instructions for measures groups would be provided separately from the specifications and instructions for the individual 2012 Physician Quality Reporting System measures. We will post the detailed specifications and specific instructions for reporting measures groups on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/PQRS* by no later than December 31, 2011.

Additionally, the detailed measure specifications and instructions for submitting data on those 2012 measures groups that were also included as 2011 Physician Quality Reporting System measures groups may be updated or modified by the measure developer prior to 2012. Therefore, the 2012 Physician Quality Reporting System measure specifications for any given measures group could be different from specifications and submission instructions for the same measures group used for 2011. For example, the measure developer may change the codes contained in the measure's denominator. These measure specification changes do not materially impact the intended meaning of the measures or the strength of the measures. We invite public comment on our proposed retention of all 2011 Physician Quality Reporting System measures groups, as well as our newly proposed measures groups for the 2012 Physician Quality Reporting System.

(5) Proposed 2012 Physician Quality Reporting System Quality Measures for Group Practices Selected To Participate in the GPRO (GPRO)

For 2012, we propose that group practices selected to participate in the 2012 Physician Quality Reporting System GPRO would be required to report on 40 proposed measures listed in Table 55. Specifically, for the 2012 Physician Quality Reporting System, we propose to retain most of the measures available for reporting under the 2011 Physician Quality Reporting System GPRO because of our continued interest in the reporting of those measures as well as to maintain program consistency from year to year. However, for 2012, we propose to retire the following measures that were required under the 2010 and 2011 GPRO (that is, GPRO I for 2011):

- Diabetes Mellitus: Hemoglobin A1c Testing.
- Diabetes Mellitus: Lipid Profile.
- Hypertension (HTN): Blood Pressure Measurement.

Furthermore, we propose to add the following Physician Quality core measures that were not available for reporting via the GPRO for the 2011 Physician Quality Reporting System:

- Ischemic Vascular Disease (IVD): Use of Aspirin or another Antithrombotic.
- Measure pair: a. Tobacco Use Assessment, b. Tobacco Cessation Intervention.
- Ischemic Vascular Disease (IVD): Complete Lipid Profile and LDL Control < 100.
- Proportion of adults 18 years and older who have had their blood pressure measured within the preceding 2 years.

In addition to adding the Physician Quality Reporting System core measures that were not available for reporting under the GPRO for the 2011 Physician Quality Reporting System, we propose to add the following measures for reporting under the 2012 Physician Quality Reporting System GPRO:

- Chronic Obstructive Pulmonary Disease (COPD): Bronchodilator Therapy.
- Adult Weight Screening and Follow-up.
- Ischemic Vascular Disease (IVD): Blood Pressure Management Control.
- Chronic Obstructive Pulmonary Disease (COPD): Spirometry Evaluation.
- 30 Day Post Discharge Physician Visit.
- Medication Reconciliation: Reconciliation After Discharge from an Inpatient Facility.
- Diabetes: Aspirin Use.
- Falls: Screening for Fall Risk.
- Osteoporosis: Management Following Fracture of Hip, Spine or Distal Radius for Men and Women Aged 50 Years and Older.
- Diabetes Mellitus: Tobacco Non Use.
- Coronary Artery Disease (CAD): LDL-level < 100 mg/dl.
- Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus (less than 8 percent).
- Chronic Obstructive Pulmonary Disease (COPD): Smoking Cessation Counseling Received.
- Monthly International Normalized Ratio (INR) for Beneficiaries on Warfarin.

We propose these new measures because they are NQF-endorsed measures that are consistent with other CMS quality reporting initiatives. We believe it is in the stakeholders' interest to align measures in different initiatives. As stated previously in section (e)(6) of this proposed rule, we propose that

group practices selected to participate in the Physician Quality Reporting System GPRO would be required to report on all measures listed in Table 56.

TABLE 56—PROPOSED MEASURES FOR PHYSICIAN GROUPS PARTICIPATING IN THE 2012 PHYSICIAN QUALITY REPORTING SYSTEM GROUP PRACTICE REPORTING OPTION (GPRO)

Physician quality reporting system No.	Measure title	NQF measure No.	Measure developer
1	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus (> 9%)	0059	NCQA
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus	0064	NCQA
3	Diabetes Mellitus: High Blood Pressure Control in Diabetes Mellitus	0061	NCQA
5	Heart Failure: Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0081	AMA–PCPI
6	Coronary Artery Disease (CAD): Oral Antiplatelet Therapy Prescribed for Patients with CAD.	0067	AMA–PCPI
7	Coronary Artery Disease (CAD): Beta-Blocker Therapy for CAD Patients with Prior Myocardial Infarction (MI).	0070	AMA–PCPI
8	Heart Failure: Beta-Blocker Therapy for Left Ventricular Systolic Dysfunction (LVSD)	0083	AMA–PCPI
110	Preventive Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old	0041	AMA–PCPI
111	Preventive Care and Screening: Pneumonia Vaccination for Patients 65 Years and Older.	0043	NCQA
112	Preventive Care and Screening: Screening Mammography	0031	NCQA
113	Preventive Care and Screening: Colorectal Cancer Screening	0034	NCQA
117	Diabetes Mellitus: Dilated Eye Exam in Diabetic Patient	0055	NCQA
118	Coronary Artery Disease (CAD): Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Patients with CAD and Diabetes and/or Left Ventricular Systolic Dysfunction (LVSD).	0066	AMA–PCPI
119	Diabetes Mellitus: Urine Screening for Microalbumin or Medical Attention for Nephropathy in Diabetic Patients.	0062	NCQA
163	Diabetes Mellitus: Foot Exam	0056	NCQA
228	Heart Failure: Left Ventricular Function (LVF) Testing	.....	CMS
198	Heart Failure: Left Ventricular Function (LVF) Assessment	0079	AMA–PCPI
227	Heart Failure: Weight Measurement	0085	AMA–PCPI
199	Heart Failure: Patient Education	0082	AMA–PCPI
236	Hypertension (HTN): Blood Pressure Control	0018	NCQA
235	Hypertension (HTN): Plan of Care	0017	AMA–PCPI
201	Ischemic Vascular Disease (IVD): Blood Pressure Management Control	0073	NCQA
51	Chronic Obstructive Pulmonary Disease (COPD): Spirometry Evaluation	0091	AMA–PCPI
226	Measure pair: a. Tobacco Use Assessment, b. Tobacco Cessation Intervention	0028	AMA–PCPI
52	Chronic Obstructive Pulmonary Disease (COPD): Bronchodilator Therapy	0102	AMA–PCPI
204	Ischemic Vascular Disease (IVD): Use of Aspirin or another Antithrombotic	0068	NCQA
TBD	Ischemic Vascular Disease (IVD): Complete Lipid Profile and LDL Control < 100	0075	NCQA
TBD	Proportion of adults 18 years and older who have had their BP measured within the preceding 2 years.	N/A	CMS
TBD	30-Day Post Discharge Physician Visit	N/A	CFMC
46	Medication Reconciliation: Reconciliation After Discharge from an Inpatient Facility	0097	AMA–PCPI/NCQA
197	Coronary Artery Disease (CAD): Lipid Control	0074	AMA–PCPI
200	Heart Failure: Warfarin Therapy for Patients with Atrial Fibrillation	0084	AMA–PCPI
TBD	Diabetes: Aspirin Use	0076	MN Community Measurement
TBD	Falls: Screening for Fall Risk	0101	NCQA
40	Osteoporosis: Management Following Fracture of Hip, Spine or Distal Radius for Men and Women Aged 50 Years and Older.	0045	AMA–PCPI/NCQA
128	Adult Weigh Screening and Follow-up	421	CMS/QIP
TBD	Diabetes Mellitus: Tobacco Non-Use	0729	MN Community Management
TBD	Coronary Artery Disease (CAD): LDL-level < 100 mg/dl	N/A	CMS
TBD	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus (< 8%)	575	NCQA
TBD	Chronic Obstructive Pulmonary Disease (COPD): Smoking Cessation Counseling Received.	N/A	CMS
TBD	Monthly INR for Beneficiaries on Warfarin	555	CMS

We intend to provide a separate measures specifications document and other supporting documents for group practices participating in the 2012 Physician Quality Reporting System GPRO. We anticipate that the group practice measures specifications document will be available by November 15, 2011 or shortly thereafter on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/PQRS*. We invite public comment on the proposed 2012 Physician Quality Reporting System measures for group practices selected to participate in the 2012 Physician Quality Reporting System GPRO.

g. Maintenance of Certification Program Incentive

Section 3002(c) of the Affordable Care Act amends section 1848(k)(4) of the Act, as amended by section 3002(c) of

the Affordable Care Act, requires the Secretary to address a mechanism whereby an eligible professional may provide data on quality measures through a maintenance of certification program (Maintenance of Certification Program) operated by a specialty body of the American Board of Medical Specialties (ABMS). In addition, section 1848(m)(7) of the Act (''Additional Incentive Payment''), as added by section 10327(a) of the Affordable Care Act, provides for an additional 0.5 percent incentive payment for years 2011 through 2014 if certain requirements are met. In accordance with section 1848(m)(7)(B) of the Act governing the ''Additional Incentive Payment,'' in order to qualify for the additional incentive payment, an eligible professional must—

• Satisfactorily submit data on quality measures under the Physician Quality Reporting System for a year and have such data submitted—

++ On their behalf through a Maintenance of Certification Program that meets the criteria for a registry under the Physician Quality Reporting System; or

++ In an alternative form and manner determined appropriate by the Secretary; and

++ More frequently than is required to qualify for or maintain board certification status:

++ Participate in such a Maintenance of Certification Program for a year; and

++ Successfully complete a qualified Maintenance of Certification Program practice assessment for such year.

Section 1848(m)(7)(C)(i) of the Act defines ''Maintenance of Certification Program'' as a continuous assessment program, such as a qualified ABMS Maintenance of Certification Program, or an equivalent program (as determined by the Secretary), that advances quality and the lifelong learning and self-assessment of board certified specialty physicians by focusing on the competencies of patient care, medical knowledge, practice-based learning, interpersonal and communications skills and professionalism. Such a program shall require a physician to do the following:

• Maintain a valid, unrestricted medical license in the United States.

• Participate in educational and self-assessment programs that require an assessment of what was learned.

• Demonstrate, through a formalized, secure examination, that the physician has the fundamental diagnostic skills, medical knowledge, and clinical judgment to provide quality care in their respective specialty.

• Successful completion of a qualified Maintenance of Certification Program practice assessment.

As defined in section 1848(m)(7)(C)(ii) of the Act, a ''qualified Maintenance of Certification Program practice assessment'' means an assessment of a physician's practice that—

• Includes an initial assessment of an eligible professional's practice that is designed to demonstrate the physician's use of evidence-based medicine;

• Includes a survey of patient experience with care; and

• Requires a physician to implement a quality improvement intervention to address a practice weakness identified in the initial assessment and then to remeasure to assess performance after such intervention.

To qualify for the additional incentive payment, section 1848(m)(7)(B)(iii) of the Act also requires the Maintenance of Certification Program to submit to CMS, on behalf of the eligible professional, information:

• In a form and manner specified by the Secretary, that the eligible professional more frequently than is required to qualify for or maintain board certification status, participates in the Maintenance of Certification Program for a year and successfully completes a qualified Maintenance of Certification Program practice assessment for such year;

• Upon request by the Secretary, information on the survey of patient experience with care; and

• As the Secretary may require, on the methods, measures, and data used under the Maintenance of Certification Program and the qualified Maintenance of Certification Program practice assessment.

In order to qualify for the additional 0.5 percent incentive payment in 2011, eligible professionals were required to participate more frequently in each of the following four parts of the Maintenance of Certification Program:

• Maintain a valid unrestricted license in the United States. For 2011, physicians simply needed to maintain a valid unrestricted license in the United States to meet the requirement for ''more frequent'' participation with respect to this part (75 FR 73541 through 73546).

• Participate in educational and self-assessment programs that require an assessment of what was learned.

• Demonstrate, through a formalized secure examination, that the physician has the fundamental diagnostic skills, medical knowledge, and clinical judgment to provide quality care in their respective specialty.

• Successfully complete a qualified maintenance of certification program practice assessment.

We have received requests from the American Board of Medical Specialties, as well as various specialty organizations, to revise the criteria for satisfying the Maintenance of Certification Program additional incentive, because these entities believe that more frequent participation in all four parts of the Maintenance of Certification Program is too narrow. We have further considered the language under section 1848(m)(7)(B)(ii)(I) of the Act and we believe it can be interpreted more broadly. In particular, we note that the requirement that a professional ''more frequently than is required to qualify for or maintain board certification status participates in such a Maintenance of Certification Program'' could refer to the program as a whole, such that any element performed more frequently than is required satisfies the general requirement. The nature of the various components of a maintenance of certification program also suggest that it is not necessary that each of the four elements of the program be performed more frequently. We previously stated we believe that the ''more frequently'' requirement does not apply to the first part, which states that a physician maintain a valid unrestricted license, as there is no way a physician may maintain a valid unrestricted license ''more frequently.'' As such, we believe that the more frequently requirement could be satisfied based on any of the other elements of the program (that is, educational and self-assessment program; secure examination; or practice assessment). Specifically, we believe that if a professional more frequently than is required satisfies one or more of those parts of a program, the more frequently requirement would be met. Accordingly, we propose that in order to earn an additional 0.5 percent incentive for 2012 through 2014, an eligible professional must participate more frequently than is required in at least one of the following four parts of the Maintenance of Certification Program, as well as ''more frequent'' participation in the practice assessment component. With respect to how to assess whether a professional completes one of the elements of a program ''more frequently,'' we believe that this would be tied to the specific requirements of Board certification for the professional. Given that different specialties have different certification requirements (physician examination requirements to maintain Board certification varies widely depending on specialty), we do

not believe it is appropriate to impose a uniform requirement for all professionals and therefore, we believe that the board could determine for a particular program element the more frequent requirement for the professional. However, we believe that a minimum threshold would need to be met such that the professional would have to do something more frequently or more than what is ordinarily required for a particular part of the program, as well as ''more frequent'' participation in the practice assessment component.

Accordingly, we propose for 2012, 2013, and 2014 the following for each year:

- An eligible professional wishing to be eligible for the additional Physician Quality Reporting System incentive payment of 0.5 percent would be required to meet the proposed requirements for satisfactory Physician Quality Reporting System reporting, for the applicable program year (that is, to qualify for the additional 0.5 percent incentive payment for 2012, meet the 2012 requirements for satisfactory reporting), based on the 12-month reporting period (January 1 through December 31 of the respective program year).
- For purposes of satisfactory reporting under the Physician Quality Reporting System, we propose that the eligible professional may participate as an individual eligible professional using either individual Physician Quality Reporting System measures or measures groups and submitting the Physician Quality Reporting System data via claims, a registry, or an EHR or participate under the GPRO option. As an alternative to this reporting option, we propose that eligible professionals may satisfactorily report under the Physician Quality Reporting System based on submission of Physician Quality Reporting System data by a Maintenance of Certification Program, provided that the Maintenance of Certification Program has qualified as a Physician Quality Reporting System registry for 2012. As indicated previously, an eligible professional would not necessarily have to qualify for the Physician Quality Reporting System through a Maintenance of Certification Program serving as a registry. Rather, we propose that an eligible professional may qualify for the additional incentive, without regard to the method by which the eligible professional has met the basic requirement of satisfactory reporting under the Physician Quality Reporting System.
- In addition to meeting the proposed requirements for satisfactory reporting for the Physician Quality Reporting System for a program year, the eligible professional must have data with respect to the eligible professional's participation in a Maintenance of Certification Program submitted on his or her behalf by a qualified medical specialty board or other entity sponsoring a Maintenance of Certification Program. For each eligible professional that wishes to qualify for the Maintenance of Certification Program Incentive, the qualified medical specialty board or other entity sponsoring a Maintenance of Certification Program must submit data to CMS with respect to the following:
- An eligible professional must, more frequently than is required to qualify for or maintain board certification, participate in a Maintenance of Certification Program for a year and successfully complete a qualified Maintenance of Certification Program practice assessment for such year. With regard to the ''more frequently'' requirement as it applies to the elements of a Maintenance of Certification Program itself (other than completing a qualified Maintenance of Certification Program practice assessment), we propose to require that the Maintenance of Certification Program certify that the eligible professional has ''more frequently'' than is required to qualify for or maintain board certification ''participated in a Maintenance of Certification Program for a year.'' We do not propose to specify with respect to participation how a physician must meet the more frequently requirement, but rather that the Maintenance of Certification Program determine what a physician must do to more frequently participate in a Maintenance of Certification Program and so certify that the eligible professional has met this requirement. While we do not believe that the ''more frequently'' requirement is applicable to the licensure requirement, given that one cannot be licensed ''more frequently'' than is required, we propose to leave it up to the Maintenance of Certification Program to determine which element(s) of a Maintenance of Certification Program must be completed more frequently. We believe that making this change will reduce burden on physicians and will increase participation while being consistent with the requirement to ''more frequently'' participate in a Maintenance of Certification Program.
- With respect to the Maintenance of Certification Program practice assessment, which is specifically delineated in section 1848(m)(7)(B)(ii) of the Act as being required more often than is necessary to qualify for or maintain board certification, we believe we need to be more specific regarding our interpretation of the phrase ''more frequently.'' Additionally, we are aware that some specialty boards have varying Maintenance of Certification Program requirements for physicians to maintain board certification, based on the date of original certification. Some, we believe, may not be required to participate in a Maintenance of Certification Program at all in order to maintain board certification. Accordingly, we recognize that ''more often'' may vary among physicians certified by the same specialty board. We interpret the statutory provisions as requiring participation in and successful completion of at least one Maintenance of Certification Program practice assessment per year. Therefore, we propose, as a basic requirement, participation in and successful completion in at least one Maintenance of Certification Program practice assessment for each year the physician participates in the Maintenance of Certification Program Incentive, regardless of whether or how often the physician is required to participate in a Maintenance of Certification Program to maintain board certification.

We are also aware that ABMS boards are at various stages in implementing the practice assessment modules, and some may not have such assessment modules in place. However, inasmuch as we interpret the statute to require a Maintenance of Certification Program practice assessment at least once per program year as part of the Maintenance of Certification Program, eligible professionals who do not have available, through their boards or otherwise, a Maintenance of Certification Program practice assessment are not eligible for the 0.5 percent incentive.

We believe that the experience of care survey provides particularly valuable information and proposed that a qualified Maintenance of Certification Program practice assessment must include a survey of patient experience with care. The Secretary may request information on the survey of patient experience with care, under section 1848(m)(7)(B)(iii) of the Act. In view of the importance of this information, and the lack of readily available alternative sources, we propose to require that Maintenance of Certification Programs submit information about the patient experience with care survey(s) used by physicians to fulfill the Maintenance of Certification Program practice assessment. We are not, at this time, requesting the results of the survey for the eligible professionals for whom

information is being submitted by the Maintenance of Certification Program. We may, however, request such information for appropriate validation purposes and may propose to request such data for future years of the Maintenance of Certification Program Incentive.

Some Maintenance of Certification Programs underwent a self-nomination process in 2011 to enable their members to be eligible for this Physician Quality Reporting System Maintenance of Certification Program Incentive for 2011 Physician Quality Reporting System. We propose that a Maintenance of Certification Program that was approved after undergoing the self-nomination process in 2011 must submit a self nomination statement for each year the Maintenance of Certification Program intends to participate in the Physician Quality Reporting System Maintenance of Certification Program. In the self-nomination statement, we propose that the previously approved program must provide us with updates to its program in its self-nomination statement. We propose that this self-nomination statement be submitted to CMS via a web-based tool.

For Maintenance of Certification Programs new for 2012, we propose that Maintenance of Certification Programs wishing to enable their diplomates to be eligible for an additional Physician Quality Reporting System incentive payment for the 2012 Physician Quality Reporting System will need to go through a self-nomination process by January 31, 2012. We proposed the board would need to include all of the following information in their self-nomination statement to us:

- Provide detailed information regarding the Maintenance of Certification Program with reference to the statutory requirements for such program.
- Indicate the organization sponsoring the Maintenance of Certification Program, and whether the Maintenance of Certification Program is sponsored by an ABMS board. If not an ABMS board, indicate whether and how the program is substantially equivalent to the ABMS Maintenance of Certification Program process.
- Indicate that the program is in existence as of January 1, 2012.
- Indicate that the program has at least 1 active participant.
- The frequency of a cycle of Maintenance of Certification Program for the specific Maintenance of Certification Program of the sponsoring organization; including what constitutes ''more frequently'' for the Maintenance of Certification Program itself and for the practice assessment for the specific Maintenance of Certification Program of the sponsoring organization.
- Confirmation from the board that the practice assessment will occur and be completed in the year the physician is participating in the Maintenance of Certification Program Incentive.
- What was, is, or will be the first year of availability of the Maintenance of Certification Program practice assessment for completion by an eligible professional.
- What data is collected under the patient experience of care survey and how this information would be provided to CMS.
- How the Maintenance of Certification Program monitors that an eligible professional has implemented a quality improvement process for their practice.
- Describe the methods, and data used under the Maintenance of Certification Program, and provide a list of all measures used in the Maintenance of Certification Program for 2011 and to be used for 2012, including the title and descriptions of each measure, the owner of the measure, whether the measure is NQF endorsed, and a link to a Web site containing the detailed specifications of the measures, or an electronic file containing the detailed specifications of the measures.

We propose that sponsoring organizations who desire to participate as a Maintenance of Certification Program would need to be able to provide CMS the following information in a CMS-specified file format by no later than the end of the first quarter of 2012:

- The name, NPI and applicable TIN(s) of the eligible professional who would like to participate in this process.
- Attestation from the board that the information provided to CMS is accurate and complete.
- The board has signed documentation from the eligible professional that the eligible professional wishes to have the information released to us.
- Information from the patient experience of care survey.
- Information certifying that the eligible professional has participated in a Maintenance of Certification Program for a year, more frequently than is required to qualify for or maintain board certification status, including the year that the physician met the board certification requirements for the Maintenance of Certification Program, and the year the eligible professional participated in a Maintenance of Certification Program ''more frequently'' than is required to maintain or qualify for board certification.
- Information certifying that the eligible professional has completed the Maintenance of Certification Program practice assessment at least one time each year the eligible professional participates in the Maintenance of Certification Program Incentive.

We propose that specialty boards that also desire to send Physician Quality Reporting System information to us on behalf of eligible professionals should be able to meet the proposed requirements for registry data submission and should follow the directions for self-nomination to become a qualified registry. Boards may also participate as registries for Physician Quality Reporting System data provided that they meet the registry requirements. As an alternative to requiring boards to either operate a qualified Physician Quality Reporting System registry or to self-nominate to submit Maintenance of Certification Program data to us on behalf of their members, we propose to continue to allow the various boards to submit the Maintenance of Certification Program data to the ABMS and having ABMS submit the information on behalf of the various boards and their member eligible professionals to CMS.

To the extent an eligible professional participates in multiple Maintenance of Certification Programs and meets the requirements under section 1848(m)(7) of the Act (Additional Incentive Payment) under multiple programs, we note that the eligible professional can qualify for only one additional 0.5 percent incentive per year. We invite public comment on our proposals for the Physician Quality Maintenance of Certification Program Incentive for 2012 through 2014.

h. Feedback Reports

Section 1848(m)(5)(H) of the Act requires the Secretary to provide timely feedback to eligible professionals on the performance of the eligible professional with respect to satisfactorily submitting data on quality measures. Since the inception of the program in 2007, the Physician Quality Reporting System has provided eligible professionals who have reported Physician Quality Reporting System data on quality measures feedback reports at the TIN/NPI level detailing participation in the Physician Quality Reporting System, including reporting rate and performance rate information. For 2008, we improved the format and content of feedback reports based on stakeholder input. We also developed an alternate report distribution method whereby each eligible professional can directly

request and receive a feedback report. In accordance with Section 1848(m)(5)(H) of the Act, we will continue to provide feedback reports to individuals and group practices that attempt to report on at least one Physician Quality Reporting System quality measure. We propose to provide feedback reports for 2012 and beyond on or about the time of issuance of the incentive payments, consistent with our current practice.

We believe it will be beneficial for eligible professionals to also receive interim feedback reports. In the 2011 MPFS Final Rule with comment period, we stated that we intended to provide interim feedback reports to eligible professionals in 2012 (75 FR 73549). Therefore, we propose to provide interim feedback reports for eligible professionals reporting individual measures and measures groups through the claims-based reporting mechanism for 2012 and beyond. These reports would be a simplified version of annual feedback reports that we currently provide for such eligible professionals and would be based on claims for dates of service occurring on or after January 1 and processed by March 31 of the respective program year (that is, January 1, 2012 and processed by March 31, 2012 for the 2012 program year). We expect that we would be able to make these interim feedback reports available to eligible professionals in the summer of the respective program year (that is summer 2012 for the 2012 program year). We believe interim feedback reports would be particularly valuable to eligible professionals reporting measures groups, because it would let an eligible professional know how many more cases he or she needs to report to satisfy the criteria for satisfactory reporting for claims-based reporting of measures groups. We invite public comment on our proposal to continue to provide annual feedback reports as well as our intention to provide interim feedback reports.

i. Informal Review

Under 42 CFR 414.90(i), eligible professionals or group practices may seek an informal review of the determination that the eligible professional or group practice did not satisfactorily submit data on quality measures under the Physician Quality Reporting System.

To maintain program consistency until we have further experience with the informal review process that we implemented for the 2011 Physician Quality Reporting System, we propose to largely retain the same informal review process that was finalized in the 2011 MPFS final rule with comment period (75 FR 73549 through 73551) for 2012 and beyond. Specifically, we propose to base the informal process on our current inquiry process whereby an eligible professional can contact the Quality Net Help Desk (via phone or e-mail) for general Physician Quality Reporting System and eRx Incentive Program information, information on Physician Quality Reporting System feedback report availability and access, and/or information on Physician Quality Reporting System Portal password issues. For purposes of the informal process required under section 1848(m)(5)(E) of the Act, we propose the following inquiry process:

- An eligible professional electing to utilize the informal process must request an informal review within 90 days of the release of his or her feedback report, irrespective of when an eligible professional actually accesses his/her feedback report.
- An eligible professional may request an informal review through use of a web-based tool, if technically feasible. We believe use of the web-based tool will provide a more efficient way to record informal review requests, as web-based tool will guide the eligible professional through the creation of an informal review requests. For example, the web-based tool will prompt an eligible professional of any necessary information s/he must provide. If not technically feasible, we propose that an eligible professional may request the informal review by notifying the Quality Net Help Desk via e-mail at *qnetsupport@sdps.org.* The e-mail requesting the initiation of the informal review process should summarize the concern(s) of the eligible professional and the reason(s) for requesting an informal review.
- We further propose that CMS will provide the eligible professional with a response to his or her request for an informal review within 90 days of receiving the original request. In 2011, we proposed to provide the eligible professional with a response to his or her request for an informal review within 60 days of receiving the original request. However, we anticipate that the volume of informal review requests will grow as participation in the Physician Quality Reporting System grows, particularly as we move towards the implementation of the 2015 payment adjustment. Furthermore, we believe that the time it takes for CMS to calculate data on Physician Quality Reporting System quality measures will be greater than in 2011, since we are proposing additional individual measures and measures groups. For these reasons, we are proposing to amend 42 CFR 414.90(i)(2) to indicate that CMS will provide a written response within 90 days of the receipt of the original request for an informal review.
- As this process is informal and the statute does not require a formal appeals process, we will not include a hearing or evidence submission process, although the eligible professional may submit information to assist in the review.
- Based on our informal review, we will provide a written response. Where we find that the eligible professional did satisfactorily report, we propose to provide the applicable incentive payment.
- Given that this is an informal review process and given the limitations on review under section 1848(m)(5)(E) of the Act, decisions based on the informal review will be final, and there will be no further review or appeal.

We invite public comment on our proposal for the Physician Quality Reporting System informal review process.

j. Future Payment Adjustments for the Physician Quality Reporting System

Beginning in 2015, a payment adjustment will apply under the Physician Quality Reporting System. Specifically, under section 1848(a)(8) of the Act, as added by section 3002(b) of the Affordable Care Act, with respect to covered professional services furnished by an eligible professional during 2015 or any subsequent year, if the eligible professional does not satisfactorily submit data on quality measures for covered professional services for the quality reporting period for the year, the fee schedule amount for services furnished by such professionals during the year shall be equal to the applicable percent of the fee schedule amount that would otherwise apply to such services. The applicable percent is—

- 98.5 percent for 2015; and
- 98.0 percent for 2016 and each subsequent year.

Section 1848(8)(A)(i) of the Act provides that, for purposes of the payment adjustment, the ''quality reporting period'' with the respect to a year, is a period specified by the Secretary. In order to maintain consistency and program continuity, similar to the 12-month reporting period we are proposing for 2012, we are also proposing a 12-month reporting period for the 2015 payment adjustment. Specifically, we propose that the reporting period for purposes of the 2015 payment adjustment to be the 2013 calendar year, that is, January 1, 2013 through December 31, 2013. We believe

that this proposed reporting period will allow a full calendar year for eligible professionals to meet the criteria for satisfactory reporting for purposes of the 2015 payment adjustment (that will be proposed in future rulemaking) while still providing us with enough time to collect and analyze the data submitted by eligible professionals for the 2015 payment adjustment without having to make retroactive payment adjustments in 2015. If we determine that an eligible professional or group practice has not satisfactorily reported data on quality measures for the January 1, 2013 through December 31, 2013 reporting period for purposes of the 2015 payment adjustment, then the eligible professional or group practice would be subject to the 1.5 percent adjustment in their fee schedule amount in 2015. We invite public comment on the proposed reporting period for purposes of the 2015 Physician Quality Reporting System payment adjustment.

We intend to address the remaining requirements for satisfactory reporting for purposes of the 2015 payment adjustment in future rulemaking. We welcome suggestions for what the criteria for satisfactory reporting for purposes of the 2015 payment adjustment we might consider in the future with regard to the proposed reporting period described previously.

2. Incentives and Payment Adjustments for Electronic Prescribing (eRx)—The Electronic Prescribing Incentive Program

a. Program Background and Statutory Authority

Electronic prescribing is the transmission using electronic media, of prescription or prescription-related information between the prescriber, dispenser, pharmacy benefit manager (PBM), or health plan, either directly or through an intermediary, including an electronic prescribing network. To encourage the use of electronic prescribing among eligible professionals, section 132 of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) amended section 1848(m) of the Act to establish the eRx Incentive Program. The eRx Incentive Program provides a combination of incentive payments and payment adjustments through 2014 to eligible professionals who are successful electronic prescribers. No eRx incentive payments or payment adjustments are authorized beyond 2014.

From 2009 through 2013, the Secretary is authorized to provide eligible professionals who are successful electronic prescribers an incentive payment equal to a percentage of the eligible professional's total estimated Medicare Part B PFS allowed charges (based on claims submitted not later than 2 months after the end of the reporting period) for all covered professional services furnished by the eligible professional during the respective reporting period. However, section 1848(m)(2)(D) of the Act, as added by section 4101(f)(2)(B) of Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (ARRA), which also authorized the Medicare EHR Incentive Program, specifies that the eRx incentive does not apply to an eligible professional, if, for the EHR reporting period, the eligible professional earns an incentive payment under the Medicare EHR Incentive Program beginning in 2011.

The applicable electronic prescribing percent for incentive payments under the eRx Incentive Program are as follows:

- 2.0 percent for 2009.
- 2.0 percent for 2010.
- 1.0 percent for 2011.
- 1.0 percent for 2012.
- 0.5 percent for 2013.

In addition, for years 2012 through 2014, under section 1848(a)(5)(A) of the Act, a PFS payment adjustment applies to eligible professionals who are not successful electronic prescribers at an increasing rate through 2014. Specifically, if the eligible professional is not a successful electronic prescriber for the respective reporting period for the year, the PFS amount for covered professional services during the year shall be a percentage less than the PFS amount that would otherwise apply. The applicable electronic prescribing percent for payment adjustments under the eRx Incentive Program are as follows:

- 1.0 percent in 2012.
- 1.5 percent in 2013.
- 2.0 percent in 2014.

We believe the purpose of the eRx Incentive Program for 2012 and beyond is to continue to encourage significant expansion of the use of electronic prescribing by authorizing a combination of financial incentives and payment adjustments. We are proposing to modify the incentive and payment adjustment language in 42 CFR 414.92 to provide language more consistent with section 1848(k) of the Act.

We believe that the criteria used to determine who is a successful electronic prescriber for purposes of the eRx incentive are not required to be identical to the criteria used to determine the applicability of the eRx payment adjustment. In general, we believe that an incentive should be broadly available to encourage the widest possible adoption of electronic prescribing, even for low volume prescribers. On the other hand, we believe that a payment adjustment should be applied primarily to assure that those who have a large volume of prescribing do so electronically, without penalizing those for whom the adoption and use of an electronic prescribing system may be impractical given the low volume of prescribing. We also believe that eligible professionals who have met the requirements for receiving an incentive payment under the eRx Incentive Program for a particular year have sufficiently demonstrated their adoption and use of electronic prescribing technology and thus should not be subject to the payment adjustment in a future year.

Individual eligible professionals do not have to participate in the Physician Quality Reporting System in order to participate in the eRx Incentive Program (and vice versa). The provisions of the eRx Incentive Program are codified at 42 CFR 414.92.

In prior years, we have proposed and finalized the details of the eRx Incentive Program for each program year through an annual rulemaking process. Through this annual rulemaking process, we have previously established the criteria for avoiding the 2012 eRx payment adjustment in the 2011 PFS Final Rule with comment period (75 FR 73562 through 73565) as well as issued a proposed rule entitled ''Proposed Changes to the Electronic Prescribing (eRx) Incentive Program'' (76 FR 31547), in which we proposed additional changes to the 2012 payment adjustment, as well as the electronic prescribing quality measure for certain reporting periods in 2011. We also established requirements for the 2013 eRx payment adjustment in the 2011 PFS Final Rule with comment period (75 FR 7356).

In this rule, we are setting forth our comprehensive proposals for the 2012 and 2013 incentive payments, additional requirements for the 2013 payment adjustment, and 2014 payment adjustment. We believe that proposing criteria for the eRx Incentive Program for 2012 and beyond will provide eligible professionals with more time to familiarize themselves with the details of the eRx Incentive Program. We hope this will lead to increased, successful participation in the eRx Incentive Program. Details regarding our proposals for the eRx Incentive Program for 2012 and 2013 incentive payments, additional requirements for the 2013 payment adjustment, and the 2014

payment adjustment, including our rationale for such proposals, are described in the following section.

b. Eligibility

For the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments, we propose the following two ways eligible professionals may participate in the eRx Incentive Program: (1) As an individual eligible professional; or (2) as part of a group practice reporting option (GPRO) for the eRx Incentive Program (eRx GPRO). Eligible professionals eligible to participate in the eRx Incentive Program are defined at 42 CFR 414.92(b). For more information on which professionals are eligible to participate in the eRx Incentive Program, we refer readers to the Eligible Professionals page of the eRx Incentive Program section of the CMS Web site at: *http://www.cms.gov/ERxIncentive/05_Eligible%20Professionals.asp#TopOfPage.*

(1) Individual Eligible Professionals

(A) Definition of Eligible Professional

As in the 2011 eRx Incentive Program, we propose that, for individual eligible professionals participating in the eRx Incentive Program for purposes of the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments, the determination of whether an eligible professional is a successful electronic prescriber will be made at the individual professional level, based on the National Provider Identifier (NPI) number. Inasmuch as some individuals (identified by NPIs) may be associated with more than one practice or Tax Identification Number (TIN), for the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments, we propose that the determination of whether an eligible professional is a successful electronic prescriber will continue to be made for each unique TIN/NPI combination. Then, as in previous years, incentive payments would be made to the applicable holder of the TIN. We propose continuing to use the TIN/NPI combination as the unit of analysis to maintain program continuity, as individual eligible professionals are already familiar with this level of analysis and payment. We invite public comment on our proposal to continue analyzing data using the TIN/NPI combination while providing payment to the applicable holder of the TIN.

As in prior program years, we propose that individual eligible professionals who wish to participate in the eRx Incentive Program for purposes of the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments may simply start participating. Individual eligible professionals are not required to register or notify CMS they intend to participate; rather, they may simply begin to report the eRx measure. We invite public comment on the proposed process for individual eligible professionals to participate in the eRx Incentive Program.

(2) Group Practices

As required under section 1848(m)(3)(C) of the Act, we established a process under which eligible professionals in a group practice (as defined by the Secretary) would be treated as meeting the requirements for submitting data on electronic prescribing quality measures for covered professional services for a reporting period (or, for purposes of the payment adjustment under section 1848(a)(5) of the Act, for a reporting period for a year) if, in lieu of reporting the electronic prescribing measure, the group practice reports measures determined appropriate by the Secretary, such as measures that target high-cost chronic conditions and preventive care, in a form and manner, and at a time specified by the Secretary. Specifically, we first established the eRx GPRO in 2010, which was further modified in the 2011 PFS Final Rule (75 FR 73502). The eRx GPRO was further modified in 2011. In addition to determining whether an eligible professional is a successful electronic prescriber for incentive payment and payment adjustment purposes based on separately analyzing whether the individual eligible professionals are successful electronic prescribers, we propose to also make the determination that the group practice, as a whole, is a successful electronic prescriber in accordance with section 1848(m)(3)(C) of the Act for those group practices that wish to participate in the eRx GPRO.

(A) Proposed Definition of ''Group Practice''

Section 1848(m)(3)(C)(i) of the Act authorizes the Secretary to define ''group practice,'' which CMS defined by referencing our regulation at § 414.92(b). For the 2011 eRx Incentive Program, a group practice is—

(1) Defined at § 414.90(b), that is participating in the Physician Quality Reporting System; or

(2)(a) In a Medicare approved demonstration project that is deemed to be participating in the Physician Quality Reporting System group practice reporting option; and

(b) Has indicated its desire to participate in the electronic prescribing group practice option.

However, for purposes of determining whether an eRx GPRO is a successful electronic prescriber for CYs 2012 through 2014, we propose to modify the definition of the ''group practice'' at 42 CFR 414.92(b) to be consistent with modifications being proposed to the definition of ''group practice'' at 42 CFR 414.90(b) for the 2012 Physician Quality Reporting System.

Specifically, we propose to modify the language that references Medicare demonstrations to more broadly recognize other similar Medicare programs that group practices may be participating in so that such practices may be eligible to participate in the eRx Incentive Program. In addition, we are making clear that all group practices must indicate their desire to participate in the eRx group practice option. Also, as we noted above, we are proposing to modify the definition of group practice under the Physician Quality Reporting System definition at 42 CFR 414.90(b) by defining a group practice as a single TIN with at least 25 or more eligible professionals, as identified by their individual NPI, who have reassigned their Medicare billing rights to the TIN. Given that the definition of ''group practice'' at 42 CFR 414.92(b) follows the Physician Quality Reporting System definition, if the proposed changes to 414.90(b) are finalized, it would apply to the definition for group practice under the eRx Incentive Program.

Although this proposal would eliminate group practices comprised of 2 to 24 eligible professionals for the purpose of the eRx Incentive Program, we believe this proposal to change the definition of ''group practice'' would not be a significant burden to these small group practices as they may still participate as individual eligible professionals. For 2010, out of 107 group practices that self-nominated to participate in GPRO II for the Physician Quality Reporting System, 68 of these group practices qualified to participate in the eRx Incentive Program under GPRO II. However, during the opt-out period which ended on May 12, 2011, 6 of these 68 group practices dropped out of GPRO II participation, leaving only 62 group practices to participate in GPRO II for 2010. Due to the low participation of only 62 groups, we believe participation in the eRx Incentive GPRO should be limited to only those group practices with 25 or more eligible professionals. Indeed, we believe participating under GPRO II may be more burdensome for very small group practices than participating as

eligible professionals. For example, with respect to the payment adjustment, additional limitations may apply to eligible professionals as individuals that are not applied to group practices, which presents an additional burden to the group practice.

(B) Proposed Process to Participate in the eRx Incentive Program—eRx GPRO

We propose that if a group practice wishes to participate in the eRx Incentive Program under the eRx GPRO, the group practice must self-nominate to do so. To self-nominate, we propose that the group practice follow the requirements for self-nomination under the Physician Quality Reporting System as well as specifically indicate its intent to participate in the eRx Incentive Program as a group practice. A group practice must self-nominate for each calendar year the group wishes to participate in the eRx GPRO. If a group practice self-nominates to participate in the eRx GPRO for a calendar year, then we propose to consider that the group practice is participating in the eRx GPRO for purposes of both the incentive payment (with respect to any incentive payment reporting period that occurs during the calendar year) and the payment adjustment (with respect to any payment adjustment reporting period that occurs during any calendar year). For example, the 2013 payment adjustment reporting period occurs during calendar year 2012 (January 1, 2012 through June 30, 2012). Therefore, any group practice participating in the eRx GPRO during calendar year 2012 would be considered to be participating in the eRx GPRO for both the 2012 incentive and 2013 payment adjustment. Please note that a group practice that is deemed to be participating in the Physician Quality Reporting System, such as an ACO participating under the Medicare Shared Savings Program, will not be deemed participating as a group practice in the eRx Incentive Program. Therefore, the group practice must self-nominate to participate in the eRx Incentive Program under the eRx GPRO. Instructions for submitting the self-nomination statement are the same as the instructions for submitting a self-nomination statement for the Physician Quality Reporting System. Each year, we expect to notify a group practice of the selection decision with respect to participation in the eRx GPRO during the first quarter of the year. We invite public comment on the requirements for eligible professionals to participate as an eRx GPRO for purposes of the eRx Incentive Program.

c. Proposed Reporting Periods

Section 1848(m)(6)(C)(ii) of the Act also authorizes the Secretary to revise the reporting period if the Secretary determines such revision is appropriate, produces valid results on measures reported, and are consistent with the goals of maximizing scientific validity and reducing administrative burden.

(1) Proposed Reporting Periods for the 2012 and 2013 eRx Incentives

Section 1848(m)(6)(C)(i)(II) of the Act defines ''reporting period'' under the eRx Incentive Program for years after 2008 to be the entire year. We also have authority under section 1848(m)(6)(C)(ii) of the Act to revise the reporting period. We propose, however, entire calendar year reporting periods for the reporting period for purposes of the 2012 and 2013 incentive payment (January 1, 2012 through December 31, 2012 for the 2012 incentive and January 1, 2013 through December 31, 2013 for the 2013 incentive, respectively). Accordingly, we propose to modify 42 CFR 414.92(d)(1).

(2) Proposed Reporting Periods for the 2013 and 2014 eRx Payment Adjustments

As we indicated, using our authority under Section 1848(m)(6)(C)(ii) of the Act, in the 2011 PFS Final Rule with comment period, we finalized two different reporting periods: A 6-month reporting period (between January 1, 2011 and June 30, 2011) for purposes of the 2012 payment adjustment for both individual eligible professionals and group practices participating in the eRx GPRO (75 FR 73562 through 73563) and a 12-month reporting period (between January 1, 2011 and December 31, 2011) for purposes of the 2013 payment adjustment for individual eligible professionals and group practices participating in the eRx GPRO (75 FR 73565).

In addition to the 12-month reporting period finalized in the 2011 PFS Final Rule with comment period, we propose an additional 6-month reporting period for purposes of the 2013 payment adjustment. As stated in the CY 2011 PFS final rule with comment period (75 FR 73565), we indicated that we might consider in future rulemaking additional reporting periods for purposes of the 2013 payment adjustment to maximize the opportunities for eligible professionals to become successful electronic prescribers.

As such, we propose for both individual eligible professionals and group practices participating in the eRx GPRO a 6-month reporting period (between January 1, 2012 and June 30, 2012) for purposes of the 2013 payment adjustment.

For similar reasons, we propose a 12-month reporting period (between January 1, 2012 and December 31, 2012) that would apply to individual eligible professionals and a 6-month reporting period (between January 1, 2013 and June 30, 2013) that would apply to both individual eligible professionals and group practices with regard to the 2014 payment adjustment.. (Please note that we are not proposing the 12-month reporting period for group practices for purposes of the 2014 payment adjustment because it is the same proposed reporting period for the 2013 incentive.) Providing two different reporting periods will provide eligible professionals with two opportunities to become successful electronic prescribers. We invite public comment on the proposed reporting periods for the 2013 and 2014 payment adjustments.

d. Proposed Criterion for Determining Successful Electronic Prescribers

Section 1848(m)(3)(B) of the Act governs the requirements for ''successful electronic prescriber,'' for purposes of the incentive payment under section 1848(m)(2) of the Act and the payment adjustment under section 1848(a)(5) of the Act. The Secretary is authorized to use one of two possible criteria for determining whether an eligible professional is a successful electronic prescriber. One criterion, under section 1848(m)(3)(B)(ii) of the Act, is based on the eligible professional's reporting, in at least 50 percent of the reportable cases, on any electronic prescribing measures that have been established under the Physician Quality Reporting System, and are applicable to services furnished by the eligible professional for the reporting period. However, for years after 2009, section 1848(m)(3)(D) of the Act permits the Secretary in consultation with stakeholders and experts to revise the criteria for submitting data on electronic prescribing measures under section 1848(m)(3)(B)(ii) of the Act.

The second criterion, under section 1848(m)(3)(B)(iii) of the Act, is based on the electronic submission by the eligible professional of a sufficient number (as determined by the Secretary) of prescriptions under Part D during the reporting period. If the Secretary decides to use this standard, then, in accordance with section 1848(m)(3)(B)(iv) of the Act, the Secretary is authorized to use Part D

drug claims data to assess whether a sufficient number of prescriptions have been submitted by eligible professionals. However, under section 1848(m)(3)(B)(i) of the Act, if the standard based on a sufficient number (as determined by the Secretary) of electronic Part D prescriptions is applied for a particular reporting period, then the standard specified in law, based on the reporting on electronic prescribing measures would no longer apply.

We considered use of the second criterion for determining successful prescribing under the eRx Incentive Program. While we recognize the benefits of using Part D data as the standard for determining successful electronic prescribers, we believe use of Part D prescriptions for analysis may be premature. For example, as the use of Part D data is fairly new, there is uncertainty as to the accuracies of reporting electronic prescribing activities. For example, if an electronic prescription is converted to a facsimile when reaching the pharmacy, under reporting of Part D data, the transmission is still reported as a pure, electronic prescribing event. Furthermore, use of Part D data would require a complete overhaul of the current requirements for the eRx Incentive Program. For instance, if we choose to shift to the use of Part D data, the program would have to adopt a new form of measurement, a new form of analysis other than use of an eligible professionals' TIN/NPI (as no TIN is populated under Part D data), and new criteria for eligible professionals and eRx GPROs to become successful electronic prescribers. Therefore, we are not proposing to use the second criterion.

For the reasons stated previously, we propose to continue to require eligible professionals to report on the electronic prescribing measure used in 2011 to determine whether an eligible professional is a successful electronic prescriber for the remainder of the eRx Incentive Program. Please note, however, we also are proposing in section IV.F.2.(d).(1). of this proposed rule to modify the electronic quality measure's specifications and to use modified reporting criteria based on the authority provided under section 1848(m)(3)(D) of the Act. We invite public comment on the continued use of reporting the electronic prescribing quality measure for purposes of the ''successful electronic prescriber'' determination under the program.

(1) Reporting the Electronic Prescribing Quality Measure

The proposed electronic prescribing quality measure, similar to the Physician Quality Reporting System measures, has two basic elements, which include: (1) A reporting denominator that defines the patient population on which the eligible professional's performance is being measured; and (2) a reporting numerator, which identifies whether or not a clinical quality action was performed. Our proposals specified later in this section apply to the following eRx Incentive Program years: The 2012 eRx incentive payment; the 2013 eRx incentive payment; the 2013 eRx payment adjustment; and the 2014 eRx payment adjustment.

Under section 1848(k)(2)(C)(i) of the Act, the electronic prescribing measure, which was initially introduced under the Physician Quality Reporting System, shall be a measure selected by the Secretary that has been endorsed by the entity with a contract with the Secretary under section 1890(a) of the Act. Currently, that entity is the National Quality Forum (NQF). The electronic prescribing measure we propose to retain, NQF Measure #0486: Adoption of Medication e-Prescribing, is currently endorsed by the NQF.

(2) The Denominator for the Electronic Prescribing Measure

The denominator for the electronic prescribing quality measure consists of specific billing codes for covered professional services.

As initially required under section 1848(k)(2)(A)(ii) of the Act, and further established through rulemaking and under section 1848(m)(2)(B) of the Act, we may modify the codes making up the denominator of the electronic prescribing measure. As such, we expanded the scope of the denominator codes for 2010 to covered professional services outside the professional office and outpatient setting, such as professional services furnished in skilled nursing facilities or the home care setting. For 2011, we finalized the following CPT and HCPCS codes in the denominator of the electronic prescribing measure: 90801, 90802, 90804, 90805, 90806, 90807, 90808, 90809, 90862, 92002, 92004, 92012, 92014, 96150, 96151, 96152, 99201, 99202, 99203, 99204, 99205, 99211, 99212, 99213, 99214, 99215, 99304, 99305, 99306, 99307, 99308, 99309, 99310, 99315, 99316, 99324, 99325, 99326, 99327, 99328, 99334, 99335, 99336, 99337, 99341, 99342, 99343, 99344, 99345, 99347, 99348, 99349, 99350, G0101, G0108, and G0109 (75 FR 73555). For purposes of reporting periods during CYs 2012 and 2013, we propose to retain these CPT and HCPCS codes in the denominator of the electronic prescribing measure because we believe that these codes represent the types of services for which prescriptions are likely to be generated. Therefore, if we were to measure an eligible professional's performance on the electronic prescribing measure, we would want to do so only for patients who saw the professional for such services. For purposes of the 2012 and 2013 incentives and 2013 and 2014 payment adjustment, we propose to retain the denominator codes contained in the 2011 electronic prescribing measure. Whereas in prior years we only permitted eligible professionals to report the electronic prescribing measure's numerator in connection with a service in the measure's denominator, as discussed in section IV.F.2.i. of this proposed rule, we are proposing to depart from this requirement for purposes of the 2013 and 2014 payment adjustments.

(3) The Reporting Numerator for the Electronic Prescribing Measure

Currently, the electronic prescribing measure's numerator consists of a single code, G8553, which indicates that at least 1 prescription created during the encounter was generated and transmitted electronically using a qualified electronic prescribing system.

For purposes of reporting the measure for the 2012 and 2013 incentives or the 2013 and 2014 payment adjustment, as in prior years, we propose that an eligible professional or group practice participating in the eRx GPRO can report the code associated with the measure's numerator whenever a prescription is generated and transmitted electronically.

We propose to post the final electronic prescribing measure specifications on the ''eRx Measure'' page of the eRx Incentive Program section of the CMS Web site at *http://www.cms.gov/ERXIncentive* by no later than—

- December 31, 2011 for the reporting periods that occur during calendar year 2012.
- December 31, 2012 for the reporting periods that occur during calendar year 2013.

In the event that additional changes are needed to the measure specifications for years after 2012, we would do so via notice and comment rulemaking prior to posting the final measure specifications for that year. We invite public comment on the proposed numerator for the

electronic prescribing measure for CYs 2012 through 2013.

e. Required Functionalities and Part D Electronic Prescribing Standards

As previously stated, to report the electronic prescribing measure, we propose that the eligible professional or group practice must report the measure's numerator G-code. When reporting this G-code for incentive payment or payment adjustment purposes, we propose, for purposes of the 2012 and 2013 incentive and 2013 and 2014 payment adjustment that the eligible professional or eRx GPRO must have and regularly use a ''qualified'' electronic prescribing system, which we further propose to define as either a system with functionalities identified in the electronic prescribing measure specifications, or Certified EHR Technology as defined at 42 CFR 495.4 and 45 CFR 170.102. This proposal is consistent with our June 1, 2011 proposed rule for the 2011 eRx Incentive Program (76 FR 31549).

We are aware that there are significant numbers of eligible professionals who are interested in participating in the eRx Incentive Program but currently do not have an electronic prescribing system or Certified EHR Technology. The electronic prescribing measure does not require the use of any particular system or transmission network; only that the system be a ''qualified'' system.

If the professional does not have general access to an electronic prescribing system or Certified EHR Technology in the practice setting, the eligible professional would not be able to report the electronic prescribing measure. In addition to not being eligible for an incentive payment, an eligible professional who does not report the electronic prescribing measure for 2012 or 2013 would be subject to the 2013 or 2014 eRx payment adjustment, unless an exception applied. We invite public comment on the proposed technological requirements of the electronic prescribing quality measure.

(1) ''Qualified'' Electronic Prescribing System

We propose to retain what constitutes a ''qualified'' electronic prescribing system as a system based upon certain required functionalities that the system can perform. We propose to retain the same functionalities that were required in 2010 and 2011. Therefore, for 2012 through 2014, we propose that a ''qualified'' electronic prescribing system is one that can do the following:

- Generate a complete active medication list incorporating electronic data received from applicable pharmacies and PBMs, if available.
- Enable eligible professionals to select medications, print prescriptions, electronically transmit prescriptions, as well as provide notifications (that is, signals to warn the prescriber of possible undesirable or unsafe situations including potentially inappropriate dose or route of administration of a drug, drug-drug interactions, allergy concerns, or warnings and cautions). This functionality must be enabled.
- Provide information related to lower cost, therapeutically appropriate alternatives (if any). The ability of an electronic prescribing system to receive tiered formulary information, if available, would again suffice for this requirement for reporting the electronic prescribing measure during the reporting periods occurring in CYs 2012 and 2013 until this function is more widely available in the marketplace.
- Provide information on formulary or tiered formulary medications, patient eligibility, and authorization requirements received electronically from the patient's drug plan (if available).

We invite public comment on the proposed definition of a ''qualified electronic prescribing system,'' for systems that have these four functionalities.

Furthermore, we are proposing to expand the definition of a ''qualified electronic prescribing system'' in the electronic prescribing measure that would be used for reporting periods that occur during CY 2012 and 2013 to include Certified EHR Technology as defined at 42 CFR 495.4 and 45 CFR 170.102 because we believe the technological requirements for eRx in the EHR Incentive Program are similar to the technological requirements for the eRx Incentive Program. We also desire to align the requirements of the eRx and the Medicare EHR Incentive Program in order to potentially reduce unnecessary investment in multiple technologies for purposes of meeting the requirements for each program. This proposal is consistent with our June 1, 2011 proposed rule for the 2011 eRx incentive and the 2013 eRx payment adjustment (76 FR 31549).

(2) Part D Electronic Prescribing Standards

Section 1848(m)(3)(B)(v) of the Act specifies that to the extent practicable, in determining whether an eligible professional is a successful electronic prescriber, ''the Secretary shall ensure that eligible professionals utilize electronic prescribing systems in compliance with standards established for such systems pursuant to the Part D Electronic Prescribing Program under section 1860D–4(e) of the Act''. The Part D standards for electronic prescribing systems establish which electronic standards Part D sponsors, providers, and dispensers must use when they electronically transmit prescriptions and certain prescription related information for Part D covered drugs that are prescribed for Part D eligible individuals.

To be a qualified electronic prescribing system under the eRx Incentive Program, electronic systems must convey the information listed previously using the standards currently in effect for the Part D electronic prescribing program. Additional Part D electronic prescribing standards were implemented April 1, 2009. On July 1, 2010, we published an Interim Final Rule providing additional updates to Part D electronic prescribing standards. These latest Part D electronic prescribing standards, and those that had previously been adopted, can be found on the CMS Web site at *http://www.cms.gov/eprescribing.*

To ensure that eligible professionals utilize electronic prescribing systems that meet these requirements, the electronic prescribing measure requires that those functionalities required for a ''qualified'' electronic prescribing system utilize the adopted Part D electronic prescribing standards. We propose to modify the Part D electronic prescribing standards required for a ''qualified'' electronic prescribing system under the eRx Incentive Program to have these standards consistent with current, CMS Part D electronic prescribing standards. The Part D electronic prescribing standards relevant to the four functionalities described previously are as follows:

- Generate medication list—Use the National Council for Prescription Drug Programs (NCPDP) Prescriber/Pharmacist Interface SCRIPT Standard, Implementation Guide, Version 8 or 10.6, Release 1, October 2005 (hereinafter ''NCPDP SCRIPT 8.1 or 10.6'') Medication History Standard. Use of NCPDP SCRIPT 10.6 is a new option for use in the eRx Incentive Program.
- Transmit prescriptions electronically—Use the NCPDP SCRIPT 8.1or 10.6 for the transactions listed at § 423.160(b)(2).
- Provide information on lower cost alternatives—Use the NCPDP Formulary and Benefits Standard, Implementation Guide, Version 1, Release 0 (Version 1.0), October 2005 (hereinafter ''NCPDP Formulary and Benefits 1.0'').

• Provide information on formulary or tiered formulary medications, patient eligibility, and authorization requirements received electronically from the patient's drug plan use:

++ NCPDP Formulary and Benefits 1.0 for communicating formulary and benefits information between prescribers and plans.

++ Accredited Standards Committee (ASC) X12N 270/271–Health Care Eligibility Benefit Inquiry and Response, Version 4010, May 2000, Washington Publishing Company, 004010X092 and Addenda to Health Care Eligibility Benefit Inquiry and Response, Version 4010A1, October 2002, Washington Publishing Company, 004010X092A1 for communicating eligibility information between the plan and prescribers.

++ NCPDP Telecommunication Standard Specification, Version 5, Release 1 (Version 5.1), September 1999, and equivalent NCPDP Batch Standard Batch Implementation Guide, Version 1, Release 1 (Version 1.1), January 2000 for communicating eligibility information between the plan and dispensers.

However, there are Part D electronic prescribing standards that are in effect for functionalities that are not commonly utilized at this time. One example is Rx Fill Notification, which is discussed in the Part D electronic prescribing final rule (73 FR 18926). For purposes of the eRx Incentive Program for CYs 2012 through 2014, we again are not requiring that an electronic prescribing system contain all functionalities for which there are available Part D electronic prescribing standards since many of these functionalities are not commonly available. For those required functionalities previously described, we propose that a ''qualified'' system must use the adopted Part D electronic prescribing standards listed previously for electronic messaging only.

There are other aspects of the functionalities for a ''qualified'' system that are not dependent on electronic messaging and are part of the software of the electronic prescribing system, for which Part D standards for electronic prescribing do not pertain and are not required for purposes of the eRx Incentive Program. For example, the requirements in the second functionality that require the system to allow professionals to select medications, print prescriptions, and conduct alerts are functions included in the particular software, for which Part D standards for electronic messaging do not apply.

As stated previously, we are proposing to expand the definition of what constitutes a ''qualified'' electronic prescribing system under the electronic prescribing system to also recognize as ''qualified'' Certified EHR Technology. Among other requirements, Certified EHR Technology must be able to electronically generate and transmit prescriptions and prescription-related information in accordance with certain standards, some of which have been adopted for purposes of electronic prescribing under Part D. Similar to the four functionalities previously noted with regard to a qualified eRx system, Certified EHR Technology also must be able to check for drug-drug interactions and check whether drugs are in a formulary or a preferred drug list, although the certification criteria do not specify any standards for the performance of those functions. We believe that it is acceptable that not all of the Part D eRx standards are required for Certified EHR Technology in light of our desire to better align the requirements of the eRx and the Medicare EHR Incentive Program and potentially reduce unnecessary investment in multiple technologies for purposes of meeting the requirements for each program. Furthermore, to the extent that an eligible professional uses Certified EHR Technology to electronically prescribe under Part D, he or she would still be required to comply with the Part D standards to do so.

f. Proposed Reporting Mechanisms for the 2012 and 2013 Reporting Periods

For purposes of the 2011 incentive payment and 2013 payment adjustment, an eligible professional (and eRx GPRO, for purposes of the 2011 incentive) may report on the electronic prescribing measure to meet the criteria for being a successful electronic prescriber via three reporting mechanisms—claims, qualified registry, and qualified EHR product. However, for purposes of the 2012 payment adjustment, due to operational limitations, only the claims-based reporting mechanism is available for purposes of reporting on the electronic prescribing measure for the 2012 payment adjustment (75 FR 73563).

For reporting periods that occur during CY 2012 and 2013, to provide eligible professionals and groups practices with multiple mechanisms to report on the electronic prescribing measure for purposes of reporting the electronic prescribing measure for the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments, we propose the following three reporting mechanisms—claims, qualified registry, and qualified EHR. However, as in the past, we would not combine data on the electronic prescribing measure submitted via multiple reporting mechanisms. Combining data received via multiple reporting mechanisms would add significant complexity to our analytics and potentially delay incentive payments. Therefore, we are proposing that an eligible professional or eRx GPRO would need to meet the relevant reporting criteria for the incentive or payment adjustment using a single reporting mechanism.

For reporting periods that occur during CYs 2012 and 2013, we also propose that a group practice that wishes to participate in the eRx Incentive Program as an eRx GPRO for a particular calendar year will have to indicate which reporting mechanism the group practice intends to use to report the electronic prescribing measure. That is, the group practice will need to indicate at the time it self-nominates which reporting mechanism (claims, qualified registry, or qualified EHR) the group practice intends to use for purposes of participating in the eRx GPRO.

The proposed requirements for each reporting mechanism with respect to the 2012 and 2013 incentives and 2013 and 2014 payment adjustments are described below.

(1) Claims-Based Reporting

First, for purposes of reporting the electronic measure for the 2012 and 2013 incentives as well as the 2013 and 2014 payment adjustments, we propose to again retain the claims-based reporting mechanism that has been used since the implementation of the eRx Incentive Program in 2009 for all remaining incentive and payment adjustment years. We are not proposing any prerequisites, such as registration, to begin reporting on the electronic prescribing measure via claims. Retaining the claims-based mechanism allows eligible professionals and group practices to begin to report on the electronic prescribing measure without the added cost of submitting data to a registry or purchasing an EHR system (if the eligible professional is using a standalone eRx system) as eligible professionals already report PFS charges via claims.

If an eligible professional or group practice chooses the claims-based reporting mechanism, we propose that the eligible professional or group practice must directly submit data on the electronic prescribing measure. For eligible professionals and group practices participating in the eRx GPRO using the proposed claims-based reporting mechanism for purposes of

reporting the electronic prescribing measure during a 12-month incentive or payment adjustment reporting period, we propose that all claims for services must be processed by us no later than two months after the respective reporting period, for the claim to be included in our data analysis. (For example, for an eligible professional using the 12-month, 2014 payment adjustment reporting period, all claims for services between January 1, 2012 and December 31, 2012 must be processed no later than February 28, 2013 to be included in our data analysis.) For eligible professionals and group practices using the proposed claims-based reporting mechanism for purposes of reporting the electronic prescribing measure during a 6-month payment adjustment reporting period, we propose that all claims for services must be processed by us by no later than one month after the respective reporting period, for the claim to be included in our data analysis (for example, for an eligible professional using the 6-month, 2013 payment adjustment reporting period, all claims for services between January 1, 2012 and June 30, 2012 must be processed no later than July 31, 2012, for the claims to be included in our data analysis.) We believe that these proposed reporting periods will allow sufficient time for eligible professionals to report the electronic prescribing measure, allow us to collect and analyze the data submitted by eligible professionals, and avoid retroactive adjustments of payments. We invite public comment on our proposal to retain claims-based reporting as a reporting mechanism for the eRx Incentive Program.

(2) Registry-Based Reporting

In addition, for purposes of reporting for the 2012 and 2013 incentives as well as the 2013 and 2014 payment adjustments, to provide an opportunity for individual eligible professionals and group practices who choose to participate in the Physician Quality Reporting System via registry to use the same reporting mechanism for reporting the electronic prescribing measure, we propose to continue the registry-based reporting mechanism introduced under the 2010 eRx Incentive Program. Retaining the registry-based reporting option provides eligible professionals and group practices with another alternative to reporting. In addition, unlike claims-based reporting, although there may be a cost associated with submitting data to a registry, reporting of the electronic prescribing measure to CMS is done entirely by the registry.

We note that there may be a cost associated with submitting data to a registry. As in prior program years, we propose that only registries qualified to submit quality measure results and numerator and denominator data on quality measures on behalf of eligible professionals for the Physician Quality Reporting System for the applicable calendar year would be qualified to submit measure results and numerator and denominator data on the electronic prescribing measure on behalf of eligible professionals for the eRx Incentive Program.

Some registries that self-nominate to become a qualified registry for the Physician Quality Reporting System may not choose to self-nominate to become a qualified registry for purposes for the eRx Incentive Program. Registries need to indicate their desire to qualify to submit measure results and numerator and denominator data on the electronic prescribing measure for reporting periods that occur during CYs 2012 and 2013 at the time that they submit their self-nomination letter for the 2012 and 2013 Physician Quality Reporting System respectively. The self-nomination process and requirements for registries for the Physician Quality Reporting System, which also will apply to the registries for the eRx Incentive Program, are discussed in the Physician Quality Reporting System section IV.F.1.(d).(2). of this proposed rule. We would post a final list of qualified registries for the eRx Incentive Program for CYs 2012 and 2013 on the eRx Incentive Program section of the CMS Web site at *http://www.cms.gov/ERXIncentive* when we post the final list of qualified registries for the Physician Quality Reporting System for 2012 and 2013 respectively on the Physician Quality Reporting System section of the CMS Web site.

Since we are proposing a 12-month reporting period for purposes of the 2012 and 2013 incentive and 6 and 12-month reporting periods for purposes of the 2013 and 2014 payment adjustments (as described in the section previously), we further propose that qualified registries would need to submit the electronic prescribing measure for the eRx Incentive Program to us in two separate transmissions, based on the proposed reporting periods for the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments. Specifically, we propose that qualified registries would need to submit 2012 and 2013 data on the electronic prescribing measure in two separate submissions:

- Following the end of the respective 6-month payment adjustment reporting period (between July 1, 2012 and August 19, 2012, for purposes of the 2013 eRx payment adjustment, and between July 1, 2013 and August 19, 2013, for purposes of the 2014 eRx payment adjustment); and
- Following the end of the 12-month reporting period for the 2012 and 2013 incentives and 2014 payment adjustment.

We invite public comment on our proposals regarding registry-based reporting for the 2012, 2013, and 2014 eRx Incentive Program.

(3) EHR-Based Reporting

For purposes of reporting for the 2013 incentive as well as the 2013 and 2014 payment adjustments, in order to provide an opportunity for eligible professionals and group practices who choose to participate in the Physician Quality Reporting System via EHR as well as eligible professionals who participate in the Medicaid or Medicare EHR Incentive Program to use the same reporting mechanism for reporting the electronic prescribing measure, we propose to retain the EHR-Based reporting mechanism to encourage the use of EHR technology as well as provide eligible professionals and group practices with a third reporting option.

Similar to registry-based reporting, we propose that direct EHR technology as well as EHR data submission vendors (as described in our proposals to the Physician Quality Reporting System) ''qualified'' to submit extracted Medicare clinical quality data to us for the Physician Quality Reporting System would be able to be used by an eligible professional or group practice to submit data on the electronic prescribing measure for the 2012 and 2013 incentives and 2013 and 2014 payment adjustments. The self-nomination process and requirements for direct EHR products and EHR data submission vendors for the Physician Quality Reporting System as discussed previously in section IV.F.1.d.(3). of this proposed rule in our 2012 proposals for the Physician Quality Reporting System, would continue to apply to the EHR products and EHR data submission vendors for the eRx Incentive Program. We hope this third reporting option for eligible professionals and group practices will encourage the use of EHR technology.

We propose that direct EHR products and EHR data submission vendors be required to indicate their desire to have one or more of their EHR products approved for the purpose of an eligible professional potentially being able to submit data on the electronic prescribing measure for the eRx

Incentive Program for reporting periods that occur in CYs 2012 and 2013 at the time they self-nominate for the respective 2012 and 2013 Physician Quality Reporting System. A list of approved EHR technology, their vendors (including the technology's version that is approved) for the eRx Incentive Program would be posted on the eRx Incentive Program section of the CMS Web site at *http://www.cms.gov/ERXIncentive* when we post the list of approved EHR technology for the Physician Quality Reporting System on the Physician Quality Reporting System section of the CMS Web site.

Since we are proposing two reporting periods with respect to the 2013 and 2014 payment adjustments (described in section (c)(2) previously), we further propose that eligible professionals using their approved EHR systems would need to submit the electronic prescribing measure for the eRx Incentive Program to us in two separate transmissions, based on the proposed reporting periods for the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments. Specifically, we propose that eligible professionals would need to submit 2012 and 2013 data on the electronic prescribing measure in two separate submissions:

- Following the end of the respective 6-month payment adjustment reporting period (between July 1, 2012 and August 19, 2012, for purposes of the 2013 eRx payment adjustment, and between July 1, 2013 and August 19, 2013, for purposes of the 2014 eRx payment adjustment); and
- Following the end of the 12-month reporting period for the 2012 and 2013 incentives and 2014 payment adjustment.

We invite public comment on our proposals with regard to EHR-Based reporting.

g. The 2012 and 2013 eRx Incentives

42 CFR 414.92(d) states the requirements for individual eligible professionals to qualify to receive an incentive payment. We are proposing to modify 42 CFR 414.92(d) to add ''being a,'' so that the provision reads:

In order to be considered a successful electronic prescriber and qualify to earn an electronic prescribing incentive payment (subject to paragraph (c)(3) of this section), an individual eligible professional, as identified by a unique TIN/NPI combination, must meet the criteria for being a successful electronic prescriber under section 1848(m)(3)(B) of the Act and as specified by CMS during the reporting period specified in paragraph (d)(1) of this section and using one of the reporting mechanisms specified in paragraph (d)(2) of this section. Although an eligible professional may attempt to qualify for the electronic prescribing incentive payment using more than one reporting mechanism (as specified in paragraph (d)(2) of this section), the eligible professional will receive only one electronic prescribing incentive payment per TIN/NPI combination for a program year.

We believe this change provides more clarity to the provision.

(1) Applicability of 2012 and 2013 eRx Incentives for Eligible Professionals and eRx GPROs

Section 1848(m)(2)(B) of the Act imposes a limitation on the eRx incentive payment. The Secretary is authorized to choose 1 of 2 possible criteria for determining whether or not the limitation applies to a successful electronic prescriber:

- Whether Medicare Part B allowed charges for covered professional services to which the electronic prescribing quality measure applies are less than 10 percent of the total Medicare Part B PFS allowed charges for all covered professional services furnished by the eligible professional during the reporting period; OR
- The second criterion, under section 1848(m)(3)(B)(iii) of the Act, is based on whether the eligible professional submits (both electronically and non-electronically) a sufficient number (as determined by the Secretary) of prescriptions under Part D (which can, again, be assessed using Part D drug claims data). If the Secretary decides to use this criterion, the criterion based on the reporting on electronic prescribing measures would no longer apply.

Based on our proposal to make the determination of whether an eligible professional or group practice is a ''successful electronic prescriber'' based on submission of the electronic prescribing measure (the first criterion), we propose to apply the criterion under section 1848(m)(2)(B)(i) of the Act for the limitation for both the 2012 and 2013 incentives. Specifically, a successful electronic prescriber is eligible for the 2012 and/or 2013 incentive only if the Medicare Part B allowed charges for covered professional services to which the electronic prescribing quality measure applies comprise at least 10 percent of the total Medicare Part B PFS allowed charges for all covered professional services furnished by the eligible professional or group practice during the reporting period.

For purposes of the 2012 and 2013 incentives, this analysis would be performed during the first quarters of 2013 and 2014 respectively by dividing the eligible professional's or group practice's (for those group practices participation in the eRx GPRO for that year) total 2012 and 2013 respective Medicare Part B PFS allowed charges for all such covered professional services submitted for the measure's denominator codes by the eligible professional's or group practices' total Medicare Part B PFS allowed charges for all covered professional services. If the result is 10 percent or more, then the statutory limitation would not apply and a successful electronic prescriber would qualify to earn the electronic prescribing incentive payment. If the result is less than 10 percent, then the statutory limitation would apply and the eligible professional or group practice would not earn an electronic prescribing incentive payment even if he or she meets the reporting criteria for being a successful electronic prescriber. Although an individual eligible professional or group practice may decide to conduct his or her own assessment of how likely this statutory limitation is expected to apply to him or her before deciding whether or not to report the electronic prescribing measure, an individual eligible professional or group practice may report the electronic prescribing measure without regard to the statutory limitation for the incentive payment. We invite public comment on our proposed use of the 10 percent limitation with respect to the 2012 and 2013 incentive payments.

(2) Proposed Reporting Criteria for Being a Successful Electronic for the 2012 and 2013 eRx Incentives—Individual Eligible Professionals

As discussed previously, section 1848(m)(3)(D) of the Act authorizes the Secretary to revise the criteria for submitting data on the electronic prescribing measure under section 1848(m)(3)(B)(ii) of the Act, which requires the measure to be reported in at least 50 percent of the cases in which the measure is reportable. For 2010 and 2011, we revised that criterion, such that an eligible professional is a successful electronic prescriber by reporting the electronic prescribing quality measure for a minimum of 25 unique visits per year of applicable cases in the denominator.

For the 2012 and 2013 incentives, to maintain program consistency form year to year, we propose to make the determination of whether an eligible professional is a successful electronic prescriber for purposes of the incentive based on a count of the number of times (minimum threshold of 25) an eligible professional reports that at least one prescription created during the denominator-eligible encounter is generated using a qualified electronic

prescribing system, which would include Certified EHR Technology (that is, reports the G8553 code when the eligible professional bills for one of the services included in the measure's denominator). We believe this criterion adequately addresses the goal of the eRx Incentive Program, specifically to promote the use of electronic prescribing systems. We invite public comment on the proposed criteria for successful electronic prescriber with regard to reporting the electronic prescribing quality measure by individual eligible professionals for purposes of qualifying for the 2012 and 2013 eRx incentive payments.

(3) Proposed Criteria for Being a Successful Electronic Prescriber 2012 and 2013 eRx Incentives—Group Practices

Under section 1848(m)(3)(B) of the Act, in order to qualify for the incentive payment, an eligible professional or group practice must be a ''successful electronic prescriber.''

For a group practice to be a successful electronic prescriber for purposes of the 2011 incentive payment, depending on the group's size, a group practice was required to report the electronic prescribing measure for a minimum of 75 to 2,500 unique visits per year of applicable cases in the electronic prescribing measure's denominator. Specifically, 2011 eRx GPRO comprised of 26 to 50 eligible professionals are required to report the electronic prescribing measure for at least 475 unique visits. 2011 group practices comprised of 51 to 100 eligible professionals are required to report the electronic prescribing measure for at least 925 unique visits, and 2011 group practices comprised of 101 to 199 eligible professionals are required to report the electronic prescribing measure for at least 1,875 unique visits.

Because we seek to simplify the reporting criteria for group practices using the eRx GPRO, we propose that, for the 2012 and 2013 incentive payments and 2013 and 2014 payment adjustments, for a group practice using the eRx GPRO to be a successful prescriber, a group practice using the eRx GPRO must report the electronic prescribing measure's numerator for at least 625 unique visits (for group practices comprised of 25–99 eligible professionals) or 2,500 unique visits (for group practices comprised of 100 or more eligible professionals). To obtain these reporting criteria, we multiplied the smallest group practice size for each respective threshold (that is, 25 for the first threshold and 100 for the second threshold) by the number of unique visits (25) an individual eligible professional must report on the electronic prescribing measure in order to qualify for an incentive payment. Although this may be a higher reporting threshold for group practices using the eRx GPRO comprised of 25–50 eligible professionals and group practices using the eRx GPRO comprised of 101–199 eligible professionals than in 2011, we believe it is still quite feasible for these group practices to meet the respective reporting threshold as this would be the reporting threshold should the members of the group practice choose to participate in the eRx Incentive Program as individual eligible professionals.

We invite public comment on the proposed criteria for determining successful electronic prescribers for eRx GPROs reporting for purposes of earning the 2012 and 2013 incentives.

(4) No Double Payments

We are prohibited from making double payments under section 1848(m)(3)(C)(iii) of the Act, which requires that payments to a group practice shall be in lieu of the payments that would otherwise be made under the eRx Incentive Program to eligible professionals in the group practice for being a successful electronic prescriber. Accordingly, consistent with 2010 and 2011, we propose to make incentive payments to group practices based on the determination that the eRx GPRO, as a whole, is a successful electronic prescriber for the respective program year. An individual eligible professional who is affiliated with a group practice participating in the eRx GPRO reporting option that meets the requirements of being a successful electronic prescriber under a group practice would not be eligible to earn a separate eRx incentive payment on the basis of the individual eligible professional meeting the criteria for successful electronic reporter at the individual level. We invite public comment on the proposed determination of the 2012 and 2013 incentive payment amount for group practices that are successful electronic prescribers.

Furthermore, we propose to make a technical change 42 CFR 414.92(g)(5)(ii) to modify ''another'' to ''a'' to clarify the provision.

h. The 2013 and 2014 Electronic Prescribing Payment Adjustments

As previously stated, for 2012, 2013, and 2014, if the eligible professional is not a successful electronic prescriber for the reporting period for the year, the PFS amount for covered professional services furnished by such professionals during the year shall be less than the PFS amount that would otherwise apply by—

- 1.0 percent for 2012;
- 1.5 percent for 2013; and
- 2.0 percent for 2014.

We propose to modify 42 CFR 414.92 to provide further explanation of the requirements for individual eligible professionals and group practices for the 2013 and 2014 payment adjustment, which we will propose below.

(1) Proposed Limitations to the 2013 and 2014 eRx Payment Adjustments—Individual Eligible Professionals

Whereas we believe that an incentive should be broadly available to encourage the widest possible adoption of electronic prescribing, even for low volume prescribers, we believe that a payment adjustment should be applied primarily to assure that those who have a large volume of prescribing do so electronically, without penalizing those for whom the adoption and use of an electronic prescribing system may be impractical given the low volume of prescribing. We propose that the 2013 and 2014 payment adjustments would not apply if:

- An eligible professional is not an MD, DO, podiatrist, nurse practitioner, or physician assistant as of June 30, 2012, for purposes of the 2013 payment adjustment and June 30, 2013, for purposes of the 2014 payment adjustment. Since these eligible professionals do not generally prescribe, we have excluded these eligible professionals from the eRx Incentive Program.

For purposes of determining whether an eligible professional is an MD, DO, podiatrist, nurse practitioner, or physician assistant we would use National Plan and Provider Enumeration System (NPPES) data. It is an eligible professional's responsibility to ensure that his or her primary taxonomy code in NPPES is accurate. However, in 2011, we also established a G-code, (G8644) that eligible professionals can use to report to us that they do not have prescribing privileges. We propose to retain the reporting of this G-code for purposes of the 2013 and 2014 payment adjustments. For purposes of the 2013 payment adjustment, we propose that eligible professionals who report this G-code must do so on a claim with dates of services during the 6-month reporting period (January 1, 2012 and June 30, 2012). For purposes of the 2014 payment adjustment, we propose that eligible professionals who report this G-code must do so on a claim with dates of services during the 6-month reporting period (January 1, 2013 and June 30,

2013) so that we are able to distinguish whether a professional is reporting this G-code for the 2013 payment adjustment or the 2014 payment adjustment.

- The eligible professional's Medicare Part B allowed charges for covered professional services to which the electronic prescribing quality measure applies are less than 10 percent of the total Medicare Part B PFS allowed charges for all covered professional services furnished by the eligible professional during the respective payment adjustment reporting period. This is a required limitation under section 1848(m)(2)(B) of the Act. This calculation will be performed by dividing the eligible professional's total 2011 Medicare Part B PFS allowed charges for all such covered professional services submitted for the measure's denominator codes by the eligible professional's total Medicare Part B PFS allowed charges for all covered professional services (as assessed at the TIN/NPI level). If the result is 10 percent or more, then the statutory limitation will not apply. If the result is less than 10 percent, then the statutory limitation will apply. For the 12-month incentive and payment adjustment reporting periods, this calculation is expected to take place in the first quarter of the year following the reporting period (for example, in the first quarter of 2013 for the 12-month reporting period for the 2012 incentive). For the 6-month payment adjustment reporting period, this calculation is expected to take place within the calendar year for that 6-month reporting period (for example. within 2012 for the 6-month reporting period for the 2013 payment adjustment).
- An eligible professional who does not have at least 100 cases (that is, claims for patient services) containing an encounter code that falls within the denominator of the electronic prescribing measure for dates of service during: The 6-month, 2013 payment adjustment reporting period (January 1, 2012 through June 30, 2012) for purposes of the 2013 payment adjustment or the 6-month, 2014 payment adjustment reporting period (January 1, 2013 through June 30, 2013) for purposes of the 2014 payment adjustment. If an eligible professional has less than 100 denominator-eligible instances in a 6-month period, this would be an indicator to us that the professional likely has a small Medicare patient population.

We invite public comment on the proposed limitations of the 2013 and 2014 payment adjustments.

(2) Proposed Requirements for the 2013 and 2014 eRx Payment Adjustments—Individual Eligible Professionals

As we explained previously, section 1848(a)(5) of the Act requires a payment adjustment be applied with respect to covered professional services furnished by an eligible professional in 2013 and 2014, if the eligible professional is not a successful electronic prescriber for the reporting period for the year. Section 1848(m)(3)(B) of the Act sets forth the requirements for being a successful electronic prescriber. However, section 1848(m)(3)(D) of the Act authorizes the Secretary to revise the criteria for submitting data on the electronic prescribing quality measure. In the 2011 PFS Final Rule with comment period, we established the same reporting criteria for being a successful electronic prescriber for purposes of the 2011 incentive and the 2013 payment adjustment, based on a 12-month reporting period in 2011 (75 FR 73565). In order to create another opportunity for an eligible professional to become a successful electronic prescriber for purposes of the 2013 payment adjustment, we propose the following criteria, based on the proposed 6-month reporting period, for being a successful electronic prescriber: An eligible professional will be deemed a successful electronic prescriber if he/she reports the electronic prescribing measure's numerator, that is, at least 1 prescription for Medicare Part B PFS patients created during an encounter was generated and transmitted electronically using a qualified electronic prescribing system at least 10 times during the 6-month payment adjustment reporting period (that is, January 1, 2012 through June 30, 2012). Unlike the reporting criteria for the incentive payments where the numerator must be reported in connection with a denominator-eligible visit, for purposes of the 2013 and 2014 payment adjustments, we propose an eligible professional would be able to report the measure's numerator for any Medicare Part B PFS service provided during the reporting period, regardless of whether the code for such service appears in the denominator, because we recognize that eligible professionals may generate prescriptions during encounters that are not necessarily included in the measure's denominator.

For purposes of avoiding the 2014 payment adjustment, we also seek to provide more than one opportunity for eligible professionals to avoid the 2014 payment adjustment by becoming a successful electronic prescriber. Therefore, consistent with the finalized and proposed criteria for successful electronic prescribing for purposes of the 2013 payment adjustment, we propose that an eligible professional the following criteria for an eligible professional to be a successful electronic prescriber for purposes of the 2014 payment adjustment: (1) An eligible professional meets the criteria for the 2013 incentive, that is, reports that at least one prescription for Medicare Part B PFS patients created during an encounter was generated and transmitted electronically using a qualified electronic prescribing system at least 25 times during the 12-month payment adjustment reporting period (that is, January 1, 2012 through December 31, 2012) or (2) An eligible professional reports the electronic prescribing measure's numerator (that is, that at least 1 prescription for Medicare Part B PFS patients created during an encounter was generated and transmitted electronically using a qualified electronic prescribing system) at least 10 times during the 6-month payment adjustment reporting period (that is, January 1, 2013 through June 30, 2013).

As with the 2012 and 2013 incentive payments, we propose that the determination of whether an eligible professional is subject to the payment adjustment will be made at the individual professional level, based on the NPI and for each unique TIN/NPI combination. Tables 57 and 58 reflect the proposed criteria for being a successful electronic prescriber for an individual eligible professional for purposes of the 2013 and 2014 payment adjustment respectively.

TABLE 57—PROPOSED CRITERIA FOR BEING A SUCCESSFUL ELECTRONIC PRESCRIBER FOR THE 2013 ERX PAYMENT ADJUSTMENT FOR THE PROPOSED 6-MONTH REPORTING PERIOD—INDIVIDUAL ELIGIBLE PROFESSIONALS *

Reporting period	Criteria
6–month (Jan 1, 2012–Jun 30, 2012)	Report the electronic prescribing measure's numerator code at least 10 times.

* In the CY 2011 PFS final rule with comment period, we finalized a reporting criterion based on a 12-month reporting period (January 1, 2011 through December 31, 2011) for being a successful electronic prescriber for the 2013 payment adjustment. That is, the eligible professional becomes a successful electronic prescriber for the 2013 payment adjustment if, between January 1, 2011 and December 31, 2011 s/he reports on the 2011 electronic prescribing measure at least 25 times.

TABLE 58—PROPOSED CRITERIA FOR BEING A SUCCESSFUL ELECTRONIC PRESCRIBER FOR THE 2014 ERX PAYMENT ADJUSTMENT—INDIVIDUAL ELIGIBLE PROFESSIONALS

Reporting period	Criteria
12-month (Jan 1, 2012–Dec 31, 2012)	Report the electronic prescribing measure's numerator code at least 25 times for encounters associated with at least 1 of the denominator codes (the same criteria as the 2013 eRx incentive).
6-month (Jan 1, 2013–Jun 30, 2013)	Report the electronic prescribing measure's numerator code at least 10 times.

We proposed the previous criteria for being a successful electronic prescriber for purposes of the 2013 and 2014 payment adjustments because they are consistent with the criteria for being a successful electronic prescriber for purposes of the 2012 and 2013 payment adjustment that were finalized in the CY 2011 PFS final rule with comment period (75 FR 73562 through 73565). We invite public comment on the proposed criteria for becoming a successful electronic prescriber for the 2013 and 2014 payment adjustments for individual eligible professionals.

(3) Proposed Requirements for the 2013 and 2014 eRx Payment Adjustments—Group Practices

As required by section 1848(m)(3)(C) of the Act, we are also required to establish and have in place a process under which eligible professionals in a group practice shall be treated as a successful electronic prescriber for purposes of the payment adjustment. For purposes of the 2013 and 2014 payment adjustments, we propose that if a group practice chooses to participate in the eRx GPRO during CYs 2012 and 2013, respectively, then the group practice would be evaluated for applicability of the 2013 and 2014 payment adjustment as a group practice.

We propose an eRx GPRO will be deemed a successful electronic prescriber for purposes of the 2013 payment adjustment if, during the 6-month, 2013 payment adjustment reporting period (January 1, 2012 through June 30, 2012), a group practice reports the electronic prescribing measure's numerator (that is, that at least 1 prescription for Medicare Part B PFS patients created during an encounter was generated and transmitted electronically using a qualified electronic prescribing system) at least 625 times (for group practices comprised of 25 to 99 eligible professionals) or 2,500 times (for group practices comprised of 100+ eligible professionals).

Similarly, for the 2014 payment adjustment, we propose the following: A group practice would be a successful electronic prescriber for purposes of the 2014 payment adjustment if the group practice meets the 2012 criteria for being a successful electronic prescriber for purposes of the 2012 incentive payment. In other words, the group practice would need to report the electronic prescribing measure's numerator for at least 625 (for group practices comprised of 25 to 99 eligible professionals) or 2,500 (for group practices comprised of 100 or more eligible professionals) times for encounters associated with at least 1 of the denominator codes that occur between January 1, 2012 and December 31, 2012. In addition, we propose that a group practice would also be a successful electronic prescriber for purposes of the 2014 payment adjustment if, during the 6-month, 2014 payment adjustment reporting period (January 1, 2013 through June 30, 2013), a group practice reports the electronic prescribing measure's numerator (that is, that at least 1 prescription for Medicare Part B PFS patients created during an encounter was generated and transmitted electronically using a qualified electronic prescribing system at least 625 times (for group practices with 25 to 99 eligible professionals) or 2,500 times (for group practices with 100+ eligible professionals)).

In addition, in accordance with the limitation under section 1848(m)(2)(B)(i) of the Act, the 2013 or 2014 payment adjustment would not apply to a group practice in which less than 10 percent of the group practice's estimated total allowed charges for the respective 6-month or 12-month payment adjustment reporting period are comprised of services which appear in the denominator of the 2012 or 2013 electronic prescribing measure. To be consistent with how this limitation is applied to group practices for purposes of the incentive, we propose to determine whether this limitation applies to a group practice for the payment adjustment at the TIN level. Tables 59 and 60 reflect the proposed criteria for being a successful electronic prescriber for a group practice for purposes of the 2013 and 2014 payment adjustments, respectively.

TABLE 59—PROPOSED CRITERIA FOR BEING A SUCCESSFUL ELECTRONIC PRESCRIBER FOR THE 2013 ERX PAYMENT ADJUSTMENT FOR THE PROPOSED 6-MONTH REPORTING PERIOD—GROUP PRACTICES

eRx GPRO Size	Reporting period	Criteria
25–99 Eligible Professionals	6-month (Jan 1, 2012–Jun 30, 2012)	Report the electronic prescribing measure's numerator code at least 625 times.
100+ Eligible Professionals	6-month (Jan 1, 2012–Jun 30, 2012)	Report the electronic prescribing measure's numerator code at least 2,500 times.

TABLE 60—PROPOSED CRITERIA FOR BEING A SUCCESSFUL ELECTRONIC PRESCRIBER FOR THE 2014 ERX PAYMENT ADJUSTMENT—GROUP PRACTICES USING THE ERX GPROS

eRx GPRO Size	Reporting period	Criteria
25–99 Eligible Professionals	12-month (Jan 1, 2012–Dec 31, 2012)	Report the electronic prescribing measure's numerator for at least 625 times for encounters associated with at least 1 of the denominator codes (the same criteria as the 2012 eRx incentive).
100+ Eligible Professionals	12-month (Jan 1, 2012–Dec 31, 2012)	Report the electronic prescribing measure's numerator for at least 2,500 times for encounters associated with at least 1 of the denominator codes (the same criteria as the 2012 incentive).
25–99 Eligible Professionals	6-month (Jan 1, 2013–Jun 30, 2013)	Report the electronic prescribing measure's numerator code at least 625 times.
100+ Eligible Professionals	6-month (Jan 1, 2013–Jun 30, 2013)	Report the electronic prescribing measure's numerator code at least 2,500 times.

We invite public comment on the proposed requirements for 2013 and 2014 electronic prescribing payment adjustment for eRx GPROs.

(4) Significant Hardship Exemptions

Section 1848(a)(5)(B) of the Act provides that the Secretary may, on a case-by-case basis, exempt an eligible professional from the application of the payment adjustment, if the Secretary determines, subject to annual renewal, that compliance with the requirement for being a successful electronic prescriber would result in a significant hardship.

(A) Proposed Significant Hardship Exemptions

In the CY 2011 PFS Final Rule with comment period (75 FR 73564 through 75 FR 73565), we finalized two circumstances under which an eligible professional or eRx GPRO can request consideration for a significant hardship exemption for the 2012 eRx payment adjustment:

- The eligible professional or eRx GPRO practices in a rural area with limited high speed internet access.
- The eligible professional or eRx GPRO practices in an area with limited available pharmacies for electronic prescribing.

For the 2013 and 2014 payment adjustments, we propose to retain these two significant hardship exemption categories. We propose that eligible professionals and eRx GPROs wishing to request applicability of these significant hardship exemption categories may do so via a web-based tool. Alternatively, since we created a G-code for each of the previous categories, we propose that eligible professionals and eRx GPROs may use the G-codes to request consideration for a significant hardship exemption for the 2013 and 2014 payment adjustment by reporting the appropriate G-code at least once on claims for services rendered during the respective 2013 and 2014 6-month reporting periods.

Since publication of the CY 2011 PFS Final Rule with comment period, we have received numerous requests to expand the categories under the significant hardship exemption for the payment adjustment. Some stakeholders have recommended specific circumstances of significant hardship for our consideration (for example, eligible professionals who have prescribing privileges but do not prescribe under their NPI, eligible professionals who prescribe a high volume of narcotics, and eligible professionals who electronically prescribe but typically do not do so for any of the services included in the electronic prescribing measure's denominator), while others strongly suggested we consider increasing the number of specific hardship exemption categories. We believe that many of the circumstances raised by stakeholders may pose a significant hardship and limit eligible professionals and group practices in their ability to meet the requirements for being successful electronic prescribers either because of the nature of their practice or because of the limitations of the electronic prescribing measure itself, and as a result, such professionals might be unfairly penalized. Therefore, in 2011, in the proposed rule entitled ''Proposed Changes to the Electronic Prescribing (eRx) Incentive'' (76 FR 31547), we proposed to expand the categories under the significant hardship exemption for the 2012 payment adjustment. Because we believe the reasons for proposing the expanded categories under the significant hardship exemption for the 2012 payment adjustment also apply to the 2013 and 2014 payment adjustments, we propose to retain the following significant hardship exemptions for the 2013 and 2014 payment adjustments:

- Inability to electronically prescribe due to local, state, or federal law or regulation
- Eligible professionals who prescribe fewer than 100 prescriptions during a 6-month, payment adjustment reporting period

(i) Inability to Electronically Prescribe Due to Local, State, or Federal Law or Regulation

We are proposing that, to the extent that local, State, or Federal law or regulation limits or prevents an eligible professional or group practice that otherwise has general prescribing authority from electronically prescribing (for example, eligible professionals who prescribe a large volume of narcotics, which may not be electronically

prescribed in some states, or eligible professionals who practice in a State that prohibits or limits the transmission of electronic prescriptions via a third party network such as Surescripts), the eligible professional or group practice would be able to request consideration for an exemption from application of the 2013 and/or 2014 payment adjustments, which would be reviewed on a case-by-case basis. We believe eligible professionals in this situation face a significant hardship with regard to the requirements for being successful electronic prescribers because while they may meet the 10 percent threshold for applicability of the payment adjustment, or the 100 denominator-eligible cases limit in a 6-month payment adjustment reporting period, they may not have sufficient opportunities to meet the requirements for being a successful electronic prescriber because Federal, State, or local law or regulation may limit the number of opportunities that an eligible professional or group practice has to electronically prescribe.

(ii) Eligible Professionals Who Prescribe Fewer Than 100 Prescriptions During a 6-Month, Payment Adjustment Reporting Period

We are proposing that an eligible professional who has prescribing privileges but prescribes fewer than 100 prescriptions during a 6-month, payment adjustment reporting period (for example, a nurse practitioner who may not write prescriptions under his or her own NPI, a physician who decides to let his Drug Enforcement Administration registration expire during the reporting period without renewing it, or an eligible professional who prescribed fewer than 100 prescriptions between January 1, 2012 and June 30, 2012 regardless of whether the prescriptions were electronically prescribed or not), yet still meets the 10 percent threshold for applicability of the payment adjustment, would be able to request consideration for a significant hardship exemption from application of the 2013 and/or 2014 payment adjustment, which would be reviewed on a case-by-case basis. We believe that it is a significant hardship for eligible professionals who have prescribing privileges, but infrequently prescribe, to become successful electronic prescribers because the nature of their practice may limit the number of opportunities an eligible professional or group practice to prescribe, much less electronically prescribe.

We invite public comments on our proposal to modify 42 CFR 414.92 to include our proposed significant hardship exemption categories for the 2013 and 2014 payment adjustments.

As we realize that the 4 significant hardship exemptions we have proposed above may not capture every circumstance that could constitute a significant hardship, we invite public comment on other suggestions for significant hardship exemption categories that we may want to consider.

(B) Process for Submitting Significant Hardship Exemptions—Individual Eligible Professionals and Group Practices

To request a significant hardship exemption for any of the categories proposed and previously described, we are proposing that an eligible professional provide to us by the end of the 2013 and/or 2014 payment adjustment reporting periods (that is June 30, 2012 for the 2013 payment adjustment and June 30, 2013 for the 2014 payment adjustment), the following:

- The name of the practice and other Identifying information (for example: TIN, NPI, mailing address, and e-mail address of all affected eligible professionals.
- The proposed significant hardship exemption category(ies) that apply.
- A justification statement describing how compliance with the requirement for being a successful electronic prescriber for the respective 2013 and/or 2014 payment adjustment during the reporting period would result in a significant hardship to the eligible professional.
- An attestation of the accuracy of the information provided.

The justification statement should be specific to the category under which the eligible professional or group practice is submitting its request and must explain how the exemption applies to the professional. For example, if the eligible professional is requesting a significant hardship exemption due to Federal, State, or local law or regulation, he or she must cite the applicable law and how the law restricts the eligible professional's ability to electronically prescribe. CMS will review the information submitted by each eligible professional on a case-by-case basis. In addition, we are proposing that an eligible professional or group practice must, upon request, provide additional supporting documentation if there is insufficient information (such as, but not limited to, a TIN or NPI that we cannot match to the Medicare claims, a certification number for the Certified EHR Technology that does not appear on the list of Certified EHR Technology, or an incomplete justification for the significant hardship exemption request) to justify the request or make the determination of whether a significant hardship exists.

We also are proposing that eligible professionals or group practices would be able to submit significant hardship exemption requests using the web-based tool or interface (that we also proposed to use in the 2011 ''Proposed Changes to the Electronic Prescribing (eRx) Incentive Program'' proposed rule). Under the web-based tool, we propose that eligible professionals and group practices be able to log-in, request a specific significant hardship exemption, and provide the reasons why a significant hardship exemption should apply. We propose that eligible professionals would be required to submit their requests for a significant hardship exemption via the web-based tool during the relevant 6-month payment adjustment reporting period. For example, if an eligible professional is requesting a significant hardship exemption from the 2013 payment adjustment, then the request must be submitted between January 1, 2012 and June 30, 2012.

We also are proposing that once we have completed our review of the eligible professional's or group practice's request and made a decision, we would notify the eligible professional or group practice of our decision and all such decisions would be final. Eligible professionals or group practices would not have the opportunity to request reconsiderations of their requests for significant hardship exemption. We invite public comment on the proposed process for individual eligible professionals and group practices for submitting these requests for significant hardship exemptions to us (including comments on the type of information we are proposing eligible professionals must submit, the proposed options for how the information could be submitted, and the proposed timeframes for submission).

G Physician Compare Web Site

1. Background and Statutory Authority

Section 10331 (a)(1) of the Affordable Care Act (42 U.S.C. 1395w–5 note) requires that we, by no later than January 1, 2011, develop a Physician Compare Internet Web site with information on physicians enrolled in the Medicare program under section 1866(j) of the Act as well information on other eligible professionals who participate in the Physician Quality Reporting System under section 1848 of the Act (42 U.S.C. 1395w–4). Public

reporting of performance results on standardized quality measures currently exists on *http://www.medicare.gov* for the following:

- Hospitals (Hospital Compare).
- Dialysis facilities (Dialysis Facility Compare).
- Nursing homes (Nursing Home Compare).
- Home health facilities (Home Health Compare).

As an initial step towards providing information on the quality of care for services furnished by physicians and other professionals to Medicare beneficiaries, we have enhanced the existing Physician and Other Health Care Professionals directory at *http://www.medicare.gov* to develop a similar Compare Web site specific to physicians and other professionals. In accordance with section 10331 of the Affordable Care Act, we launched the first phase of the Physician Compare Internet Web site on December 30, 2010. This initial phase included the posting of the names of eligible professionals that satisfactorily submitted quality data for the 2009 Physician Quality Reporting System.

2. Proposed Plans

Section 10331 (a)(2) of the Affordable Care Act also requires that, no later than January 1, 2013, and with respect to reporting periods that begin no earlier than January 1, 2012, we implement a plan for making information on physician performance publicly available through the Physician Compare Web site. To the extent that scientifically sound measures are developed and are available, we are required to include, to the extent practicable, the following types of measures for public reporting:

- Measures collected under the Physician Quality Reporting System.
- An assessment of patient health outcomes and functional status of patients.
- An assessment of the continuity and coordination of care and care transitions, including episodes of care and risk-adjusted resource use.
- An assessment of efficiency.
- An assessment of patient experience and patient, caregiver, and family engagement.
- An assessment of the safety, effectiveness, and timeliness of care.
- Other information as determined appropriate by the Secretary.

As required under section 10331(b) of the Affordable Care Act, in developing and implementing the plan, we must include, to the extent practicable, the following:

- Processes to ensure that data made public are statistically valid, reliable, and accurate, including risk adjustment mechanisms used by the Secretary.
- Processes for physicians and eligible professionals whose information is being publically reported to have a reasonable opportunity, as determined by the Secretary, to review their results before posting to Physician Compare.
- Processes to ensure the data published on Physician Compare provides a robust and accurate portrayal of a physician's performance.
- Data that reflects the care provided to all patients seen by physicians, under both the Medicare program and, to the extent applicable, other payers, to the extent such information would provide a more accurate portrayal of physician performance.
- Processes to ensure appropriate attribution of care when multiple and other providers are involved in the care of the patient.
- Processes to ensure timely statistical performance feedback is provided to physicians concerning the data published on Physician Compare.
- Implementation of computer and data infrastructure and systems used to support valid, reliable, and accurate reporting activities.

Section 10331(d) of the Affordable Care Act requires us to consider input from multi-stakeholder groups in selecting quality measures for Physician Compare. In developing the plan for making information on physician performance publicly available through the Physician Compare Web site, section 10331(e) of the Affordable Care Act requires the Secretary, as the Secretary deems appropriate, to consider the plan to transition to value-based purchasing for physicians and other practitioners that was developed under section 131(d) of the Medicare Improvements for Patients and Providers Act of 2008.

We are required, under section 10331(f) of the Affordable Care Act, to submit a report to the Congress by January 1, 2015 on the Physician Compare Web site developed, and include information on the efforts and plans to collect and publish data on physician quality and efficiency and on patient experience of care in support of value-based purchasing and consumer choice. Section 10331(g) of the Affordable Care Act provides that any time before that date, we may continue to expand the information made available on Physician Compare.

We believe section 10331 of the Affordable Care Act supports our overarching goals to foster transparency and public reporting by providing consumers with quality of care information to make informed decisions about their health care, while encouraging clinicians to improve on the quality of care they provide to their patients. In accordance with Section 10331 of the Affordable Care Act, we intend to utilize the Physician Compare Web site to publicly report physician performance results.

For purposes of implementing a plan to publicly report physician performance, we plan to use data reported under the existing Physician Quality Reporting System as an initial step for making public physician ''measure performance'' information on Physician Compare. By ''measure performance,'' we mean the percent of times that a particular clinical quality action was reported as being performed, or a particular outcome was attained, for the applicable persons to whom a measure applies as described in the denominator for the measure.

The Physician Quality Reporting System is a readily available source of measures performance data. First implemented in 2007, the program grew to include 194 different measures in 2011. The measures used in the Physician Quality Reporting System cover a wide range of health conditions and topics and include measures applicable to most physician specialties and other clinicians. Work is underway to ensure consistency of quality measures reported under the Physician Quality Reporting System and the EHR Incentive Program.

The first phase of the plan to make information on physicians and other eligible professionals who participate in the Physician Quality Reporting System publically available was completed through the launch of the Physician Compare Web site and the posting of the names of those eligible professionals who satisfactorily participated in the Physician Quality Reporting System.

During the second phase of the plan, occurring in 2011 through 2012, we will continue to work towards the development and improvement of the Web site. Our plans for Physician Compare Web site development during this second phase include monthly data refreshes and a semiannual Web site release to incorporate updates and improvements to the Web site. Updates will include the addition of the names of eligible professionals who are successful electronic prescribers, as required by section 1848(m)(5)(G) of the Social Security Act (the Act), as well as the names of those eligible professionals who participate in the EHR Incentive Program, as required by section 1848(o)(3)(D) of the Act. Additional enhancements planned include the addition of links to specialty board Web sites that can provide more information

on an eligible professional's board certification status and improved Web site functionality and layout.

Moving towards the reporting of physician performance information, we propose to take an initial step by making public the performance rates of the quality measures that group practices submit under the 2012 Physician Quality Reporting System group practice reporting option (GPRO) described in section IV.F.b.2. of this proposed rule. We also propose to publicly report the performance rates of the quality measures that the group practices participating in the Physician Group Practice demonstration report on the Physician Compare Web site as early as 2013 for performance information collected in CY 2012. Subject to the discussion later in this section, we would make public the measure performance for each of the measures included in the 2012 Physician Quality Reporting System GPRO. Since the quality measures in GPRO are reported for the group as a whole, the information on measure performance would also apply to the group as a whole, rather than to individual physicians within a group.

Public reporting of the group practices' measure performance results at the group practice level would begin public reporting at the earliest time specified by the statute. We believe the design of the GPRO (see section IV.F.b.2. of this proposed rule) facilitates making public groups' performance results. All groups participating in the GPRO would be reporting on the same set of clinical quality measures, which allows for comparison of the results across groups.

To eliminate the risk of calculating performance rates based on a small denominator, we propose to set a minimum patient sample size threshold. A minimum threshold of 25 patients will have to be met in order for the group practice's measure performance rate to be reported on the Physician Compare Web site. If the threshold of 25 patients is not met for a particular measure, the group's performance rate for that measure would be suppressed and not publically reported. In determining the minimum patient sample size, we took into consideration the minimum patient sample size used by other Compare Web sites that publically report measure performance data. We wanted to ensure that we used a number large enough to accurately reflect measure performance, but not so large that it will limit the number of groups for which measure performance could be reported. In taking into consideration the minimum patient sample size used by other Compare Web sites that publically report measure performance data, we also considered a minimum patient sample size of 10 patients, 20 patients and 30 patients. As we are proposing to report measure performance at a group level and a majority of the other Compare Web sites use minimum sample sizes of between 20 and 30 patients, we concluded that a minimum patient sample size of 25 would meet our criteria.

As discussed in section IV.F.b.2 of this proposed rule, we propose that group practices participating in the 2012 Physician Quality Reporting System GPRO would agree in advance to have their reporting performance results publicly reported as part of their self-nomination to participate in the 2012 Physician Quality Reporting System GPRO. Finally, we propose to modify the GPRO data collection tool for 2012 to calculate the numerator, denominator, and measure performance rate for each measure from the data that the group practices use to populate the tool and provide each group practice this information at the time of tool submission. This feature would allow the group practice the opportunity to review their measure performance results before they are made public in accordance with section 10331(b) of the Affordable Care Act. For groups reporting using GPRO information that is made public in 2013, we do not propose to post information with respect to the measure performance of individual physicians or eligible professionals associated with the group. However, we propose to identify the individual eligible professionals who were associated with the group during the reporting period. We will identify the eligible professionals associated with the group by posting a list of the eligible professionals on the Physician Compare Web site.

We believe a staged approach to public reporting of physician information allows for the use of information currently available while we develop the infrastructure necessary to support the collection of additional types of measures and public reporting of individual physicians' quality measure performance results. Implementation of subsequent phases of the plan will need to be developed and addressed in future notice and comment rulemaking, as needed. We invite comments regarding our proposal to: (1) To publicly report group practices' measure performance results in 2013 based on group practices' 2012 Physician Quality Reporting System performance results under GPRO; and (2) utilize a minimum patient sample size of 25 for reporting and displaying measure performance on the Physician Compare Web site.

H. Medicare EHR Incentive Program for Eligible Professionals for the 2012 Payment Year

1. Background

On July 28, 2010, we published in the **Federal Register** (75 FR 44314) a final rule entitled ''Medicare and Medicaid Programs; Electronic Health Record Incentive Program'' to implement the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5) that amended sections 1848, 1853, and 1886 of the Social Security Act (the Act) to provide incentive payments to eligible professionals (EPs), eligible hospitals, and critical access hospitals (CAHs) participating in the Medicare and Medicaid programs that successfully adopt, implement, upgrade, or demonstrate meaningful use of certified electronic health record (EHR) technology. In that final rule, we specified the initial criteria EPs, eligible hospitals, and CAHs must meet in order to qualify for an incentive payment, including the initial clinical quality measures (CQMs) for which these providers would be required to submit information to the Secretary in the form and manner specified by CMS.

In the July 28, 2010 final rule (75 FR 44430), we stated that for the Medicare EHR Incentive Program, for the 2011 payment year, EPs, eligible hospitals, and CAHs will be required to submit CQM results as calculated by certified EHR technology through attestation, and for the 2012 payment year and subsequent payment years, they will be required to electronically submit CQM results as calculated by certified EHR technology. Additionally, we stated that the primary method for these providers to report required CQM information electronically will be to submit data by an upload process through a CMS-designated portal. In the final rule, we also stated that we anticipated that we would have completed the necessary steps to have the capacity to receive information on CQMs electronically for the 2012 payment year. However, we also stated that if the Secretary does not have the capacity to accept the information on CQMs electronically in 2012, consistent with sections 1848(o)(2)(B)(ii) and 1886(n)(3)(B)(ii) of the Act, then we will continue to rely on attestation for reporting CQMs as a requirement for demonstrating meaningful use of certified EHR technology for the 2012 payment year (75 FR 44380).

We also stated in the final rule that certified EHR technology will be required to calculate the clinical quality measure results and transmit under the Physician Quality Reporting Initiative (PQRI) Registry XML specification (75 FR 44435). Since the publication of the final rule, we have determined that it is not feasible to receive electronically the information necessary for clinical quality measure reporting based solely on the use of PQRI 2009 Registry XML Specification content exchange standards as is required for certified EHR technology. This is because the specification is tailored to the elements required for 2009 PQRI Registry submission, rather than constituting a more generic standard. As a result, we propose to modify the requirement that clinical quality measure reporting must be done electronically. Specifically, we propose that for the 2012 payment year, EPs may continue to report clinical quality measure results as calculated by certified EHR technology by attestation, as for the 2011 payment year.

In addition to attestation, we propose to establish a pilot mechanism through which EPs participating in the Medicare EHR Incentive Program may report CQM information electronically using certified EHR technology for the 2012 payment year. Participation in the pilot would be voluntary and would enable EPs to satisfy the Medicare EHR Incentive Program requirements for reporting CQMs for the 2012 payment year. EPs who choose not to participate in the pilot would be able to continue to use an attestation methodology for reporting CQMs for payment year 2012.

We propose to modify 42 CFR 495.8(a)(2) by adding a new paragraph to allow for the reporting of CQMs for the Medicare EHR Incentive Program via the Physician Quality Reporting System-Medicare EHR Incentive Pilot. Furthermore we are proposing to revise 42 CFR 495.8(a)(2)(ii) by deleting the word ''electronically'' and adding the words ''form and'' such that it reads as follows:

Reporting of clinical quality information. For 42 CFR 495.6(d)(10), 'Report ambulatory clinical quality measures to CMS or, in the case of Medicaid EPs, the States,' report the ambulatory clinical quality measures selected by CMS to CMS (or in the case of Medicaid EPs, the States) in the form and manner specified by CMS (or in the case of Medicaid EPs, the States).

2. The Proposed Physician Quality Reporting System-Medicare EHR Incentive Pilot

We propose to modify 42 CFR 495.8(a)(2) to indicate that EPs participating in the Medicare EHR Incentive Program can meet the CQM reporting requirements of the EHR Incentive Program for payment year 2012 by participating in a pilot, which we refer to as the Physician Quality Reporting System-Medicare EHR Incentive Pilot. Sections 1848(o)(2)(B)(ii) of the Act provides authority for the Secretary to accept information on CQMs electronically on a pilot basis. We propose that EPs may participate in the pilot on a voluntary basis, and that those EPs who choose not to participate may instead continue to attest to the results of the CQMs as calculated by certified EHR technology, consistent with the CQM reporting method for the 2011 payment year. However, we encourage participation in the pilot based on our desire to adequately pilot electronic submission of CQMs and to move to a system of reporting where EPs can satisfy the CQM reporting requirements for both the Physician Quality Reporting System and the EHR Incentive Program. To participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot, we propose that EPs would be required to electronically report the CQMs using certified EHR technology via one of two options that are based on the existing reporting platforms of the Physician Quality Reporting System. As described later in this section, one option would be based on the infrastructure used for the Physician Quality Reporting System EHR data submission vendor reporting mechanism. The second option would be based on the infrastructure used for the Physician Quality Reporting System EHR reporting mechanism. EPs who seek to participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot must also participate in the Physician Quality Reporting System itself, because the pilot will rely on the infrastructure used for Physician Quality Reporting System.

To move towards the integration of reporting on quality measures under the Physician Quality Reporting System with the reporting requirements of the Medicare EHR Incentive Program, as required by section 1848(m)(7) of the Act (''Integration of Physician Quality Reporting and EHR Reporting''), we propose that participation in the Physician Quality Reporting System-Medicare EHR Incentive Pilot would require EPs to submit information on the same CQMs that were adopted for EPs for the Medicare EHR Incentive Program and included in Tables 6 and 7 of the July 28, 2010 final rule (75 FR 44398 through 44410). We propose that EPs participating in this pilot must submit information on the three core measures included in Table 7, up to three of the alternate core measures included in Table 7 insofar as the denominator for one or more of the core measures is zero, and three additional measures from the measures included in Table 6, as is otherwise required by the final rule to successfully demonstrate meaningful use (75 FR 44409 through 44411). EPs that elect to participate in this Physician Quality Reporting System-Medicare EHR Incentive Pilot will still be required to report information on the CQMs as required under the Stage 1 criteria established for the Medicare EHR Incentive Program regardless of which option they select as described later in this section. As the reporting of CQMs is only one of the 15 core meaningful use objectives for EPs for the Medicare EHR Incentive Program, an EP who elects to participate in the proposed Physician Quality Reporting System-Medicare EHR Incentive Pilot would still be required to meet and attest to the remaining 14 core objectives and required menu set objectives using the attestation module on the CMS Web site for the program. Consequently, participation in this pilot only applies to the method of reporting for meeting the meaningful use CQM objective in the EHR Incentive Program (42 CFR 495.6(d)(10)).

To participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot, we propose EPs would be required to electronically report the CQMs by choosing one of the options described later in this section. By submitting the required information through the pilot, an EP could meet the core objective for reporting CQMs for the Medicare EHR Incentive Program for the 2012 payment year. After attesting to all other meaningful use objectives, the EP's attestation file would be placed in a holding status, with respect to the CQM objective only, until the EP reports the CQMs via one of the proposed Physician Quality Reporting System-Medicare EHR Incentive Pilot options. Thus, the EP would not know if he/she successfully met the requirements for the Medicare EHR Incentive Program with respect to the CQM objective until the CQMs are received at the end of the submission period for measures for the Physician Quality Reporting System (we expect this would be 2 months after the close of the reporting period, which is the CY 2012, and no later than February 29, 2013). As explained later in this section, any EP participating in this pilot would be required to report CQMs based on a full calendar year, regardless

of the EP's year of participation in the Medicare EHR Incentive Program.

If the EP who selects one of the pilot options subsequently determines completion of the pilot is unfeasible, then we propose it is permissible for the EP to go back into the Medicare EHR Incentive Program attestation module on the CMS Web site and complete attestation for the CQMs assuming it is within the reporting timeframes established under the EHR Incentive Program. We note that EPs who are in their first year of participation in the EHR Incentive Program and choose to participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot only will have their EHR incentive payments delayed until the data submitted under the Pilot has been analyzed. However, participation in this Physician Quality Reporting System-EHR Incentive Pilot will allow for the receipt of EHR Incentive Program and Physician Quality Reporting System incentives, provided an EP meets the provisions described later in this section.

a. EHR Data Submission Vendor-Based Reporting Option

As discussed further in the Physician Quality Reporting System section IV.F.1(d).(3).(b). of this proposed rule, EPs participating in the Physician Quality Reporting System may choose to report the Physician Quality Reporting System measures to CMS via a Physician Quality Reporting System qualified EHR data submission vendor. For purposes of the Physician Quality Reporting System, a Physician Quality Reporting System qualified EHR data submission vendor would receive data from an EP's EHR and subsequently reformat and transmit the data on behalf of the EP to CMS. Under this reporting option, we propose that an EP participating in the Physician Quality Reporting System-Medicare EHR Incentive Pilot would submit CQM data from his or her certified EHR technology to a Physician Quality Reporting System qualified EHR data submission vendor. We expect to post a list of the 2012 Physician Quality Reporting System EHR data submission vendors that are qualified to submit data from an EP's certified EHR technology to CMS on the EP's behalf on the Physician Quality Reporting System section of the CMS Web site (*http://www.cms.gov/pqrs*) by summer 2012.

Under this option, the Physician Quality Reporting System qualified EHR data submission vendor would obtain data elements for the calculation of CQMs from the EP's certified EHR technology and then submit the calculated results to CMS on the EP's behalf via a secure portal. As discussed previously, in order for an EP to submit CQMs electronically through the Physician Quality Reporting System-Medicare EHR Incentive Pilot EHR data submission vendor-based reporting option, we propose that such EPs must submit information on the same CQMs as required by the July 28, 2010 final rule, which must be based on data contained in the EP's certified EHR technology. However, it would be sufficient for an EP participating in this EHR data submission vendor-based reporting option to submit CQM data as required by the pilot even though such data would differ from what is required by the July 28, 2010 final rule in the following two respects: (1) The data would be limited to Medicare patients rather than all patients, and (2) the data would be based on a CQM reporting period of 1-calendar year regardless of which year of participation in the Medicare EHR Incentive Program the EP is in (resulting in a later determination of whether the EP has successfully demonstrated meaningful use, for those EPs in their first year of program participation). We invite comment on the proposed EHR data submission vendor-based reporting option under the Physician Quality Reporting System-Medicare EHR Incentive Pilot.

b. EHR-Based Reporting Option

As discussed further in the Physician Quality Reporting System section IV.F.1.(d).(3).(a). of this proposed rule, EPs participating in the Physician Quality Reporting System via the EHR reporting mechanism can choose to report the Physician Quality Reporting System measures to CMS directly from the EP's EHR. Therefore, under this EHR-Based reporting option, we propose that an EP participating in the Physician Quality Reporting System-Medicare EHR Incentive Pilot would submit CQM data directly from his or her certified EHR technology to CMS via a secure portal using the infrastructure of the Physician Quality Reporting System EHR reporting mechanism. We propose that in order to participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot under this option, the EP's certified EHR technology must also be a 2012 Physician Quality Reporting System qualified EHR. We expect to post a list of the 2012 Physician Quality Reporting System qualified EHRs on the Physician Quality Reporting System section of the CMS Web site prior to January 1, 2012. Due to this proposed Physician Quality Reporting System-Medicare EHR Incentive Pilot, we are proposing to have an additional vetting process for EHR vendors wishing to participate in the Pilot. We expect to post an additional list of these additional 2012 qualified EHR vendors, if applicable, and their products in the summer of 2012.

As discussed previously, in order for an EP to submit CQMs electronically through the Physician Quality Reporting System-Medicare EHR Incentive Pilot EHR-Based reporting option, we propose that such EPs must submit information on the same CQMs as required by the July 28, 2010 final rule, which must be based on data contained in the EP's certified EHR technology. That is, EPs participating in this pilot must submit information on the three core measures included in Table 7, up to three of the alternate core measures included in Table 7 insofar as the denominator for one or more of the core measures is zero, and three additional measures from the measures included in Table 6, as is otherwise required by the final rule to successfully demonstrate meaningful use. If the EP cannot report three additional measures without zero denominators, the EP must report on all applicable measures (that is, 1 or 2 measures) and attest that all remaining measures have zero denominators. However, as with the EHR data submission vendor-based reporting option, the data would be different from what is required by the July 28, 2010 final rule in that it would be: (1) Limited to Medicare patients rather than all patients; (2) patient-level data from which we may calculate CQM results using a uniform calculation process, rather than aggregate results calculated by the EP's certified EHR technology; and (3) based on a CQM reporting period of 1 calendar year regardless of the EP's year of participation in the Medicare EHR Incentive Program (resulting in a later determination of whether the EP has successfully demonstrated meaningful use, for those EPs in their first year of program participation). We invite comment on the proposed EHR-Based reporting option under the Physician Quality Reporting System-Medicare EHR Incentive Pilot.

In addition, as discussed in the Physician Quality Reporting System section of this proposed rule, we propose if an EP successfully submits all required CQM data from certified EHR technology, which also must be a Physician Quality Reporting System qualified EHR product, directly to CMS, then the EP would also meet the criteria for satisfactory reporting under the 2012 Physician Quality Reporting System, which would also qualify the EP under

the 2012 Physician Quality Reporting System.

The Medicare EHR Incentive Program measures, including the core and alternate core measures, and the 38 additional measures, are specified in the Physician Quality Reporting System's Table 31 of this proposed rule. It should be noted that while the EP is required to use certified EHR technology, the electronic submission format used for this pilot is not a functionality of certified EHR technology. Rather, for purposes of the pilot, the certified EHR technology must conform to the qualifications for an EHR under the Physician Quality Reporting System.

3. Method for EPs To Indicate Election To Participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot for Payment Year 2012

EPs electing to participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot would be able to indicate their intent to fulfill the CQM objective by participating in the Physician Quality Reporting System-Medicare EHR Incentive Pilot under the EHR Incentive Program attestation module. The EHR Incentive Program attestation module is available on the CMS Web site at *https://www.cms.gov/EHRIncentivePrograms/32_Attestation.asp#TopOfPage.*

I. Improvements to the Physician Feedback Program and Establishment of the Value-Based Payment Modifier (Effect of Sections 3003 and 3007 of the Affordable Care Act on the Program)

1. Overview

The requirements of the Physician Feedback Program, in section 1848(n) of the Act, as amended by section 3003(a) of the Affordable Care Act, and the value-based payment modifier (''value modifier''), under section 1848(p) of the Act, as added by section 3007 of the Affordable Care Act, mutually reinforce our goal to provide physicians with fair, actionable and meaningful information concerning resource use and quality regarding their Medicare fee-for-service patients. We view value-based purchasing (''VBP'') as an important step toward revamping not only how care and services are paid for, but also moving increasingly toward rewarding better value, outcomes and innovations instead of volume. The approach used this year and that we anticipate using in future years for the Physician Feedback reports will serve as the testing basis to develop and implement the value modifier, which will be applied to certain physicians and physician groups under the physician fee schedule starting in 2015.

In 2011, we will begin to include the quality measures that are reported in the Physician Quality Reporting System in the Physician Feedback reports. Aligning quality measures reduces potential program inconsistencies, ensures we do not measure the same clinical process or outcome using different data sources or methodologies, and does not place new reporting burdens on physicians. For physicians who participate in the Physician Quality Reporting System, it also identifies clear and consistent opportunities for improvement, because the Feedback reports will show how their performance compares to their peers on the same quality measures.

Under section 1848(p)(4)(B) of the Act, we are required to begin implementing the value modifier through the rulemaking process during 2013, so that it is ready for application to specific physicians and groups of physicians under the physician fee schedule in 2015. We expect the value modifier to evolve after its initial application in 2015. We anticipate that information we have obtained from the Physician Feedback reports, our efforts to learn from and build upon the best transparent practices and methodologies developed in the private sector, and our continued and sustained dialogue with the physician and patient communities will yield significant improvements to the development of the value modifier. We plan to move forward with substantial input from physicians and experts as we continue to develop and implement these programs.

2. Background

As required under section 1848 (n) of the Act, as added by section 131(c) of the Medicare Improvements for Patients and Providers Act and amended by section 3003(a) of the Affordable Care Act, we established and implemented by January 1, 2009, the Physician Resource Use Measurement & Reporting Program (now referred to as the Physician Feedback Program) (74 FR 61844). The purpose of the Physician Feedback Program is to provide confidential reports to physicians that measure the resources involved in furnishing care to Medicare beneficiaries. Section 1848(n) of the Act also authorized us to include information on the quality of care furnished to Medicare beneficiaries by a physician or group of physicians. We have completed two phases of Physician Feedback reports and, by the end of 2011, we intend to implement Phase III of the Physician Feedback Program, by providing reports on both resource use and quality measures that cover a larger number and increased breadth of physicians and groups of physicians.

Phase I was discussed in the CY 2010 PFS proposed and final rules (74 FR 33589 and 74 FR 61844, respectively). In Phase I, we sent to several hundred individual practicing physicians in 12 geographic areas reports that contained per capita and episode-based cost information based on 2007 claims.[1] In creating these reports, we assessed patient attribution models and risk adjustment methodologies. We also tested various report designs with practicing physicians.

In Phase II of the Physician Feedback Program, we expanded on Phase I by providing reports that included quality measures for both individual and groups of physicians in the same 12 geographic areas using the same 2007 claims data. (Phase II was discussed in the CY 2011 PFS proposed and final rules 75 FR 40113 and 75 FR 73377, respectively). The quality measures used were the claims-based measures developed by us in the Generating Medicare Physician Quality Performance Measurement Results (GEM) project (74 FR 61846).[2] This initial core set of 12 quality measures was a first step to provide sufficient quality information to allow peer group comparisons. These measures were calculated using administrative claims data and did not require physicians to submit additional quality data. The measures captured several chronic conditions that are prevalent in the Medicare population and could be applied to all eligible physicians, although the measures were most applicable to primary care physicians.

Phase II reports contained total per capita cost information, as well as total per capita cost information for those beneficiaries with the following five common chronic diseases: (1) Diabetes; (2) congestive heart failure; (3) coronary artery disease; (4) chronic obstructive pulmonary disease; and (5) prostate cancer. This information was not limited to the cost of treating the disease itself, but also included total Parts A and B per capita cost information, as well as service category breakdowns, for the care received by the subset of attributed beneficiaries with that disease. Phase II reports did not include episode-specific cost information (as we had included in the Phase I reports),

[1] The 12 geographic areas are: Boston, MA, Syracuse, NY, Northern New Jersey, Greenville, SC, Miami, FL, Little Rock, AR, Indianapolis, IN, Cleveland, OH, Lansing, MI, Phoenix, AZ, Seattle, WA, and Orange County, CA.

[2] *http://www.cms.gov/GEM.*

because we found that the two commercially available proprietary groupers, which were not built for use with Medicare claims data, did not work well to create episodes for the significant number of Medicare beneficiaries with multiple chronic conditions (75 FR 73378).

We provided Phase II reports to 36 group practices and approximately 1,650 individual physicians who were members of these practices in the 12 geographic areas identified in Phase I. A group was defined as a single provider entity, identified by its tax identification number (TIN), which served at least 5,000 Medicare beneficiaries and in which at least one primary care physician and at least one medical specialist or surgeon in the group billed for Evaluation and Management (E/M) Medicare services. The use of group reports allowed for more robust comparisons on a fuller set of quality measures, because the groups were more likely to have sufficient number of cases to calculate each measure.

We used a ''single-provider plurality-minimum [3]'' method to attribute beneficiaries to the 36 group practices and the individual physicians. This method was based on the highest number of E/M services furnished by an individual physician and a minimum threshold of 20 percent of E/M costs.[4] Attribution of a beneficiary to a group practice was based on the group practice that provided the plurality of E/M services and a minimum threshold of 30 percent of E/M costs. For both individuals and groups, we required at least 30 beneficiaries to be assigned to either the individual or the group practice.[5] Seventy percent of eligible beneficiaries were attributed to an individual physician or group practice. These beneficiaries accounted for 53 percent of total Parts A and B costs but covered only 30 percent of individual physicians.

Our data analysis showed that the single-provider plurality-minimum rule generally assigned Medicare beneficiaries correctly to primary care physicians including internists, geriatricians, family practitioners, and general practitioners. However, this rule did not work well to attribute beneficiaries with multiple conditions that see a variety of physicians, because a single physician was unlikely to have both provided the plurality of E/M visits and to have also accounted for 20 percent of E/M costs.

As in Phase I, we price standardized the cost data to adjust for geographic differences. We also employed the same method of risk adjustment for per capita costs as we use in the Medicare Advantage (MA) program; that is, the hierarchal condition category (HCC) model for the cost data.[6] We did not risk-adjust the quality data included in Phase II, because the GEM measures are all clinical process measures, measure specifications provided detailed inclusion/exclusion criteria, and it is generally accepted that these measures need not be risk adjusted.

The individual-level reports in both phases of the program contained two peer group comparisons: (1) Physicians in the same specialty in the same geographic area; and (2) physicians in the same specialty across all 12 geographic areas. Peer group comparisons were made for both measures of cost and quality. We imposed a minimum peer group size of 30 physicians in Phase II for each of the cost and quality measures to ensure the group comparisons were credible to the physicians being compared. For the per capita cost measures, the physician was shown his or her position in a distribution that specifically identified the 10th, 50th, and 90th percentiles of performance.

3. Future Considerations for Phase III Physician Feedback Program

a. Phase III Physician Feedback Reports (Fall 2011)

Based on the experience gained so far and our plan to provide reports to a greater number and percentage of physicians, we intend to increase production and dissemination of Physician Feedback reports. In 2011, we are examining several approaches to developing and disseminating reports based on our 2010 experience. We believe that many of the issues we address in these reports will assist us as we begin to implement the value modifier in 2013.

We anticipate using quality measures reported in the Physician Quality Reporting System in the Physician Feedback reports this year. We further believe that use of these measures will begin to reduce potential program inconsistencies, ensure we do not measure the same clinical process or outcome using different data sources or methodologies, and not place new reporting burdens on physicians. In addition, elsewhere in this proposed rule, we are proposing to align the quality measures in the Physician Quality Reporting System with the Electronic Health Records incentive program quality measures. We seek comment on using the performance data in the Physician Quality Reporting System in the Physician Feedback program and on other issues discussed below that could help inform future phases of the Physician Feedback program.

(1) Physician Group Reports

We intend to create physician feedback reports for the 35 large medical group practices (each with 200 or more physicians) that chose to participate in the Physician Quality Reporting System Group Practice Reporting Option (GPRO–1) in 2010. We specifically chose these medical groups, because they could be compared on the common set of 26 quality measures included in the GPRO–1 reporting tool. The reports will be e-mailed to each group. We anticipate scheduling outreach and feedback sessions following dissemination of these reports to garner physician reaction to the information contained in the reports and elicit physician input on ways to increase their utility in future years.

The resource use portion of these reports will present summary information based on 2010 Medicare Parts A and B paid claims for all Medicare providers paid under the PFS who treated patients attributed to a participating medical practice group. This information will allow each group to compare its per capita Medicare costs to the per capita Medicare costs attributed to all 35 medical practice groups that participated in the 2010 GPRO–1 cohort. In addition, the report will show each medical group its average per capita costs for various types of fee-for-service patient services. The reports will also display group-specific data on per capita costs and hospital utilization of patients who have chronic conditions such as diabetes, heart failure, COPD, and coronary artery disease. Data in these reports will be risk adjusted and price standardized in a similar manner to the Phase II reports.

[3] Under a ''single-provider plurality-minimum'' attribution method, a beneficiary is attributed to the one physician who furnished the plurality of the beneficiary's E/M services during the year so long as that physician billed at least 20 percent of the beneficiary's E/M allowed charges for the year. If a beneficiary did not receive the plurality of services from the same physician that met the 20 percent minimum, the beneficiary was not assigned to a physician. For a more detailed discussion of methodology issues, see the Detailed Methodology Specification, available at *https://www.cms.gov/PhysicianFeedbackProgram/Downloads/2010_QRUR_Detailed_Methodology.pdf.*

[4] Costs refer to allowed charges for Part A and B services.

[5] We chose 30 beneficiaries because this threshold is commonly used for attribution purposes.

[6] For more information about hierarchal condition categories model, see *https://www.cms.gov/MedicareAdvtgSpecRateStats/downloads/Evaluation_Risk_Adj_Model_2011.pdf.*

The quality portion of these reports will present the group's performance on each of the 26 quality measures included in the Physician Quality Reporting System 2010 GPRO–1 reporting option. It will also show the average rate of preventable hospital admissions (for which a lower rate is better) for six ambulatory care-sensitive conditions: Diabetes, bacterial pneumonia, dehydration, chronic obstructive pulmonary disease (COPD), urinary tract infection, and congestive heart failure. The information presented will also allow each group to compare its performance to the performance of all of the 35 medical practice groups that participated in the 2010 GPRO–1 cohort.

(2) Reports to Individual Physicians

Late in 2011, we also intend to disseminate Physician Feedback reports to physicians paid under the PFS within four states: Iowa, Kansas, Missouri, and Nebraska. We choose these four states because the Medicare Administrative Contractor (MAC) serving these states can assist us in e-mailing these reports to a substantial number of physicians because of its robust electronic communications infrastructure. There are approximately 56,000 physicians in these four states. We realize, however, that we will not produce reports for all of these physicians, because some portion of the total will not have sufficient numbers of fee-for-service Medicare patients to qualify for a report based on the attribution rules we use. As discussed later in this section, we are examining which attribution rules to apply to these individual reports.

Individual physicians in these four States who satisfactorily reported data on quality measures under the Physician Quality Reporting System will receive a report that includes their performance on these quality measures. In addition, individual reports will display clinical quality measures that are derived from Medicare claims for all physicians in these four States. We used an internal multi-step process among our medical officers (who represent a variety of medical specialties) and other internal experts to identify these claims-based quality measures. Our medical officers and internal experts thoroughly reviewed over 70 claims-based National Quality Forum-endorsed measures and ultimately recommended 28 claims-based clinical measures to include in the 2011 individual physician reports. These measures include the 12 HEDIS measures that CMS included in the 2010 reports. Use of these 28 measures in the 2011 reports will allow us to have a sufficient number of cases to make peer group comparisons, which we believe are a critical component of the Physician Feedback program. The claims-based clinical measures for the 2011 individual physician feedback reports are displayed in Table 61 and additional information on these measures is available at: *http://www.cms.gov/physicianfeedbackprogram/.*

TABLE 61—CLAIMS-BASED MEASURES FOR THE 2011 INDIVIDUAL PHYSICIAN FEEDBACK REPORTS

Measure No.	Measure title and description	NQF measure No. or measure steward *	Source of data
1	Acute Myocardial Infarction (AMI): Persistence of Beta-Blocker Treatment After a Heart Attack. Percentage of patients age 18 years and older during the measurement year who were hospitalized and discharged alive with a diagnosis of acute myocardial infarction (AMI) and who received persistent beta-blocker treatment for six months after discharge.	0071	Administrative Claims.
2	Use of Spirometry Testing in the Assessment and Diagnosis of COPD) Percentage of patients at least 40 years old who have a new diagnosis or newly active chronic obstructive pulmonary disease (COPD) who received appropriate spirometry testing to confirm the diagnosis.	0577	Administrative Claims.
3	Antidepressant Medication Management: (a) Effective Acute Phase Treatment. Percentage of patients who were diagnosed with a new episode of depression and treated with antidepressant medication and who remained on an antidepressant drug during the entire 84-day Acute Treatment Phase. (b) Effective Continuation Phase Treatment. Percentage of patients who were diagnosed with a new episode of depression and treated with antidepressant medication and who remained on an antidepressant drug for at least 180 days.	0105	Administrative Claims.
4	Follow-Up After Hospitalization for Mental Illness Percentage of discharges for patients who were hospitalized for treatment of selected mental health disorders and who had an outpatient visit, an intensive outpatient encounter, or partial hospitalization with a mental health practitioner. Two rates are reported: Rate 1: Percentage of patients who received follow-up within 30 days of discharge. Rate 2: Percentage of patients who received follow-up within 7 days of discharge.	0576	Administrative Claims.
5	Osteoporosis management in women who had a fracture Percentage of women 67 years and older who suffered a fracture and who had either a bone mineral density (BMD) test or prescription for a drug to treat or prevent osteoporosis in the six months after the date of fracture.	0053	Administrative Claims.
6	Use of High-Risk Medications in the Elderly: (a) Patients Who Receive At Least One Drug To Be Avoided. Percentage of patients ages 65 years and older who received at least one high-risk medication in the measurement year. (b) Patients Who Receive At Least Two Different Drugs To Be Avoided.	0022	Administrative Claims.

TABLE 61—CLAIMS-BASED MEASURES FOR THE 2011 INDIVIDUAL PHYSICIAN FEEDBACK REPORTS—Continued

Measure No.	Measure title and description	NQF measure No. or measure steward *	Source of data
	Percentage of patients 65 years of age and older who received at least two different high-risk medications in the measurement year.		
7	Potentially Harmful Drug-Disease Interactions in the Elderly Percentage of Medicare patients 65 years of age and older who have evidence of an underlying disease, condition or health concern and who were dispensed an ambulatory prescription for a contraindicated medication, concurrent with or after the diagnosis. Report each of the three rates separately and as a total rate: Rate 1: A history of falls and a prescription for tricyclic antidepressants, antipsychotics or sleep agents. Rate 2: Dementia and a prescription for tricyclic antidepressants or anticholinergic agents. Rate 3: Chronic renal failure (CRF) and prescription for nonaspirin NSAIDs or Cox-2 Selective NSAIDs. Total rate: The sum of the three numerators divided by the sum of the three denominators.	National Committee for Quality Assurance (NCQA).	Administrative Claims.
8	International Normalized Ration (INR) for Beneficiaries Taking Warfarin and Interacting Anti-Infective Medications. Percentage of episodes with an INR test performed 3 to 7 days after a newly-started interacting anti-infective medication for Part D beneficiaries receiving warfarin.	0556	Administrative Claims.
9	Appropriate Follow-Up for Patients with HIV Percentage of patients diagnosed with HIV who received a CD4 count and an HIV RNA level laboratory test in the 6 months following diagnosis.	0568	Administrative Claims.
10	Ischemic Vascular Disease (IVD): Complete Lipid Profile Percentage of patients 18 years of age and older who were discharged alive for acute myocardial infarction (AMI), coronary artery bypass graft (CABG) or percutaneous coronary interventions (PCI) from January 1–November 1 of the year prior to the measurement year, or who had a diagnosis of ischemic vascular disease (IVD) during the measurement year and the year prior to measurement year, who had a complete lipid profile during the measurement year.	0075	Administrative Claims.
11	Breast Cancer—Cancer Surveillance Percentage of female patients 18 and older with breast cancer who had breast cancer surveillance in the past 12 months.	0623	Administrative Claims.
12	Prostate Cancer—Cancer Surveillance Percentage of males with prostate cancer that have had their PSA monitored in the past 12 months.	0625	Administrative Claims.
13	Diabetes: Eye Exam Percentage of adult patients with diabetes aged 18–75 years who received a dilated eye exam by an ophthalmologist or optometrist during the measurement year, or had a negative retinal exam (no evidence of retinopathy) by an eye care professional in the year prior to the measurement year.	0055	Administrative Claims.
14	Diabetes: Hemoglobin A1c Testing Percentage of adult patients with diabetes aged 18–75 years receiving one or more A1c test(s) per year.	0057	Administrative Claims.
15	Diabetes: Medical Attention for Nephropathy Percentage of adult diabetes patients aged 18–75 years with at least one test nephropathy screening test during the measurement year or who had evidence existing nephropathy (diagnosis of nephropathy or documentation of microalbuminuria or albuminuria).	0062	Administrative Claims.
16	Diabetes: LDL–C Screening Percentage of adult patients with diabetes aged 18–75 who had an LDL–C test performed during the measurement year.	NCQA	Administrative Claims.
17	Pharmacotherapy Management of COPD Exacerbation Percentage of chronic obstructive pulmonary disease (COPD) exacerbations for patients 40 years of age and older who had an acute inpatient discharge or ED encounter between January 1–November 30 of the measurement year and were dispensed appropriate medications. Two rates are reported: Rate 1: Dispensed a systemic corticosteroid within 14 days of the event. Rate 2: Dispensed a bronchodilator within 30 days of the event. Note: The eligible population for this measure is based on acute inpatient discharges and emergency department (ED) visits, not on patients; it is possible for the denominator to include multiple events for the same individual.	0549	Administrative Claims.

TABLE 61—CLAIMS-BASED MEASURES FOR THE 2011 INDIVIDUAL PHYSICIAN FEEDBACK REPORTS—Continued

Measure No.	Measure title and description	NQF measure No. or measure steward *	Source of data
18	Arthritis: Disease Modifying Antirheumatic Drug (DMARD) Therapy in Rheumatoid Arthritis. Percentage of patients 18 years and older, diagnosed with rheumatoid arthritis who have had at least one ambulatory prescription dispensed for a DMARD.	0054	Administrative Claims.
19	Coronary Artery Disease and Medication Possession Ratio for Statin Therapy. Medication Possession Ratio (MPR) for statin therapy for individuals over 18 years of age with coronary artery disease. Rate 1: Percentage of patients who are prescribed statin therapy in the measurement year. Rate 2: Average Medication Possession Ratio (MPR) of patients in the measurement year (MPR = the days supply of medication divided by the number of days in the measurement period). Rate 3: The percentage of patients with MPR $\geq$ 0.80 in the measurement year.	0543	Administrative Claims.
20	Therapeutic Monitoring: Annual Monitoring for Patients on Persistent Medications. Percentage of patients 18 years of age and older who received at least 180 treatment days of ambulatory medication therapy for a select therapeutic agent during the measurement year and at least one therapeutic monitoring event for the therapeutic agent in the measurement year. Report each of the four rates separately and as a total rate: Rate 1: Annual monitoring for patients on angiotensin converting enzyme (ACE) inhibitors or angiotensin receptor blockers (ARB). Rate 2: Annual monitoring for patients on digoxin. Rate 3: Annual monitoring for patients on diuretics. Rate 4: Annual monitoring for patients on anticonvulsants. Total Rate: The sum of the four numerators divided by the sum of the four denominators.	0021	Administrative Claims.
21	Deep Vein Thrombosis Anticoagulation At Least 3 Months Percentage of patients diagnosed with a lower extremity DVT more than 3 months prior to the end of the measurement year (who do not have contraindications to warfarin therapy and who do not have an IVC filter in the 90 days after the onset of PE) who had at least 3 months of anticoagulation after the event or patients showing compliance with anticoagulation therapy as indicated by a Home PT Monitoring device or multiple instances of prothrombin time testing over the 3-month period.	0581	Administrative Claims.
22	Pulmonary Embolism Anticoagulation At Least 3 Months Percentage of patients diagnosed with a PE more than 3 months prior to the end of the measurement year (who do not have contraindications to warfarin therapy and who do not have an IVC filter in the 90 days after the onset of PE) who had at least 3 months of anticoagulation after the event or patients showing compliance with anticoagulation therapy as indicated by a Home PT Monitoring device or multiple instances of prothrombin time testing over the 3-month period.	0593	Administrative Claims.
23	Monthly INR Monitoring for Beneficiaries on Warfarin Average percentage of 40-day intervals in which Part D beneficiaries with claims for warfarin do not receive an INR test during the measurement period.	0555	Administrative Claims.
24	Steroid Use—Osteoporosis Screening Percentage of patients, 18 and older, who have been on chronic steroids for at least 180 days in the past 9 months and who had a bone density evaluation or osteoporosis treatment.	0614	Administrative Claims.
25	Appropriate Work-Up Prior To Endometrial Ablation Procedure Percentage of women who had an endometrial ablation procedure during the measurement year who received endometrial sampling or hysteroscopy with biopsy during the previous year.	0567	Administrative Claims.
26	Breast Cancer Screening Percentage of eligible women 40–69 who receive a mammogram in during the measurement year or in the year prior to the measurement year.	0031	Administrative Claims.
27	Hepatitis C: Viral Load Test Percentage of patients 18 years or older with Hepatitis C (HCV) who began HCV antiviral therapy during the measurement year and had HCV Viral Load testing prior to initiation of antiviral therapy.	0584	Administrative Claims.
28	Dyslipidemia New Medication 12-Week Lipid Test	0583	Administrative Claims.

TABLE 61—CLAIMS-BASED MEASURES FOR THE 2011 INDIVIDUAL PHYSICIAN FEEDBACK REPORTS—Continued

Measure No.	Measure title and description	NQF measure No. or measure steward*	Source of data
	Percentage of patients age 18 or older starting lipid-lowering medication during the measurement year who had a lipid panel checked within 3 months after starting drug therapy.		

*The NQF measure number is reported unless the measure is not NQF-endorsed, in which case the measure steward is reported.

The individual reports will not contain the average rate of preventable hospital admissions for the six ambulatory care-sensitive conditions identified above because these measures are not specified at the individual physician level at this time.

We again plan to display resource use measures that reflect average per capita cost for a given physician's Medicare patients. In addition to comparing average per capita costs of one physician's patients to the average per capita costs of his/her peers' patients, the reports will compare total per capita costs for patients with the following chronic conditions: Heart failure, chronic pulmonary obstructive disease (COPD), diabetes, and coronary artery disease.

b. Refinement of the Physician Feedback Program in 2011: Individual Physicians/Medical Group Practices/Specialties

As stated in the CY 2011 PFS proposed rule, deciding which physician(s) is/are responsible for the care of which beneficiaries is an important aspect of measurement (75 FR 40115). When attributing beneficiary cost information to physicians, we must balance between costs for delivered services that are within the physician's control and costs for delivered services that are not within their control. We recognize that attribution rules have the potential to alter incentives regarding how physicians coordinate and deliver care to beneficiaries and seek to encourage better care coordination and accountability for patient outcomes. In addition, determining how to make relevant comparisons of physicians to a standard or to their peers is also an important policy aspect of the Physician Feedback Program. In light of these issues, we are engaging in the efforts described below to help inform how to develop and produce this and future year's reports.

First, we are examining alternative attribution methods that would allow more Medicare beneficiaries to be matched to physicians for purposes of assessing the quality of care furnished and the associated resources. We plan to explore broader attribution models than we used in last year's Physician Feedback reports, in which beneficiaries were attributed to physicians/groups based on E/M services and a minimum cost threshold. Cost of service rules, for example, may better apply to physicians who commonly furnish surgical procedures or interventions, especially those that are high volume and/or high cost. We anticipate combining this effort with work to identify quality measures appropriate to the practices of these specialists. We recognize that characteristics of physicians and the scope of their medical practices vary far more than those of other provider types such as hospitals, home health agencies, and nursing homes and, thus, we want to ensure we develop sound attribution rules that recognize these variations and are appropriate for physicians.

We also are planning to investigate stratifying physicians by specialty and by the conditions they treat, which would allow both cost and clinical measures to reflect procedures and services that best portray physician practice patterns.

Second, we intend to examine whether to provide reports to groups of physicians who submit Medicare claims under a single tax identification number (TIN) to see if we can provide feedback reports that cover more physicians. TIN-level reporting may prove useful in situations where individual physicians have too few of some types of patients to allow for accurate reporting of cost measures or certain quality measures.

We seek comment on these and any other issues to ensure that the future Physician Feedback reports provide meaningful and actionable information.

c. Beyond 2011: Future Scale Up and Dissemination for Increased Physician Feedback Reporting

In CY 2012, we expect to expand dissemination of reports to cover 100,000 physicians nationally. In 2012, we expect to be able to evaluate whether leveraging the quality measures in the Physician Quality Reporting System will help achieve this goal. We recognize that our current inventory of quality measures, both claims-based and those used in the 2010 GPRO–1 quality measures, best covers primary care practitioners including family physicians, general practitioners, internists, geriatricians, and related medical non-procedural specialists. As the scope of measures, including outcomes, in the Physician Quality Reporting System increases and as more physicians report measures, we expect to be able to provide meaningful and actionable quality information to an increasing number of physicians. This increased participation will increase the breadth of Medicare physicians for whom Physician Feedback reports can be created.

Second, section 1848(n)(9)(A) of the Act, as added by section 3003 of the Affordable Care Act, requires the development, by not later than January 1, 2012, of a Medicare-specific episode grouper so that physicians can be compared on episode-based costs of care. The episode grouper will require further testing and refinement in order to see how well it integrates with other parameters, such as attribution and benchmarking, before it can be fully operational. The episode grouper is being developed to determine episode-based costs for a subset of selected high cost, high volume conditions for Medicare beneficiaries, including six of the following nine conditions: Hip fracture/hip replacement; pneumonia; heart attack; coronary artery disease; asthma; COPD; stroke; diabetes; and heart failure. Aspects of the episode grouper could be applied, on a limited basis, in Physician Feedback reports in 2012 or 2013, depending upon the testing and validation of the methodology. Section 1848(n)(9)(A)(iv) of the Act requires that the Secretary seek endorsement of the grouper by an entity with a contract under section 1890(a) of the Act. Plans to secure this endorsement are under development. We plan to make details of the Medicare grouper publicly available as required by section 1848(n)(9)(A)(iii)) of the Act.

In addition, we will continue to monitor developments regarding the National Quality Forum's project regarding resource use measures. Learning from this project is likely to help refine the next steps related to the scale up of the Physician Feedback reports.

Lastly, we will pursue how best to incorporate the production and dissemination of the feedback reports into the IT infrastructure of the agency. For example, in this year's reports we plan to use the Medicare Administrative Contractor to distribute the individual physician reports by e-mail. It is our intent in future years to use other mechanisms, such as a secure portal, for physicians to obtain and review their reports. It is critical for us to plan for the very significant, and ongoing, data and dissemination infrastructure that must be built for us to provide feedback reports to all physicians paid under the PFS.

As the science of quality measurement improves, attribution methodologies mature, participation rates in our reporting programs increase, and our IT infrastructure evolves, we will determine how best to incorporate these advances into a better physician feedback program. Furthermore, it is our intent to engage in continued dialogue with the physician community about ways to improve these reports and their dissemination.

4. The Value-Based Payment Modifier: Section 3007 of the Affordable Care Act

Section 1848(p) of the Act, as added by Section 3007 of the Affordable Care Act, requires the Secretary to ''establish a payment modifier that provides for differential payment to a physician or a group of physicians'' under the physician fee schedule ''based upon the quality of care furnished compared to cost * * * during a performance period.'' The provision requires that ''such payment modifier be separate from the geographic adjustment factors'' established for the physician fee schedule. We believe that this provision requires the Secretary to establish a differential payment under the physician fee schedule to reflect ''value,'' for example, the quality of care compared to cost, and that the value modifier is independent from the geographic adjustments applied under the fee schedule.

Section 1848(p)(4)(C) of the Act requires that the value modifier be implemented in a budget-neutral manner. Budget neutrality means that payments will increase for some physicians but decrease for others, but the aggregate amount of Medicare spending in any given year for physicians' services will not change as a result of application of the value modifier. Over time, we expect that implementation of the value modifier will lead to more efficient use of services.

Section 1848(p)(4)(A) and (B) of the Act establish the time frame for implementation of the value modifier. Section 1848(p)(4)(B)(iii) of the Act requires the Secretary to apply the value modifier beginning January 1, 2015 to specific physicians and groups of physicians the Secretary determines appropriate. This section also requires the Secretary to apply the value modifier with respect to all physicians and groups of physicians beginning not later than January 1, 2017.

Section 1848(p)(4) of the Act requires the Secretary to take a series of steps, beginning not later than January 1, 2012, and leading up to implementation of the value modifier on January 1, 2015. Section 1848(p)(4)(A) of the Act requires us to publish, not later than January 1, 2012, three items related to the establishment of the value modifier: (a) The quality of care and cost measures established by the Secretary for purposes of the modifier; (b) the dates for implementation of the value modifier; and (c) the initial performance period for application of value modifier in 2015.

Section 1848(p)(4)(B) of the Act requires the Secretary to begin implementing the value modifier through the physician fee schedule rulemaking process during 2013; this rulemaking would apply to value modifier payment adjustments for 2015. Section 1848(p)(4)(B) of the Act further requires the Secretary, to the extent practicable during the initial performance period, to provide information to physicians and physician groups about the quality of care furnished by the physician or group of physicians to Medicare beneficiaries compared to cost.

The value modifier is an important component in revamping how care and services are paid for under the physician fee schedule. Currently, payments under the physician fee schedule are generally based on the relative resources involved with furnishing each service, and adjusted for differences in resource inputs among geographic areas. Thus, all physicians in a geographic area are paid the same amount for individual services regardless of the quality of care or outcomes of services they furnish.

Although the fee schedule payments are or will soon be adjusted depending upon whether eligible professionals are satisfactory reporters of PQRS quality measures, successful electronic prescribers and meaningful users of electronic health records (EHRs),[7] these adjustments do not currently take into account performance on these quality measures. In addition, the fee schedule does not take into account the overall cost of services furnished or ordered by physicians for individual Medicare beneficiaries. These limitations mean that the physician fee schedule does not contain incentives for physicians to focus on: (1) The relative cost or value of each service they furnish or order; (2) the cumulative cost of their own services and the services that their beneficiaries receive from other providers; or (3) the quality and outcomes of all the care furnished to beneficiaries.[8]

We note that Medicare is beginning to implement value-based payment adjustments for other types of services. For example, recently, we published a final rule to implement the hospital value-based purchasing program that will affect hospitals beginning with FY 2013 discharges (76 FR 26490). In addition, section 3006 of the Affordable Care Act requires us to develop a plan to implement value-based purchasing programs for skilled nursing facilities, home health agencies, and ambulatory surgical centers. We view the physician value modifier as the companion value-based payment mechanism for physicians.

In implementing value-based purchasing initiatives generally, we seek to meet the following goals:

- Improving quality.

++ Value-based payment systems and public reporting should rely on a mix of standards, processes, outcomes, and patient experience measures, including measures of care transitions and changes in patient functional status. Across all programs, we seek to move as quickly as possible to the use of outcome and patient experience measures. To the extent practicable and appropriate, we believe these outcome and patient experience measures should be adjusted for risk or other appropriate patient population or provider characteristics.

++ To the extent possible, and recognizing differences in payment system readiness and statutory requirements and authorities, measures should be aligned across Medicare and Medicaid's public reporting and payment systems. We seek to evolve a focused core set of measures appropriate to each specific provider category that reflects the level of care and the most

[7] See, for example, section 1848(a)(8) of the Act, as added by section 3002(b) of the Affordable Care Act; section 1848(a)(7)(A) of the Act, as added by section Sec 4101 (b) of the HITECH Act.

[8] Source: MedPAC, Report to the Congress: Reforming the Delivery System, Chapter 1 (June 2008), available at: *http://www.medpac.gov/documents/Jun08_EntireReport.pdf.*

important areas of service and measures for that provider.

++ The collection of information should minimize the burden on providers to the extent possible. As part of that effort, we will continuously seek to align our measures with the adoption of meaningful use standards for health information technology (HIT), so the collection of performance information is part of care delivery.

++ To the extent practicable, measures used by us should be nationally endorsed by a multi-stakeholder organization. Measures should be aligned with best practices among other payers and the needs of the end users of the measures.

• Lowering per-capita growth in expenditures.

++ Providers should be accountable for the cost of care, and be rewarded for reducing unnecessary expenditures and be responsible for excess expenditures.

++ In reducing excess expenditures, providers should continually improve the quality of care they deliver.

++ To the extent possible, and recognizing differences in payers' value based purchasing initiatives, providers should apply cost-reducing and quality-improving redesigned care processes to their entire patient population.

Our experience with providing physicians confidential feedback reports, which include various measures of cost and quality, is helping us to design and develop the value modifier. In addition, we seek to build upon best practices that have evolved in the private sector to provide meaningful and actionable information to physicians. For example, we recognize the importance of transparent methodologies and of procedural safeguards necessary to provide physicians with an opportunity to review the value modifier such as the one we will develop.[9]

We intend to move both deliberately and carefully because we recognize the complexities of calculating a reliable and valid measure of value that compares physicians against their peers and uses the measure to differentiate payment. We view this rulemaking as one part of an ongoing and extensive dialogue with health care stakeholders on how best to ensure development of a fair, meaningful, and actionable value modifier on which to differentiate payments to physicians.

a. Measures of Quality of Care and Costs

(1) Quality of Care Measures

Section 1848(p)(2) of the Act requires that the quality of care be evaluated, to the extent practicable, based on a composite of measures of the quality of care furnished. Section 1848(p)(2)(B) of the Act requires that the Secretary establish appropriate measures of the quality of care furnished by a physician or a group of physicians to Medicare beneficiaries such as measures that reflect health outcomes. The statute requires the measures to be risk adjusted as determined appropriate by the Secretary. Section 1848(p)(2)(B)(ii) of the Act requires the Secretary to seek endorsement of the quality of care measures by the entity with a contract under section 1890(a) of the Act, which is the National Quality Forum.

In establishing the quality of care measures for the value modifier, our interest is to move toward a core set of measures so that we can assess and benchmark physician performance. We are interested in ensuring that this set of core measures includes outcome measures, especially for care provided by specialists. We also want to start a discussion of potential measures that could provide a richer picture of the quality of care furnished by a physician. At our September 24, 2010, Listening Session on the Physician Feedback Program and Implementation of the Value-Based Payment Modifier for Fee-for-Service Medicare, the stakeholder community suggested the need for additional quality measures that focus on care coordination/care transitions, patient experience, and outcomes such as functional health status.[10] We agree with these suggestions and believe that these measures could provide a richer picture of the quality of care furnished by physicians to Medicare beneficiaries.

We view the requirement for the Secretary to establish, by January 1, 2012, the quality measures for the value modifier to be the first step in identifying a robust core set of measures of the quality of care furnished by physicians for use in the value modifier. We envision incorporating additional quality measures into the value modifier over time.

(A) Proposed Quality of Care Measures for the Value-Modifier

For purposes of section 1848(p)(4)(A)(i) of the Act, we propose to use performance on: (1) The measures in the core set of the Physician Quality Reporting System for 2012; (2) all measures in the GPRO of the Physician Quality Reporting System for 2012; and (3) the core measures, alternate core, and 38 additional measures in the Electronic Health Record Incentive Program measures for 2012. Table 62 lists these measures. We recognize that there are measures common to these two programs because they are derived from the proposed 2012 Physician Quality Reporting System and may be available for reporting in other CMS programs, such as the Medicare and Medicaid EHR Incentive Program as well as the Medicare Shared Savings Program. We note that measure titles, in some instances, may vary from program to program. Once these measures are finalized, we will identify the measures more fully to eliminate any duplication.

TABLE 62—PROPOSED QUALITY MEASURES FOR THE VALUE MODIFIER

Physician quality reporting system No.	Measure title	NQF Measure No.	Measure developer	EHR Incentive program	PQRS GPRO	PQRS Core
110	Preventative Care and Screening: Influenza Immunization for Patients ≥ 50 Years Old.	0041	AMA–PCPI	X	X	
111	Preventive Care and Screening: Pneumonia Vaccination for Patients 65 Years and Older.	0043	NCQA	X	X	
112	Preventive Care and Screening: Screening Mammography.	0031	NCQA	X	X	

[9] See for example Ambulatory Quality Alliance, Performance Measurement Workgroup materials, available at: *http://www.ambulatoryqualityalliance.org/performancewg.htm;* New York Attorney General Settlement with Excellus, available at: *http://www.ag.ny.gov/bureaus/health_care/pdfs/Excellus%20Settlement.pdf.*

[10] Listening Session Regarding: Physician Feedback Program and Implementation of the Value-Based Payment Modifier for Fee-for-Service Medicare (Sept. 24, 2010) (see, for example, comments of Pacific Business Group on Health, Consumer Purchaser Disclosure Project), transcript available at: *https://www.cms.gov/PhysicianFeedbackProgram/Downloads/092410_Listening_Session_Feedback_Program_Transcript.pdf.*

TABLE 62—PROPOSED QUALITY MEASURES FOR THE VALUE MODIFIER—Continued

Physician quality reporting system No.	Measure title	NQF Measure No.	Measure developer	EHR Incentive program	PQRS GPRO	PQRS Core
113	Preventive Care and Screening: Colorectal Cancer Screening.	0034	NCQA	X	X	
128	Preventive Care and Screening: Body Mass Index (BMI) Screening and Follow-up.	0421	CMS–QIP	X		
TBD	Preventive Care: Cholesterol-LDL test performed.	N/A	CMS			X
TBD	Falls: Screening for Falls Risk	101	NCQA		X	
TBD	Cervical Cancer Screening	0032	NCQA	X		
226	Preventive Care and Screening: Tobacco Use: Screening and Cessation Intervention.	0028	AMA–PCPI	X	X	X
235	Hypertension (HTN): Plan of Care	0017	AMA–PCPI		X	
236	Controlling High Blood Pressure	0018	NCQA	X	X	X
237	Hypertension (HTN): Blood Pressure Measurement.	0013	AMA–PCPI	X	X	
TBD	Proportion of adults 18 years and older who have had their BP measured within the preceding 2 years.	N/A	CMS		X	X
6	Coronary Artery Disease (CAD): Oral Antiplatelet Therapy Prescribed for Patients with CAD.	0067	AMA–PCPI	X	X	
7	Coronary Artery Disease (CAD): Beta-Blocker Therapy for CAD Patients with Prior Myocardial Infarction (MI).	0070	AMA–PCPI	X	X	
118	Coronary Artery Disease (CAD): Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Patients with CAD and Diabetes and/or Left Ventricular Systolic Dysfunction (LVSD).	0066	AMA–PCPI		X	
TBD	Coronary Artery Disease (CAD): LDL <100 mg/dl.	NA	CMS		X	
197	Coronary Artery Disease (CAD): Lipid Control	0074	AMA–PCPI	X	X	
201	Ischemic Vascular Disease (IVD): Blood Pressure Management Control.	0073	NCQA	X	X	
204	Ischemic Vascular Disease (IVD): Use of Aspirin or another Antithrombotic.	0068	NCQA	X	X	X
TBD	Ischemic Vascular Disease (IVD): Complete Lipid Profile and LDL Control < 100 mg/dl.	0075	NCQA	x	X	X
5	Heart Failure: Angiotensin-Converting Enzyme (ACE) Inhibitor or Angiotensin Receptor Blocker (ARB) Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0081	AMA–PCPI	X	X	
8	Heart Failure: Beta-Blocker Therapy for Left Ventricular Systolic Dysfunction (LVSD).	0083	AMA–PCPI	X	X	
228	Heart Failure: Left Ventricular Function (LVF) Testing.	N/A	CMS		X	
198	Heart Failure: Left Ventricular Function (LVF) Assessment.	0079	AMA–PCPI		X	
227	Heart Failure: Weight Measurement	0085	AMA–PCPI		X	
199	Heart Failure: Patient Education	0082	AMA–PCPI		X	
200	Heart Failure: Warfarin Therapy for Patients with Atrial Fibrillation.	0084	AMA–PCPI	X	X	
TBD	Monthly INR for Beneficiaries on Warfarin	555	CMS		X	
1	Diabetes Mellitus: Hemoglobin A1c Poor Control in Diabetes Mellitus.	0059	AMA–PCPI	X	X	
TBD	Diabetes: Aspirin Use	0729	MN Community Measurement.		X	
3	Diabetes Mellitus: High Blood Pressure Control in Diabetes Mellitus.	0061	NCQA	X	X	
TBD	Diabetes: Hemoglobin A 1 c Control (<8.0%)	575	NCQA	X	X	
2	Diabetes Mellitus: Low Density Lipoprotein (LDL–C) Control in Diabetes Mellitus.	0064	NCQA	X	X	X
117	Diabetes Mellitus: Dilated Eye Exam in Diabetic Patient.	0055	NCQA	X	X	
18	Diabetic Retinopathy: Documentation of Presence or Absence of Macular Edema and Level of Severity of Retinopathy.	0088	AMA–PCPI	X		
TBD	Diabetic Retinopathy: Communication with the Physician Managing Ongoing Diabetes Care.	0089	AMA–PCPI	X		

TABLE 62—PROPOSED QUALITY MEASURES FOR THE VALUE MODIFIER—Continued

Physician quality reporting system No.	Measure title	NQF Measure No.	Measure developer	EHR Incentive program	PQRS GPRO	PQRS Core
119	Diabetes Mellitus: Urine Screening for Microalbumin or Medical Attention for Nephropathy in Diabetic Patients.	0062	NCQA	X	X	
163	Diabetes Mellitus: Foot Exam	0056	NCQA	X	X	
TBD	Diabetes Mellitus: Tobacco Non-Use	0729	MN Community Measurement.		X	
239	Weight Assessment and Counseling for Children and Adolescents.	0024	NCQA	X		
240	Childhood Immunization Status	0038	NCQA	X		
TBD	Appropriate Testing for Children with Pharyngitis	0002	NCQA	X		
TBD	Prenatal Care: Screening for Human Immunodeficiency Virus (HIV).	0012	AMA–PCPI	X		
TBD	Prenatal Care: Anti-D Immune Globulin	0014	AMA–PCPI	X		
53	Asthma Pharmacologic Therapy	0047	AMA–PCPI	X		
64	Asthma Assessment	0001	AMA–PCPI	X		
TBD	Use of Appropriate Medications for Asthma	0036	NCQA	X		
51	Chronic Obstructive Pulmonary Disease (COPD): Spirometry Evaluation.	0091	NCQA		X	
52	Chronic Obstructive Pulmonary Disease (COPD): Bronchodilator Therapy.	0102	AMA–PCPI		X	
TBD	Chronic Obstructive Pulmonary Disease (COPD): Smoking Cessation Counseling Received.	N/A	CMS		X	
71	Oncology Breast Cancer: Hormonal Therapy for Stage IC–IIIC Estrogen Receptor/Progesterone Receptor (ER/PR) Positive Breast Cancer.	0387	AMA–PCPI	X		
72	Oncology Colon Cancer: Chemotherapy for Stage III Colon Cancer Patients.	0385	AMA–PCPI	X		
102	Prostate Cancer: Avoidance of Overuse of Bone Scan for Staging Low Risk Prostate Cancer Patients.	0389	AMA–PCPI	X		
9	Anti-depressant Medication Management: (a) Effective Acute Phase Treatment, (b) Effective Continuation Phase Treatment.	0105	NCQA	X		
TBD	Initiation and Engagement of Alcohol and Other Drug Dependence Treatment: (a) Initiation, (b) Engagement.	0004	NCQA	X		
40	Osteoporosis: Management Following Fracture of Hip, Spine or Distal Radius for Men and Women Aged 50 Years and Older.	0045	NCQA		X	
TBD	Low Back Pain: Use of Imaging Studies	0052	NCQA	X		
TBD	Chlamydia Screening for Women	0033	NCQA	X		
12	Primary Open Angle Glaucoma (POAG): Optic Nerve Evaluation.	0086	AMA–PCPI	X		
46	Medication Reconciliation: Reconciliation After Discharge from an Inpatient Facility.	0097	AMA–PCPI		X	
TBD	30-Day Post Discharge Physician Visit	N/A	Colorado Foundation for Medical Care.		X	

We seek comment on whether to include additional measures from the Physician Quality Reporting System (which are described elsewhere in this proposed rule) in the measures that we propose for the value modifier. We also seek comment on whether there are any measures included here that should be excluded from the value modifier, and on the appropriate number of measures for inclusion.

To the extent that the 2013 measures adopted for the Physician Quality Reporting System and Electronic Health Record Incentive Program are different than those used in 2012, we would consider, through rulemaking next year, revising the value modifier quality measures applicable to 2013 to be consistent with the revisions made to the measures for those programs. Indeed, Section 1848(p)(9) of the Act directs us to coordinate the value modifier quality measures with the Physician Feedback Program, and, as the Secretary determines appropriate, other similar provisions of Title XVIII of the Social Security Act. We plan to coordinate the value modifier with the Physician Feedback Program, the Physician Quality Reporting System, and the EHR incentive program. We seek comment on the proposed measures and on our interest to establish a core measure set for the value modifier.

(B) Potential Quality of Care Measures for Additional Dimensions of Care in the Value Modifier

As described previously, one of our goals is to start a discussion about potential measures that could provide a richer picture of the quality of care furnished by a physician. For example, we are very interested in quality measures that assess the care provided by specialists. We specifically seek

comment from specialists about measures that are not included in the list of proposed measures.

We also seek comment on the types of measures identified below as well as the 28 administrative claims measures (described above with respect to the 2011 Physician Feedback reports) and whether we should include them in the value modifier. We especially urge the physician community and private payers that have been engaged in pay-for-performance programs to identify other quality measures that they have used and to describe their experience with these measures. We seek comment on how the measures discussed below align with current private sector quality measurement initiatives. To the extent that such measures are not currently developed, we would use the established agency procedures to develop such measures.

(i) Outcome Measures

We are very interested in moving toward a core quality of care measure set for the value modifier that includes outcome measures. For example, the Physician Feedback reports already display the rate of potentially preventable hospital admissions for six ambulatory care sensitive conditions at the practice group level: Diabetes, bacterial pneumonia, dehydration, chronic obstructive pulmonary disease (COPD), urinary tract infection, and congestive heart failure. These measures have been developed by the Agency for Healthcare Research and Quality and specifications for these measures can be found at *http://www.qualityindicators.ahrq.gov/modules/PQI_TechSpec.aspx.* We also are developing an all-cause hospital readmission measure for potential use in the Shared Savings Program, and section 1886(q)(8) of the Act requires us to develop an all-patient hospital readmission measure. We are considering use of these measures for physicians and physician groups. Our goal is to focus on outcomes of care for which it would be appropriate to assess physician performance. We seek comments about these potential measures for physicians. Although we are not proposing these measures at this time, we are soliciting comment and will consider including these outcome measures in the value modifier.

We also specifically seek suggestions about other outcome measures that would be appropriate measures of the quality of care furnished for purposes of the value modifier. For example, section 931 of the Public Health Service Act, as added by section 3013(a) and amended by section 10303 of the Affordable Care Act, also requires the Secretary to develop and periodically update provider-level outcome measures for physicians, among other types of providers. We also could consider development of measures that examine emergency room use for ambulatory care sensitive conditions. We are interested in outcome measures that can be calculated from existing Medicare claims data and do not require reporting by physicians. In addition, we are particularly interested in comments on potential measures of complications that would be appropriate to include in the value modifier.

(ii) Care Coordination/Transition Measures

We believe that care transitions such as transition of a beneficiary from an inpatient setting to the community or to a post-acute setting are important aspects of quality of care furnished. Successful transitions help ensure that a beneficiary is on a path to improvement and could avoid readmission. We believe that several aspects of the care transition could be developed into quality of care measures for purposes of the value modifier. For example, we could potentially consider developing a measure that would assess whether an appointment was set up or whether the hospitalized beneficiary saw a physician during a specified post-discharge period. This measure could apply to both the hospital physician and the community physician. In addition, beneficiaries often have unscheduled admissions (such as, via an emergency room) of which their primary physician is not made aware. We are considering including a care transition/care coordination measure that would involve a hospital physician checking to see if the hospital has notified the beneficiary's primary physician of an unscheduled admission (if the hospital and community physician were not the same).

Another aspect of care coordination could involve services that are ordered by one physician but furnished by another physician. Under this scenario, the treating physician may send a report back to the ordering physician. However, this is not always the case. The lack of coordination between two physicians involved in the beneficiary's care could be a missed opportunity to provide optimal, seamless care for the beneficiary. A care coordination measure could potentially assess the extent to which the report is sent back to the ordering physician and whether the furnishing physician has confirmation that the report was actually received.

We seek input about these and other potential aspects of care coordination/transitions for which measures could be developed and/or used for purposes of the value modifier. To the extent commenters are aware of potential measures that address care coordination/transitions that we could use, we welcome such suggestions. We would propose the specific measures through notice and comment rulemaking before including them as measures of the quality of care furnished for purposes of the value modifier.

(iii) Patient Safety, Patient Experience and Functional Status:

We believe that it is important to develop measures of patient safety, patient experience and functional status for purposes of the value modifier. A potential patient safety measure might involve use of a surgical checklist. We seek comment about such a measure and other potential patient safety measures that could be developed and/or used for purposes of the value modifier. To the extent commenters are aware of potential measures of patient safety, patient experience, or functional status that we could use, we welcome such suggestions. We would propose the specific measures through notice and comment rulemaking before including them as measures of the quality of care furnished for purposes of the value modifier.

(2) Cost Measures

Section 1848(p)(3) of the Act requires that cost measures used in the value modifier be evaluated, to the extent practicable, based on a composite of appropriate measures of costs established by the Secretary. This composite would eliminate the effect of geographic adjustments in payment rates and account for risk factors and other factors determined appropriate by the Secretary. In our Physician Feedback reports, we currently use a total per capita cost measure and per capita cost measures for the overall costs for beneficiaries with four chronic conditions: Chronic obstructive pulmonary disease; heart failure; coronary artery disease; and diabetes. These per capita cost measures are price standardized and risk adjusted to ensure geographic and clinical comparability, as required by section 1848(p)(3) of the Act. These measures are described in more detail in the Detailed Methodology Specification document accompanying the 2010 Physician Feedback reports.[11]

[11] The Detailed Methodology Specifications are available at: *https://www.cms.gov/PhysicianFeedbackProgram/Downloads/2010_QRUR_Detailed_Methodology.pdf.*

(A) Proposed Cost Measures for the Value Modifier

For purposes of section 1848(p)(4)(A)(i) of the Act, we propose to use total per capita cost measures and per capita cost measures for beneficiaries with these four chronic conditions (chronic obstructive pulmonary disease; heart failure; coronary artery disease; and diabetes) in the value modifier. These cost measures would be compared to the quality of care furnished for use in determining the value modifier. We seek comment on this proposal.

(B) Potential Cost Measures for Future Use in the Value Modifier

During 2012 we will test and plan how to use an ''episode grouper.'' The purpose of the episode grouper is to combine separate, but clinically related items and services into an episode of care for a beneficiary. Section 1848(n)(9)(A) of the Act requires us to develop an episode grouper so that physicians can be compared on episode-based costs of care. In order to comply with this statutory requirement, we have awarded separate contracts to four different project teams. We have tasked each project team to design a ''prototype'' of the episode grouper by determining episode-based costs for selected high-cost, high-volume conditions that occur among Medicare beneficiaries, including six of the following nine conditions: Hip fracture/hip replacement; pneumonia; heart attack; coronary artery disease; asthma; COPD; stroke; diabetes; and heart failure. By January 1, 2012, we will select one project team's prototype. The selected team will then be tasked to develop episode groupers for a more comprehensive set of conditions over a four-year period.

As a transition to implementing the episode grouper, we could use cost measures based on the inpatient hospital Medicare Severity Diagnosis Related Groups (MS–DRG) classification system. Specifically, we could use allowed Parts A and B charges per beneficiary for all services furnished on the day of admission and furnished through a specific number of days after the day of discharge. We are currently assessing how to attribute episode costs to physicians. We seek comment on whether we should pursue the MS–DRG approach in the near term while we develop episode-based cost measures for a significant number of high-cost and high-volume conditions in the Medicare program.

In addition, we specifically seek comment on the resource and cost measures used in private sector initiatives and how they are used to profile physicians compared to the quality of care provided.

b. Assessing Physician Performance and Applying the Value Modifier

Apart from the measures that would be used for purposes of applying the value modifier, there are a number of issues related to the implementation of the value modifier including steps for both measurement of performance and application of payment adjustments. While we are not making proposals on these issues at this time, we have briefly described them below and welcome public comments to be considered as we develop proposals on the value modifier for future rulemaking.

Pursuant to statutory requirements, we are examining how to create composites of measures of quality of care and of cost from the measures we have proposed so that we can compare quality relative to cost. We are also examining how to make appropriate risk and other adjustments to these measures. In addition, we are examining how to attribute beneficiaries to physicians to develop meaningful and actionable physician profiles for use in the value modifier. Some of the issues involved with examining attribution rules were discussed earlier in the discussion of Physician Feedback reports and include issues of sample size. We are also developing appropriate peer groups or benchmarks in order to compare physicians on the value modifier.

As previously mentioned, prior to application of the value modifier to all physicians and physician groups in 2017, section 1848(p)(4)(B)(iii) of the Act allows the Secretary in 2015 and 2016 to apply the value modifier to specific physicians and physician groups the Secretary determines appropriate. For example, we could apply the value modifier to physicians who are outliers (as identified individually, by practice group, or by geographic region) compared to national or regional areas in terms of high cost and low quality. Alternatively, we could apply the modifier to physicians who treat the conditions that are most prevalent and/or most costly, among Medicare beneficiaries.

As stated previously, we seek comment on these issues and other issues related to implementation of the value modifier. Our plan is to begin implementing the value modifier through the rulemaking process during 2013 as required by section 1848(p)(4)(B)(i) of the Act. We seek input from stakeholders as we work on these issues.

c. Dates for Implementation of the Value Modifier

Section 1848(p)(4)(B)(iii) of the Act requires that the Secretary apply the value modifier for items and services furnished beginning on January 1, 2015, with respect to specific physicians and groups of physicians, and not later than January 1, 2017, with respect to all physicians and groups of physicians. As required by section 1848(p)(4)(B)(i) of the Act, we will begin implementation of the value modifier through the rulemaking process during 2013 for the physician fee schedule effective for CY 2014. We anticipate that the methodology we propose to calculate the value modifier may be further refined, if necessary, during the 2014 rulemaking process for the physician fee schedule that will take effect in 2015.

d. Initial Performance Period

Section 1848(p)(4)(B)(ii)(I) of the Act requires the Secretary to specify an initial performance period for the application of the value modifier with respect to 2015. We propose that the initial performance period be the full calendar year 2013, that is, January 1, 2013 through December 31, 2013. The value modifier that is applied to items and services furnished by specific physicians and groups of physicians under the 2015 physician fee schedule would be based on performance during 2013. We propose this performance period because some claims for 2013 (which could be used in cost or quality measures) may not be fully processed until 2014. As such, we will need adequate lead time to collect performance data, assess performance, and construct and compute the value modifier during 2014 so that it can be applied to specific physicians starting January 1, 2015, as required by statute. As we have done in other payment systems, we plan to use claims that are paid within a specified time period, such as, 90-days after 2013, for assessment of performance and application of the value modifier for 2015. We will propose the specific cut-off period as part of the more detailed methodology for computation and application of the value modifier in future rulemakings. We seek comment on this proposed performance period.

e. Other Issues

We also seek comment on a number of issues related to the development of the value modifier, which we will address in future rulemaking. Although we are not proposing particular policies

at this time, we seek comment on two specific issues.

(1) Systems-Based Care

Section 1848(p)(5) of the Act requires the Secretary, as appropriate, to apply the value-based modifier in a manner that promotes systems-based care. We seek comment on how we might determine the scope of systems-based care and how best to promote it in applying the value modifier. For example, systems-based care might include an integrated group practice participation in the Shared Savings Program, a medical home, or an Innovation Center program that promotes systems-based care. We also could implement an attribution method that attributes patients to a collection of physicians that treat patients in common to encourage better coordination of care. Additionally, we could promote systems-based care by developing a common set of quality measures on which all providers would be evaluated. We seek comment on these and other ways in which we could promote systems-based care through the application of the value modifier.

(2) Special Circumstances for Physicians in Rural Areas and Other Underserved Communities

Section 1848(p)(6) of the Act requires the Secretary in applying the value modifier, as appropriate, to take into account the special circumstances of physicians or groups of physicians in rural areas and other underserved communities. We seek comment on how we should identify physicians or groups of physicians in rural areas and other underserved communities, the specific special circumstances they face, and once identified, how these special circumstances should be taken into account for purposes of applying the value modifier. In addition, we seek comment on the organizational structures and practices that rural physicians and other underserved communities use and how we could apply a value modifier in these areas to accommodate their special circumstances.

J. Bundling of Payments for Services Provided to Outpatients Who Later Are Admitted as Inpatients: 3-Day Payment Window Policy and the Impact on Wholly Owned or Wholly Operated Physician Practices

1. Introduction

On June 25, 2010, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PACMBPRA) (Pub. L. 111–192) was enacted. Section 102 of this Act entitled, ''Clarification of 3-Day Payment Window,'' clarified when certain services furnished to Medicare beneficiaries in the 3-days (or, in the case of a hospital that is not a subsection (d) hospital, during the 1-day) preceding an inpatient admission should be considered ''operating costs of inpatient hospital services'' and therefore included in the hospital's payment under the Hospital Inpatient Prospective Payment System (IPPS). This policy is generally known as the ''3-day payment window.'' Under the 3-day payment window, a hospital (or an entity that is wholly owned or wholly operated by the hospital) must include on the claim for a Medicare beneficiary's inpatient stay, the technical portion of any outpatient diagnostic services and admission-related nondiagnostic services provided during the payment window. The new law makes the policy pertaining to admission-related nondiagnostic services more consistent with common hospital billing practices. Section 102 of the PACMBPRA is effective for services furnished on or after June 25, 2010.

2. Background

We discussed changes to the 3-day payment window in the interim final rule with comment period that was issued as part of last year's IPPS final rule (75 FR 50346). The law makes no changes to the billing of ''diagnostic services'' furnished during the 3-day payment window, which are included in the ''operating costs of inpatient hospital services'' pursuant to section 1886(a)(4) of the Act. All diagnostic services furnished to a Medicare beneficiary by a hospital (or an entity wholly owned or wholly operated by the hospital), on the date of a beneficiary's admission or during the 3-days (1-day for a non-subsection (d) hospital) immediately preceding the date of a beneficiary's inpatient hospital admission, continue to be included on the Part A bill for the beneficiary's inpatient stay at the hospital. In accordance with section 102(a)(1) of the PACMBPRA, for outpatient services furnished on or after June 25, 2010, all nondiagnostic services, other than ambulance and maintenance renal dialysis services, provided by the hospital (or an entity wholly owned or wholly operated by the hospital) on the date of a beneficiary's inpatient admission and during the 3 calendar days (1 calendar day for a nonsubsection (d) hospital) immediately preceding the date of admission are deemed related to the admission and, therefore, must be billed with the inpatient stay, unless the hospital attests that certain nondiagnostic services are unrelated to the hospital claim (that is, the preadmission nondiagnostic services are clinically distinct or independent from the reason for the beneficiary's inpatient admission). In such cases, the unrelated outpatient hospital nondiagnostic services are covered by Medicare Part B, and the hospital may separately bill for those services.

Prior to the enactment of section 102 of the PACMBPRA clarifying the 3-Day Payment Window, the term ''related to the admission'' was defined in section 40.3, Chapter 3, Inpatient Hospital Billing, of the Medicare Claims Processing Manual (Pub. 100–04) to mean an exact match between the principal ICD–9 CM diagnosis codes for the outpatient encounter and the inpatient admission. On November 5, 1990, section 4003(a) of the Omnibus Budget Reconciliation Act of 1990 (Pub. L. 101–508) amended the statutory definition of ''operating cost of inpatient hospital services'' to include the costs of certain services furnished prior to admission. Section 4003(a) also required that these preadmission services be included on the Medicare Part A bill for the subsequent inpatient stay. With this amendment, section 1886(a)(4) of the Act defines the operating costs of inpatient hospital services to include diagnostic services (including clinical diagnostic laboratory tests) or other services related to the admission (as defined by the Secretary) furnished by the hospital (or by an entity that is wholly owned or wholly operated by the hospital) to the patient during the 3-days prior to the date of the patient's admission to the hospital.

Section 1886(a)(4) of the Act was further amended by section 110 of the Social Security Amendments of 1994 (Pub. L. 103–432) enacted on October 31, 1994. This provision revised the payment window for hospitals that are excluded from the IPPS to include only those services furnished by the hospital or an entity wholly owned or wholly operated by the hospital during the 1-day (instead of the previous 3-days) prior to the patient's hospital inpatient admission. The hospital and hospital units excluded from the IPPS and affected by this policy are psychiatric hospitals and units, inpatient rehabilitation hospitals and units, long-term care hospitals, children's hospitals, and cancer hospitals. In the FY 1996 IPPS final rule (60 FR 45840), we noted that the term ''day'' refers to the entire calendar-day immediately preceding the date of admission and not the 24-hour time period that immediately precedes the hour of admission.

On February 11, 1998, we published a final rule (63 FR 6864), that responded to public comments received on a prior interim final rule on this policy. In that final rule, we confirmed that ambulance services and chronic maintenance of renal dialysis services are excluded from the 3-day payment window. This final rule also clarified that the payment window applies to outpatient services that are otherwise billable under Part B and does not apply to nonhospital services that are generally covered under Part A (such as home health, skilled nursing facility, and hospice). In addition, the rule clarified the terms ''wholly owned or operated'' and ''admission-related'' for nondiagnostic services.

The 1998 final rule (63 FR 6866) defined an entity as wholly owned or wholly operated if a hospital has direct ownership or control over another entity's operations. Specifically, 42 CFR 412.2(c)(5)(i) states, ''An entity is wholly owned by the hospital if the hospital is the sole owner of the entity. An entity is wholly operated by a hospital if the hospital has exclusive responsibility for conducting and overseeing the entity's routine operations, regardless of whether the hospital also has policymaking authority over the entity.'' The 1998 final rule also stated ''that we have defined services as being related to the admission only when there is an exact match between the ICD–9–CM diagnosis code assigned for both the preadmission services and the inpatient stay.'' The rule also stated ''A hospital-owned or hospital-operated physician clinic or practice is subject to the payment window provision.'' Therefore, related preadmission nondiagnostic services provided by a wholly owned or wholly operated physician clinic or practice are also included in the 3-Day (or 1-day) payment window policy, and services were considered related when there was an exact match between ICD–9 CM diagnosis codes for the outpatient encounter and the inpatient admission.

Prior to the June 25, 2010 enactment of section 102(a)(1) of PACMBPRA (Pub. L. 111–192), the payment window policy for preadmission nondiagnostic services was rarely applied in the wholly-owned or operated physician's office or clinic because, as noted, the policy required an exact match between the principal ICD–9 CM diagnosis codes for the outpatient services and the inpatient admission. Because of the exact match policy, very few services furnished in a physician's office or clinic that is wholly owned or operated by the hospital would be subject to the policy. Because the policy applied only in such narrow circumstances, until the recent statutory change, we have not provided further guidance to wholly owned or wholly operated physician offices on how nondiagnostic services are to be included on hospital bills when the 3-day payment window applied. However, the statutory change to the payment window policy made by Public Law 111–192 significantly broadened the definition of nondiagnostic services that are subject to the payment window to include any nondiagnostic service that is clinically related to the reason for a patient's inpatient admission, regardless of whether the inpatient and outpatient diagnoses are the same.

The FY 2012 IPPS proposed rule (76 FR 25960) further discusses application of the 3-day payment window for both preadmission diagnostic and related nondiagnostic services furnished to a patient at wholly owned or wholly operated physician practices after June 25, 2010. We do not know how many physician offices will meet this definition of wholly owned or wholly operated. Our expectation is that most hospital-owned entities providing outpatient services would be considered part of the hospital, likely as an outpatient department, and not separate physician clinics or practices. However, we believe there may be at least some hospital-owned clinics that meet the definition of a wholly owned or wholly operated physician practice. When a physician furnishes a service in a hospital, including an outpatient department of a hospital, Medicare pays the physician under the physician fee schedule, generally at a facility-based payment rate that is lower than the ''nonfacility'' payment rate in order to avoid duplication of payment for supplies, equipment, and staff that are paid directly to the hospital by Medicare.

3. Applicability of the 3-Day Payment Window Policy for Services Furnished in Physician Practices

In circumstances where the 3-day payment window applies to nondiagnostic services related to an inpatient admission furnished in a wholly owned or wholly operated physician practice, we propose that Medicare would make payment under the physician fee schedule for the physicians' services that are subject to the 3-day payment window at the facility rate. As explained more fully later in this section, the services that are subject to the 3-day payment window would be billed to Medicare similar to services that are furnished in a hospital, including an outpatient department of a hospital. On or after January 1, 2012, we propose that when a physician furnishes services to a beneficiary in a hospital's wholly owned or wholly operated physician practice and the beneficiary is admitted as an inpatient within 3 days (or, in the case of non-IPPS hospitals, 1 day), the payment window will apply to all diagnostic services furnished and to any nondiagnostic services that are clinically related to the reason for the patient's inpatient admission regardless of whether the reported inpatient and outpatient ICD–9–CM diagnosis codes are the same.

a. Payment Methodology

Specifically, we would establish a new Medicare HCPCS modifier that will signal claims processing systems to provide payment at the facility rate. We propose to pay only the Professional Component (PC) for CPT/HCPCS codes with a Technical Component (TC)/PC split that are provided in the 3-day (or, in the case of non-IPPS hospitals, 1-day) payment window in a hospital's wholly owned or wholly operated physician practice. We propose to pay the facility rate for codes without a TC/PC split to avoid duplicate payment for the technical resources required to provide the services as those costs will be included on the hospital's inpatient claim for the related inpatient admission. The facility rate includes physician work, malpractice, and the facility practice expense, which is a payment to support services provided by the physician office when a physician treats patients at another facility, such as updating medical records. We propose to modify our regulation at § 414.22(b)(5)(i), which defines the sites of service that result in a facility practice expense RVU for payment, to add an entity that is wholly owned or wholly operated by a hospital, as defined in § 412.2(c)(5)(ii) when that entity furnishes preadmission services.

If this proposal is finalized, we would establish a new HCPCS modifier through sub-regulatory guidance. We would require that this modifier be appended to the physician preadmission diagnostic and admission-related nondiagnostic services, reported with HCPCS codes, which are subject to the 3-day payment window policy. Each wholly owned or wholly operated physician's practice would need to manage its billing processes to ensure that it billed for its physician services appropriately when a related inpatient admission has occurred. The hospital would be responsible for notifying the practice of related inpatient admissions for a patient who received services in a wholly owned or wholly operated

physician practice within the 3-day (or when appropriate 1-day) payment window prior to the inpatient stay. We would make the new modifier effective for claims with dates of service on or after January 1, 2012, and wholly owned or wholly operated physician practices would receive payment at the facility rate for related nondiagnostic services and receive payment for only the professional component for diagnostic services effective for services furnished on or after January 1, 2012.

We realize that the time frames associated with the global surgical package for many surgical services could overlap with the 3-day (or 1-day) payment window policy. Global surgical payment rules apply to major and minor surgeries, and endoscopies. Section 40.1 of the Claims Processing Manual (100–04 chapter 12 Physician/Nonphysician Practitioners) defines the global surgical package. Procedures can have a global surgical period of 0, 10, or 90-days. Generally, the global period for major surgeries is 1-day prior to the surgical procedure and 90-days immediately following the procedure. For minor surgeries, the global period is the-day of the procedure and 10-days immediately following the procedure.

Medicare payment for the global surgical package is based on the typical case for a procedure, and includes preoperative visits, intra-operative services, and complications following surgery, postoperative visits, postsurgical pain management, supplies, and miscellaneous other services such as dressing changes and removal of sutures or staples. Medicare makes a single payment to the treating physician (or group practice) for the surgical procedure and any of the pre- and postoperative services typically associated with the surgical procedure provided within the global surgical period (10 or 90-days). The same section of the Claims Processing Manual (100–04 chapter 12 Physician/Nonphysician Practitioners) also discusses the services that are not included in payment for the global surgical period. In general, these services are unrelated to the surgery, are diagnostic or are part of the decision to pursue surgery, or are related to the surgery but are so significant they warrant an additional payment. Some examples of services not included in payment for the global surgical period include the initial evaluation of the problem by the surgeon to determine the need for major surgery; services of another physician; visits unrelated to the diagnosis for the surgical procedure unless the visits occur due to surgical complications; treatment that is not part of the normal recovery from surgery; diagnostic tests; distinct surgical procedures that are not re-operations; treatment for postoperative complications that require a return trip to the operating room; critical care unrelated to the surgery where a seriously injured or burned patient is critically ill and requires the constant attention of the physician; and immunosuppressive therapy for organ transplants.

The time frames for application of the 3-day payment window and the global surgical package could overlap. In some cases, the application of the 3-day payment window is straightforward. For example, a patient could have minor surgery in a wholly owned or wholly operated physician's office and, due to complications, need to be admitted within 3-days to an acute care hospital paid under the IPPS for follow-up surgery. Under the 3-day payment window policy, the practice expense portion of the initial surgery and any pre- and postoperative visits associated with the surgery (both those subject to the global surgery rules and separate diagnostic procedures) should be included on the hospital's Part A claim for the inpatient admission. The wholly owned or wholly operated physician practice would bill for the surgery performed for the inpatient as well as for the initial surgical procedure performed in the physician practice that started the global period. The wholly owned or wholly operated physician practice would apply the HCPCS modifier that CMS would pursue to implement the 3-day payment window to each of these services HCPCS code. Medicare would pay the physician practice for the initial surgical procedure and the related procedure following inpatient admission at the facility rate. Finally, any preadmission diagnostic tests conducted by the wholly owned or wholly operated physician practice in the 3-day payment window would be included on the physician practice's claim with the anticipated HCPCS modifier, and Medicare would pay the wholly owned or wholly operated physician practice only the professional portion of the service.

However, the situation could arise where a global surgical period overlaps with the 3-day payment window, but the actual surgical procedure with the global surgical package occurred before the 3-day payment window. In this case, several post-operative services, such as follow-up visits, would occur during the global period, but the surgeon would not bill separately for those services. We propose that services with a global surgical package would be subject to the 3-day payment window policy when wholly owned or wholly operated physician practices furnish preadmission diagnostic and nondiagnostic services that are clinically related to an inpatient admission when the date of the actual surgical procedure falls within the 3-day payment window policy. However, when the actual surgical procedure for a service that has a global surgical package is furnished on a date that falls outside the 3-day payment window, the 3-day window policy would not apply. We do not believe it would be appropriate to require the wholly owned or wholly operated physician practice to unbundle the post operative services associated with the global surgical procedure so that the practice expense portion of those services could be paid under the PFS at the facility rate and the costs included on the hospital's inpatient claim. However, any service that a wholly owned or wholly operated physician practice would bill separately from the global surgical package, such as a separate initial evaluation of a problem by the surgeon to determine the need for surgery or separate diagnostic tests, would continue to be subject to the 3-day payment window policy.

b. Identification of Wholly Owned or Wholly Operated Physician Practices

The 1998 final rule (63 FR 6864) defined wholly owned or wholly operated as a hospital's direct ownership or control over another entity's operations. In that rule, we added the regulation at 42 CFR 412.2(c)(5)(i) which states, ''An entity is wholly owned by the hospital if the hospital is the sole owner of the entity. An entity is wholly operated by a hospital if the hospital has exclusive responsibility for conducting and overseeing the entity's routine operations, regardless of whether the hospital also has policymaking authority over the entity.'' Physician practices self-designate whether they are owned or operated by a hospital during the Medicare enrollment process. Currently, a physician practice enrolls in Medicare with CMS form ''855B.'' This enrollment form reports pertinent practice information such as ownership, organizational structure, and operational duties. Likewise, hospitals enroll in Medicare using CMS form ''855A'' also reporting pertinent hospital information such as ownership, organizational structure and operational duties. Medicare Administrative Contractors update files of physician practices that are owned and operated by hospitals, and the files of hospitals that own those physician practices, in

their claims processing systems and use that data to confirm an ownership relationship for identified physician practices. We will investigate the feasibility of establishing national system edits within the Common Working File to fully identify whether a physician practice is wholly owned or wholly operated by a hospital and to associate such practice with its affiliated hospital.

K. Hospital Discharge Care Coordination

We are committed to achieving better care for individuals, better health for populations, and reduced expenditure growth. Reforms such as Accountable Care Organizations and Medical Homes work to achieve these goals. We are also committed to reforms to the fee-for-service payment system to achieve these goals. We recently launched the Partnership for Patients, (in April 2011), a national patient safety initiative that includes the Community Based Care Transitions Program, which provides funding to community-based organizations to coordinate a continuum of post-acute care in order to test models for improving care transitions for high risk Medicare beneficiaries.

Care coordination involving the transition of a beneficiary from care furnished by a treating physician during a hospital stay to the beneficiary's primary physician in the community could avoid adverse events such as readmissions or subsequent illnesses, improve beneficiary outcomes, and avoid a financial burden on the health care system. Successful efforts to improve hospital discharge care coordination and care transitions could improve the quality of care while simultaneously decreasing costs. We are interested in broad public comment on how to further improve physician care coordination within the statutory structure for physician payment and quality reporting, particularly for a beneficiary's transition from the hospital to the community.

Care coordination is a component of many evaluation and management (E/M) services. Under the physician fee schedule, there are two hospital discharge codes, hospital discharge day management services CPT codes 99238 (Hospital discharge day management; 30 minutes or less) and 99239 (Hospital discharge day management; more than 30 minutes). Both of these codes include care coordination activities. The specific physician activities for care coordination associated with the hospital discharge day management codes as shown in Table 63 include the following:

- Providing care coordination for the transition including instructions for aftercare to caregivers.
- Ordering and arranging for post discharge follow-up professional services and testing.
- Discussing aftercare treatment with the beneficiary, family, and other healthcare professionals.
- Informing the primary care or referring physician of discharge plans.
- Provide necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this hospitalization.
- Revise treatment plan(s) and communicate with beneficiary and/or caregiver, as necessary.

Providing necessary care coordination also is a component of the office visit CPT codes 99203 (Level 3 new patient office or other outpatient visit) and 99213 (Level 3 established patient office or other outpatient visit) that a beneficiary's primary physician would use to bill for the first visit after discharge. The physician activities for care coordination associated with these E/M services as shown in Table 63 include providing necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this office visit.

The clinical vignettes that are used to value the resources included in these codes are shown in Table 63. We have provided the full clinical vignettes used by the American Medical Association/Specialty Society Relative Value Update Committee (AMA RUC) to develop recommended RVU values for the resources included in the discharge day management and E/M codes. These vignettes detail all the specific physician activities that the AMA RUC considered for these CPT codes, including hospital discharge care coordination activities.

TABLE 63—AMA RUC CLINICAL VIGNETTE

CPT code	Long descriptor	Vignette	Pre service	Intra service	Post service
99238	Hospital discharge day management; 30 minutes or less.	Discharge visit for a 55-year-old male admitted with a community-acquired pneumonia is seen in preparation for discharge from the hospital. He is euvolemic, afebrile, asymptomatic, and his oxygen saturations are normal.	• Review data not available on the unit (such as diagnostic and imaging studies). • Communicate with other professionals and with patient or patient's family.	• Review medical records and data available on the unit. • Obtain an interval history • Perform a physical exam. • Consider relevant data, options, and risks and formulate/revise diagnosis and treatment plan(s) including making the decision for discharge. • Discuss aftercare treatment with the patient, family and other healthcare professionals. • Provide care coordination for the transition including instructions for aftercare to caregivers. • Order/arrange for post discharge follow-up professional services and testing. • Reconcile medications with attention to pre-admission therapy, inpatient therapy and outpatient formulary and write prescriptions. • Complete discharge and aftercare forms. • Inform the primary care or referring physician of discharge plans. • Complete medical record documentation.	• Complete discharge records. • Handle (with the help of clinical staff) any treatment failures or adverse reactions to medications that may occur after discharge. • Provide necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this hospitalization. • Receive and respond to any interval testing results or correspondence, including obtaining any results pending at discharge. • Revise treatment plan(s) and communicate with patient and/or caregiver, as necessary.
99239	Hospital discharge day management; more than 30 minutes.	Discharge visit for a 75-year-old female who required a below-the knee amputation for an infected non-healing ulcer on her right foot is seen in preparation for discharge from the hospital. She has Type 2 diabetes mellitus, ischemic cardiomyopathy, atherosclerotic peripheral vascular disease, hypertension, chronic renal insufficiency, and dementia. She is no longer delirious, her blood sugars are well controlled, and she is at her baseline weight. She is being discharged back to the nursing home.	• Review data not available on the unit (such as diagnostic and imaging studies). • Communicate with other professionals and with patient or patient's family.	• Review medical records and data available on the unit. • Obtain an interval history. • Perform a physical exam. • Consider relevant data, options, and risks and formulate/revise diagnosis and treatment plan(s) including making the decision for discharge. • Discuss aftercare treatment with the patient, family and other healthcare professionals. • Provide care coordination for the transition including instructions for aftercare to caregivers. • Order/arrange for post discharge follow-up professional services and testing. • Reconcile medications with attention to pre-admission therapy, inpatient therapy and outpatient formulary and write prescriptions. • Complete discharge and aftercare forms. • Inform the primary care or referring physician of discharge plans. • Complete medical record documentation.	• Complete discharge records. • Handle (with the help of clinical staff) any treatment failures or adverse reactions to medications that may occur after discharge. • Provide necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this hospitalization. • Receive and respond to any interval testing results or correspondence, including obtaining any results pending at discharge. • Revise treatment plan(s) and communicate with patient and/or caregiver, as necessary.

TABLE 63—AMA RUC CLINICAL VIGNETTE—Continued

CPT code	Long descriptor	Vignette	Pre service	Intra service	Post service
99203	Office/outpatient visit, new ..	Initial office visit for a 63-year-old female with hypertension presents for a pre-employment physical after moving to the area. Her blood pressure has been adequately controlled with her current medication on home blood pressure monitoring.	• Review the medical history form completed by the patient and vital signs obtained by clinical staff. • Communicate with other health professionals.	• Obtain a detailed history. • Perform a detailed examination. • Consider relevant data, options, and risks and formulate a diagnosis and develop a treatment plan (low complexity medical decision making). • Discuss diagnosis and treatment options with the patient. • Address the preventive health care needs of the patient. • Reconcile medication(s) • Write prescription(s). • Order and arrange diagnostic testing or referral as necessary.	• Complete the medical record documentation. • Handle (with the help of clinical staff) any treatment failures or adverse reactions to medications that may occur after the visit. • Provide necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this office visit. • Receive and respond to any interval testing results or correspondence. • Revise treatment plan(s) and communicate with patient, as necessary.
99213	Office/outpatient visit, est	Office visit, established patient, a 55-year-old male with a history of hypertension and hyperlipidemia who presents for follow up.	• Review the medical history form completed by the patient and vital signs obtained by clinical staff.	• Obtain an expended problem focused history (including response to treatment at last visit and reviewing interval correspondence or medical records received).* • Perform an expended problem focused examination.* • Consider relevant data, options, and risks and formulate a diagnosis and develop a treatment plan (low complexity medical decision making).* • Discuss diagnosis and treatment options with the patient. • Address the preventive health care needs of the patient. • Reconcile medication(s). • Write prescription(s). • Order and arrange diagnostic testing or referral as necessary.	• Complete the medical record documentation. • Handle (with the help of clinical staff) any treatment failures or adverse reactions to medications that may occur after the visit. • Provide necessary care coordination, telephonic or electronic communication assistance, and other necessary management related to this office visit. • Receive and respond to any interval testing results or correspondence. • Revise treatment plan(s) and communicate with patient, as necessary. * Two of these three components required.

In order to ensure that these hospital discharge care coordination services are appropriately valued, we are seeking comment on the specific physician activities and the associated resources involved in physician provision of effective care coordination surrounding a hospital discharge. For the treating physician(s) overseeing the care of the beneficiary in the hospital, specific care coordination activities (for example, transfer of the beneficiary to a community physician) could include the following:

• Transitioning responsibility for the beneficiary's care to a receiving physician without a ''gap'' (that is, a seamless transition). This could include identifying the receiving physician by name and providing that physician's contact information to the beneficiary and/or family representative.

• Facilitating the transfer of ''core'' information to the receiving physician and/or beneficiary/family (if requested), via fax, secure e-mail, hard copy, or other mechanism. The core set of information could include (unless not applicable):

++ Important lab and diagnostic test results and drugs and treatments, as well as pending tests and how and when to obtain results.

++ Drugs prescribed, including planned changes.

++ Other treatments and tests prescribed, including planned changes.

++ Allergies.

++ Receiving physician contact information and specification of physician coverage for problems before any initial appointment. For hospitalized beneficiaries, this could include a planned initial post-discharge appointment within 7 business days with a physician, NP, or PA (if authorized by State law).

++ Overview of the caregiver situation.

++ Summary of beneficiary/family goals of care, with time frames and any restrictions.

++ Family caregiver and surrogate decision-maker identification, and assessment of needs (for the caregiver), as appropriate.

++ Responding to inquiries from the receiving physician or other provider (such as, LTCH, IRF, SNF) about the beneficiary's hospital stay and care plan in a timely and collaborative way.

For the beneficiary's primary physician(s) in the community overseeing the beneficiary's care post hospital discharge, specific care coordination activities could include:

• Assuming responsibility for the beneficiary's care without a gap.

• Notifying the patient that the receiving physician will be responsible for the beneficiary's care, and checking on the beneficiary's condition in the first few days after the transition.

• Obtaining and reviewing the core information provided by the sending physician.

• Contacting the physician(s) involved in the beneficiary's care during the hospital stay (as appropriate).

• Setting up an appointment for a face-to-face visit with the beneficiary, as appropriate.

We welcome comment on key physician activities associated with effective care coordination between the treating physician in the hospital and the beneficiary's primary physician in the community upon hospital discharge. We request public comment on the extent to which the clinical vignette for the hospital discharge and office visit codes appropriately incorporate hospital discharge care coordination activities. We also seek comment about whether the relative values assigned to these services under the physician fee schedule appropriately reflect the resources involved in performing activities that are essential to hospital discharge care coordination, and on ways to ensure appropriate recognition of the resources involved in these services, specifically, the physician time and complexity of physician work as well as the associated practice expenses. We also seek comments on the current coding structure for these services and on any other suggested changes to improve care coordination, particularly for the beneficiary's transition from the hospital to the community, to better reflect the resources required. We note that the Assistant Secretary of Planning and Evaluation (ASPE) in the Department of Health and Human Services hosted a technical expert panel in May 2011 identifying areas of additional research into equitable payment for services among specialties, with particular attention to valuing the resources required for primary care including generally identifying and valuing care coordination activities. We will consider the panel's discussion and any available analyses as we broadly consider physician payment for hospital discharge care coordination activities.

In addition to specific comments on the resources required for effective care coordination activities, we also broadly invite comment on other means to emphasize physician care coordination, such as educational efforts or the development of additional care coordination performance measures for the Physician Quality Reporting System and the Physician Fee Schedule Value Modifier.

A new trend in care transition planning is the use of shared care plans between beneficiary and physician rather than those created solely by the physician and dictated as ''doctor's orders'' to the beneficiary. Shared care plans are jointly developed between beneficiary and physician where the physician sets and documents self-management goals collaboratively with beneficiaries. These jointly developed care plans can be particularly important to improving overall beneficiary outcomes for beneficiaries with chronic illnesses, such as diabetes or HIV/AIDS, by developing a sense of personal responsibility for health outcomes. These plans give the patients a tool to learn about and practice principles of self-management, producing motivated and engaged beneficiaries. In addition, they provide health care professionals a communication tool to provide timely information that supports planned care and beneficiary self-management. (For more information see *http://www.innovations.ahrq.gov/content.aspx?id=2191* or *http://www.ihi.org/IHI/Topics/HIVAIDS/HIVDiseaseGeneral/Tools/My+Shared+Care+Plan.htm*.)

We will carefully weigh all comments received as we consider changes to the Medicare physician fee schedule to appropriately reflect the relative value of effective post discharge care coordination or other means to focus attention in this area. We note that we are not proposing any changes at this time. If we believe it would be appropriate to make certain changes, they would be proposed through future notice and comment rulemaking and would be subject to the budget neutrality requirements of section 1848(c)(2)(B)(ii)(II) of the Act.

L. Technical Corrections

1. Outpatient Speech-Language Pathology Services: Conditions and Exclusions

We are proposing a technical correction to the heading of the condition of coverage at § 410.62(b) for outpatient speech-language pathology services. The heading was inadvertently changed in the course of rulemaking for CY 2009 when a new paragraph was added at § 410.62(c) to recognize speech-language pathologists in private practice. The section heading at § 410.62(b) currently reads ''Special provisions for services furnished by speech-language pathologists in private practice.'' We are proposing to reinstate the correct heading at § 410.62(b) to read ''Condition for coverage of outpatient speech-language pathology services furnished to certain inpatients of a hospital or a CAH or SNF.''

2. Outpatient Diabetes Self-Management Training and Diabetes Outcome Measurements

a. Proposed Changes to the Definition of Deemed Entity

We are proposing the following technical corrections to the definition of ''deemed entity'' in § 410.140:

• Removing the following phrases to clarify the purpose of the reference to an approved entity:

++ ''[B]y CMS to furnish and receive Medicare payment for the training''.

++ ''Upon being approved''.

++ ''CMS refers to this entity as an ''approved entity'' ''.

• Removing an incorrect reference to § 410.141(e) and replacing it with § 410.145(b).

The proposed revisions would read as follows:

Deemed entity means an individual, physician, or entity accredited by an approved organization, but that has not yet been approved by CMS under § 410.145(b) to furnish training.

b. Proposed Changes to the Condition of Coverage Regarding Training Orders

We are proposing the following technical correction to § 410.141(b)(1) entitled ''training orders'':

• Removing the cross-reference ''§ 410.32(a)'' and adding the cross-reference ''§ 410.32(a)(2)''.

• Removing the term ''it'' and adding the phrase ''the training'' in its place.

The proposed revisions would read as follows:

Training orders. Following an evaluation of the beneficiary's need for the training, the training is ordered by the physician (or qualified nonphysician practitioner) (as defined in § 410.32(a)(2)) treating the beneficiary's diabetes.

3. Practice Expense Relative Value Units (RVUs)

We are proposing the following technical corrections to the regulation at § 414.22(b):

• In paragraphs (b)(5)(i)(A) and (B)—

++ Include additional examples of the settings in which the facility or nonfacility practice expense (PE) RVUs are applied, respectively; and

++ Clarify that the lists of settings are not exhaustive; and amend these lists to include additional place of service examples.

• In paragraph (b)(5)(i)(A) we would add ''hospice'' to the list of places of service after ''community mental health center.

• In paragraph (b)(5)(i)(B)—

++ Revise the language to be more consistent with (b)(5)(i)(A) and to

include the ''comprehensive outpatient rehabilitation facility (CORF)'' as a place of service example; and

++ Clarify this provision by removing the text regarding the use of the nonfacility PE RVUs for services in ''* * * a facility or institution other than the hospital, skilled nursing facility, community mental health center, or ASC'' because this phrase does not accurately reflect the places of service where the nonfacility PE RVUs are applied.

• In paragraph (b)(5)(i)(C)—

++ Revise the paragraph introduction by adding ''and CORF'' after ''outpatient therapy'' and before ''services'' and, to more accurately define the term ''outpatient therapy services,'' to add ''(including physical therapy, occupational therapy and speech-language pathology services)'' after ''therapy services'' and before ''CORF services billed under * * *''.

The proposed revisions to § 414.22(b)(5)(i)(A), (B), and (C) would read as follows:

(A) *Facility practice expense RVUs.* The facility practice expense RVUs apply to services furnished to patients in places of service including, but not limited to, a hospital, a skilled nursing facility, a community mental health center, a hospice, or an ambulatory surgical center.

(B) *Nonfacility practice expense RVUs.* The nonfacility practice expense RVUs apply to services furnished to patients in places of service including, but not limited to, a physician's office, the patient's home, a nursing facility, or a comprehensive outpatient rehabilitation facility (CORF).

(C) *Outpatient therapy and CORF services.* Outpatient therapy services (including physical therapy, occupational therapy, and speech-language pathology services) and CORF services billed under the physician fee schedule are paid using the nonfacility practice expense RVUs.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

• The need for the information collection and its usefulness in carrying out the proper functions of our agency.

• The accuracy of our estimate of the information collection burden.

• The quality, utility, and clarity of the information to be collected.

• Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

The proposed rule imposes collection of information requirements as outlined in the regulation text and specified in various section of this proposed rule. However, this proposed rule also makes reference to several associated information collections that are not discussed in the regulation text contained in this document. The following is a discussion of these information collections, some of which have already received OMB approval.

A. Part B Drug Payment

The discussion of average sales price (ASP) issues in section IV.A.1 of this proposed rule with comment period pertains to payment for Medicare Part B drugs and biologicals under the ASP methodology. Drug manufacturers are required to submit ASP data to us on a quarterly basis. The ASP reporting requirements are set forth in section 1927(b) of the Act.

In order to facilitate more accurate and consistent ASP data reporting from manufacturers, we are proposing the following:

• To revise existing reporting fields and add new fields to the Addendum A template.

• To add a macro to the Addendum A template that will allow manufacturers to validate the format of their data prior to submission.

• To maintain a list of HCPCS codes for which manufacturer's report ASPs for NDCs on the basis of a specified unit.

• A clarification to existing regulation text at § 414.802. Current regulation text states that ''Unit means the product represented by the 11 digit National Drug Code.'' We propose to update the definition to account for situations when an alternative unit of reporting must be used.

Additionally, we will also be revising our instructions for the reporting of dermal grafting products in a user guide available on the ASP Web site at: Z*http://www.cms.gov/McrPartBDrugAvgSalesPrice/.*

The burden associated with this requirement is the time and effort required by manufacturers of Medicare Part B drugs and biologicals to calculate, record, and submit the required data to CMS. The Addendum A template is currently approved under OMB control number 0938–0921. For the first year, we estimate that collection of the additional data elements will take approximately 2 additional hours for each submission of data, or 12 hours per response, at a cost of $252 per response. Based on the current number of respondents, we estimate that this requirement will affect approximately 180 manufacturers. Since manufacturers will respond 4 times per year, we estimate that, on an annual basis, the annual number of responses will be 720 (180 manufacturers multiplied by 4 responses) and the total annual hours burden will be 34,560 hours (720 annual responses multiplied by 48 annual hours per response). We estimate the annual cost burden to be $181,440 (cost per response multiplied by the annual number of responses). Once manufacturers adjust to the changes associated with electronic reporting after the first year, we anticipate that the burden estimate will decrease.

B. The Physician Quality Reporting System

Section IV.F.1. of this proposed rule discusses the background of the Physician Quality Reporting System, provides information about the proposed measures and reporting mechanisms that would be available to eligible professionals and group practices who choose to participate in the 2012 Physician Quality Reporting System, and the proposed criteria for satisfactory reporting in 2012.

With respect to satisfactory submission of data on quality measures by eligible professionals, eligible professionals include physicians, other practitioners as described in section 1842(b)(18)(c) of the Act, physical and occupational therapists, qualified speech-language pathologists, and qualified audiologists. Eligible professionals may choose whether to participate and, to the extent they satisfactorily submit data on quality measures for covered professional services, they can qualify to receive an incentive payment. To qualify to receive an incentive payment for 2012, we propose that the eligible professional (or group practice) would need to meet one of the criteria for satisfactory reporting described in section IV.F.1.e. or IV.F.1.f. of this proposed rule (or section IV.F.1.g. for group practices).

Because this is a voluntary program, it is difficult to accurately estimate how many eligible professionals would opt to participate in the Physician Quality Reporting System in CY 2012. Information from the ''Physician Quality

Reporting System 2009 Reporting Experience Report, ''which is available on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/pqrs,* indicates that eligible professionals from nearly 120,000 unique TIN/NPI combinations attempted to submit Physician Quality Reporting System quality measures data for the 2009 Physician Quality Reporting System. Therefore, for purposes of conducting a burden analysis for the 2012 Physician Quality Reporting System, we will assume that all eligible professionals who attempted to participate in the 2009 Physician Quality Reporting System will also attempt to participate in the 2012 Physician Quality Reporting System. Furthermore, we believe that the burden for eligible professionals who are participating in the Physician Quality Reporting System for the first time in 2012 would be considerably higher than the burden for eligible professionals who have participated in the Physician Quality Reporting System in prior years. As described later in this section, some preparatory steps are needed to begin participating in the Physician Quality Reporting System. To the extent that we are not proposing to retire the measures that an eligible professional has reported in a prior year and there are no changes to the measure's specifications from a prior year, such preparatory steps would not need to be repeated in subsequent years.

For individual eligible professionals, the burden associated with the requirements of this reporting initiative would be the time and effort associated with eligible professionals identifying applicable Physician Quality Reporting System quality measures for which they can report the necessary information, collecting the necessary information, and reporting the information needed to report the eligible professional's or group practice's measures. We believe it is difficult to definitively quantify the burden because eligible professionals may have different processes for integrating the data collection for the Physician Quality Reporting System measures into their practice's work flows. Moreover, we expect that the time needed for an eligible professional to review the quality measures and other information, select measures applicable to his or her patients and the services he or she furnishes to them, and incorporate the use of quality data codes into the office work flows would vary along with the number of measures that are potentially applicable to a given professional's practice. Since a majority of eligible professionals participate via claims or registry-based reporting of individual measures, they would generally be required to report on at least three measures to earn a Physician Quality Reporting System incentive. Therefore, we will assume that each eligible professional who attempts to submit Physician Quality Reporting System quality measures data via claims or registry reporting is attempting to earn a Physician Quality Reporting System incentive payment and reports on an average of three measures for this burden analysis.

Due to the fact that we have seen significant increases in participation each year since the program's inception, we anticipate even greater participation in the 2012 Physician Quality Reporting System than in previous years, including participation by eligible professionals who are participating in the Physician Quality Reporting System for the first time in 2012. As discussed previously, eligible professionals who are participating in the Physician Quality Reporting System for the first time in 2012 need to take preparatory steps to begin participating in the program. Since this burden analysis focuses on those new to the Physician Quality Reporting System, we will assign 5 hours as the amount of time needed for eligible professionals to review the 2012 Physician Quality Reporting System Measures List, review the various reporting options, select the most appropriate reporting option, identify the applicable measures or measures groups for which they can report the necessary information, review the measure specifications for the selected measures or measures groups, and incorporate reporting of the selected measures or measures groups into the office work flows. This estimate is based on our assumption that an eligible professional would need up to 2 hours to review the 2012 Physician Quality Reporting System Measures List, review the reporting options, and select a reporting option and measures on which to report and 3 hours to review the measure specifications for up to 3 selected measures or up to 1 selected measures group and to develop a mechanism for incorporating reporting of the selected measures or measures group into the office work flows.

Information from the Physician Voluntary Reporting Program (PVRP), which was a predecessor to the Physician Quality Reporting System, indicated an average labor cost of $50 per hour for 2006. To account for salary increases over time, we will use an average practice labor cost of $60 per hour in our estimates based on an assumption of an average annual increase of approximately 3 percent. Thus, we estimate the cost for an eligible professional associated with preparing to report Physician Quality Reporting System quality measures would be approximately $300 per eligible professional ($60 per hour × 5 hours).

We continue to expect the ongoing costs associated with Physician Quality Reporting System participation to decline based on an eligible professional's familiarity with and understanding of the Physician Quality Reporting System, experience with participating in the Physician Quality Reporting System, and increased efforts by CMS and stakeholders to disseminate useful educational resources and best practices. We also continue to expect the ongoing costs associated with Physician Quality Reporting System participation to decline as we align the participation requirements in the Physician Quality Reporting System with the reporting requirements in the Medicare and Medicaid Electronic Health Record (EHR) Incentive Program such that an eligible professional would only need to submit data to CMS one time for multiple purposes.

We believe the burden associated with actually reporting the Physician Quality Reporting System quality measures would vary depending on the reporting mechanism selected by the eligible professional. For the proposed claims-based reporting option, eligible professionals would need to gather the required information, select the appropriate quality data codes (QDCs), and include the appropriate QDCs on the claims they submit for payment. The Physician Quality Reporting System would collect QDCs as additional (optional) line items on the existing HIPAA transaction 837–P and/or CMS Form 1500 (OCN: 0938–0999). We do not anticipate any new forms and or any modifications to the existing transaction or form. We also do not anticipate changes to the 837–P or CMS Form 1500 for CY 2012.

Based on our experience with the PVRP, we continue to estimate that the time needed to perform all the steps necessary to report each measure (that is, reporting the relevant quality data code(s) for a measure) on claims would ranges from 15 seconds (0.25 minutes) to over 12 minutes for complicated cases and/or measures, with the median time being 1.75 minutes. At an average labor cost of $60 per hour per practice, the cost associated with this burden would range from $0.25 in labor to about $12.00 in labor time for more complicated cases and/or measures,

with the cost for the median practice being $1.75.

The total estimated annual burden for this requirement would also vary along with the volume of claims on which quality data is reported. In previous years, when we required reporting on 80 percent of eligible cases for claims-based reporting, we found that on average, the median number of reporting instances for each of the Physician Quality Reporting System measures was 9. Since we proposed to reduce the required reporting rate by over one-third to 50 percent, then for purposes of this burden analysis we will assume that an eligible professional will need to report each selected measure for 6 reporting instances. The actual number of cases on which an eligible professional would be required to report quality measures data would vary, however, with the eligible professional's patient population and the types of measures on which the eligible professional chooses to report (each measure's specifications includes a required reporting frequency).

Based on the assumptions discussed previously, we estimate the total annual reporting burden per individual eligible professional associated with claims-based reporting would range from 4.5 minutes (0.25 minutes per measure × 3 measures × 6 cases per measure) to 180 minutes (12 minutes per measure × 3 measures × 6 cases per measure), with the burden to the median practice being 31.5 minutes (1.75 minutes per measure × 3 measures × 6 cases). We estimate the total annual reporting cost per eligible professional associated with claims-based reporting would range from $4.50 ($0.25 per measure × 3 measures × 6 cases per measure) to $216.00 ($12.00 per measure × 3 measures × 6 cases per measure), with the cost to the median practice being $31.50 per eligible professional ($1.75 per measure × 3 measures × 6 cases per measure).

For registry-based reporting, there would be no additional time burden for eligible professionals to report data to a registry as eligible professionals opting for registry-based reporting would more than likely already be reporting data to the registry for other purposes and the registry would merely be re-packaging the data for use in the Physician Quality Reporting System. Little, if any, additional data would need to be reported to the registry solely for purposes of participation in the 2012 Physician Quality Reporting System. However, eligible professionals would need to authorize or instruct the registry to submit quality measures results and numerator and denominator data on quality measures to CMS on their behalf. We estimate that the time and effort associated with this would be approximately 5 minutes per eligible professional.

We are proposing that registries interested in submitting quality measures results and numerator and denominator data on quality measures to CMS on their participants' behalf in 2012 would need to complete a self-nomination process in order to be considered ''qualified'' to submit on behalf of eligible professionals unless the registry was qualified to submit on behalf of eligible professionals for prior program years and did so successfully. We estimate that the proposed self-nomination process for qualifying additional registries to submit on behalf of eligible professionals for the 2012 Physician Quality Reporting System would involve approximately 1 hour per registry to draft the letter of intent for self-nomination. We estimate that each self-nominated entity would also spend 2 hours for the interview with CMS officials and 2 hours calculating numerators, denominators, and measure results for each measure the registry wishes to report using a CMS-provided measure flow. However, the time it takes to produce calculated numerators, denominators, and measure results using the CMS-provided measure flows could vary depending on the registry's experience and the number and type of measures for which the registry wishes to submit on behalf of eligible professionals. Additionally, part of the proposed self-nomination process involves the completion of an XML submission by the registry, which we estimate to take approximately 5 hours, but may vary depending on the registry's experience. We estimate that the registry staff involved in the registry self-nomination process would have an average labor cost of $50 per hour. Therefore, assuming the total burden hours per registry associated with the registry self-nomination process is 10 hours, we estimate that the total cost to a registry associated with the registry self-nomination process would be approximately $500 ($50 per hour × 10 hours per registry).

The burden associated with the proposed registry-based reporting requirements of the Physician Quality Reporting System would be the time and effort associated with the registry calculating quality measures results from the data submitted to the registry by its participants and submitting the quality measures results and numerator and denominator data on quality measures to CMS on behalf of their participants. We expect that the time needed for a registry to review the quality measures and other information, calculate the measures results, and submit the measures results and numerator and denominator data on the quality measures on their participants' behalf is would vary along with the number of eligible professionals reporting data to the registry and the number of applicable measures. However, we believe that registries already perform many of these activities for their participants. Therefore, there may not necessarily be a burden on a particular registry associated with calculating the measure results and submitting the measures results and numerator and denominator data on the quality measures to CMS on behalf of their participants. Whether there is any additional burden to the registry as a result of the registry's participation in the Physician Quality Reporting System would depend on the number of measures that the registry intends to report to CMS and how similar the registry's measures are to CMS' proposed Physician Quality Reporting System measures.

For EHR-Based reporting we have proposed for the CY 2012 Physician Quality Reporting System, the individual eligible professional could either submit the quality measures data directly to CMS from their EHR or utilize an EHR data submission vendor to submit the data to CMS on the eligible professionals' behalf. To submit data to CMS must directly from their EHR, the eligible professional would have to have access to a CMS-specified identity management system, such as IACS, which we believe takes less than 1 hour to obtain. Once an eligible professional has an account for this CMS-specified identity management system, he or she would need to extract the necessary clinical data from his or her EHR, and submit the necessary data to the CMS-designated clinical data warehouse. With respect to our proposed requirement for an eligible professional to submit a test file, we believe that doing so would take less than 1 hour. With respect to submitting the actual 2012 data file in 2013, we believe that this would take an eligible professional no more than 2 hours, depending on the number of patients on which the eligible professional is submitting. We believe that once the EHR is programmed by the vendor to allow data submission to CMS, the burden to the eligible professional associated with submission of data on Physician Quality Reporting System quality measures should be minimal as all of the information required to report the measure should already reside in the

eligible professional's EHR. We did not introduce the EHR-Based reporting mechanism into the Physician Quality Reporting System until 2010. We are still in the process of analyzing 2010 data. As such, we believe it is difficult to predict how many eligible professionals may choose to participate in the 2012 Physician Quality Reporting System via the EHR-Based reporting mechanism.

We are proposing that an EHR vendor interested in having their product(s) be used by eligible professionals to submit the proposed Physician Quality Reporting System quality measures data to CMS or interested in submitting data obtained from an EHR to CMS on behalf of eligible professionals would be required to complete a self-nomination process in order for the vendor and/or its product(s) to be considered ''qualified'' for 2012. It is difficult to definitively quantify the burden associated with the proposed EHR self-nomination process as there is variation regarding the technical capabilities and experience among vendors. For purposes of this burden analysis, however, we estimate that the time required for an EHR vendor to complete the self-nomination process would be similar to the time required for registries to self-nominate, which is approximately 10 hours at $50 per hour for a total of $500 per EHR vendor ($50 per hour × 10 hours per EHR vendor).

The burden associated with the EHR vendor programming its EHR product(s) to extract the clinical data that the eligible professional would need to submit to CMS for purposes of reporting 2012 Physician Quality Reporting System quality measures would be dependent on the EHR vendor's familiarity with the Physician Quality Reporting System, the vendor's system capabilities, as well as the vendor's programming capabilities. Some vendors already have these necessary capabilities and for such vendors, we estimate that the total burden hours would be 40 hours at a rate of $50 per hour for a total burden estimate of $2,000 ($50 per hour × 40 hours per vendor). However, given the variability in the capabilities of the vendors, we believe those vendors with minimal experience would have a burden of approximately 200 hours at $50 per hour, for a total estimate of $10,000 per vendor ($50 per hour × 200 hours per EHR vendor).

With respect to the proposed criteria for satisfactorily reporting data on the proposed quality measures for group practices to be treated as satisfactorily submitting quality measures data under the 2012 Physician Quality Reporting System discussed in section IV.F.1. of this proposed rule, group practices interested in participating in the 2012 Physician Quality Reporting System through the proposed group practice reporting option (GPRO) would need to complete a proposed self-nomination process similar to the proposed self-nomination process required of registries and EHR vendors. Therefore, assuming it takes 2 hours for a group practice to decide whether to participate as a group or individually, approximately 2 hours per group practice to draft the letter of intent for self-nomination, gather the requested information, and provide this requested information, and an additional 2 hours undergoing the vetting process with CMS officials, we estimate a total of 6 hours associated with the proposed self-nomination process. Assuming that the group practice staff involved in the group practice proposed self-nomination process have the same average practice labor cost as the average practice labor cost estimates we used for individual eligible professionals of $60 per hour, we estimate that the total cost to a group practice associated with the group practice self-nomination process would be approximately $360 ($60 per hour x 6 hours per group practice).

The burden associated with the proposed group practice reporting requirements of the 2012 Physician Quality Reporting System is the time and effort associated with the group practice submitting the proposed quality measures data. For practices participating under the proposed GPRO process, this would be the time associated with the physician group completing the data collection tool. The information collection components of this data collection tool have been reviewed by OMB and are currently approved under OMB control number 0938–0941, with an expiration date of December 31, 2011, for use in the Physician Group Practice, Medicare Care Management Performance (MCMP), and EHR demonstrations. Based on burden estimates for the PGP demonstration, which uses the same data submission methods, we estimate the burden associated with a physician group completing the data collection tool would be approximately 79 hours per physician group. Based on an average labor cost of $60 per physician group, we estimate the cost of data submission per physician group associated with participating in the proposed 2012 Physician Quality Reporting System GPRO would be $4,740 ($60 per hour × 79 hours per group practice).

Eligible professionals who wish to qualify for the additional 0.5 percent incentive payment authorized under section 1848(m)(7) of the Act (''Additional Incentive Payments'') for 2012 would need to more frequently than is required to qualify for or maintain board certification status participate in a qualified Maintenance of Certification Program for 2012 and successfully complete a qualified Maintenance of Certification Program practice assessment for 2012. We believe that a majority of the eligible professionals who would attempt to qualify for this additional 0.5 percent incentive payment would be those who are already enrolled and participating in a Maintenance of Certification Board. The amount of time that it would take for the eligible professional to participate in the Maintenance of Certification Program more frequently than is required to qualify for or maintain board certification status would vary based on what each individual board determines constitutes ''more frequently.'' We expect that the amount of time needed to complete a qualified Maintenance of Certification Program practice assessment would be spread out over time since a quality improvement component is often required. Information from an informal poll of a few ABMS member boards indicates that the time an individual eligible professional spends to complete the practice assessment component of the Maintenance of Certification ranges from 8 to 12 hours.

We are seeking comments on this burden analysis, including the underlying assumptions used in developing our burden estimates.

C. Electronic Prescribing (eRx) Incentive Program

The eRx Incentive Program is a voluntary reporting program. In 2009, approximately 670,000 eligible professionals were eligible to participate in the eRx Incentive Program. Approximately 90,000 (or about 14 percent) of eligible professionals participated in the eRx Incentive Program in 2009. For purposes of participation in the eRx Incentive Program to earn an incentive payment, we expect that the number of eligible professionals participating in the eRx Incentive Program to be approximately 90,000, based on participation rates from the 2009 eRx Incentive Program.

Due to the implementation of the 2013 and 2014 payment adjustments as well as the proposals to expand the reporting mechanisms for purposes of

reporting the electronic prescribing measure for the 2013 and 2014 payment adjustments, we expect that there will be an increase in eligible professionals who participate in the eRx Incentive Program for CYs 2012 through 2014. Therefore, for purposes of conducting a burden analysis for the 2012 through 2014 eRx Incentive Program, we will assume that approximately 90,000 professionals eligible to participate in the 2009 eRx Incentive Program will participate. This is based on participation rates from the 2009 eRx Incentive Program, which is the highest participation level for the eRx Incentive Program we have yet recorded. As such, we can estimate that more than 90,000 unique TIN/NPI combinations will participate in the 2012, 2013, and 2014 eRx Incentive Program for purposes of the 2013 and 2014 payment adjustment (see the ''2009 Reporting Experience,'' which is available on the Physician Quality Reporting System section of the CMS Web site at *http://www.cms.hhs.gov/pqrs).* Although this estimate only accounts for approximately 13 percent of all professionals eligible to participate in the eRx Incentive Program, we believe that participation may be offset by the limitations and significant hardship exemptions we have proposed for the 2013 and 2014 payment adjustment.

Section IV.F.2. of this proposed rule discusses the background of the eRx Incentive Program. For the proposed programs for 2012 through 2014, eligible professionals and group practices may choose whether to participate and, to the extent they meet—(1) Certain proposed thresholds with respect to the volume of covered professional services furnished; and (2) the proposed criteria for being a successful electronic prescriber described in section IV.F.2.b.(2). of this proposed rule, they would qualify to receive an incentive payment for 2012 and 2013 and/or avoid being subject to the 2013 and 2014 payment adjustment.

In section IV.F.2.b.(2). of this proposed rule, we propose the requirements for eligible professionals and group practices can qualify for being a successful electronic prescriber in order to earn a 2012 and/or 2013 incentive payment. For the 2012 and 2013 incentives, as discussed in section IV.F.2. of this proposed rule, each eligible professional would need to report the electronic prescribing measure's numerator indicating that at least one prescription generated during an encounter was electronically submitted at least 25 instances during the reporting period in association with a denominator-eligible visit.

In section IV.F.2.b.(2). of this proposed rule, we propose additional requirements for eligible professionals and group practices can meet for the 2013 payment adjustment, as well as propose requirements for being a successful electronic prescriber for the 2014 payment adjustment. For the 2013 and 2014 payment adjustment, we propose that each eligible professional would need to report the electronic prescribing measure's numerator at least 10 instances during the reporting period.

We expect the ongoing costs associated with participation in the eRx Incentive Program to decline based on an eligible professional's understanding of the eRx Incentive Program, experience with participating in the eRx Incentive Program, and increased efforts by CMS and stakeholders to disseminate useful educational resources and best practices.

Similar to the Physician Quality Reporting System, one factor in the burden to individual eligible professionals is the time and effort associated with individual eligible professionals reviewing the electronic prescribing measure to determine whether it is applicable to them, reviewing and selecting one of the available proposed reporting options (for purposes of the 2012 and 2013 incentives and the 2013 and 2014 payment adjustments, this measure would be reportable through claims-based reporting, registry-based reporting, or through EHRs) and selecting one, gathering the required information, and incorporating reporting of the measure into their office work flows. Since the eRx Incentive Program consists of only 1 measure to report, we estimate 2 hours as the amount of time that would be needed for individual eligible professionals to prepare for participation in the eRx Incentive Program. At an average cost of approximately $60 per hour per practice, we estimate the total preparation costs to individual eligible professionals would be approximately $120 (2 hours × $60 per hour).

Another factor that we believe influences the burden to eligible professionals is how they choose to report the electronic prescribing measure. For eligible professionals who choose to do so via claims, we estimate that the burden associated with the requirements of this incentive program would be the time and effort associated with gathering the required information and identifying when it is appropriate to include the measure's quality data code (QDC) on the claims they submit for payment. For claims-based reporting, the measure's QDC would be collected as additional (optional) line items on the existing HIPAA transaction 837–P and/or CMS Form 1500. We do not anticipate any new forms and or modifications to the existing transaction or form. We also do not anticipate changes to the 837–P or CMS Form 1500 for CY 2012.

Based on the information from the PVRP for the amount of time it takes a median practice to report one measure one time on claims (1.75 minutes) and our proposed requirement that eligible professionals report the measure 25 times for purposes of the incentive payment, we estimate the burden associated with claims-based data submission to would be 43.75 minutes (1.75 minutes per case × 1 measure × 25 cases per measure). This equates to a cost of approximately $43.75 (1.75 minutes per case × 1 measure × 25 cases per measure × $60 per hour) per individual eligible professional. For purposes of the 2013 and 2014 eRx payment adjustment, where we propose that an eligible professional is required to report the measure only 10 times, we estimate the burden associated with claims-based submission would be 17.5 minutes (1.75 minutes per case × 1 measure × 10 cases per measure). This equates to a cost of approximately $17.50 (1.75 minutes per case × 1 measure × 10 cases per measure × $60 per hour) per individual eligible professional.

Because registry-based reporting of the electronic prescribing measure to CMS was added to the eRx Incentive Program for 2010 and eligible professionals are not required to indicate to us how they plan to report the electronic prescribing measure each year, it is difficult to accurately estimate how many eligible professionals would opt to participate in the eRx Incentive Program through the proposed registry-based reporting mechanism in CYs 2012 through 2014. We do not anticipate, however, any additional burden for eligible professionals to report data to a registry as eligible professionals opting for registry-based reporting would more than likely already be reporting data to the registry for other purposes. Little, if any, additional data would need to be reported to the registry for purposes of participation in the 2012, 2013, and 2014 eRx Incentive Program since the only information that the registry would need to report to us is the number of times the eligible professional electronically prescribed. However, eligible professionals would need to authorize or instruct the registry to submit quality measures results and numerator and denominator data on the

electronic prescribing measure to CMS on their behalf. We estimate that the time and effort associated with this would be approximately 5 minutes for each eligible professional that wishes to authorize or instruct the registry to submit quality measures results and numerator and denominator data on the electronic prescribing measure to CMS on their behalf.

Based on our proposal to consider only registries qualified to submit Physician Quality Reporting System quality measures results and numerator and denominator data on quality measures to CMS on their participants' behalf for the 2012 and 2013 Physician Quality Reporting System reporting periods to be qualified to submit results and numerator and denominator data on the electronic prescribing measure for the respective eRx Incentive Program reporting periods that occur in 2012 and 2013, there would be no need for a registry to undergo a separate self-nomination process for the eRx Incentive Program and therefore, no additional burden associated with the registry self-nomination process.

There would also be a burden to the registry associated with the registry calculating results for the electronic prescribing measure from the data submitted to the registry by its participants and submitting the quality measures results and numerator and denominator data on the electronic prescribing quality measure to CMS on behalf of their participants. We expect that the time needed for a registry to review the electronic prescribing measure's specifications, calculate the measure's results, and submit the measure's results and numerator and denominator data on their participants' behalf would vary along with the number of eligible professionals reporting data to the registry. However, we believe that registries already perform many of these activities for their participants. Since the eRx Incentive Program consists of only one measure, we believe that the burden associated with the registry reporting the measure's results and numerator and denominator to CMS on behalf of their participants would be minimal.

For the proposed EHR-Based reporting mechanism, the eligible professional would need to either extract the necessary clinical data from his or her EHR and submit the necessary data to the CMS-designated clinical data warehouse or have an EHR data submission vendor extract the necessary clinical data from his or her EHR and submit the necessary data to CMS on the professional's behalf. Because this manner of reporting quality data to CMS was first added to the eRx Incentive Program in 2010 and eligible professionals are not currently required to (and we are not proposing to require that they) indicate to us how they intend to report the electronic prescribing measure, it is difficult to estimate how many eligible professionals would opt to participate in the eRx Incentive Program through the proposed EHR-Based reporting mechanism for reporting periods that occur in CYs 2012 and 2013. We believe that once an eligible professional's EHR is programmed by the vendor to allow data submission to CMS, the burden to the eligible professional associated with submission of data on the electronic prescribing measure should be minimal. The eligible professional who chooses to submit the electronic prescribing measure data directly to CMS from his or her EHR would have to have access to a CMS-specified identity management system, such as IACS, though. We believe it takes less than 1 hour to obtain access to the identity management system.

Since we are proposing that only EHR products and data submission vendors qualified for 2012 and 2013 Physician Quality Reporting System reporting periods could be used to submit data on the electronic prescribing measure for the respective eRx Incentive Program reporting periods that occur in CYs 2012 and 2013, there would be no need for EHR vendors and/or their products to undergo a separate self-nomination process for the eRx Incentive Program and therefore, no additional burden associated with the self-nomination process for the eRx Incentive Program.

There would also be a burden to the EHR vendor associated with the EHR vendor programming its EHR product(s) to extract the clinical data that the eligible professional and/or vendor would need to submit to CMS for purposes of reporting the proposed electronic prescribing measure. The time needed for an EHR vendor to review the measure's specifications and program its product to submit data on the measure to the CMS-designated clinical data warehouse would be dependent on the EHR vendor's familiarity with the electronic prescribing measure, the vendor's system capabilities, as well as the vendor's programming capabilities. Since we are proposing that only EHR products qualified for 2012 and 2013Physician Quality Reporting System reporting periods would qualify for the respective eRx Incentive Program reporting periods that occur in CY 2012 or 2013, and the eRx Incentive Program consists of only one measure, we believe that any burden associated with the EHR vendor to program its product(s) to submit data on the electronic prescribing measure to the CMS-designated clinical data warehouse would be minimal.

Finally, with respect to the proposed criteria for group practices to be treated as successful electronic prescribers for the 2012 and 2013 incentive, as well as with regard to the 2013 and 2014 payment adjustments, as discussed in section IV.F.2. of this proposed rule, respectively, group practices would have the same options as individual eligible professionals in terms of the form and manner for reporting the electronic prescribing measure (that is, group practices would have the option of reporting the measure through claims, a qualified registry, or a qualified EHR product). There are only 2 differences between the proposed requirements for an individual eligible professional and a group practice: (1) The fact that a group practice would have to self-nominate; and (2) a difference in the number of times that a group practice would be required to report the electronic prescribing measure.

We do not anticipate any additional burden associated with the proposed group practice self-nomination process since we propose to limit the group practices to those selected to participate in the Physician Quality Reporting System GPRO. We are proposing that the practice only would need to indicate its desire to participate in the proposed eRx GPRO at the same time it self-nominates for the Physician Quality Reporting System GPRO and indicate how it intends to report the electronic prescribing measure.

In terms of the burden to group practices comprised of 25 to 99 eligible professionals associated with submission of the electronic prescribing measure, we believe that this would be similar to the burden to individual eligible professionals for submitting the electronic prescribing measure. In fact, overall, there could be less burden associated with a practice participating as a group rather than as individual eligible professionals because the total number of proposed reporting instances required by the group could be less than the total number of proposed reporting instances that would be required if each member of the group separately reported the electronic prescribing measure. Thus, we believe that the burden to a group practice associated with reporting the electronic prescribing measure could range from almost no burden (for groups who choose to do so through a qualified EHR or registry) to 18.22 hours (1.75 minutes per measure $\times$ 1 measure

× 625 cases per measure) for a group practice that chooses to report the electronic prescribing measures through the proposed claims submission process. Consequently, the total estimated cost per group practice to report the electronic prescribing measure could be as high as $1,093 ($1.75 per measure × 1 measure × 625 cases per measure).

In terms of the burden to group practices comprised of 100 or more eligible professionals associated with submission of the electronic prescribing measure, we believe that this would be similar to the burden to individual eligible professionals for submitting the electronic prescribing measure. In fact, overall, there could be less burden associated with a practice participating as a group rather than as individual eligible professionals because the total number of proposed reporting instances required by the group could be less than the total number of proposed reporting instances that would be required if each member of the group separately reported the electronic prescribing measure. Thus, we believe that the burden to a group practice associated with reporting the electronic prescribing measure could range from almost no burden (for groups who choose to do so through a qualified EHR or registry) to 72.92 hours (1.75 minutes per measure × 1 measure × 2,500 cases per measure) for a group practice that chooses to report the electronic prescribing measures through the proposed claims submission process. Consequently, the total estimated cost per group practice to report the electronic prescribing measure could be as high as $4,375 ($1.75 per measure × 1 measure × 2,500 cases per measure).

As with individual eligible professionals, we believe that group practices that choose to participate in the eRx GPRO through the proposed registry-based reporting mechanism of the electronic prescribing measure would more than likely already be reporting data to the registry. Little, if any, additional data would need to be reported to the registry for purposes of participation in the eRx Incentive Program for CYs 2012 through 2014 beyond authorizing or instructing the registry to submit quality measures results and numerator and denominator data on the electronic prescribing measure to CMS on their behalf. We estimate that the time and effort associated with this proposed registry option would be approximately 5 minutes for each group practice that wishes to authorize or instruct the registry to submit quality measures results and numerator and denominator data on the electronic prescribing measure to CMS on their behalf.

For group practices that choose to participate in the eRx Incentive Program for CYs 2012 through 2014 via the proposed EHR-Based reporting of the electronic prescribing mechanism, once the EHR is programmed by the vendor to allow data submission to CMS, the burden to the group practice associated with submission of data on the electronic prescribing measure should be minimal.

We invite comments on this burden analysis, including the underlying assumptions used in developing our burden estimates.

D. Medicare Electronic Health Record (EHR) Incentive Program for Eligible Professionals for the 2012 Payment Year

The EHR Incentive Program (discussed in section IV.H. of this proposed rule) is a voluntary program whereby eligible professionals (EPs) may earn an incentive payment for demonstrating meaningful use of certified EHR technology, which includes among other requirements, the submission of clinical quality measures (CQMs). The ''Electronic Health Record Incentive Program'' final rule (75 FR 44314 through 75 FR 44588) describes the CQMs and the CQM reporting mechanisms that will be available to EPs who choose to participate in the EHR Incentive Program (75 FR 44380) and established the criteria for achieving meaningful use in Stage 1, which includes CY 2012. In the final rule, for CY 2012, we estimated that approximately 385,954 Medicare EPs will be eligible to receive an incentive under the EHR Incentive Program (75 FR 44518). Section IV.H.2. of this proposed rule proposes changes to the EHR Incentive Program for EPs for the 2012 payment year. Aside from continuing the attestation method of reporting CQMs, we propose to allow the reporting of CQMs for purposes of demonstrating meaningful use through participation in the Physician Quality Reporting System—Medicare EHR Incentive Pilot. Eligible professionals may participate in the Pilot by submitting CQMs via (1) a Physician Quality Reporting System ''qualified'' EHR data submission vendor or (2) an EHR-Based reporting option using the EP's certified EHR technology, which must also be a Physician Quality Reporting System ''qualified'' EHR.

Because this is a voluntary program, EPs may choose whether to participate in the EHR Incentive Program and attest that they have met the meaningful use objectives and measures. Registration for the EHR Incentive Program opened in January 2011. At this time, we do not have sufficient data available on participation in the EHR Incentive Program by EPs to revise the final rule's estimate of how many EPs will opt to participate in the EHR Incentive Program for payment year 2012.

We believe the burden associated with actually reporting CQMs will vary depending on the reporting mechanism selected by the EP. Attestation to the objectives and measures is the only method available for EPs to demonstrate that they have met the meaningful use criteria in 2011. Attestation was first available on April 18, 2011 and we do not yet have sufficient data on the 2011 participation in the EHR Incentive Program. Therefore, it is difficult to estimate the level of participation in the proposed Pilot versus the number of EPs that would prefer to attest to the CQMs. However, we believe that the number of EPs who choose to participate via attestation will largely be those who are not participating in both the EHR Incentive Program and Physician Quality Reporting System. This is because EPs participating in the Physician Quality Reporting System would be more likely to participate in the Pilot.

As we estimated in the EHR Incentive Program final rule, we estimate that it would take 8 hours and 52 minutes for an EP to attest that during the EHR reporting period, the EP used certified EHR technology, specify the technology, and satisfied all Stage 1 meaningful use core criteria for payment year 2012 (75 FR 44518). We estimate that it will further take an additional 0.5 hours to select and attest to the clinical quality measures, in the format and manner specified by CMS (75 FR 44517).

For reporting via a qualified EHR data submission vendor, there would be no additional time burden for eligible professionals to report CQM data to a ''qualified'' EHR data submission vendor as EPs opting for this option would more than likely already be reporting data to the EHR data submission vendor for other purposes, such as the Physician Quality Reporting System, and the EHR data submission vendor would merely be re-packaging the data for use in the EHR Incentive Program. Furthermore, EPs more than likely would not need to authorize or instruct the EHR data submission vendor to submit CQM data to CMS on their behalf because this likely will have already been done as a requirement for reporting via an EHR data submission vendor under the Physician Quality Reporting System.

Qualified EHR data submission vendors interested in submitting CQM

data to CMS on their participants' behalf will not need to complete a self-nomination process in order to be considered ''qualified'' to submit on behalf of EPs as this process would have already been performed for the Physician Quality Reporting System. Therefore, we believe that there is no additional burden aside from the burden associated with being a Physician Qualified Reporting System qualified EHR data submission vendor for such vendors to submit CQMs on behalf of EPs.

For EPs who choose to participate in the pilot via direct data submission to CMS from the EP's certified her technology, an EP must have access to a CMS-specified identity management system, such as IACS, to participate in the Physician Quality Reporting System or eRx Incentive Program. We believe that EPs that choose the EHR-Based reporting pilot to report CQMs will do so only if they are participating in the Physician Quality Reporting System. As such, we believe there will be no additional burden on EPs to have access to a CMS-specified identity management system if the EP is already participating in the Physician Quality Reporting System. With respect to submitting the actual 2012 data file in 2013, we believe that this would take an EP no more than 2 hours, depending on the number of patients on which the EP is submitting. We believe that once the EHR is programmed by the vendor to allow data submission to CMS and the EP participates in the Physician Quality Reporting System, the additional burden to the EP associated with electronic submission of the CQMs should be minimal. Since this is a new, proposed reporting mechanism for the EHR Incentive Program 2012 payment year, it is difficult to predict the level of participation in EHR-Based reporting. However, we believe that the number of EPs who choose to participate in the EHR-Based reporting pilot will be the same as the number of eligible professionals who choose the EHR-Based reporting mechanism for the Physician Quality Reporting System. This is primarily because in addition to being certified EHR technology, the technology used under this reporting option would need to be ''qualified'' according to the Physician Quality Reporting System qualification process.

The burden associated with the EHR vendor programming its EHR product(s) to extract the clinical data that the EP or vendor needs to submit to CMS for purposes of reporting CQMs will be dependent on the EHR vendor's familiarity with the EHR Incentive Program, the vendor's system capabilities, as well as the vendor's programming capabilities. As we already propose to require ''qualified'' EHRs vendors to perform these functions under the Physician Quality Reporting System, the burden for submitting CQMs under the EHR Incentive Program will be similar to the EHR vendor reporting burden under the Physician Quality Reporting System. For vendors who already have these necessary capabilities, we estimate the total burden hours to be 40 hours at a rate of $50 per hour for a total burden estimate of $2,000 ($50 per hour × 40 hours per vendor). However, given the variability in the capabilities of the vendors, those vendors with minimal experience would have a burden of approximately 200 hours at $50 per hour, for a total estimate of $10,000 per vendor ($50 per hour × 200 hours per EHR vendor).

We invite comments on this burden analysis, including the underlying assumptions used in developing our burden estimates.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site at *http://www.cms.gov/PaperworkReductionActof1995/PRAL/list.asp#TopOfPage* or e-mail your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office at (410) 786–1326.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS–1524–P], Fax: (202) 395–5806; or E-mail: *OIRA_submission@omb.eop.gov.*

VI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VII. Regulatory Impact Analysis

A. Statement of Need

This proposed rule is necessary in order to make payment and policy changes under the Medicare PFS and to make required statutory changes under the Affordable Care Act and MIPPA and other statutory changes. This proposed rule is also necessary to make changes to the Part B drug payment policy and other Part B related policies.

B. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999) and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated an ''economically'' significant rule, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. We have prepared a Regulatory Impact Analysis, that to the best of our ability presents the costs and benefits of the proposed rule. We solicit comment on the Regulatory Impact Analysis provided.

The RFA requires agencies to analyze options for regulatory relief of small entities, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $7.0 million to $34.5 million in any 1 year (for details see the SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards* (refer to the 620000 series)). Individuals

and States are not included in the definition of a small entity. The RFA requires that we analyze regulatory options for small businesses and other entities. A Regulatory Flexibility Act analysis must include a justification concerning the reason action is being taken, the kinds and number of small entities the rule affects, and an explanation of any meaningful options that achieve the objectives with less significant adverse economic impact on the small entities.

For purposes of the RFA, physicians, NPPs, and suppliers including IDTFs are considered small businesses if they generate revenues of $10 million or less based on SBA size standards. Approximately 95 percent of physicians are considered to be small entities. There are over 1 million physicians, other practitioners, and medical suppliers that receive Medicare payment under the PFS.

Because we acknowledge that many of the affected entities are small entities, the analysis provided here and throughout the preamble of this proposed rule constitutes our Initial Regulatory Flexibility Act (IRFA) analysis for the remaining provisions. This includes alternatives considered for the various proposed policies in this rule. We solicit public comment on the IRFA analysis provided.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area for Medicare payment regulations and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined, and the Secretary certifies, that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2011, that threshold is approximately $136 million. This regulation does not impose any costs on State or local governments, the requirements of Executive Order 13132 are not applicable.

We have prepared the following analysis, which together with the information provided in the rest of this preamble, meets all assessment requirements. The analysis explains the rationale for and purposes of this proposed rule; details the costs and benefits of the rule; analyzes alternatives; and presents the measures we would use to minimize the burden on small entities. As indicated elsewhere in this proposed rule, we are implementing a variety of changes to our regulations, payments, or payment policies to ensure that our payment systems reflect changes in medical practice and the relative value of services. We provide information for each of the policy changes in the relevant sections of this proposed rule. We are unaware of any relevant Federal rules that duplicate, overlap, or conflict with this proposed rule. The relevant sections of this proposed rule contain a description of significant alternatives if applicable.

C. RVU Impacts

1. Resource-Based Work, PE, and Malpractice RVUs

Section 1848(c)(2)(B)(ii)(II) of the Act requires that increases or decreases in RVUs may not cause the amount of expenditures for the year to differ by more than $20 million from what expenditures would have been in the absence of these changes. If this threshold is exceeded, we make adjustments to preserve budget neutrality.

Our estimates of changes in Medicare revenues for PFS services compare payment rates for CY 2011 with proposed payment rates for CY 2012 using CY 2010 Medicare utilization for all years. To the extent that there are year-to-year changes in the volume and mix of services provided by physicians, the actual impact on total Medicare revenues will be different than those shown in Table 64. The payment impacts reflect averages for each specialty based on Medicare utilization. The payment impact for an individual physician would be different from the average, based on the mix of services the physician furnishes. The average change in total revenues would be less than the impact displayed here because physicians furnish services to both Medicare and non-Medicare patients and specialties may receive substantial Medicare revenues for services that are not paid under the PFS. For instance, independent laboratories receive approximately 85 percent of their Medicare revenues from clinical laboratory services that are not paid under the PFS.

Table 64 shows only the payment impact on PFS services. We note that these impacts do not include the effect of the January 2012 conversion factor changes under current law. The annual update to the PFS conversion factor is calculated based on a statutory formula that measures actual versus allowed or ''target'' expenditures, and applies a sustainable growth rate (SGR) calculation intended to control growth in aggregate Medicare expenditures for physicians' services. This update methodology is typically referred to as the ''SGR'' methodology, although the SGR is only one component of the formula. Medicare physician fee schedule payments for services are not withheld if the percentage increase in actual expenditures exceeds the SGR. Rather, the PFS update, as specified in section 1848(d)(4) of the Act, is adjusted to eventually bring actual expenditures back in line with targets. If actual expenditures exceed allowed expenditures, the update is reduced. If actual expenditures are less than allowed expenditures, the update is increased. We currently estimate that the statutory formula used to determine the physician update will result in a CY 2012 conversion factor of $23.9635 which represents a PFS update of −29.5 percent. By law, we are required to make these reductions in accordance with section 1848(d) and (f) of the Act, and these reductions can only be averted by an Act of the Congress. While the Congress has provided temporary relief from these reductions for every year since 2003, a long-term solution is critical. We are committed to working with the Congress to permanently reform the SGR methodology for Medicare physician fee schedule updates.

The following is an explanation of the information represented in Table 64:

- *Column A (Specialty):* The Medicare specialty code as reflected in our physician/supplier enrollment files.
- *Column B (Allowed Charges):* The aggregate estimated PFS allowed charges for the specialty based on CY 2010 utilization and CY 2011 rates. That is, allowed charges are the PFS amounts for covered services and include coinsurance and deductibles (which are the financial responsibility of the beneficiary). These amounts have been summed across all services furnished by physicians, practitioners, and suppliers within a specialty to arrive at the total allowed charges for the specialty.
- *Column C (Impact of Work and Malpractice (MP) RVU Changes):* This column shows the estimated CY 2012

impact on total allowed charges of the changes in the work and malpractice RVUs, including the impact of changes due to potentially misvalued codes. These impacts are primarily due to the multiple procedure payment reduction (MPPR) for the professional component of advanced imaging services.

• *Column D (Impact of PE RVU Changes—Full):* This column shows the estimated CY 2012 impact on total allowed charges of the changes in the PE RVUs if there were no remaining transition to the full use of the PPIS data.

• *Column E (Impact of PE RVU Changes—Tran):* This column shows the estimated CY 2012 impact on total allowed charges of the changes in the PE RVUs under the third year of the 4-year transition to the full use of the PPIS data. This column also includes the impact of the MPPR policy and, and the impact of changes due to potentially misvalued codes.

• *Column F (Combined Impact—Full):* This column shows the estimated CY 2012 combined impact on total allowed charges of all the changes in the previous columns if there were no remaining transition to the new PE RVUs using the PPIS data.

• *Column G (Combined Impact—Tran):* This column shows the estimated CY 2012 combined impact on total allowed charges of all the changes in the previous columns under the third year of the 4-year transition to the new PE RVUs using the PPIS data.

TABLE 64—CY 2012 PFS PROPOSED RULE TOTAL ALLOWED CHARGE ESTIMATED IMPACT FOR RVU AND MPPR CHANGES *

Specialty	Allowed charges (mil)	Impact of work and MP RVU changes	Impact of PE RVU changes		Combined impact	
			Full	Tran	Full	Tran
(A)	(B)	(C)	(D)	(E)	(F)	(G)
TOTAL	$83,014	0%	0%	0%	0%	0%
ALLERGY/IMMUNOLOGY	194	0%	1%	1%	1%	1%
ANESTHESIOLOGY	1,847	0%	4%	2%	4%	2%
CARDIAC SURGERY	384	0%	−2%	−1%	−2%	−1%
CARDIOLOGY	6,778	0%	−3%	−1%	−3%	−1%
COLON AND RECTAL SURGERY	146	0%	2%	1%	2%	1%
CRITICAL CARE	252	0%	1%	0%	1%	0%
DERMATOLOGY	2,931	0%	0%	0%	0%	0%
EMERGENCY MEDICINE	2,658	0%	−1%	−1%	−1%	−1%
ENDOCRINOLOGY	415	0%	1%	0%	1%	0%
FAMILY PRACTICE	5,640	0%	2%	1%	2%	1%
GASTROENTEROLOGY	1,837	0%	1%	0%	0%	0%
GENERAL PRACTICE	656	0%	2%	1%	2%	1%
GENERAL SURGERY	2,277	0%	1%	0%	1%	0%
GERIATRICS	200	0%	2%	1%	2%	1%
HAND SURGERY	121	0%	3%	1%	2%	1%
HEMATOLOGY/ONCOLOGY	1,912	0%	−1%	0%	−2%	0%
INFECTIOUS DISEASE	597	0%	1%	1%	1%	0%
INTERNAL MEDICINE	10,737	0%	1%	1%	1%	1%
INTERVENTIONAL PAIN MGMT	448	0%	3%	2%	2%	1%
INTERVENTIONAL RADIOLOGY	211	−1%	−3%	−1%	−4%	−2%
MULTISPECIALTY CLINIC/OTHER	84	1%	1%	1%	2%	1%
NEPHROLOGY	2,011	0%	0%	0%	0%	0%
NEUROLOGY	1,520	0%	4%	2%	4%	2%
NEUROSURGERY	669	0%	1%	0%	1%	0%
NUCLEAR MEDICINE	53	0%	−4%	−2%	−5%	−3%
OBSTETRICS/GYNECOLOGY	678	0%	0%	0%	0%	0%
OPHTHALMOLOGY	5,316	0%	3%	2%	3%	2%
ORTHOPEDIC SURGERY	3,572	0%	2%	1%	2%	1%
OTOLARNGOLOGY	1,001	0%	2%	1%	1%	1%
PATHOLOGY	1,122	0%	−2%	−1%	−2%	−1%
PEDIATRICS	68	0%	1%	1%	1%	1%
PHYSICAL MEDICINE	928	0%	3%	2%	3%	2%
PLASTIC SURGERY	339	0%	2%	1%	1%	0%
PSYCHIATRY	1,134	0%	0%	0%	0%	0%
PULMONARY DISEASE	1,758	0%	1%	0%	1%	0%
RADIATION ONCOLOGY	1,968	0%	−8%	−4%	−8%	−4%
RADIOLOGY	4,722	−1%	−5%	−2%	−6%	−4%
RHEUMATOLOGY	530	0%	0%	0%	0%	0%
THORACIC SURGERY	371	0%	−2%	−1%	−1%	−1%
UROLOGY	1,919	0%	−3%	−2%	−3%	−2%
VASCULAR SURGERY	749	0%	−2%	−1%	−2%	−1%
AUDIOLOGIST	56	0%	−6%	−3%	−6%	−3%
CHIROPRACTOR	743	0%	2%	1%	2%	1%
CLINICAL PSYCHOLOGIST	559	0%	−5%	−3%	−5%	−3%
CLINICAL SOCIAL WORKER	386	0%	−6%	−3%	−6%	−3%
DIAGNOSTIC TESTING FACILITY	833	0%	−8%	−2%	−8%	−3%
INDEPENDENT LABORATORY	1,047	0%	−3%	−1%	−3%	−1%
NURSE ANES/ANES ASST	769	0%	5%	2%	5%	2%
NURSE PRACTITIONER	1,376	0%	2%	1%	2%	1%
OPTOMETRY	980	0%	4%	2%	4%	2%

TABLE 64—CY 2012 PFS PROPOSED RULE TOTAL ALLOWED CHARGE ESTIMATED IMPACT FOR RVU AND MPPR CHANGES *—Continued

Specialty	Allowed charges (mil)	Impact of work and MP RVU changes	Impact of PE RVU changes		Combined impact	
			Full	Tran	Full	Tran
(A)	(B)	(C)	(D)	(E)	(F)	(G)
ORAL/MAXILLOFACIAL SURGERY	43	0%	2%	1%	2%	1%
PHYSICAL/OCCUPATIONAL THERAPY	2,324	0%	5%	3%	5%	3%
PHYSICIAN ASSISTANT	1,055	0%	1%	0%	1%	0%
PODIATRY	1,902	0%	3%	2%	3%	2%
PORTABLE X-RAY	97	0%	4%	3%	4%	3%
RADIATION THERAPY CENTERS	73	0%	−9%	−5%	−9%	−5%
OTHER	17	0%	5%	4%	5%	4%

*Table 64 shows only the payment impact on PFS services. We note that these impacts do not include the effects of the January 2012 conversion factor change under current law.

2. CY 2012 PFS Impact Discussion

a. Changes in RVUs

The most widespread specialty impacts of the RVU changes are generally related to several factors. First, as discussed in section II.A.2. of this proposed rule, we are currently implementing the third year of the 4-year transition to new PE RVUs using the PPIS data that were adopted in the CY 2010 PFS final rule with comment period. The impacts of the third year of the transition are generally consistent with the impacts that would be expected based on the impacts displayed in the CY 2011 final rule with comment period.

The second general factor contributing to the CY 2012 impacts shown in Table 64 is a secondary effect of the CY 2011 rescaling of the RVUs so that, in the aggregate, they match the work, PE, and malpractice proportions in the revised and rebased MEI for CY 2011. That is, the rebased MEI had a greater proportion attributable to malpractice and PE and, correspondingly, a lesser proportion attributable to work. Specialties that have a high proportion of total RVUs attributable to work, such as emergency medicine, experienced a decrease in aggregate payments as a result of this rescaling, while specialties that have a high proportion attributable to PE, such as diagnostic testing facilities, experienced an increase in aggregate payments. (For further details on the MEI rebasing, see the discussion beginning on 75 FR 73262 in the CY 2011 PFS final rule.)

Table 64 also includes the impacts resulting from our proposal to expand the current 50 percent MPPR policy to the professional component of advanced imaging services. We estimate that this policy would redistribute approximately $100 million through a small increase in the conversion factor and a small adjustment to all PE RVUs. We estimate that this change would primarily reduce payments to the specialties of radiology and interventional radiology. Finally, Table 64 also reflects the impacts of our proposed adjustments to improve the accuracy of the time associated with the work RVUs for certain services, including group therapy services, as discussed previously in section II.A. of this proposed rule.

b. Combined Impact

Column F of Table 64 displays the estimated CY 2012 combined impact on total allowed charges by specialty of all the proposed RVU and MPPR changes. These impacts range from an increase of 5 percent for nurse anesthetists to a decrease of 9 percent for radiation therapy centers. Again, these impacts are estimated prior to the application of the negative CY 2012 Conversion Factor (CF) update applicable under the current statute.

Table 65 shows the estimated impact on total payments for selected high-volume procedures of all of the changes discussed previously. We have included CY 2012 payment rates with and without the effect of the CY 2012 negative PFS CF update for comparison purposes. We selected these procedures because they are the most commonly furnished by a broad spectrum of physician specialties. There are separate columns that show the change in the facility rates and the nonfacility rates. For an explanation of facility and nonfacility PE, we refer readers to Addendum A of this proposed rule.

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TABLE 65: IMPACT OF PROPOSED RULE AND ESTIMATED PHYSICIAN UPDATE ON CY 2012 PAYMENT FOR SELECTED PROCEDURES

CPT/ HCPCS[1]	MOD	Short Descriptor	Facility					Nonfacility				
			CY 2011[2]	CY 2012[3] (pre-update)	% Change (pre-update)	CY 2012[4]	% Change (post-update)	CY 2011[2]	CY 2012[3] (pre-update)	% Change (pre-update)	CY 2012[4]	% Change (post-update)
11721		Debride nail 6 or more	$25.82	$25.17	-3%	$17.73	-31%	$41.79	$41.83	0%	$29.48	-29%
17000		Destruct premalg lesion	$55.38	$55.44	0%	$39.06	-29%	$79.50	$79.92	1%	$56.31	-29%
27130		Total hip arthroplasty	$1,440.26	$1,437.28	0%	$1,012.70	-30%	NA	NA	NA	NA	NA
27244		Treat thigh fracture	$1,224.51	$1,223.69	0%	$862.21	-30%	NA	NA	NA	NA	NA
27447		Total knee arthroplasty	$1,539.47	$1,535.22	0%	$1,081.71	-30%	NA	NA	NA	NA	NA
33533		Cabg arterial single	$1,984.22	$1,942.33	-2%	$1,368.56	-31%	NA	NA	NA	NA	NA
35301		Rechanneling of artery	$1,128.70	$1,108.74	-2%	$781.21	-31%	NA	NA	NA	NA	NA
43239		Upper gi endoscopy biopsy	$174.64	$173.45	-1%	$122.21	-30%	$345.20	$346.22	0%	$243.95	-29%
66821		After cataract laser surgery	$296.95	$303.71	NA	$213.99	-28%	$314.62	$321.74	2%	$226.69	-28%
66984		Cataract surg w/iol 1 stage	$742.38	$753.67	2%	$531.03	-28%	NA	NA	NA	NA	NA
67210		Treatment of retinal lesion	$647.59	$657.08	1%	$462.97	-29%	$669.00	$678.85	1%	$478.31	-29%
71010		Chest x-ray	NA	NA	NA	NA	NA	$23.78	$23.47	-1%	$16.53	-30%
71010	26	Chest x-ray	$8.83	$8.84	0%	$6.23	-29%	$8.83	$8.84	0%	$6.23	-29%
77056		Mammogram both breasts	NA	NA	NA	NA	NA	$110.76	$110.19	-1%	$77.64	-30%
77056	26	Mammogram both breasts	$43.49	$42.17	-3%	$29.71	-32%	$43.49	$42.17	-3%	$29.71	-32%
77057		Mammogram screening	NA	NA	NA	NA	NA	$81.20	$79.92	-2%	$56.31	-31%
77057	26	Mammogram screening	$35.00	$34.01	-3%	$23.96	-32%	$35.00	$34.01	-3%	$23.96	-32%
77427		Radiation tx management x5	$180.41	$174.81	-3%	$123.17	-32%	$180.41	$174.81	-3%	$123.17	-32%
88305	26	Tissue exam by pathologist	$36.35	$35.71	-2%	$25.16	-31%	$36.35	$35.71	-2%	$25.16	-31%
90801		Psy dx interview	$123.33	$119.38	-3%	$84.11	-32%	$153.91	$151.35	-2%	$106.64	-31%
90862		Medication management	$44.85	$44.21	-1%	$31.15	-31%	$57.76	$58.16	1%	$40.98	-29%
90935		Hemodialysis one evaluation	$74.75	$72.44	-3%	$51.04	-32%	NA	NA	NA	NA	NA
92012		Eye exam established pat	$50.62	$51.36	1%	$36.18	-29%	$79.84	$81.62	2%	$57.51	-28%
92014		Eye exam & treatment	$77.13	$77.88	1%	$54.88	-29%	$115.86	$118.36	2%	$83.39	-28%
92980		Insert intracoronary stent	$873.19	$834.95	-4%	$588.30	-33%	NA	NA	NA	NA	NA
93000		Electrocardiogram complete	NA	NA	NA	NA	NA	$19.71	$18.71	-5%	$13.18	-33%
93010		Electrocardiogram report	$8.83	$8.50	-4%	$5.99	-32%	$8.83	$8.50	-4%	$5.99	-32%
93015		Cardiovascular stress test	NA	NA	NA	NA	NA	$92.42	$87.41	-5%	$61.59	-33%
93307	26	Tte w/o doppler complete	$47.57	$45.91	-3%	$32.35	-32%	$47.57	$45.91	-3%	$32.35	-32%
93458	26	L hrt artery/ventricle angio	$320.06	$315.96	-1%	$222.62	-30%	$320.06	$315.96	-1%	$222.62	-30%
98941		Chiropractic manipulation	$30.92	$30.61	-1%	$21.57	-30%	$35.34	$35.71	1%	$25.16	-29%
99203		Office/outpatient visit new	$74.75	$74.48	0%	$52.48	-30%	$102.95	$104.41	1%	$73.57	-29%
99213		Office/outpatient visit est	$49.27	$49.66	1%	$34.99	-29%	$68.97	$69.72	1%	$49.13	-29%
99214		Office/outpatient visit est	$75.77	$75.84	0%	$53.44	-29%	$102.27	$103.05	1%	$72.61	-29%
99222		Initial hospital care	$132.17	$132.64	0%	$93.46	-29%	NA	NA	NA	NA	NA

CPT/ HCPCS[1]	MOD	Short Descriptor	Facility					Nonfacility				
			CY 2011[2]	CY 2012[3] (pre-update)	% Change (pre-update)	CY 2012[4]	% Change (post-update)	CY 2011[2]	CY 2012[3] (pre-update)	% Change (pre-update)	CY 2012[4]	% Change (post-update)
99223		Initial hospital care	$194.01	$194.88	0%	$137.31	-29%	NA	NA	NA	NA	NA
99231		Subsequent hospital care	$38.39	$38.09	-1%	$26.84	-30%	NA	NA	NA	NA	NA
99232		Subsequent hospital care	$69.31	$69.38	0%	$48.89	-29%	NA	NA	NA	NA	NA
99233		Subsequent hospital care	$99.55	$99.65	0%	$70.21	-29%	NA	NA	NA	NA	NA
99236		Observ/hosp same date	$214.05	$184.34	-14%	$129.88	-39%	NA	NA	NA	NA	NA
99239		Hospital discharge day	$101.25	$102.37	1%	$72.13	-29%	NA	NA	NA	NA	NA
99283		Emergency dept visit	$61.16	$59.86	-2%	$42.18	-31%	NA	NA	NA	NA	NA
99284		Emergency dept visit	$115.52	$114.27	-1%	$80.52	-30%	NA	NA	NA	NA	NA
99291		Critical care first hour	$217.11	$216.65	0%	$152.65	-30%	$264.34	$265.28	0%	$186.92	-29%
99292		Critical care addl 30 min	$109.06	$108.83	0%	$76.68	-30%	$118.92	$118.70	0%	$83.63	-30%
99348		Home visit est patient	NA	NA	NA	NA	NA	$82.22	$81.62	-1%	$57.51	-30%
99350		Home visit est patient	NA	NA	NA	NA	NA	$169.54	$170.39	1%	$120.06	-29%
G0008		Immunization admin	NA	NA	NA	NA	NA	$23.10	$23.81	3%	$16.77	-27%

1 CPT codes and descriptions are copyright 2010 American Medical Association. All Rights Reserved. Applicable FARS/DFARS apply.
2 Payments based on the 2011 conversion factor of 33.9764
3 Payments based on the 2011 conversion factor of 33.9764, adjusted to 34.0103 to include the budget neutrality adjustment.
4 Payments based on the 2012 conversion factor of 23.9635, which includes the budget neutrality adjustment.

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D. Effects of Proposal To Review Potentially Misvalued Codes on an Annual Basis Under the PFS

This year's proposal of a process to consolidate the Five-Year Reviews of Work and PE RVUs with the annual review of potentially misvalued codes, as discussed in section II.B.3. of this proposed rule with comment period, is not anticipated to have a budgetary impact in CY 2012. As noted previously, to the extent that for CY 2012 we have proposed revised RVUs for codes identified under the potentially misvalued codes initiative, Table 64 includes the estimated CY 2012 impact on total allowed charges of the changes in the RVUs for these codes.

E. Effect of Proposed Revisions to Malpractice RUVs

As discussed in section II.D.2. of this proposed rule, we proposed to revise malpractice RVUs for a limited number of codes. The utilization of many of these services is 0, while the others have a very low utilization. Therefore, we estimate no significant budgetary impact from the proposed changes to the MP RVUs due to the very low utilization of these services.

F. Effect of Proposed Changes to Geographic Practice Cost Indices (GPCIs)

As discussed in section II.E. of this proposed rule, we are required to update the GPCI values at least every 3 years and phase in the adjustment over 2 years (if there has not been an adjustment in the past year). For CY 2012, we are proposing to revise the PE GPCIs for each Medicare locality, as well as the cost share weights for all three GPCI components. Moreover, the proposed revised PE GPCI values are a result of our analysis of the PE methodology as required by section 1848(e)(1)(H)(iv) of the Act. The new GPCIs rely upon the 2006–2008 American Community Survey (ACS) data for determining the relative cost differences in the office rent component of the PE GPCIs. In addition, we utilized 2006 through 2008 Bureau of Labor Statistics (BLS) and Occupational Employment Statistics (OES) data to determine the employee compensation component with data specific to the offices of physicians industry. Finally, we proposed to create a purchased services index that will be used to geographically adjust for differences in the labor-related share of the industries occupying the ''All Other Services'' and ''Other Professional Expenses'' 2006-based MEI categories.

To determine the cost share weights for the proposed CY 2012 PE GPCIs, we used the 2006-based MEI weight for the PE category of 51.734 percent minus the professional liability insurance category weight of 4.295 percent. Therefore, we propose a cost share weight for the PE GPCIs of 47.439 percent. For the employee compensation portion of the PE GPCIs, we used the non-physician employee compensation category weight of 19.153 percent. The fixed capital and utilities MEI categories were combined to achieve a total office rent weight of 10.223 percent. As discussed in the previous paragraph, a new purchased services index was created to geographically adjust the labor-related components of the ''All Other Services'' and ''Other Professional Expenses'' categories of the MEI. In order to calculate the purchased services index, we are proposing to merge the corresponding weights of these two categories to form a combined purchased services weight of 8.095. However, since our proposed purchased services methodology only accounts for the labor related share of the industries comprising the ''All Other Services'' and ''Other Professional Expenses'' categories, only 5.011 percentage points of the 8.095 percentage points accounting for the purchased services cost share weight is adjusted for locality cost differences. We are proposing a cost share weight for the medical equipment, supplies, and other miscellaneous expenses component of 9.968 percent. Furthermore, the physician compensation cost category and its weight of 48.266 percent reflects the proposed work GPCI cost share weight and the professional liability insurance weight of 4.295 percent was used for the malpractice GPCI cost share weight. A more detailed discussion on the proposed CY 2012 GPCI cost share weights can be found in section II.E. of this proposed rule.

Additionally, section 1848(e)(1)(E) of the Act (as amended by section 103 of the Medicare and Medicaid Extenders Act of 2010) extended the 1.000 work GPCI floor through December 31, 2011. Therefore, the CY 2012 GPCIs reflect the sunset of the 1.000 work GPCI floor. Section 1848(e)(1)(G) of the Act (as amended by section 134(b) of the MIPPA) established a permanent 1.500 work GPCI floor in Alaska, beginning January 1, 2009 and, therefore, the 1.500 work GPCI floor in Alaska will remain in place for CY 2012. Moreover, section 1848(e)(1)(I) of the Act (as added by section 10324(c) of the Affordable Care Act) established a permanent 1.000 PE GPCI floor for services furnished in frontier States effective January 1, 2011.

Addendum D to this proposed rule shows the estimated effects of the revised GPCIs on locality GAFs for CY 2012. The GAFs reflect the use of revised GPCI data and the updated cost share weights. The GAFs are a weighted composite of each area's work, PE, and malpractice GPCIs using the national GPCI cost share weights. While we do not actually use the GAFs in computing the PFS payment for a specific service, they are useful in comparing the estimated overall costs and payments for different localities. The cumulative effects of all of the GPCI revisions, including the updated underlying GPCI data, updated cost share weights, and provisions of the Affordable Care Act, are reflected in the CY 2012 GPCI values that are displayed in Addendum E in this proposed rule.

The following Table 66 illustrates the impact by physician fee schedule geographic locality of moving from the current law CY 2011 Geographic Adjustment Factors (GAFs) to the proposed CY 2012 GAFs. The GAFs summarize the combined impact of the three separate GPCIs into a single number to more easily compare the impact of policy changes among localities. More specifically, the GAF for a locality is the weighted average of the individual work, practice expense, and malpractice. The table first shows the impact under current law and regulation, and then with the additional impact of our recommendations. As shown in the table, the primary driver of the CY 2012 impact is the current law expiration of the non-budget neutral increases to the CY 2011 GPCIs for lower expense areas authorized by the Affordable Care Act and the Medicare and Medicaid Extenders Act. The table is sorted by total impact from largest reductions to largest increases. When the overall impacts directly resulting from our proposed changes to the PE GPCI are isolated, the impacts are negligible (Column F). The following is an explanation of the information represented in Table 66:

- *Column (A):* Medicare Locality—The PFS geographic locality.
- *Column (B):* CY 2011 GAF—The current CY 2011 Geographic Adjustment Factor for the locality, which includes the non-budget neutral increases to the CY 2011 GPCIs for lower expense areas authorized by the Affordable Care Act and the Medicare and Medicaid Extenders Act. These figures also reflect the first year of the two-year transition to the latest GPCIs that began in 2011.
- *Column (C):* CY 2012 GAF (Current Law/Reg)—The CY 2012 Geographic

Adjustment Factor for the locality under current law and regulations, which includes the expiration of the non-budget neutral increases to the CY 2011 GPCIs for lower expense areas authorized by the Affordable Care Act and the MMEA. These numbers also reflect the end of the transition to the latest GPCIs that began in 2011.

• *Column (D):* CY 2012 GAF (Proposed NPRM)—The CY 2012 Geographic Adjustment Factor for the locality under the recommended NPRM proposals. The two largest drivers are the proposed use of residential rent data from the Census Bureau's ACS data instead of the Department of Housing and Urban Development's HUD FMR data, and the proposed benchmarking of the GPCI practice expense weights to the 2006-based MEI cost share weights. The Geographic Adjustment Factors in this column are for 2012 and do not reflect any temporary increases to work and practice expense required by the Affordable Care Act.

• *Column (E):* Percent Change CY 2011 to CY 2012 (current)—Impact of the expiration of the non-budget neutral increases to the CY 2011 GPCIs for lower expense areas authorized by the Affordable Care Act and the MMEA and the end of the transition to the latest GPCIs that began in 2011.

• *Column (F):* Percent Change CY 2012 (No NPRM) to CY 2012 (NPRM)—Impact of the four regulatory changes described previously.

• *Column (G):* Percent Change Combined Impact CY 2011 to CY 2012—Combined impact of all changes from CY 2011 to CY 2012.

TABLE 66—CY 2012 GEOGRAPHIC ADJUSTMENT FACTORS (GAFS) CHANGES UNDER CURRENT LAW AND THE PROPOSED RULE

(A)	(B)	(C)	(D)	(E)	(F)	(G)
Medicare locality	CY 2011 GAF	CY 2012 GAF (current law/ reg)	CY 2012 GAF (proposed)	% Change CY 2011 to CY 2012 (current) Col (C)/Col (B)	% Change CY 2012 (curr) to CY 2012 (proposed rule) Col (D)/Col (C)	% Change combined impact CY 2011 to CY 2012 Col (D)/Col (B)
PUERTO RICO	0.903	0.786	0.769	−13	−2	−15
WEST VIRGINIA	0.972	0.910	0.909	−6	0	−6
OKLAHOMA	0.955	0.904	0.897	−5	−1	−6
MISSISSIPPI	0.961	0.910	0.907	−5	0	−6
REST OF MISSOURI	0.961	0.903	0.908	−6	1	−6
ARKANSAS	0.945	0.893	0.895	−6	0	−5
REST OF LOUISIANA	0.965	0.914	0.914	−5	0	−5
IOWA	0.950	0.898	0.902	−5	0	−5
BEAUMONT, TX	0.978	0.925	0.932	−5	1	−5
KENTUCKY	0.959	0.917	0.914	−4	0	−5
ALABAMA	0.949	0.905	0.907	−5	0	−4
TENNESSEE	0.959	0.918	0.918	−4	0	−4
NEBRASKA	0.947	0.905	0.909	−4	0	−4
REST OF MAINE	0.961	0.922	0.923	−4	0	−4
IDAHO	0.959	0.926	0.923	−3	0	−4
KANSAS	0.964	0.923	0.928	−4	1	−4
SOUTH CAROLINA	0.959	0.925	0.924	−4	0	−4
INDIANA	0.966	0.928	0.932	−4	0	−4
REST OF TEXAS	0.973	0.934	0.939	−4	1	−3
REST OF GEORGIA	0.970	0.936	0.937	−4	0	−3
METROPOLITAN BOSTON	1.106	1.079	1.069	−2	−1	−3
NORTH CAROLINA	0.970	0.934	0.938	−4	0	−3
UTAH	0.982	0.946	0.950	−4	0	−3
MANHATTAN, NY	1.153	1.142	1.119	−1	−2	−3
REST OF PENNSYLVANIA	0.986	0.957	0.957	−3	0	−3
NEW ORLEANS, LA	1.005	0.980	0.977	−2	0	−3
SOUTH DAKOTA**	0.978	0.952	0.951	−3	0	−3
LOS ANGELES, CA	1.106	1.099	1.076	−1	−2	−3
REST OF ILLINOIS	0.985	0.950	0.959	−4	1	−3
NEW MEXICO	0.979	0.949	0.955	−3	1	−2
REST OF MICHIGAN	0.985	0.962	0.962	−2	0	−2
ALASKA*	1.289	1.289	1.260	0	−2	−2
VENTURA, CA	1.113	1.105	1.090	−1	−1	−2
REST OF NEW YORK	0.965	0.948	0.946	−2	0	−2
OHIO	0.992	0.970	0.974	−2	0	−2
METROPOLITAN KANSAS CITY, MO	0.996	0.975	0.978	−2	0	−2
MONTANA**	0.996	0.976	0.978	−2	0	−2
CONNECTICUT	1.094	1.086	1.075	−1	−1	−2
NORTH DAKOTA**	0.979	0.964	0.963	−2	0	−2
ANAHEIM/SANTA ANA, CA	1.129	1.129	1.111	0	−2	−2
REST OF FLORIDA	1.014	0.996	0.999	−2	0	−1
NYC SUBURBS/LONG I., NY	1.161	1.159	1.144	0	−1	−1
SAN MATEO, CA	1.199	1.194	1.183	0	−1	−1
EAST ST. LOUIS, IL	1.016	0.997	1.003	−2	1	−1
REST OF MASSACHUSETTS	1.040	1.039	1.028	0	−1	−1
REST OF OREGON	0.968	0.950	0.958	−2	1	−1
HAWAII	1.074	1.091	1.063	2	−3	−1

TABLE 66—CY 2012 GEOGRAPHIC ADJUSTMENT FACTORS (GAFS) CHANGES UNDER CURRENT LAW AND THE PROPOSED RULE—Continued

(A)	(B)	(C)	(D)	(E)	(F)	(G)
Medicare locality	CY 2011 GAF	CY 2012 GAF (current law/ reg)	CY 2012 GAF (proposed)	% Change CY 2011 to CY 2012 (current) Col (C)/Col (B)	% Change CY 2012 (curr) to CY 2012 (proposed rule) Col (D)/Col (C)	% Change combined impact CY 2011 to CY 2012 Col (D)/Col (B)
ARIZONA	0.989	0.977	0.979	−1	0	−1
SAN FRANCISCO, CA	1.198	1.194	1.186	0	−1	−1
WISCONSIN	0.965	0.949	0.956	−2	1	−1
METROPOLITAN ST. LOUIS, MO	0.988	0.971	0.979	−2	1	−1
FORT WORTH, TX	0.991	0.981	0.982	−1	0	−1
VERMONT	0.982	0.980	0.974	0	−1	−1
NORTHERN NJ	1.120	1.105	1.112	−1	1	−1
AUSTIN, TX	0.992	0.979	0.985	−1	1	−1
MIAMI, FL	1.108	1.100	1.101	−1	0	−1
SOUTHERN MAINE	0.997	0.993	0.991	0	0	−1
WYOMING**	1.002	0.994	0.996	−1	0	−1
HOUSTON, TX	1.008	0.992	1.002	−2	1	−1
METROPOLITAN PHILADELPHIA, PA	1.068	1.062	1.062	−1	0	−1
VIRGINIA	0.978	0.971	0.974	−1	0	0
DETROIT, MI	1.060	1.047	1.056	−1	1	0
OAKLAND/BERKELEY, CA	1.133	1.136	1.130	0	−1	0
REST OF NEW JERSEY	1.074	1.066	1.072	−1	1	0
BRAZORIA, TX	0.996	0.977	0.995	−2	2	0
DC + MD/VA SUBURBS	1.124	1.125	1.123	0	0	0
RHODE ISLAND	1.042	1.039	1.042	0	0	0
MARIN/NAPA/SOLANO, CA	1.119	1.127	1.120	1	−1	0
DELAWARE	1.012	1.010	1.013	0	0	0
DALLAS, TX	1.004	0.997	1.005	−1	1	0
VIRGIN ISLANDS	0.998	0.997	1.000	0	0	0
FORT LAUDERDALE, FL	1.061	1.062	1.064	0	0	0
POUGHKEEPSIE/N NYC SUBURBS, NY	1.037	1.039	1.040	0	0	0
ATLANTA, GA	1.002	0.997	1.005	0	1	0
QUEENS, NY	1.140	1.150	1.144	1	−1	0
CHICAGO, IL	1.081	1.076	1.085	0	1	0
NEW HAMPSHIRE	1.007	1.012	1.011	0	0	0
GALVESTON, TX	0.997	0.995	1.002	0	1	1
COLORADO	0.989	0.990	0.994	0	0	1
MINNESOTA	0.969	0.968	0.974	0	1	1
REST OF CALIFORNIA	1.025	1.038	1.033	1	0	1
REST OF WASHINGTON	0.987	0.985	0.997	0	1	1
NEVADA**	1.024	1.031	1.037	1	1	1
SUBURBAN CHICAGO, IL	1.061	1.059	1.077	0	2	2
BALTIMORE/SURR. CNTYS, MD	1.052	1.070	1.069	2	0	2
REST OF MARYLAND	1.004	1.024	1.021	2	0	2
PORTLAND, OR	0.991	0.995	1.009	0	1	2
SANTA CLARA, CA	1.156	1.164	1.179	1	1	2
SEATTLE (KING CNTY), WA	1.045	1.056	1.077	1	2	3

* GAF reflects a 1.5 work GPCI floor in Alaska established by the MIPPA.
** GAFs reflect a 1.0 PE GPCI floor for frontier States as required by the Affordable Care Act.

G. Effects of Proposed Changes to Medicare Telehealth Services Under the Physician Fee Schedule

As discussed in section III.D. of this proposed rule, we are proposing to add several new codes to the list of telehealth services and revise the criteria for adding services to the list of telehealth services. While we expect these changes to increase access to care in rural areas, based on recent utilization of similar services already on the telehealth list, we estimate no significant budgetary impact from the proposed additions. In addition, the proposed revision to the telehealth criteria would be effective for CY 2013 PFS telehealth services, with no impact in CY 2012.

H. Effects of the Impacts of Other Provisions of the Proposed Rule

1. Part B Drug Payment: ASP Issues

Application of our proposals for ''ASP Reporting Template Update'' and ''Reporting of ASP Units and Sales Volume for Certain Products,'' as discussed in section IV.A. of this proposed rule involve revisions to the existing ASP reporting template which will facilitate the accuracy and efficiency of data transfer from manufacturers. Any impacts are dependent on the status and quality of quarterly manufacturer data submissions, so we cannot quantify associated savings.

Finally, as discussed in section IV.A. of this proposed rule, we are proposing to provide for appropriate price substitutions that account for market-related pricing changes and would allow Medicare to pay based off lower

market prices for those drugs and biologicals that consistently exceed the applicable threshold percentage. Based on estimates published in various OIG reports (see section IV.A. for a list of citations), we believe that this proposal will generate minor savings for the Medicare program and its beneficiaries since any substituted prices would be for amounts less than the calculated 106 percent of the ASP.

2. Chiropractic Services Demonstration

As discussed in section IV.B. of this proposed rule, we are continuing the recoupment of the $50 million in expenditures from this demonstration in order to satisfy the budget neutrality requirement in section 651(f)(1)(b) of the MMA. We initiated this recoupment in CY 2010 and this will be the third year. As discussed in the CY 2010 PFS final rule with comment period, we finalized a policy to recoup $10 million each year through adjustments to the PFS for all chiropractors in CYs 2010 through 2014. To implement this required budget neutrality adjustment, we are recouping $10 million in CY 2012 by reducing the payment amount under the PFS for the chiropractic CPT codes (that is, CPT codes 98940, 98941, and 98942) by approximately 2 percent.

3. Extension of Payment for Technical Component of Certain Physician Pathology Services

As discussed in section IV.D. of this proposed rule, we are proposing to implement the provision that specifies that for services furnished after December 31, 2011, an independent laboratory may not bill the Medicare contractor for the TC of physician pathology services furnished to a hospital inpatient or outpatient. The savings associated with implementing this provision are estimated to be approximately 80 million dollars for CY 2012.

4. Section 4103: Medicare Coverage of Annual Wellness Visit Providing a Personalized Prevention Plan: Incorporation of a Health Risk Assessment as Part of the Annual Wellness Visit

As discussed in section IV.E. of this proposed rule, section 1861(s)(2)(FF) of the Act, as described more fully in section 1861(hhh), of the Act (as added by section 4103 of the Affordable Care Act) provides Medicare coverage for an annual wellness visit. Regulations for Medicare coverage of the AWV are established at 42 CFR 410.15. The annual wellness visit is covered with no coinsurance or deductible when furnished by a Medicare participating provider (a health professional as that term is defined in 42 CFR 410.15). The annual wellness visit entails the creation of a personalized prevention plan for an individual and includes elements, such as updating medical and family history, identifying providers that regularly provide medical care to the individual, measurement of height, weight, and body mass index, identification of risk factors, the provision of personalized health advice, and development of a screening schedule (such as a checklist), and referrals as appropriate for additional preventive services. Section 1861(hhh)(1)(A) of the Act specifies that a personalized prevention plan for an individual includes a health risk assessment (HRA) that meets the guidelines established by the Secretary and takes into account the results of a HRA. We are proposing to incorporate the use and results of an HRA as part of the provision of personalized prevention plan services during the AWV. The estimated impact of incorporating the HRA as part of the AWV is unknown for CY 2012. We are specifically seeking public comment on the following:

- The impact of use of the HRA on health professional practices.
- The burden on health professional practices of incorporating an HRA into subsequent AWVs, as well as the first AWV.
- The impact of the elements included in the definitions of first and subsequent AWVs.
- Modification of those AWV elements for which the Secretary has authority to determine appropriateness.

5. Physician Payment, Efficiency, and Quality Improvements—Physician Quality Reporting System

As discussed in section IV.F.1 of this proposed rule, we are proposing several different reporting options for eligible professionals who wish to participate in the 2012 Physician Quality Reporting System. Although there may be some cost incurred by CMS for maintaining the Physician Quality Reporting System measures and their associated code sets, and for expanding an existing clinical data warehouse to accommodate the proposed registry-based reporting, EHR-Based reporting, and group practice reporting options for the 2012 Physician Quality Reporting System, we do not anticipate a significant cost impact on the Medicare program.

Participation in the CY 2012 Physician Quality Reporting System by individual eligible professionals and group practices is voluntary and individual eligible professionals and group practices may have different processes for integrating the collection of the Physician Quality Reporting System measures into their practice's work flows. Given this variability and the multiple reporting options that we provide, it is difficult to definitively estimate the impact of the Physician Quality Reporting System on providers. Furthermore, we believe that costs for eligible professionals who are participating in the Physician Quality Reporting System for the first time in 2012 would be considerably higher than the cost for eligible professionals who participated in the Physician Quality Reporting System in prior years. Some preparatory steps are needed to begin participating in the Physician Quality Reporting System. To the extent that we are not proposing to retire the measures that an eligible professional has reported in a prior year and there are no changes to the measure's specifications from a prior year, such preparatory steps would not need to be repeated in subsequent years. In addition, for many eligible professionals, the cost of participating in the Physician Quality Reporting System is offset by the incentive payment received.

With respect to the potential incentive payments that would be made to satisfactory reporters under the 2012 Physician Quality Reporting System, we estimate this amount for individual eligible professionals would be approximately $60 million. This estimate is derived from looking at our 2009 incentive payment of approximately $235 million and then accounting for the fact that the 2009 incentive payment was 2.0 percent of an eligible professional's total estimated Medicare Part B PFS allowed charges for all such covered professional services furnished by the eligible professional during the 2009 reporting period. For 2012, the incentive payment is 0.5 percent of an eligible professional's total estimated Medicare Part B PFS allowed charges for all covered professional services furnished by an eligible professional during the 2012 reporting period. Although we expect that the lower incentive payment percentage for 2012 would reduce the total outlay by approximately one-fourth, we also expect more eligible professionals to participate in the 2012 Physician Quality Reporting System because there we are proposing more methods of data submission, additional alternative reporting methods, and because CMS seeks to align the Physician Quality Reporting System with the EHR Incentive Program. We also believe that some eligible professionals would

qualify for the additional 0.5 percent incentive authorized under section 1848(m)(7) of the Act (''Additional Incentive Payment'').

One factor that influences the cost to individual eligible professionals is the time and effort associated it would take individual eligible professionals to identify applicable proposed Physician Quality Reporting System quality measures and reviewing and selecting a reporting option. This burden would vary with each individual eligible professional by the number of applicable measures, the eligible professional's understanding of the Physician Quality Reporting System, experience with Physician Quality Reporting System participation, and the proposed method(s) selected by the eligible professional for reporting of the proposed measures, and incorporating the reporting of the proposed measures into the office work flows. Information obtained from the Physician Voluntary Reporting Program (PVRP), which was a predecessor to the Physician Quality Reporting System and was the first step for the reporting of physician quality of care through certain quality metrics, indicated an average labor cost per practice of approximately $50 per hour in 2006. To account for salary increases over time, we will use an average practice labor cost of $60 per hour for our estimates, based on an assumption of an average annual increase of approximately 3 percent. Therefore, assuming that it takes an individual eligible professional approximately 5 hours to review the Physician Quality Reporting System quality measures, review the various reporting options, select the most appropriate reporting option, identify the applicable measures for which they can report the necessary information, and incorporate reporting of the selected measures into their office work flows, we estimate that the cost to eligible professionals associated with preparing to report Physician Quality Reporting System quality measures would be approximately $300 per individual eligible professional ($60 per hour × 5 hours).

Another factor that influences the cost to individual eligible professionals is how they choose to report the Physician Quality Reporting System measures (that is, whether they select the claims-based, registry-based or EHR-Based reporting mechanism we are proposing). For the proposed claims-based reporting mechanism, estimates from the PVRP indicate the time needed to perform all the steps necessary to report quality data codes (QDCs) for 1 measure on a claim ranges from 15 seconds (0.25 minutes) to 12 minutes for complicated cases or measures. In previous years, when we required reporting on 80 percent of eligible cases for claims-based reporting, we found that on average, the median number of reporting instances for each of the Physician Quality Reporting System measures was 9. Since we are proposing to reduce the required reporting rate by over one-third to 50 percent, then for purposes of this impact analysis we will assume that an eligible professional will would need to report each selected measure for 6 reporting instances, or 6 cases. Assuming that an eligible professional, on average, would report 3 measures since a majority of eligible professionals participate in the Physician Quality Reporting System by reporting individual measures via claims or registry and that an eligible professional reports on an average of 6 reporting instances per measure, we estimate that the cost to an individual eligible professional associated with the proposed claims-based reporting option of Physician Quality Reporting System measures would range from approximately $4.50 (0.25 minutes per reporting instance × 6 reporting instances per measure × 3 measures × $60 per hour) to $216.00 (12 minutes per reporting instance × 6 reporting instances per measure × 3 measures × $60 per hour). If an eligible professional satisfactorily reports, these costs would more than likely be negated by the incentive earned. For the 2009 Physician Quality Reporting System, which had a 2.0 percent incentive, the mean incentive amount was close to $2,000 for an individual eligible professional. For the proposed registry-based reporting option, individual eligible professionals would generally incur a cost to submit data to registries. We estimate that fees for using a qualified registry would range from no charge, or a nominal charge, for an individual eligible professional to use a registry to several thousand dollars, with a majority of registries charging fees ranging from $500 to $1,000. However, our impact analysis is limited to the incremental costs associated with Physician Quality Reporting System reporting, which we believe are minimal. We believe that many eligible professionals who would select the proposed registry-based reporting option would already be utilizing the registry for other purposes and would not need to report additional data to the registry specifically for Physician Quality Reporting System. The registries also often provide the eligible professional services above and beyond what is required for Physician Quality Reporting System.

For the proposed EHR-Based reporting option, an individual eligible professional generally would incur a cost associated with purchasing an EHR product. Although we do not believe that the majority of eligible professionals would purchase an EHR solely for the purpose of participating in Physician Quality Reporting System, cost estimates for EHR adoption by eligible professionals from the EHR Incentive Program final rule (75 FR 44549) show that an individual eligible professional who chooses to do so would have to spend anywhere from $25,000 to $54,000 to purchase and implement an EHR and up to $18,000 annually for ongoing maintenance.

Although we believe that the majority of eligible professionals attempting to qualify for the additional 0.5 percent incentive payment authorized by section 1848(m)(7) of the Act would be those who are already required by their Boards to participate in a Maintenance of Certification Program, individual eligible professionals who wish to qualify for the additional 0.5 percent incentive payment and are not currently participating in a Maintenance of Certification Program would also have to incur a cost for participating in a Maintenance of Certification Program. The manner in which fees are charged for participating in a Maintenance of Certification Program vary by specialty. Some Boards charge a single fee for participation in the full cycle of Maintenance of Certification Program. Such fees appear to range anywhere from over $1,100 to nearly $1,800 per cycle. Some Boards have annual fees that are paid by their diplomates. On average, ABMS diplomates pay approximately $200.00 per year for participating in Maintenance of Certification Program. Some Boards have an additional fee for the Maintenance of Certification Program Part III secure examination, but most Boards do not have additional charges for participation in the Part IV practice/quality improvement activities.

With respect to the proposed requirements for group practices to be treated as satisfactorily submitting quality measures data for the CY 2012 Physician Quality Reporting System discussed in section IV.F.1 of this proposed rule, group practices interested in participating in the CY 2012 Physician Quality Reporting System through the proposed group practice reporting option (GPRO) may also incur a cost. However, for groups that satisfactorily report for the proposed 2012 Physician Quality

Reporting System, we believe these costs would be completely offset if the group practice earns the incentive payment since the group practice would be eligible for an incentive payment equal to 0.5 percent of the entire group's total estimated Medicare Part B PFS allowed charges for covered professional services furnished by the group practice during the reporting period.

One factor in the cost to group practices would be the costs associated with the proposed self-nomination process. Similar to our estimates for staff involved with the proposed claims-based reporting option for individual eligible professionals, we also estimate that the group practice staff involved in the proposed group practice self-nomination process would have an an average labor cost of $60 per hour. Therefore, assuming 2 hours for a group practice to decide whether to participate as a group or have members of the practice participate individually and 4 hours for the self-nomination process, we estimate the total cost to a group practice associated with the group practice self-nomination process would be approximately $360 ($60 per hour × 6 hours per group practice).

For groups participating under the proposed GPRO process that are comprised of 25 or more eligible professionals, another factor in the cost to the group would be the time and effort associated with the group practice completing and submitting the proposed data collection tool. Based on the Physician Group Practice (PGP) demonstration's estimate that it takes approximately 79 hours for a group practice to complete the data collection tool, which uses the same data submission methods as those we have proposed, we estimate the cost associated with a physician group completing the data collection tool would be approximately $4,740 ($60 per hour × 79 hours per group practice).

In addition to costs incurred by individual eligible professionals and group practices, registries and EHR vendors may also incur some costs related to the proposals for the 2012 Physician Quality Reporting System. Registries interested in becoming ''qualified'' to submit on behalf of individual eligible professionals would also have to incur a cost associated with the vetting process, and with calculating quality measures results from the data submitted to the registry by its participants, and submitting the quality measures results, as well as numerator and denominator data on quality measures, to CMS on behalf of their participants. We estimate the registry self-nomination process will cost approximately $500 per registry ($50 per hour × 10 hours per registry). This cost estimate includes the cost of submitting the self-nomination letter to CMS and completing the proposed CMS vetting process. Our estimate of $50 per hour average labor cost for registries is based on the assumption that registry staff include IT professionals whose average hourly rates range from $36 to $84 per hour depending on experience, with an average rate of nearly $50 per hour for a mid-level programmer. We do not believe that there are any additional costs for registries associated with a registry calculating quality measures results from the data submitted to the registry by its participants and submitting the quality measures results and numerator and denominator data on quality measures to CMS on behalf of their participants under the proposed program for 2012. We believe that the majority of registries already perform these functions for their participants.

An EHR vendor interested in having its product(s) be used by individual eligible professionals to submit the proposed Physician Quality Reporting System measures to CMS for 2012 would have to complete the proposed vetting process during 2012 and program its EHR product(s) to extract the clinical data that the eligible professional would need to submit to CMS for purposes of reporting the proposed 2012 quality measures in 2013 as well. We proposed that previously qualified vendors would need to only update their electronic measure specifications and data transmission schema during 2012 to incorporate any new EHR measures we proposed to maintain their qualification for the 2012 Physician Quality Reporting System. Therefore, for EHR vendors that were not previously qualified, we estimate the cost associated with completing the proposed self-nomination process, including the proposed vetting process with CMS officials, is estimated would be $500 ($50 per hour × 10 hours per EHR vendor). Our estimate of a $50 per hour average labor cost for EHR vendors is based on the assumption that vendor staff include IT professionals whose average hourly rates range from $36 to $84 per hour depending on experience, with an average rate of nearly $50 per hour for a mid-level programmer. We believe that the cost associated with the time and effort needed for an EHR vendor to review the proposed quality measures and other information and program the EHR product to enable individual eligible professionals to submit Physician Quality Reporting System proposed quality measures data to the CMS-designated clinical warehouse would be dependent on the EHR vendor's familiarity with the Physician Quality Reporting System, the vendor's system's capabilities, as well as the vendor's programming capabilities. Some vendors already have the necessary capabilities and for such vendors, we estimate the total cost would be approximately $2,000 ($50 per hour × 40 hours per vendor). However, given the variability in the capabilities of the vendors, we believe an estimate for those vendors with minimal experience would be approximately $10,000 per vendor ($50 per hour × 200 hours per EHR vendor).

TABLE 67—ESTIMATED COSTS TO PROFESSIONALS: PHYSICIAN QUALITY REPORTING

	Estimated hours	Estimated instances	Number of measures	Hourly rate	Total cost
Individual Eligible Professional (EP): Preparation.	5.0	1	N/A	$60	$300.
Individual EP: Claims Reporting	0.2	6	3	60	$216.
Individual EP: Registry Reporting	N/A	1	N/A	N/A	$500 to $1,000.
Individual EP: EHR Reporting	N/A	1	N/A	N/A	$25,000–$54,000 initial start-up.
	.....	.....	.....	.....	$18,000 annually for subsequent years.
Group Practice: Self-Nomination	6.0	1	N/A	60	$360.
Group Practice: Reporting	79	1	N/A	60	$4,740.

TABLE 68—ESTIMATED COSTS TO VENDORS: PHYSICIAN QUALITY REPORTING

	Estimated hours	Hourly rate	Total cost
Registry: Self-Nomination	10	$50	$500
EHR: Self-Nomination	10	50	500
EHR: Programming	40–200	50	2,000–10,000

6. Incentives for Electronic Prescribing (eRx)—The Electronic Prescribing Incentive Program

Section IV.F.2. of this proposed rule describes the proposed Electronic Prescribing (eRx) Incentive Programs for CYs 2012 through 2014. To be considered a successful electronic prescriber in CYs 2012 through 2014, an individual eligible professional would need to meet the proposed requirements described in section IV.F.2. of this proposed rule.

We estimate that the cost impact of the proposed eRx Incentive Programs for CYs 2012 through 2014 on the Medicare program would be the cost incurred for maintaining the electronic prescribing measure and its associated code set, and for maintaining the existing clinical data warehouse to accommodate the proposed registry-based reporting and EHR-Based reporting options for the electronic prescribing measure. However, we do not believe that the proposed program for CYs 2012 through 2014 has a significant administrative cost impact on the Medicare program since much of this infrastructure has already been established for the eRx Incentive Program.

Individual eligible professionals and group practices may have different processes for integrating data collection on the electronic prescribing measure into their practices' work workflows. Given this variability and the multiple reporting options that we are proposing, it is difficult to accurately estimate the impact of the eRx Incentive Program for CYs 2012 through 2014 on providers. Furthermore, we believe that costs for eligible professionals who would participate in the eRx Incentive Program for the first time would be considerably higher than the cost for eligible professionals who participated in the eRx Incentive Program in prior years as there are preparatory steps that an eligible professional would need to take to begin participating in the program. In addition, for many eligible professionals (especially those who participated in the eRx Incentive Program in prior years), we believe the cost of participating in the eRx Incentive Program in 2012 or 2013 would be offset by the incentive payment received. As a result of the payment adjustment that begins in 2012 and continues until 2014, the cost of not participating in the eRx Incentive Program for CYs 2012 through 2014 could be higher than the cost of participating in the form of reduced Medicare payments as a result of the payment adjustment.

For the 2009 eRx Incentive Program, based on an incentive of 2.0 percent of eligible professionals' total estimated Medicare Part B allowed charges, approximately $148 million in total incentives were paid to eligible professionals with a mean incentive amount of approximately $3,000. Based on the aforementioned figures from the 2009 eRx Incentive Program, we estimate that the total incentive payments for individual eligible professionals for the 2012 eRx incentive would be approximately $74 million, taking into account that the incentive payment for 2012 would be 1.0 percent. Assuming no changes in the participation rates, we estimate that the total incentive payments for the 2013 eRx incentive would be approximately $37 million, taking into account that the incentive payment for 2013 would be 0.5 percent.

From 2009, 89,752 eligible professionals participated in the eRx Incentive Program. For purposes of the 2013 and 2014 payment adjustment, we anticipate that despite a decrease in the incentive payment amount from 2 percent in 2009 to 1 percent of total estimated Medicare Part B allowed charges for covered professional services in 2012 and 0.5 percent in 2013, more eligible professionals (and groups) will choose to participate in the eRx Incentive Program due to the 2013 and 2014 payment adjustments of 1.5 percent and 2.0 percent respectively on eligible professionals' totally estimated Medicare Part B allowed charges for not demonstrating that they are successful electronic prescribers. In order to become a successful electronic prescriber for purposes of the 2013 and 2014 payment adjustments, we are proposing to provide more opportunities to report on the electronic prescribing measure by concentrating only on the numerator of the measure. Furthermore, we are proposing to expand the reporting mechanisms for the 2013 and 2014 payment adjustments to include registry and EHR-Based reporting. Although we expect an increase in participation for purposes of the 2013 and 2014 payment adjustments, we believe that at least some of these anticipated increases would be offset by the additional significant hardship exemptions we have proposed for the 2013 and 2014 payment adjustments. As such, we expect that the participation level for the eRx Incentive Program will be approximately 90,000 eligible professionals, based on the level of participation in 2009 (which was the highest participation level for the eRx Incentive Program recorded as of yet).

Since we do not have participation results for the implementation of the eRx payment adjustment as the reporting period for the 2012 payment adjustment (the first of 3 such payment adjustments), we will base our estimates for the distribution of payment adjustment amounts on the incentives earned in the 2009 eRx Incentive Program. For the 2013 payment adjustment, taking into account that the payment adjustment would be 1.5 percent, we believe that the total payment adjustment amount would be $111 million. This is based off of the incentive amount distributed for the 2009 eRx Incentive Program. For the 2014 payment adjustment, taking into account that the payment adjustment would be 2.0 percent, we believe that the total payment adjustment amount would be $148 million. This is also based off of the incentive amount distributed for the 2009 eRx Incentive Program.

We propose that any eligible professional who wishes to participate in the eRx Incentive Program must have a qualified electronic prescribing system in order to participate. Therefore, a one-time potential cost to some individual eligible professionals would be the cost of purchasing and using an electronic prescribing system, which varies by the commercial software package selected, the level at which the professional currently employs information technology in his or her practice and the training needed. One study indicated that a midrange complete electronic medical record with electronic prescribing functionality costs $2,500 per license with an annual fee of $90 per license for quarterly updates of the

drug database after setup costs while standalone prescribing, messaging, and problem list system may cost $1,200 per physician per year after setup costs. Hardware costs and setup fees substantially add to the final cost of any software package. (Corley, S.T. (2003). ''Electronic prescribing: a review of costs and benefits.'' Topics in Health Information Management 24(1):29–38.). These are the estimates that we intend to use for our impact analysis.

Similar to the Physician Quality Reporting System, one factor in the cost to individual eligible professionals is the time and effort associated with individual eligible professionals reviewing the electronic prescribing measure to determine whether it is applicable to them, reviewing the available reporting options and selecting one, gathering the required information, and incorporating reporting of the measure into their office work flows. Since the eRx Incentive Program consists of only 1 quality measure, we estimate 2 hours as the amount of time needed for individual eligible professionals to prepare for participation in the eRx Incentive Program. Information obtained from the PVRP, which was a predecessor to the Physician Quality Reporting System and was the first step for the reporting of physician quality of care through certain quality metrics, indicated an average labor cost per practice of approximately $50 per hour. To account for salary increases over time, we will use an average practice labor cost of $60 per hour for our estimates, based on an assumption of an average annual increase of approximately 3 percent. At an average cost of approximately $60 per hour, we estimate the total preparation costs to individual eligible professionals to be approximately $120 ($60 per hour × 2 hours).

Another factor that influences the cost to individual eligible professionals is how they choose to report the electronic prescribing measure (that is, whether they select the claims-based, registry-based or EHR-Based reporting mechanism). For claims-based reporting, there would be a cost associated with reporting the appropriate QDC on the claims an individual eligible professional submits for payment. Based on the information from the PVRP described previously for the amount of time it takes a median practice to report one measure one time (1.75 minutes) and the requirement to report 25 electronic prescribing events during 2012, we estimate the annual estimated cost per individual eligible professional to report the electronic prescribing measure via claims-submission would be $43.75 (1.75 minutes per case × 1 measure × 25 cases per measure × $60 per hour). We believe that for most successful electronic prescribers who earn an incentive, these costs would be negated by the incentive payment received given that the median incentive for eligible professionals who qualified for a 2010 eRx incentive was around $1,600.

For eligible professionals who select the proposed registry-based reporting mechanism, we do not anticipate any additional cost for individual eligible professionals to report data to a registry, as individual eligible professionals opting for registry-based reporting are more than likely already reporting data to the registry. Little if any, additional data would need to be reported to the registry for purposes of participation in the eRx Incentive Program for CYs 2012 through 2014. Individual eligible professionals using registries for Physician Quality Reporting System would likely experience minimal, if any, increased costs charged by the registry to report this 1 additional measure.

For EHR-Based reporting, we propose that the eligible professional must extract the necessary clinical data from his or her EHR, and submit the necessary data to the CMS-designated clinical data warehouse. Once the EHR is programmed by the vendor to allow data submission to CMS, the cost to the individual eligible professional associated with the time and effort to submit data on the electronic prescribing measure should be minimal.

With respect to the proposed process for group practices to be treated as successful electronic prescribers for the 2012 and 2013 incentive and 2013 and 2014 payment adjustment discussed in section IV.F.2. of this proposed rule, group practices have the same proposed options as individual eligible professionals in terms of the form and manner for reporting the electronic prescribing measure (that is, group practices have the option of reporting the measure through claims, a qualified registry, or a qualified EHR product). There are only 2 differences between the proposed requirements for an individual eligible professional and a group practice: (1) The fact that a group practice would have to self-nominate; and (2) the number of times a group practice would be required to report the electronic prescribing measure. Overall, there could be less cost associated with a practice participating in the eRx Incentive Program as a group rather than the individual members of the group separately participating. We do not believe that there are any additional costs associated with the group practice self-nomination process since we are limiting the group practices to those selected to participate in the 2012, 2013, and/or 2014 respective Physician Quality Reporting System GPRO. The practices only will need to indicate their desire to participate in the eRx GPRO at the time they self-nominate for the Physician Quality Reporting System GPRO.

The costs for a group practice reporting to an EHR or registry should be similar to the costs associated with registry and EHR reporting for an individual eligible professional, as the process is the same with the exception that more electronic prescribing events must be reported by the group. For similar reasons, the costs for a group practice reporting via claims should also be similar to the costs associated with claims-based reporting for an individual eligible professional. Therefore, we estimate that the costs for group practices who are selected to participate in the eRx Incentive Program for CYs 2012 through 2014 as a group would range from $3,349.61 (1.75 minutes per case × 1 measure × 625 cases per measure × $60 per hour) for groups comprised of 25–99 eligible professionals participating as an eRx GPRO to $4,375.00 (1.75 minutes per case × 2,500 cases per measure × $60 per hour) for the groups comprised of 100 or more eligible professionals participating as an eRx GPRO.

We believe that the costs to individual eligible professionals and group practices associated with avoiding the 2013 and 2014 payment adjustment would be similar to the costs of an eligible professional or group practice reporting the electronic prescribing measure for purposes of the 2012 and 2013 incentive. Specifically, we believe that the cost of reporting the electronic prescribing measure in one instance for purposes of the payment adjustment is identical to the cost of reporting the electronic prescribing measure for one instance on claims for purposes of the incentive payment. The only difference would be in the total costs for an individual eligible professional. Group practices would be required to report the electronic prescribing measure for the same number of electronic prescribing events for both the 2012 and 2013 incentives and the 2013 and 2014 payment adjustments. Individual eligible professionals, however, would be required to report the electronic prescribing measure for only 10 electronic prescribing events for purposes of the 2013 and 2014 payment adjustments as opposed to 25 electronic

prescribing events for purposes of the 2012 and 2013 incentives.

Based on our decision to consider only registries qualified to submit quality measures results and numerator and denominator data on quality measures to CMS on their participant's behalf for the 2012, 2013, and 2014 Physician Quality Reporting System to be qualified to submit results and numerator and denominator data on the electronic prescribing measure for eRx Incentive Program for CYs 2012, 2013, and 2014 respectively, we do not estimate any cost to the registry associated with becoming a registry qualified to submit the electronic prescribing measure for CYs 2012 through 2014.

The cost for the registry would be the time and effort associated with the registry calculating results for the electronic prescribing measure from the data submitted to the registry by its participants and submitting the quality measures results and numerator and denominator data on the eRx quality measure to CMS on behalf of their participants. We believe such costs would be minimal as registries would already be required to perform these activities for Physician Quality Reporting System.

Likewise, based on our decision to consider only EHR products qualified for the Physician Quality Reporting System for CYs 2012, 2013, and 2014 to be qualified to submit results and numerator and denominator data on the electronic prescribing measure for the eRx Incentive Program for CYs 2012, 2013, and 2014, there would be no need for EHR vendors to undergo a separate self-nomination process for the eRx Incentive Program. Therefore, there would be no additional cost associated with the self-nomination process.

The cost to the EHR vendor associated with the proposed EHR-Based reporting requirements of this reporting initiative is the time and effort associated with the EHR vendor programming its EHR product(s) to extract the clinical data that the individual eligible professional needs to submit to CMS for reporting the electronic prescribing measure. Since we determined that only EHR products qualified for the Physician Quality Reporting System would be qualified for the eRx Incentive Program, and the eRx Incentive Program consists of only one measure, we believe that any burden associated with the EHR vendor to program its product(s) to enable individual eligible professionals to submit data on the electronic prescribing measure to the CMS-designated clinical data warehouse would be minimal.

7. Physician Compare Web Site

Section IV.G.2. of this proposed rule discusses the background of the Physician Compare Web site. As described in section IV.G.2. of this proposed rule, we propose to develop aspects of the Physician Compare Web site in stages. In the first stage, which was completed in 2011, we posted the names of those eligible professionals who satisfactorily participated in the 2009 Physician Quality Reporting System. The second phase of the plan, which would occur during CYs 2011 through 2012, would include the posting of the names of eligible professionals who are successful electronic prescribers under the 2009 eRx Incentive Program, as well as eligible professionals (EPs) who participate in the EHR Incentive Program.

We are proposing to include performance information with respect to the 2012 Physician Quality Reporting System GPRO measures. As reporting of physician performance rates on the Physician Compare Web site will be performed directly by us using the data that we collect under the 2012 Physician Quality Reporting System GPRO, we do not anticipate any notable impact on eligible professionals with respect to the posting of information on the Physician Compare Web site.

8. Medicare EHR Incentive Program

Section IV.H.2. of this proposed rule proposes changes to the EHR Incentive Program for EPs for the 2012 payment year. Aside from continuing the attestation method of reporting CQMs, we propose to allow the reporting of CQMs for purposes of demonstrating meaningful use through participation in the Physician Quality Reporting System—Medicare EHR Incentive Pilot via—(1) A Physician Quality Reporting System ''qualified'' EHR data submission vendor or (2) using an EP's certified EHR technology, which also must be a Physician Quality Reporting System ''qualified'' EHR.

We believe the impact associated with actually reporting CQMs would vary depending on how the EP chooses to do so. We believe that the number of EPs who choose to participate via attestation would largely be those who are not participating in both the EHR Incentive Program and Physician Quality Reporting System as this is the method of reporting most favorable to EPs not participating in the Physician Quality Reporting System. EPs participating in the Physician Quality Reporting System would be more likely to participate in the proposed pilot. Therefore, based on the previously mentioned assumptions, we do not believe there would be any additional impact on EPs specific to the EP's participation in the proposed pilot. All the steps necessary to participate in the proposed pilot would need to be performed to participate in the Physician Quality Reporting System.

9. Physician Feedback Program/Value Modifier Payment

The proposed changes to the Physician Feedback Program in section IV.I. of this proposed rule would not impact CY 2012 physician payments under the Physician Fee Schedule. However, we expect that our proposals to use the Physician Quality Reporting System quality measures in the Physician Feedback reports and in the value modifier to be implemented in CY 2015 may result in increased participation in the Physician Quality Reporting System in CY 2012. We anticipate that as we approach implementation of the value modifier, physicians will increasingly participate in the Physician Quality Reporting System to determine and understand how the value modifier could affect their payments.

10. Bundling of Payments for Services Provided to Outpatients Who Later Are Admitted as Inpatients: 3-Day Payment Window Policy and the Impact on Wholly Owned or Wholly Operated Physician Offices

Medicare traditionally collects ownership information obtained in the 855 A and 855 B enrollment forms completed upon a facility or a practitioner's Medicare enrollment. The 855 forms are self-selecting enrollment forms that may be updated as necessary. Although the enrollment forms do not specifically require information on whether a physician office is wholly owned or wholly operated by a hospital, we will use this information to aid us in identifying physician offices and clinics that might be wholly owned or operated by a hospital. While we believe that most hospital owned entities providing physician services will be considered part of the hospital and operating as hospital outpatient departments; there will be at least some hospital owned physician offices and clinics that will meet the definition of ''wholly-owned or wholly-operated'' and will be subject to the 3-day payment window policy. We are unable to accurately estimate and verify the number of wholly owned or wholly operated physician offices or clinics enrolled in Medicare and furnishing health services to Medicare beneficiaries that will be subject to the 3-day

payment window policy under the PFS because the 855 forms do not explicitly capture information on sole ownership or operation. We note that the application of the 3-day window policy is limited to only those outpatient services provided within the payment window to patients that are admitted to a hospital. The 3-day window policy would not apply to the majority of services provided by wholly-owned or wholly-operated physician offices. Furthermore, application of the 3-day window policy would be limited to only the practice expense component of the payment rate, and the professional component will be unchanged by the payment policy. For the CY 2012 PFS proposed rule, we are unable to estimate the impact of this proposed policy change. However, we note that if we were able to estimate a savings in Part B payments as a result of the application of the 3-day payment window, the program savings would be redistributed across all other services paid under the PFS in accordance with due to the PFS budget neutrality provisions.

I. Alternatives Considered

This proposed rule contains a range of policies, including some provisions related to specific statutory provisions. The preceding preamble provides descriptions of the statutory provisions that are addressed, identifies those policies when discretion has been exercised, presents rationale for our policies and, where relevant, alternatives that were considered.

J. Impact on Beneficiaries

There are a number of changes in this proposed rule that would have an effect on beneficiaries. In general, we believe that many of the proposed changes, including the refinements of the Physician Quality Reporting System with its focus on measuring, submitting, and analyzing quality data will have a positive impact and improve the quality and value of care provided to Medicare beneficiaries.

The regulatory provisions may affect beneficiary liability in some cases. Most changes in aggregate beneficiary liability due to a particular provision would be a function of the coinsurance (20 percent if applicable for the particular provision after the beneficiary has met the deductible). To illustrate this point, as shown in Table 65, the CY 2011 national payment amount in the nonfacility setting for CPT code 99203 (Office/outpatient visit, new) is $102.95, which means that in CY 2011 a beneficiary would be responsible for 20 percent of this amount, or $20.59. Based on this proposed rule, including the negative update, the CY 2012 national payment amount in the nonfacility setting for CPT code 99203, as shown in Table 65, is $73.57, which means that, in CY 2012, the beneficiary coinsurance for this service would be $14.71. Most policies discussed in this proposed rule that impact payment rates, such as the expansion of the MPPR to the professional component of imaging procedures, would similarly impact beneficiaries' coinsurance.

K. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf*), in Table 69, we have prepared an accounting statement showing the estimated expenditures associated with this proposed rule. This estimate includes the estimated CY 2012 incurred benefit impact associated with the estimated CY 2012 PFS conversion factor update based on the FY 2012 President's Budget baseline.

TABLE 69—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED TRANSFERS

Category	Transfers
CY 2012 Annualized Monetized Transfers	Estimated decrease in expenditures of $20.2 billion for the PFS update.
From Whom To Whom?	Federal Government to physicians, other practitioners and providers and suppliers who receive payment under Medicare.

L. Conclusion

The analysis in the previous sections, together with the remainder of this preamble, provides an Initial Regulatory Flexibility Act Analysis. The previous analysis, together with the remainder of this preamble, provides a Regulatory Impact Analysis.

VIII. Addenda Referenced in This Proposed Rule and Available Only Through the Internet on the CMS Web Site

This section lists the Addenda referred to throughout the preamble of this proposed rule. Beginning with the CY 2012 PFS proposed rule, the PFS Addenda A, B, C, D, E, F, G, and H will no longer appear in the **Federal Register**. Instead, these Addenda, along with other supplemental documents, will be available through the Internet.

Readers who experience any problems accessing any of the Addenda that are posted on the CMS Web sites identified above should contact Erin Smith at (410) 786–4497.

The following PFS Addenda for CY 2012 PFS proposed rule are available through the Internet on the CMS Web site at *http://www.cms.gov/PhysicianFeeSched/*. Click on the link on the left side of the screen titled, ''PFS Federal Regulations Notices'' for a chronological list of PFS **Federal Register** and other related documents. For the CY 2012 PFS proposed rule, refer to item CMS–1524–P.

Addendum A—Explanation and Use of Addendum B

Addendum B—Proposed Relative Value Units and Relations Information Used in Determining Medicare Payments for CY 2012

Addendum C—[Reserved]

Addendum D—Proposed CY 2012 Geographic Adjustment Factors (GAFs)

Addendum E—Proposed CY 2012 Geographic Practice Cost Indices (GPCIs) by States and Medicare Locality

Addendum F—Proposed CY 2012 Diagnostic Imaging Services Subject to the Multiple Procedure Payment Reduction

Addendum G—CPT/HCPCS Imaging Codes Defined by Section 5102(b) of the DRA

Addendum H—CY 2011 ''Always Therapy'' Services Subject to the Multiple Procedure Payment Reduction

List of Subjects

42 CFR Part 410

Health facilities, Health professions, Kidney diseases, Laboratories, Medicare, Reporting and recordkeeping requirements, Rural areas, X-rays.

42 CFR Part 414

Administrative practice and procedure, Health facilities, Health professions, Kidney diseases, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 415

Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 495

Administrative practice and procedure, Electronic health records, Health facilities, Health professions, Health Maintenance Organizations (HMO), Medicaid, Medicare, Penalties, Privacy, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble of this proposed rule, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 410—SUPPLEMENTARY MEDICAL INSURANCE (SMI) BENEFITS

Subpart B—Medical and Other Health Services

1. The authority citation for part 410 continues to read as follows:

Authority: Secs. 1102, 1834, 1871, and 1893 of the Social Security Act (42 U.S.C. 1302, 1395m, 1395hh, and 1395ddd).

2. Amend § 410.15(a) as follows:

A. Amending the definition of ''first annual wellness visit providing personalized prevention plan services'' by—

1. Revising the introductory text.

2. Redesignating paragraphs (i) through (ix) as paragraphs (ii) through (x).

3. Adding a new paragraph (i).

4. Revising newly redesignated paragraph (viii)(A).

B. Adding the definition of ''Health risk assessment''.

C. In the definition of ''subsequent annual wellness visit providing personalized prevention plan services''.

1. Revising the introductory text.

2. Redesignating paragraphs (i) through (vii) as paragraphs (ii) through (viii).

3. Adding a new paragraph (i).

4. Revising newly redesigned paragraphs (iii) and (vi)(B).

The revisions and additions read as follows:

§ 410.15 Annual wellness visits providing Personalized Prevention Plan Services: Conditions for and limitations on coverage.

(a) * * *

First annual wellness visit providing personalized prevention plan services means the following services furnished to an eligible beneficiary by a health professional, taking into account the results of a health risk assessment, as those terms are defined in this section:

(i) Review (and administration if needed) of a health risk assessment (as defined in this paragraph).

* * * * *

(viii) * * *

(A) A written screening schedule for the individual such as a checklist for the next 5 to 10 years, as appropriate, based on recommendations of the United States Preventive Services Task Force and the Advisory Committee on Immunization Practices, and the individual's health risk assessment (as that term is defined in this section), health status, screening history, and age-appropriate preventive services covered by Medicare.

* * * * *

Health risk assessment means, for the purposes of this section, an evaluation tool that meets the following criteria:

(i) Collects self-reported information about the beneficiary.

(ii) Can be administered independently by the beneficiary or administered by a health professional prior to or as part of the AWV encounter.

(iii) Is appropriately tailored to and takes into account the communication needs of underserved populations, persons with limited English proficiency, and persons with health literacy needs.

(iv) Takes no more than 20 minutes to complete.

(v) Addresses, at a minimum, the following topics:

(A) Demographic data, including but not limited to age, gender, race, and ethnicity.

(B) Self assessment of health status, frailty, and physical functioning.

(C) Psychosocial risks, including but not limited to, depression/life satisfaction, stress, anger, loneliness/social isolation, pain, or fatigue.

(D) Behavioral risks, including but not limited to, tobacco use, physical activity, nutrition and oral health, alcohol consumption, sexual practices, motor vehicle safety (seat belt use), and home safety.

(E) Activities of daily living (ADLs), including but not limited to, dressing, feeding, toileting, grooming, physical ambulation (including balance/risk of falls), and bathing.

(F) Instrumental activities of daily living (IADLs), including but not limited to, shopping, food preparation, using the telephone, housekeeping, laundry, mode of transportation, responsibility for own medications, and ability to handle finances.

* * * * *

Subsequent annual wellness visit providing personalized prevention plan services means the following services furnished to an eligible beneficiary by a health professional, taking into account the results of a health risk assessment, as those terms are defined in this section:

(i) Review (and administration, if needed) of a health risk assessment (as defined in this section).

* * * * *

(iii) An update of the list of current providers and suppliers that are regularly involved in providing medical care to the individual as that list was developed for the first annual wellness visit providing personalized prevention plan services or the previous subsequent annual wellness visit providing personalized prevention plan services.

* * * * *

(vi) * * *

(B) The list of risk factors and conditions for which primary, secondary or tertiary interventions are recommended or are underway for the individual as that list was developed at the first annual wellness visit providing personalized prevention plan services or the previous subsequent annual wellness visit providing personalized prevention plan services.

* * * * *

3. Amend § 410.62 paragraph (b) by revising the paragraph heading to read as follows:

§ 410.62 Outpatient speech-language pathology services: Conditions and exclusions.

* * * * *

(b) Condition for coverage of outpatient speech-language pathology services furnished to certain inpatients of a hospital or a CAH or SNF.* * *

* * * * *

§ 410.78 [Amended]

4. In § 410.78 the introductory text of paragraph (b) is amended by removing the phrase ''and individual and group health and behavior assessment and intervention services furnished by an interactive telecommunications system if the following conditions are met:'' and adding in its place the phrase ''individual and group health and behavior assessment and intervention services, and smoking cessation services furnished by an interactive telecommunications system if the following conditions are met:''.

5. Amend § 410.140 by revising the definition of ''Deemed entity'' to read as follows:

§ 410.140 Definitions.

* * * * *

Deemed entity means an individual, physician, or entity accredited by an

approved organization, but that has not yet been approved by CMS under § 410.145(b) to furnish training.

§ 410.141 [Amended]

6. Amend § 410.141 paragraph (b)(1) as follows:

A. Removing the term ''it'' and adding the phrase ''the training'' in its place.

B. Removing the cross-reference ''§ 410.32(a)'' and adding the cross-reference ''§ 410.32(a)(2)''.

PART 414—PAYMENT FOR PART B MEDICAL AND OTHER HEALTH SERVICES

Subpart B—Physicians and Other Practitioners

7. The authority citation for part 414 continues to read as follows:

Authority: Secs. 1102, 1871, and 1881(b)(l) of the Social Security Act (42 U.S.C. 1302, 1395hh, and 1395rr(b)(l)).

8. Amend § 414.22 by revising paragraphs (b)(5)(i)(A) through (b)(5)(i)(C) to read as follows:

§ 414.22 Relative value units (RVUs).

* * * * *

(b) * * *

(5) * * *

(i) * * *

(A) *Facility practice expense RVUs.* The facility practice expense RVUs apply to services furnished to patients in places of service including, but not limited to, a hospital, a skilled nursing facility, a community mental health center, a hospice, or an ambulatory surgical center, or in a wholly owned or wholly operated physician practice providing preadmission services under § 412.2(c)(5).

(B) *Nonfacility practice expense RVUs.* The nonfacility practice expense RVUs apply to services furnished to patients in places of service including, but not limited to, a physician's office, the patient's home, a nursing facility, or a comprehensive outpatient rehabilitation facility (CORF).

(C) *Outpatient therapy and CORF services.* Outpatient therapy services (including physical therapy, occupational therapy, and speech-language pathology services) and CORF services billed under the physician fee schedule are paid using the nonfacility practice expense RVUs.

* * * * *

§ 414.65 [Amended]

9. In § 414.65 paragraph (a) is amended by removing the phrase ''and individual and group health and behavior assessment and intervention furnished via an interactive telecommunications system is equal to the current fee schedule amount applicable for the service of the physician or practitioner.'' and adding in its place the phrase ''individual and group health and behavior assessment and intervention, and smoking cessation services furnished via an interactive telecommunications system is equal to the current fee schedule amount applicable for the service of the physician or practitioner.''

10. Amend § 414.90 as follows:

A. In paragraph (b), adding the definition of ''Certified electronic health record technology''.

B. In paragraph (b), revising the definitions of ''Group practice''.

C. Removing paragraph (c)(2).

D. Redesignating paragraph (c)(3) as (c)(2).

E. Revising paragraph (f)(1).

F. Removing paragraph (f)(2).

G. Redesignating paragraph (f)(3) as (f)(2).

H. Revising newly redesignated paragraph (f)(2) introductory text.

I. In newly redesignated paragraph (f)(2)(ii), removing the phrase ''behalf; or'' and adding in its place the phrase ''behalf.''

J. In newly redesignated paragraph (f)(2)(iii), removing the phrase ''containing real or dummy'' and adding in its place the phrase ''containing dummy''.

K. Revising paragraphs (g)(1), (g)(5), (i)(1) and (i)(2) introductory text.

The revisions and additions and read as follows:

§ 414.90 Physician Quality Reporting System.

* * * * *

(b) * * *

Certified electronic health record technology means an electronic health record vendor's product and version as described in 45 CFR 170.102.

Group practice means a physician group practice, as defined by a TIN, with 25 or more individual eligible professionals (or, as identified by NPIs) who have reassigned their billing rights to the TIN.

* * * * *

(f) * * *

(1) *Reporting periods.* For purposes of this paragraph, the reporting period is—

(i) The 12-month period from January 1 through December 31 of such program year.

(ii) *Exceptions*—(A) *Program year 2011.* The reporting period for the program year 2011 is one of the following:

(*1*) The 12-month period from January 1 through December 31 of such program year; or

(*2*) The 6-month period from July 1 through December 31 of such program year.

(B) For 2012 and subsequent program years, the 6-month reporting period from July 1 through December 31 of such program year is available for registry-based reporting of Physician Quality Reporting System measures groups by eligible professionals.

(2) *Reporting mechanisms.* For program year 2011 and subsequent program years, an eligible professional who wishes to participate in the Physician Quality Reporting System must report information on the individual Physician Quality Reporting System quality measures or Physician Quality Reporting System measures groups identified by CMS in one of the following manners:

(g) * * *

(1) Meets the participation requirements specified by CMS for the Physician Quality Reporting System group practice reporting option;

* * * * *

(5) Payments to a group practice under this paragraph must be in lieu of the payments that would otherwise be made under the Physician Quality Reporting System to eligible professionals in the group practice for meeting the criteria for satisfactory reporting for individual eligible professionals.

(i) If an eligible professional, as identified by an individual NPI, has reassigned his or her Medicare billing rights to a TIN selected to participate in the Physician Quality Reporting System group practice reporting option for a program year, then for that program year the eligible professional must participate in the Physician Quality Reporting System via the group practice reporting option. For any program year in which the TIN is selected to participate in the Physician Quality Reporting System group practice reporting option, the eligible professional cannot individually qualify for a Physician Quality Reporting System incentive payment by meeting the requirements specified in paragraph (f) of this section.

(ii) If, for the program year, the eligible professional participates in the Physician Quality Reporting System under a TIN that is not selected to participate in the Physician Quality Reporting System group practice reporting option for that program year, then the eligible professional may individually qualify for a Physician Quality Reporting System incentive by meeting the requirements specified in

paragraph (f) of this section under that TIN.

* * * * *

(i) * * *

(1) To request an informal review, an eligible professional (or in the case of reporting under paragraph (g) of this section, group practices) must submit a request to CMS within 90 days of the release of the feedback reports. The request must be submitted in writing and summarize the concern(s) and reasons for requesting an informal review and may also include information to assist in the review.

(2) CMS will provide a written response within 90 days of the receipt of the original request.

* * * * *

11. Section 414.92 is amended as follows:

A. In paragraph (b), adding the definition of ''Certified electronic health record technology''.

B. In paragraph (b), revising paragraphs (ii) and (iii) of the definition of ''Group practice''.

C. Revising paragraph (c)(1).

D. In paragraph (c)(2), revise the paragraph heading.

E. Revising paragraph (c)(2)(ii).

F. Adding paragraph (c)(2)(iii).

G. In paragraph (d)(1), removing the phrase ''For purposes of this paragraph in 2011,'' is removed and adding in its place the phrase ''For purposes of this paragraph,''.

H. In paragraph (d)(2), removing the phrase ''For program year 2011,'' and adding in its place the phrase ''For the 2012 and 2013 incentive payments,''

I. Redesignating paragraph (f) as (g).

J. Adding a new paragraph (f).

§ 414.92 Electronic Prescribing Incentive Program.

* * * * *

(b) * * *

Certified electronic health record technology means an electronic health record vendor's product and version as described in 45 CFR 170.102.

Group practice * * *

(ii) In a Medicare-approved demonstration project or other Medicare program, under which Physician Quality Reporting System requirements and incentives have been incorporated; and

(iii) Has indicated its desire to participate in the electronic prescribing group practice reporting option.

* * * * *

(c) * * *

(1) *Incentive payments.* Subject to paragraph (c)(3) of this section, with respect to covered professional services furnished during a reporting period by an eligible professional, if the eligible professional is a successful electronic prescriber for such reporting period, in addition to the amount otherwise paid under section 1848 of the Act, there also must be paid to the eligible professional (or to an employer or facility in the cases described in section 1842(b)(6)(A) of the Act) or, in the case of a group practice under paragraph (e) of this section, to the group practice, from the Federal Supplementary Medical Insurance Trust Fund established under section 1841 of the Act an amount equal to the applicable electronic prescribing percent (as specified in paragraph (c)(1)(ii) of this section) of the total estimated allowed part B charges for all such covered professional services furnished by the eligible professional (or, in the case of a group practice under paragraph (e) of this section, by the group practice) during the applicable reporting period.

(2) Payment adjustment.* * * (ii) *Significant hardship exception.* CMS may, on a case-by-case basis, exempt an eligible professional (or in the case of a group practice under paragraph (e) of this section, a group practice) from the application of the payment adjustment under paragraph (c)(2) of this section if, CMS determines, subject to annual renewal, that compliance with the requirement for being a successful electronic prescriber would result in a significant hardship. Eligible professionals (or, in the case of a group practice under paragraph (e) of this section, a group practice) may request consideration for a significant hardship exemption from the 2013 and 2014 payment adjustments if one of the following circumstances apply:

(A) The eligible professional or group practice is located in a rural area without high speed internet access.

(B) The eligible professional or group practice is located in an area without sufficient available pharmacies for electronic prescribing.

(C) The eligible professional or group practice is unable to electronically prescribe due to local, State, or Federal law or regulation.

(D) The eligible professional or group practice has limited prescribing activity, as defined by an eligible professional generating fewer than 100 prescriptions during a 6-month reporting period.

(iii) Exemptions to the payment adjustment. An eligible professional (or in the case of a group practice under paragraph (b) of this section, a group practice) is exempt from the application of the payment adjustment under paragraph (c)(2) of this section if one of the following applies:

(A) The eligible professional is not an MD, DO, podiatrist, nurse practitioner, or physician assistant.

(B) The eligible professional does not have at least 100 cases containing an encounter code that falls within the denominator of the electronic prescribing measure for dates of service during the 6-month reporting period specified in paragraph (f)(1) of this section.

* * * * *

(f) *Requirements for individual eligible professionals and group practices for the payment adjustment.* In order to be considered a successful electronic prescriber for the electronic prescribing payment adjustment, an individual eligible professional (or, in the case of a group practice under paragraph (b) of this section, a group practice), as identified by a unique TIN/NPI combination, must meet the criteria for being a successful electronic prescriber specified by CMS, in the form and manner specified in paragraph (f)(2) of this section, and during the reporting period specified in paragraph (f)(1) of this section.

(1) *Reporting periods.* (i) For purposes of this paragraph, the reporting period for the 2013 payment adjustment is either of the following:

(A) The 12-month period from January 1, 2011 through December 31, 2011.

(B) The 6-month period from January 1, 2012 through June 30, 2012.

(ii) For purposes of this paragraph, the reporting period for the 2014 payment adjustment is either of the following:

(A) The 12-month period from January 1, 2012 through December 31, 2012.

(B) The 6-month period from January 1, 2013 through June 30, 2013.

(2) *Reporting mechanisms.* For program years 2012 through 2014, an eligible professional (or, in the case of a group practice under paragraph (e) of this section, a group practice) who wishes to participate in the Electronic Prescribing Incentive Program must report information on the electronic prescribing measure identified by CMS to one of the following:

(i) CMS, by no later than 2 months after the end of the applicable 12-month reporting period or by no later than 1 month after the end of the applicable 6-month reporting period, on the eligible professional's Medicare Part B claims for covered professional services furnished by the eligible professional during the reporting period specified in paragraph (f)(1) of this section.

(ii) A qualified registry (as defined in paragraph (b) of this section) in the form

and manner and by the deadline specified by the qualified registry selected by the eligible professional. The selected qualified registry submits information, as required by CMS, for covered professional services furnished by the eligible professional during the reporting period specified in paragraph (f)(1) of this section to CMS on the eligible professional's behalf.

(iii) CMS by extracting clinical data using a secure data submission method, as required by CMS, from a qualified electronic health record product (as defined in paragraph (b) of this section) by the deadline specified by CMS for covered professional services furnished by the eligible professional during the reporting period specified in paragraph (f)(1) of this section. Prior to actual data submission for a given program year and by a date specified by CMS, the eligible professional must submit a test file containing dummy clinical quality data extracted from the qualified electronic health record product selected by the eligible professional using a secure data submission method, as required by CMS.

* * * * *

Subpart J—Submission of Manufacturer's Average Sales Price Data

12. Section 414.802 is amended by revising the first sentence of the definition of ''unit'' to read as follows:

§ 414.802 Definitions.

* * * * *

Unit means the product represented by the 11-digit National Drug Code, unless otherwise specified by CMS to account for situations where labeling indicates that the amount of drug product represented by an NDC varies.

* * *

* * * * *

13. Section 414.904 is amended by revising paragraph (d)(3) to read as follows:

§ 414.904 Average sales price as the basis for payment.

* * * * *

(d) * * *

(3) *Widely available market price and average manufacturer price.* If the Inspector General finds that the average sales price exceeds the widely available market price or the average manufacturer price by the applicable threshold percentage specified in paragraph (d)(3)(iii) or (d)(3)(iv) of this section, the Inspector General is responsible for informing the Secretary (at such times as specified by the Secretary) and the payment amount for the drug or biological will be substituted subject to the following adjustments:

(i) The payment amount substitution will be applied at the next ASP payment amount calculation period after the Inspector General informs the Secretary (at such times specified by the Secretary) about billing codes for which the ASP has exceeded the AMP by the applicable threshold percentage, and will remain in effect for one quarter after publication.

(ii) Payment at 103 percent of the average manufacturer price for a billing code will be applied at such times when—

(A) The threshold for making price substitutions, as defined in paragraph (d)(3)(iii) of this section is met; and

(B) 103 percent of the AMP is less than the 106 percent of the ASP for the quarter in which the substitution would be applied.

(iii) The applicable percentage threshold for AMP comparisons for CYs 2005 through 2011 is 5 percent. For CY 2012, the applicable percentage threshold for ASP comparisons is reached when—

(A) The ASP for the billing code has exceeded the AMP for the billing code by 5 percent or more in two consecutive quarters, or three of the last 4 quarters immediately preceding the quarter to which the price substitution would be applied; and

(B) The average manufacturer price for the billing code is calculated using the same set of NDCs used for the average sales price for the billing code.

(iv) The applicable percentage threshold for WAMP comparisons for CYs 2005 through 2012 is 5 percent.

* * * * *

PART 415—SERVICES FURNISHED BY PHYSICIANS IN PROVIDERS, SUPERVISING PHYSICIANS IN TEACHING SETTINGS, AND RESIDENTS IN CERTAIN SETTINGS

14. The authority citation for part 415 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart C—Part B Carrier Payments for Physician Services to Beneficiaries in Providers

§ 415.130 [Amended]

15. In § 415.130, paragraphs (d)(1) and (d)(2) are amended by removing the date ''December 31, 2010'' and adding the date ''December 31, 2011'' in its place.

PART 495—STANDARDS FOR THE ELECTRONIC HEALTH RECORD TECHNOLOGY INCENTIVE PROGRAM

16. The authority for part 495 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

17. Amend § 495.8 as follows:

A. In pargraph (a)(2)(ii), removing the phrase ''selected by CMS electronically to CMS (or in the case of Medicaid EPs, the States) in the manner specified by CMS (or in the case of Medicaid EPs, the States).'' and adding in its place the phrase ''selected by CMS to CMS (or in the case of Medicaid EPs, the States) in the form and manner specified by CMS (or in the case of Medicaid EPs, the States).''

B. Adding a new paragraph (a)(2)(v) to read as follows:

§ 495.8 Demonstration of meaningful use criteria.

(a) * * *

(2) * * *

(v) *Exception for Medicare EPs for PY 2012—Participation in the Physician Quality Reporting System-Medicare EHR Incentive Pilot.* In order to satisfy the clinical quality measure reporting objective in § 495.6(d)(10), aside from attestation, an EP participating in the Physician Quality Reporting System may also participate in the Physician Quality Reporting System-Medicare EHR Incentive Pilot through one of the following methods:

(A) Submission of data extracted from the EP's certified EHR technology through a Physician Quality Reporting System qualified EHR data submission vendor; or

(B) Submission of data extracted from the EP's certified EHR technology, which must also be through a Physician Quality Reporting System qualified EHR.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: June 16, 2011.

Donald M. Berwick,

Administrator, Centers for Medicare & Medicaid Services.

Approved: June 24, 2011.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2011–16972 Filed 7–1–11; 4:15 pm]

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Part III

Securities and Exchange Commission

17 CFR Parts 275 and 279
Rules Implementing Amendments to the Investment Advisers Act of 1940; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release No. IA–3221; File No. S7–36–10]

RIN 3235–AK82

Rules Implementing Amendments to the Investment Advisers Act of 1940

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission is adopting new rules and rule amendments under the Investment Advisers Act of 1940 to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. These rules and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act that, among other things, increase the statutory threshold for registration by investment advisers with the Commission, require advisers to hedge funds and other private funds to register with the Commission, and require reporting by certain investment advisers that are exempt from registration. In addition, we are adopting rule amendments, including amendments to the Commission's pay to play rule, that address a number of other changes made by the Dodd-Frank Act.

DATES: *Effective dates:* The effective date of 17 CFR 275.204–4 and 275.203A–5(b) and (c), amendments to 17 CFR 275.0–7, 275.203A–1, 275.203A–2, 275.203A–3, 275.204–1, 275.204–2, 275.206(4)–5, 275.222–1, and 275.222–2, and amendments to Forms ADV, ADV–E, ADV–H, and ADV–NR (referenced in 17 CFR part 279) is September 19, 2011. The effective date of 17 CFR 275.203A–5(a) and the amendment to 17 CFR 275.203–1 is July 21, 2011. 17 CFR 275.202(a)(11)–1, 275.203(b)(3)–1, 275.203(b)(3)–2, and 275.203A–4 are removed effective September 19, 2011.

Compliance Date: See section III of this Release.

FOR FURTHER INFORMATION CONTACT: David P. Bartels, Attorney-Adviser, Michael J. Spratt, Attorney-Adviser, Jennifer R. Porter, Senior Counsel, Devin F. Sullivan, Senior Counsel, Melissa A. Roverts, Branch Chief, Matthew N. Goldin, Branch Chief, or Daniel S. Kahl, Assistant Director, at (202) 551–6787 or *IArules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Commission is adopting rules 203A–5 and 204–4 [17 CFR 275.203A–5 and 275.204–4] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (''Advisers Act'' or ''Act''),[1] amendments to rules 0–7, 203–1, 203A–1, 203A–2, 203A–3, 204–1, 204–2, 206(4)–5, 222–1, and 222–2 [17 CFR 275.0–7, 275.203–1, 275.203A–1, 275.203A–2, 275.203A–3, 275.204–1, 275.204–2, 275.206(4)–5, 275. 222–1, and 275.222–2] under the Advisers Act, and amendments to Form ADV, Form ADV–E, Form ADV–H, and Form ADV–NR [17 CFR 279.1, 279.3, and 279.4] under the Advisers Act. The Commission is also rescinding rules 202(a)(11)–1, 203(b)(3)–1, 203(b)(3)–2, and 203A–4 [17 CFR 275.202(a)(11)–1, 275.203(b)(3)–1, 275.203(b)(3)–2, and 275.203A–4] under the Advisers Act.

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I. Background

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') which, among other things, amends certain provisions of the Advisers Act.[2] Title IV of the Dodd-Frank Act (''Title IV'') includes

[1] Unless otherwise noted, when we refer to the Advisers Act, or any paragraph of the Advisers Act, we are referring to 15 U.S.C. 80b of the United States Code, at which the Advisers Act is codified, and when we refer to rule 0–7, rule 202(a)(11)–1, rule 203–1, rule 203(b)(3)–1, rule 203(b)(3)–2, rule 203A–1, rule 203A–2, rule 203A–3, rule 203A–4, rule 203A–5, rule 204–1, rule 204–2, rule 204–4, rule 206(4)–5, rule 222–1, or rule 222–2, or any paragraph of these rules, we are referring to 17 CFR 275.0–7, 17 CFR 275.202(a)(11)–1, 17 CFR 275.203–1; 17 CFR 275.203(b)(3)–1, 17 CFR 275.203(b)(3)–2, 17 CFR 275.203A–1, 17 CFR 275.203A–2, 17 CFR 275.203A–3, 17 CFR 275.203A–4, 17 CFR 275.203A–5, 17 CFR 275.204–1, 17 CFR 275.204–2, 17 CFR 275.204–4, 17 CFR 275.206(4)–5, 17 CFR 275.222–1, or 17 CFR 275.222–2, respectively, of the Code of Federal Regulations (''CFR''), in which these rules are published.

[2] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

most of the amendments to the Advisers Act. These amendments include provisions that reallocate primary responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers—*i.e.,* those that have between $25 million and $100 million of assets under management.[3] These provisions will require a significant number of advisers currently registered with the Commission to withdraw their registrations with the Commission and to switch to registration with one or more state securities authorities. In addition, Title IV repeals the ''private adviser exemption'' contained in section 203(b)(3) of the Advisers Act on which many advisers, including those to many hedge funds, private equity funds, and venture capital funds, rely in order to avoid registration under the Act.[4] In eliminating this provision, Congress created, or directed us to adopt other, in some ways narrower, exemptions for advisers to certain types of private funds—*e.g.,* venture capital funds—which provide that the Commission shall require such advisers to submit such reports ''as the Commission determines necessary or appropriate in the public interest.''[5] These provisions in Title IV of the Dodd-Frank Act will be effective on July 21, 2011.[6]

On November 19, 2010, we proposed new rules and amendments to existing rules and forms to give effect to these provisions.[7] Specifically, we proposed a new rule and amendments to our rules and forms to facilitate mid-size advisers' transition from Commission to state registration.[8] We also proposed a new rule and rule amendments to require certain advisers to private funds that are exempt from registration under the Advisers Act to submit reports to us.[9] We proposed rule amendments, including amendments to the Commission's ''pay to play'' rule,[10] to address a number of other changes to the Advisers Act made by the Dodd-Frank Act.[11] Also, in light of our increased responsibility for oversight of private funds, we proposed to require advisers to those funds to provide us with additional information about the operation of those funds.[12] Finally, we proposed additional changes to Form ADV that would enhance our oversight of advisers and also would enable us to identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[13]

We received more than 70 comment letters on our proposals, most of which were from advisers, trade or professional organizations, and law firms.[14] Commenters generally supported our approach to facilitate mid-size advisers' transition from Commission to state registration, and our amendments to Form ADV, including those requiring disclosure of additional information about private funds. Many, however, urged us to take a different approach to, among other things, our proposed amendments to the pay to play rule. We are adopting the proposed rules and rule amendments with several modifications to address commenters' concerns. We address these modifications and comments in detail below.

II. Discussion

A. Eligibility for Registration With the Commission: Section 410

Section 203A of the Advisers Act, enacted in 1996 as part of the National Securities Markets Improvement Act (''NSMIA''), generally prohibits an investment adviser regulated by the state in which it maintains its principal office and place of business from registering with the Commission unless it has at least $25 million of assets under management,[15] and preempts certain state laws regulating advisers that are registered with the Commission.[16] This provision makes the states the primary regulators of smaller advisers and the Commission the primary regulator of larger advisers.[17]

Section 410 of the Dodd-Frank Act creates a new category of ''mid-sized

[3] *See* section 410 of the Dodd-Frank Act; Advisers Act section 203A. *See also* National Securities Markets Improvement Act of 1996, Public Law 104–290, 110 Stat. 3416, § 303 (1996) (''NSMIA'') (allocating to states certain responsibility for small investment advisers with less than $25 million in assets under management).

[4] *See* section 403 of the Dodd-Frank Act. Section 203(b)(3) currently exempts from registration any investment adviser who during the course of the preceding twelve months, has had fewer than fifteen clients, and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''Investment Company Act''), or a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act (15 U.S.C. 80a–54). Section 403 of the Dodd-Frank Act eliminates this ''private adviser'' exemption from section 203(b)(3) and replaces it with a new exemption for ''foreign private advisers.'' We are also adopting today a rule to clarify the definition of a ''foreign private adviser'' in a separate release. *Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers With Less Than $150 Million in Assets Under Management, and Foreign Private Advisers,* Investment Advisers Act Release No. 3222 (''Exemptions Adopting Release'').

[5] *See* section 407 of the Dodd-Frank Act (''The Commission shall require such advisers to * * * provide to the Commission such annual or other reports as the Commission determines necessary or appropriate in the public interest or for the protection of investors''). *See also* section 408 of the Dodd-Frank Act. Section 407 of the Dodd-Frank Act, which adds section 203(l) to the Advisers Act, exempts advisers solely to one or more venture capital funds. Section 408, which adds section 203(m) to the Advisers Act, exempts advisers solely to private funds with assets under management in the United States of less than $150 million.

[6] *See* section 419 of the Dodd-Frank Act. For purposes of this Release, unless indicated otherwise, when we refer to the effective date of the Dodd-Frank Act, we are referring to the effective date of Title IV, which is July 21, 2011.

[7] *See Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 3110 (Nov. 19, 2010) [75 FR 77052 (Dec. 10, 2010)] (''Implementing Proposing Release'').

[8] *See id.* at section II.A.

[9] *See id.* at section II.B. Throughout this Release, we refer to advisers exempt from registration under sections 203(l) and 203(m) of the Advisers Act as ''exempt reporting advisers.''

[10] Rule 206(4)–5.

[11] *See* Implementing Proposing Release, *supra* note 7, at section II.D.

[12] *See* sections 403, 407 and 408 of the Dodd-Frank Act; Implementing Proposing Release, *supra* note 7, at section II.C.

[13] *See* Implementing Proposing Release, *supra* note 7, at section II.C; section 956 of the Dodd-Frank Act.

[14] Comment letters submitted in File No. S7–36–10 are available on the Commission's Web site at: *http://www.sec.gov/comments/s7-36-10/s73610.shtml.* We also considered those comments submitted in File No. S7–37–10 (*Exemptions for Advisers to Venture Capital Funds, Private Fund Advisers with Less Than $150 Million in Assets Under Management, and Foreign Private Advisers,* Investment Advisers Act Release No. 3111 (Nov. 19, 2010) [75 FR 77190 (Dec. 10, 2010)] (''Exemptions Proposing Release'')) that addressed the rules and amendments adopted in this Release. Those comments are available at on the Commission's Web site at: *http://www.sec.gov/comments/s7-37-10/s73710.shtml.*

[15] Advisers Act section 203A(a)(1). The prohibition does not apply if the investment adviser is an adviser to an investment company registered under the Investment Company Act, or if the adviser is eligible for one of six exemptions the Commission has adopted. *See id.;* rule 203A–2; *infra* section II.A.5.

[16] An investment adviser must register with the Commission unless it is prohibited from registering under section 203A of the Advisers Act or is exempt from registration under section 203. Advisers Act section 203(a). Investment advisers that are prohibited from registering with the Commission are subject to regulation by the states, but the antifraud provisions of the Advisers Act continue to apply to them. *See* Advisers Act sections 203A(b), 206. For SEC-registered investment advisers, state laws requiring registration, licensing, and qualification are preempted, but states may investigate and bring enforcement actions alleging fraud or deceit, require notice filings of documents filed with the Commission, and require investment advisers to pay state notice filing fees. *See* Advisers Act section 203A(b); NSMIA, *supra* note 3, at sections 307(a) and (b). Section 410 of the Dodd-Frank Act did not amend sections 203A(a)(1) or 203(a) of the Advisers Act.

[17] *See* S. Rep. No. 104–293, at 4 (1996). *See also Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 1633, section I (May 15, 1997) [62 FR 28112 (May 22, 1997)] (''NSMIA Adopting Release'').

advisers'' and shifts primary responsibility for their regulatory oversight to the states by prohibiting from Commission registration an investment adviser that is required to be registered as an investment adviser in the state in which it maintains its principal office and place of business and that has assets under management between $25 million and $100 million.[18] Unlike a small adviser, a mid-sized adviser must register with the Commission: (i) if the adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; or (ii) if registered with that state, the adviser would not be subject to examination as an investment adviser by that securities commissioner.[19] Section 203A(c) of the Advisers Act, which was not amended by the Dodd-Frank Act, permits the Commission to exempt small and mid-sized advisers from the prohibitions on Commission registration,[20] and we have adopted six exemptions for small advisers pursuant to this authority.[21]

As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 SEC-registered advisers will be required to withdraw their registrations and register with one or more state securities authorities.[22] We are working closely with the state securities authorities to provide an orderly transition of investment adviser registrants to state regulation. In addition, we are adopting rules and rule amendments, discussed below, that provide us with a means of identifying advisers that must transition to state regulation, that clarify the application of new statutory provisions, and that modify certain exemptions from the prohibition on Commission registration that we previously adopted under section 203A of the Act.

1. Transition to State Registration

We are adopting new rule 203A–5 to provide for an orderly transition to state registration for mid-sized advisers that will no longer be eligible to register with the Commission.[23]

- *Existing Registrants.* Under the rule, *each* adviser registered with us on January 1, 2012 must file an amendment to its Form ADV no later than March 30, 2012.[24] These amendments will respond to new items in Form ADV (discussed below) and will identify mid-sized advisers no longer eligible to remain registered with the Commission.[25] Mid-sized advisers that are no longer eligible for Commission registration must withdraw their registrations with us after filing their Form ADV amendments by filing Form ADV–W[26] no later than June 28, 2012.[27] Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration is available) until January 1, 2012.[28]
- *New Applicants.* Until July 21, 2011, when the amendments to section 203A(a)(2) take effect, advisers applying for registration with the Commission that qualify as mid-sized advisers under section 203A(a)(2) of the Act[29] may register with either the Commission or the appropriate state securities authority.[30] Thereafter, all such advisers

[18] *See* section 410 of the Dodd-Frank Act (adding new section 203A(a)(2) of the Advisers Act). This amendment increases the threshold above which all investment advisers must register with the Commission from $25 million to $100 million. *See* S. Rep. No. 111–176, at 76 (2010) (''Senate Committee Report''). We are further increasing this threshold to $110 million, pursuant to authority granted to us by Congress. *See* section 410 of the Dodd-Frank Act; *infra* section II.A.4.

[19] *See* section 410 of the Dodd-Frank Act. A mid-sized adviser also is required to register with the Commission if it is an adviser to a registered investment company or business development company under the Investment Company Act; therefore, mid-sized advisers to registered investment companies and business development companies are not permitted to withdraw their Commission registrations. *Compare* section 410 of the Dodd-Frank Act *with* Advisers Act section 203A(a)(1). Additionally, a mid-sized adviser may register with the Commission if the adviser is required to register in 15 or more states. *See* section 410 of the Dodd-Frank Act. For a discussion of advisers required to register in multiple states, see *infra* section II.A.5.c.

[20] For the Commission to permit the registration of small and mid-sized advisers with the Commission, application of the prohibition from registration must be ''unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes'' of section 203A. Advisers Act section 203A(c). The Commission's exercise of this authority not only would permit registration with the Commission, but also would result in the preemption of state law with respect to the advisers that register with us as a result of an exemption. *See* Advisers Act sections 203(a), 203A(b), and 203A(c).

[21] *See* rule 203A–2 (permitting the following types of advisers to register with the Commission: (i) Nationally recognized statistical rating organizations (''NRSROs''); (ii) certain pension consultants; (iii) investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) certain multi-state investment advisers; and (vi) certain Internet advisers).

[22] According to data from the Investment Adviser Registration Depository (''IARD'') as of April 7, 2011, 3,531 SEC-registered advisers either: (i) Had assets under management between $25 million and $90 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $90 million and are not relying on an exemption from registration. We estimate that 350 of these advisers will not switch to state registration because their principal office and place of business is located in Minnesota, New York, or Wyoming, which did not advise our staff that advisers registered with them are subject to examination. *See infra* note 152 (according to IARD data as of April 7, 2011, there were 63 mid-sized advisers in Minnesota, 286 in New York, and 1 in Wyoming). As a result, we estimate that approximately 3,200 advisers will switch to state registration. 3,531 SEC-registered advisers − 350 advisers not switching to state registration = 3,181 advisers. In the Implementing Proposing Release, we estimated that approximately 4,100 SEC-registered advisers would be required to withdraw their registrations and register with one or more state securities authorities, based on IARD data as of September 1, 2010. *See* Implementing Proposing Release, *supra* note 7, at n.15. We have lowered our estimate by 900 advisers to account for the advisers that have between $90 million and $100 million of assets under management that may remain registered with us as a result of the amendments we are adopting to rule 203A–1, the advisers that have withdrawn their registrations with us since that time, and as discussed above, the advisers that will not switch registration because they have a principal office and place of business in Minnesota, New York or Wyoming. *See* section II.A.4. for a discussion of adopted rule 203A–1. Based on IARD data as of April 7, 2011, 244 advisers had assets under management of between $90 million and $100 million and, from September 2, 2010 to April 7, 2011, 405 advisers withdrew their registrations with us and 114 advisers initially registered with us.

[23] As proposed, we are also amending the instructions to Form ADV to explain this process. *See* amended Form ADV: General Instructions (special one-time instruction for Dodd-Frank transition filing for SEC-registered advisers).

[24] New rule 203A–5(b). In this filing, advisers will report the current market value of their assets under management determined within 90 days of the filing.

[25] *See infra* sections II.A.2. and II.C. Advisers will be required to update all of the items in Form ADV, and this filing will serve as the annual updating amendment for most advisers. *See infra* note 48 and accompanying text.

[26] 17 CFR 279.2 (''Form ADV–W'').

[27] New rule 203A–5(c)(1).

[28] New rule 203A–5(a). We are using the authority provided to us in section 203A(c) of the Act to require mid-sized advisers to remain registered with the Commission until the programming of the IARD is completed. *See infra* notes 35–41 and accompanying text. For a discussion of section 203A(c) of the Act, see *supra* note 20. We believe that the failure to provide a transition period during the beginning of 2012 would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Act. We are also adopting, as proposed, a provision that will permit us to postpone the effectiveness of, and impose additional terms and conditions on, an adviser's withdrawal from SEC registration if we institute certain proceedings before the adviser files Form ADV–W. New rule 203A–5(c)(2). This limitation on withdrawal of an adviser's registration is similar to the one we adopted to implement NSMIA in 1997. *See* NSMIA Adopting Release, *supra* note 17.

[29] For a discussion of section 203A(a)(2) of the Act, see *supra* notes 18–19 and accompanying text. As discussed above, the Dodd-Frank Act amendments to this section will be effective on July 21, 2011. *See supra* note 6 and accompanying text.

[30] We noted in the Implementing Proposing Release that we would not object if, on or after January 1, 2011 until the end of the transition period, any state-registered or newly-registering adviser is not registered with us, so long as the adviser reports on its Form ADV that it has between $30 million and $100 million of assets under

are prohibited from registering with the Commission and must register with the state securities authorities.[31] We also note that advisers that have assets under management of $100 million or more will continue to register with the Commission (unless an exemption from registration with the Commission otherwise is available).[32]

We have made several changes to these transition provisions in response to comments we received.[33] The proposed rule would have provided mid-sized advisers with a 90-day transitional process with two ''grace periods,'' the first providing until August 20, 2011 for an adviser to determine whether it is eligible for Commission registration and to file an amended Form ADV, and the second providing until October 19, 2011 for an adviser to register in the states and withdraw its registration with us.[34] We noted in the Implementing Proposing Release, however, that timing of the transition period would be affected by our ability to re-program the IARD, through which advisers file their amendments to Form ADV.[35]

We have worked closely with the Financial Industry Regulatory Authority (''FINRA''), our IARD contractor, to make the needed modifications, but it has informed us that the programming will not be completed by the July 21, 2011 effective date of the Dodd-Frank Act. We understand that beginning in November, the IARD will be updated to reflect the revisions to Form ADV that we are adopting today. We noted in the Implementing Proposing Release that if the IARD is unable to accept filings of revised Form ADV on July 21, 2011, we might consider delaying the transition process until the system could accept electronic filing of the revised form.[36]

Commenters, including the North American Securities Administrators Association, Inc. (''NASAA''), agreed with our assessment and supported delaying the transition if the IARD could not accept the revised Form ADV instead of adopting alternative requirements, such as requiring interim paper filings.[37] Many also urged us to provide additional time for mid-sized advisers to complete the switch to state registration,[38] and recommended that the Commission match the current 180-day period[39] provided to SEC-registered advisers that must switch to state registration.[40] We are persuaded by these commenters, and, as described above, we are requiring mid-sized advisers registered with us on July 21, 2011 to remain registered until they switch to state registration after January 1, 2012.[41] As noted above, rule 203A–5 provides until March 30, 2012 for each adviser already registered with the Commission to determine whether it is eligible for Commission registration and to file an amended Form ADV,[42] and provides an additional 90 days (*i.e.,* by June 28, 2012) for an adviser no longer eligible for Commission registration to register with the states and withdraw its registration with us.[43] After the end of

management, is registered as an investment adviser in the state in which it maintains its principal office and place of business, and has a reasonable belief that it is required to be registered with, and is subject to examination as an investment adviser by, that state. *See* Implementing Proposing Release, *supra* note 7, at section II.A.1. In order to account for the July 21, 2011 effective date of section 410 of the Dodd-Frank Act and the longer transition period that we are adopting (ending on June 28, 2012 instead of October 19, 2011, as proposed), beginning on July 21, 2011, these advisers will no longer be able to choose to register with us; instead, they will be prohibited from registering with us and must instead register with the states. *See infra* note 31. We believe that allowing these advisers to register with the Commission before January 1, 2012 only to require them to withdraw their registrations by June 28, 2012 would be burdensome, and permitting them to choose whether to register with us until the summer of 2012 would be inconsistent with the purposes of Advisers Act section 203A(a)(2), as amended by section 410 of the Dodd-Frank Act. *See supra* note 3 and accompanying text.

[31] Once registered, an adviser must remain registered with the Commission (unless an exemption is available) until January 1, 2012, when it may transition to state registration as described above. Until January 1, 2012, we are exempting from section 203A(a)(2) only those mid-sized advisers *already registered* with us on July 21, 2011 that have at least $25 million in assets under management because the IARD will not be able to accept the revised Form ADV by July 21, 2011 and it is our understanding that mid-sized advisers will need additional time to switch to state registration. *See* new rule 203A–5(a); *supra* note 28 and accompanying text. As a result, on or after July 21, 2011, state-registered advisers and newly-registering advisers will be subject to the section 203A(a)(2) prohibition from Commission registration.

[32] *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act. *See also* Advisers Act section 203. For a discussion of the threshold requiring larger advisers to register with the Commission, see *infra* section II.A.4.

[33] *See* proposed rule 203A–5(a)–(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

[34] *See* proposed rule 203A–5(a)–(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

[35] *See* Implementing Proposing Release, *supra* note 7, at section II.A.1.

[36] *See id.*

[37] Comment letter of the North American Securities Administrators Association, Inc. (Feb. 10, 2011) (''NASAA Letter'') (''the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines.''); comment letter of Bill Dezellem, CFA, Tieton Capital Management (Jan. 4, 2011) (''Dezellem Letter''); comment letter of the National Regulatory Services (Jan. 24, 2011) (''NRS Letter''); comment letter of the New York State Bar Association, Business Law Section, Securities Regulation Committee (Apr. 1, 2011) (''NYSBA Committee Letter'').

[38] Comment letter of the American Bar Association, Section of Business Law, Committee on Federal Regulation of Securities, Committee on State Regulation of Securities, and the Committee on Private Equity and Venture Capital (Jan. 31, 2011) (''ABA Committees Letter''); comment letter of Altruist Financial Advisors LLC (Dec. 12, 2010) (''Altruist Letter''); comment letter of Capital Markets Compliance, LLC (Feb. 8, 2011) (''CMC Letter''); Dezellem Letter; comment letter of R.H. Dinel Investment Counsel, Inc. (Jan. 20, 2011) (''Dinel Letter''); comment letter of Financial Services Institute (Jan. 24, 2011) (''FSI Letter''); comment letter of Amy Klein (Nov. 30, 2010) (''Klein Letter''); NRS Letter; NYSBA Committee Letter; comment letter of Sadis & Goldberg LLP (Jan. 21, 2011) (''Sadis Letter''); comment letter of L.A. Schnase (Dec. 23, 2010) (''Schnase Letter''); comment letter of Seward & Kissel LLP (Jan. 31, 2011) (''Seward Letter''); comment letter of Shearman & Sterling LLP (Jan. 24, 2011) (''Shearman Letter''). Only one commenter supported the proposed 90-day grace period. Comment letter of Pickard and Djinis LLP (Jan. 21, 2011) (''Pickard Letter'').

[39] Our current rule provides an SEC-registered adviser that has to switch to state registration a period of 180 days after its fiscal year end to file an annual amendment to Form ADV and to withdraw its SEC registration after reporting to us that it is no longer eligible to remain registered with us. *See* rule 203A–1(b)(2); *cf.* rule 204–1(a) (requiring an adviser to file an annual amendment 90 days after its fiscal year end).

[40] Altruist Letter; Dezellem Letter; FSI Letter; Klein Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter; Shearman Letter. *See also* ABA Committees Letter (recommending December 31 deadline); NRS Letter (recommending rolling state registration process). One commenter stated that based on its almost three decades of experience, it ''most strongly supports a defined and longer'' transition period. NRS Letter. Another stated that ''some states may be unable to process such filings in a timely and efficient manner.'' ABA Committees Letter. Several commenters echoed concerns about timely state processing of applications, noting, in particular, additional registration and compliance requirements in many states and expected delays to approve state registrations given the increase in filings as a result of the Dodd-Frank Act. *See* Altruist Letter (noting that it took 122 days for a state to approve its application). *See also* CMC Letter; Dezellem Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter. To address potential timing issues, NASAA noted that it is recommending to advisers to file with the states as soon as possible and to the states to conditionally approve the registrations until the re-filing of Form ADV is completed. NASAA Letter.

[41] *See supra* note 28 and accompanying text.

[42] New rule 203A–5(a) and (b). This deadline coincides with the deadline for most advisers' required annual updating amendment (90 days from December 31, 2011), eliminating the requirement that they file an additional amendment to their Form ADV. *See* rule 204–1(a); *infra* note 48. Postponing the beginning of the transition process until January, instead of November or December, also will ensure that the refiling of Form ADV does not interfere with the November state registration and license renewal process and annual system outages for the IARD scheduled in December.

[43] New rule 203A–5(c)(1). The rule 203A–5 transition period is the same 180-day transition period for advisers that fall below the $25 million threshold and have to switch to state registration. *See* rule 203A–1(b)(2). Other advisers that will be required to withdraw from registration because they are no longer eligible for Commission registration will include, for example, pension consultants with plan assets of $50 million to $200 million. *See infra* section II.A.5.b.

this period, we expect to cancel the registration of advisers no longer eligible to register with us that fail to file an amendment or withdraw their registrations in accordance with the rule.[44] The revised process that we are adopting today allows the Commission and state regulators to manage the transition of mid-sized advisers in an orderly manner.[45]

We are requiring that all advisers registered with us on January 1, 2012—regardless of size—file amendments to Form ADV no later than March 30, 2012. Some commenters argued that advisers unaffected by the statutory changes effected by the Dodd-Frank Act should not have to complete and file all of Form ADV.[46] We believe such a filing is necessary for each adviser to confirm its current eligibility for Commission registration in light of the multiple statutory changes (as well as changes to the rules that we are adopting today) that could affect whether the adviser may register with the Commission.[47] These commenters' concerns also should be allayed by the new March 30, 2012 deadline for filing Form ADV that will coincide with most advisers' required annual updating amendment, eliminating the requirement that they file an additional amendment to their Form ADV.[48] Finally, as recommended by several commenters,[49] we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management reported on Form ADV by requiring the calculation within 90 days of the transition filing, rather than 30 days.[50] This is the same amount of time that advisers are afforded to report assets under management after the end of their fiscal year on Form ADV today.[51]

2. Amendments to Form ADV

We are adopting several amendments to Item 2.A. of Part 1A of Form ADV to reflect the new threshold for registration and the revisions we are making to related rules in response to the enactment of the Dodd-Frank Act.[52] Item 2 requires each investment adviser applying for registration to indicate its basis for registration with the Commission and to report annually whether it is eligible to remain registered. We are adopting the revisions to Item 2.A. substantially as proposed,[53] except that we have revised the instructions and Item 2.A.(1) to reflect our adoption of a ''buffer'' for advisers with close to $100 million in assets under management, which we discuss below.[54]

To implement the new prohibition on registration for mid-sized advisers, we are amending Item 2.A. to reflect the new statutory threshold for registration. Item 2.A. requires each adviser registered with us (and each applicant for registration) to identify whether it is eligible to register with the Commission because it: (i) Is a large adviser that has $100 million or more of regulatory assets under management (or $90 million or more if an adviser is filing its most recent annual updating amendment and is already registered with us);[55] (ii) is a mid-sized adviser that does not meet the criteria for state registration or is not subject to examination;[56] (iii) has its principal office and place of business in Wyoming (which does not regulate advisers) or outside the United States;[57] (iv) meets the requirements for one or more of the revised exemptive rules under section 203A discussed below;[58] (v) is an adviser (or subadviser) to a registered investment company;[59] (vi) is an adviser to a business development company and has at least $25 million of regulatory assets under management;[60] or (vii) received an order permitting the adviser to register with the Commission.[61]

Each adviser must check at least one of these items, or indicate that the adviser is no longer eligible to remain registered with the Commission.[62] The IARD will prevent an applicant from registering with us, and an adviser from remaining registered, unless it

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[44] *See* Advisers Act section 203(h). As provided in the Advisers Act, an adviser would be given appropriate notice and opportunity for hearing to show why its registration should not be cancelled. Advisers Act section 211(c).

[45] *See also supra* notes 24–28 and accompanying text.

[46] Comment letter of the Investment Company Institute (Jan. 24, 2011) (''ICI Letter'') (recommending exempting advisers that do not rely on assets under management to register with the SEC); comment letter of the Managed Funds Association (Jan. 24, 2011) (''MFA Letter'') (recommending exempting private fund advisers that file an initial Form ADV by July 7); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011); Shearman Letter (recommending a more limited filing of Form ADV to determine eligibility). But most commenters supported the proposal. *See* CMC Letter; FSI Letter; NASAA Letter; NRS Letter; Pickard Letter.

[47] In addition, we believe that requiring advisers to complete all of the items will provide the Commission and the state regulatory authorities with essential information about the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission. *See infra* sections II.A.2., II.C.

[48] As of April 7, 2011, 10,636 of SEC-registered advisers (approximately 92%) had a fiscal year ending on December 31. These advisers will comply with rule 203A–5(b)'s Form ADV filing requirement by submitting their annual amendment. SEC-registered advisers not required to file an annual updating amendment between January 1, 2012 and March 30, 2012 will file an other-than-annual amendment, but they will complete all of the items on Part 1A of Form ADV (not just the items required to be updated in a typical other-than-annual amendment).

[49] Altruist Letter (quarter end); comment letter of Dechert LLP (Jan. 24, 2011) (''Dechert General Letter'') (rolling 12-month average); Dezellem Letter (fiscal year end); Dinel Letter (rolling three-year average); NYSBA Committee Letter (quarter end); Seward Letter (quarter end); Shearman Letter (quarter end). Several commenters argued, for example, that providing for the use of end of quarter numbers precludes an administrate burden for many advisers that value assets on a quarterly basis because most advisers already value assets quarterly to calculate fees. Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

[50] New rule 203A–5(b).

[51] Form ADV: Instructions for Part 1A, instr. 5.b.(4).

[52] We are adopting conforming amendments to Item 2.A. and the related items in Schedule D to reflect revisions to rule 203A–2, which provides exemptions from the prohibition on registration with the Commission. *See* amended Form ADV Items 2.A.(7), (10) and Section 2.A.(10) of amended Schedule D; *infra* sections II.A.4., II.A.5., II.A.7. Additionally, we are making conforming changes to the instructions for Form ADV. *See* amended Form ADV: Instructions for Part 1A, instr. 2. We also are revising the terms used in the rules and Form ADV to refer to the securities authorities in each state with a single defined term, ''state securities authority.'' *Compare* amended rules 203A–1, 203A–2(c) and (d), 203A–3(e); amended Form ADV: Glossary *with* rules 203A–1(b)(1), 203A–2(e)(1), 203A–4; Form ADV: Glossary. *See also* section 410 of the Dodd-Frank Act (amended section 203A(a)(2) of the Advisers Act describes a state securities authority as ''the securities commissioner (or any agency or office performing like functions)'').

[53] One commenter expressed the view that the item was ''sufficiently and clearly written.'' NRS Letter.

[54] *See* amended Form ADV: Instructions for Part 1A, instr. 2.a. For a discussion of the buffer, see *infra* section II.A.4.

[55] Amended Form ADV, Part 1A, Item 2.A.(1). We are revising Form ADV to use the term ''regulatory assets under management'' instead of ''assets under management.'' For a discussion of regulatory assets under management, see *infra* section II.A.3.

[56] Amended Form ADV, Part 1A, Item 2.A.(2). For a discussion of the criteria for state registration and examination for mid-sized advisers, see *infra* section II.A.7.

[57] Amended Form ADV, Part 1A, Items 2.A.(3), 2.A.(4).

[58] Amended Form ADV, Part 1A, Items 2.A.(7)–2.A.(11). For a discussion of the exemptive rules, see *infra* section II.A.5.

[59] Amended Form ADV, Part 1A, Item 2.A.(5).

[60] Amended Form ADV, Part 1A, Item 2.A.(6).

[61] Amended Form ADV, Part 1A, Item 2.A.(12). We are also deleting the item for NRSROs to register as investment advisers. For a discussion of NRSROs, see *infra* section II.A.5.a.

[62] Amended Form ADV, Part 1A, Item 2.A.(13). One commenter asked that we clarify whether advisers must check every box in Item 2.A. that they are eligible to check. Schnase Letter. The instructions to the item indicate that an adviser must check ''at least one'' of the items, but does not require all bases for registration be identified. Amended Form ADV: Instructions for Part 1A, instr. 2.

represents on Form ADV that it meets at least one of the specific eligibility criteria set forth in the Advisers Act or our rules.

3. Assets Under Management

In most cases, the amount of assets an adviser has under management will determine whether the adviser must register with the Commission or one or more states. Section 203A(a)(2) of the Act defines ''assets under management'' as the ''securities portfolios'' with respect to which an adviser provides ''continuous and regular supervisory or management services.'' [63] Instructions to Form ADV provide advisers with guidance in applying this provision, and until now have permitted advisers to exclude certain types of assets that otherwise would have to be included.[64]

We are adopting revisions to the instructions to Part 1A of Form ADV to implement a uniform method for advisers to calculate assets under management that will be used under the Act for regulatory purposes in addition to assessing whether an adviser is eligible to register with the Commission.[65] As discussed in more detail below, the amendments improve consistency by eliminating choices the instructions had provided advisers that have enabled some of them to opt in or out of federal or state regulation (by including or excluding a class of assets). We are also amending rule 203A–3 to continue to require that the calculation of ''assets under management'' for purposes of section 203A of the Act be the calculation of the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services, as reported on the investment adviser's Form ADV.[66] Finally, we are altering the terminology we use in Part 1A of Form ADV to refer to an adviser's ''regulatory assets under management'' in order to acknowledge the ''regulatory'' purposes of this reporting requirement and to distinguish it from the assets under management disclosure that advisory clients receive in Part 2 of Form ADV.[67]

Many commenters expressed general support for providing a uniform method of calculating assets under management in order to maintain consistency for registration and risk assessment purposes.[68] Others, however, disagreed with or sought changes to one or more of the revisions we are making to the instructions, which we discuss below. We are adopting the amendments as proposed.

Under the revised instructions, advisers must include in their regulatory assets under management securities portfolios for which they provide continuous and regular supervisory or management services, regardless of whether these assets are family or proprietary assets, assets managed without receiving compensation, or assets of foreign clients.[69] We proposed to require advisers to include these assets in light of the new uses of the term ''assets under management'' in the Advisers Act and the new regulatory requirements related to systemic risk that we anticipated would be triggered by registration with the Commission.[70] Eliminating an adviser's ability to exclude all or some of these assets will prevent advisers from excluding these assets from their regulatory assets under management in order to remain below the new asset threshold for registration and to avoid reporting systemic risk information.[71] This approach will also lead to more consistent reporting of assets under management among advisers.

A number of commenters disagreed with the proposed changes.[72] Some argued that advisers should not be required to include proprietary assets and assets managed without receiving compensation in the calculation because such a requirement would be inconsistent with the statutory definition of ''investment adviser.'' [73] Although a person is not an ''investment adviser'' for purposes of the Advisers Act unless it receives compensation for providing advice to others, once a person meets that definition (by receiving compensation from *any* client to which it provides advice), the person is an adviser, and the Act applies to the relationship between the adviser and any of its clients (whether or not the adviser receives compensation from them).[74] Moreover, the management of ''proprietary'' assets or assets for which the adviser may not be compensated, when combined with other client assets, may suggest that the adviser's activities are of national concern or have implications regarding the reporting for the assessment of systemic risk.[75] We are therefore adopting the amendment to the instruction, as proposed.[76]

[63] Advisers Act section 203A(a)(2). The Dodd-Frank Act renumbered current paragraph 203A(a)(2) as 203A(a)(3), but did not amend this definition. *See* section 410 of the Dodd-Frank Act.

[64] *See* Form ADV: Instructions for Part 1A, instr. 5.b. These assets include proprietary assets, assets an adviser manages without receiving compensation, and assets of foreign clients.

[65] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b. *See also* sections 402(a) and 408 of the Dodd-Frank Act (adding section 202(a)(30) of the Act, which defines a foreign private adviser as having ''assets under management'' attributable to U.S. clients and private fund investors of less than $25 million, and section 203(m) of the Act, which directs the Commission to provide for an exemption for advisers solely to private funds with assets under management in the United States of less than $150 million); Exemptions Adopting Release, *supra* note 4, at section II.B.

[66] *See* amended rule 203A–3(d).

[67] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.; *Amendments to Form ADV,* Investment Advisers Act Release No. 3060 (July 28, 2010) [75 FR 49234 (Aug. 12, 2010)] (''Part 2 Release''). One commenter supported the change of terminology. *See* Schnase Letter (supporting the idea of distinguishing ''regulatory assets under management'' from ''assets under management'').

[68] *See, e.g.,* comment letter of the American Federation of Labor and Congress of Industrial Organizations (Jan. 24, 2011) (''AFL–CIO Letter'') (''an adviser's calculation of its assets under management is central to the determination of whether that adviser is required to register with the SEC and be subject to its oversight * * *. The uniform, comprehensive methodology proposed by the SEC will ensure its ability to oversee advisers to funds that may pose a systemic threat.''); comment letter of Americans for Financial Reform (Jan. 24, 2011) (''AFR Letter'') (''Because calculations of the amount of assets under management by each adviser are key to the determination of whether or not they are required to register, the comprehensive and uniform definition of these terms in the proposed rule is particularly important.''). *See also* comment letter of the Alternative Investment Management Association (Jan. 24, 2011) (''AIMA Letter''); Dechert General Letter; comment letter of the Investment Adviser Association (by Valerie M. Baruch) (Jan. 24, 2011) (''IAA General Letter''); NRS Letter; comment letter of O'Melveny & Myers LLP (on behalf of the China Venture Capital and Private Equity Association) (Jan. 25, 2011) (''O'Melveny Letter''); Schnase Letter; NYSBA Committee Letter; Dezellem Letter.

[69] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1).

[70] *See supra* note 65. Section 404 of the Dodd-Frank Act gives the Commission authority to impose on investment advisers registered with the Commission reporting and recordkeeping requirements for systemic risk assessment purposes.

[71] *See* Implementing Proposing Release, *supra* note 7, at nn.44–45 and accompanying text; *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF,* Investment Advisers Act Release No. IA–3145 (Jan. 26, 2011) [76 FR 8,068 (Feb. 11, 2011)] (''Systemic Risk Reporting Release'') (proposing systemic risk reporting).

[72] *See* AIMA Letter; Dechert General Letter; MFA Letter; Pickard Letter; Seward Letter; NYSBA Committee Letter.

[73] *See* Dechert General Letter; MFA Letter; Seward Letter; NYSBA Committee Letter. *See also* Pickard Letter. Under Section 202(a)(11) of the Advisers Act, the definition of ''investment adviser'' includes, among others, ''any person who, for compensation, engages in the business of advising others * * * as to the value of securities or as to the advisability of investing in, purchasing, or selling securities * * *.''

[74] *See* section 202(a)(11); Form ADV: Instructions for Part 1A, Glossary of Terms, Client.

[75] *See supra* note 70.

[76] One commenter objected to the inclusion of assets of foreign clients because it would require domestic advisers that only have a foreign client base to register with the Commission. Comment letter of Katten Muchin Rosenman LLP (on behalf of APG Asset Management US Inc.) (Jan. 21, 2011). However, a domestic adviser dealing exclusively

Continued

The revised instructions to Form ADV also clarify that an adviser must calculate its regulatory assets under management on a gross basis, that is, without deduction of ''any outstanding indebtedness or other accrued but unpaid liabilities.'' [77] Several commenters argued that advisers should determine the amount of regulatory assets under management on a net, rather than gross, basis.[78] They asserted that the use of net assets would better reflect the clients' assets at risk that an adviser manages,[79] and that use of gross assets would confuse advisory clients.[80] However, nothing in the current instructions suggests that liabilities should be deducted from the calculation of an adviser's assets under management. Indeed, since 1997, the instructions have stated that an adviser should not deduct securities purchased on margin when calculating its assets under management.[81] Whether a client has borrowed to purchase a portion of assets managed does not seem to us a relevant consideration in determining the amount of assets an adviser has to manage and the scope and national significance of an adviser's business. Moreover, we are concerned that the use of net assets could permit advisers that utilize investment strategies with highly leveraged positions to avoid registration with the Commission even though the activities of such advisers may have national significance. The use of a net assets test also could allow advisers to large and highly leveraged funds to avoid systemic risk reporting under our proposed systemic risk reporting rules.[82] In addition, there need not be any investor confusion because although an adviser will be required to use gross (rather than net) assets for regulatory purposes, the instruction would not preclude an adviser from holding itself out to its clients as managing a net amount of assets as may be its custom in, for example, its client brochure. We are therefore adopting the instruction, as proposed.[83]

We are also revising the Form ADV instructions, as proposed, to provide guidance regarding how an adviser that advises private funds determines the amount of assets it has under management. We have designed our new instructions both to provide advisers with greater certainty in their calculation of regulatory assets under management (which they would also use as a basis to determine their eligibility for certain exemptions that we are adopting today in the Exemptions Adopting Release) and to prevent advisers from understating those assets to avoid registration.

First, an adviser must include in its calculation of regulatory assets under management the value of any private fund over which it exercises continuous and regular supervisory or management services, regardless of the nature of the assets held by the fund.[84] A sub-adviser to a private fund would include in its regulatory assets under management only that portion of the value of the portfolio for which it provides continuous and regular supervisory or management services. Advisers that have discretionary authority over fund assets, or a portion of fund assets, and that provide ongoing supervisory or management services over those assets would exercise continuous and regular supervisory or management services.[85]

Second, an adviser must include the amount of any uncalled capital commitments made to a private fund managed by the adviser.[86] As we explained in the Implementing Proposing Release, advisers to some private funds (such as private equity funds) typically make investments following capital calls on the funds' investors.[87] One commenter agreed with this approach generally,[88] while another disagreed, asserting that the uncalled capital commitments remain under the management of the fund investor.[89] As we noted in the Implementing Proposing Release, in the early years of a private fund's life, its adviser typically earns fees based on the total amount of capital commitments, which we presume reflects compensation for efforts expended on behalf of the fund in preparation for the investments.[90] We are adopting the instruction, as proposed.

Third, advisers must use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable.[91] This requirement is designed to make advisers value private fund assets on a more meaningful and consistent basis for regulatory purposes under the Act and it, therefore, should result in a more coherent application of the Act's regulatory requirements and assessment of risk. This instruction would prevent, for example, an adviser electing to value its assets based on their cost, which could be significantly lower than the value of the assets based on their fair value, thus permitting the adviser to avoid registration with or reporting to the Commission. It is designed to prevent inconsistent application of the Advisers Act to advisers managing the same amount of assets.

We received a number of comments regarding the use of fair value, which represents a change from the current instruction that permits an adviser to calculate the value of its assets under management based on whatever method the adviser uses to report its assets to clients or to calculate fees for

with foreign clients must register with the Commission if it uses any U.S. jurisdictional means in connection with its advisory business. *See* section 203 of the Advisers Act (requiring registration of *any* investment adviser that uses the United States mails or any other means or instrumentality of interstate commerce in connection with its business as an investment adviser unless the adviser qualifies for an exemption from registration or is prohibited from registering with the Commission).

[77] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(2). Accordingly, an adviser cannot deduct accrued fees, expenses, or the amount of any borrowing. Prior to today's amendments, the instructions directed advisers not to ''deduct securities purchased on margin.''

[78] *See, e.g.,* Dechert General Letter; comment letter of Georg Merkl (Jan. 25, 2011) (''Merkl Exemptions Letter''); MFA Letter; Seward Letter; Shearman Letter. *See also* NYSBA Committee Letter.

[79] *See* Merkl Exemptions Letter; MFA Letter.

[80] *See* Dechert General Letter; MFA Letter.

[81] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(2). (''Do not deduct securities purchased on margin.'').

[82] *See* Systemic Risk Reporting Release, *supra* note 71.

[83] Some commenters asked that we clarify how the calculation on a gross basis would apply with respect to, among others, mutual funds, short positions, and leverage. *See* IAA General Letter; MFA Letter. We expect that advisers will continue to calculate their gross assets as they do today, even if they currently only calculate gross assets as an intermediate step to compute their net assets. In the case of pooled investment vehicles with a balance sheet, for instance, an adviser could include in the calculation the total assets of the entity as reported on the balance sheet.

[84] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1). One commenter specifically addressed this matter, supporting our approach. *See* IAA General Letter.

[85] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(3).

[86] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(1). A capital commitment is a contractual obligation of an investor to acquire an interest in, or provide the total commitment amount over time to, a private fund, when called by the fund.

[87] Implementing Proposing Release, *supra* note 7, at n.53 and accompanying text.

[88] *See* AIMA Letter (supporting including uncalled capital commitments, provided that the adviser has full contractual rights to call that capital and would be given responsibility for management of those assets).

[89] *See* Merkl Exemptions Letter.

[90] Implementing Proposing Release, *supra* note 7, at n.54 and accompanying text.

[91] *See* amended Form ADV: Instructions for Part 1A, instr. 5.b.(4). This valuation requirement is described in terms similar to the definition of ''value'' in the Investment Company Act, which looks to market value when quotations are readily available and, if not, then to fair value. *See* Investment Company Act section 2(a)(41) (15 U.S.C. 80a–2(a)(41)). Other standards also may be expressed as requiring that a determination of fair value be based on market quotations where they are readily available.

investment advisory services.[92] One commenter, for example, supported requiring the use of fair value, noting that it would help achieve more consistent asset calculations and reporting across the investment advisory industry, and that it would enable better application of our staff's risk assessment program.[93] Other commenters, including the Managed Funds Association, however, objected to the use of fair value, asserting that the requirement would cause those advisers that did not use fair value standards to incur additional costs, particularly if the assets are illiquid and therefore difficult to fair value.[94]

In the Implementing Proposing Release, we noted that we understood that many private funds already value assets in accordance with U.S. generally accepted accounting principles (''GAAP'') or other international accounting standards that require the use of fair value, citing letters we had received in connection with other rulemaking initiatives.[95] We are sensitive to the costs this new requirement will impose. We believe, however, that this approach is warranted in light of the unique regulatory purposes of the calculation under the Advisers Act. We estimated these costs in the Implementing Proposing Release,[96] and have taken several steps to mitigate them.[97] While many advisers will calculate fair value in accordance with GAAP or another international accounting standard,[98] other advisers acting consistently and in good faith may utilize another fair valuation standard.[99] While these other standards may not provide the quality of information in financial reporting (for example, of private fund returns), we expect these calculations will provide sufficient consistency for the purposes that regulatory assets under management serve in our rules (such as applying annual thresholds to determine the registration status of an adviser).[100]

The alternatives that commenters recommended (*e.g.,* cost basis or any method required by the private fund's governing documents other than fair value) would not meet our objective of having more meaningful and comparable valuation of private fund assets, and could result in a significant understatement of appreciated assets.[101] Moreover, these alternative approaches could permit advisers to circumvent the Advisers Act's registration requirements. Permitting the use of any valuation standard set forth in the governing documents of the private fund other than fair value could effectively yield to the adviser the choice of the most favorable standard for determining its registration obligation as well as the application of other regulatory requirements, and would not provide consistent outcomes from similarly situated advisers. Accordingly, we are adopting the requirement as proposed.

We also requested comment in the Implementing Proposing Release on whether we should require advisers to report their assets under management more frequently than annually. All commenters who responded to our request asked that we continue to require annual reporting, arguing that more frequent reporting would require additional calculations only for purposes of Form ADV disclosure, thus placing an unnecessary burden on advisers.[102] As commenters recommended, we are not changing the frequency of the reporting requirement.

4. Switching Between State and Commission Registration

Rule 203A–1 is designed to prevent an adviser from having to switch frequently between state and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients. We are amending the rule to eliminate the current buffer for advisers that have assets under management between $25 million and $30 million that permits these advisers to remain regulated by the states, and we are replacing it with a similar buffer for mid-sized advisers.[103] We are also retaining, as proposed, the requirement that eligibility for registration be determined annually as part of an adviser's annual updating amendment, allowing an adviser to avoid the need to change registration status based on fluctuations that occur during the course of the year.[104]

The amended rule provides a buffer for mid-sized advisers with assets under management close to $100 million to determine whether and when to switch between state and Commission

[92] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(4).

[93] *See* IAA General Letter. *See also* ABA Committees Letter (addressing the requirement within the context of the asset calculation for purposes of the foreign private adviser and the private fund adviser exemptions).

[94] *See* MFA Letter; Merkl Exemptions Letter; O'Melveny Letter; Seward Letter.

[95] *See* Implementing Proposing Release, *supra* note 7, at n.56 and accompanying text.

[96] *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

[97] We recognize that although these steps will provide advisers greater flexibility in calculating the value of their private fund assets, they also will result in valuations that are not as comparable as they could be if we specified a fair value standard (*e.g.,* as specified in GAAP).

[98] Several commenters asked that we not require advisers to fair value private fund assets in accordance with GAAP for purposes of calculating regulatory assets under management because many funds, particularly offshore ones, do not use GAAP and such a requirement would be unduly burdensome. *See, e.g.,* comment letter of European Fund and Asset Management Association (Jan. 24, 2011) (''EFAMA Letter''); IAA General Letter; Comment letter of Katten Muchin Rosenman LLP (on behalf of non-U.S. Advisers) (Jan. 24, 2011) (''Katten Foreign Advisers Letter''). We did not propose such a requirement, nor are we adopting one.

[99] Consistent with this good faith requirement, we would expect that an adviser that calculates fair value in accordance with GAAP or another basis of accounting for financial reporting purposes will also use that same basis for purposes of determining the fair value of its regulatory assets under management.

[100] The fair valuation process need not be the result of a particular mandated procedure and the procedure need not involve the use of a third-party pricing service, appraiser or similar outside expert. An adviser could rely on the procedure for calculating fair value that is specified in a private fund's governing documents. The fund's governing documents may provide, for example, that the fund's general partner determines the fair value of the fund's assets. Advisers are not, however, required to fair value real estate assets only in those limited circumstances where real estate assets are not required to be fair valued for financial reporting purposes under accounting principles that otherwise require fair value for assets of private funds. For example, in those cases, an adviser may instead value the real estate assets as the private fund does for financial reporting purposes. We note that the Financial Accounting Standards Board (''FASB'') has a current project related to investment property entities that may require real estate assets subject to that accounting standard to be measured by the adviser at fair value. *See* FASB Project on *Investment Properties.* We also note that certain international accounting standards currently permit, but do not require, fair valuation of certain real estate assets. *See* International Accounting Standard 40, *Investment Property.* To the extent that an adviser follows GAAP or another accounting standard that requires or in the future requires real estate assets to be fair valued, this limited exception to the use of fair value measurement for real estate assets would not be available.

[101] *See* Merkl Exemptions Letter; MFA Letter; O'Melveny Letter; Seward Letter; NYSBA Committee Letter.

[102] *See, e.g.,* AIMA Letter; NRS Letter; O'Melveny Letter; NYSBA Committee Letter. Under the Systemic Risk Reporting Release, we proposed to require large advisers with $1 billion or more in assets under management attributable to hedge funds, unregistered money market funds or private equity funds to file systemic risk reports quarterly. *See* Systemic Risk Reporting Release, *supra* note 71.

[103] Amended rule 203A–1(a). Additionally, we are revising the provision in rule 203A–1 that does not require an adviser to withdraw its Commission registration until its assets under management fall below $25 million to reflect the new, $90 million threshold. *See* amended rule 203A–1(a)(1).

[104] Amended rule 203A–1(b)(2) (continuing to require an adviser filing an annual updating amendment to its Form ADV reporting that it is not eligible for Commission registration to withdraw its registration within 180 days of its fiscal year end). We are not renumbering this paragraph as proposed. *Compare* proposed rule 203A–1(a)–(b) *with* amended rule 203A–1(b)(1)–(2).

registration.[105] The rule raises the threshold above which a mid-sized investment adviser must register with the Commission to $110 million; but, once registered with the Commission, an adviser need not withdraw its registration until it has less than $90 million of assets under management.[106]

Although commenters did not object to elimination of the current buffer, several argued that we need to include a new buffer for mid-sized advisers that have close to $100 million of assets under management.[107] Some commenters, for example, asserted that the current $5 million buffer was effective in preventing frequent switching of registration attributable to market fluctuations,[108] while another called the buffer an important element of regulatory flexibility.[109] Several advisers with close to $100 million of assets under management asserted that a buffer is necessary to prevent them from switching to and from Commission registration.[110] Commenters recommended several different buffers, including one for advisers with between $100 million and $120 million (to retain the current buffer's 20 percent increase in assets under management),[111] one that would fall below $100 million,[112] and a buffer that straddled above and below $100 million.[113]

We are persuaded by these comments that a buffer may prevent costs and disruption to advisers that otherwise may have to switch between federal and state registration frequently because of, for example, the volatility of the market values of the assets they manage. Rule 203A–1(a), as amended, raises the threshold above which a mid-sized investment adviser must register with the Commission to $110 million.[114] Once registered with the Commission, an adviser need not withdraw its registration until it has less than $90 million of assets under management.[115] The amendment operates to provide a buffer of 20 percent of the $100 million statutory threshold for registration with the Commission, which is the same percentage as the current buffer.[116] We believe a 20 percent buffer is appropriate because it is large enough to accommodate market fluctuations or the departure of one or more clients, and does not substantially increase or decrease the $100 million threshold set by Congress in the Dodd-Frank Act.[117]

5. Exemptions From the Prohibition on Registration With the Commission

Using the authority provided by section 203A(c) of the Advisers Act, we are adopting, as proposed, amendments to three of the exemptions in rule 203A–2 from the prohibition on Commission registration in section 203A to reflect developments since their original adoption, including the enactment of the Dodd-Frank Act, which we discuss below.[118] Each of the exemptions (including those we are not amending) also applies to mid-sized advisers, exempting them from the prohibitions on registering with the Commission if they meet the requirements of rule 203A–2.[119]

[105] Amended rule 203A–1(a).

[106] Amended rule 203A–1(a)(1). Mid-sized advisers eligible for a rule 203A–2 exemption and advisers to a registered investment company or business development company under the Investment Company Act will not be able to rely on the buffer because they are required to register with us regardless of whether they have $100 million of assets under management. Amended rule 203A–1(a)(2). In addition, advisers that rely on amended rule 203A–2(c) to register with the Commission because they expect to be eligible for registration within 120 days cannot rely on the buffer—they must have $100 million of assets under management within 120 days to remain registered with the Commission. *See* Form ADV: Instructions for Part 1A, instrs. 2.a., 2.g. *See also* amended rule 203A–1(a)(2)(ii); amended rule 203A–2(c).

[107] Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; comment letter of Intelligent Capitalworks Investment Advisors (Jan. 24, 2011) (''ICW Letter''); comment letter of JVL Associates, LLC (Jan. 13, 2011) (''JVL Associates Letter''); comment letter of Georg Merkl (Jan. 25, 2011) (''Merkl Implementing Letter''); NASAA Letter; NRS Letter; NYSBA Committee Letter; comment letter of The Wealth Coach, LLC (by Jeffrey W. McClure) (Dec. 31, 2010) (''Wealth Coach Letter''); and comment letter of WJM Financial, LLC (Jan. 4, 2011) (''WJM Letter''). To prevent an adviser from switching frequently between state and Commission registration, we proposed to retain an adviser's ability to rely on the reporting on Form ADV of assets under management in the annual updating amendment for purposes of determining its eligibility to register. *See* proposed rule 203A–1(b).

[108] *See, e.g.,* Altruist Letter; NRS Letter.

[109] NASAA Letter.

[110] ICW Letter (for 3 years, adviser's assets under management have been greater than $100 million by a few million dollars and at various times throughout the year has been reduced to under $100 million by just a few days of downside market volatility); JVL Associates Letter (adviser's assets under management have fluctuated around $100 million since 2007). *See also* Wealth Coach Letter (from October 2008 through March 2009, adviser's total assets under management fell over 25%).

[111] Altruist Letter; FSI Letter; NASAA Letter; WJM Letter. *See also* ICW Letter; Merkl Implementing Letter; NYSBA Committee Letter.

[112] Dezellem Letter ($80–$100 million); Dinel Letter ($80–$100 million); JVL Associates Letter ($90–$100 million); NRS Letter ($90–$100 million).

[113] Wealth Coach Letter ($85–$115 million).

[114] We find that raising the threshold for mid-sized advisers to register with the Commission is appropriate in accordance with the purposes of the Advisers Act. Advisers Act section 203A(a)(2)(B)(ii), as amended by the Dodd-Frank Act.

[115] Amended rule 203A–1(a)(1). We find that not providing this buffer and requiring advisers with assets under management of between $90 million and $100 million to register with the states would be unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes of section 203A of the Advisers Act. Advisers Act section 203A(c). Advisers Act section 203A(c) permits the Commission to exempt advisers from the prohibition on Commission registration, including small and mid-sized advisers, if the application of the prohibition from registration would be ''unfair, a burden on interstate commerce, or otherwise inconsistent with the purposes'' of section 203A. *See supra* note 20 for a discussion of section 203A(c).

[116] Commenters said the current $5 million buffer, which is 20 percent of the $25 million statutory threshold, effectively limits advisers having to switch registrations due to market changes in their assets under management. *See, e.g.,* Altruist Letter (current $5 million buffer ''was useful in lessening the need to switch back and forth between state and Federal regulation as an IA's AUM grew or fell''). *See also* Advisers Act section 203A(a)(1); rule 203A–1(a). The amendment we are adopting provides a $20 million buffer, which is 20 percent of the $100 million statutory threshold. *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act; amended rule 203A–1(a)(1).

[117] An adviser must register if its assets under management are $110 million or more, which is $10 million higher than the $100 million statutory threshold. *See* Advisers Act section 203A(a)(2), as amended by the Dodd-Frank Act; amended rule 203A–1(a)(1). *See also supra* note 108 (citing commenters discussing market fluctuations); Senate Committee Report, *supra* note 18, at 76 (stating that this amendment increases the threshold above which all investment advisers must register with the Commission from $25 million to $100 million).

[118] Using the authority provided in section 203A(c) of the Advisers Act, the Commission has permitted six types of investment advisers to register with the Commission under rule 203A–2: (i) NRSROs; (ii) certain pension consultants; (iii) certain investment advisers affiliated with an adviser registered with the Commission; (iv) investment advisers expecting to be eligible for Commission registration within 120 days of filing Form ADV; (v) certain multi-state investment advisers; and (vi) certain Internet advisers. *See supra* notes 20–21 and accompanying text. We are also renumbering, and making minor conforming changes to, rule 203A–2(c), (d) and (f) regarding investment advisers affiliated with an SEC-registered adviser, newly formed advisers expecting to be eligible for Commission registration within 120 days, and Internet advisers, respectively. *See* amended rule 203A–2(b), (c), and (e). We are requiring advisers to comply with amended rule 203A–2 60 days after publication in the **Federal Register.** *See infra* section III.

[119] Rule 203A–2 provides that advisers meeting the criteria for a category of advisers under the rule will not be prohibited from registering with us by Advisers Act section 203A(a). *See* rule 203A–2; NSMIA Adopting Release, *supra* note 17, at section II.D. The new prohibition on mid-sized advisers registering with the Commission also is established under Advisers Act section 203A(a); therefore, mid-sized advisers meeting the requirements for a category of exempt advisers under rule 203A–2 are eligible to register with us. *See* section 410 of the Dodd-Frank Act; amended rule 203A–2. We asked, but did not receive comment on, whether we should limit rule 203A–2's application to small advisers; however, one commenter agreed that these exemptions should apply to all advisers, including mid-sized advisers. NRS Letter (strongly supporting that the exemptions be applicable to all advisers no matter their assets under management as it ''promotes uniformity, clarity and a consistent standard for all.''). We are leaving rule 203A–2 unchanged in this regard.

a. Nationally Recognized Statistical Rating Organizations

We are eliminating, as proposed, the exemption in rule 203A–2(a) from the prohibition on Commission registration for nationally recognized statistical rating organizations (''NRSROs'').[120] Since we adopted this exemption, Congress amended the Act to exclude certain NRSROs from the Act's definition of ''investment adviser'' [121] and provided for a separate regulatory regime for NRSROs under the Securities Exchange Act of 1934 (''Exchange Act'').[122] Commenters supported the elimination of this provision.[123]

b. Pension Consultants

We are amending rule 203A–2(b), the exemption available to pension consultants, to increase the minimum value of plan assets required to rely on the exemption from $50 million to $200 million.[124] As discussed in the Implementing Proposing Release, pension consultants typically do not have ''assets under management,'' but we have required these advisers to register with us because their activities have a direct effect on the management of large amounts of pension plan assets.[125] As a result of this amendment, advisers currently relying on the pension consultant exemption advising plan assets of less than $200 million may be required to withdraw from Commission registration and register with one or more states.[126]

We proposed to increase the threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of ''assets under management'' that requires all advisers to register with the Commission, and to maintain the same ratio as today of plan assets to the statutory threshold for registration.[127] Commenters supported our proposal.[128] One agreed that the new $200 million threshold would continue to ensure that the activities of a pension consultant registered with the Commission are significant enough to have an impact on national markets.[129] We are adopting the amendment, as proposed.

c. Multi-State Advisers

We are adopting, as proposed, amendments to the multi-state adviser exemption to align the rule with the multi-state exemption that Congress provided for mid-sized advisers in section 410 of the Dodd-Frank Act.[130] Amended rule 203A–2(d) permits all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[131] An adviser relying on the rule must withdraw from registration with the Commission when it is no longer required to be registered with 15 states.[132] We are also rescinding, as proposed, the provision in the current rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not adopting a similar cushion for the 15-state threshold.[133]

Commenters generally agreed with our proposal to align our multi-state exemption for small advisers with the statutory exemption for mid-sized advisers.[134] A few, however, recommended a lower threshold of required state registrations for eligibility for the multi-state exemption.[135] In light of Congressional determination to set the threshold at 15 states and our stated purpose in amending the rule to align it with the Dodd-Frank Act, we have determined not to lower the threshold further.[136] We also note that the

[120] *See* rule 203A–2(a).

[121] Credit Rating Agency Reform Act of 2006, P.L. 109–291, 120 Stat. 1327 § 4(b)(3)(B) (2006) (''Credit Rating Agency Reform Act''). *See also* Advisers Act section 202(a)(11)(F) (excluding an NRSRO from the definition of investment adviser unless it issues recommendations about purchasing, selling, or holding securities or engages in managing assets that include securities on behalf of others).

[122] Credit Rating Agency Reform Act, *supra* note 121, at sections 4(a), 5.

[123] NRS Letter (asserting that the proposal is consistent with the Credit Rating Agency Reform Act, which amended the Advisers Act to exclude NRSROs and to provide for a separate regulatory regime for them under the Exchange Act); Pickard Letter (asserting that continued availability of the NRSRO exemption is causing confusion among advisers).

[124] Amended rule 203A–2(a). Pension consultants provide services to pension and employee benefit plans and their fiduciaries, including assisting them to select investment advisers that manage plan assets. *See* rule 203A–2(b)(2), (3); NSMIA Adopting Release, *supra* note 17, at section II.D.2. The exemption does not apply to pension consultants that solely provide services to plan participants. *See* NSMIA Adopting Release, *supra* note 17, at section II.D.2. To determine the aggregate value of plan assets, a pension consultant may only include the portion of the plan's assets for which the consultant provides investment advice. Rule 203A–2(b)(3).

[125] *See* Implementing Proposing Release, *supra* note 7, at section II.A.5.b.; NSMIA Adopting Release, *supra* note 17, at section II.D.2.; *Rules Implementing Amendments to the Investment Advisers Act of 1940,* Investment Advisers Act Release No. 1601, section II.D.2. (Dec. 20, 1996) [61 FR 68480 (Dec. 27, 1996)].

[126] An adviser currently relying on the exemption, but that advises plan assets of less than $200 million and files an annual updating amendment to its Form ADV following the compliance date of the amended rule, will be required to withdraw from Commission registration within 180 days of the adviser's fiscal year end (unless the adviser is otherwise eligible for SEC registration). *See* rule 203A–1(b)(2); *supra* note 118.

[127] Proposed rule 203A–2(a).

[128] *See* NRS Letter; Pickard Letter.

[129] NRS Letter. *See also* NSMIA Adopting Release, *supra* note 17, at n.60 (the $50 million ''higher threshold is necessary to demonstrate that a pension consultant's activities have an effect on national markets.''). The higher asset requirement also reflects that a pension consultant has substantially less control over client assets than an adviser that has ''assets under management.'' *Id.*

[130] Amended rule 203A–2(d). Form ADV will not be amended to reflect the changes to the multi-state adviser exemption until the end of the calendar year. *See supra* section II.A.1. Until that time, both a mid-sized adviser eligible for the statutory multi-state exemption and a small adviser eligible for the exemption under amended rule 203A–2(d) because it is required to register as an adviser in 15 or more states may register or remain registered (as the case may be) with the Commission by checking the boxes (Item 2.A.(9) and the relevant section of Schedule D) indicating that it is exempt because it is required to register in 30 or more states. *See supra* note 118. Upon making its next amendments to Form ADV, the adviser should revise its filing to report reliance on the new multi-state adviser exemption.

[131] We note that amended rule 203A–2(d) permits an adviser otherwise eligible to rely on the exemption to choose to maintain its state registrations and not switch to SEC registration. *See* amended rule 203A–2(d)(2) (adviser elects to rely on the exemption by making the required representations on Form ADV).

[132] *See* amended rule 203A–2(d). To rely on this exemption, an adviser also must continue to: (i) Include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with the required number of states; (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that it would be required by the laws of fewer than 15 states to register as an investment adviser with the state; and (iii) maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. Amended rule 203A–2(d)(2)–(3). The adviser may not include in the number of states those in which it is not required to register because of applicable state laws or the national *de minimis* standard of section 222(d) of the Advisers Act. *See Exemption for Investment Advisers Operating in Multiple States; Revisions to Rules Implementing Amendments to the Investment Advisers Act of 1940; Investment Advisers with Principal Offices and Places of Business in Colorado or Iowa,* Investment Advisers Act Release No. 1733, n.17 (July 17, 1998) [63 FR 39708 (July 24, 1998)].

[133] *See* rule 203A–2(e)(1). Eliminating this buffer simplifies the requirements of the exemption. *See* NRS Letter (''The Dodd-Frank Act has addressed the multi-state adviser exemption to simplify the requirements of this exemption.'')

[134] *See* NASAA Letter; comment letter of the National Education Association Member Benefits Corporation (Jan. 21, 2011) (''NEA Letter''); NRS Letter; Pickard Letter; Seward Letter; Shearman Letter.

[135] *See* Seward Letter and Shearman Letter (in each case supporting the 15-state threshold we proposed, and suggesting the burdens of maintaining multiple state registrations can be significant). *See also* NEA Letter. One of these commenters also would support further decreasing the number of states to five and requiring advisers relying on the exemption to have at least $25 million of assets under management. Seward Letter. Another ''would support an even lower threshold.'' Shearman Letter.

[136] *See* section 410 of the Dodd-Frank Act (a mid-sized adviser that otherwise would be prohibited may register with the Commission if it would be required to register with 15 or more states); H. Rep. No. 111–517, at 867 (2010) (''Conference Committee

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requirement that advisers annually assess their eligibility for registration and the grace periods provided to switch to and from state registration should further mitigate the frequency with which an investment adviser required to register in 15 states will have to switch between state and federal registration.[137]

6. Elimination of Safe Harbor

We are rescinding, as proposed, rule 203A–4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[138] One commenter argued that the safe harbor should be retained for mid-sized advisers because advisers calculating regulatory assets under management face similar challenges today as when the safe harbor was adopted.[139] We disagree. As stated in the Implementing Proposing Release, the safe harbor was designed for smaller advisory businesses with assets under management of less than $30 million, which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[140] We also believe that the revisions we are adopting to the Form ADV instructions to implement a uniform method for advisers to calculate assets under management will clarify the requirements and reduce confusion among advisers.[141] Moreover, the rule is a safe harbor only from our enforcement actions, and to our knowledge few, if any, advisers have relied upon it in the 14 years since it was adopted.[142] Accordingly, we are rescinding the rule.

7. Mid-Sized Advisers

We are amending Form ADV to require a mid-sized adviser registering with us to affirm, upon application and annually thereafter, that it is either: (i) Not required to be registered as an adviser with the state securities authority in the state where it maintains its principal office and place of business; or (ii) is not subject to examination as an adviser by that state.[143] These form revisions implement the Dodd-Frank Act amendment to section 203A of the Advisers Act that prohibits mid-sized advisers from registering with the Commission, but only: (i) If the adviser is required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; and (ii) if registered, the adviser would be subject to examination as an investment adviser by such commissioner, agency, or office.[144] The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is ''required to be registered'' or is ''subject to examination'' by a particular state securities authority.[145] We are therefore providing an explanation of these provisions in instructions to Form ADV.[146]

a. Required To Be Registered

The Form ADV instructions we are adopting reflect that the ''required to be registered'' standard that Congress included in new section 203A(a)(2) of the Advisers Act for mid-sized advisers is different from the ''regulated or required to be regulated'' standard set forth in section 203A(a)(1) for small advisers.[147] The instruction explains that a mid-sized adviser ''is not required to be registered'' with the state securities authority and must register with the Commission (unless an exemption from registration with the Commission otherwise is available)[148] if the adviser is exempt from registration under the law of the state in which it has its principal office and place of business, or is excluded from the definition of investment adviser in that state.[149] Thus, for example, an adviser with $75 million of assets under management that is exempt from registration in the state in which its principal office and place of business is located will have to register with the Commission (unless an exemption from Commission registration is available). None of the commenters disputed our interpretation or suggested an alternative interpretation of the ''required to be registered'' element,[150] and we are adopting the instructions, as proposed.[151]

Report'') (''Those advisers who qualify to register with their home state must register with the SEC should the adviser operate in more than 15 states.'').

[137] *See supra* section II.A.4.

[138] Rule 203A–4.

[139] NYSBA Committee Letter. Another commenter asserted that there has been and continues to be confusion among smaller advisers in calculating assets under management. NRS Letter.

[140] Implementing Proposing Release, *supra* note 7, at section II.A.6. (*citing* rule 203A–4; NSMIA Adopting Release, *supra* note 17, at section II.B.3.).

[141] *See supra* section II.A.3.

[142] *See* NRS Letter (noting a belief that the safe harbor has been little used by small advisers based upon the commenter's years of consulting for such advisers).

[143] *See* amended Form ADV, Part 1A, Item 2.A.(2). For a discussion of changes to Form ADV, Part 1A, Item 2.A., see *supra* section II.A.2.

[144] *See* section 410 of the Dodd-Frank Act. An adviser reporting that it is no longer able to make this affirmation will have 180 days from its fiscal year end to withdraw from Commission registration. *See* amended rule 203A–1(b)(2). Thus, the rule will operate to permit an adviser to rely on this affirmation reported in its annual updating amendments for purposes of determining its eligibility to register with the Commission.

[145] The Advisers Act defines the term ''state'' to include any U.S. state, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. Advisers Act section 202(a)(19). For purposes of section 203A of the Advisers Act and the rules thereunder, rule 203A–3(c) defines ''principal office and place of business'' to mean the executive office of the investment adviser from which its officers, partners, or managers direct, control, and coordinate its activities. We are not changing this definition. *See* amended rule 203A–3(c). For a discussion of amendments we are making to the calculation of assets under management, see *supra* section II.A.3.

[146] *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.

[147] *See* amended Form ADV: Instructions for Part 1A, instr. 2.b. Under section 203A(a)(1) of the Act, an adviser that is not regulated or required to be regulated as an investment adviser in the state in which it has its principal office and place of business must register with the Commission regardless of the amount of assets it has under management. Advisers Act section 203A(a)(1). *See also* Advisers Act section 203(a). We have interpreted ''regulated or required to be regulated'' to mean that a state has enacted an investment adviser statute, regardless of whether the adviser is actually registered in that state. *See* NSMIA Adopting Release, *supra* note 17, at section II.E.1. The bills originally introduced and passed in the House and Senate increased up to $100 million the threshold for Commission registration under the ''regulated or required to be regulated'' standard that is used today in section 203A(a)(1). *See* The Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7418 (2009); Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 410 (2010). But the final version of the Dodd-Frank Act prohibits a mid-sized adviser from registering with the Commission if, among other things, it is ''required to be registered'' as an adviser with the state securities authority where it maintains its principal office and place of business. *See* section 410 of the Dodd-Frank Act.

[148] *See, e.g.,* Advisers Act sections 203(a) and (b), 203A(b); rule 203A–2.

[149] *See, e.g.,* Uniform Securities Act §§ 102(15), 403(b) (2002). An adviser not registered under a state adviser statute in contravention of such statute, however, is not eligible for registration with the Commission. Similarly, an adviser could not voluntarily register with the Commission to avoid state registration.

[150] One commenter suggested that we clarify whether mid-sized advisers that are exempt from registration in their home states may or are required to register with us. Sadis Letter. As discussed above and in the Form ADV instructions, if a mid-sized adviser is not required to be registered in the state where it has its principal office and place of business, the adviser must register with the Commission (unless an exemption from Commission registration is available). *See supra* notes 148–149 and accompanying text; amended Form ADV: Instructions for Part 1A, instr. 2.b.

[151] *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.

b. Subject to Examination

As we discussed in the Implementing Proposing Release, our staff contacted the state securities authority for each state and, based upon information they have provided us, identified those states that do not subject advisers registered with them to examination.[152] We have posted this list on our Web site,[153] and it also will be available to advisers using the IARD to register or amend their registration forms.[154] Based on those responses, advisers with their principal office and place of business in Minnesota, New York and Wyoming with assets under management between $25 million and $100 million must register with the Commission.[155]

Several commenters agreed with our approach of relying on responses from the state regulators rather than determinations by the Commission to identify whether an adviser is ''subject to examination'' by a state.[156] Two commenters, however, suggested that we should instead establish our own criteria for whether an adviser is ''subject to examination,'' and one further recommended that we should engage in an evaluation of each state's adviser examination program.[157] We do not believe that the alternatives suggested are practical or appropriate. As we explained in the Implementing Proposing Release, the states are the most familiar with their own circumstances and are in the best position to determine whether advisers in their states are subject to examination.[158]

B. Exempt Reporting Advisers: Sections 407 and 408

To implement new sections 203(l) and 203(m) of the Advisers Act, we are adopting a new rule, as proposed, that requires advisers relying on those exemptions from registration to submit to us, and to periodically update, reports that consist of a limited subset of items on Form ADV.[159] We are also adopting the amendments we proposed to Form ADV to permit the form to serve as both a reporting and registration form and to specify the seven items these ''exempt reporting advisers'' must complete.[160]

As discussed above, the Dodd-Frank Act amends the Advisers Act, as of July 21, 2011, to create two new exemptions from registration for advisers to certain types of ''private funds'' and to repeal the private adviser exemption contained in section 203(b)(3) of the Advisers Act on which advisers to many hedge and other private funds relied in order to avoid registration.[161] Both section 203(l) (which provides an exemption for an adviser that advises solely one or more ''venture capital funds'') and section 203(m) of the Advisers Act (which instructs the Commission to exempt any adviser that acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million) provide that the Commission shall require such advisers to maintain such records and to submit such reports ''as the Commission determines necessary or appropriate in the public interest.'' [162] The rules and amendments to Form ADV that we are adopting today are designed to address the reporting aspects of these two exemptions.[163]

1. Reporting Required

Rule 204–4 requires exempt reporting advisers to file reports with the Commission electronically on Form ADV through the IARD using the same process used by registered investment advisers.[164] An exempt reporting adviser must submit its initial Form ADV within 60 days of relying on the exemption from registration under either section 203(l) or section 203(m) of the Advisers Act.[165] Each Form ADV is considered filed with the Commission upon acceptance by the IARD.[166] An exempt reporting adviser unable to file electronically as a result of unanticipated technical difficulties may, like a registered adviser, request a temporary hardship exemption of up to seven business days after the filing was due.[167] Advisers filing the form must

[152] All state securities authorities other than Minnesota, New York and Wyoming have advised our staff that advisers registered with them are subject to examination. According to IARD data as of April 7, 2011, there were 63 advisers with assets under management between $25 million and $90 million and a principal office and place of business in Minnesota, 286 in New York, and 1 in Wyoming.

[153] *See http://www.sec.gov/divisions/investment/midsizedadviserinfo.htm.*

[154] *See* amended Form ADV, Part 1A, Item 2.A.(2)(b); amended Form ADV: Instructions for Part 1A, instr. 2.b. The staff also requested that each state notify us promptly if advisers in the state will begin to be subject to examination or will no longer be subject to examination, and we will update the list on the IARD and our Web site accordingly.

[155] *See supra* note 152. The requirement for such an adviser to register with the Commission, as opposed to one of these states, will be effective on July 21, 2011.

[156] *See* NASAA Letter (proposed approach ''complies with the clear and unambiguous language of the statute'' and ''attempting to define or otherwise interpret terms that are plain and direct is contrary to long-established rules of statutory construction.''); NRS Letter; Pickard Letter. *See also* Sadis Letter (recommending the Commission clarify whether an adviser in a particular state is required to register with the Commission).

[157] ABA Committees Letter (recommending the Commission construe ''examination'' to indicate a ''structured adviser examination program, rather than one conducted on an occasional, sporadic or informal basis,'' and require an annual affirmation from each state that it subjects advisers to examination); FSI Letter (recommending the Commission engage in a stringent evaluation of each state's adviser examination program and expressly define ''subject to examination'' to, at a minimum, include a ''uniform or risk based routine examination process'' and that it ''mirrors the frequency of broker-dealer examination by FINRA and the SEC'').

[158] *See* Implementing Proposing Release, *supra* note 7, at section II.A.7.b.

[159] We refer to advisers that rely on the exemptions from registration provided in either new section 203(l) or new section 203(m) of the Advisers Act as ''exempt reporting advisers.'' For a brief discussion of these exemptions, see *infra* note 162 and accompanying text; for a more in-depth discussion, see Exemptions Adopting Release, *supra* note 4.

[160] For a discussion of additional amendments we are proposing to Part 1 of Form ADV, see *infra* section II.C.

[161] Section 403 of the Dodd-Frank Act. Section 203(b)(3) exempts from registration any investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to any investment company registered under the Investment Company Act, or a company which has elected to be a business development company pursuant to Section 54 of the Investment Company Act (15 U.S.C. 80a–54). *See supra* note 4; Implementing Proposing Release, *supra* note 7, at n.112 and accompanying text.

[162] *See* sections 407 and 408 of the Dodd-Frank Act, adding Advisers Act sections 203(l) and (m). See *supra* note 5. *See also* Exemptions Adopting Release, *supra* note 4, at section II.; section 204(a) of the Advisers Act and section 204(b)(5), as added by section 404 of the Dodd-Frank Act.

[163] Recordkeeping requirements for exempt reporting advisers will be addressed in a future release. *See* sections 407 and 408 of the Dodd-Frank Act (providing that the Commission shall require investment advisers exempt from registration under either section 407 or 408 of the Dodd-Frank Act to maintain such records as the Commission determines necessary or appropriate in the public interest or for the protection of investors.).

[164] New rule 204–4. *See* amended Form ADV: General Instructions 6, 7, 8 and 9 (providing guidance about the IARD entitlement process, signing the form, and submitting it for filing). We are also adopting technical amendments, as proposed, to Form ADV–NR, to enable exempt reporting advisers to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers. *See* amended Form ADV–NR; amended Form ADV: General Instruction 19.

[165] *See* amended Form ADV: General Instruction 13. An adviser may not be both registered with us and filing as an exempt reporting adviser at the same time. An SEC registered adviser switching from being registered to being an exempt reporting adviser must first file a Form ADV–W to withdraw its SEC registration before submitting its first report as an exempt reporting adviser. We have modified General Instruction 13 from the proposal to reflect IARD system functionality, which we continue to develop.

[166] New rule 204–4(c). *Cf.* rule 0–4(a)(2) (''All filings required to be made electronically with the * * * [IARD] shall, unless otherwise provided by the rules and regulations in this part, be deemed to have been filed with the Commission upon acceptance by the IARD.'').

[167] *See* new rule 204–4(e) (providing a temporary hardship exemption for an adviser having unanticipated technical difficulties that prevent submission of a filing to IARD); amended Form

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pay a filing fee designed to pay the reasonable costs associated with the filing and maintenance of the system.[168] We anticipate that filing fees, which the Commission will consider separately, will be the same as those for registered investment advisers, which currently range from $40 to $225 based on the amount of assets an adviser has under management.[169]

Several commenters expressed the view that use of Form ADV and the IARD for exempt reporting advisers would be efficient, because the system is familiar to many advisers and because it would integrate the process of filing with the Commission with any parallel filing the adviser may be obligated to make with state securities authorities.[170] Commenters agreed with our expectation that use of Form ADV and the IARD would facilitate a transition from filing reports with us to applying for registration with us.[171] Two commenters urged that we create a separate reporting system.[172] One recommended a new, more interactive system; and the other suggested a separate filing system to avoid confusion among investors who might mistakenly assume that an exempt reporting adviser is registered if its information comes up in an IARD search. We share these commenters' general goals of innovation and the avoidance of investor confusion as our staff works with FINRA (our IARD contractor) to continue improving the IARD.[173] However, the expense and delay of initiating and developing a new system with adequate functionality, which neither commenter addressed, argues against these commenters' recommendations. We are adopting rule 204–4 as proposed.

2. Information in Reports

We are also amending Form ADV to accommodate its use by exempt reporting advisers. First, we are re-titling the form to reflect its dual purpose as both the ''Uniform Application for Investment Adviser Registration,'' as well as the ''Report by Exempt Reporting Advisers.'' Second, we are revising the cover page to require exempt reporting advisers to indicate the type of report they are filing.[174] Finally, we are amending Item 2 of Part 1A, which today requires advisers to indicate their eligibility for SEC registration, to add a new subsection B that requires an exempt reporting adviser to identify the exemption(s) on which it is relying to report, rather than register, with the Commission.[175]

Some commenters asserted that it would be inconsistent with these new exemptions to require exempt reporting advisers to submit reports to the Commission,[176] while others argued that we proposed to require too much information.[177] Congress, however, gave us broad authority to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[178] In addition, the Dodd-Frank Act neither limits the types of information we could require in the reports nor specifies the purpose for which we would use the information.

We are adopting, as proposed, a requirement that exempt reporting advisers complete the following items of Part 1A of Form ADV: Items 1 (Identifying Information), 2.B. (SEC Reporting by Exempt Reporting Advisers), 3 (Form of Organization), 6 (Other Business Activities), 7 (Financial Industry Affiliations and Private Fund Reporting), 10 (Control Persons), and 11 (Disclosure Information).[179] In addition, we are requiring, as proposed, that exempt reporting advisers also complete corresponding sections of Schedules A, B, C, and D.[180] Responses to these items will assist us to identify exempt reporting advisers, their owners, and their business models. The information we collect will provide us with information as to whether these advisers or their activities might present sufficient concerns to warrant our further attention in order to protect their clients, investors, and other market participants.[181] The reports will also provide the public with some basic information about these advisers and their businesses.

Items 1, 3, and 10 elicit basic identification details such as name, address, contact information, form of organization, and who controls the adviser. Items 6 and 7.A. provide us with details regarding other business activities in which the adviser and its

ADV–H; amended Form ADV: General Instruction 17.

[168] New rule 204–4(d).

[169] The current fee schedule applicable to advisers applying for registration may be found on our Web site at *http://www.sec.gov/divisions/investment/iard/iardfee.shtml.*

[170] The Dodd-Frank Act exempts exempt reporting advisers from registration with the Commission. *See* sections 407 and 408 of the Dodd-Frank Act. It does not, however, exempt these advisers from registering or filing reports with state securities regulators. *See also* amended Form ADV: General Instruction 14 (noting that exempt reporting advisers who file reports with the SEC may continue to be subject to state registration, reporting, or other obligations).

[171] ABA Committees Letter; comment letter of Better Markets, Inc. (Jan. 24, 2011) (''Better Markets Letter''); NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

[172] Merkl Implementing Letter; Seward Letter. *See also* Shearman Letter (making similar arguments regarding the potential for investor confusion, but not advocating use of a different form or reporting system).

[173] Our staff, for example, recently completed a study mandated by section 919B of the Dodd-Frank Act on ways to improve investor access to information about certain financial service providers, including data contained in the IARD. *See* Staff of the Office of Investor Education and Advocacy of the U.S. Securities and Exchange Commission, *Study and Recommendations on Improved Investor Access to Registration Information about Investment Advisers and Broker-Dealers,* Jan. 2011, available at *http://www.sec.gov/news/studies/2011/919bstudy.pdf.*

[174] An exempt reporting adviser must indicate whether it is submitting an initial report, an annual updating amendment, an other-than-annual amendment, or a final report. We are also adopting corresponding changes to General Instruction 2.

[175] An exempt reporting adviser must check that it qualifies for an exemption from registration: (i) As an adviser solely to one or more venture capital funds; and/or (ii) because it acts solely as an adviser to private funds and has assets under management in the United States of less than $150 million. *See* amended Form ADV, Part 1A, Item 2.B, questions 1 and 2. An exempt reporting adviser relying on the latter exemption, for private fund advisers, must also indicate the amount of private fund assets it manages in Section 2.B. of Schedule D to Form ADV, Part 1A. Investment advisers who have their principal office and place of business outside of the United States, however, need only include private fund assets that they manage at a place of business in the United States. *See* Exemptions Adopting Release, *supra* note 4, at section II.B.3. An adviser that acts solely as an adviser to private funds but is no longer eligible to check box 2.B.(2) because it has assets under management in the United States of $150 million or more may, subject to certain conditions, check a separate box to continue filing as an exempt reporting adviser during the safe harbor transition period described below. *See infra* note 211 and accompanying text. *See also* amended Form ADV, Part 1A, Item 2.B, question 3; Form ADV: General Instruction 15.

[176] Comment letter of Avoca Capital Holdings (Dec. 21, 2011) (''Avoca Letter''); AIMA Letter; comment letter of AustinVentures (Jan. 21, 2011) (''AV Letter'').

[177] Comment letter of Berkeley Center for Law, Business and the Economy (Jan. 31, 2011) (''BCLBE Letter''); Shearman Letter; comment letter of Village Ventures, Inc. (Jan. 24, 2011) (''Village Ventures Letter'').

[178] *See* sections 407 and 408 of the Dodd-Frank Act.

[179] *See* amended Form ADV: General Instruction 3. We will continue to monitor whether we should also require exempt reporting advisers to complete other items on Form ADV (*e.g.,* Part 2).

[180] *See id.;* Implementing Proposing Release, *supra* note 7, at section II.B.2.

[181] One commenter agreed. *See* ABA Committees Letter (stating that most of the information exempt reporting advisers would have to provide is of a nature that will assist the Commission to identify compliance risks posed by exempt reporting advisers and thus such disclosure responds to the mandate set forth in the Dodd-Frank Act).

affiliates are engaged, which would permit us to identify conflicts that the adviser may have with its clients that may suggest significant risks to those clients. Item 11 requires advisers to disclose the disciplinary history of the adviser and its employees and to complete a separate schedule containing details of each disciplinary event.[182] Item 7.B. and Section 7.B. of Schedule D require advisers to private funds, which these advisers manage by terms of the exemptions, to disclose information regarding each private fund they advise. As discussed in more detail in Section II.C. of this Release, we are adopting significant amendments to Section 7.B. of Schedule D that are designed to provide us with a comprehensive overview, or census, of private funds.[183] Exempt reporting advisers' responses to Item 7.B., and Section 7.B.(1) of Schedule D, in conjunction with information provided by registered advisers, will provide us with important data about these funds that we would use to identify risks to their investors.

Several commenters expressed general support for the Commission's proposed reporting requirement.[184] One commenter urged us not to require exempt reporting advisers to report information about their other business activities in response to Item 6, their related persons in response to Item 7.A., their private funds in response to Item 7.B., and their control persons in response to Item 10 because, among other reasons, such information ''would not add to the Commission's ability to protect the public interest or investors.'' [185] We disagree. Without this information, the reports would contain little more than basic identifying data, which would be inadequate to help us to meaningfully identify significant risks to an exempt reporting adviser's clients, investors, or other market participants. Moreover, to require such limited information to be reported would deny investors an opportunity to verify disclosures they receive directly from the adviser.

Some commenters urged that we broaden the scope of information we proposed to collect, suggesting among other things that the Commission should require all or some of the additional information that registered advisers must submit on Form ADV, including a requirement to prepare and deliver a client brochure (Part 2) and brochure supplements.[186] We have considered our need for this information in light of the exemptions Congress provided in the Dodd-Frank Act and the regulatory role we expect to assume with respect to exempt reporting advisers. We have not sought to apply most of the prophylactic rules we have adopted for registered advisers,[187] and we do not anticipate that our staff will conduct compliance examinations of these advisers on a regular basis.[188] One commenter who urged us to collect a broader set of information recommended that we apply additional prophylactic rules to exempt reporting advisers, the consequence of which would be to reduce the distinctions between these advisers and registered advisers, which those urging us to collect less information argued we should avoid.[189] We believe that requiring advisers to complete the items we proposed strikes an appropriate balance. As discussed in more detail below, we have revised some of these items in response to comments we received.

3. Public Availability of Reports

Several commenters urged that we not make public any information filed by exempt reporting advisers.[190] Other commenters, however, supported public disclosure of information by these advisers and suggested that such data would be useful, for example, for prospective clients who were conducting ''due diligence'' reviews of advisers.[191]

Section 210(a) of the Advisers Act requires information contained in reports filed with the Commission to be made available to the public, unless we find that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Commenters did not persuade us that we could make such a finding.[192] On the contrary, we believe

[182] *See* amended Form ADV, Part 1A, Disclosure Reporting Pages.

[183] For instance, advisers who complete Section 7.B.(1) of Schedule D would have to provide identifying information about each private fund, such as its name and domicile, as well as information about its service providers and its gross assets. *See* amended Form ADV, Part 1A, Schedule D, Section 7.B.(1). *See also infra* Section II.C.1.

[184] *See, e.g.,* AFL–CIO Letter; comment letter of Council of Institutional Investors (Jan. 20, 2011) (''CII Letter''); NRS Letter; Better Markets Letter; ABA Committees Letter; NASAA Letter.

[185] Village Ventures Letter (asserting also that the requirements would be burdensome). We address the anticipated costs and burdens associated with these requirements below. *See infra* Section V.

[186] *See* Better Markets Letter; CII Letter. Part 2 of Form ADV, which requires advisers to prepare a narrative, plain English client brochure, contains 18 items including information on the adviser's business practices, conflicts of interest, and background. Part 2 also requires advisers to prepare brochure supplements that include information about advisory personnel on whom clients rely for investment advice. *See also* AFL–CIO Letter (suggesting requiring performance reporting).

[187] *See, e.g.,* rule 206(4)–2 (the custody rule), which applies to advisers registered or required to be registered with the Commission. *But see* rule 206(4)–5 (the ''pay to play'' rule) (applied to exempt reporting advisers that previously relied on the private adviser exemption and continues to apply to exempt reporting advisers that currently rely on exemptions from registration under sections 203(l) and 203(m) of the Advisers Act). *See infra* section II.D.1. (discussing amendments we are adopting today to the pay to play rule to continue to apply the rule to exempt reporting advisers and foreign private advisers).

[188] Our staff will conduct cause examinations where there are indications of wrongdoing, *e.g.,* those examinations prompted by tips, complaints, and referrals. Under section 204(a) of the Advisers Act, however, the Commission has the authority to examine records, unless the adviser is ''specifically exempted'' from the requirement to register pursuant to section 203(b) of the Advisers Act. Investment advisers that are exempt from registration in reliance on section 203(l) or 203(m) of the Advisers Act are not ''specifically exempted'' from the requirement to register pursuant to section 203(b).

[189] *Compare* comment letter of Coalition of Private Investment Companies (Jan. 28, 2011) (''CPIC Letter'') *with* AV Letter; AIMA Letter; Shearman Letter; Village Ventures Letter. *See* Merkl Implementing Letter (indicating that our proposal created a meaningful distinction between registered advisers and exempt reporting advisers by not subjecting exempt reporting advisers to all of Form ADV, to compliance program requirements under rule 206(4)–7, to custody requirements under rule 206(4)–2, and to regular examinations, consistent with a primary concern of Congress in adopting the Dodd-Frank Act).

[190] *See* AV Letter; AIMA Letter; ABA Committees Letter; Avoca Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; comment letter of the National Venture Capital Association (Jan. 24, 2011) (''NVCA Letter''); Shearman Letter; Seward Letter.

[191] *See* AFL–CIO Letter; CII Letter; Better Markets Letter (each lauding the Commission's initiative to create, for the first time, a database of public information on private investment funds). *See also* Merkl Implementing Letter (noting that a potential investor would be better able to perform due diligence if the information were made available to the public); CII Letter (arguing that an investor could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees).

[192] *See* AV Letter (claiming that the public disclosure of the reports would be ''unnecessary and intrusive'' and would be done ''for no apparent reason''); MFA Letter (urging that, absent a compelling policy reason for public disclosure, the reports should not be publicly available because some of the information is competitively sensitive); NVCA Letter (arguing that making public the ownership or control persons of an exempt reporting adviser would cause competition for scarce human resources among these advisers and could reveal strategic relationships to competitors); NRS Letter (claiming that because investors and prospective investors receive voluminous offering documents, due diligence questionnaires, and other materials, limited Form ADV Part 1A information would be of little value and limited use); ABA Committees Letter (indicating there would be no benefit in members of the general public having access to this information because they are not qualified to invest); Katten Foreign Advisers Letter (claiming that private fund investors already receive an offering document that should cover the items that would be included in the reports). *See also* Katten Foreign Advisers Letter; NVCA Letter; AIMA

Continued

the public reporting requirements we are adopting will provide a level of transparency that will help us to identify practices that may harm investors,[193] will aid investors in conducting their own due diligence,[194] and will deter advisers' fraud and facilitate earlier discovery of potential misconduct.[195] For instance, investors will be able to compare Form ADV information to the information they have received in offering documents and due diligence to identify potential misrepresentations. For these reasons, we believe public availability of these reports is in the public interest and will help to protect investors. Suggestions by some that the Dodd-Frank Act compels us to deny public access to these reports are misplaced.[196] In the Dodd-Frank Act, Congress sought to protect only certain proprietary and similarly sensitive information submitted by advisers about their private funds in reports for the assessment of systemic risk.[197] In light of section 210 of the Act, which presumes reports submitted to us by advisers to be publicly available, together with the Freedom of Information Act,[198] which generally supports disclosure of such documents, we believe at this time that the information should be publicly available.[199]

Some commenters expressed more narrow concerns that certain of the information we proposed to require could require them to disclose proprietary or competitively sensitive information.[200] As discussed below, we have responded to those concerns by revising certain of our items in a manner that will affect the information that both registered and exempt reporting advisers will provide to us.[201]

4. Updating Requirements

We are also amending rule 204–1 under the Advisers Act, which requires advisers to update their Form ADV filings, to require exempt reporting advisers to file updating amendments to reports filed on Form ADV.[202] As amended, rule 204–1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) At least annually, within 90 days of the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Similarly, we are amending General Instruction 4 to Form ADV to require an exempt reporting adviser, like a registered adviser, to update promptly Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disciplinary Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[203]

Most of the commenters who addressed updating and amendment requirements agreed with our approach to update the report annually and to amend it according to the same schedule as is applicable to registered advisers.[204] In order to permit us to receive timely information from exempt reporting advisers, we are adopting the rule amendments as proposed.

5. Final Reports

When an adviser ceases to be an exempt reporting adviser, new rule 204–4 requires the adviser to file an amendment to its Form ADV to indicate that it is filing a final report.[205] Final report filings will allow us to distinguish such a filer from one that is failing to meet its filing obligations.[206] In some cases an exempt reporting adviser will file a final report because it ceases to do business as an investment adviser and thus is no longer subject to reporting under the Act.[207] In other cases an exempt reporting adviser will file a final report in connection with becoming registered with the Commission, in which case it will continue to periodically update its Form ADV, but as a registered adviser.[208]

Amended general instruction 15 to Form ADV provides guidance to exempt reporting advisers transitioning to becoming registered with the Commission. An exempt reporting adviser wishing to register with the Commission can file a single amendment to its Form ADV that will serve both as a final ''report'' as an exempt reporting adviser and an application for registration under the Advisers Act.[209] While an application is pending, but before it is approved, an adviser may continue to operate as an exempt reporting adviser in accordance with the terms of the relevant exemption.[210] In addition, General

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Letter (each conditioning its support for the scope of the reporting requirement on making the reports non-public).

[193] For instance, census data about a private fund's gatekeepers, including administrators and auditors, will be available on Section 7.B.1. of Schedule D and will be verifiable by investors and the Commission. Recent enforcement actions suggest that the availability of such information could be helpful. *See, e.g., SEC* v. *Grant Ivan Grieve, et al.,* Litigation Release No. 21402 (Feb. 2, 2010) (default judgment against hedge fund adviser that was alleged to have fabricated and disseminated false financial information for the fund that was ''certified'' by a sham independent back-office administrator and phony accounting firm).

[194] *See supra* note 191.

[195] *See In the Matter of John Hunting Whittier,* Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

[196] ABA Committees Letter; Avoca Letter; AV Letter; Seward Letter; Shearman Letter.

[197] *Compare* section 404 of the Dodd-Frank Act, codified at Advisers Act section 204(b), *with* sections 407 and 408 of the Dodd-Frank Act, codified at Advisers Act sections 203(l) and 203(m). *See also* Systemic Risk Reporting Release, *supra* note 71 (proposing confidential reporting by advisers to private funds designed to assist the Financial Stability Oversight Council (''FSOC'') in its assessment of systemic risk in the U.S. financial system).

[198] 5 U.S.C. 552(a).

[199] Information on Form ADV is available to the public through the Investment Adviser Public Disclosure System (''IAPD''), which allows the public to access the most recent Form ADV filing made by an investment adviser and is available at *http://www.adviserinfo.sec.gov.* In response to commenters' suggestions we will, however, make it clear to the public viewing reports filed by an exempt reporting adviser on IAPD that the adviser is not registered with us. *See* Shearman Letter; Seward Letter (expressing concerns that public access to reports by exempt reporting advisers might cause confusion if an unregistered adviser's information comes up in an IARD search, an investor's perception may be that the adviser is registered).

[200] *See infra* note 238. The NVCA also argued that requiring a venture capital fund adviser to report information about the adviser's control persons, as required by Item 10 of Part 1A of Form ADV, could increase competition among these advisers for human resources. While this information could result in competitive effects among these advisers, the effects of this item are not unique to these advisers, and they may result in benefits.

[201] *See infra* Section II.C.1.

[202] Rule 204–1. We are also amending the title of the rule to be ''Amendments to Form ADV,'' rather than ''Amendments to application for registration,'' to reflect use of the form by exempt reporting advisers.

[203] *See* amended Form ADV: General Instruction 4.

[204] NRS Letter; Merkl Implementing Letter; CII Letter; ABA Committees Letter. Some of the commenters added that information reported by exempt reporting advisers that is allowed to become significantly outdated or inaccurate would not serve the Commission's or public's interest or protect investors as mandated by the Dodd-Frank Act and could be misleading. ABA Committees Letter; Merkl Implementing Letter. *But see* NVCA Letter (indicating that, because venture capital fund investments are long-term and illiquid, there would be little, if any, benefit to investors, regulators or the public to update the report more frequently).

[205] New rule 204–4(f).

[206] *Id.* Advisers filing a final report are not required to pay a filing fee. An adviser that failed to file a final report would violate rule 204–4(f).

[207] Such an adviser must indicate that it is filing a final report and update Item 1 (Identifying Information) of Part 1A of Form ADV. Amended Form ADV: General Instruction 15.

[208] An exempt reporting adviser may be required to become registered with the Commission if, for example, it is relying on the exemption provided by section 203(l) of the Act and accepts a client that is not a venture capital fund. *See* amended Form ADV: General Instruction 15; Exemptions Adopting Release, *supra* note 4, at Section II.A.

[209] *See* amended Form ADV: General Instruction 15.

[210] *See* amended Form ADV: General Instruction 15. For example, an adviser transitioning from

Instruction 15 provides a safe harbor for certain exempt reporting advisers relying on the ''private fund adviser'' exemption provided by rule 203(m)-1. Such an adviser that has complied with all of its reporting obligations as an exempt reporting adviser may continue advising private fund clients for up to 90 days after filing an annual updating amendment indicating that it has private fund assets of $150 million or more before filing its final report and application for registration.[211] This transition period is designed to accommodate events that may be beyond the adviser's control, such as an increase in the value of the adviser's assets under management, but it is not available to an adviser that otherwise would not qualify for the exemption provided by rule 203(m)–1. The transition period also is not available to advisers relying on the ''venture capital adviser'' exemption in section 203(l) of the Act. Advisers seeking to rely on that exemption may not accept a client that is not a venture capital fund without first registering under the Adviser Act.[212] Commenters who addressed the proposal to require a final report endorsed the Commission's approach.[213]

C. Form ADV

We are adopting today a number of amendments to Form ADV that will improve our ability to oversee investment advisers. Data collected from Form ADV is of critical importance to our regulatory program and our ability to protect investors. We use information reported to us on Form ADV for a number of purposes, such as to efficiently allocate our examination resources based on the risks we discern, or to identify common business activities, from information provided by advisers. The information is used to create risk profiles of investment advisers and permits our examiners to better prepare for, and more efficiently conduct, their examinations. Moreover, the information in Form ADV allows us to better understand the investment advisory industry and to evaluate the implications of policy choices we must make in administering the Advisers Act.

As amended, Form ADV requires advisers to provide us with additional information about three areas of their operations.[214] First, we require advisers to provide additional information about private funds they advise. Second, we expand the data advisers provide us about their advisory business (including data about the types of clients they have, their employees, and their advisory activities), as well as about their business practices that may present significant conflicts of interest (such as the use of affiliated brokers, soft dollar arrangements, and compensation for client referrals). Third, we require additional information about advisers' non-advisory activities and their financial industry affiliations. Some additional changes to the Form (described below) improve our ability to assess compliance risks and also to identify advisers that are subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements.[215]

The commenters that addressed these proposed amendments to Form ADV generally supported the amendments,[216] although many expressed concerns with or urged changes to the proposed private fund reporting requirements contained in Item 7.B. and Section 7.B.(1) of Schedule D.[217] Two commenters argued that the new information requirements we proposed to Part 1A of Form ADV overlap in some respects with the new brochure requirements (Part 2 of Form ADV) and should not be adopted.[218] We acknowledge some overlap in the information required to be reported, but note that overlap may be necessary as the two parts of Form ADV serve very different purposes. Part 2 of Form ADV may overlap Part 1 to ensure that investors are fully informed about a particular practice or conflict, while the information we collect in Part 1 permits us to collect data about that practice or conflict for regulatory purposes.

We are adopting amendments to the form, with several substantive and technical or clarifying revisions that respond to comments we received.

1. Private Fund Reporting: Item 7.B.

We are adopting amendments to Item 7.B. and Schedule D of Form ADV that expand the information advisers must report to us about the private funds they advise. This information will provide us with a more complete understanding of private funds and permit us to enhance our assessment of advisers for purposes of targeting our examinations. The information will also improve our ability to identify practices that could harm investors and help expose and deter fraud and other misconduct.[219] Both registered and exempt reporting advisers are required to complete Item 7.B. and the related portions of Schedule D.

Item 7.B. requires an adviser to complete a separate Section 7.B. of Schedule D for each private fund that it advises. Part A of Section 7.B.(1) requires an adviser to provide basic information regarding the size and organizational, operational, and investment characteristics of each fund. Part B requires information about five types of private fund service providers that perform important roles as ''gatekeepers.'' This information will be publicly available, as is other information reported on Form ADV. We are adopting these amendments with several changes, discussed below, that respond to comments we received.

Item 7.B. has required an adviser to complete section 7.B. of Schedule D for each ''investment-related'' limited partnership or limited liability company

exempt reporting to registered would violate the Advisers Act registration requirement if it provides advisory services to a client that is not a private fund before the Commission approves its application for registration.

[211] *See* amended Form ADV: General Instruction 15. This condition reflects the importance of the Advisers Act reporting requirements applicable to advisers relying on the exemption provided by rule 203(m)–1. *See also* Exemptions Adopting Release, *supra* note 4, at n.377. An adviser that meets or exceeds $150 million in assets under management in the United States must indicate that change by checking the box in Item 2.B.(3) of Form ADV in its annual updating amendment.

[212] *See* amended Form ADV: General Instruction 15.

[213] ABA Committees Letter; Merkl Implementing Letter.

[214] In addition, we are making several clarifying or technical amendments in response to comments, frequently asked questions we receive, and our experience administering the form. *See infra* sections II.C.5. and 7.

[215] *See* section 956 of the Dodd-Frank Act.

[216] *See, e.g.,* NASAA Letter; IAA General Letter (stating that enhanced disclosure in Part 1 of Form ADV will improve the Commission's ability to gather data about firms and to conduct appropriate inquiries, inspections, and other activities based on that data, and noting that certain additional information will allow the Commission to focus its examination and enforcement resources on those advisers that appear to present greater compliance risks); CPIC Letter (noting that additional information that the revised form will collect should be of assistance to the Commission in its efforts to identify fund advisers, to verify the existence and location of assets and to carry out general market surveillance, and it should also be of use to investors as they conduct due diligence and research the background of fund managers).

[217] *See, e.g.,* ABA Committees Letter; AV Letter; AIMA Letter; comment letter of CompliGlobe Ltd. (Jan. 24, 2011) (''CompliGlobe Letter''); comment letter of Debevoise & Plimpton LLP (Jan. 24, 2011) (''Debevoise General Letter''); comment letter of DLA Piper LLP (US) (on behalf of Emerging Growth and Venture Capital Group) (Jan. 24, 2011)) (''DLA Piper VC Letter''); comment letter of Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP (Jan. 24, 2011) (''Gunderson Letter''); IAA General Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; NVCA Letter; O'Melveny Letter; Seward Letter; Shearman Letter.

[218] *See* NRS Letter (asserting that parts of the proposed amendments to Items 5, 6, 7, 8, and 10 would result in duplicative reporting); Seward Letter.

[219] *See* Implementing Proposing Release, *supra* note 7, at nn.148–150 and accompanying text.

that it or a related person advises.[220] We are modifying, as proposed, the scope of Item 7.B. by requiring an adviser to complete a separate Schedule D for each ''private fund'' that the adviser (but not a related person) manages. We use the new term ''private fund,'' defined in section 202(a)(29) of the Act,[221] with the result that advisers must report on pooled investment vehicles regardless of how they are organized. In addition, as proposed, we are narrowing the reporting requirement so that advisers are no longer required to report on the funds of their related persons, which in most cases are now required to be reported to us by a related person that is either registered under the Act or is an exempt reporting adviser.[222]

We are also adopting several measures that will help to avoid multiple reporting for each private fund and minimize the overall burden of reporting private fund information. First, only one adviser must report the full scope of information for each private fund, even where there are other advisers to the same fund (*e.g.,* subadvisers).[223] Second, an adviser managing a master-feeder arrangement may submit a single Section 7.B.(1) for the master fund and all of the feeder funds if these funds would otherwise report substantially identical information.[224] Finally, an adviser with a principal office and place of business outside the United States is not required to complete Schedule D for any private fund that, during the adviser's last fiscal year, was not a United States person, was not offered in the United States and was not beneficially owned by any United States person.[225] Commenters did not address any of the issues raised by these changes to Item 7.B., which we are adopting as proposed.

An adviser must file a separate Section 7.B.(1) (Parts A and B) for each private fund it manages.[226] Part A of Section 7.B.(1) requires an adviser to provide the name of the fund and the state or country in which the fund is organized and to identify other persons involved in the management of the fund.[227] Part A also requires the adviser to report whether the fund is part of a master-feeder arrangement [228] or is a fund of funds [229] and to provide information about the regulatory status of the fund, such as the exclusion from the Investment Company Act on which the fund relies, whether the fund is subject to the jurisdiction of a foreign regulatory authority, and whether the fund relies on an exemption from registration under the Securities Act of 1933 (the ''Securities Act'') with respect to its securities.[230] An adviser must also identify, within seven broad categories, the type of investment strategy the fund employs,[231] report whether the fund invests in securities of registered investment companies,[232] and provide the gross asset value of the fund.[233] Finally, an adviser must provide limited information regarding investors in the fund, including: (i) The minimum amount that investors are required to invest; [234] (ii) the approximate number of beneficial owners of the fund and the approximate percentage of the fund beneficially owned by the adviser and

[220] Section 7.B. of Schedule D previously required an adviser to a private fund that is a limited partnership or limited liability company to provide only the following information: (i) The name of the fund; (ii) the name of the general partner or manager; (iii) whether the adviser's clients are solicited to invest in the fund; (iv) the approximate percentage of the adviser's clients that have invested in the fund; (v) the minimum investment commitment; and (vi) the current value of the total assets of the fund. As we discussed in the Implementing Proposing Release, this information provided us with little data about the operations of the many large hedge funds and other private funds managed by a growing number of advisers registered with the Commission.

[221] This section defines a ''private fund'' as an issuer that would be an investment company, as defined in section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3), but for section 3(c)(1) or 3(c)(7) of that Act.

[222] The Dodd-Frank Act repealed the private adviser exemption effective July 21, 2011, so many private fund advisers that were previously unregistered will now be required to register under the Advisers Act. *See supra* at sections I. and II.B.

[223] If an investment adviser completes section 7.B.(1) of Schedule D for a private fund, other advisers to that fund do not have to complete section 7.B.(1) for that private fund. *See* amended Form ADV, Part 1A, Note to Item 7.B.; Section 7.B.(2) of Schedule D. Section 7.B.(1) of Schedule D requires advisers to provide a private fund identification number, which is a unique identification number for each fund. Advisers must obtain an identification number for each private fund by logging onto the IARD Web site and using the private fund identification number generator. Once an adviser obtains a private fund identification number for a private fund, all advisers to the fund must use that same number on Sections 7.B.(1) and 7.B.(2) for that fund and continue using that same number whenever they amend either section of Schedule D. *See* amended Form ADV: Instructions for Part 1A, instr. 6.b.

[224] *See* amended Form ADV: Instructions for Part 1A, instr. 6.d. The feeder funds need not have a direct relationship with the master fund's prime broker or custodian to rely on this instruction. In a master-feeder arrangement, one or more funds (''feeder funds'') invest all or substantially all of their assets in a single fund (''master fund'').

[225] *See* amended Form ADV: Instructions for Part 1A, instr. 6.a. This instruction is only necessary for those funds that fall within the definition of ''private fund.'' A non-U.S. fund that has never used U.S. jurisdictional means in the offering of the securities it issues would not be a private fund. *See* Exemptions Adopting Release, *supra* note 4, at n.285 and accompanying text. We have modified this instruction from the proposal to more closely follow the requirements of Regulation S; the instruction now looks to whether the offering was made ''in the United States'' rather than ''to * * * any *United States person.*'' *See also* amended Form ADV: Glossary. ''United States person'' is defined by reference to the definition in rule 203(m)–1, which tracks the definition of a ''U.S. person'' under Regulation S, except that it contains a special rule for discretionary accounts maintained for the benefit of United States persons. *See* Exemptions Adopting Release, *supra* note 4, at section II.B.4.

[226] *See* amended Form ADV, Part 1A, Item 7.B.

[227] An adviser is required to report the names of the fund's general partner, trustee and directors and persons occupying similar positions as well as the name and SEC file number of any other advisers to the fund. *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 1–3 and 17–18.

[228] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 6 and 7. As discussed above, an adviser managing a master-feeder arrangement may submit a single Schedule D for the relevant funds if the information provided would otherwise be substantially identical. *See supra* note 224 and accompanying text. We have added a note to question 6 to clarify that an adviser must respond to that question regardless of whether it is filing a single Schedule D, Section 7.B.(1) for the master-feeder arrangement or reporting on the funds separately.

[229] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 8. Clause (b) of this question also requires the adviser to indicate whether the fund invests in funds managed by the adviser or its related persons.

[230] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 4–5 and 21–22. Two commenters asserted that requiring advisers to report whether the fund relies on an exemption from registration under the Securities Act with respect to its securities is unnecessarily duplicative because the information is already reported on Form D. *See* Debevoise General Letter; NYSBA Committee Letter. We are not persuaded that providing this information will significantly increase the reporting burden, and the information will assist both the Commission and the public in quickly and accurately locating additional relevant information regarding the fund.

[231] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 10. The categories, which are defined in the Instructions for Part 1A, include: (i) Hedge fund; (ii) liquidity fund; (iii) private equity fund; (iv) real estate fund; (v) securitized asset fund; (vi) venture capital fund; and (vii) other private fund. *See infra* note 248 and accompanying text for a discussion of changes to these definitions.

[232] This information relates to compliance with the provision of the Investment Company Act that limits the ability of one investment company to invest in shares of another. *See* section 12(d)(1) of the Investment Company Act (15 U.S.C. 80a–12(d)(1)) and amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 9. We have modified this question from the proposal to cross-reference Instruction 6.e. of the Instructions for Part 1A, which excludes from this question investments in money market funds made in reliance on rule 12d1–1 under the Investment Company Act because that rule exempts (subject to the conditions described in the rule) investments in money market funds from the limitations contained in section 12(d)(1) of the Investment Company Act. 17 CFR 270.12d1–1.

[233] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 11.

[234] *See* amended Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 12. We made one change in this item in response to a comment, which pointed out that a private fund manager may have discretion to lower the minimum amount, meaning that the minimum investment may in practice be different from the amount set out in the organizational documents of the fund. IAA General Letter. We have added an instruction clarifying that the amount reported should be the amount that is routinely required of investors who are not related persons of the adviser.

its related persons, funds of funds and non-United States persons;[235] and (iii) the extent to which clients of the adviser are solicited to invest, and have invested, in the fund.[236] We are adopting Part A with several changes discussed below.[237]

Several commenters argued that certain information we proposed to include in Part A is competitively sensitive or proprietary and, as a result, should not be disclosed publicly.[238] These commenters focused in particular on three of the proposed questions in Part A. The first would have required an adviser to report both the gross and net asset values of each private fund it manages.[239] Commenters asserted that public disclosure of this information could reveal a fund's leverage, which may be competitively sensitive strategy information.[240] In addition, commenters expressed concerns regarding the competitive effects of our proposal to require that advisers report the assets and liabilities of each fund broken down by class and categorization in the fair value hierarchy established under GAAP.[241] Commenters explained that this disclosure could harm an adviser's competitiveness and could, for instance, be used to ascertain the values of private companies held by venture capital funds that make only one or a few investments, potentially harming the private company and the interests of the private fund and its investors.[242] Finally, our proposal would have required that advisers report the approximate percentage of each fund beneficially owned by certain types of investors.[243] Commenters argued that the public disclosure of these data could reveal potentially sensitive information and, in particular, that they could be used to reverse engineer investor identities where a fund is owned by a few investors and that it could serve to deter certain institutional clients from investing in private funds.[244] We are persuaded at this time that, with respect to these three questions, the benefit of public disclosure would not outweigh the potential competitive harm. Therefore, we are not adopting the amendments that would have required an adviser: (i) to disclose each private fund's net assets;[245] (ii) to report private fund assets and liabilities by class and categorization in the fair value hierarchy established under GAAP;[246] and (iii) to specify the percentage of each fund owned by particular types of beneficial owners.[247]

As noted above, Part A of Section 7.B.(1) requires an adviser to classify each of its private funds by strategy, using definitions that we proposed in the instructions to Form ADV.[248] In the Systemic Risk Reporting Release, we also proposed to use these definitions for purposes of Form PF.[249] Although we received no comments on these definitions in this rulemaking, we received several comments on the same definitions in response to Form PF.[250] We have considered these comments in the context of this rulemaking and have determined to make several changes. We will also consider these comments in the context of the Form PF release.

The first of the changes we are making clarifies the definitions to address concerns that a securitized asset fund may be classified as a hedge fund because of its borrowings.[251] We believe that the quality and usefulness of the data reported depends in part on accurately grouping funds and that securitized asset funds should not be categorized as hedge funds based on their issuance of debt. To clarify the definitions, we have excluded securitized asset funds from the definition of ''hedge fund'' and modified ''securitized asset fund'' so that it is no longer defined by reference to ''hedge fund.''

Second, we have modified clause (a) of the ''hedge fund'' definition, which classifies funds based on whether performance fees or allocations are calculated by taking into account unrealized gains. One commenter pointed out that even funds that do not allow for the payment of such fees or allocations, such as private equity funds, may be required to accrue or allocate these amounts in their financial statements to comply with applicable accounting principles.[252] We did not intend for funds that accrue or allocate these fees or allocations solely for financial reporting purposes to be classified as hedge funds, so we have clarified that clause (a) relates only to

[235] *Id.* questions 13–16. For purposes of these questions, beneficial owners are persons who would be counted as beneficial owners under section 3(c)(1) of the Investment Company Act or who would be included in determining whether the owners of the fund are qualified purchasers under section 3(c)(7) of that Act. (15 U.S.C. 80a–3(c)(1) or (7)). We added the word ''approximate'' to question 13 to make this question more consistent with questions 14–16 and because we understand based on comments received that, in some cases, the number of beneficial owners may change frequently, making a precise number more difficult to provide and less meaningful. *See* IAA General Letter.

[236] *Id.* questions 19–20. This information helps to identify where a fund manager may have conflicts of interest with fund investors of the sort that implicate the adviser's fiduciary obligations to the fund and, in some cases, create risks for the fund investors.

[237] *See also infra* notes 264 through 279 and accompanying text for a general discussion of comments on Section 7.B.(1). Some of these comments relate to all or portions of the proposed reporting requirements in Part A.

[238] *See* IAA General Letter; MFA Letter; NVCA Letter; NYSBA Committee Letter; O'Melveny Letter.

[239] *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, questions 11(a) and 11(b).

[240] *See, e.g.,* MFA Letter. *See also* NYSBA Committee Letter.

[241] *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 12. *See also* FASB ASC 820–10–50–2b.

[242] *See* MFA Letter; NVCA Letter; O'Melveny Letter.

[243] *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)A. of Schedule D, question 17. The investor types included individuals, broker-dealers, insurance companies, registered investment companies, private funds, non-profits, pension funds, banks and thrift institutions, and state and municipal government entities.

[244] IAA General Letter. *See also* MFA Letter.

[245] We are, however, adopting question 11(a), concerning gross assets, as proposed. This question retains the requirement, included in Form ADV prior to today's amendments, that advisers report the total (or gross) assets of their private funds on Section 7.B. of Schedule D. Net asset values of individual funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities. *See* Systemic Risk Reporting Release, *supra* note 71 (proposing non-public reporting of gross and net asset values for private funds managed by registered investment advisers).

[246] The fair value breakdown for individual funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider whether to adopt it as part of our Form PF proposal. *See* Systemic Risk Reporting Release, *supra* note 71. Some commenters also expressed concern with respect to the burden of reporting this information. *See, e.g.,* ABA Committees Letter; AIMA Letter; Dechert General Letter; DLA Piper VC Letter; IAA General Letter; Katten Foreign Advisers Letter; Merkl Implementing Letter; NVCA Letter. We will consider these comments in connection with our consideration of other comments on proposed Form PF.

[247] Beneficial ownership percentages of funds may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider whether to adopt it as part of our Form PF proposal. *See* Systemic Risk Reporting Release, *supra* note 71. Some commenters also expressed concern with respect to the burden of reporting this information. *See, e.g.,* Debevoise General Letter; IAA General Letter; Shearman Letter. We will consider these comments in connection with our consideration of other comments on proposed Form PF.

[248] The definitions appear in Instruction 6 of the instructions to Part 1A of Form ADV. *See supra* at note 231 and accompanying text.

[249] *See* Systemic Risk Reporting Release, *supra* note 71, at section II.B.1. If adopted, registered advisers would use Form PF to report information about the private funds they manage for use by FSOC in its assessment of systemic risk in the U.S. financial system.

[250] These comments were submitted in response to the Systemic Risk Reporting Release, *supra* note 71, and are available on the Commission's Web site at: *http://www.sec.gov/comments/s7-05-11/s70511.shtml.*

[251] *See* Comment letter of TCW Group, Inc. (Apr. 12, 2011) (''TCW Systemic Risk Reporting Letter'').

[252] *See* TCW Systemic Risk Reporting Letter.

fees or allocations that may be *paid* to an investment adviser (or its related persons).

Third, we have addressed another commenter's concern that clause (a) could inadvertently capture certain private equity funds because, although these funds typically calculate currently payable performance fees and allocations based on realized amounts, they will sometimes reduce these fees and allocations by taking into account ''unrealized losses net of unrealized gains in the portfolio.'' [253] We agree that funds should not be classified as hedge funds based solely on this practice and have clarified that clause (a) would not include performance fees or allocations the calculation of which may take into account unrealized gains solely for the purpose of reducing such fees or allocations to reflect net unrealized losses.

Finally, several commenters asserted that clause (c) of the ''hedge fund'' definition, which looks to whether a fund may engage in short selling, should include an exception for a *de minimis* amount of short selling or exclude short selling intended to hedge the fund's exposures.[254] We continue to believe that short selling is a potentially important distinguishing feature of hedge funds, many of which may, as the name suggests, use short selling to hedge or manage risk of various types. We are persuaded, however, that many funds pursuing traditional investment strategies use short positions to hedge foreign exchange risk and to manage the duration of interest rate exposure, and we are concerned that including funds within the definition of ''hedge fund'' solely because they use these particular techniques would dilute the meaningfulness of the category. Therefore, we have modified clause (c) to provide an exception for short selling that hedges currency exposure or manages duration.[255] We expect that the changes to the private fund definitions discussed above will provide for a more accurate classification of private funds and reduce the number of funds categorized as hedge funds.

Part B of Section 7.B.(1), as amended, requires advisers to report information concerning five types of service providers that generally perform important roles as ''gatekeepers'' for private funds—auditors, prime brokers, custodians, administrators, and marketers.[256] An adviser must identify each of these service providers, report their locations, and indicate which of them, if any, are related persons of the adviser.[257] In addition, for certain types of service providers, an adviser would report information intended to help us and investors understand the nature of the services provided. For instance, with respect to each prime broker, an adviser must indicate whether the prime broker has custody of fund assets.[258]

We are adopting Part B with minor changes from the Implementing Proposing Release that are designed to clarify instructions. Where we ask for the percentage of the fund's assets valued by a third party, we have revised the question and instructions to clarify that a person should be viewed as valuing an asset for this purpose only if that person carried out the valuation procedure for that asset (if any) and that person's determination as to value was used for purposes of subscriptions, redemptions, distributions and fee calculations.[259] We have decided not to require advisers to report the name and location of the third parties performing these valuations because we recognize, as commenters pointed out, that identifying the specific person carrying out the valuation could be difficult where two or more third parties are involved (such as where an unaffiliated administrator obtains a quote from an electronic pricing service).[260] In addition, we are modifying question 23, which requires information about the relevant private fund's auditing firm, so that advisers must indicate whether the fund's auditor issued an unqualified opinion on the fund's financial statements.[261] By requiring this information in question 23, we are able to relieve advisers from the burden of reporting similar information with respect to private funds in Section 9.C. of Schedule D.[262] Few commenters specifically addressed the proposed reporting requirements in Part B.[263]

Many commenters who addressed the private fund reporting requirements did not comment on specific items but provided comments more generally on the proposals. Several expressed strong support for the proposal as a

[253] *See* comment letter of the Private Equity Growth Capital Council (Apr. 12, 2011) (''PEGCC Systemic Risk Reporting Letter'').

[254] *See* comment letter of the Investment Adviser Association (Apr. 12, 2011) (''IAA Systemic Risk Reporting Letter''); PEGCC Systemic Risk Reporting Letter; Comment letter of Securities Industry and Financial Markets Association (Apr. 12, 2011) (''SIFMA Systemic Risk Reporting Letter''); TCW Systemic Risk Reporting Letter.

[255] We have also made a change to clause (c) to clarify that this clause includes traditional short sales and any transaction resulting in a short exposure to a security or other asset (such as using a derivative instrument to take a short position). The purpose of this definition is to appropriately categorize funds that engage in certain types of market activity, and whether the definition applies should not depend on the form in which the fund engages in that activity. In addition, we note that several commenters expressed concern that clauses (b) and (c) of the ''hedge fund'' definition are too broad because many funds have the capacity to borrow or incur derivative exposures in excess of the specified amounts or to engage in short selling but do not in fact engage, or intend to engage, in these practices. *See, e.g.,* comment letter of the Alternative Investment Management Association (Apr. 12, 2011); IAA Systemic Risk Reporting Letter; PEGCC Systemic Risk Reporting Letter; SIFMA Systemic Risk Reporting Letter; TCW Systemic Risk Reporting Letter. These commenters generally argued that clauses (b) and (c) should focus on actual or contemplated use of these practices rather than potential use. We have not made changes to the ''hedge fund'' definition in response to these comments because we continue to believe that clauses (b) and (c) properly focus on a fund's ability to engage in these practices. Even a fund for which leverage or short selling is an important part of its strategy may not engage in that practice during every reporting period. We would, however, not regard a private fund to be a ''hedge fund'' solely because its organizational documents fail to prohibit the fund from borrowing or incurring derivative exposures in excess of the specified amounts or from engaging in short selling so long as the fund in fact does not engage in these practices (other than, in the case of clause (c), short selling for the purpose of hedging currency exposure or managing duration) and a reasonable investor would understand, based on the fund's offering documents, that the fund will not engage in these practices.

[256] *See* amended Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D.

[257] *Id.* questions 23–28.

[258] *Id.* question 24(e). *See also id.* questions 23(a), 23(g), 23(h), 26(e), 26(f), 28(f), and 28(g).

[259] *Id.* question 27. We are making this change in response to commenter requests for clarification regarding ''what constitutes assets 'valued' by a third-party administrator.'' IAA General Letter; *see also* ABA Committees Letter.

[260] *See* IAA General Letter and ABA Committees Letter, each discussing the difficulty of identifying who is ''valuing'' an asset. *See* the Implementing Proposing Release for the as proposed version of Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D, question 28(f)(2) and (3).

[261] *See* amended Form ADV, Part 1A, Section 7.B.(1)B. of Schedule D, question 23(h).

[262] *See* amended Form ADV, Part 1A, Item 9.C., which provides that ''[i]f you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.(1) of Schedule D.'' An adviser must still complete Section 9.C. of Schedule D with respect to clients other than private funds to the extent required by the instructions to Item 9.C.

[263] *See, e.g.,* Debevoise General Letter (contending that the service provider information ''goes beyond what is necessary'' because it requests ''**both** the legal name of the custodian as well as the custodian's primary business name'' (original emphasis)); Shearman Letter (arguing that a ''fund's investors will generally already receive [information identifying the fund's service providers] and it generally has little public interest''). With respect to the comment in the Debevoise General Letter, we are not persuaded that providing both a legal name and business name will significantly increase the reporting burden, and the information will assist both the Commission and the public in quickly and accurately identifying the relevant custodian. With respect to the comment in the Shearman Letter, see the discussion accompanying note 272 below regarding the value of public disclosure of Section 7.B.(1) information generally.

whole,[264] and some agreed with our assessment that the new information will allow us to identify harmful practices, to improve risk assessment, and to more efficiently target examinations.[265] A few recommended that we expand the requirements to include reporting of performance information.[266] Many commenters offered more measured support, generally agreeing with the Commission's proposal but expressing reservations about the public availability of the information or concerns about the difficulty of responding to specific reporting items.[267] Often citing these same concerns, some commenters disagreed more generally with the Commission's proposal.[268]

Critics of the proposal most frequently focused on public disclosure of the information required by Section 7.B., arguing that all or part of the required private fund information is competitively sensitive or proprietary.[269] As discussed above, we have made several changes to Part A of Section 7.B.(1) to address some of these concerns. However, we continue to believe that, as a general matter, the information we collect in response to Item 7.B. is important for several reasons, including to inform prospective clients and other investors.[270] Moreover, and as we discussed in the Implementing Proposing Release, the public availability of this information will serve as a check on fund managers, helping to deter fraud and other misconduct.[271] We are not persuaded that public disclosure is unnecessary simply because, as some commenters asserted, investors in these pooled investment vehicles meet certain sophistication standards or may otherwise receive similar information from advisers.[272] To the contrary, it is precisely the ability of these investors to compare Form ADV information to the information they have received in offering documents and due diligence that makes public disclosure valuable. We also believe that public disclosure could reduce the likelihood of advisers making false representations regarding fund service providers, such as administrators and auditors, who could uncover false representations by reviewing the information that advisers report to us and comparing it to their own client lists.[273] In addition, as discussed above, the Advisers Act requires that information filed in a report with the Commission be made available to the public unless the Commission finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors.[274] We are not convinced that withholding the private fund information reported on Form ADV is in the public interest. Therefore, as proposed, it will be available to the public.

Commenters expressing disagreement with all or parts of our proposal also pointed to what they viewed as an excessive reporting burden, particularly where valuation or ownership information would be required.[275] As discussed above, we are adopting Part A of Section 7.B.(1) with several changes that reduce the amount of information required in respect of private funds. We are not convinced that the burden associated with Item 7.B. and Schedule D will be excessive, in part because commenters confirmed that much of the required information is readily available to private fund advisers.[276] These commenters also acknowledged that the required information is similar to, and at times less extensive than, the information that investors in hedge funds and other private funds commonly receive in response to due diligence questionnaires or in offering documents.[277] Moreover, responses to many of the items are unlikely to change from year to year.

Finally, a few commenters expressed concern that an adviser's required public disclosure on Section 7.B.(1) of Schedule D could call into question a private fund's reliance on the non-public offering exemption in the Securities Act.[278] We believe public disclosure of the information required by Section 7.B.(1) of Schedule D

[264] *See, e.g.,* AFL–CIO Letter; AFR Letter; Better Markets Letter; CII Letter; CPIC Letter; comment letter of U.S. Senator Carl Levin (''Sen. Levin Letter'').

[265] *See, e.g.,* CII Letter; CPIC Letter; NASAA Letter; Sen. Levin Letter (also asserting that the data would assist FSOC in monitoring systemic risk).

[266] *See* AFL–CIO Letter and AFR Letter, each favoring public disclosure of 1-, 5- and 10-year performance numbers. We note that performance data may be important to our investor protection mission and to FSOC's systemic risk monitoring activities, and we will consider these comments in connection with our consideration of other comments on proposed Form PF. *See* Systemic Risk Reporting Release, *supra* note 71.

[267] *See, e.g.,* IAA General Letter (supporting the ''increased oversight of private funds and increased information gathering'' but arguing that ''the Commission should limit the public availability of private fund information provided on Part 1 of Form ADV.''); MFA Letter (''MFA strongly supports private fund managers reporting to the Commission information about their businesses or the funds they manage. We believe, however, that the Commission should carefully consider whether the additional step of publicly disclosing information it collects would enhance its oversight capabilities, and whether any such benefits would outweigh the potentially significant costs to managers in sharing sensitive business information with market participants.''); Dechert General Letter (stating that they ''generally agree with the information the Revised Form ADV would be soliciting with respect to private funds managed by registered or exempt reporting advisers'' but expressing reservations regarding the requirement to report private fund assets and liabilities by class and categorization in the fair value hierarchy established under GAAP). *See also* DLA Piper VC Letter; Merkl Implementing Letter; NVCA Letter.

[268] *See, e.g.,* AIMA Letter; AV Letter; CompliGlobe Letter; Debevoise General Letter; Katten Foreign Advisers Letter; NRS Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter; AV Letter.

[269] *See, e.g.,* ABA Committees Letter; AIMA Letter; AV Letter; CompliGlobe Letter; Debevoise Letter; DLA Piper VC Letter; Gunderson Letter; IAA General Letter; Katten Foreign Advisers Letter; MFA Letter; NRS Letter; NVCA Letter; NYSBA Committee Letter; O'Melveny Letter; Seward Letter; Shearman Letter.

[270] Several commenters agreed. *See, e.g.,* AFL–CIO Letter (''This information will assist investors as they perform due diligence before making investment decisions * * *''); AFR Letter (''making clear and uniform information on private investment funds available to the public will make it easier for investors to perform due diligence * * *''); CII Letter; CPIC Letter (''The additional information that the revised Form will collect * * * should also be of use to investors as they conduct due diligence and research the background of fund managers.'').

[271] *See* Implementing Proposing Release, *supra* note 7, at nn.150 and 175 and accompanying text. *See also* CII Letter (agreeing that ''the public availability of such basic information would aid investors in their due diligence efforts and help investors and other industry participants protect against fraud'').

[272] *See, e.g.,* ABA Committees Letter; AV Letter; NRS Letter; NYSBA Committee Letter; Shearman Letter.

[273] *See, e.g., In the Matter of John Hunting Whittier,* Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

[274] Advisers Act section 210(a). *See supra* section II.B.3. for discussion of public availability of exempt reporting adviser filings.

[275] *See, e.g.,* AIMA Letter; AV Letter; BCLBE Letter; Debevoise General Letter; comment letter of Dechert LLP (on behalf of foreign asset manager) (Jan. 24, 2011) (''Dechert Foreign Adviser Letter''); Gunderson Letter; Katten Foreign Advisers Letter; NRS Letter; Seward Letter; Shearman Letter; Village Ventures Letter.

[276] *See, e.g.,* ABA Committees Letter (''We expect that most ERAs will already have most of the information requested by Form ADV Part 1 readily available.''); Katten Foreign Advisers Letter (''Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports.''); NRS Letter (arguing that the expanded private fund disclosures on Schedule D would ''replicate the due diligence questionnaire information. * * *'').

[277] *See, e.g.,* ABA Committees Letter; NRS Letter. *See also* AIMA's Illustrative Questionnaire For Due Diligence of Hedge Fund Managers, available at (registration required) *http://www.aima.org/en/knowledge_centre/index.cfm.*

[278] *See* IAA General Letter; MFA Letter. The non-public offering exemption is found in Section 4(2) of the Securities Act. Offers and sale of securities by an issuer that satisfy the conditions of Rule 506 of Regulation D (17 CFR 230.501 *et seq.*) are deemed to be non-public within the meaning of Section 4(2).

through IAPD would not, in and of itself, jeopardize the fund's reliance on that exemption (or the safe harbor for offshore offerings provided by Regulation S under the Securities Act).[279]

2. Advisory Business Information: Employees, Clients and Advisory Activities: Item 5

Item 5 of Part 1A requires a registered adviser to provide basic information regarding the business of the adviser that allows us to identify the scope of the adviser's business, the types of services it provides, and the types of clients to whom it provides those services. The item also requires information from the adviser about the number of its employees, the amount of assets it manages, and the number and types of its clients.

We are adopting the amendments that we proposed to Item 5.B., which require an adviser to indicate how many of its employees are registered as investment adviser representatives or are licensed insurance agents.[280] An adviser must also provide a single numerical approximation (instead of a range) in response to these questions as well as to the existing questions that ask about employees that perform investment advisory functions or are registered representatives of a broker-dealer, and firms that solicit advisory clients.[281] Commenters did not object to these new questions and revisions.

We are adopting amendments to Items 5.C. and 5.D., which require advisers to report the number and types of clients the adviser services. Specifically, the amendments require each registered adviser to: (i) provide an approximate number of clients it has if over 100; [282] (ii) report the approximate percentage of its clients that are not United States persons; [283] (iii) specify the types of clients that it advises (adding categories for business development companies, other investment advisers, and insurance companies) and the percentage that each client type comprises of its total number of clients (adding a box to check if 100% of an adviser's clients are a particular type); [284] and (iv) report in a new item the approximate percentage (in broad ranges) of assets under management attributable to each client type.[285] These form amendments are designed to help us better understand an adviser's business.

Commenters did not address our proposed amendments to Item 5.C., which we are adopting as proposed. We are making one change to Item 5.D., as suggested by one commenter, so that advisers report approximate percentages of assets under management by client type in broad ranges (*i.e.*, 25 percent segments).[286] This change will decrease the burden on advisers gathering the data necessary to respond to this item while retaining the substance of the information we need for our risk-assessment program. We are also, at the suggestion of a commenter, adding a note to Items 5.D.(1) and (2) to clarify that an adviser should check all applicable boxes.[287]

We are adopting, as proposed, amendments to Item 5.G. that require an adviser to select from a list set forth in the form the types of advisory services that it provides, and that add two additional types of services: (i) portfolio management for pooled investment vehicles, *other* than registered investment companies; and (ii) educational seminars or workshops.[288] At the request of a commenter, we are clarifying that educational seminars and workshops would not include episodic meetings at which advisers educate existing clients about issues related to the ongoing management of their accounts.[289] In addition, the revised item requires that if an adviser selects from that list ''portfolio management for an investment company,'' the adviser must provide the SEC file number for the registered investment company, as well as business development companies that have made an election pursuant to section 54 of the Investment Company Act of 1940, in Section 5.G.(3) of Schedule D. This information will connect information reported on Form ADV to information reported on forms filed through our EDGAR system by investment companies managed by these advisers. We have made a few technical changes to avoid potential overlap of some of the listed types of advisory services.[290]

We are adopting new Item 5.J. to require advisers to indicate whether they report, in response to Item 4.B. of Part 2A of Form ADV, that they provide investment advice only with respect to limited types of investments. We had proposed to require advisers to indicate the types of investments they provided advice about during the previous fiscal year. Commenters expressed skepticism about whether such an item would provide us with much useful information because many advisers would simply indicate all the items.[291] We agree, and have revised the item to provide us with information that will identify advisers that disclose to their clients that they provide specialized advice, which is the type of information we had intended to collect.

3. Other Business Activities and Financial Industry Affiliations: Items 6 and 7

Items 6 and 7 of Part 1A require advisers, including exempt reporting advisers, to report those financial services the adviser or a related person is actively engaged in providing, from lists of financial services set forth in the items. We are adopting amendments to these items largely as proposed to provide us with a more complete picture of the activities of an adviser and its related persons, which would better enable us to assess the conflicts of interest and risks that may be created by those relationships and to identify affiliated financial service businesses.

First, we are expanding the lists of types of financial service businesses in both Items 6.A. and 7.A. As a result, an adviser must also report whether it or a related person is a trust company, registered municipal advisor, registered security-based swap dealer, or major security-based swap participant, the latter three of which are or will be new SEC-registrants under the Dodd-Frank Act's amendments to the Exchange

[279] We have previously taken a similar position with respect to mandatory reporting in Part 2 of Form ADV. *See* Part 2 Release, *supra* note 67, at n. 276 and accompanying text. Regulation S is codified at 17 CFR 230.901 *et seq.*

[280] Amended Form ADV, Part 1A, Items 5.B.(1)–(5).

[281] Amended Form ADV, Part 1A, Item 5.B.(6).

[282] Amended Form ADV, Part 1A, Item 5.C.(1).

[283] Amended Form ADV, Part 1A, Item 5.C.(2). *See supra* note 225 (discussing the definition of ''United States person'').

[284] Amended Form ADV Part 1A, Item 5.D.(1).

[285] Amended Form ADV Part 1A, Item 5.D.(2).

[286] Advisers should not, however, include as clients the investors in a private fund they advise unless they have a separate advisory relationship with those investors. Amended Form ADV, Part 1A, Items 5.C., 5.D. and 5.H.

[287] *See* IAA General Letter. For example, an adviser to a state pension plan should check boxes for both ''pension and profit sharing plans'' and ''state or municipal government entities.'' We also note that we are not adopting our proposal to divide the category for pension and profit sharing plans into those subject to ERISA and those that are not. *See id.* (noting that there could be substantial confusion about what it means to be ''subject to'' ERISA because some plans are subject to some, but not all, of ERISA's provisions).

[288] Amended Form ADV, Part 1A, Item 5.G.

[289] *See* IAA General Letter (requesting clarification that such episodic meetings would not be reportable educational seminars or workshops). We also confirm this commenter's understanding that educational seminars and workshops would not include events sponsored by third parties that are merely attended by an adviser's supervised persons.

[290] *See* amended Form ADV, Part 1A, Items 5.G.(4) and 5.G.(5).

[291] IAA General Letter.

Act.[292] Second, to parallel Item 7.A. for related persons, an adviser must also report if it is an accountant (or accounting firm) or lawyer (or law firm). Last, amendments to Item 7.A. require an adviser to report if a related person is a sponsor, general partner or managing member of a pooled investment vehicle,[293] and add an instruction to clarify that advisers' responses must include related persons that are foreign affiliates, regardless of whether they are registered or required to be registered in the United States. One commenter expressed support for the additions we proposed to make to the lists in Items 6.A. and 7.A., which we are adopting as proposed.[294] In response to commenters, we are clarifying that for responses to Item 7.A. relating to natural persons (*e.g.,* accountant, lawyer), the adviser should respond affirmatively only for such persons that have a separate business in that field rather than for those persons that the adviser may employ as accountants or lawyers.[295]

We also are amending Schedule D, which contains expanded reporting requirements that correspond to Items 6 and 7. Section 6.A. of Schedule D requires an adviser that checks the box in Item 6.A. to indicate that it is engaged in another financial service business under a different name, to list that other business name, and to identify the other lines of business in which the adviser engages using that name.[296] Sections 6.B.(2) and 6.B.(3) of Schedule D similarly require advisers that are primarily engaged in another business or that sell products or provide services other than investment advice to advisory clients to describe that business and provide the name under which it conducts that business, if different. One commenter, an association comprised of state regulators, expressed particular support for the Schedule D reporting requirement we are adopting with respect to 6.B.(3).[297]

Section 7.A. of Schedule D, requires advisers to provide certain identifying information for any type of related person listed in Item 7.A. as well as to provide more details about the relationship between the adviser and the related person, including whether the related person is registered with a foreign financial regulatory authority, whether they share employees or the same physical location, and, if the adviser is reporting a related person investment adviser, whether the related person is exempt from registration.[298] Responses to these questions will allow us to link disparate pieces of information to which we have access concerning an adviser and its affiliates as well as to identify whether the adviser controls the affiliate or vice versa. It will also provide us with a tool to identify where there may be advisory activities by unregistered affiliates.

Commenters who addressed Section 7.A. of Schedule D urged that we limit the reporting of related persons, which could be significant in the case of advisers that are part of a large organization.[299] Many of these commenters pointed out that in some cases the adviser and its clients have no business dealings with some affiliates and thus there is less of a chance of conflicts developing. We agree and have revised the proposed item to permit an adviser to omit reporting about certain related persons in a manner that is similar to the approach suggested by a commenter.[300] In particular, an adviser need not complete Section 7.A. of Schedule D for any related person if: (1) The adviser has no business dealings with the related person in connection with advisory services it provides to its clients; (2) the adviser does not conduct shared operations with the related person; (3) the adviser does not refer clients or business to the related person, and the related person does not refer prospective clients or business to the adviser; (4) the adviser does not share supervised persons or premises with the related person; and (5) the adviser has no reason to believe that its relationship with the related person otherwise creates a conflict of interest with its clients.[301] These criteria are designed so that advisers need not report about affiliates who are likely to present little, if any, potential for conflicts of interest. Under these criteria, an adviser may omit, for example, an offshore adviser that has no business dealings with the adviser, a bank that merely provides payroll services to the adviser, an accounting firm that prepares the adviser's annual tax return filings, or a real estate broker that represents the adviser in securing office space. However, an adviser may *not* omit an affiliated adviser with whom the adviser shares information technology infrastructure, for example, as the advisers would be considered to share operations.

Finally, we have moved to this item a question that had been in Item 9 that requires advisers to report whether a related person foreign financial institution acts as a qualified custodian for client assets under the adviser custody rule, to centralize reporting of related qualified custodians in a single item.[302]

4. Participation in Client Transactions: Item 8

Item 8 requires a registered adviser to report information about its transactions, if any, with clients, including whether the adviser or a related person (including a foreign related person) engages in transactions with clients as a principal, otherwise sells securities to clients, or has discretionary authority over client assets. We are adopting three amendments to this item. First, an adviser that indicates it has discretionary authority to determine the brokers or dealers for client transactions or that it recommends brokers or dealers

[292] Amended Form ADV, Part 1A, Items 6.A. and 7.A. Section 975 of the Dodd-Frank Act amends the Exchange Act to require ''municipal advisors'' to register with the Commission; Section 761 of that Act amends the Exchange Act to define the terms ''security-based swap dealer'' and ''major security-based swap participant''; and section 764 amends the Exchange Act to require these entities to register with the Commission.

[293] This serves to retain information about related persons that would otherwise not be required as a result of amendments we are adopting to Item 7.B. Amended Item 7.B. and section 7.B.(1) of Schedule D require advisers to report private fund information only about funds they advise, not funds advised by a related person. *See supra* section II.C.1. We have also deleted ''investment company'' from the list in Item 7 as duplicative of information we obtain in another category of Item 7.A., as well as Item 5. *See, e.g.,* amended Form ADV, Part 1A, Items 5.D., 5.G., Section 5.G.(3) of Schedule D, and Item 7.A.(2).

[294] NRS Letter.

[295] NEA Letter; IAA General Letter. Many of the questions in Item 5.B. elicit information about an adviser's employees acting in the scope of employment. We note that because Item 6 asks questions about the advisory *firm,* responses should not relate to natural persons, unless the adviser is operating as a sole proprietor.

[296] For example, an adviser registered with us under the name ''Adam Bob Charlie Advisers LLC'' that is also actively engaged in business as an insurance agent under the name ''ABC Insurance LLC'' would put the name ''ABC Insurance LLC'' in Section 6.A. of Schedule D and would check the box for ''Insurance broker or agent.''

[297] NASAA Letter. We note, ''6.B.(3)'' was inadvertently renumbered in Part 1A of Form ADV as ''6.C.'' in our proposal.

[298] The questions we are adopting in Section 7.A. of Schedule D contain a few minor modifications from the proposal to renumber the questions and to clarify wording (*e.g.,* questions 11 and 12).

[299] *See, e.g.,* Shearman Letter.

[300] *See* IAA General Letter (suggesting we adopt a standard for omitting a related person based on factors established several years ago by our staff in Frequently Asked Questions on Form ADV and IARD).

[301] Amended Form ADV, Part 1A, Item 7.A.

[302] Amended Form ADV, Part 1A, Section 7.A. of Schedule D, question 8. At the suggestion of commenters, we have also modified this question to include the remainder of the questions in what had been Section 9.D. of the previous version of Form ADV Part 1A, which we inadvertently failed to include when we relocated this question in Proposed Form ADV Part 1A. Consequently, we have also eliminated Section 9.D. *See* IAA General Letter; Schnase Letter.

to clients [303] must additionally report whether any of such brokers or dealers are related persons of the adviser.[304] Second, an adviser that indicates that it receives ''soft dollar benefits'' must also report whether all those benefits qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services.[305] Third, an adviser must report whether it or its related person receives direct or indirect compensation for client referrals.[306] These amendments, which we are adopting as proposed, are designed to enhance our ability to identify additional conflicts of interest that advisers may face that we have identified through our experience administering the Advisers Act.

Comments on these amendments were limited to the question about soft dollars, which commenters supported, but these commenters urged us to permit advisers to answer based on an adviser's reasonable belief that the benefits received are eligible research and brokerage services under the safe harbor provided by section 28(e) of the Exchange Act.[307] We are not making this change as the safe harbor itself does not include a ''reasonable belief'' standard and the Form ADV item is intended to track the language of the statute. We also remind advisers that we have issued interpretive guidance on section 28(e) of the Exchange Act and direct advisers to it if relying on this safe harbor.[308]

5. Custody: Item 9

We are amending Item 9 to require each registered adviser to indicate the *total* number of persons that act as qualified custodians for the adviser's clients in connection with advisory services the adviser provides to its clients.[309] In 2009, we amended certain items of Form ADV in connection with amendments we made to Advisers Act rule 206(4)–2 (the ''2009 Custody Amendments''). At that time, we modified Item 9 to elicit information about the adviser or its related person(s) acting as qualified custodian.[310] We did not, however, request information about *other* qualified custodians. This additional data will provide us with a more complete picture of an adviser's custodial practices.[311] Commenters suggested that advisers be permitted to provide an approximate number of qualified custodians in response to this item.[312] We have not made such a change. An adviser with custody of client funds or securities must maintain those assets with a qualified custodian,[313] and must therefore know the identity (and therefore number) of qualified custodians that maintain its clients' assets.

We are also adopting several clarifications urged by commenters, and to make certain technical changes.[314] The first of these changes clarifies that Item 9 asks whether the adviser or a related person has custody of funds and securities of clients that are not registered investment companies. The questions in Item 9 relate to various provisions of rule 206(4)–2 (the custody rule), and advisers are not required to comply with rule 206(4)–2 with respect to the account of an investment company registered under the Investment Company Act.[315] Second, we are amending the notes within Item 9.A. to correct a drafting error.[316] The amended note within Item 9.A. requires an adviser to exclude from 9.A. and to report in 9.B. only client assets for which custody is attributed to the adviser as a result of related person custody.[317] Third, we are also clarifying in Items 9.B. and 9.C. that advisers' responses must include funds and securities of which a related person has custody *in connection with advisory services the adviser provides to clients.*[318] This clarification aligns the reporting requirements of these items with the amended definition of custody adopted in the 2009 Custody Amendments.[319] Finally, amended question (6) within Section 9.C. of Schedule D enables an adviser to check a box to indicate that it has not yet received a report prepared by an independent accountant that audited a pooled investment vehicle or that examined internal controls.[320] Under the previous version of this question, an adviser who had not yet received the independent public accountant's report by the time the adviser submitted its Form ADV filing could not accurately respond. The updating requirements of Item 9.C. and Section 9.C. of Schedule D, however, require advisers to promptly file an amendment to update their response when the accountant's report is available.[321]

[303] Amended Form ADV, Part 1A, Items 8.C.3. and 8.E.

[304] Amended Form ADV, Part 1A, Items 8.D. and 8.F.

[305] Amended Form ADV, Part 1A, Item 8.G.(2). *See also Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934,* Exchange Act Release No. 54165 (July 18, 2006) [71 FR 41978 (July 24, 2006)] (''28(e) Release'').

[306] Amended Form ADV, Part 1A, Items 8.H. and 8.I.

[307] *See* ICI Letter; IAA General Letter.

[308] *See* 28(e) Release, *supra* note 305, at Sections II.B. and III.

[309] Amended Form ADV, Part 1A, Item 9.F. We have also made a minor modification from the proposal to make clear that an adviser need only respond if it has custody of client funds or securities, including if it has custody because a related person has custody in connection with advisory services the adviser provides to its clients.

[310] *See Custody of Funds or Securities of Clients by Investment Advisers,* Investment Advisers Act Release No. 2968 (Dec. 30, 2009) [75 FR 1456 (Jan. 11, 2010)] (''2009 Custody Release'').

[311] Consistent with the updating requirements for Items 9.A.(2), 9.B.(2), and 9.E., advisers are required to update new Item 9.F. only annually. *See* amended Form ADV: General Instruction 4.

[312] IAA General Letter; NRS Letter. *But see* NRS Letter (indicating that many advisers have only one or two qualified custodians).

[313] Rule 206(4)–2(a)(1) (defining ''qualified custodian'').

[314] Investment advisers registered with us were required to begin completing revised Item 9 in connection with amendments we made to rule 206(4)–2 (the custody rule) as of their first annual updating amendment after January 1, 2011. *See* 2009 Custody Release, *supra* note 310 at n.161 and accompanying text. We are also making a technical amendment to Form ADV–E to reflect the requirement that the accountant's report be filed electronically. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV–E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV–E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV–E until the IARD system is programmed to accept Form ADV–E, and noting that advisers would be informed when that programming was completed).

[315] Rule 206(4)–2(b)(5). These advisers must instead comply with custody requirements under the Investment Company Act.

[316] *See* IAA General Letter; Pickard Letter; Schnase Letter (each urging us to correct this drafting error).

[317] When we adopted the 2009 Custody Amendments we explained that Items 9.A. and 9.B. require a registered adviser to report to us whether the adviser or a related person *has custody* of client funds or securities, and if so, both the total U.S. dollar amount of those assets as well as the number of clients for whose accounts the adviser or its related person *has custody. See* 2009 Custody Release, *supra* note 310 at n.145 and accompanying text. Item 9.A., which was intended to limit reporting of assets the adviser has custody of other than through a related person, inadvertently required the adviser to include assets attributable to it in certain circumstances where a related person had custody of the assets.

We also are making a technical revision to the note within Item 9.A. to remind advisers that their responses should not include assets of which they have custody solely because they deduct advisory fees from client accounts.

[318] *See* IAA General Letter.

[319] We amended the definition of ''custody'' to include circumstances under which a related person ''holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, *in connection with advisory services [an adviser] provide[s] to clients.*'' *See* rule 206(4)–2(d)(2).

[320] Question 6 does not require a response about reports related to an independent verification (or ''surprise examination'') of client assets because the independent public accountant that conducts the surprise examination separately files a certificate on Form ADV–E. *See* rule 206(4)–2(a)(4).

[321] *See* amended Form ADV: General Instruction 4.

6. Reporting $1 Billion in Assets: Item 1.O.

We are adopting, as proposed, Item 1.O. and related instructions to require each adviser to indicate whether it had $1 billion or more in total assets shown on the adviser's balance sheet as of the last day of the most recent fiscal year,[322] which we will use to identify those advisers that could be subject to rules regarding certain excessive incentive-based compensation arrangements required by section 956 of the Dodd-Frank Act.[323] Two commenters supported the proposal,[324] while another suggested that we allow an adviser to exclude certain assets from the calculation so that certain advisers would not be covered by any future rule regarding section 956.[325] Although we retain certain flexibility to adopt a different standard for purposes of the incentive-based compensation rule,[326] we believe, as noted above, that this new item will assist us in identifying the advisers that may be subject to such future rule.[327]

7. Other Amendments to Form ADV

The amendments we are adopting today also include a number of additional changes unrelated to the Dodd-Frank Act that are intended to improve our ability to assess compliance risks. To improve certain identifying information we obtain from other items of Part 1A of Form ADV, we are amending Item 1.J. to require an adviser to provide contact information for its chief compliance officer to give us direct access to the person designated to be in charge of its compliance program.[328] An adviser also has the option, in Item 1.K., to provide an additional regulatory contact for Form ADV.[329] Neither Items 1.K. nor 1.J. will be viewable by the public on our Web site.[330] One commenter expressed its support for this change to the form.[331] We are also amending Item 1 to require an adviser to indicate whether it or any of its control persons is a public reporting company under the Exchange Act.[332] An affirmative response to this item will provide a signal, not only to us, but to investors and to prospective investors, that additional public information is available about the adviser and/or its control persons. New Item 1.P. requires an adviser to provide a ''legal entity identifier'' if it has one.[333] In addition, we are adding ''Limited Partnership'' as another choice advisers may select to indicate how their organization is legally formed.[334] Other than the addition of Item 1.P., we are adopting amended Item 1 as proposed.

We are also adopting three technical changes with respect to the reporting of disciplinary events. First, with commenters' support, we are adding a box to Item 11, as proposed, for advisers to check if any disciplinary information reported in that item and the corresponding disclosure reporting pages is being reported about the adviser or any of its supervised persons.[335] Second, we are adding a third reason to each disclosure reporting page (''DRP'') that permits an adviser to remove the DRP from its filing by adding a box an adviser could check if it was filed in error. One commenter supported this aspect of the proposal.[336] Third, we are amending Item 3.D. of Part 2B, the brochure supplement, to correct a drafting error regarding when a brochure supplement would need to include disclosure regarding the revocation or suspension of a professional attainment, designation, or license. Advisers are required to include in brochure supplements disclosure regarding hearings or formal adjudications relating to the revocation or suspension of a professional attainment, designation, or license of the supervised person by the designating authority.[337]

Finally, we had requested comment in the Implementing Proposing Release on whether we should accelerate the deadline for filing an annual updating amendment to an adviser's Form ADV filing from 90 to 60 days after the adviser's fiscal year end.[338] All of the commenters who responded to the question opposed it.[339] We are not adopting a requirement to accelerate the

[322] *See* amended Form ADV, Part 1A, Item 1.O. (adviser must mark ''yes'' or ''no'' to indicate whether it has $1 billion or more in assets). For purposes of this reporting requirement only, the amount of assets will be determined in the same manner as the amount of ''total assets'' is determined on the adviser's balance sheet for its most recent fiscal year end, using the same accounting method used to prepare the balance sheet. *See* amended Form ADV: Instructions for Part 1A, instr. 1.b. We are not requiring advisers to use GAAP or another accounting method.

[323] The Commission and other Federal regulators proposed a joint rule that addresses certain excessive incentive-based compensation arrangements, including those of investment advisers with $1 billion or more in assets, pursuant to section 956 of the Dodd-Frank Act. *See Incentive-Based Compensation Arrangements,* Release No. 34–64140 (Mar. 29, 2011) [76 FR 21170 (Apr. 14, 2011)] (''Incentive Compensation Proposing Release''). We construe section 956 as specifying, and thus define ''assets'' to mean, the total assets of the advisory firm rather than the total ''assets under management,'' *i.e.,* assets managed on behalf of clients. *See* Implementing Proposing Release, *supra* note 7, at n.196; Incentive Compensation Proposing Release, at section III.

[324] *See* IAA Letter; ICI Letter. One commenter argued that Form ADV is not the correct reporting mechanism for this information, but did not recommend an alternative way to identify these advisers. NRS Letter.

[325] MFA Letter.

[326] In the Incentive Compensation Proposing Release, we invited comments on whether the determination of total balance sheet assets should be further tailored for certain types of advisers. *See* Incentive Compensation Proposing Release, *supra* note 323, at section III.

[327] We also note that almost all of the other covered financial institutions under section 956 already report the amount of their total assets to their Federal regulator. *See* Incentive Compensation Proposing Release, supra note 323, at section III. (proposing to calculate ''total consolidated assets'' based on reports filed with each Federal regulator).

[328] Amended Form ADV, Part 1A, Item 1.J. An adviser is also required to provide the name of its chief compliance officer on Schedule A of Form ADV. *See also* 17 CFR 275.206(4)–7; *Compliance Programs of Investment Companies and Investment Advisers,* Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)] (adopting rule 206(4)–7 requiring registered investment advisers to designate a chief compliance officer). An exempt reporting adviser that does not have a chief compliance officer must instead provide a designated person's contact information in Item 1.K. Likewise, an exempt reporting adviser need not provide the name of a chief compliance officer on Schedule A of Form ADV.

[329] Amended Form ADV, Part 1A, Item 1.K.

[330] We note that clients will be provided with a supervisory contact in brochure supplements. *See* Part 2 Release, *supra* note 67.

[331] *See* NRS Letter.

[332] Amended Form ADV, Part 1A, Items 1.N. and 10.B., and Section 10.B. of Schedule D.

[333] Amended Form ADV, Part 1A, Item 1.P. *See also* Amended Form ADV: Glossary (defining ''Legal Entity Identifier''). A legal entity identifier is a unique number that companies use to identify each other in the financial marketplace. It is a number assigned by or on behalf of an internationally recognized standards setting body and it is required for reporting purposes by the U.S. Department of the Treasury's Office of Financial Research or a financial regulator. The legal entity identifier standard is still in development, and an adviser may not have one. An adviser is required to respond to Item 1.P. only if it has a legal entity identifier.

[334] Amended Form ADV, Part 1A, Item 3.A.

[335] Amended Form ADV, Part 1A, Item 11. *See* IAA General Letter; Pickard Letter.

[336] *See* NRS Letter.

[337] As originally adopted, this item stated ''Any other *proceeding* in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished his attainment, designation, or license) in anticipation of such a proceeding (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event.'' (emphasis added).

[338] *See* Implementing Proposing Release, *supra* note 7, at nn.207 and 208 and accompanying text.

[339] Pickard Letter (citing additional burdens it would place on advisory firm personnel and resources); IAA General Letter (stating that many advisers need the full 90 days to ensure accurate and complete disclosures); ICI Letter (urging the Commission to at least give advisers time to become acclimated with all of the new filing requirements before imposing an accelerated deadline); NRS Letter (claiming it will add little benefit and will impose a substantial burden); Schnase Letter.

annual updating amendment deadline at this time.

D. Other Amendments

1. Amendments to ''Pay to Play'' Rule

We are adopting amendments to rule 206(4)–5, the ''pay to play'' rule, to address certain consequences arising from the Dodd-Frank Act's amendments to the Advisers Act and the Exchange Act.[340] First, we are amending the scope of the rule, as proposed, so that it applies both to exempt reporting advisers and foreign private advisers.[341] The rule currently applies to advisers either registered with the Commission or unregistered in reliance on the ''private adviser'' exemption under section 203(b)(3) of the Advisers Act.[342] The amendment prevents the unintended narrowing of the application of the rule resulting from the repeal of the ''private adviser'' exemption.[343]

Commenters generally favored the amendment,[344] although one commenter opposed applying the rule to foreign private advisers and foreign exempt reporting advisers, contending that the costs of doing so would outweigh the benefits.[345] However, many advisers that will qualify for the foreign private adviser exemption are currently subject to the pay to play rule, either because they are currently registered with us or exempt under the ''private adviser'' exemption. We continue to believe that the pay to play rule is necessary and appropriate to prevent these advisers and others from engaging in fraudulent pay to play practices in the U.S.

Second, we are amending the rule to add municipal advisors to the categories of registered entities—referred to as ''regulated persons''—excepted from the rule's prohibition on advisers paying third parties to solicit government entities.[346] To qualify as a ''municipal advisor'' (and thereby a ''regulated person''), a solicitor must be registered under section 15B of the Exchange Act and subject to pay to play rules adopted by the Municipal Securities Rulemaking Board (''MSRB'').[347] Notably, for municipal advisors to qualify as ''regulated persons,'' we must find that applicable MSRB pay to play rules: (i) impose substantially equivalent or more stringent restrictions on municipal advisors than the pay to play rule imposes on investment advisers; and (ii) are consistent with the objectives of the pay to play rule.[348]

We had proposed to limit the exception to the third-party solicitation ban to registered municipal advisors.[349] But commenters urged us to preserve the existing ''regulated person'' exception as well.[350] Commenters explained that affiliated broker-dealers or investment advisers—which would not meet the statutory definition of a ''municipal advisor'' under section 15B(e)(4) of the Exchange Act if they solicit government entities only on behalf of *affiliates* [351]—are often paid by investment advisers to solicit on their behalf.[352] While commenters recognized that adviser-affiliated solicitors may be permitted to voluntarily register as municipal advisors, they argued that voluntary registration of these solicitors would subject them to regulatory requirements unrelated to pay to play practices and thus impose significant additional costs, which they argued are unnecessary, particularly when they already are subject to a comprehensive regulatory regime as broker-dealers or advisers.[353]

The amended rule retains the approach of the current rule by permitting advisers to compensate persons that are ''regulated persons'' for soliciting government entities if they are subject to restrictions at least as stringent as the pay to play rule. We have expanded ''regulated persons'' to include registered municipal advisors. Accordingly, the pay to play rule continues to impose critical restrictions on third-party solicitors and their personnel designed to minimize the potential for their engaging in pay to play on behalf of investment advisers. Advisers may only compensate third-party solicitors that are subject to the Commission's regulatory oversight and examination and to a regulatory regime that the Commission has determined is

[340] *See* amended rule 206(4)–5. We are not, however, adopting an amendment we proposed to specify that a legal entity, not just a natural person, that is a general partner or managing member of an investment adviser would meet the definition of ''covered associate'' in the rule. Upon reflection, it would broaden the application of the rule more than we intended. For example, because political action committees (''PACs'') controlled by a covered associate are themselves treated as covered associates, were we to make this amendment, contributions by an adviser's parent company's PAC could trigger the two-year time out. However, as we noted in the release adopting the pay to play rule, depending on facts and circumstances, there may be instances in which a supervisor of an adviser's covered associate (who, for example, engages in solicitation of government entity clients for the adviser) formally resides at a parent company, but whose contributions should trigger the two-year time out because they raise the same conflict of interest issues that we are concerned about, irrespective of that person's location or title. *See* Political Contributions by Certain Investment Advisers, Investment Advisers Act Release No. 3043, n. 179 (Jul. 1, 2010) [75 FR 41018 (Jul. 15, 2010)] (''Pay to Play Release'').

[341] *See* amended rule 206(4)–5(a)(1); Implementing Proposing Release, *supra* note 7, at section II.D.1. *See also* sections 403, 407 and 408 of the Dodd-Frank Act (replacing the ''private adviser'' exemption at section 203(b)(3) of the Advisers Act with an exemption for ''foreign private advisers'' and adding exemptions for exempt reporting advisers at sections 203(l) and 203(m) of the Advisers Act).

[342] *See* rule 206(4)–5(a).

[343] Section 203(b)(3) was revised by the Dodd-Frank Act to create a new exemption for foreign private advisers. *See supra* note 4.

[344] *See, e.g.,* Better Markets Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter.

[345] *See* Dechert General Letter.

[346] *See* amended rule 206(4)–5(a)(2)(i)(A), (f)(9). ''Regulated persons'' also include registered investment advisers and broker-dealers subject to the rules of a registered national securities association, such as the Financial Industry Regulatory Authority (''FINRA''), that has adopted pay to play rules that the Commission determines satisfy the criteria of amended rule 206(4)–5(f)(9)(iii)(B).

[347] *See* amended rule 206(4)–5(f)(9)(iii).

[348] *See* amended rule 206(4)–5(f)(9)(iii)(B). The MSRB issued a draft pay to play rule for municipal advisors and request for comment on January 14, 2011. *See* MSRB, *Request for Comment on Pay to Play Rule for Municipal Advisors,* MSRB Notice 2011–04 (Jan. 14, 2011) *available at http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2011/2011-04.aspx?n=1.* The Commission's authority to consider rules proposed by a self-regulatory organization is governed by section 19(b) of the Exchange Act [15 U.S.C. 78s(b)] (''No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.'').

[349] *See* Implementing Proposing Release, *supra* note 7, at sections II.D.1.

[350] *See* Comment letter of Debevoise & Plimpton LLP (Feb. 22, 2011) (''Debevoise Pay to Play Letter''); Dechert General Letter; comment letter of Investment Adviser Association (by Monique S. Botkin) (Jan. 24, 2011) (''IAA Pay to Play Letter''); ICI Letter; comment letter of Securities Industry and Financial Markets Association (Jan. 24, 2011) (''SIFMA Letter''); comment letter of T. Rowe Price Associates, Inc. (Jan. 24, 2011) (''T. Rowe Letter''). *But see* NRS Letter (supporting the proposal).

[351] *See* section 15B(e)(4) of the Exchange Act (defining ''municipal advisor'' to include ''a person (who is not a municipal entity or an employee of a municipal entity) that * * * undertakes a solicitation of a municipal entity''); section 15B(e)(9) of the Exchange Act (defining ''solicitation of a municipal entity or obligated person'' to mean ''a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of * * * [an] investment adviser * * * *that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation* for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person * * * of an investment adviser to provide investment advisory services to or on behalf of a municipal entity'' (emphasis added)). In recognition of this limitation, we separately proposed to allow adviser-affiliated solicitors to register voluntarily as municipal advisors. *See Registration of Municipal Advisors,* Exchange Act Release No. 63576, at nn. 102–104 and accompanying text (Dec. 20, 2010) [76 FR 824, (Jan. 6, 2011)] (''Municipal Advisors Registration Release'').

[352] *See, e.g.,* IAA Pay to Play Letter; SIFMA Letter.

[353] *See* Municipal Advisor Registration Release, *supra* note 351, at 831 (stating that solicitors acting on behalf of affiliates may voluntarily register as municipal advisors).

equally or more stringent than the pay to play rule.[354]

Finally, we are extending the date by which advisers must comply with the ban on third-party solicitation from September 13, 2011 to June 13, 2012 due to the fact that we are modifying our proposal and expanding the definition of ''regulated persons.'' [355] This extension will provide time for the MSRB and FINRA to adopt pay to play rules if they choose to do so and give third-party solicitors additional time to come into compliance with such rules.[356]

2. Technical and Conforming Amendments

a. Rules 203(b)(3)–1 and 203(b)(3)–2

We are rescinding rules 203(b)(3)–1 [357] and 203(b)(3)–2 [358] under the Advisers Act. These rules specify how advisers ''count clients'' for purposes of determining whether the adviser is eligible for the private adviser exemption of section 203(b)(3) of the Advisers Act (which, as discussed above, Congress repealed in section 403 of the Dodd-Frank Act). In the Exemptions Adopting Release, we are adopting a new client counting rule, rule 202(a)(30)–1, for purposes of the new foreign private adviser exemption.[359]

b. Rule 204–2

We are adopting amendments to rule 204–2 under the Advisers Act, the ''books and records'' rule. The first amendment updates the rule's ''grandfathering provision'' for investment advisers that are currently exempt from registration under the ''private adviser'' exemption, but will be required to register after the exemption is eliminated on July 21, 2011.[360] Upon registration, these advisers will become subject to the recordkeeping requirements of the Act, including the requirement to keep certain records relating to performance.[361] The amendment clarifies that these advisers are not obligated to keep certain performance-related records for any period when they were not registered with the Commission; however, to the extent that these advisers preserved these performance-related records even though they were not required to keep them, they must continue to preserve them.[362] As discussed in section III, we are providing these advisers with additional time to register and establish compliance with rules under the Advisers Act to which they will become subject as registered advisers, including rule 204–2.[363] The second amendment modifies rule 204–2(e)(3)(ii) to cross-reference the new definition of ''private fund'' added by the Dodd-Frank Act.[364] The third amendment rescinds rule 204–2(l) [365] because it was vacated by the federal appeals court in *Goldstein* and because the Dodd-Frank Act's addition of section 204(b)(2) to the Advisers Act codifies this approach in the Advisers Act itself.[366]

We received three comment letters in favor of the proposed amendment to apply the grandfathering provision to advisers that will be required to register due to the Dodd-Frank Act's elimination of the ''private adviser'' exemption.[367]

c. Rule 0–7

We are adopting, as proposed, an amendment to rule 0–7(a)(1) [368] under the Advisers Act to update a cross reference to section 203A(a)(2) of the Advisers Act, which has been renumbered as section 203A(a)(3) by the Dodd-Frank Act.[369]

d. Rule 222–1

We are replacing, as proposed, the term ''principal place of business'' in rule 222–1(b) [370] under the Advisers Act

[354] Several commenters further urged the Commission to amend the pay to play rule also to permit an adviser to pay any affiliate and/or its employees to solicit clients on the adviser's behalf so long as the adviser treats such solicitors as its own ''covered associates.'' *See* Debevoise Pay to Play Letter; IAA Pay to Play Letter; ICI Letter; NYSBA Committee Letter; comment letter of Skadden, Arps, Slate, Meagher & Flom LLP (Mar. 8, 2011) (''Skadden Letter''); T. Rowe Letter. In light of the approach we are adopting (discussed above), we believe that such an amendment is unnecessary.

[355] *See* comment letter of American Council of Life Insurers (Jan. 24, 2011) (''ACLI Pay to Play Letter''); IAA Pay to Play Letter; ICI Letter (suggesting that the Commission extend the compliance date for the third-party solicitation ban). *See also* SIFMA Letter (suggesting that the Commission delay adoption of amendments to the pay to play rule until it completes its municipal advisor registration rulemaking).

[356] The extension applies only to the third-party solicitation ban and not to any other provisions in the pay to play rule. *See supra* note 348 (referencing the MSRB's issuance of a draft pay to play rule for municipal advisors).

[357] Rule 203(b)(3)–1.

[358] Rule 203(b)(3)–2. We adopted rule 203(b)(3)–2 in 2004 in order to require certain hedge fund advisers to register under the Act. *See Registration under the Advisers Act of Certain Hedge Fund Advisers,* Investment Advisers Act Release No. 2333 (Dec. 2, 2004) [69 FR 72054 (Dec. 10, 2004)]. That rule, and certain amendments to rule 203(b)(3)–1 and other rules, were vacated by a Federal appeals, but have remained in the CFR. *See Goldstein* v. *SEC, 451 F.3d 873 (DC Cir. June 23, 2006) (''Goldstein'').*

[359] *See* Exemptions Adopting Release, *supra* note 4, at section II.C.1.

[360] *See* amended rule 204–2(e)(3)(ii); Implementing Proposing Release, *supra* note 7, at section III.D.2.b. Our proposal would have applied the grandfathering provision only to those periods prior to the date that the Dodd-Frank Act removes the ''private adviser'' exemption in section 203(b)(3)—July 21, 2011. However, as discussed in section III of this Release, we are providing a transition period for advisers relying on the ''private adviser'' exemption, requiring that they register by March 30, 2012 and comply with all Advisers Act provisions and rules by that date. To reflect this transition period in the grandfathering provision in rule 204–2, we are adopting a modification from our proposal to provide that the grandfathering period applies to any period prior to such adviser's registration.

[361] *See* rule 204–2(a)(16).

[362] *See* amended rule 204–2(e)(3)(ii) (stating, ''[i]f you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), as in effect on July 20, 2011, [this rule] does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under [certain sections of this rule] to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b–2(a)(29)), or other account you advise for any period ended prior to your registration, provided that that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.'' Advisers to private funds that registered with the Commission based on adoption of rule 203(b)(3)–2 in the Hedge Fund Adviser Registration Release and then withdrew their registration based upon the decision by the U.S. Court of Appeals for the District of Columbia Circuit in *Goldstein* are permitted to rely on the grandfathering provision for periods during which they were unregistered.

[363] An adviser that must register with the Commission because of the Dodd-Frank Act's elimination of the ''private adviser'' exemption and that files an application for registration on or before the transition deadline of March 30, 2012, may rely on the grandfathering provision for any period prior to registering, but must begin keeping performance-related records in accordance with the rule upon registering.

[364] *See* rule 204–2(e)(3)(ii) (using the term ''private fund'' without reference to a definition). We are adding a parenthetical noting that the term is defined in section 202(a)(29) of the Advisers Act.

[365] Rule 204–2(l) states that books and records of a private fund are, under certain circumstances, treated as books and records of its adviser.

[366] Section 404 of the Dodd-Frank Act (adding section 204(b)(2) to the Advisers Act, which states that ''[t]he records and reports of any private fund to which an investment adviser registered under this title provides investment advice shall be deemed to be the records and reports of the investment adviser.'').

[367] *See* MFA Letter; NYSBA Committee Letter; Seward Letter.

[368] Rule 0–7(a) defines ''small entities'' under the Advisers Act for purposes of the Regulatory Flexibility Act.

[369] *See* amended rule 0–7(a)(1) (stating that the term ''small business'' or ''small organization'' for purposes of the Advisers Act means an investment adviser that: ''Has assets under management, as defined under Section 203A(a)(3) of the Act (15 U.S.C. 80b–3a(a)(3)) and reported on its annual updating amendment to Form ADV [17 CFR 279.1], of less than $25 million, or such higher amount as the Commission may by rule deem appropriate. * * *''); Implementing Proposing Release, *supra* note 7, at section II.D.2.c.

[370] Rule 222–1 contains definitions relevant to section 222 of the Advisers Act's provisions regarding state regulation of investment advisers. Amended rule 222–1(b) defines ''principal office and place of business'' exactly as it defined

Continued

with the term ''principal office and place of business'' to conform to the Dodd-Frank Act's amendments to section 222 of the Advisers Act.[371] We are not modifying the definition.

e. Rule 222–2

We are adopting, as proposed, amendments to rule 222–2 to define ''client'' for purposes of the national *de minimis* standard by cross-referencing the definition of ''client'' in rule 202(a)(30)–1 rather than the definition in rule 203(b)(3)–1. The cross-reference to rule 203(b)(3)–1 must be updated because we are rescinding rule 203(b)(3)–1.[372] We are also changing, as proposed, a cross-reference to paragraph (b)(6) of rule 203(b)(3)–1 to paragraph (b)(4) of rule 202(a)(30)–1 to account for the changed location of that particular provision.

We are not adopting a proposed amendment to specify that, for purposes of the national *de minimis* standard, an adviser is not required to count as a client any person for whom the adviser provides investment advisory services without compensation.[373] We received a comment letter opposing this amendment, citing the fact that under proposed rule 202(a)(30)–1, an adviser would be required to count such a person as a client for purposes of the ''foreign private adviser'' definition in section 202(a)(30) of the Act.[374] The commenter stated that it would be confusing and inconsistent to require an adviser to count the same person as a client for purposes of the ''foreign private adviser'' definition, but not for the national *de minimis* standard. We agree. Thus, in the interests of consistency and clarity, advisers must count such clients for both purposes.

f. Rule 202(a)(11)–1

We are rescinding rule 202(a)(11)–1 under the Advisers Act.[375] Although the rule was vacated by a federal appeals court (and is therefore not in effect), it has remained in the CFR.[376]

III. Effective and Compliance Dates

A. Effective Dates

The effective date of rules 204–4 and 203A–5(b) and (c), amendments to rules 0–7, 203A–1, 203A–2, 203A–3, 204–1, 204–2, 206(4)–5, 222–1, and 222–2, and amendments to Forms ADV, ADV–E, ADV–H, and ADV–NR is September 19, 2011. The effective date of rule 203A–5(a) and the amendment to rule 203–1 is July 21, 2011.[377] Rules 202(a)(11)–1, 203(b)(3)–1, 203(b)(3)–2, and 203A–4 are rescinded effective September 19, 2011.

B. Compliance Dates

1. Transition to State Registration and Form ADV

As discussed in section II.A.1 above, new rule 203A–5 provides 90 days from December 31, 2011 for each adviser registered with us to determine whether it is eligible for Commission registration.[378] Accordingly, the rule requires all registered advisers to file an amended Form ADV by March 30, 2012,[379] which for most of our registrants will be their annual updating amendments that are due 90 days after their December 31, 2011 fiscal year ends.[380] For an adviser that is no longer eligible to remain registered with us, rule 203A–5 provides an additional 90 days for it to register in one or more of the states and withdraw its registration with us.[381] After January 1, 2012, any adviser filing an amendment to Form ADV to meet the filing requirements of rule 203A–5 or for any other purpose will be required to provide responses to the form revisions we are adopting today.[382] Our staff is working closely with FINRA, our IARD contractor, to re-program IARD and we understand that the system is expected to be able to accept filings of revised Form ADV by January 1, 2012.[383] Investment advisers filing initial applications for registration after the IARD is re-programmed to accommodate filing of the revised Form ADV must complete the revised form.

2. Advisers Previously Exempt Under Section 203(b)(3)

We are adopting a transition provision in rule 203–1 for advisers that are newly required to register due to the Dodd-Frank Act's repeal of the ''private adviser'' exemption in section 203(b)(3).[384] Under rule 203–1(e), an adviser that was relying on, and was entitled to rely on, the ''private adviser'' exemption in section 203(b)(3) on July 20, 2011, may delay registering with the Commission until March 30, 2012.[385] Because initial applications for registration can take up to 45 days to be approved, advisers relying on this transition provision to remain unregistered until March 30, 2012 should file a complete application, both Part 1 and a brochure(s) meeting the requirements of Part 2 of Form ADV at least by February 14, 2012.[386]

To qualify for the delayed transition under rule 203–1(e) an adviser must, during the course of the preceding 12 months, have had fewer than 15 clients and neither hold itself out generally to the public as an investment adviser nor act as an adviser to a registered investment company or business development company.[387] The

''principal place of business'' of an investment adviser: ''The executive office of the investment adviser from which the officers, partners, or managers of the investment adviser direct, control, and coordinate the activities of the investment adviser.''

[371] *See* section 985 of the Dodd-Frank Act (replacing the term ''principal place of business'' each time it appears—*i.e.,* six times—with the term ''principal office and place of business'' in section 222 of the Advisers Act).

[372] *See supra* section II.D.2.a. (discussing rescinding rule 203(b)(3)–1); new rule 202(a)(30)–1; Exemptions Adopting Release, *supra* note 4, at section II.C.1. (discussing the definition of ''client'' in rule 202(a)(30)–1).

[373] *See* Implementing Proposing Release, *supra* note 7, at section II.D.2.e.

[374] *See* NASAA Letter; Exemptions Adopting Release, *supra* note 4, at section II.C.1.

[375] Rule 202(a)(11)–1. Rule 202(a)(11)–1 addressed the application of the Advisers Act to broker-dealers offering certain types of brokerage programs.

[376] *See Financial Planning Association* v. *SEC,* 482 F.3d 481 (DC Cir. 2007).

[377] *See* section IV *infra* (discussing certain administrative law matters associated with the effective date for new rule 203A–5(a) and amended rule 203–1(e)).

[378] *See* new rule 203A–5; *supra* section II.A.1.

[379] *See* new rule 203A–5(b); *supra* section II.A.1.

[380] Advisers not filing an annual updating amendment from January 1 to March 30, 2012, must file an other than annual amendment updating Form ADV.

[381] *See* new rule 203A–5(c)(1). A mid-sized adviser that must switch to state registration may not withdraw its SEC registration until January 1, 2012. *See* new rule 203A–5(a); *supra* section II.A.1.

[382] *See supra* note 25 and accompanying text.

[383] As discussed in section II.B.1, we are also making technical amendments to Forms ADV–H and ADV–NR to account for the fact that exempt reporting advisers, along with registered advisers, will file these forms.

[384] *See* amended rule 203–1(e); section 203(b)(3) of the Advisers Act.

[385] *See* amended rule 203–1(e). *See also* Letter from Robert E. Plaze, Associate Director, Division of Investment Management, U.S. Securities and Exchange Commission, to David Massey, Deputy Securities Administrator, North Carolina Securities Division, and President, NASAA (Apr. 8, 2011) *available at http://www.sec.gov/rules/proposed/2010/ia-3110-letter-to-nasaa.pdf* (stating that the Commission would potentially consider extending the date by which these advisers must register and come into compliance with the obligations of a registered adviser until the first quarter of 2012).

[386] *See* section 203(c)(2) of the Advisers Act (providing that the Commission will grant registration or institute proceedings to determine whether registration should be denied within 45 days of the date an adviser files an application for registration).

[387] *See* amended rule 203–1(e). An adviser relying on the transition provision must come into compliance with Advisers Act statutory provisions and rules applicable to registered advisers by the time it is registered, which must occur no later than March 30, 2012. However, nothing in the transition provision exempts these advisers from Advisers Act provisions and rules to which they are currently subject. For example, the Advisers Act pay to play rule, rule 206(4)–5, currently applies to advisers exempt from registration under the ''private adviser'' exemption in section 203(b)(3) of the Act. *See supra* section II.D.1. (discussing our

transition period will provide these advisers with needed additional time to work through any technical issues associated with applying for registration and to establish compliance with Advisers Act provisions and rules to which they are newly subject as advisers required to register.[388] As such, we believe that the temporary extension of the registration deadline provided by rule 203–1(e) will assure an orderly transition to registration that will minimize costs to these advisers and their clients.

3. Exempt Reporting Advisers

Exempt reporting advisers must file their first reports on Form ADV through IARD between January 1 and March 30, 2012. We originally proposed to require exempt reporting advisers to file initial reports by August 20, 2011.[389] However, we are further delaying the compliance date to accommodate re-programming of the IARD system on which these reports will be filed.[390] The extended deadline of March 30, 2012 will also address concerns raised by commenters that advisers will not have sufficient time to determine whether they qualify for the new exemptions, familiarize themselves with Form ADV and IARD, collect the data necessary to file an initial report, and to file the report.[391]

4. Other Amendments

As discussed in section II.A.5., advisers may rely on our amendments to rule 203A–2 beginning on September 19, 2011.[392] These include our amendments to increase the threshold for pension consultants from $50 million to $200 million and to create a uniform threshold for small and mid-sized advisers that permits them to register with the Commission if they are required to register in 15 or more states.[393] Advisers may begin relying on our amendment to the buffer in rule 203A–1 on September 19, 2011. In addition, as discussed in section II.D.1, we are extending the compliance date for the pay to play rule's ban on third-party solicitation from September 13, 2011 to June 13, 2012. Advisers must comply with any other amendments not discussed in this section III.B by their effective dates.

IV. Certain Administrative Law Matters

As discussed in section III.A above, the effective date for rule 203A–5(a) and the amendment to rule 203–1 is July 21, 2011. The Administrative Procedure Act generally requires that an agency publish a final rule in the **Federal Register** not less than 30 days before its effective date.[394] However, this requirement does not apply if the rule is a substantive rule which grants or recognizes an exemption or relieves a restriction, if the rule is interpretive, or if the agency finds good cause to make the rule effective less than 30 days after its date of publication in the **Federal Register**.[395] Effective July 21, 2011, the Dodd-Frank Act amends section 203A of the Advisers Act to prohibit certain mid-sized advisers from registering with the Commission, and eliminates the ''private adviser'' exemption in section 203(b)(3), requiring advisers relying on that exemption to register as of July 21, 2011.[396] Rule 203A–5(a) provides a temporary extension of the deadline by which certain mid-sized advisers must withdraw their Commission registration, and rule 203–1(e) provides a temporary extension of the registration deadline for advisers relying on the ''private adviser'' exemption in section 203(b)(3).[397] Thus, both rule 203A–5(a) and rule 203–1(e) recognize an exemption or relieve a restriction. Furthermore, as discussed in sections II.A and III.B.2 of this Release, we believe that these temporary extensions are necessary to facilitate an orderly process for advisers relying on the ''private adviser'' exemption in section 203(b)(3) to apply for registration and for mid-sized advisers to withdraw from registration, and to provide sufficient time for the re-programming of IARD. Thus, we find good cause to make rules 203A–5(a) and 203–1(e) effective on July 21, 2011.

V. Cost-Benefit Analysis

We are sensitive to the costs and benefits imposed by our rules, and understand that there will be costs associated with compliance with the new rules and rule amendments. The new rules and amendments we are adopting are designed to give effect to provisions of Title IV of the Dodd-Frank Act that: (i) Reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the ''private adviser'' exemption contained in section 203(b)(3) of the Advisers Act; and (iii) provide for reporting by advisers to certain types of private funds that are exempt from registration. As part of these amendments, we are also adopting amendments to the Advisers Act pay to play rule, rule 206(4)–5. Additionally, we are identifying the advisers that may be subject to the Dodd-Frank Act's requirements concerning certain incentive-based compensation arrangements. Because many of the new rules and rule amendments will implement or clarify provisions of the Dodd-Frank Act, they will not create benefits and costs separate from the benefits and costs considered by Congress in passing the Dodd-Frank Act.[398] However, certain of the rules and rule amendments that we are adopting will generate costs and benefits independent of those generated by the Dodd-Frank Act itself. These costs and benefits are discussed below.[399]

In the Implementing Proposing Release, we requested comment on the proposed rules and amendments, suggestions for additional changes to the existing rules, and comment on other matters that might have an effect on our proposals. We received approximately 73 comment letters on the proposal. Commenters generally supported our approach facilitating mid-sized advisers' transition from Commission to state registration, and our amendments to

amendments to the pay to play rule, one of which is designed so that advisers exempt from registration under the ''private adviser'' exemption in section 203(b)(3) continue to be subject to the pay to play rule after the Dodd-Frank Act eliminates the exemption).

[388] We received a number of comment letters requesting that these advisers have additional time after July 21, 2011 (the date the Dodd-Frank Act's repeal of the section 203(b)(3) private adviser exemption becomes effective) to become registered and to establish compliance with all provisions of the Advisers Act and rules thereunder to which they are newly subject by virtue of their required registration. *See* CompliGlobe Letter; MFA Letter; Schnase Letter; Shearman Letter. We are using our authority under section 206A of the Act to implement this transition to registration. We believe that providing advisers newly required to register with this additional transition period 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 Advisers Act.

[389] *See* Implementing Proposing Release, *supra* note 7, at section II.B.4.

[390] *See supra* section II.A.1. (discussing the expectation that the IARD will be re-programmed in November 2011).

[391] *See* ABA Committees Letter; Merkl Implementing Letter.

[392] *See supra* note 118.

[393] *See supra* section II.A.5.

[394] *See* 5 U.S.C. 553(d).

[395] *See id.*

[396] *See* sections 403, 410, and 419 of the Dodd-Frank Act; sections 203(b)(3), 203A(a)(2) of the Advisers Act; *supra* sections I and II.A.

[397] *See* amended rule 203–1(e) and new rule 203A–5(a); *supra* section II.A and section III.B.2.

[398] *See* Dodd-Frank Act, *supra* note 2; Conference Committee Report, *supra* note 136; Senate Committee Report, *supra* note 18; *supra* section I. Rules and amendments not generating costs and benefits independent of those generated by the Dodd-Frank Act include the amendments to rules 0–7, 204–2, 222–1, 222–2 and our rescinding of rules 202(a)(11)–1, 203(b)(3)–1, and 203(b)(3)–2.

[399] To indicate the scale of the market which is addressed by Title IV of the Dodd-Frank Act and the amendments to Advisers Act rules we are adopting today—the market for investment advisory services—based on IARD data as of April 7, 2011, our staff estimates that SEC-registered advisers manage approximately $43.822 trillion in assets.

Form ADV requiring disclosure of additional information about private funds. Many, however, urged us to take a different approach to revising the pay to play rule.

A. Benefits

1. Eligibility to Register With the Commission: Section 410

Section 410 of the Dodd-Frank Act amends section 203A of the Advisers Act to create a new category of ''mid-sized advisers'' and shifts primary responsibility for their regulatory oversight to the states. Specifically, section 410 prohibits an investment adviser from registering with the Commission if the adviser is required to be registered and is subject to examination as an investment adviser in the state in which it maintains its principal office and place of business, and has assets under management between $25 million and $100 million.[400] We are adopting rules and rule amendments that provide us with a means of identifying advisers that must transition to state regulation, clarify the application of new statutory provisions, and modify certain exemptions we previously adopted under section 203A of the Act.

Transition to State Registration

We are adopting new rule 203A–5, which requires *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from Commission registration by June 28, 2012, if no longer eligible.[401] As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 SEC-registered advisers will be required to withdraw their registration and register with one or more state securities authorities.[402] We believe this filing is necessary for each adviser to confirm its current eligibility for Commission registration in light of multiple statutory changes (as well as changes to the rules that we are today adopting) that could affect whether the adviser may register with the Commission.[403] Given this significant realignment of regulatory authority over numerous advisers, requiring all advisers to file the new Form ADV and complete all items also will allow us and the state securities authorities to easily and efficiently identify the advisers that are subject to our regulatory authority and which advisers have switched to state registration after the implementation of the Dodd-Frank Act's amendment to section 203A of the Advisers Act. Additionally, the filing will help minimize any potential uncertainty among investors and other market participants about the effects of the Dodd-Frank Act on the registration status of a particular adviser by providing a simple, efficient means of determining an adviser's registration status after the implementation of the Dodd-Frank Act through the IARD as of a specific date. This could help minimize any disruption in advisory business that such uncertainty could provoke. One commenter agreed with our expectation that the transition rule will benefit advisers, noting that the rule will ''assist mid-sized advisers in transitioning from federal to state registration.'' [404]

Rule 203A–5 that we are adopting today differs from the one we proposed in several respects. First, rule 203A–5 requires advisers already registered with the Commission to refile Form ADV beginning on January 1, 2012, instead of beginning on July 21, 2011 as proposed.[405] We stated in the Implementing Proposing Release that a delay might be necessary if the IARD was not re-programmed to reflect the revised Form ADV by July 21.[406] We now understand that beginning in November 2011, the IARD will be updated to reflect the revisions to Form ADV that we are adopting today.[407] Several commenters agreed with our approach to delay the transition instead of adopting alternative requirements, such as requiring interim paper filings, to reduce burdens for both advisers and regulators.[408] Additionally, we believe that delaying the beginning of the transition until January 1, 2012 will allow the Commission and state regulators to manage the transition of mid-sized advisers in an orderly manner, and will accommodate the re-programming of the IARD that eliminates the need and cost of alternatives such as interim paper filings.

Second, rule 203A–5 provides a 180-day transition period, which is longer than the 90-day period we proposed.[409] Advisers will be required to file an amended Form ADV by March 30, 2012 (instead of August 20, 2011, as proposed), and mid-sized advisers no longer eligible for Commission registration will be required to withdraw by June 28, 2012 (instead of October 19, 2011, as proposed).[410] Changing the deadline for advisers to refile amended Form ADV to March 30, 2012, which coincides with most advisers' required annual updating amendment, significantly reduces the burden of rule 203A–5 by eliminating the costs associated with a special one-time filing requirement for most registered advisers.[411] In addition, the change in deadline to refile also coincides with the filing deadline for newly registering private fund advisers, which, as one commenter pointed out, eliminates the need for these advisers also to file Form ADV solely for the purposes of determining eligibility for registration.[412] Also, the June 28, 2012 deadline to withdraw from registration

[400] *See supra* notes 18–19 and accompanying text (discussing section 410 of the Dodd-Frank Act, which amends section 203A of the Advisers Act to increase the threshold above which all investment advisers must register with the Commission from $25 million to $100 million).

[401] New rule 203A–5(b)–(c); *supra* section II.A.1. Mid-sized advisers registered with the Commission as of July 21, 2011 must remain registered with the Commission (unless an exemption from Commission registration otherwise is available) until January 1, 2012. New rule 203A–5(a). *See supra* note 28.

[402] *See supra* note 22 and accompanying text.

[403] In addition, we believe that requiring advisers to complete all of the items will provide the Commission and the state regulatory authorities with essential information about the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission. *See infra* section II.C.

[404] Pickard Letter.

[405] *See* new rule 203A–5(b); proposed rule 203A–5(a); *supra* section II.A.1.

[406] Implementing Proposing Release, *supra* note 7, at section II.A.1.

[407] FINRA informed us that the IARD will be updated to reflect the revisions to Form ADV that we are adopting today beginning in November. *See supra* section II.A.1.

[408] *See* Dezellem Letter (urging the Commission to wait for the IARD to be reprogrammed because it is efficient and reduces risks of misplacing paper documents and possible filing errors); NASAA Letter (''the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines.''); NRS Letter (urging Commission not to ''regress to paper filings'' which would be ''a huge step into the past'' and ''appears to be counter to Dodd-Frank Act purposes of transparency and consistency.''). *See also* NYSBA Committee Letter.

[409] *See* new rule 203A–5(b)–(c); proposed rule 203A–5(a)–(b) and *supra* section II.A.1.

[410] *See* new rule 203A–5(b)–(c); proposed rule 203A–5(a)–(b); Implementing Proposing Release, *supra* note 7, at section II.A.1.

[411] *See, e.g.,* CMC Letter (suggesting ''timing of the transition from Federal to state registration could be centered around renewals for 2012''). As of April 7, 2011, 10,636 SEC-registered advisers had a fiscal year ending on December 31. We expect that these advisers will comply with new rule 203A–5(b)'s Form ADV filing requirement by submitting their annual updating amendment. The 868 SEC-registered advisers not required to file an annual updating amendment between January 1, 2012 and March 30, 2012 will file an other-than-annual amendment, but they will complete all of the items on the form (not just the items required to be updated in a typical other-than-annual amendment). *See supra* note 48.

[412] *See* MFA Letter.

will provide additional time for advisers to complete the switch to state registration and to comply with their obligations under state law, and will reduce administrative burdens for the state securities authorities that must review and process mid-sized adviser state registrations, as underscored by several commenters.[413] Several commenters expressed concerns about the burdens of requiring all advisers to amend all of Form ADV solely to indicate their eligibility to register[414] and requiring mid-sized advisers to switch to state registration within 90 days after July 21, 2011.[415] The revised transition discussed above should allay these concerns. We believe that providing advisers with 180 days, rather than 90 days, to transition to state registration will allow them to do so in a more orderly manner.[416] It will provide them greater time to collect the information necessary for state registration and to assess and to come into compliance with state regulations governing advisers. As such, it may promote efficiency and reduce advisers' costs.

Finally, we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management that it reports on Form ADV by requiring the same 90 day period as in Form ADV today, instead of 30 days, as proposed.[417] This change will make an additional administrative burden unnecessary for the majority of advisers that already value assets on a quarterly basis, as underscored by several commenters.[418]

Switching Between State and Commission Registration

Rule 203A–1 is designed to prevent an adviser from having to switch frequently between state and Commission registration as a result of changes in the value of its assets under management or the departure of one or more clients. We are amending the rule to eliminate the current buffer for advisers with assets under management between $25 million and $30 million that permits these advisers to remain regulated by the states, and we are replacing it with a similar buffer for mid-sized advisers with assets under management of close to $100 million.[419] The rule raises the threshold above which a mid-sized adviser must register with the Commission to $110 million; but, once registered with the Commission, an adviser need not withdraw its registration until it has less than $90 million of assets under management.[420] Commenters did not object to elimination of the current buffer, but several argued that we need to include a new buffer for mid-sized advisers that have close to $100 million of assets under management.[421] These comments persuaded us to adopt a buffer that, as discussed below, may prevent costs and disruption to advisers that otherwise may have had to switch between federal and state registration frequently.[422] The rule also maintains the 180-day grace period from the adviser's fiscal year end for advisers no longer eligible to switch to state registration,[423] which further addresses commenters' concerns about advisers frequently having to switch registration.[424]

We are eliminating the current $5 million buffer, as proposed, because, as one commenter noted, it seems ''unnecessary and potentially confusing,''[425] particularly in light of Congress's determination generally to require most advisers having between $25 million and $100 million of assets under management to be registered with the states.[426] Elimination of the current buffer also promotes efficiency and competition by making the registration requirements for advisers with assets under management between $25 million and $30 million consistent with the requirements for advisers with assets under management between $30 million and $100 million.

The new buffer yields several benefits, also identified by commenters, including enhancing efficiency because it will prevent advisers from frequently switching to and from Commission registration due to market fluctuations.[427] The buffer also will eliminate the additional costs and resulting competitive disadvantages these advisers would therefore incur (such as paying filing fees and changing compliance programs to reflect a different regulatory regime).[428] The amendment operates to provide a buffer of 20 percent of the $100 million

[413] Many commenters urged us to provide additional time for mid-sized advisers to complete the switch to state registration. *See* ABA Committees Letter; Altruist Letter; CMC Letter; Dezellem Letter; Dinel Letter; FSI Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Sadis Letter; Schnase Letter; Seward Letter; Shearman Letter. Several commenters echoed concerns about timely state processing of applications, noting, in particular, additional registration and compliance requirements in many states and expected delays to approve state registrations given the increase in filings as a result of the Dodd-Frank Act. *See* ABA Committees Letter (''some states may be unable to process such filings in a timely and efficient manner.''); Altruist Letter (noting that it took 122 days for a state to approve its application). *See also* CMC Letter; Dezellem Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter. One commenter, while supporting the method and timeline for transition contained in proposed rule 203A–5, suggested that it would be prudent to include in the rule flexibility to extend this timeline if necessary. *See* NASAA Letter.

[414] *See, e.g.,* ICI Letter; MFA Letter; NYSBA Committee Letter; Shearman Letter.

[415] *See, e.g.,* ABA Committees Letter; Altruist Letter; CMC Letter; Dezellem Letter; Dinel Letter; FSI Letter; Klein Letter; NRS Letter; NYSBA Committee Letter; Sadis Letter; Schnase Letter; Seward Letter; Shearman Letter. Only one commenter supported the proposed 90-day grace period. Pickard Letter.

[416] Our current rules provide an SEC-registered adviser that has to switch to state registration a period of 180 days after its fiscal year end to file an annual amendment to Form ADV and to withdraw its SEC registration after reporting to us that it is no longer eligible to remain registered with us. *See* rule 203A–1(b)(2); *cf.* rule 204–1(a). Several commenters recommended the Commission match the current 180-day period. *See* Altruist Letter; Dezellem Letter; FSI Letter; Klein Letter; NYSBA Committee Letter; Schnase Letter; Seward Letter; Shearman Letter.

[417] *See* new rule 203A–5(b); amended Form ADV: Instructions for Part 1A, instr. 5.b.(4); *supra* section II.A.1.

[418] Several commenters recommended that advisers be able to calculate assets under management as of the quarter-end. *See* Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

[419] *See* amended rule 203A–1(a); *supra* note 103 and accompanying text.

[420] *See* amended rule 203A–1(a); *supra* note 106.

[421] *See* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NASAA Letter; NRS Letter; NYSBA Committee Letter; Wealth Coach Letter; WJM Letter.

[422] Several commenters discussed the costs of switching frequently between Federal and state registration. *See, e.g.,* Altruist Letter; ICW Letter; JVL Associates Letter; NRS Letter; Wealth Coach Letter.

[423] *See* amended rule 203A–1(b)(2); *supra* note 104 and accompanying text.

[424] *See* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NRS Letter; NYSBA Committee Letter; Wealth Coach Letter; WJM Letter.

[425] ABA Committees Letter.

[426] *See supra* note 18.

[427] Commenters said a 20 percent buffer should prevent advisers from having to switch as a result of changes in market values due to volatility in the securities markets. *See, e.g.,* Dezellem Letter; Dinel Letter; WJM Letter. *See also* Altruist Letter; FSI Letter; ICW Letter; Merkl Implementing Letter; NYSBA Committee Letter. Several advisers with close to $100 million of assets under management asserted that a buffer is necessary to prevent them from switching to and from Commission registration. ICW Letter (for three years, adviser's assets under management have fluctuated above and below $100 million due to market volatility); JVL Associates Letter (adviser's assets under management have fluctuated around $100 million since 2007). *See also* Wealth Coach Letter (from October 2008 through March 2009, adviser's total assets under management fell over 25 percent).

[428] *See* ICW Letter (having to switch back and forth ''would create a disproportionate regulatory burden and cost structure'' and would ''place them at a significant operating and financial disadvantage to advisory firms clearly exposed to only one regulatory regime that is not likely to change.''); WJM Letter (not having a buffer potentially puts an unreasonable and unfair burden on the smaller SEC advisers and could mean they would re-register several times before getting into a ''safe'' zone). *See also* Dezellem Letter; FSI Letter; Wealth Coach Letter.

statutory threshold for registration with the Commission, which is the same percentage as the current buffer. We believe a 20 percent buffer is appropriate because it is large enough to create a flexible regime that accommodates market fluctuations or the departure of one or more clients, and does not substantially increase or decrease the $100 million threshold set by Congress in the Dodd-Frank Act.[429] Commenters further asserted that the buffer will reduce burdens for investors, clients and regulators,[430] and will provide regulatory flexibility.[431]

Exemptions From the Prohibition on Registration With the Commission

We are amending three of the exemptions from the prohibition on registration in rule 203A–2 to reflect developments since their original adoption, including the enactment of the Dodd-Frank Act.[432] First, we are eliminating the exemption in rule 203A–2(a) from the prohibition on Commission registration for NRSROs.[433] Currently, no advisers indicate that they are NRSROs by marking Item 2.A.(5) of Part 1A of Form ADV.[434] Given that NRSROs do not currently rely on the exemption and Congress excluded certain NRSROs from the Act's definition of ''investment adviser'' since we adopted this exemption,[435] the amendment will not generate any benefits or costs and will not impact efficiency, competition or capital formation, separate from the benefit of simplifying our rules and, as one commenter noted, will increase ''consistency across legislative and regulatory requirements.''[436]

Second, we are amending the exemption available to pension consultants in rule 203A–2(b) to increase the minimum value of plan assets on which an adviser must consult from $50 million to $200 million.[437] We are increasing the threshold to $200 million in light of Congress's determination to increase from $25 million to $100 million the amount of assets under management that requires advisers to register with the Commission, and to maintain the same ratio as today of plan assets to the statutory threshold for registration.[438] This amendment will provide the benefit to these firms of registering with a single securities regulator, and will provide the regulatory benefit of allowing the Commission to focus its resources on oversight of those pension consultants that are more likely to have an effect on national markets.[439]

Finally, we are amending the multi-state adviser exemption to align the rule with the multi-state exemption Congress provided for mid-sized advisers in section 410 of the Dodd-Frank Act.[440] Amended rule 203A–2(d) permits all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[441] An adviser relying on the rule must withdraw from registration with the Commission when it is no longer required to register with 15 states.[442] We believe this change reflects the Congressional determination to set the threshold at 15 states.[443] This amendment reduces the regulatory burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator—the Commission.[444] Additionally, the amendment promotes efficiency and reduces the effect on competition between small and mid-sized investment advisers by imposing a consistent multi-state exemption standard.[445] We also are rescinding, as proposed, the provision in the current rule that permits advisers to remain registered until the number of states in which they must register falls below 25 states, and we are not adopting a similar cushion for the 15-state threshold.[446] We do not see any significant benefit of retaining this buffer, and we believe it is unnecessary because advisers elect to rely on the exemption and we are lowering the number of states from 30 to 15. As one commenter observed, eliminating the buffer also simplifies the requirements of the exemption.[447]

Elimination of Safe Harbor

We are rescinding, as proposed, rule 203A–4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with the state securities authority of the state in which it has its principal office and place of business based on a reasonable belief that it is prohibited from registering with the Commission because it does not have sufficient assets under management.[448] As discussed above, the safe harbor was designed for smaller advisory businesses with assets under management of less than $30 million, which may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[449] We also believe that the revisions we are adopting to the Form ADV instructions to implement a uniform method for advisers to calculate assets under management will clarify the requirements and reduce confusion

[429] *See supra* note 117.

[430] *See* Dezellem Letter (arguing new registrations are time consuming and costly for regulators and advisers, and adopting a buffer will decrease investor confusion); FSI Letter (arguing a buffer will reduce costs associated with re-registration that would be passed on to investors); Wealth Coach Letter (arguing different registrations could overwhelm clients, and the resources required to change registration could negatively impact an adviser's client services and portfolio management); WJM Letter (arguing clients would be ''puzzled or concerned'' by registration changes, and multiple re-registrations would put additional burdens on states).

[431] *See* NASAA Letter (arguing a buffer ''provides an element of regulatory flexibility.'').

[432] *See* amended rule 203A–2; *supra* section II.A.5. We are also renumbering and making minor conforming changes to rule 203A–2(c), (d) and (f). *See* amended rule 203A–2(b), (c) and (e). Each of the exemptions from the prohibition on registration in rule 203A–2 (including those we are not amending) also apply to mid-sized advisers, which one commenter asserted ''promotes uniformity, clarity and a consistent standard for all.'' NRS Letter. *See supra* note 119.

[433] *See supra* section II.A.5.a.

[434] Based on IARD data as of April 7, 2011.

[435] *See supra* notes 121–122.

[436] NRS Letter (asserting that the proposal is consistent with the Credit Rating Agency Reform Act, which amended the Advisers Act to exclude NRSROs and to provide for a separate regulatory regime for them under the Exchange Act). *See also* Pickard Letter (asserting that continued availability of the NRSRO exemption is causing confusion among advisers).

[437] *See* amended rule 203A–2(a); *supra* section II.A.5.b.

[438] *See supra* note 127.

[439] One commenter expressed support for the $200 million threshold. *See* NRS Letter (agreeing that the $200 million threshold would continue to ensure that the activities of a pension consultant registered with the Commission are significant enough to have an impact on national markets).

[440] *See* amended rule 203A–2(d); *supra* section II.A.5.c.

[441] *See supra* note 131.

[442] *See supra* note 132.

[443] *See supra* note 136.

[444] *See* Seward Letter, and Shearman Letter (in each case supporting the 15-state threshold we proposed, and suggesting the burdens of maintaining multiple state registrations can be significant). *See also* NEA Letter. One of these commenters also would support further decreasing the number of states to five and requiring advisers relying on the exemption to have at least $25 million of assets under management. Seward Letter. Another ''would support an even lower threshold.'' Shearman Letter.

[445] NASAA Letter (supporting amendment ''as an effort to be more consistent in the registration requirements for all advisers when analyzing the thresholds for registration with the SEC or the states.''); NRS Letter (''Establishing one uniform standard for all advisers of a 15-state requirement provides a uniform and clear standard.''). *See also* NEA Letter (strongly recommending the 15-state threshold be applied to both small and mid-sized advisers).

[446] *See* rule 203A–2(e)(1); *supra* section II.A.5.c.

[447] *See* NRS Letter (''The Dodd-Frank Act has addressed the multi-state adviser exemption to simplify the requirements of this exemption.'').

[448] *See* rule 203A–4; *supra* section II.A.6.

[449] *See supra* note 140.

among advisers.[450] Moreover, the rule is a safe harbor only from our enforcement actions, and to our knowledge few, if any, advisers have relied upon it in the 14 years since it was adopted.[451] We believe rescinding the safe harbor will simplify our rules in general, thereby marginally reducing costs of compliance, and will have little, if any, other effect on efficiency, competition or capital formation.

Mid-Sized Advisers

The Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is ''required to be registered'' or is ''subject to examination'' by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers registering with the Commission.[452] We are providing in the instructions to Form ADV an explanation of how we construe these statutory provisions.[453] Our instructions are intended to clarify the meaning of these provisions, promoting efficiency by mitigating uncertainty about their meaning. For example, as underscored by commenters, because we are identifying to advisers filing on the IARD the states that do not subject advisers to examination, a mid-sized adviser will not be required to independently determine whether it is subject to examination in a particular state.[454] Simplifying the process for mid-sized advisers to determine whether they are required to register with us would decrease any competitive disadvantages compared to smaller advisers.

2. Exempt Reporting Advisers: Sections 407 and 408

Congress gave us broad authority under sections 203(l) and 203(m) of the Advisers Act to require exempt reporting advisers to file reports as necessary or appropriate in the public interest or for the protection of investors.[455] To implement these new sections of the Advisers Act, we are adopting new rule 204–4, as proposed, that requires exempt reporting advisers to submit to us, and to periodically update, reports that consist of a limited subset of items on Form ADV.[456] We are also adopting the amendments we proposed to Form ADV to permit the form to serve as both a reporting and registration form and to specify the seven items that exempt reporting advisers must complete.[457]

While the benefits of the reporting requirement under new rule 204–4 are difficult to quantify, we believe they are substantial. The information exempt reporting advisers provide on Form ADV will be beneficial to both the Commission and investors. This information will help us to identify exempt reporting advisers, their owners, and their business models and will provide us with information as to whether these advisers or their activities might present concerns sufficient to warrant our further attention in order to protect their clients, investors, and other market participants.[458] The reports, which will be publicly available, will also provide investors with some basic information about these advisers and their businesses. Several commenters agreed, expressing general support for the proposed reporting requirements.[459]

Under rule 204–4, exempt reporting advisers are required to file their Form ADV reports electronically through the IARD.[460] We believe that using Form ADV and the IARD for exempt reporting adviser reports will yield several important benefits. For instance, using Form ADV and the IARD creates efficiencies that benefit both us and filers by taking advantage of an established and proven filing system, while avoiding the expense and delay of developing a new form and filing system. Several commenters agreed,[461] and one explained that, in its view, there is ''no reason to create a new form or filing system when the existing ones have been designed for use by advisers and are suitable for that purpose.'' [462] In addition, because an exempt reporting adviser may be required to register on Form ADV with one or more state securities authorities, use of the existing form and filing system (which is shared with the states) should reduce regulatory burdens for exempt reporting advisers because they can satisfy multiple filing obligations through a uniform form.[463] Commenters agreed with our expectation that regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[464] Finally, certain items in Form ADV Part 1 are also linked to Form BD, which will create efficiencies if the exempt reporting adviser were to apply for broker-dealer registration.[465]

Requiring exempt reporting advisers to file their reports through the IARD will also benefit investors, prospective investors, and other members of the public who can readily access the information, without cost, through the Commission's Web site on the Investment Adviser Public Disclosure (IAPD) system. Investors will have access to some information that may have been previously unavailable or not easily attainable, such as whether an exempt reporting adviser has certain disciplinary events and whether its affiliates present conflicts of interest or allow broader access to other financial services.

Several commenters supported the public availability of exempt reporting adviser reports as beneficial to the protection of investors.[466] Investor advocacy groups, for instance, lauded the Commission's initiative to create, for the first time, a database of public information on advisers to private investment funds.[467] Others added that an investor would be better able to perform due diligence if the information were made available to the

[450] *See supra* note 141.

[451] *See supra* note 142.

[452] *See supra* note 145.

[453] *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.; *supra* section II.A.7.

[454] *See* NRS Letter (noting ''the wide range of state regulatory regimes and processes'' and supporting ''efforts to verify those states which do or will subject advisers to examinations.''); Sadis Letter (noting different state examination practices and arguing that clarification of registration requirements ''is vital to the compliance of mid-sized advisers in states * * * which do not have routine examination programs in place for its investment advisers.'').

[455] *See* sections 407 and 408 of the Dodd-Frank Act, codified as new sections 203(l) and 203(m) of the Advisers Act.

[456] New rule 204–4(a); amended Form ADV: General Instructions 3 and 4. *See supra* section II.B.

[457] *See supra* section II.B.2.

[458] One commenter agreed. ABA Committees Letter.

[459] *See, e.g.,* AFL–CIO Letter; CII Letter; NRS Letter; Better Markets Letter; ABA Committees Letter; NASAA Letter.

[460] New rule 204–4(b) and (d).

[461] *See, e.g.,* AFL–CIO Letter; Better Markets Letter; NRS Letter; NASAA Letter. Responding to our request for comment regarding the possible use of EDGAR in place of the IARD, one commenter argued that ''[s]uch an approach would be confusing and burdensome for any adviser that transitions between [exempt reporting adviser] and SEC-registered status.'' ABA Committees Letter.

[462] ABA Committees Letter.

[463] *See supra* note 170 and accompanying text.

[464] *See* ABA Committees Letter; Better Markets Letter; NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

[465] Form BD is the Uniform Application for Broker-Dealer Registration. 17 CFR 249.501.

[466] AFL–CIO Letter; CII Letter; Better Markets Letter.

[467] *Id.*

public,[468] and could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees.[469] In addition, requiring exempt reporting advisers to complete Section 7.B. of Schedule D for each private fund they manage should result in many of the same benefits that this information produces with respect to registered advisers that we address in the discussion of the amendments to Form ADV below.[470]

We have considered the broad public interest in making this information generally available, and we agree with commenters who assert there will be important benefits of providing information about these advisers to the public. In addition to furnishing us with important data about the private funds advised by exempt reporting advisers that we can use to identify practices that may harm investors,[471] and to administer our regulatory programs, these reports will create a publicly accessible foundation of basic information that could aid investors and prospective investors in conducting due diligence and could further help investors and other industry participants protect against fraud.[472] The easy availability of information about these advisers and their advisory affiliates may also discourage advisers from engaging in certain practices (such as maintaining client assets with a related person custodian) or hiring certain persons (such as those with disciplinary history). Investors' access to information may also facilitate greater competition among advisers, which may in turn benefit clients.

Electronic reporting by exempt reporting advisers of certain items within Form ADV will give us better access to information about these advisers, which will improve the administration of our regulatory programs and allow us to identify advisers whose activities suggest a need for closer scrutiny. We routinely use the IARD to generate reports on the advisory industry, its characteristics and trends. These reports would help us anticipate regulatory problems, identify potential conflicts of interest, allocate our resources, and more fully evaluate various regulatory actions we may consider taking, which should increase both the efficiency and effectiveness of our programs and thus increase investor protection.

We are also amending rule 204–1 under the Advisers Act, which addresses when and how advisers must amend their Form ADV, to require that exempt reporting advisers file updating amendments to reports filed on Form ADV.[473] As amended, rule 204–1 requires an exempt reporting adviser, like a registered adviser, to amend its reports on Form ADV: (i) at least annually, within 90 days after the end of the adviser's fiscal year; and (ii) more frequently, if required by the instructions to Form ADV. Similarly, we are amending General Instruction 4 to Form ADV to require an exempt reporting adviser, like a registered adviser, to update promptly Items 1 (Identification Information), 3 (Form of Organization), and 11 (Disciplinary Information) if they become inaccurate in any way, and to update Item 10 (Control Persons) if it becomes materially inaccurate.[474]

Requiring advisers to amend and update their reports assures that we have access to updated information. For example, these updates will allow us to know when an exempt reporting adviser has added or no longer advises a private fund client or has reported a disciplinary event, which will provide us with the information necessary to assess whether the adviser might present sufficient concerns to warrant our further inquiry. Updated information also benefits investors, prospective investors, and other members of the public that could use this information in evaluating, for example, whether to invest in a venture capital fund managed by an exempt reporting adviser. Many commenters who addressed updating and amendment requirements agreed with our approach to update the report annually and to amend it according to the same schedule as is applicable to registered advisers.[475]

When an adviser ceases to be an exempt reporting adviser, new rule 204–4 requires the adviser to file an amendment to its Form ADV to indicate that it is filing a final report.[476] Final report filings will allow us and the public to distinguish such a filer from one that is failing to meet its filing obligations.[477] Commenters who addressed the proposal to require a final report endorsed the Commission's approach.[478]

To accommodate their use by exempt reporting advisers, we also are making technical amendments to Form ADV–H, the form advisers use to request a hardship exemption from electronic filing,[479] and Form ADV–NR, the form certain non-resident advisers use to appoint the Secretary of the Commission as an agent for service of process.[480] Rule 204–4(e) and the amendments to Form ADV–H benefit exempt reporting advisers by allowing them to avoid non-compliance with reporting requirements based purely on unanticipated technical difficulties. The amendments to Form ADV–NR benefit investors by allowing us to obtain appropriate consent to permit the Commission and other parties to bring

[468] Merkl Implementing Letter.

[469] CII Letter.

[470] *See infra* notes 483–488 and accompanying text.

[471] For instance, census data about a private fund's gatekeepers, including administrators and auditors, would be available on amended Section 7.B.(1) of Schedule D and would be verifiable by investors and the Commission. Recent enforcement actions suggest that the availability of such information could be helpful. *See, e.g., SEC* v. *Grant Ivan Grieve, et al.,* Litigation Release No. 21402 (Feb. 2, 2010) (default judgment against hedge fund adviser that was alleged to have fabricated and disseminated false financial information for the fund that was ''certified'' by a sham independent back-office administrator and phony accounting firm); *In the Matter of John Hunting Whittier,* Investment Advisers Act Release No. 2637 (Aug. 21, 2007) (settled action against hedge fund manager for, among other things, misrepresenting to fund investors that a particular auditor audited certain hedge funds, when in fact it did not).

[472] *See infra* section V.A.3.

[473] Amended rule 204–1. *See supra* section II.B.4.

[474] *See* Form ADV: General Instruction 4.

[475] *See* NRS Letter (expressing general support); Merkl Implementing Letter (stating that less frequent reporting would result in information that is less useful or materially inaccurate); CII Letter (expressing general support); ABA Committees Letter (asserting that information reported by exempt reporting advisers that is allowed to become significantly outdated or inaccurate would not serve the Commission's or public's interest or protect investors as mandated by the Dodd-Frank Act, and could be misleading).

[476] New rule 204–4(f); Form ADV: General Instruction 15. *See* section II.B.5.

[477] New rule 204–4(f). Advisers filing a final report are required only to update Item 1 of Part 1A of Form ADV and are not required to pay a filing fee. An adviser that failed to file a final report would violate rule 204–4(f).

[478] ABA Committees Letter (agreeing that a final report is a reasonable way for an exempt reporting adviser to notify the Commission that it is no longer an exempt reporting adviser and endorsing the concept of allowing exempt reporting advisers that are transitioning to registration to use a single Form ADV filing for the purposes of submitting their final report and their application for registration); Merkl Implementing Letter (indicating that the Commission should not require some other approach than a final report when an adviser ceases to be an exempt reporting adviser).

[479] New rule 204–4(e) allows exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD to request a temporary hardship exemption from electronic filing requirements.

[480] *See* amended Form ADV–H; amended Form ADV–NR; amended Form ADV: General Instruction 19. The amendments to Form ADV–H and Form ADV–NR reflect that exempt reporting advisers use the forms in the same way and for the same purpose as they are currently used by registered investment advisers.

actions against non-resident partners or agents for violations of the federal securities laws. Commenters did not specifically address these changes to Form ADV–H and ADV–NR.

3. Form ADV Amendments

As discussed above, we are adopting amendments to Form ADV that will require advisers to provide us additional information about: (i) The private funds they advise, (ii) their advisory business and conflicts of interest, and (iii) their non-advisory activities and financial industry affiliations.[481] We are also adopting certain additional changes intended to improve our ability to assess compliance risks and to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

Private Fund Reporting Requirements

We are adopting amendments to Item 7.B. and Schedule D of Form ADV that expand the information advisers must report to us about the private funds they advise. This reporting will provide us with information designed to help us better understand private fund investment activities and the scope and potential impact of those activities on investors and markets. The information will also assist us in identifying particular practices that may harm investors and will allow us to conduct targeted examinations of private fund advisers based on these practices or other criteria. The amended reporting items are designed to improve our ability to assess risk, identify funds with service provider arrangements that raise a ''red flag,'' identify firms for examination, and allow us to more efficiently conduct examinations. For instance, it would be relevant to us to know that a private fund is using a service provider that we are separately investigating for alleged misconduct. Responses to the service provider questions will also allow us to identify private funds that do not make use of independent service providers and provide other key information regarding the identity and role of these private fund gatekeepers. Advisers are required to report the gross asset value of the fund, which will help us understand the scope of its operations.[482] While no particular item of information may by itself indicate an elevated risk of a compliance failure, the reporting as a whole is designed to serve as an input to the risk metrics by which our staff identifies potential risk and allocates examination resources. The staff conducts similar analyses today, but with fewer inputs.

Several commenters agreed with our assessment that the new information will allow us to identify harmful practices, improve risk assessment and more efficiently target examinations,[483] and a U.S. Senator added that the data would aid the Financial Stability Oversight Council in monitoring systemic risk.[484] In its comment letter, NASAA wrote that ''the information required of these advisers will be of critical importance to regulators in identifying practices that may harm investors.'' One commenter who criticized certain aspects of the proposal nonetheless conceded that ''these disclosures would assist the Commission in seeking to achieve these goals [protecting against fraud and assisting in systemic risk evaluation].''[485]

Prospective and current private fund investors will also benefit from the public disclosure of this expanded private fund reporting. Private fund advisers must report information about their business, affiliates, owners, gatekeepers, and disciplinary history. This will create a publicly accessible foundation of basic information that could aid investors in conducting due diligence and could further help investors and other industry participants protect against fraud. For example, investors (and their consultants) will be able to compare representations made on Schedule D with those made in private offering documents or other materials provided to prospective investors. Fund service providers, such as administrators and auditors, may review the information that advisers report in order to uncover false representations regarding the identity of service providers.[486] Some commenters agreed that the public availability of private fund data would aid investors.[487] We continue to believe that public disclosure of this information will be valuable to investors precisely because they will be able to compare the Form ADV information to the information they have received in offering documents and as a result of due diligence.[488]

The expanded private fund reporting will also benefit investors and market participants by providing us and other policy makers with improved data. This data will enhance our ability to form and frame regulatory policies regarding the private fund industry and its advisers, and to evaluate the effect of our policies and programs on this industry, including for the protection of private fund investors. Today, we frequently have to rely on data from other sources, when available. Private fund reporting will provide us with important information about this rapidly growing segment of the U.S. financial system.

Other Amendments to Form ADV

We are adopting other amendments to Form ADV that refine or expand existing questions. These changes will give us a more complete picture of an adviser's practices, help us better understand an adviser's operations, business and services, and provide us with more information to determine an adviser's risk profile and prepare for examinations. The information reported will help us to identify practices that may harm clients, including by detecting data or patterns that suggest further inquiry may be warranted and distinguishing additional conflicts of interest that advisers may face. For example, the new reporting on related persons will allow us to link disparate pieces of information to which we have access concerning an adviser and its affiliates to identify whether those relationships present conflicts of interest that create higher risks for advisory clients. Another example is the amendment that requires advisers to switch from ranges to approximate numbers of employees; although this change refines data we previously received, it will enable us to better develop risk-based profiles of advisers. The expanded list of activities in which an adviser might engage will help us better understand the operations of advisers. Additionally, requiring advisers to report whether they have $1 billion or more in assets will help us to identify the advisers that could be subject to rules regarding certain excessive incentive-based compensation arrangements required by section 956 of the Dodd-Frank Act. Overall, the information to be collected on amended Form ADV is designed to improve our

[481] *See supra* section II.C.

[482] *See* amended Form ADV, Part 1A, Schedule D, Section 7.B.(1)A., question 11.

[483] *See infra* note 265.

[484] Sen. Levin Letter.

[485] Seward Letter.

[486] *See* Implementing Proposing Release, *supra* note 7, at n.149 and accompanying text.

[487] *See, e.g.,* AFL–CIO Letter; CII Letter; Better Markets Letter (each lauding the Commission's initiative to create, for the first time, a database of public information on private investment funds).

[488] *See supra* note 270. *See, e.g.,* Merkl Implementing Letter (noting that a potential investor would be better able to perform due diligence if the information were made available to the public).

risk-assessment capabilities and help us improve our allocation of examination resources. Commenters who addressed these proposed amendments to Form ADV expressed general support.[489] One commenter, for instance, agreed that these amendments will improve our ability to gather data about firms, to conduct appropriate inquiries, inspections, and other activities based on that data, and to focus examination and enforcement resources on those advisers that appear to present greater compliance risks.[490] Another indicated that the additional information the amended form will collect would assist the Commission to identify fund advisers, to verify the existence and location of assets and to carry out general market surveillance.[491]

Advisory clients and prospective clients will also benefit from the changes to Form ADV. As one commenter indicated, information reported on Form ADV is publicly available, allowing investors to use the IAPD as a resource in evaluating potential managers and understanding their practices.[492] For example, clients and prospective clients will be able to see whether an adviser or one of its control persons is a public reporting company registered under the Exchange Act and then access additional public information about the adviser and/or the control person on the EDGAR system. Requiring an adviser to report whether it has $1 billion or more of assets helps to inform the adviser, its clients and the public whether or not the adviser may be subject to section 956 of the Dodd-Frank Act and any rules or guidelines thereunder. The additional information about the adviser's related persons will assist investors that compare business practices, strategies, and conflicts of a number of advisers, which may help them to select the most appropriate adviser for them. Clients may also benefit indirectly because advisers may be incentivized to implement stronger controls and practices, particularly related to any conflicts of interest or business practices that may result in additional risks, because of enhanced client awareness. Third parties will also be able to access the new information reported in filings of the amended form, allowing academics, businesses, and others to access additional information about registered investment advisers and exempt reporting advisers, which they can use to study the advisory industry.

Among the amendments to Form ADV are improvements to its instructions. We expect these changes to assist advisers in determining their regulatory assets under management and whether they are eligible or required to register with us, which may result in cost savings for some advisers because they may more readily be able to make this determination.[493] Eliminating the choices we have given advisers in the Form ADV instructions for calculating assets under management, for example, provides for a uniform method of determining assets under management for purposes of the form and the new exemptions from registration under the Advisers Act. These updates will also include, for the first time, specific instructions on how to determine the amount of private fund assets an adviser has under management. We expect that these changes will promote competition, increase certainty when an adviser chooses to rely on an exemption from registration, and improve consistency in reporting across the industry.[494] Some of the technical amendments we are adopting, such as those to Item 9, are designed, at commenter request, to alleviate adviser confusion.[495]

4. Amendments to Pay to Play Rule

We are making two amendments to the pay to play rule that we believe are appropriate as a result of the enactment of the Dodd-Frank Act.[496] First, we are amending the rule to make it continue to apply to advisers that previously relied on the ''private adviser'' exemption, including exempt reporting advisers and foreign private advisers.[497] We are making this amendment to prevent the narrowing of the application of the rule as a result of the amendments to the Act made by the Dodd-Frank Act.[498] We do not believe that this amendment will create any benefits (or costs) beyond those created by the rule as originally adopted,[499] but rather will merely assure that the rule continues to apply to the same advisers as we intended when we adopted the rule.

Second, we are amending the rule to add municipal advisors to the categories of registered entities—referred to as ''regulated persons''—excepted from the rule's prohibition on advisers paying third parties to solicit government entities.[500] To qualify as a ''municipal advisor'' (and thereby a ''regulated person''), a solicitor must be registered under section 15B of the Securities Exchange Act and subject to pay to play rules adopted by the MSRB.[501] Notably, for municipal advisors to qualify as ''regulated persons,'' we must find that applicable MSRB pay to play rules: (i) impose substantially equivalent or more stringent restrictions on municipal advisors than the pay to play rule imposes on investment advisers; and (ii) are consistent with the objectives of the pay to play rule.[502]

Our amendment will continue to permit advisers to pay two other categories of persons to solicit government entities on their behalf—investment advisers and broker-dealers—so long as such third parties are registered with us and subject to pay to play rules of their own.[503] Due to the fact that the definition of a municipal advisor may include categories of persons other than registered investment advisers and broker-dealers, our amendment may increase the number of solicitors that an adviser could hire.[504] This could benefit

[489] *See supra* note 216.

[490] *See* IAA General Letter.

[491] *See* CPIC Letter.

[492] CPIC Letter.

[493] *See* section II.A.3.

[494] *See id. See also* Exemptions Adopting Release at sections II.B.2., II.C., II.C.5. (discussing exemption for foreign private advisers and certain private fund advisers).

[495] *See supra* section II.C.5. We are also making a technical amendment to Form ADV–E to reflect the requirement that the accountant's report be filed electronically. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV–E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV–E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV–E until the IARD system is programmed to accept Form ADV–E, and noting that advisers would be informed when that programming was completed). This technical change will alleviate adviser confusion about the appropriate filing method for this form.

[496] *See* section II.D.1.

[497] Rule 206(4)–5(a). *See* section II.D.1.

[498] *See supra* section II.D.1. Rule 206(4)–5 currently applies to ''private advisers'' exempt from registration with the Commission under section 203(b)(3) of the Advisers Act. As discussed in note 4, the Dodd-Frank Act has eliminated the ''private adviser'' exemption from registration with the Commission in section 203(b)(3), but has created new exemptions for exempt reporting advisers and foreign private advisers. Advisers that qualify for these new exemptions generally are subsets of the advisers that qualify for the existing section 203(b)(3) ''private adviser'' exemption.

[499] *See* Pay to Play Release, *supra* note 340, at section IV.

[500] *See* amended rule 206(4)–5(a)(2)(i)(A), (f)(9). ''Regulated persons'' also include registered investment advisers and broker-dealers subject to the rules of a registered national securities association, such as FINRA, that has adopted pay to play rules that the Commission determines satisfy the criteria of amended rule 206(4)–5(f)(9)(iii)(B).

[501] *See* amended rule 206(4)–5(f)(9)(iii).

[502] *See* amended rule 206(4)–5(f)(9)(iii)(B).

[503] Pay to Play Release, *supra* note 340, at section II.B.2.(b).

[504] Our current ''regulated person'' definition does not include, for example, advisers prohibited from registering with the Commission under section 203A of the Advisers Act, such as state-registered

advisers by increasing competition in the market for solicitation services and reducing the cost of such services. It could also benefit those solicitors that are not registered investment advisers or broker-dealers, but may meet the municipal advisor definition, by allowing advisers to hire them.

5. Advisers Previously Exempt Under Section 203(b)(3)

We are adopting a transition provision in rule 203–1 for advisers that are newly required to register due to the Dodd-Frank Act's repeal of the ''private adviser'' exemption in section 203(b)(3).[505] Specifically, under rule 203–1(e), an adviser that was relying on, and was permitted to rely on, the ''private adviser'' exemption in section 203(b)(3) on July 20, 2011, may delay registering with the Commission until March 30, 2012.[506] The transition period will provide these advisers with needed additional time to work through any technical issues associated with applying for registration and to establish compliance with Advisers Act provisions and rules to which they are newly subject as advisers required to register.[507] As such, we believe that the temporary extension of the registration deadline provided by rule 203(e)-1 will assure an orderly transition to registration that will minimize costs to these advisers—costs that could otherwise be passed on to clients. We believe that maintaining an orderly transition process promotes efficiency and may reduce the costs of filing an initial application for registration and coming into compliance with Advisers Act provisions and rules to which these advisers are newly subject.

B. Costs

1. Eligibility To Register With the Commission: Section 410

Transition to State Registration

Rule 203A–5 will impose one-time costs on certain investment advisers registered with us by requiring them to file an amendment to Form ADV, and on advisers that are no longer eligible to remain registered with us by requiring them to file Form ADV–W to withdraw from Commission registration.[508] According to IARD data, approximately 11,500 investment advisers are registered with us and will be required to file an amended Form ADV,[509] and approximately 3,200 of those advisers will be required to withdraw their registration and register with one or more state securities authorities.[510] As we discuss below, although all SEC-registered advisers will be required to file Form ADV, we estimate that only 3,900 of them will have to make an additional filing not in the usual course of business.[511]

Some commenters argued that we should decrease the costs of proposed rule 203A–5 by exempting advisers unaffected by the statutory changes from the Form ADV filing requirement,[512] or only requiring advisers to report their assets under management.[513] As discussed above, we believe there are significant benefits of requiring all advisers to file Form ADV, including having each adviser confirm its eligibility for Commission registration in light of multiple statutory and rule changes, and allowing us and the state regulatory authorities to easily and efficiently identify the advisers that are transitioning to state registration and the advisers that are remaining registered with the Commission.[514] We also note that commenters' concerns also should be allayed by the new March 30, 2012 deadline for filing Form ADV that will coincide with most advisers' required annual updating amendment, eliminating the requirement that they file an additional amendment to their Form ADV,[515] and that will coincide with the filing requirements for newly registering private fund advisers.[516] In

advisers, or advisers unregistered in reliance on an exemption other than section 203(b)(3) of the Act. The definition of ''municipal advisor'' does not exclude these advisers. *See* section 975 of the Dodd-Frank Act. We adopted the third party solicitor ban to prevent advisers from circumventing the rule through third parties. *See* section II.B.2.(b) of the Pay to Play Release. Given the Dodd-Frank Act's creation of the ''municipal advisor'' category, and given that it requires these persons to register with the Commission and subjects them to MSRB rulemaking authority, we believe that expanding the current ''regulated person'' exception to the third party solicitor ban to include registered municipal advisors subject to pay to play rules would not undermine the ban's purpose. By allowing advisers to choose from a broader set of potential third party solicitors, we believe our amendments may promote efficiency and competition in the market for advisory services to the extent third party solicitors that are not registered investment advisers or broker-dealers participate.

[505] *See* rule 203–1(e); section 203(b)(3) of the Advisers Act; *supra* section III.B.2.

[506] *See* rule 203–1(e); *supra* note 385.

[507] We received a number of comment letters requesting that these advisers have additional time after July 21, 2011 (the date the Dodd-Frank Act's repeal of the section 203(b)(3) private adviser exemption becomes effective) to become registered and to establish compliance with all provisions of the Advisers Act and rules thereunder to which they are newly subject by virtue of their required registration. *See* CompliGlobe Letter; MFA Letter; Schnase Letter; Shearman Letter.

[508] *See* new rule 203A–5; *supra* section II.A.1.

[509] Based on IARD data as of April 7, 2011, 11,504 investment advisers are registered with the Commission. We have rounded this number to 11,500 for purposes of our analysis.

[510] According to data from the IARD as of April 7, 2011, 3,531 SEC-registered advisers either: (i) had assets under management between $25 million and $90 million and did not indicate on Form ADV Part 1A that they are relying on an exemption from the prohibition on Commission registration; or (ii) were permitted to register with us because they rely on the registration of an SEC-registered affiliate that has assets under management between $25 million and $90 million and are not relying on an exemption from registration. We estimate that 350 of these advisers will not switch to state registration because their principal office and place of business is located in Minnesota, New York, or Wyoming. *See supra* note 152 (according to IARD data as of April 7, 2011, there were 63 mid-sized advisers in Minnesota, 286 in New York, and 1 in Wyoming). As a result, we estimate that approximately 3,200 advisers will switch to state registration. 3,531 SEC-registered advisers—350 advisers not switching to state registration = 3,181 advisers. In the Implementing Proposing Release, we estimated that approximately 4,100 SEC-registered advisers would be required to withdraw their registrations and register with one or more state securities authorities, based on IARD data as of September 1, 2010. *See* Implementing Proposing Release, *supra* note 7, at n.15. We have lowered our estimate by 900 advisers to account for the advisers that have between $90 million and $100 million of assets under management that may remain registered with us as a result of the amendments we are adopting to rule 203A–1, the advisers that have withdrawn their registrations with us since that time, and as discussed above, the advisers that will not switch registration because they have a principal office and place of business in Minnesota, New York or Wyoming. *See supra* note 22.

[511] Based on IARD data as of April 7, 2011, 10,636 advisers reported on Form ADV a December 31 fiscal year end, of which we estimate approximately 3,013 will file a Form ADV to comply with the Form ADV filing requirement of new rule 203A–5 before switching to state registration because they reported assets under management of less than $90 million and either: (i) they did not indicate on Part 1A of Form ADV that they are relying on an exemption from the prohibition on Commission registration; or (ii) they do not have a principal office and place of business in Minnesota, New York or Wyoming. Additionally, 868 advisers reported a fiscal year end other than December 31 and will file an additional, other-than-annual amendment to comply with new rule 203A–5. 3,013 + 868 = 3,881. We have rounded this number to 3,900 for purposes of our analysis. The revised PRA burden for Form ADV includes the annual amendment filing by the approximately 7,623 advisers with a December 31 fiscal year end that we estimate will remain registered with us after the switch because they reported assets under management of more than $90 million, indicated on Part 1A of Form ADV that they are relying on an exemption from the prohibition on Commission registration, or have a principal office and place of business in Minnesota, New York or Wyoming. *See infra* section VI.B. We have rounded this number to 7,600 for purposes of our analysis.

[512] ICI Letter (recommending exempting advisers that do not rely on assets under management to register with the SEC); MFA Letter (recommending exempting private fund advisers that file an initial Form ADV by July 21); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011).

[513] Shearman Letter.

[514] *See supra* section II.C.

[515] *See supra* note 511.

[516] *See* MFA Letter (''Requiring private fund managers to file two Form ADV's would be costly,

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addition, providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management reported on Form ADV further reduces the cost of the filing and promotes uniformity by requiring the same 90 day period as in Form ADV today.[517] We believe that the rule will have little impact on competition among advisers registered with us because they will all be subject to these requirements, but the rule could have an impact of limited duration on competition between advisers registered with us as of July 21, 2011 who are subject to the rule, and state-registered advisers who are not.[518] We also believe that the rule will have little, if any, effect on capital formation.

For purposes of calculating the currently approved Paperwork Reduction Act (''PRA'') burden for Form ADV, we estimated that an annual updating amendment will take each adviser approximately 6 hours,[519] and we estimate the one-time transition amendment will have a similar burden. In addition, for purposes of the increased PRA burden for Form ADV, we estimate that the amendments to Part 1A of Form ADV will take each adviser approximately 4.5 hours, on average, to complete.[520] As a result, we estimate a total average time burden of 10.5 hours for each adviser completing the amendment to Form ADV required by rule 203A–5 (excluding private fund information which is addressed below).[521] We estimate that each adviser will incur average costs of approximately $2,667.[522]

Proposed rule 203A–5 would have required all advisers registered with us on July 21, 2011 to file a Form ADV amendment, in addition to the amendment that each adviser is required to file annually,[523] and we estimated that 11,850 advisers would file the form.[524] To address commenters' concerns about the burdens of an additional filing,[525] we modified the rule so that approximately 7,600 advisers that will remain registered with the SEC after the transition will satisfy the Form ADV filing requirement by filing their annual amendment following their fiscal year ending on December 31, 2011.[526] This reduces the number of advisers that will file an additional Form ADV attributable to the rule 203A–5 to approximately 3,900.[527] As a result, the total aggregate cost of the Form ADV filing requirement will be approximately $10,401,300.[528] In addition, of these 3,900 registered advisers, we estimate that 850 advise one or more private funds and will have to complete the private fund reporting requirements.[529] We expect this will take 8,373 hours,[530] in the aggregate, for a total cost of $2,126,742.[531] As a result, the total estimated costs associated with filing amended Form ADV as required by rule 203A–5 will be $12,528,042.[532]

For the estimated 3,200 advisers that will be required to withdraw their registrations, we estimate that the average burden for each respondent is 0.25 hours for filing a partial withdrawal on Form ADV–W.[533] An adviser will likely use compliance clerks to prepare the filings and review the prepared Form ADV–W.[534] We estimate that each adviser will incur average costs of approximately $16.75 [535] to comply with the Form ADV–W filing requirements, for a total one-time cost of $53,600.[536] As a result, rule 203A–5 will result in a total one-time cost of $12,581,642.[537]

Switching Between State and Commission Registration

We are adopting amendments to rule 203A–1 to eliminate the $5 million buffer that permits, but does not require, an adviser to register with the Commission if the adviser has between $25 million and $30 million of assets under management.[538] Specifically, the amendment will require advisers with between $25 million and $30 million in assets under management that relied on the buffer to switch their registration to the states.[539] As of April 7, 2011,

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inefficient and potentially confusing.''). *See also supra* section III.

[517] *See* new rule 203A–5(b); Form ADV: Instructions for Part 1A, instr. 5.b.(4). Several commenters that requested more flexibility asserted that the use of end of quarter numbers precludes an administrate burden for many advisers that value assets on a quarterly basis because most advisers already value assets quarterly to calculate fees. *See, e.g.,* Altruist Letter; NYSBA Committee Letter; Seward Letter; Shearman Letter.

[518] For example, the rule requires mid-sized advisers registered with us on July 21, 2011 to remain registered (unless an exemption from Commission registration is available) until they switch to state registration in 2012. *See supra* note 23. All of these advisers must file an amended Form ADV with us by March 30, 2012, and any advisers maintaining dual registrations with the SEC and states will incur renewal fees and compliance costs to maintain both registrations until the beginning of 2012. *See, e.g., infra* note 543. Mid-sized advisers that are not registered with us on July 21, 2011 will not have similar costs.

[519] *See infra* section VI.B.2.a.iii.

[520] *See infra* sections VI.B.1.a.

[521] 6 hours (Form ADV amendment) + 4.5 hours (new Form ADV items) = 10.5 hours.

[522] We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the Securities Industry Financial Markets Association's *Management & Professional Earnings in the Securities Industry 2010* (''SIFMA Management and Earnings Report''), modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for a senior compliance examiner and a compliance manager are $235 and $273 per hour, respectively. (5.25 hours × $235 = $1,233.75) + (5.25 hours × $273 = $1,433.25) = $2,667.

[523] *See* proposed rule 203A–5(a).

[524] *See* Implementing Proposing Release, *supra* note 7, at n.293 and accompanying text.

[525] *See supra* note 414 and accompanying text.

[526] *See supra* note 511.

[527] *See id.*

[528] 3,900 advisers × $2,667 = $10,401,300.

[529] Based on IARD data as of April 7, 2011, 839 advisers out of the estimated 3,700 current SEC-registered advisers that advise private funds do not have a December fiscal year end or are expected to switch to state registration. We have rounded this number to 850 for purposes of this analysis.

[530] Based on IARD data as of April 7, 2011, we estimate that approximately 52 percent of these 850 private fund advisers, or 442, currently advise an average of 3 private funds each; 43 percent, or 365 advisers, currently advise an average of 10 private funds each; and the remaining 5 percent, or 43 advisers, currently advise an average of 79 private funds each. *See infra* note 697 and accompanying text. (442 advisers × 3 funds × 1 burden hour per fund) + (365 × 10 funds × 1 burden hour per fund) + (43 advisers × 79 funds × 1 burden hour per fund) = 1,326 hours + 3,650 hours + 3,397 hours = 8,373 hours.

[531] (4,186.5 hours × $235) + (4,186.5 × $273) = $983,827.5 + $1,142,914.5 = $2,126,742. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 522.

[532] $10,401,300 (total cost for Form ADV filing excluding private fund reporting) + $2,126,742 (total cost for private fund reporting) = $12,528,042 (total cost for Form ADV filing).

[533] Form ADV–W is designed to accommodate the different types of withdrawals an investment adviser may file. An investment adviser ceasing operations will complete the entire form to withdraw from all of the jurisdictions in which it is registered (full withdrawal), while an adviser withdrawing from some, but not all, of the jurisdictions in which it is registered will omit certain items that we do not need from an adviser continuing in business as a state-registered adviser. We expect that advisers required to file Form ADV–W will file only a partial withdrawal because switching to state registration only requires a partial withdrawal. Compliance with the requirement to complete Form ADV–W imposes an average burden of 0.25 hours for an adviser filing for partial withdrawal.

[534] We have assumed for purposes of the current approved PRA burden for rule 203–2 and Form ADV–W that advisers will use clerical staff to file a partial withdrawal. Data from the Securities Industry Financial Markets Association's *Office Salaries in the Securities Industry 2010* (''SIFMA Office Salaries Report'') modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the hourly rate for a compliance clerk is $67.

[535] 0.25 hours × $67 (hourly wage for clerk) = $16.75 (total cost for Form ADV–W filing).

[536] $16.75 × 3,200 = $53,600.

[537] $12,528,042 (total cost for Form ADV filing) + $53,600 (total cost for Form ADV–W filing) = $12,581,642 (total cost for new rule 203A–5).

[538] *See* amended rule 203A–1(a); *supra* section II.A.4.

[539] *See supra* section II.A.4. Under the Dodd-Frank Act, a mid-sized adviser (with at least $25

approximately 300 advisers registered with the Commission had between $25 million and $30 million of assets under management.[540] Because the Dodd-Frank Act has amended section 203A to prohibit approximately 240 of these advisers from registering with the Commission, we believe that 240 advisers will see increased costs as a result of the amendment.[541] These costs include those associated with withdrawing their registration with the Commission and registering with the states, including filing a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act. We have estimated for purposes of our current approved hour burden under the PRA for rule 203–2 and Form ADV that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser, and the filing (and costs associated with the filing) by these 240 advisers are included in our discussion above of the Form ADV–W filing requirement under rule 203A–5.[542] These advisers also will incur the costs of state registration and of compliance with state laws and regulations, which we expect will vary widely depending on the number of, and which, states with which each adviser is required to register. For example, individual state registration fees generally range from approximately $60 to $400 annually, and some states require advisers to submit documentation in addition to Form ADV.[543]

The buffer we are adopting for mid-sized advisers with assets under management of close to $100 million may marginally increase costs for advisers initially as they determine how to comply with the new requirements and complete the amended Form ADV,[544] but, as underscored by several commenters, the buffer decreases costs for advisers in the aggregate.[545] As discussed above, the buffer permits mid-sized advisers to determine whether and when to switch between state and Commission registration, which will prevent costs and disruption for these advisers to frequently switch their registrations.[546] We believe these amendments will have little, if any, effect on capital formation.

Exemptions from the Prohibition on Registration With the Commission

Amending the exemption from the prohibition on registration available to pension consultants in rule 203A–2(b) to increase the minimum value of plan assets from $50 million to $200 million[547] may impose costs on some of the approximately 325 advisers that currently rely on the exemption.[548] These costs, which include those associated with withdrawing their registration with the Commission and registering with the states, if required, will have a negative impact on competition for the advisers that no longer qualify for the exemption and potentially must register as an adviser with more than one state securities authority. We estimate that 50 of the 325 advisers relying on the exemption will have to file a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act and withdraw their registration.[549] We have estimated that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[550] Thus, we estimate that the amendment to rule 203A–2(b) associated with filing Form ADV–W will generate a burden of 12.5 hours[551] at a cost of approximately $840.[552] These advisers will incur the costs of state registration, which we expect will vary widely depending on the number

million of assets under management) is not prohibited from registering with the Commission if: (i) the adviser is not required to be registered as an investment adviser with the securities commissioner (or any agency or office performing like functions) of the state in which it maintains its principal office and place of business; (ii) if registered, the adviser will not be subject to examination as an investment adviser by that securities commissioner; or (iii) the adviser is required to register in 15 or more states. *See* section 410 of the Dodd-Frank Act; *supra* section II.A.

[540] Based on IARD data as of April 7, 2011, 305 advisers registered with the Commission had between $25 million and $30 million of assets under management. We have rounded this number to 300 for purposes of this analysis.

[541] *See supra* section II.A. (discussing new section 203A(a)(2) of the Advisers Act, which prohibits certain mid-sized advisers from registering with the Commission). Based on IARD data as of April 7, 2011, 242 advisers registered with the Commission had between $25 million and $30 million of assets under management. For purposes of this analysis, we have rounded this number to 240 and assume that all of these advisers will not remain eligible to register with the Commission because they will be required to be registered and subject to examination by securities authorities in the states where they maintain their respective principal offices and places of business. *See* Advisers Act section 203A(a)(2) (as amended by the Dodd-Frank Act); *supra* section II.A.7.b. (discussing the fact that each state securities commissioner (or official with similar authority) advised our staff whether investment advisers registered in the state will be subject to examination as an investment adviser by that state's securities commissioner (or agency or office with similar authority)). All state securities authorities other than Minnesota, New York, and Wyoming have advised our staff that advisers registered with them are subject to examination. *See supra* note 152.

[542] *See supra* notes 533–536 and accompanying text (addressing the costs of filing Form ADV–W for advisers that will be required to withdraw their registrations).

[543] *See, e.g.,* Colorado Division of Securities Fee Schedule ($60 registration fee), *available at http://www.dora.state.co.us/securities/feeschedule.htm;* Illinois Secretary of State, Securities Fees ($400 registration fee), *available at http://www.sos.state.il.us/departments/securities/investment_advisers/fees.html;* Ohio Rev. Code § 1707.17(B)(3) (2010) ($100 registration fee); Ark. Code § 23–42–304(a)(3) (2010) ($300 registration fee); Texas State Securities Board, Check Sheet For a Sole Proprietor Corporation LLC or Partnership Applying For Registration as an Investment Adviser ($275 registration fee and requiring copies of adviser's organizational documents, balance sheet, fee schedule, advisory contract, and brochure or disclosure document delivered to clients), *available at http://www.ssb.state.tx.us/Dealer_And_Investment_Adviser_Registration/Check_Sheet_For_a_Sole_Proprietor_Corporation_LLC_or_Partnership_Applying_For_Registration_as_an_Investment_Adviser.php;* North American Securities Administrators Association, Inc., State Securities *Regulators Report on Regulatory Effectiveness and Resources with Respect to Broker-Dealers and Investment Advisers,* 7 (2010) (among other things, states review registrants' disclosure history, financial status, business practices, and provisions in client contracts).

[544] The PRA burdens for Form ADV and rule 203A–5 include a burden of 4.5 hours per adviser to complete the amended Form ADV, including the assets under management calculation and eligibility requirements. *See infra* sections IV.B.1. and IV.C.

[545] Several commenters argued that the buffer would decrease costs, for example, by preventing advisers with close to $100 million of assets under management from having to switch to and from Commission registration frequently. *See, e.g.,* Altruist Letter; Dezellem Letter; Dinel Letter; FSI Letter; ICW Letter; JVL Associates Letter; Merkl Implementing Letter; NRS Letter; Wealth Coach Letter; and WJM Letter.

[546] *See supra* notes 427–428 and accompanying text.

[547] *See* amended rule 203A–2(a); *supra* section II.A.5.b.

[548] Based on IARD data as of April 7, 2011, 322 SEC-registered advisers, which we rounded to 325, indicated that they rely on the exemption for pension consultants by marking Item 2.A.(6) on Part 1A of Form ADV. These advisers do not report the amount of plan assets for which they provide investment advice, so we are unable to determine how many have between $50 million and $200 million of plan assets and, therefore, may have to register with the state securities authorities as a result of the amendment. It is also difficult to determine whether such advisers will be prohibited from registering with the Commission because they are required to register with and are subject to examination by the state securities authority where they maintain a principal office and place of business under the Dodd-Frank Act.

[549] Based on IARD data as of April 7, 2011, approximately 190 pension consultants reported assets under management of less than $90 million, and 166 of those advisers reported assets under management of less than $25 million. We believe that most pension consultants relying on the exemption provide advice regarding a large amount of plan assets, so we expect the number of advisers affected by the amendment to be one quarter of the advisers with less than $25 million of assets under management, or 42 advisers (which is approximately 15 percent of all advisers relying on this exemption). We have rounded this number to 50 for purposes of our analysis. We expect that advisers that will be required to file Form ADV–W will file only a partial withdrawal because they will be registering with the states. *See supra* note 533. Compliance with the requirement to complete Form ADV–W imposes an average burden of approximately 0.25 hours for an adviser filing for partial withdrawal. *See id.*

[550] *See supra* note 533.

[551] 50 responses on Form ADV–W × 0.25 hours = 12.5 hours.

[552] 12.5 hours × $67 = $837.50.

of, and which, states with which an adviser is required to register.[553] We believe the amendment will have little, if any, effect on capital formation.

As discussed above, the amendment to the multi-state adviser exemption in rule 203A–2(e) will reduce costs for advisers in the aggregate because more advisers will be permitted to register with one securities regulator—the Commission—rather than being required to register with multiple states.[554] Advisers newly relying on the amended exemption will incur costs associated with completing and filing Form ADV for purposes of registration with the Commission, and all of the advisers relying on the exemption will incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states. In addition, these advisers will incur costs of complying with the Advisers Act and our rules.

We estimate that, in addition to the approximately 40 advisers that rely on the exemption currently, approximately 115 will rely on the exemption as amended.[555] For purposes of the PRA, we have estimated that these advisers will incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-state threshold.[556] We further estimate that a senior operations manager will maintain the records at an hourly rate of $331, resulting in average initial and annual recordkeeping costs associated with our amendments to rule 203A–2(e) of $2,648 per adviser,[557] and total increased costs of approximately $304,520 per year.[558] Advisers newly relying on the amended exemption will also incur costs associated with completing and filing Form ADV for purposes of registration with the Commission. For purposes of the increase in our PRA burden for Form ADV, we have estimated that advisers newly registering with the Commission will incur an average amortized hour burden of approximately 13.58 hours per year,[559] resulting in costs of approximately $3,450 per adviser[560] and total increased costs of approximately $396,750 per year.[561] Additionally, we estimate that approximately 30 of the newly registering advisers will use outside legal services, and 60 will use outside compliance consulting services, to assist them in preparing their Part 2 brochures,[562] for a cost of $132,000, and $300,000, respectively, resulting in a total non-labor cost among the newly registering advisers of $432,000.[563] The rule could also impact competition between advisers who rely on the exemption and are subject to our full regulatory program, including examinations and our rules, and state-registered advisers who do not rely on the exemption. We believe these amendments will have little, if any, effect on capital formation.

Mid-Sized Advisers

As discussed above, the Dodd-Frank Act does not explain how to determine whether a mid-sized adviser is ''required to be registered'' or is ''subject to examination'' by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers registering with the Commission, and we are providing in Form ADV an explanation of how we construe these provisions.[564] We do not, however, believe that they will generate costs independent of any costs associated with Congress' enactment of section 203A(a)(2), and will have little, if any, effect on capital formation.

2. Exempt Reporting Advisers: Sections 407 and 408

While we believe that our approach to implementing the Dodd-Frank Act's reporting provisions applicable to exempt reporting advisers will minimize costs inherent in such reporting, we acknowledge that it will impose costs on these advisers.[565] These costs include filing fees, although not significant, paid for submitting initial and annual filings through the IARD. We anticipate that filing fees, which the Commission will consider separately, will be the same as those for registered investment advisers, which currently range from $40 to $225 based on the amount of assets an adviser has under management.[566] In order to estimate the costs associated with filing fees, we assume for purposes of this analysis that exempt reporting advisers will pay a fee of $225 per initial or annual report.[567] We estimate that approximately 2,000 advisers will qualify as exempt reporting advisers pursuant to section 203(l) of the Advisers Act, as added by

[553] *See supra* note 543.

[554] *See* amended rule 203A–2(d); *supra* section II.A.5.c. Several commenters suggested that the burdens of maintaining multiple state registrations can be significant. *See* Seward Letter; Shearman Letter. *See also* NEA Letter.

[555] Based on IARD data as of April 7, 2011, of the approximately 11,500 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-state advisers rule. Of the advisers that have less than $90 million of assets under management, approximately 100 currently file notice filings with 15 or more states. However, state notice filing requirements for SEC-registered advisers may differ from registration requirements because Form ADV does not distinguish between states where registration is mandatory and where registration is voluntary. In addition, we estimate that 15 advisers currently registered with 15 or more states could rely on the exemption and register with us. Thus, we estimate that approximately 155 advisers will rely on the exemption (40 currently relying on it + estimated 100 advisers eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

[556] These estimates are based on an estimate that each year an investment adviser will spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain the record, for a total of 8 hours. *See infra* note 665 and accompanying text.

[557] 8 hours × $331 = $2,648. The $331 compensation rate used is the rate for a senior operations manager in the SIFMA Management and Earnings Report, modified by Commission staff to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[558] 115 new advisers relying on the exemption × $2,648 = $304,520.

[559] *See infra* note 695 and accompanying text.

[560] We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner at $235 per hour and a compliance manager at $273 per hour. *See infra* note 579. (6.79 hours × $235 = $1,596) + (6.79 hours × $273 = $1,854) = $3,450.

[561] 115 advisers relying on the exemption × $3,450 = $396,750.

[562] We estimate that a quarter of medium-sized advisers seek the help of outside legal services and half seek the help of compliance consulting services. *See* section VI.B.2.a.iv. As discussed above, we have estimated that 115 new advisers will begin relying on the exemption, in addition to the 40 advisers that currently rely on it. *See supra* note 555. 0.25 × 115 new advisers relying on the exemption = 28.75 advisers seeking outside legal services. 0.5 × 115 new advisers relying on the exemption = 57.5 advisers seeking compliance consulting services. We have rounded these numbers to 30 and 60, respectively, for the purpose of this analysis.

[563] We estimate that the initial cost related to preparation of Part 2 of Form ADV would be $4,400 for legal services and $5,000 for compliance consulting services for those medium-sized advisers who engage legal counsel or consultants. *See infra* note 729 and accompanying text. (30 advisers seeking outside legal services × $4,400 for legal services) + (60 advisers seeking compliance consulting services × $5,000 for compliance consulting services) = $132,000 for legal services + $300,000 for compliance consulting services = $432,000. The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. *See id.*

[564] *See supra* section II.A.7.

[565] *See* amended rule 204–1 and new rule 204–4; amended Form ADV, Part 1A; *supra* section II.B.

[566] The current fee schedule for registered advisers may be found on our Web site at *http://www.sec.gov/divisions/investment/iard/iardfee.shtml.* We amended this fee schedule in December 2010. *See Order Approving Investment Adviser Registration Depository Filing Fees,* Investment Advisers Act Release No. 3126 (Dec. 22, 2010), available at *http://www.sec.gov/rules/other/2010/ia-3126.pdf.*

[567] This is the fee applicable to registered advisers with $100 million or more in assets under management. There will be no fee for filing an other-than-annual amendment to a report.

the Dodd-Frank Act, and rule 203(m)-1 thereunder, and will have to file Form ADV on the IARD.[568] As a result, we expect exempt reporting advisers to incur a total annual cost of approximately $450,000 in filing fees.[569]

In addition to filing fees, exempt reporting advisers will incur internal costs associated with collecting, reviewing, reporting, and updating a limited subset of Form ADV items in Part 1A, including Items 1, 2.B., 3, 6, 7, 10, 11 and corresponding schedules. We expect this cost to be substantially less than that incurred by registered advisers because exempt reporting advisers are not required to complete the remainder of Part 1A or Part 2 of Form ADV. The costs of completing the relevant items of Form ADV will vary from adviser to adviser, depending in large part on the number of private funds an adviser manages.

We believe, and several commenters confirmed, that the information these items require should be readily available to any adviser (particularly the identifying, private fund and control person information required by Items 1, 3, 7.B. and 10), which mitigates the costs and burdens of reporting.[570] Similarly, Item 6 requires the adviser to indicate if it engages in other specific business activities, information which we believe should also be readily available to these advisers. Item 2.B. elicits the information an exempt reporting adviser would already have gathered for purposes of determining if it is eligible for an exemption from registration under section 203(l) of the Act or rule 203(m)-1 thereunder, and as such, this item should impose few, if any, costs to complete. Commenters who addressed Section 7.A. of Schedule D urged that we limit the reporting of related persons, which could be significant in the case of advisers that are part of a large organization.[571] Many of these commenters pointed out that in some cases the adviser and its clients have no business dealings with some affiliates and thus there is less of a chance of conflicts developing.[572] We agree and have revised the proposed item to permit an adviser to omit reporting about certain related persons in a manner that is similar to the approach suggested by a commenter.[573] We are neither reducing nor eliminating the disciplinary reporting requirements that we proposed in Item 11, and no commenters suggested that we do so.[574] Although we believe, as noted above, that the information an adviser needs to complete Section 7.B.(1) is readily available in fund offering documents, we acknowledge that this Section of Form ADV could be time-consuming to complete, particularly for an exempt reporting adviser's initial filing, depending on the number of funds the exempt reporting adviser manages. The primarily check-the-box style of this item and most of the other items exempt reporting advisers must complete, as well as some of the features of the IARD (such as drop-down boxes for common responses and the ability to pre-populate responses) should help decrease the average completion time for these advisers. Based on views expressed by some commenters,[575] we expect the changes we are adopting to Section 7.B.(1) (including the removal of some of the questions that commenters identified as most burdensome) that reduce the amount of information required in respect of private funds[576] will also alleviate concerns that the reports require too much information or that the requirements will impose excessive burdens.[577]

For purposes of the PRA, we estimate that exempt reporting advisers, in the aggregate, will spend 16,000 hours to prepare and submit their initial reports on Form ADV.[578] Based on this estimate, we expect that exempt reporting advisers will incur costs of approximately $4,064,000 to prepare and submit their initial report on Form ADV.[579] Additionally, for PRA purposes, we estimate that exempt reporting advisers in the aggregate will spend 2,200 hours per year on amendments to their filings and on final filings.[580] Based on this estimate, we expect that exempt reporting advisers will incur costs of approximately $558,800 to prepare and submit annual amendments to their reports on Form ADV and final filings.[581] One commenter argued that these estimates should include costs of retaining outside counsel to review the disclosures.[582] We disagree. Exempt reporting advisers are only required to complete a limited subset of Part 1A of Form ADV. As noted above, this part of the form generally calls for readily available information to be reported as approximate numerical responses, as short answers, or by checking a box. Unlike Part 2 of Form ADV, which requires free-form narrative responses, we do not believe that advisers will require outside legal advice in order to provide the factual information that Part 1A requires.[583] Commenters who asserted that our estimates were too low did not provide empirical data by which to recalculate our estimates, making it difficult to evaluate these assertions or determine the magnitude by which their

[568] *See infra* note 734. While this is an estimate of the total number of advisers that may file reports rather than register with the Commission, a number of these advisers may choose to register with the Commission rather than file reports. We cannot determine in advance the precise number of these advisers that will choose to register rather than report. Therefore, in order to avoid under-estimating the costs of these amendments, we are using the total number of potential exempt reporting advisers in our estimates.

[569] 2,000 exempt reporting advisers × $225 per year = $450,000. Advisers pay for initial Form ADV submissions and for annual amendments; there is no charge for an interim amendment.

[570] *See* ABA Committees Letter (''We expect that most [exempt reporting advisers] will already have most of the information requested by Form ADV Part 1 readily available.''); Merkl Implementing Letter (confirming that the disclosure requirements would not impose a significant burden on advisers). *See also,* with respect to private fund reporting under Item 7.B. specifically, Katten Foreign Advisers Letter (''Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports.'') and NRS Letter (arguing that the expanded private fund disclosures on Schedule D would ''replicate the due diligence questionnaire information * * * '').

[571] *See, e.g.,* Shearman Letter.

[572] *See* IAA General Letter.

[573] *See supra* note 300 and accompanying text.

[574] Indeed, one commenter that urged us to substantially reduce the amount of information these advisers are required to report did not advocate to eliminate disciplinary reporting. Village Ventures Letter.

[575] *See supra* note 570.

[576] *See supra* section II.C.1. We are adopting Form ADV with several other changes from the proposal, some of which will affect the reporting by exempt reporting advisers. *See* section II.C. for details concerning these changes to Form ADV.

[577] AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter. A broader discussion about the costs associated with Section 7.B.(1) appears below. *See infra* section V.C.3.

[578] *See infra* note 738; *infra* section VI.B.1.b.

[579] We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. (8,000 hours × $235 = $1,880,000) + (8,000 hours × $273 = $2,184,000) = $4,064,000. For an exempt reporting adviser that does not already have a senior compliance examiner or a compliance manager, we expect that a person performing a similar function would have similar hourly costs.

[580] *See infra* note 744.

[581] (1,100 hours × $235 = $258,500) + (1,100 hours × $273 = $300,300) = $558,800.

[582] *See* BCLBE Letter.

[583] Certain items in Part 1A of Form ADV call for information about which an adviser may consult with outside legal counsel, such as the exemption on which the adviser relies (Item 2.B.) or the exemption on which the adviser's private fund relies (Section 7.B.(1) of Schedule D, question 4). These determinations, however, are part of the adviser's compliance burdens associated with and accounted for as a part of other regulatory requirements (*e.g.,* rule 203(m)–1) and are not, therefore, costs associated with the reporting requirements we are adopting today.

estimates would differ from ours.[584] The changes we are making from the proposal will reduce the amount of information that advisers must file and result in decreased burdens for advisers from the proposal. However, in light of the general comments we received about burdens we are not reducing our burden estimates.[585]

In the Implementing Proposing Release we discussed that the reporting requirements we are adopting may result in other non-quantifiable additional costs for exempt reporting advisers. For example, the new disclosure requirements could influence the business or other decisions of exempt reporting advisers, such as whether to form additional private funds or manage private funds at all. In addition, some of the information made available to the public, such as the identification of owners of the adviser or disciplinary information, may impose costs on the advisers and, in some cases their supervised persons or owners, including the potential loss of business to competitors, as this information was not typically made available to others previously. Commenters neither agreed nor disagreed with these costs.[586]

Several commenters argued that public reporting would be inconsistent with the intent of the Dodd-Frank Act exemptions for these advisers.[587] They did not, however, identify any specific costs associated with these concerns. As discussed above, we do not believe public reporting is inconsistent with the intent of the Dodd-Frank Act. Congress sought to protect only certain proprietary or sensitive information submitted by advisers about their private funds in reports for the assessment of systemic risk.[588]

Some commenters expressed concern that certain of the information we proposed be publicly reported also could include proprietary or competitively sensitive information regarding private funds.[589] One such commenter's competitive concerns related to such things as access to human resource talent among venture capital fund advisers, and composition of a venture capital fund's investor base, control persons and strategic relationships.[590] These commenters, however, did not identify any specific costs associated with these concerns. As discussed elsewhere in this Release, we have responded to these concerns by declining to adopt questions we had proposed that commenters found most burdensome and persuaded us may likely be proprietary or competitively sensitive.[591]

Finally, some commenters expressed concern that access to this information by the general public may cause confusion because an exempt reporting adviser's information would be displayed using the same search function in the IAPD that is used to search registered advisers.[592] These commenters, however, did not identify any specific costs associated with these concerns. We are working with FINRA, our IARD contractor, to ensure that the IAPD search results distinguish between an exempt reporting adviser and a registered adviser.

Completing and filing Form ADV–H and Form ADV–NR will also impose costs on exempt reporting advisers. In the Implementing Proposing Release, we estimated that approximately two exempt reporting advisers would file Form ADV–H annually and that it would impose an average burden per response of one hour, for an increase in the total annual hour burden associated with Form ADV–H of two hours.[593] We did not receive comments on these estimates and continue to believe they are appropriate. We further estimate that for each hour required by the form, professional staff time will comprise 0.625 hours, and clerical staff time will comprise 0.375 hours. We estimate the hourly wage for a compliance manager to be $273 per hour,[594] and the hourly wage for general clerks to be $50 per hour.[595] Accordingly, we estimate the average cost per response imposed on exempt reporting advisers by rule 204–4 and amended Form ADV–H will be $189,[596] for a total annual cost of $378.[597] This represents a decrease of $28 from our estimate in the Implementing Proposing Release, which is attributable to updated wage and salary information.

With regard to Form ADV–NR, we continue to estimate that exempt reporting advisers will file Form ADV–NR at the same annual rate (0.17 percent) as advisers registered with us.[598] Thus, we estimate that the amendments will be filed by approximately three exempt reporting advisers annually,[599] imposing an annual burden of approximately three hours.[600] We further estimate that for each hour required by the form, compliance clerk time will comprise 0.75 hours and general clerk time will comprise 0.25 hours.[601] Therefore, we estimate that the amendments to Form ADV–NR will impose approximately $188 in total additional annual costs for

[584] *See, e.g.,* Village Ventures Letter (asserting that the Commission's ''relatively modest cost estimates * * * understate the true costs that will be required to assure compliance * * *''); AV Letter; Avoca Letter; Debevoise Letter.

[585] See *supra* notes 246, 247, 262, 300, 302 and accompanying text for a discussion of these modifications. Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change in the estimated time an adviser would spend on the reporting or the out-of-pocket costs an adviser would incur.

[586] Several commenters argued that while the reporting may be valuable to the Commission, making the information publicly available would provide little benefit to investors, and they asserted that the benefits were insufficient to justify the costs. *See* BCLBE Letter; NRS Letter; Seward Letter.

[587] Avoca Letter; ABA Committees Letter; Shearman Letter.

[588] *See supra* notes 196–197 and accompanying text.

[589] *See, e.g.,* MFA Letter; NVCA Letter; O'Melveny Letter. Another commenter, however, refuted these competitive concerns, stating that none of the items that exempt reporting advisers would complete would require the disclosure of proprietary or competitively sensitive information. Merkl Implementing Letter.

[590] NVCA Letter. As noted above, while this information could result in competitive effects among these advisers, the effects are not unique to these advisers, and they may result in benefits. *See supra* note 200.

[591] *See supra* notes 238–247 and accompanying text.

[592] Shearman Letter; Seward Letter. *See also supra* note 172 and accompanying text.

[593] *See* Implementing Proposing Release, *supra* note 7, at sections IV.B, V.F. 2 responses × 1 hour = 2 hours.

[594] Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a compliance manager is approximately $273 per hour.

[595] Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a general clerk is approximately $50 per hour.

[596] (0.625 hours × $273) + (0.375 hours × $50) = approximately $189.

[597] $189 per response × 2 responses annually = $378.

[598] *See infra* text accompanying note 776.

[599] 0.17% (rate of filing) × 2,000 estimated exempt reporting advisers = 3 exempt reporting advisers filing Form ADV–NR.

[600] 3 exempt reporting advisers filing Form ADV–NR × 1 hour per Form ADV–NR = approximately 3 hours. In calculating the costs of our amendments to Form ADV–NR in the Implementing Proposing Release, we subtracted cost savings resulting from the Dodd-Frank Act's reduction in the number of total registered advisers (and the commensurate reduction in Form ADV–NR filings) from the total costs associated with completing and filing Form ADV–NR. *See* Implementing Proposing Release, *supra* note 7, at section IV.B. We now believe, however, that it is more accurate to calculate the costs of our amendments to Form ADV–NR without subtracting these savings directly attributable to the Dodd-Frank Act.

[601] Data from the SIFMA Office Salaries Report, modified to account for an 1,800-hour work-year and multiplied by 2.93 to account for bonuses, firm size, employee benefits and overhead, suggest that the cost for a General Clerk is approximately $50 per hour and cost for a Compliance Clerk is approximately $67 per hour.

exempt reporting advisers.[602] This represents an increase from our estimate in the Implementing Proposing Release, which is attributable to updated wage and salary information.

3. Form ADV Amendments

The costs of completing these new and amended items will vary among advisers.[603] One-time monetary costs we expect certain current registrants to incur to complete the amendments we are adopting to Form ADV in connection with the transition filing are discussed above, but that discussion does not take into account costs we expect to be borne by (1) 7,600 current registrants with a December 31 fiscal year end that we expect to remain registered with us,[604] or (2) 700[605] advisers we expect will register with us within the next year as a result of normal annual growth of our population of registered advisers.[606] We estimate these 8,300 advisers will spend, on average, 4.5 hours to respond to the new and amended questions we are adopting today (other than the private fund reporting, which is discussed below),[607] at an aggregate cost of $9,486,900.[608]

In our PRA analysis, we also project that 750 new advisers will register with us as a result of the Dodd-Frank Act's elimination of the private adviser exemption.[609] Because this group of advisers was not formerly required to register with us, we have not previously accounted for the costs to them of completing and submitting Form ADV. As a result, rather than the incremental burden of 4.5 hours per adviser used in our estimates above, we expect that these advisers will spend the full 40.74 hours per adviser filing their initial reports on Form ADV (other than the private fund reporting, which is discussed separately below).[610] These advisers will also spend time preparing and filing interim updating amendments to the form, preparing brochure supplements and delivering codes of ethics to clients. In the aggregate, we expect that these 750 private fund advisers will spend 37,905 hours on these activities,[611] for a total cost of $9,627,871.[612]

Commenters that addressed burdens associated with amendments to Form ADV (other than private fund reporting discussed separately below) focused on costs associated with gathering information necessary to complete proposed Item 5.D. and Section 7.A. of Schedule D.[613] These commenters did not specifically address our estimates or provide empirical data by which to recalculate these estimates. We are making changes from the proposal that will reduce the amount of information that advisers must file and result in decreased burdens for advisers from the proposal.[614] However, in light of the general comments we received about burdens we are not reducing our burden estimates.

In addition to the costs to complete Form ADV for which we account above, some registered advisers will be required to file information regarding the private funds they advise. Specifically, filings will be required by: (i) 2,850 of the 7,600 current registrants with a December 31 fiscal year end that we expect to remain registered with us;[615] (ii) 200 of the 700 advisers we expect will register with us within the next year as a result of normal annual growth of our population of registered advisers;[616] and (iii) 750 private fund advisers registering as a result of the elimination of the private adviser exemption. We estimate this will take 33,500 hours[617] for a total cost of $8,509,000.[618] Most of the commenters that addressed Form ADV costs focused on these private fund reporting requirements, particularly where valuation or ownership information would be required.[619] Several commenters wrote that the burden of the proposed reporting would be significant.[620] As a whole, these commenters suggested that the costs of the proposed amendments would outweigh the benefits, but only a few disagreed with the Commission's estimates of those costs, which they considered too low.[621] Although we believe, as noted above, that the information an adviser needs to complete Section 7.B.(1) is readily available in fund offering documents, we acknowledge that this Section of Form ADV could be time-consuming to complete, particularly for an adviser's initial filing, depending on the number of funds the adviser manages. The primarily check-the-box and short-answer style of Section 7.B.(1), as well as some of the features of the IARD (such as drop-down boxes for common responses and ability to pre-populate

[602] 3 hours × ((0.75 hours × $67) + (0.25 hours × $50)) = approximately $188.

[603] We note that we do not estimate there to be costs associated with the technical amendment we are making to Form ADV–E to reflect the obligation that the accountant's report be filed electronically because those costs were addressed in the 2009 Custody Release. Staff notified advisers in November 2010 that the IARD system had been programmed to accept Form ADV–E. *See* 2009 Custody Release, *supra* note 310 at n.53 and accompanying text (establishing the requirement for Form ADV–E to be filed electronically, explaining that accountants performing surprise examinations should continue paper filing of Form ADV–E until the IARD system is programmed to accept Form ADV–E, and noting that advisers would be informed when that programming was completed).

[604] *See supra* note 511.

[605] *See infra* note 691.

[606] Of the 9,750 advisers we estimate will remain registered or will be newly registered with us after the transition filing, the one-time monetary costs of filing Form ADV that we estimate will be borne by approximately 700 advisers with a fiscal year end other than December 31 are discussed above in section V.B.1. The one-time monetary costs that we estimate will be borne by the remaining 9,050 advisers are discussed here (8,300 discussed in this paragraph + 750 discussed in the next). For a discussion of our PRA estimate of 9,750 advisers, see note 655 below and section VI.B.2.a.i. below.

[607] *See infra* section VI.B.1.a. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments we are adopting today would neither increase the burden associated with the other items on Form ADV, nor would they increase the external costs associated with certain Part 2 requirements.

[608] We expect that the performance of this function would most likely be equally allocated between a senior compliance examiner and a compliance manager, or persons performing similar functions. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. 8,300 advisers × 4.5 hours = 37,350 hours. (18,675 hours × $235 = $4,388,625) + (18,675 hours × $273 = $5,098,275) = $9,486,900.

[609] *See* Implementing Proposing Release, *supra* note 7, at n.375 and accompanying text.

[610] *See infra* IV.B.1. of this Release.

[611] 750 advisers × (40.74 hours per adviser to complete entire form (except private fund reporting requirements) + (1 annual updating amendment × 6.0 hours) + (1 interim updating amendment per year × 0.5 hours) + 1 hour on new brochure supplements + 1 hour on interim amendments to brochure supplements + 1.3 hours delivering codes of ethics to clients) = 37,905 hours. *See infra* notes 679, 709, 710 and accompanying text.

[612] (18,952.5 hours × $235 = $4,453,838) + (18,952.5 hours × $273 = $5,174,033) = $9,627,871. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 608.

[613] *See, e.g.,* IAA General Letter; Shearman Letter.

[614] *See supra* sections II.C.2 and II.C.3.

[615] *See infra* note 696.

[616] *See infra* note 699.

[617] *See infra* note 703.

[618] (16,750 hours x $235 = $3,936,250) + (16,750 hours × $273 = $4,572,750) = $8,509,000. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 608.

[619] *See* AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter.

[620] *See, e.g.,* AIMA Letter; AV Letter; BCLBE Letter; Debevoise Letter; Dechert Foreign Adviser Letter; Gunderson Letter; Katten Foreign Adviser Letter; NRS Letter; Seward Letter; Shearman Letter; VVL Letter. Several of these commenters were writing with respect to exempt reporting adviser reporting, but some of their comments would apply equally to registered advisers. *See supra* Section V.B.2. for a discussion of the estimated costs of reporting for exempt reporting advisers.

[621] *Id.*

responses) should help to decrease the average completion time for these advisers. Based on views expressed by some commenters,[622] we expect these factors will alleviate concerns of other commenters, who argued that the reports require too much information or that the requirements would impose significant burdens.[623] In addition, as discussed above, we are adopting Section 7.B.(1) with several changes (including the removal of some of the questions that commenters persuaded us may likely be proprietary or competitively sensitive) that reduce the amount of information required in respect of private funds.[624]

Based on the foregoing estimates, we expect that the total costs associated with the completion and submission of all of the amendments we are adopting to Form ADV, other than estimated costs above related to the transition described below,[625] therefore, are $27,623,771.[626]

In addition, we estimate for purposes of the PRA that approximately a quarter (or 350) of the 1,450 advisers estimated to register with us as a result of normal annual growth and as a result of the elimination of the private adviser exemption will use outside legal services, and half (or 725) will use outside compliance consulting services, to assist them in preparing their Part 2 brochures, for a total cost of $1,540,000, and $3,625,000, respectively, resulting in a total non-labor cost among all these newly registering advisers of $5,165,000.[627]

A few commenters objected to the amount of information required by Form ADV as a result of the amendments we proposed and suggested streamlining the form or eliminating what they saw as duplicative reporting.[628] We acknowledge some overlap in information required to be reported, but note that the two parts of Form ADV serve different purposes and that overlap in some cases may be necessary so that investors receiving a brochure are provided with full information about a practice or conflict, and that we are able to collect data on the matter for regulatory purposes. We believe that the information required by most of these items should be readily available to any adviser, and several commenters confirmed our belief.[629] The check-the-box style of most of these items, as well as some of the features of the IARD (such as drop-down boxes for common responses) should also help minimize costs by reducing the average completion time. The changes we are making from the proposal will, as a whole, reduce the amount of information that advisers must file and result in decreased burdens for advisers.[630] However, in light of the general comments we receive about burdens we are not reducing our burden estimates.

The amendments to Form ADV that we are adopting will also result in other costs, none of which commenters specifically addressed. For instance, changes to the instructions on calculating regulatory assets under management, and rule 203A–3(d), will cause some advisers to report greater assets under management than they do today and preclude some advisers from excluding certain assets from their calculation in order to remain below the new asset threshold for registration with the Commission. The impact of these changes may result in a limited number of state-registered advisers that report assets under management of less than $30 million under the current Form ADV reporting requirements to register with us if, under the revised instructions, they would report $100 million or more in assets under management.[631]

We are also amending Form ADV to require advisers to private funds to use the market value of private fund assets, or the fair value of private fund assets where market value is unavailable, for determining regulatory assets under management.[632] Advisers to private funds that do not use fair value methodologies will likely incur costs to comply with the requirement to report the fair value of those assets on Form ADV, which could (but is not required to) include reliance on a third party or outside valuation service. We anticipate that these costs will vary, but we understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[633] Based on registered advisers' responses to Items 5.D., 7.B., and 9.C. of Form ADV,[634] we estimate that approximately 3% of registered advisers have at least one private fund client that may not be audited.[635] These advisers therefore may incur costs to fair value their private fund assets.[636] We estimate that approximately 4,270

[622] *See supra* note 570.

[623] AIMA Letter; Avoca Letter; BCLBE Letter; Shearman Letter; Village Ventures Letter.

[624] *See* section II.C.1.

[625] *See* section V.B.1.

[626] $9,486,900 in one-time monetary costs of complying with amendments we are adopting today for current registrants and newly registering advisers as a result of normal growth + $9,627,871 in costs of completing and filing Form ADV (other than private fund reporting) for the 750 newly registering private fund advisers as a result of the elimination of the private adviser exemption + $8,509,000 in aggregate private fund reporting costs attributable to the foregoing filers = $27,623,771.

[627] *See infra* note 732 an accompanying text. The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants, and it already accounts for a percentage of annual growth in our population of registered advisers. *See also infra* section VI.B.2.iv.

[628] *See* IAA General Letter (citing page 48 of the Implementing Proposing Release and stating that it ''do[es] not agree that the new requirements 'should impose few additional regulatory burdens.' ''). *See also* NRS Letter and Seward Letter, arguing that parts of the proposed amendments would result in duplicative reporting.

[629] *See, e.g., supra* note 570.

[630] *See supra* notes 245–247, 262, 286, 300, 302 and accompanying text for a discussion of these modifications. Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change from the proposed estimate of time an adviser would spend on the reporting or the out of pocket costs an adviser would incur.

[631] A registered investment adviser that reports more than $30 million in assets under management under the current instructions to Item 5 of Form ADV would be required to register with the Commission. These advisers would not have additional costs associated with registration as they would already be incurring those costs.

[632] *See* Form ADV: Instructions for Part 1A, inst. 5.b.(4).

[633] For example, an adviser to a hedge fund may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to a private equity fund may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement with respect to private fund assets.

[634] Item 5.D. asks advisers to identify the types of clients they have, including clients that are pooled investment vehicles. Item 7.B. asks if the adviser or its related person is a general partner in an investment-related limited partnership or manager of an investment-related limited liability company, or if the adviser advises any other ''private fund.'' Item 9.C. asks whether an independent public accountant audits annually the pooled investment vehicles that the adviser manages and if audited financial statements are distributed to investors in the pools.

[635] A fund that is relying on the audit provision in our custody rule will have provided the fair value of its assets in its audited financial statements that are prepared in accordance with GAAP.

[636] We note, however, that at least some of these advisers may currently fair value private fund assets. For instance, funds that do not prepare financial statements in accordance with GAAP (which is required to rely on an exception in our custody rule) may nonetheless use a fair value standard other than that specified in GAAP and thus may not incur any additional costs. *See supra* notes 98–99 and accompanying text (explaining that while many advisers will calculate fair value in accordance with GAAP or another international accounting standard, other advisers acting consistently and in good faith may utilize another fair valuation standard).

registered advisers have, or after registering with us will have, at least one private fund client.[637] We therefore estimate that approximately 130 registered advisers may incur costs as a result of the fair value requirement.[638] We estimated in the Implementing Proposing Release that an adviser without the internal capacity to value specific illiquid assets would obtain pricing or valuation services from an outside administrator or other service provider at a cost ranging from $250 to $75,000 annually.[639] Commenters did not address these estimates and for reasons discussed above, we continue to believe they are accurate.[640] Accordingly, we estimate that the 130 advisers would incur costs of $37,625 each on an annual basis, which is the middle of the range of estimated fair value costs, for an aggregate annual cost of $4,891,250.[641]

Requiring advisers to report whether they have $1 billion or more in assets also may have costs for advisers that are not publicly traded or otherwise do not publicly disclose the amount of their own assets. There may also be, as discussed below, competitive effects of this change and other of the amendments to Form ADV. We believe these changes will have little, if any, effect on capital formation.

In addition, some of the amendments to Form ADV could impose costs, including potential competitive effects, as information that may not typically be provided to others becomes publicly available. For example, for advisers that may previously have only disclosed to certain clients and prospective clients, or only upon request, information such as census data about the private funds and the amount of private fund assets that the adviser manages, disclosure of state registrations of the adviser's employees, financial industry affiliates, and the service providers to each private fund that the adviser manages could be costly. As noted above, some commenters voiced these types of concerns with respect to private fund disclosures they consider competitively sensitive or proprietary.[642] As also discussed above, we have adopted certain modifications from our proposal that are designed to address some of these concerns.[643] The competitive effects of Form ADV reporting requirements, however, could create benefits as well as costs. For instance, unregistered advisers will not incur the expense of producing and reporting publicly this information, but clients and investors may have greater confidence in advisers that provide more fulsome disclosure and are subject to our oversight.

4. Amendment to Pay To Play Rule

Our amendment to include registered municipal advisors in the definition of ''regulated persons'' excepted from the pay to play rule's ban on third-party solicitation may result in additional costs to comply with the rule.[644] Specifically, advisers that have created compliance programs based on the original ''regulated person'' definition, which included only registered investment advisers and broker-dealers, may have to make adjustments to those programs to account for the broadened definition. But, as explained above, our amendment will allow them greater latitude in hiring placement agents.

As discussed in section II.D.1 of this Release, we received a number of comment letters opposing our proposal to replace the exception for '' regulated persons'' with an exception for registered municipal advisors.[645] Among other things, commenters argued that the amendment would force persons soliciting only on behalf of affiliated investment advisers to register as municipal advisors, which they argued would subject them to regulatory requirements unrelated to pay to play practices and thus impose significant additional and unnecessary costs.[646] We are persuaded by commenters and have instead modified the definition of ''regulated person'' to include registered municipal advisors, which we believe is a lower-cost means to recognize this new category of registrant in our rule.

5. Advisers Previously Exempt Under Section 203(b)(3)

The transition provision in rule 203–1(e) for advisers exempt under the private adviser exemption will impose costs. It will delay the public disclosure of information about these advisers on Form ADV. As such, current clients and potential clients will not have access to this information as quickly as they would without the transition period.[647] In addition, rule 203–1(e) will delay the deadline for these advisers to comply with all of our rules under the Advisers Act applicable to registered advisers, and thus will delay the full protection of these rules for clients and potential clients. However, we believe that providing a short transition period to effect an orderly transition to registration and full compliance for these advisers is appropriate. Furthermore, notwithstanding the transition period, these advisers continue to be subject to the Adviser's Act's antifraud provisions.[648]

VI. Paperwork Reduction Act Analysis

Certain provisions of the rules and rule amendments that the Commission is adopting today contain ''collection of information'' requirements within the meaning of the PRA. In the Implementing Proposing Release, the Commission solicited comment on the proposed collection of information requirements. The Commission also submitted the proposed collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The titles for the collections of information we are adopting or amending are: (i) ''Exemption for Certain Multi-State Investment Advisers (Rule 203A–2(d));'' [649] (ii) ''Form ADV''; (iii) ''Rule 203A–5;'' (iv) ''Rule 0–2 and Form ADV–NR under the Investment Advisers Act of 1940;'' (v) ''Rule 203–2 and Form ADV–W under the Investment Advisers Act of 1940;'' (vi) ''Form ADV–H;'' [650]

[637] Based on IARD data as of April 7, 2011. 3,320 current SEC-registered advisers to private funds remaining registered with the SEC + 750 newly registering private fund advisers as a result of the elimination of the private adviser exemption + 200 additional advisers to private funds each year = 4,270 advisers.

[638] $4,270 \times 0.03 = 128.1$.

[639] *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

[640] *See supra* section II.A.3.

[641] $130 \times \$37,625 = \$4,891,250$.

[642] *See supra* note 238 and accompanying text.

[643] *See supra* notes 245–247 and accompanying text.

[644] *See* amended rule 206(4)–5(a)(2), (f)(9). As discussed in section V.A.4., we believe that our amendment to rule 206(4)–5 to make it apply to exempt reporting advisers and foreign private advisers will not generate new costs.

[645] *See* Better Markets Letter; Debevoise Letter; Dechert General Letter; IAA Pay to Play Letter; ICI Letter; NYSBA Letter; SIFMA Letter; T. Rowe Price Letter. *But see* NRS Letter (supporting the proposal).

[646] *See, e.g.,* IAA Pay to Play Letter; SIFMA Letter. *See also supra* section II.D.1.

[647] We note, however, that the IARD system will not be updated to reflect our revisions to Form ADV, including the amendments requiring additional disclosure about private funds, until November. *See infra* note 759. Thus, even without regard to rule 203–1(e), disclosure of this information would be delayed.

[648] *See, e.g.,* Advisers Act section 206. They are also subject to antifraud provisions of other Federal securities laws, including rule 10b–5 under the Securities Exchange act of 1934. *See* 17 CFR 240.10b–5.

[649] The current title for this collection of information is ''Exemption for Certain Multi-State Investment Advisers (Rule 203A–2(e))'' which we are re-titling ''Exemption for Certain Multi-State Investment Advisers (Rule 203A–2(d))'' to reflect the renumbering of this provision.

[650] The current title for the collection of information on Form ADV–H is ''Rule 203–3 and Form ADV–H under the Investment Advisers Act of 1940'' because currently only registered advisers file Form ADV–H under rule 203–3. However, because we are proposing to amend Form ADV–H

Continued

and (vii) ''Rule 204–2 under the Investment Advisers Act of 1940.'' [651] 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.

While our new rules and rule amendments will impose new collection of information burdens for certain advisers and change existing burdens on advisers under our rules, the Dodd-Frank Act also will impact our total burden estimates for certain of our rules, principally by changing the number of advisers subject to these rules. Specifically, we estimate the Dodd-Frank Act's amendments to section 203A to reallocate regulatory responsibility over numerous registered advisers to the states will result in approximately 3,200 registered advisers switching from Commission to state registration.[652] At the same time, we estimate that the Dodd-Frank Act's elimination of the private adviser exemption in section 203(b)(3) of the Advisers Act will result in approximately 750 additional private fund advisers registering with the Commission.[653] Based on IARD data as of April 7, 2011, we estimate that approximately 11,500 advisers are currently registered with the Commission. We further estimate that approximately 700 additional advisers register with the Commission each year.[654] Therefore, for purposes of calculating the burdens of our proposed rules and amendments under the PRA, we estimate that the number of advisers registering with the Commission after the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) become effective will be approximately 9,750.[655]

A. Rule 203A–2(d)

Rule 203A–2(d), as amended, exempts certain multi-state investment advisers from section 203A's prohibition on registration with the Commission. We have renumbered and amended the exemption to permit all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[656] An adviser relying on this exemption is required to maintain in an easily accessible place a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register for a period of not less than five years from the filing of a Form ADV relying on the rule.[657] We submitted this collection of information to OMB for review, and OMB has not yet assigned this collection a control number.

Respondents to this collection of information will be investment advisers who would be required to register in 15 or more states absent the exemption (that rely on amended rule 203A–2(d) to register with the Commission). This collection of information is mandatory for those advisers. The records kept by investment advisers in compliance with the rule are necessary for the Commission staff to use in its examination and oversight program, and the information in these records generally will be kept confidential.[658]

The amendments to the rule that we are adopting today do not differ from our proposed amendments. Commenters did not discuss the rule's collection of information requirements, but generally agreed with our proposal to align our multi-state exemption for small advisers with the statutory exemption for mid-sized advisers.[659] A few, however, recommended a lower threshold of required state registrations for eligibility for the multi-state exemption,[660] but we have determined not to lower the threshold further in light of the Congressional determination to set the threshold at 15 states and our stated purpose to align the rule with the Dodd-Frank Act.[661]

In the Implementing Proposing Release, the Commission estimated that approximately 150 advisers would rely on the exemption.[662] As of April 7, 2011, there were approximately 40 advisers relying on the multi-state exemption.[663] Although it is difficult to determine a precise number of advisers that will rely on the exemption as amended because such reliance is entirely voluntary, we estimate that approximately 155 advisers will rely on the exemption.[664] These advisers will incur an average one-time initial burden of approximately 8 hours, and an average ongoing burden of approximately 8 hours per year, to keep records sufficient to demonstrate that they meet the 15-state threshold. These

to allow exempt reporting advisers to apply for a temporary hardship exemption on Form ADV–H under rule 204–4, we are re-titling the collection of information simply ''Form ADV–H.''

[651] We note that the PRA analysis associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to that form. Today, we are making only a technical amendment to Form ADV–E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310 at section IV.C.

[652] *See supra* section II.A. (discussing the Dodd-Frank Act's amendments to section 203A). Based on IARD data as of April 7, 2011, we estimate that approximately 3,200 will switch to state registration because they have assets under management of less than $90 million. This estimate includes approximately 5 advisers that will switch to state registration because they are relying on the registration of an affiliated adviser with the same principal office and place of business that will be switching to state registration. *See supra* note 422.

[653] *See* Exemptions Adopting Release at section I. (discussing elimination of the private adviser exemption in section 203(b)(3)).

[654] Over the past several years, approximately 1,000 new advisers have registered with us annually. Due to the Dodd-Frank Act's reallocation of regulatory responsibility for advisers with assets under management of less than $100 million, we estimate that approximately 700 new advisers will register with us annually based on reducing the current growth rates by the gross reduction in the number of advisers due to the Dodd-Frank Act. (3,200 (SEC advisers withdrawing)/11,500 (total SEC advisers)) × 1000 (number of new advisers each year) = 0.28 × 1000 = 280 (number of additional new advisers registering with the states, not the SEC). 1000 − 280 = 720. We have rounded this number to 700 for purposes of our analysis.

[655] 11,500 (total SEC advisers) − 3,200 (SEC advisers withdrawing) + 750 (private advisers registering with the SEC) + 700 (new SEC advisers each year) = 9,750.

[656] *See* amended rule 203A–2(d).

[657] *See* amended rule 203A–2(d)(3). An investment adviser relying on this exemption also will continue to be required to: (i) include a representation on Schedule D of Form ADV that the investment adviser has reviewed applicable law and concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake on Schedule D to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser will be required by the laws of fewer than 15 states to register as an investment adviser with the state. *See* amended rule 203A–2(d)(2). The increase in the PRA burden for Form ADV reflects these requirements. *See infra* section VI.B.

[658] *See* section 210(b) of the Advisers Act.

[659] *See* NASAA Letter; NEA Letter; NRS Letter; Pickard Letter; Seward Letter; Shearman Letter.

[660] *See* NEA Letter; Seward Letter; Shearman Letter.

[661] *See supra* note 136.

[662] *See* Implementing Proposing Release, *supra* note 7, at n.382.

[663] Based on IARD data as of April 7, 2011, of the approximately 11,500 SEC-registered advisers, 40 checked Item 2.A.(9) of Part 1A of Form ADV to indicate their basis for SEC registration under the multi-state advisers rule.

[664] Based on IARD data as of April 7, 2011, 100 of the advisers that have less than $90 million of assets under management currently file notice filings with 15 or more states. This number may overestimate the number of advisers required to be registered with 15 or more states, and therefore eligible for the amended multi-state exemption, because notice filing requirements may differ from registration requirements. In addition, we are unable to determine the number of advisers currently registered with the states that are registered with 15 or more states that may rely on the exemption and register with us. We expect this number to be small based on the scope of business of an adviser that has less than $25 million in assets under management and because section 222(d) of the Advisers Act provides a de minimis exemption for limited state operations without registration. For purposes of this analysis, we estimate the number is 15. As a result, we estimate that approximately 155 advisers will rely on the exemption (40 currently relying on it + estimated 100 eligible based on IARD data + 15 advisers required to be registered in 15 or more states that are not registered with us today).

estimates are based on an estimate that each year an investment adviser will spend approximately 0.5 hours creating a record of its determination whether it must register as an investment adviser with each of the 15 states required to rely on the exemption, and approximately 0.5 hours to maintain these records.[665] Accordingly, the revised total initial and annual burden of the recordkeeping requirements of rule 203A–2(d) will be 1,240 hours (an additional 920 hours).[666]

B. Form ADV

Form ADV (OMB Control No. 3235–0049) is the two-part investment adviser registration and exempt adviser reporting form. Part 1 of Form ADV contains information designed for use by Commission staff, and Part 2 is the client brochure. We use the information collected on Form ADV to determine eligibility for registration with us and to manage our regulatory and examination programs. Clients use certain of the information to determine whether to hire or retain an adviser. Rule 203–1 requires every person applying for investment adviser registration with the Commission to file Form ADV. Rule 204–4 requires exempt reporting advisers to file reports with the Commission by completing a limited subset of items on Form ADV. Rule 204–1 requires each registered and exempt reporting adviser to file amendments to Form ADV at least annually, and requires advisers to submit electronic filings through the IARD. These collections of information are found at 17 CFR 275.203–1, 275.204–1, 275.204–4, and 279.1 and are mandatory. The paperwork burdens associated with rules 203–1 and 204–1 are, and the paperwork burdens associated with rule 204–4 will be, included in the approved annual burden associated with Form ADV and, thus, do not entail separate collections of information. Responses are not kept confidential. The respondents to this information collection are investment advisers registered or applying for registration with us and exempt reporting advisers.

As discussed above, in order to give effect to provisions in Title IV of the Dodd-Frank Act, we are amending Part 1A of Form ADV to reflect the new statutory threshold for registration with the Commission and to accommodate filings by exempt reporting advisers. In addition, to enhance our ability to oversee investment advisers, we are amending Part 1A of Form ADV to require advisers to provide us additional information regarding: (i) The private funds they advise; (ii) their advisory business and business practices that may present significant conflicts of interest; and (iii) their non-advisory activities and financial industry affiliations.[667] We are also adopting certain additional amendments intended to improve our ability to assess compliance risks and to enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

The currently approved total annual burden of completing, amending, and filing Parts 1 and 2 of Form ADV is 268,457 hours.[668] The currently approved burden is based on an average total hour burden of 36.24 hours per adviser for the first year that an adviser completes Form ADV. The currently approved total annual cost burden for Form ADV is $22,775,400, consisting of costs for outside legal and consulting services associated with initial preparation of Part 2.[669]

The amendments we are adopting will increase the information requested in Part 1A of Form ADV, and we expect that this will correspondingly increase the average burden to an adviser filing Form ADV. As we explained in the Implementing Proposing Release, however, we expect that the total annual burden associated with Form ADV will experience a net decrease because the reduction in burden resulting from the decrease in the number of respondents that are registered advisers will have a greater effect on the total burden than the increase resulting from the use of the form by exempt reporting advisers and the additional information required by the amendments to the form.[670] We provided initial estimates of the revised burdens and requested comment on these estimates and our initial PRA analysis in the Implementing Proposing Release.[671] As discussed in detail in sections II.B., II.C., V.A.2., V.A.3., V.B.2 and V.B.3. of this Release, we received a number of comments that addressed whether the amendments to the collection of information are necessary for the proper performance of our functions, whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and whether we could further minimize the burden. Only a few commenters addressed the accuracy of our burden estimates for the proposed collection of information, and suggesting in general terms that our estimates were too low.[672] These commenters did not provide empirical data or suggest alternatives by which to recalculate our estimates, making it difficult to evaluate these assertions or determine the magnitude by which their estimates differ from ours.

To address these and other comments we received, we are adopting Form ADV with a number of changes that improve the clarity and utility of the information collected and reduce the amount of information required by the amendments.[673] Many of these changes include removing or re-formulating proposed questions that commenters identified as most burdensome.[674] We continue to believe that the check-the-box style of most of the Form ADV items, as well as some of the features of the IARD (such as drop-down boxes for common responses and the ability to pre-populate data), will mitigate the reporting burden, and several commenters confirmed our assumption that much of the information required by the amendments should be readily available to most advisers.[675] The changes we are making from the proposal will reduce the amount of information that advisers must file and result in decreased burdens for advisers from the proposal. However, in light of

[665] 0.5 hours × 15 states = 7.5 hours + 0.5 hours = 8 hours.

[666] 155 advisers relying on the exemption × 8 hours = 1,240 hours. 1,240 new burden hours − 320 current burden hours = 920 additional burden hours.

[667] *See supra* section II.C. In addition, we are adopting several clarifying or minor amendments based on frequently asked questions we receive from advisers and our experience administering the form.

[668] *See* section VI of the Part 2 Release at notes 341 and 342 and accompanying text. The approved burden is comprised of 12,658 advisers preparing an initial filing of Form ADV at 36.24 hours, which is amortized over a three-year period (the estimated period that advisers are expected to use Form ADV) for an annual burden of 152,909 hours. The burden also includes two amendments to Form ADV annually, one annual amendment and one other-than-annual amendment, for an annual burden of 87,435 hours; an annual burden of 11,658 hours to account for new brochure supplements that advisers are required to prepare; and 16,455 hours attributable to the obligation to deliver to clients codes of ethics upon request.

[669] These costs are expected to vary based on the size of the adviser, and we have assumed that fewer than all advisers will use these services in connection with preparing their initial Part 2 brochures. For outside legal services, ($4,400 × 535 medium advisers) + ($3,200 × 2,370 small advisers)) + ($10,400 × 36 large advisers) = $10,312,400. For compliance consulting services, ($3,000 × 2,371 small advisers) + ($5,000 × 1,070 medium advisers) = $12,463,000. $10,312,400 + $12,463,000 = $22,775,400. *See* Part 2 Release, *supra* note 668, for a discussion of these estimates.

[670] *See* Implementing Proposing Release, *supra* note 7, at section V.B.

[671] *Id.*

[672] AIMA Letter; BCLBE Letter; Gunderson Letter; IAA General Letter. *See also supra* notes 577, 584, 613, 619 and 620.

[673] *See* section II.C.

[674] *See supra* notes 245–247, 262, 286, 300, 302 and accompanying text.

[675] *See supra* note 570.

the general comments we received about burdens, we are also not reducing our burden estimates.[676]

We discuss below, in three sub-sections, the estimated revised collection of information requirements for Form ADV: first, we provide estimates for the revised and new burdens resulting from the amendments to Part 1A; second, we determine how those estimates will be reflected in the annual burdens attributable to Form ADV; and third, we calculate the total revised burdens associated with Form ADV.

1. Changes in Average Burden Estimates and New Burden Estimates

a. Estimated Change in Burden Related to Part 1A Amendments (Not Including Private Fund Reporting)

We are adopting amendments to several items in Part 1A, some that are merely technical changes or very simple in nature, and others that will require more of an adviser's time. The paperwork burdens of filing an amended Part 1A of Form ADV will, however, vary among advisers, depending on factors such as the size of the adviser, the complexity of its operations, and the number or extent of its affiliations. Although burdens will vary among advisers, we believe that the revisions to Part 1A will impose few additional burdens on advisers in collecting information because advisers should have ready access to all the information necessary to respond to the revised items in their normal course of operations. We also are working with FINRA, as our IARD contractor, to implement measures intended to minimize the burden for advisers filing the amended Form ADV on the IARD (*e.g.,* pre-populating fields and drop-down boxes for common responses). We anticipate, moreover, that the responses to many of the questions are unlikely to change from year to year, minimizing the ongoing reporting burden associated with these questions.

As we explained in the Implementing Proposing Release, in large part, the changes we are making to Part 1A of Form ADV, including those to account for the statutory increase in the threshold for Commission registration, primarily refine or expand existing questions or request information advisers already have for compliance or fund offering purposes. For instance, some of the changes to Item 5 require advisers to provide numerical responses to certain questions about their employees. An adviser likely already had this information in order to respond to those questions in the previous version of the form by checking boxes that correspond to a range of numbers. Likewise, the amendments to Item 8 require an adviser to expand on information it provided in response to Item 8 in the previous version of the form, such as whether the broker-dealers the adviser recommends or has discretion to select for client transactions are related persons of the adviser. Other questions expand upon existing requirements to elicit information advisers already have available for compliance purposes, such as whether the soft dollar benefits they reported receiving under the previous version of Item 8 qualify for the safe harbor under section 28(e) of the Exchange Act for eligible research or brokerage services. As amended, Item 2 requires an adviser to report to us its basis for registration or reporting, as already determined for compliance purposes. Other amendments to Items 5, 6 and 7 expand lists of information advisers already provided to us on the previous version of Form ADV, such as types of advisory activities the advisers perform and other types of business engaged in by advisers and their related persons. Amendments to Item 9 better align the information required to be reported with information advisers have for purposes of complying with rule 206(4)–2. Finally, we believe that several of the new questions merely require advisers to provide readily available or easily accessible information.[677]

We anticipate that other amended questions may take longer for advisers to complete, even with readily available information, such as calculating regulatory assets under management according to our revised instruction. Other new items will likely present greater burdens for some advisers but not others, depending on the nature and complexity of their businesses, such as the requirement to provide a list of the Commission file numbers of investment companies they advise or providing expanded information about related person financial industry affiliates.[678]

We estimate that these amendments, taken as a whole, will require an average of approximately 4.5 hours per adviser to complete. We have arrived at this estimate, in part, by comparing the relative complexity and availability of the information elicited by the amended items and the nature of the response required (*i.e.,* checking a box as opposed to providing a narrative response) to the current form and its approved burden. As a result, we estimate that the average total collection of information burden will increase to 40.74 hours per adviser for the first year that an adviser completes Form ADV (Part 1 and Part 2).[679]

b. New Estimated Burden Related to Private Fund Reporting Requirements

Revised Item 7.B. and Section 7.B. of Schedule D will provide us with basic census data on private funds and will permit us to conduct a more robust risk assessment of private fund advisers for purposes of targeting our examinations. As discussed in the Implementing Proposing Release, the information will include fund data such as basic organizational, operational, and investment characteristics of the fund; the gross amount of assets held by the fund; and the fund's service providers, or gatekeepers. We believe much of this information is readily available to private fund advisers because, among other things, it is information that private fund investors commonly seek in their due diligence questionnaires or it is the kind of information that is often included in a private placement memorandum offering fund shares, and commenters confirmed our understanding.[680]

Although we understand that the required information is readily available to private fund advisers, we expect that these amendments could subject advisers, particularly those with many private funds, to a significantly

[676] Some of the estimates provided in this section differ from those provided in the Implementing Proposing Release, but these differences reflect updated information regarding employment costs and the number of advisers subject to the reporting, not a change to the proposed estimate of time an adviser would spend on the reporting or the out-of-pocket costs an adviser would incur.

[677] For example, Item 1 requires advisers to provide contact information for their Chief Compliance Officers and report whether they have $1 billion or more in assets; Item 3 requires advisers to indicate their form of organization. *See supra* section II.C.6.

[678] Advisers may, however, omit certain related persons from their Schedule D reporting requirements in accordance with our revised instruction. We expect this change from the proposal will significantly reduce burdens associated with this item. *See supra* note 300.

[679] Current approved per adviser total (36.24) + estimated per adviser increase (4.5) = 40.74.

[680] *See,* with respect to private fund reporting under Item 7.B. specifically, Katten Foreign Advisers Letter (''Virtually all of the requested information would already have been provided to investors in the fund through an offering document or follow up status reports.'') and NRS Letter (arguing that the expanded private fund disclosures on Schedule D would ''replicate the due diligence questionnaire information.* * *''). *See also* ABA Committees Letter (''We expect that most [exempt reporting advisers] will already have most of the information requested by Form ADV Part 1 readily available.''); Merkl Implementing Letter (confirming that the disclosure requirements would not impose a significant burden on advisers). *See also supra* note 570.

increased paperwork burden. For this reason, as we explained in the Implementing Proposing Release, we have included several measures to minimize the increased burden associated with private fund reporting. First, an adviser will be permitted to exclude from its reporting on Section 7.B.(1) of Schedule D any private fund for which another adviser is filing Section 7.B.(1).[681] Second, an adviser managing a master-feeder arrangement will be permitted to submit a single Schedule D for the master fund and all of the feeder funds if separately submitted data would otherwise be substantially identical.[682] Finally, an adviser with a principal office and place of business outside the United States may omit from Section 7.B.(1) of Schedule D any private fund that, during the adviser's last fiscal year, was not a United States person, was not offered in the United States and was not beneficially owned by any United States person.[683] We are also working with FINRA to implement measures in the IARD intended to minimize the burden for advisers filing amended Form ADV, such as the ability to automatically pre-populate private fund service provider information provided for other funds managed by the same adviser. In addition, although we are generally expanding the information previously required in Section 7.B.(1), we have removed the requirement that advisers report the funds that their related persons manage.

Considering the changes to Item 7.B. and Section 7.B. of Schedule D as a whole, as well as our efforts to mitigate the reporting burden and to make technological upgrades to the IARD, we estimate that each adviser managing private funds will spend, on average, 1 hour per private fund to complete these questions.

c. New Estimated Burden Related to Exempt Reporting Adviser Reporting Requirements

Exempt reporting advisers are required to complete a limited number of items in Part 1A of Form ADV (consisting of Items 1, 2.B., 3, 6, 7, 10, 11 and corresponding schedules), and are not required to complete Part 2. We believe the information required by these items should be readily available to any adviser, particularly the identifying data and control person information required by Items 1, 3, and 10, and commenters agreed.[684] As we noted in the Implementing Proposing Release, the check-the-box style of most of these items, as well as some of the features of the IARD (such as drop-down boxes for common responses) should also keep the average completion time for these advisers to a minimum.[685] Moreover, in our staff's experience, the types of advisers that will meet the criteria for exempt reporting advisers are unlikely to have significantly large numbers of affiliations, and we do not expect that they will need to report disciplinary events at a greater rate than currently registered advisers.[686] We estimate that these items, other than Item 7.B., will take each exempt reporting adviser approximately 2 hours to complete. We anticipate that, like registered advisers, exempt reporting advisers will each spend 1 additional hour per private fund to complete Item 7.B. and Section 7.B of Schedule D.

2. Annual Burden Estimates

a. Estimated Annual Burden Applicable to All Registered Investment Advisers

i. Estimated Initial Hour Burden (Not Including Burden Applicable to Private Funds)

As a result of the transition filing discussed above,[687] we expect the total number of registered advisers responding to this collection of information will be 9,750.[688] Approximately 11,500 investment advisers are currently registered with the Commission.[689] We expect 3,200 will withdraw from registration.[690] We expect about 750 advisers who currently rely on the private adviser exemption to apply for registration with us, and we estimate that approximately 700 new advisers will register with us each year following effectiveness of the Dodd-Frank Act amendments.[691]

The estimated total annual burden applicable to these registered advisers, including new registrants, but excluding private fund reporting requirements, is 397,215 hours.[692] As discussed in the Implementing Proposing Release, we believe that most of the paperwork burden will be incurred in advisers' initial submission of the new and amended items of Part 1A of Form ADV, and that over time this burden will decrease substantially because advisers will generally only need to report updating information.[693] Amortizing this total burden over a three-year period to reflect the anticipated average period of time that advisers will use the revised form will result in an average estimated burden of 132,405 hours per year,[694] or 13.58 hours per year for each new applicant and for each currently registered adviser that will remain registered with the Commission.[695]

ii. Estimated Initial Hour Burden Applicable to All Registered Advisers to Private Funds

The amount of time that a registered adviser managing private funds will incur to complete Item 7.B. and Section 7.B. of Schedule D will vary depending on the number of private funds the adviser manages. Of the advisers currently registered with us, we estimate that approximately 2,850 advise private funds, will remain registered with us following effectiveness of the Dodd-Frank Act amendments and have a December 31 fiscal year end.[696] Based on these advisers' Form ADV filings, we estimate that 52% of them, or approximately 1,480, currently advise an average of 3 private funds each; 43%, or approximately 1,230 advisers, currently advise an average of 10 private funds each; and the remaining 5%, or approximately 140 advisers, currently advise an average of 79 private funds each.[697] As we discussed above, we

[681] *See supra* note 223.

[682] *See supra* note 224 and accompanying text.

[683] *See supra* note 225 and accompanying text.

[684] *See supra* notes 570 and 680.

[685] *See* Implementing Proposing Release, *supra* note 7, at section V.B.1.c.

[686] As of April 7, 2011, approximately 13% of SEC-registered investment advisers reported a disclosure in Item 11 of Form ADV.

[687] *See supra* section V.B.1.

[688] *See supra* note 655.

[689] Based on IARD data as of April 7, 2011.

[690] As a consequence of section 410 of the Dodd-Frank Act, we estimate that approximately 3,200 advisers currently registered with the Commission will be required to withdraw their registration and register with one or more state securities authorities. *See supra* section V.B.1.

[691] (3,200 (SEC advisers expected to withdraw from registration)/11,500 (total SEC advisers)) × 1000 (average number of new advisers registered with the Commission each year) = 0.28 × 1000 = 280 (number of additional new advisers registering with the states, not the SEC). 1000 − 280 = 720. We have rounded this number to 700 for purposes of our analysis. *See also supra* note 609 and *infra* note 734.

[692] 40.74 per-adviser burden × 9,750 = 397,215 hours.

[693] *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.a.i.

[694] 397,215/3 = 132,405.

[695] 132,405/9,750 = 13.58.

[696] IARD data as of April 7, 2011 show that 3,700 advisers indicate by reporting a fund in Schedule D, Section 7.B. that they, or a related person, advise private funds or investment-related funds. Based on IARD data, we estimate that 850 of these 3,700 advisers have a fiscal year end other than December 31 or will switch to state registration. *See supra* note 529. With respect to these 850 advisers, the burden of reporting this information is accounted for under rule 203A–5. *See infra* note 768. 3,700 − 850 = 2,850.

[697] Based on IARD data as of April 7, 2011. Form ADV currently asks for an adviser to report about investment-related partnerships and limited liability companies advised by the adviser *and* its related persons. As a result, the data we have obtained from IARD over-estimates the average

Continued

estimate that private fund advisers will spend, on average, 1 hour per private fund completing Item 7.B. and Section 7.B. of Schedule D. As a result, the private fund reporting requirements that will be applicable to registered investment advisers will add 27,800 hours to the overall annual burden applicable to registered advisers.[698]

In addition to currently registered private fund advisers, we estimate that about 200 new private fund advisers will register with us annually[699] and that 750 advisers will register with us that previously relied on the private adviser exemption. We believe that these 950 newly registering private fund advisers will, on average, be similar to the currently registered private fund advisers. However, in contrast to the currently registered advisers, this group is unlikely to include any advisers managing a large number of private funds. For example, among the 750 advisers that currently rely on the private adviser exemption, we would not expect any of them to have more than 14 private fund clients, the most that had been allowed under the exemption provided by section 203(b)(3) of the Advisers Act. In addition, for the 200 new private fund advisers that we expect to register each year, the elimination of the private adviser exemption means that they will be subject to registration requirements even if they have only a single private fund client as long as they are not eligible for another exemption. As a result, we estimate that the average newly registering private fund adviser will (like the average currently registered private fund adviser) manage approximately 6 private funds,[700] but we do not anticipate that any subgroup of these new registrants will manage a large number of private funds (unlike the 5% of currently registered private fund advisers that we estimate manage an average of 79 private funds each). Based on these estimates, we expect that private fund reporting requirements will add 4,500 hours attributable to the 750 advisers registering because of the elimination of the private adviser exemption[701] and 1,200 hours attributable to private fund advisers registering as a result of normal growth.[702]

The total annual burden related to private fund reporting by registered advisers is 33,500 hours.[703] As we discussed in the Implementing Proposing Release, we believe that most of the paperwork burden will be incurred in connection with advisers' initial submission of private fund data, and that over time this burden would decrease substantially because the paperwork burden will be limited to updating information.[704] Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing or re-filing of the rest of the form, results in an average estimated burden of 11,167 hours per year,[705] or 2.94 hours per year for each new private fund adviser and for each private fund adviser currently registered with the Commission.[706]

iii. Estimated Annual Burden Associated With Amendments, New Brochure Supplements and Delivery Obligations

The currently approved collection of information burden for Form ADV has three elements not discussed above: (i) The annual burden associated with annual and other amendments to Form ADV; (ii) the annual burden associated with creating new Part 2 brochure supplements for advisory employees and filing interim amendments to existing brochure supplements throughout the year; and (iii) the annual burden associated with delivering codes of ethics to clients as a result of the offer of such codes contained in the brochure. Although we do not anticipate that the amendments we are adopting to Form ADV will affect the per adviser burden imposed by these three elements, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the number of advisers subject to them, which will result in a change to the total annual burden associated with these elements of the collection of information for Form ADV.[707]

Based on IARD data, we continue to estimate that, on average, each adviser filing Form ADV through the IARD will amend its form two times during the year.[708] On average, these consist of one interim updating amendment (at an estimated 0.5 hours per amendment) and one annual updating amendment (at an estimated 6 hours per amendment) each year. In addition, we estimate that each adviser will, on average, spend 1 hour per year making interim amendments to brochure supplements and an additional 1 hour per year to prepare new brochure supplements as required by Part 2.[709] We also expect advisers to continue to spend an average of 1.3 hours annually to meet obligations to deliver codes of ethics to clients.[710] These obligations will add 95,550 hours annually to the collection of information, consisting of 63,375 hours attributable to annual and interim updating amendments,[711] 9,750 hours attributable to interim amendments to brochure supplements,[712] 9,750 hours attributable to the creation of new brochure supplements,[713] and 12,675 hours for delivery of codes of ethics.[714]

iv. Estimated Annual Cost Burden

The currently approved collection of information burden for Form ADV has a one-time initial cost for outside legal and compliance consulting fees in connection with the initial preparation of Part 2 of Form ADV. Although we do not anticipate that the amendments we are adopting to Form ADV will affect the per adviser cost burden estimates for outside legal and compliance consulting fees, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) of the Advisers Act will result in a significant change to our estimates of the number of advisers subject to these costs. We discuss this aspect of the annual cost burden more fully below. In addition to the estimated legal and compliance

number of funds as a result of reporting of the same fund multiple times by affiliated registered advisers.

[698] (1,480 advisers × 3 hours (3 funds × 1 hour per fund)) + (1,230 advisers × 10 hours (10 funds × 1 hour per fund)) + (140 advisers × 79 hours × 1 hour per fund)) = 4,440 + 12,300 + 11,060 = 27,800.

[699] About 30% of current registrants report that they advise one or more private funds. (3,700 advisers to private funds/11,500 registered advisers). Applying the same proportion to the 700 new registrants that we have estimated will register with us annually results in approximately 200 additional advisers to private funds each year. (700 × 0.30 = 210).

[700] Approximately 65% of advisers that reported a fund in Schedule D, Section 7.B. listed five or fewer funds and 72% of advisers that registered since April 1, 2010 and reported a fund reported five or fewer private funds. The average number of private funds reported by new registrants in the past year is about 6 funds.

[701] 750 advisers × 6 private funds on average × 1 hour/private fund = 4,500.

[702] 200 advisers × 6 private funds on average × 1 hour/private fund = 1,200.

[703] 27,800 for existing registered advisers + 4,500 for no longer exempt advisers + 1,200 for estimated new registrants due to growth = 33,500.

[704] *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.a.ii.

[705] 33,500/3 = 11,167.

[706] 11,167/(2,850 + 200 + 750) = 2.94.

[707] We anticipate that the clarification we are making to the brochure supplement (Part 2B) would not affect this burden estimate. *See* note 337 and accompanying text for a discussion of this clarifying amendment.

[708] Based on IARD data regarding the number of filings of Form ADV amendments. *See* Part 2 Release, *supra* note 67 at n.329.

[709] *See* Part 2 Release, *supra* note 668 at nn.333, 336–37 and accompanying text.

[710] *Id.*

[711] (9,750 advisers × 0.5 hours/other than annual amendment) + (9,750 advisers × 6 hours/annual amendment) = 63,375.

[712] 9,750 advisers × 1 hour = 9,750.

[713] 9,750 advisers × 1 hour = 9,750.

[714] 9,750 advisers × 1.3 hours = 12,675.

consulting fees, we also anticipate that some registered advisers may incur additional outside costs related to the Form ADV amendments we are adopting today that require advisers to report the fair value of private fund assets.[715]

Advisers to private funds that do not use fair value methodologies will likely incur costs to comply with the requirement to report the fair value of those assets on Form ADV, which could (but is not required to) include reliance on a third party or outside valuation service. We anticipate that these costs will vary, but we understand that private fund advisers, including those that may not use fair value methodologies for reporting purposes, perform administrative services, including valuing assets, internally as a matter of business practice.[716] Based on registered advisers' responses to Items 5.D., 7.B., and 9.C. of Form ADV,[717] we estimate that approximately 3% of registered advisers have at least one private fund client that may not be audited.[718] These advisers therefore may incur costs to fair value their private fund assets.[719] As explained above, we estimate that approximately 4,270 registered advisers have, or after registering with us will have, at least one private fund client.[720] We therefore estimate that approximately 130 registered advisers may incur costs as a result of the fair value requirement.[721] We estimated in the Implementing Proposing Release that an adviser without the internal capacity to value specific illiquid assets would obtain pricing or valuation services from an outside administrator or other service provider at a cost ranging from $250 to $75,000 annually.[722] Commenters did not address these estimates, and we continue to believe they are accurate. Accordingly, we estimate that the 130 advisers would incur costs of $37,625 each on an annual basis, which is the middle of the range of estimated fair value costs, for an aggregate annual cost of $4,891,250.[723]

With respect to outside legal assistance or outside consulting services, the currently approved collection of information burden is based on an estimate that some, but not all, registered advisers will elect to obtain these services on a one-time basis to draft the new narrative brochure for a total cost of $22,775,400.[724] By the time the amendments to Form ADV that we are adopting today become effective, substantially all registered advisers will have completed their initial filing of the narrative brochure required by our recent amendments to Part 2 of Form ADV and will have already incurred these estimated one-time costs.[725] As a result, the only respondents that we expect will incur legal and consulting costs for the initial drafting of Part 2 of Form ADV, subsequent to the effective date of the amendments to Form ADV we are adopting today, will consist of the estimated 700 new advisers that we expect to register annually and the estimated 750 advisers that will have to register as a result of the elimination of the private adviser exemption.[726]

For purposes of estimating the currently approved amount of this one-time cost, we divided advisers into three groups—small, medium and large—based on their number of employees. Different costs per adviser were assigned based on the group to which the adviser belongs.[727] We expect that the 750 newly registering private fund advisers and 700 new advisers registering annually will be medium-sized.[728] In the Part 2 Release, we estimated that the initial cost related to preparation of Part 2 of Form ADV would be $4,400 for legal services and $5,000 for compliance consulting services, in each case, for those medium-sized advisers who engaged legal counsel or consultants.[729] The currently approved burden anticipates that a quarter of medium-sized advisers would seek the help of outside legal services and half would seek the help of compliance consulting services. Accordingly, we estimate that 350 of these advisers would use outside legal services, for a total cost burden of $1,540,000,[730] and 725 advisers would use outside compliance consulting services, for a total cost burden of $3,625,000,[731] resulting in a total cost burden among all respondents of $5,165,000 for outside legal and compliance consulting fees related to drafting narrative brochures.[732]

Together, we estimate that the total cost burden among all respondents for outside legal and compliance consulting fees related to drafting narrative brochures and for third party or outside valuation services to be $10,056,250.[733]

b. Estimated Annual Burden Applicable to Exempt Reporting Advisers

i. Estimated Initial Hour Burden

Based on publications, reports, and general information publicly available from trade organizations, financial research companies, and news organizations as well as safe harbor

[715] *See* Form ADV: Instructions for Part 1A, instr. 5.b.(4).

[716] For example, an adviser to a hedge fund may value fund assets for purposes of allowing new investments in the fund or redemptions by existing investors, which may be permitted on a regular basis after an initial lock-up period. An adviser to a private equity fund may obtain valuation of portfolio companies in which the fund invests in connection with financing obtained by those companies. Advisers to private funds also may value portfolio companies each time the fund makes (or considers making) a follow-on investment in the company. Private fund advisers could use these valuations as a basis for complying with the fair valuation requirement with respect to private fund assets.

[717] Item 5.D. asks advisers to identify the types of clients they have, including clients that are pooled investment vehicles. Item 7.B. asks if the adviser or its related person is a general partner in an investment-related limited partnership or manager of an investment-related limited liability company, or if the adviser advises any other ''private fund.'' Item 9.C. asks whether an independent public accountant audits annually the pooled investment vehicles that the adviser manages and if audited financial statements are distributed to investors in the pools.

[718] A fund that is relying on the audit provision in our custody rule will have provided the fair value of its assets in its audited financial statements that are prepared in accordance with GAAP.

[719] We note, however, that at least some of these advisers may currently fair value private fund assets. For instance, funds that do not prepare financial statements in accordance with GAAP (which is required to rely on an exception in our custody rule) may nonetheless use a fair value standard other than that specified in GAAP and thus may not incur any additional costs. *See supra* notes 98–100 and accompanying text (explaining that an adviser may adopt a fair valuation standard other than GAAP or another international accounting standard that will satisfy the requirement, if developed and applied in good faith).

[720] *See supra* note 637.

[721] $4,270 \times 0.03 = 128.1$.

[722] *See* Implementing Proposing Release, *supra* note 7, at n.369 and accompanying text.

[723] $130 \times \$37,625 = \$4,891,250$.

[724] *See* Part 2 Release, *supra* note 67, at text accompanying n.328. We estimated that a total of 2,941 advisers would elect to obtain outside legal assistance and that 3,441 advisers would elect to obtain outside consulting services.

[725] *See id.* at section V.

[726] *See supra* note 691 and text following note 699.

[727] For purposes of this estimate, we categorize small advisers as advisers with 10 or fewer employees, medium advisers as having between 11 and 1,000 employees, and large advisers as those with 1,000 or more employees. *See* Part 2 Release, *supra* note 668, at nn.301 and 324.

[728] We would not expect these advisers to be large in this sense because advisers are likely to have become subject to registration obligations before engaging 1,000 or more employees. Some of these advisers may be small, but the increase in the threshold for registration with the Commission will limit the number of small advisers registering with us.

[729] *See* Part 2 Release, *supra* note 67, at text accompanying nn.324 and 325.

[730] $25\% \times (750 + 700) = 350$ advisers. $4,400 \times 350 = \$1,540,000$.

[731] $50\% \times (750 + 700) = 725$ advisers. $5,000 \times 725 = \$3,625,000$.

[732] $\$1,540,000 + \$3,625,000 = \$5,165,000$.

[733] $5,165,000 (legal and consulting services) + $4,891,250 (third party fair valuation services) = $10,056,250

filings with the SEC, we expect approximately 2,000 investment advisers will qualify for an exemption from registration but will be required to submit reports to us on Form ADV.[734] As we explained in the Implementing Proposing Release, the paperwork burden applicable to these new exempt reporting advisers will consist of the burden attributable to completing a limited number of items in Part 1A as well as the burden attributable to the private fund reporting requirements of Item 7.B. and Section 7.B. of Schedule D.[735] We estimated the burden to complete the subset of items in Part 1A applicable to exempt reporting advisers to be 2 hours, which would result in an annual burden of approximately 4,000 hours.

As discussed above, we estimate the private fund reporting requirements of the form to be 1 hour per private fund. We assume that each exempt reporting adviser currently relies on the private adviser exemption and, therefore, has 14 or fewer private fund clients. Based on reporting by registered advisers to private funds and industry publications and reports, we expect each of these advisers, on average, advises 6 private funds.[736] Accordingly, we attribute an additional 12,000 burden hours to exempt reporting advisers' private fund reporting requirements.[737]

The estimated total annual hour burden applicable to exempt reporting advisers is 16,000 hours.[738] We believe that most of the paperwork burden will be incurred in respect of the initial submission of Form ADV, and that over time this burden will decrease substantially because the paperwork burden will be limited to updating information. Amortizing this total burden imposed by Form ADV over a three-year period, as we did above with respect to the initial filing for registered advisers, results in an average burden of an estimated 5,330 hours per year,[739] or 2.67 hours per year, on average, for each exempt reporting adviser.[740]

ii. Estimated Annual Burden Associated With Amendments and Final Filings

In addition to the burdens associated with initial completion and filing of the portion of the form that exempt reporting advisers will be required to prepare, as in the Implementing Proposing Release, we estimate that, on average: (i) Each exempt reporting adviser will prepare an annual updating amendment; (ii) 20% of these advisers will file an interim updating amendment;[741] and (iii) 5% of these advisers will file a final filing.[742]

With respect to an exempt reporting adviser's annual updating amendment of Form ADV, we expect that advisers will not need to spend a significant amount of time entering responses into the electronic version of the form to file their annual updating amendments because the IARD will automatically pre-populate their prior responses. Based on this consideration, we estimate that the average exempt reporting adviser will spend 1 hour per year completing its annual updating amendment to Form ADV. This estimate is based on our estimate for registered advisers, but it is 85% shorter because exempt reporting advisers will be required to complete and update only a limited number of items in Part 1A of the form. We also estimate that 20% of the exempt reporting advisers will file an interim updating amendment to Items 1, 3, 10 or 11 of Form ADV,[743] and we estimate that each such amendment will require 0.5 hours. Based on the foregoing estimates, the total paperwork burden of amendments to Form ADV and final filings on Form ADV will be 2,200 hours per year for all exempt reporting advisers.[744]

3. Total Revised Burdens

The revised total annual collection of information burden for registered advisers to file and complete the revised Form ADV (Parts 1 and 2), including the initial burden for both existing and anticipated new registrants, including private fund advisers, plus the burden associated with amendments to the form, preparing brochure supplements, and delivering codes of ethics to clients is estimated to be approximately 239,122 hours per year.[745] This represents a decrease of 29,335 hours from the currently approved burden.[746] This decrease is primarily attributable to the anticipated withdrawal of 3,200 advisers from SEC registration.

Registered investment advisers are also expected to incur an annual cost burden of $10,056,250, a reduction from the current approved cost burden of $22,775,400. The decrease in annual cost burden is attributable to the nature of the costs, which are one-time initial costs to draft the narrative brochure. The transition to the narrative brochure will have substantially been completed, so the newly incurred one-time costs arise solely from new registrants.

We further estimate that the total annual collection of information burden for exempt reporting advisers to file and complete the required items of Part 1A of Form ADV, including the burden

[734] This estimate was collectively derived from various sources including the National Venture Capital Association's 2010 Yearbook (*http://www.nvca.org*), First Research reports (*http://www.firstresearch.com*), Preqin reports (*http://www.preqin.com*), Bloomberg (*http://www.bloomberg.com*), the Managed Funds Association (*http://www.managedfunds.org*), PerTrac data (*http://www.pertrac.com*), and Form D data. Specific data relevant to the number or types of advisers that would be exempt reporting advisers were not available, but the information located did inform the staff to the probable number of exempt reporting advisers.

[735] *See* Implementing Proposing Release, *supra* note 7, at section V.B.2.b.i.

[736] *Id.* Based upon the reported general number of private funds and the estimated number of advisers to these private funds, it is estimated that each adviser advises 6 private funds on average. Approximately 2,000 exempt reporting advisers × 6 private funds/adviser = 12,000 private funds. This represents an increase from our estimate of 10,000 private funds in the Implementing Proposing Release, which is attributable to updated IARD data that indicate each private fund adviser now advises approximately 6 funds, instead of 5. *Compare supra* note 700 *with* Implementing Proposing Release, *supra* note 7, at n.406.

[737] 2,000 exempt reporting advisers × 6 private funds/adviser × 1 hour/private fund = 12,000.

[738] 4,000 hours attributable to the portions of Form ADV that these advisers are required to file other than the private fund reporting + 12,000 hours attributable to private fund reporting = 16,000 hours.

[739] 16,000/3 = 5,330.

[740] 5,330/2,000 = 2.67.

[741] Approximately 20% of advisers with a fiscal year end of December that filed an other-than-annual amendment changed Item 1 or 11 between April 1, 2009, and December 31, 2009 (period between annual amendment filing time).

[742] Approximately 5% of advisers withdrew their SEC registrations in 2010 and did not switch to state registration, based on IARD data. We are assuming the same percentage of exempt reporting advisers will submit final reports and not simultaneously apply for registration with the Commission. Exempt reporting advisers filing a final report because they are applying for registration are not included in this count because there is no independent burden associated with making this type of final filing; they are, therefore, included in the number of advisers expected to register each year as a result of normal annual growth. *See supra* note 691.

[743] *See* amended Form ADV: General Instruction 4.

[744] 2,000 advisers × 1 hour = 2,000 hours per year for annual amendments. (2,000 advisers × 20%) × 0.5 hours = 200 hours per year for interim amendments. 200 + 2,000 = 2,200 hours. Exempt reporting advisers are not required to complete Part 2 of Form ADV and so will not incur an hour burden to prepare new brochure supplements or the cost burden that registered advisers will incur with respect to that part of the form. Exempt reporting advisers also will not be required to meet obligations to deliver codes of ethics to clients, as is required of registered advisers.

[745] 132,405 hours per year attributable to initial preparation of Form ADV + 11,167 hours per year attributable to initial private fund reporting requirements + 63,375 hours per year for amendments to Form ADV + 9,750 hours per year for brochure supplements for new employees + 9,750 hours per year for brochure interim amendments + 12,675 hours per year to meet code of ethics delivery obligations = 239,122 hours.

[746] Current approved burden of 268,457 hours − revised burden 239,122 hours = 29,335 decrease in hours.

associated with amendments to the form and final filings, will be 7,530 hours.[747]

Based on the foregoing, the total annual hour burden for Form ADV will decrease by 21,805 hours to 246,652.[748] Accordingly, we estimate that the blended average per adviser amortized burden for Form ADV will be 20.99 hours,[749] consisting of an average annual amortized burden of 24.52 hours for the estimated 9,750 registered advisers and 3.77 hours for the estimated 2,000 exempt reporting advisers.[750]

C. Rule 203A–5

Rule 203A–5 requires *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from Commission registration by June 28, 2012, if no longer eligible.[751] The amendments to Form ADV will, among other things, require each adviser to declare whether it remains eligible for Commission registration and to report the market value of its assets under management determined within 90 days of the filing.[752] The respondents to this information collection are all investment advisers registered with the Commission on January 1, 2012. Compliance with this collection of information is mandatory, and the information collected on Form ADV is not kept confidential.

Rule 203A–5 that we are adopting today differs from our proposed rule in several respects. First, the transition period begins on January 1, 2012, not the July 21, 2011 effective date of the Dodd-Frank Act, as proposed.[753] Second, advisers will be required to file an amended Form ADV by March 30, 2012 (instead of August 20, 2011, as proposed), and mid-sized advisers no longer eligible for Commission registration will be required to withdraw by June 28, 2012 (instead of October 19, 2011, as proposed), which provides 180 days instead of the 90 days we proposed.[754] Third, we are providing additional flexibility for an adviser to choose the date by which it must calculate its assets under management that it reports on Form ADV by requiring the same 90 day period as in Form ADV today, instead of 30 days, as proposed.[755]

As noted above, we requested comment on the PRA analysis contained in the Implementing Proposing Release. Several commenters expressed general concerns about the paperwork burdens of requiring all advisers to make an additional one-time filing of Form ADV.[756] Some commenters argued that we should decrease the paperwork burden by exempting advisers unaffected by the statutory changes from the Form ADV filing requirement,[757] or only requiring advisers to report their assets under management.[758] Several commenters agreed with us that the transition should be delayed until the IARD is able to accept filings of reviewed Form ADV, instead of implementing an alternative, such as requiring interim paper filings that would increase the paperwork burdens.[759]

Changing the deadline under rule 203A–5 for advisers to re-file amended Form ADV to March 30, 2012, which coincides with most advisers' required annual updating amendment, significantly reduces the paperwork burden of rule 203A–5 by eliminating the requirement that these advisers incur the costs associated with a special one-time filing requirement.[760] This deadline also coincides with the filing deadline for newly registering private fund advisers, which, as one commenter points out results in ''a single, comprehensive Form ADV filing to register with the Commission'' instead of requiring two filings that ''would be costly, inefficient and potentially confusing.'' [761]

We estimate that there will be approximately 3,900 respondents to this collection of information filing an amendment to Form ADV.[762] Each respondent will respond once. For purposes of the collection of information burden for Form ADV, we estimate that the amendment will take each adviser approximately 6 hours per amendment, on average,[763] and that the proposed amendments to Part 1A of Form ADV will take each adviser approximately 4.5 hours, on average, to complete.[764] We estimated that the total one-time burden for completing the proposed Form ADV amendments to be 124,425 hours, plus an additional 33,350 hours for private fund reporting, for a total of 157,775 hours.[765] As discussed above, however, the number of advisers that we estimate will complete an additional Form ADV amendment will be lower than under proposed rule 203A–5. We estimate that 700 advisers that will remain registered with the Commission after the switch will file an other-than-annual amendment, and 3,200 mid-sized advisers will file a Form ADV amendment with us before they switch to state registration.[766] In addition, of these 3,900 registered advisers, we estimate that 850 advise one or more private funds and will have to complete the private fund reporting requirements.[767] We expect this will

[747] 5,330 hours per year attributable to initial preparation of Form ADV + 2,200 hours per year for amendments = 7,530 hours.

[748] 239,122 + 7,530 = 246,652.

[749] 246,652/11,750 = 20.99.

[750] Registered advisers (239,122/9,750 = 24.52), exempt reporting advisers (7,530/2,000 = 3.77).

[751] New rule 203A–5(b)–(c). *See supra* section II.A.1. Advisers registered with us on July 21, 2011 that have at least $25 million in assets under management will be exempt from the new prohibition on Commission registration for mid-sized advisers until 2012, when the rule will require them to switch to state registration and withdraw their registration with us. *See* new rule 203A–5(a); *supra* section II.A.1., note 28.

[752] *See supra* sections II.A.1. and II.A.2.

[753] *See* proposed rule 203A–5(a)–(b); *supra* section II.A.1.

[754] *See* proposed rule 203A–5(b)–(c); *supra* section II.A.1.

[755] *See* new rule 203A–5(b); amended Form ADV: Instructions for Part 1A, instr. 5.b.(4); *supra* section II.A.1.

[756] *See, e.g.,* ICI Letter; MFA Letter; NYSBA Committee Letter; Shearman Letter.

[757] ICI Letter (recommending exempting advisers that do not rely on assets under management to register with the SEC); MFA Letter (recommending exempting private fund advisers that file an initial Form ADV by July 21); NYSBA Committee Letter (recommending exempting advisers who will continue to be eligible for Commission registration and advisers relying on the section 203(b)(3) exemption that we proposed would have to register with the Commission by July 21, 2011).

[758] Shearman Letter.

[759] *See* NASAA Letter (''the benefits of electronic filing, including easy public access to the documents, are significant and would outweigh any disadvantages imposed by a delay in filing deadlines.''); NRS Letter (urging Commission not to ''regress to paper filings'' which would be ''a huge step into the past'' and ''appears to be counter to Dodd-Frank Act purposes of transparency and consistency.''). *See also* Dezellem Letter (the IARD is efficient and reduces risks of misplacing paper documents and possible filing errors); NYSBA Committee Letter (the IARD is the ''most efficient mechanism for advisers and exempt reporting advisers to meet their filing obligations and make such filings to the public.''). FINRA informed us that the IARD will be updated to reflect the revisions to Form ADV that we are adopting today beginning in November. *See supra* section II.A.1.

[760] *See supra* note 511. *See also* CMC Letter (suggesting ''timing of the transition from Federal to state registration could be centered around renewals for 2012'').

[761] *See* MFA Letter.

[762] *See supra* note 511. The PRA burden for filing Form ADV–W is part of the PRA burden submitted for Form ADV–W. *See infra* section VI.E. The Implementing Proposing Release erroneously included Form ADV–W both in the PRA burden for proposed rule 203A–5 and for Form ADV–W. *See* sections V.C. and V.E. of the Implementing Proposing Release.

[763] We anticipate that the hour burden for the refiling of Form ADV for purposes of new rule 203A–5 will be the same as an adviser's annual amendment filing, which has an approved burden of 6 hours. *See supra* section VI.B.2.a.iii.

[764] *See supra* sectionsVI.B.1.a.

[765] *See* Implementing Proposing Release, *supra* note 7, at nn. 403, 444.

[766] *See supra* note 511.

[767] Based on IARD data as of April 7, 2011, 839 advisers out of the estimated 3,700 current SEC-

Continued

take 8,373 hours, and we estimate that the total one-time burden for completing the Form ADV amendments to be 49,323 hours.[768]

D. Form ADV–NR

We are making minor amendments to Form ADV–NR (OMB Control No.: 3235–0238), the form used to appoint the Secretary of the Commission as an agent for service of process for certain non-resident advisers.[769] Non-resident general partners or managing agents of SEC-registered investment advisers must make a one-time filing of Form ADV–NR with the Commission. Form ADV–NR requires these non-resident general partners or managing agents to furnish us with a written irrevocable consent and power of attorney that designates the Commission as an agent for service of process, and that stipulates and agrees that any civil suit or action against such person may be commenced by service of process on the Commission. The amendments we are adopting reflect that exempt reporting advisers will be filing reports on the IARD, and that they will use Form ADV–NR in the same way and for the same purpose as it is currently used by registered investment advisers. The collection of information is necessary for us to obtain appropriate consent to permit the Commission and other parties to bring actions against non-resident partners or agents for violations of the Federal securities laws. This collection of information is found at 17 CFR 279.4. The collection of information is mandatory, and the information provided in response to the collection is not kept confidential. The currently approved collection of information in Form ADV–NR is 18 hours.

In the Implementing Proposing Release, we estimated that approximately 9,150[770] investment advisers would be registered with the Commission after the Dodd-Frank Act amendments to the Advisers Act take effect and that approximately 2,000[771] exempt reporting advisers would file reports with the Commission, and that these advisers would file Form ADV–NR at the same annual rate (0.17 percent) as advisers registered with us.[772] Accordingly, we estimated that the annual aggregate information collection burden for Form ADV–NR would be 19 hours, an increase of one hour over the currently approved burden.[773] We did not receive comments on these estimates. Based on updated IARD data, we now estimate that approximately 9,750[774] investment advisers will be registered with the Commission and continue to estimate that approximately 2,000[775] exempt reporting advisers will file reports with the Commission, and that these advisers will file Form ADV–NR at an annual rate of 0.17 percent,[776] for a total of approximately 20 filings annually.[777] We continue to estimate that ADV–NR requires an average of one hour to complete. Accordingly, we estimate that as a result of the amendments to Form ADV–NR and the change in the number of filers after the effectiveness of the Dodd-Frank Act, the annual aggregate information collection burden for Form ADV–NR will be 20 hours, an increase of two hours over the currently approved burden of 18 hours.[778]

E. Rule 203–2 and Form ADV–W

We are amending rule 203A–2(b), the exemption from the prohibition on registration for certain pension consultants. The amendments will increase the minimum value of plan assets which an adviser must consult from $50 to $200 million annually.[779] An investment adviser will have to be a pension consultant with respect to assets of plans having an aggregate value of $200 million or more to be able to register with the Commission. Those pension consultants providing consulting services to plans of less than $200 million will be required to file a notice of withdrawal of their registration in accordance with rule 203–2 on Form ADV–W (OMB Control No. 3235–0313). The collection of information on Form ADV–W is mandatory and is not kept confidential. The currently approved collection of information for Form ADV–W is 500 hours for 1,000 responses.

The amendments to the rule that we are adopting today do not differ from our proposed amendments. Commenters supported our proposal and did not discuss the proposal's collection of information estimates.[780] In the Implementing Proposing Release, we estimated that approximately 50 of the current advisers relying on this exemption from the prohibition on registration would no longer be eligible to rely on the exemption if adopted as proposed, and approximately 4,100 advisers also would have to withdraw their Commission registration as a result of the Dodd-Frank Act.[781] We have lowered our estimate of advisers withdrawing from Commission registration to 3,200 based on more current IARD data,[782] but we continue to estimate that 50 of the current advisers relying on this exemption from the prohibition on registration will no longer be eligible to rely on the exemption as adopted.[783]

The estimated 50 advisers no longer eligible to rely on the exemption, however, will have to file a notice of withdrawal on Form ADV–W in accordance with rule 203–2 under the Advisers Act and withdraw their registration based on the amendment to rule 203A–2(b).[784] In addition, as noted above, we estimate that approximately 3,200 advisers also will have to withdraw their Commission registration as a result of the Dodd-Frank Act. Because these advisers are registered today, we further anticipate that these advisers will be switching from SEC to state registration, and as a result will be filing a ''partial'' Form ADV–W. We have estimated for purposes of our current approved burden under the PRA for rule 203–2 and Form ADV–W, that a partial withdrawal imposes an average burden of approximately 0.25 hours for an adviser.[785] Thus, we estimate that the amendment to rule 203A–2(b)

registered advisers that advise private funds do not have a December fiscal year end or are expected to switch to state registration. We have rounded this number to 850 for purposes of this analysis.

[768] *See supra* notes 520–522, 528–532. ((6 hours (annual amendment) + 4.5 hours (new items)) × 3,900) + ((442 advisers × 3 funds × 1 burden hour per fund) + (365 × 10 funds × 1 burden hour per fund) + (43 advisers × 79 funds × 1 burden hour per fund)) = 44,100 (burden hours for Form ADV filing excluding private fund reporting + 8,373 (burden hours for private fund reporting) = 49,323 total burden hours for Form ADV filing.

[769] *See* amended Form ADV–NR; Form ADV: General Instruction 16.

[770] *See* Implementing Proposing Release, *supra* note 7, at section V.D.

[771] *See id.*

[772] *See id.*

[773] *See id.*

[774] *See supra* note 655 and accompanying text.

[775] *See supra* note 734 and accompanying text.

[776] *See* Implementing Proposing Release, *supra* note 7, at n.450.

[777] 0.17% (rate of filing) × (9,750 estimated registered investment advisers + 2,000 estimated exempt reporting advisers) = approximately 20 Form ADV–NR filings.

[778] 20 ADV–NR filings × 1 hour per filing = 20 hours. 20 hours − 18 hours = 2 hours.

[779] *See* amended rule 203A–2(a)(1).

[780] NRS Letter; Pickard Letter.

[781] *See* Implementing Proposing Release, *supra* note 7, at n.453 and accompanying and following text.

[782] *See supra* note 510.

[783] Based on IARD data as of April 7, 2011, there are 322 advisers relying on the pension consultant exemption from registration, and we estimate that approximately 15 percent will no longer be eligible to rely on the exemption as adopted. This estimate is based on our understanding that a typical pension consultant will have plan assets far in excess of the higher threshold, in light of the fact that most pension plans contain a significant amount of assets.

[784] *See supra* note 549 (discussing the fact that advisers filing Form ADV–W due to our amendment to rule 203A–2(b) will likely file partial withdrawals).

[785] *See supra* note 533.

associated with filing Form ADV–W will generate a burden of approximately 813 additional hours [786] in addition to the approved burden of 500 hours for a total of 1,313 hours.

F. Form ADV–H

Rule 204–4(e) provides a temporary hardship exemption for an exempt reporting adviser having unanticipated technical difficulties that prevent submission of a filing to the IARD system.[787] Rule 203–3(a) provides a similar temporary hardship exemption for registered advisers that file an application on Form ADV–H (OMB Control No. 3235–0538).[788] Like rule 203–3(a), rule 204–4(e) requires advisers relying on the temporary hardship exemption to file an application on Form ADV–H in paper format no later than one business day after the filing that is the subject of the Form ADV–H was due, and submit the filing on Form ADV in electronic format with the IARD no later than seven business days after the filing was due.[789] Because we are adopting rule 204–4, respondents to the collection of information on Form ADV–H will now include exempt reporting advisers, in addition to registered advisers. The collection of information on Form ADV–H is mandatory for registered advisers and exempt reporting advisers relying on a temporary hardship exemption. The information collected on Form ADV–H is not kept confidential.

In the Implementing Proposing Release, we estimated that exempt reporting advisers would file approximately two responses to Form ADV–H annually.[790] We also estimated that Form ADV–H would impose the same average burden per response on exempt reporting advisers as it imposes on registered advisers—one hour. Thus, we estimated that rule 204–4 would result in an increase of two hours in the total hour burden associated with Form ADV–H.[791] We did not receive comments on our estimates. We continue to estimate that exempt reporting advisers will file approximately two responses to Form ADV–H annually, with each response requiring an average of one hour, for an estimated annual burden of two hours.[792] However, as discussed above, the number of registered advisers will decrease due to the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) from 11,500 to 9,750.[793] Given the reduction in registered advisers, we estimate that Form ADV–H will receive 10 annual responses from registered advisers.[794] We continue to estimate that Form ADV–H will require an average of one hour to complete, and thus estimate that the total annual burden for registered advisers to be 10 hours.[795] Thus, the total burden associated with Form ADV–H will increase one hour to 12 hours.[796]

G. Rule 204–2

Rule 204–2 (OMB Control No. 3235–0278) requires investment advisers registered, or required to be registered under section 203 of the Act, to keep certain books and records relating to their advisory business.[797] The collection of information under rule 204–2 is necessary for the Commission staff to use in its examination and oversight program, and the information is generally kept confidential.[798] The collection of information is mandatory.

We are amending rule 204–2 to update the rule's ''grandfathering provision'' for investment advisers that are currently exempt from registration under the ''private adviser'' exemption, but will be required to register after the Dodd-Frank Act eliminates the ''private adviser'' exemption on July 21, 2011.[799] Upon registration, these advisers will become subject to the recordkeeping requirements of the Act, including the requirement to keep certain records relating to performance.[800] The amendment clarifies that these advisers are not obligated to keep certain performance-related records for any period when they were not registered with the Commission; however, to the extent that these advisers preserved these performance-related records even though they were not required to keep them, they must continue to preserve them.[801] Most, if not all, advisers likely gather the records and documents necessary to support the calculation of performance or rate of return as those records or documents are produced or at the time a calculation is made. Thus, we do not believe that the amendment to the grandfathering provision will reduce our current approved average annual hourly burden per adviser under rule 204–2.

Although we do not anticipate that our amendments to rule 204–2 will affect the per adviser burden imposed by the rule, the Dodd-Frank Act's amendments to sections 203A and 203(b)(3) will change our estimates of the total annual burden associated with the rule.[802] The current approved burden for rule 204–2 is based on an estimate of 11,658 registered advisers subject to rule 204–2 and an estimated average burden of 181.45 burden hours each year per adviser, for a total of 2,115,376 hours. We estimated in the Implementing Proposing Release that the Dodd-Frank Act will reduce the number of registered advisers to 9,150.[803] We did not receive comments on these estimates. However, based on updated IARD data, we now estimate that the Dodd-Frank Act will reduce the number of registered advisers to 9,750.[804] Thus, we estimate that the total burden under amended rule 204–

[786] (3,200 + 50) responses on Form ADV–W × 0.25 hours = 812.5 hours.

[787] New rule 204–4(e).

[788] Rule 203–3(a); 17 CFR 279.3 (Form ADV–H).

[789] New rule 204–4(e).

[790] *See* Implementing Proposing Release, *supra* note 7, at section V.F.

[791] *See id.*

[792] To estimate the currently approved total burden associated with Form ADV–H, we estimated that registered advisers file approximately 11 responses to Form ADV–H per year, which, given the then-estimated 11,850 advisers registered with the Commission, meant that approximately 1 response is filed per 1,000 advisers (11,850 registered advisers/11 responses = approximately 1 response per 1,000 registered advisers). We estimate that approximately 2,000 exempt reporting advisers will file reports on Form ADV in accordance with rule 204–4. Thus, we estimate two responses to Form ADV–H in accordance with rule 204–4 (2,000 exempt reporting advisers × 1 response per 1,000 advisers = 2 responses).

[793] *See supra* note 655.

[794] 9,750 registered advisers × 1 response per 1,000 advisers = 9.75 responses.

[795] 10 responses × 1 hour = 10 hours.

[796] The current approved burden is 11 hours. Our new estimate is 10 hours for registered advisers + 2 hours for exempt reporting advisers = 12 hours.

[797] Rule 204–2.

[798] *See* section 210(b) of the Advisers Act.

[799] *See* amended rule 204–2(e)(3)(ii); section II.D.2.b. In addition, we are amending rule 204–2(e)(3)(ii) to cross-reference the new definition of ''private fund'' added to the Advisers Act by the Dodd-Frank Act where that term is used in rule 204–2. This amendment is technical and will not increase or decrease the collection burden on advisers. We are also rescinding rule 204–2(l) because that section was vacated by a Federal appeals court in *Goldstein.*

[800] *See* amended rule 204–2(a)(16).

[801] *See* amended rule 204–2(e)(3)(ii) (stating, ''[i]f you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), as in effect on July 20, 2011, [this rule] does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under [certain sections of this rule] to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b–2(a)(29)), or other account you advise for any period ended prior to your registration, provided that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.'' (emphasis added)).

[802] Exempt reporting advisers are not subject to rule 204–2, and therefore there is no offsetting increase in the number of advisers subject to the rule.

[803] *See* Implementing Proposing Release, *supra* note 7, at n.377 and accompanying text.

[804] *See supra* note 655 and accompanying text.

2 will be 1,769,138 hours,[805] a reduction of 346,238 hours.[806]

The reduction in the number of advisers subject to the rule will also reduce the total non-labor cost burden of the rule. The current approved non-labor cost burden associated with rule 204–2 is $34,965,063, or an average of approximately $3,000 per adviser.[807] Due to the reduction in the number of advisers subject to rule 204–2, we estimate that the new total non-labor cost burden will be $29,250,000,[808] a reduction of $5,715,063.[809]

VII. Final Regulatory Flexibility Analysis

The Commission has prepared the following Final Regulatory Flexibility Analysis (''FRFA''), in accordance with section 4(a) of the Regulatory Flexibility Act, regarding the rules and rule amendments we are adopting today to give effect to the Dodd-Frank Act's amendments to the Advisers Act.[810] It relates to new rules 203A–5 and 204–4, amendments to rules 0–7, 203–1, 203A–1, 203A–2, 203A–3, 203A–4, 204–1, 204–2, 206(4)–5, 222–1, 222–2, and amendments to Form ADV, Form ADV–NR and Form ADV–H under the Advisers Act.[811] We prepared an Initial Regulatory Flexibility Analysis (''IRFA'') in conjunction with the Implementing Proposing Release in November 2010.[812]

A. Need for and Objectives of the New Rules and Rule Amendments

The new rules and rule amendments are necessary to give effect to provisions of the Dodd-Frank Act which, among other things, amend certain provisions of the Advisers Act, and to respond to a number of other changes made by the Dodd-Frank Act, including the Commission's pay to play rule. In addition, in light of our increased responsibility for oversight of private funds, we are requiring advisers to those funds to provide us with additional information about the operation of those funds, which will permit us to better oversee those advisers by focusing our examination and enforcement resources on those advisers to private funds that appear to present greater compliance risks. We also are requiring all registered advisers to provide us with additional information on their operations to allow us to more efficiently allocate our examination resources, to better prepare for on-site examinations, and to provide us with a better understanding of the investment advisory industry to assist our evaluation of the implications of policy choices we must make in administering the Advisers Act.

Specifically, the new rules and rule amendments give effect to provisions of Title IV of the Dodd-Frank Act that: (i) Reallocate responsibility for oversight of investment advisers by delegating generally to the states responsibility over certain mid-sized advisers; (ii) repeal the ''private adviser'' exemption contained in section 203(b)(3) of the Advisers Act; and (iii) provide for reporting by advisers to certain types of private funds that are exempt from registration.[813] New rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 are intended to provide us a means of identifying advisers that must transition to state regulation, clarify the application of the new statutory provisions under the Dodd-Frank Act, and extend certain of the exemptions we have adopted under section 203A of the Act to mid-sized advisers. Rule 203–1(e) is intended to provide an orderly transition to registration for advisers that previously relied on the ''private adviser'' exemption in section 203(b)(3) of the Advisers Act. New rule 204–4 and amendments to rule 204–1 are intended to require exempt reporting advisers to submit, and to update periodically, reports to us by completing several items on Form ADV. The amendments to rule 204–2 are intended to account for the Dodd-Frank Act's elimination of the ''private adviser'' exemption under section 203(b)(3) of the Advisers Act and its addition of a definition of ''private fund'' to the Advisers Act.[814] The amendments to Form ADV will permit the form to serve as a reporting, as well as a registration, form and to specify the seven items exempt reporting advisers must complete. The amendments to Form ADV also will provide additional information on the operations of registered investment advisers. The amendments to Forms ADV–NR and ADV–H will revise the forms for use by exempt reporting advisers. Additionally, we are amending the Advisers Act pay to play rule, rule 206(4)–5, to make it apply both to exempt reporting advisers and foreign private advisers, thereby preventing the unintended narrowing of the application of the rule resulting from the repeal of the ''private adviser'' exemption.[815] Furthermore, we are amending the rule to add the new ''municipal advisor'' category of registrant created by the Dodd-Frank Act to the categories of registered entities—referred to as ''regulated persons''—excepted from the rule's prohibition on advisers paying third parties to solicit government entities.[816]

B. Significant Issues Raised by Public Comment

In the Implementing Proposing Release, we requested comment on the IRFA. In particular, we sought comment on the number of small entities, particularly small advisers, to which the new rules and rule amendments would apply and the effect on those entities, including whether the effects would be economically significant. None of the comment letters we received specifically addressed the IRFA. A couple of commenters made specific comments about the proposed rule and rule amendments' impact on smaller advisers, generally. In response to a question in the Implementing Proposing Release, one commenter stated that a shortened deadline, from 90 to 60 days, for filing an annual update to Form ADV would be particularly burdensome on small advisers because they have limited resources.[817] As discussed above, in light of this and similar concerns raised by other commenters, we are not adopting a requirement to accelerate the annual updating amendment deadline.[818] Another commenter asserted that we should retain the rule 203A–4 safe harbor for state-registered advisers that have a reasonable belief that they are prohibited from registration with the Commission as there has been, and continues to be, confusion among small advisers in calculating assets under management.[819] We have not retained the safe harbor, which, as we explain above, was designed for smaller advisory businesses (with assets under management of less than $30 million)

[805] 9,750 registered advisers × 181.45 hours = approximately 1,769,138.

[806] 2,115,376 hours − 1,769,138 hours = 346,238 hours.

[807] $34,965,063/11,658 advisers = approximately $3,000.

[808] 9,750 × $3,000 = $29,250,000.

[809] $34,965,063 − $29,250,000 = $5,715,063.

[810] 5 U.S.C. 604(a).

[811] We note that the FRFA analysis associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to Form ADV–E. Today, we are making only a technical amendment to Form ADV–E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310, at section VI.

[812] *See* Implementing Proposing Release, *supra* note 7, at section VI.

[813] *See supra* section I.

[814] *See supra* section II.D.2.b. As discussed above, we are also rescinding rule 204–2(l), which was vacated by the Federal appeals court in *Goldstein*.

[815] *See* amended rule 206(4)-5; *supra* section II.D.1.

[816] *See id.*

[817] Pickard Letter.

[818] *See supra* section II.C.7.

[819] NRS Letter.

that may not employ the same tools or otherwise have a need to calculate assets as precisely as advisers with greater assets under management.[820] Moreover, such a safe harbor would no longer apply to small advisers as it would be used, if at all, by advisers managing close to the new $100 million threshold for SEC registration and not the $30 million threshold that existed prior to the Dodd-Frank amendments to the Advisers Act.

C. Small Entities Subject to Rules and Rule Amendments

In developing these new rules and rule amendments, we have considered their potential impact on small entities to which they will apply. The rules and rule amendments will affect all advisers registered with the Commission and exempt reporting advisers, including small entities. Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[821]

Our rule and form amendments will not affect most advisers that are small entities (''small advisers'') because they are generally registered with one or more state securities authorities and not with us. Under section 203A of the Advisers Act, most small advisers are prohibited from registering with the Commission and are regulated by state regulators.[822] We estimate that as of April 7, 2011, approximately 570 advisers that were small advisers were registered with the Commission.[823] Because these advisers are registered, they will be subject to new rule 203A–5 and amendments to rules 0–7, 203–1, 204–2, 203A–1, 203A–2, 203A–3, and 203A–4, and Forms ADV and ADV–NR. In addition, we estimate that, due to the Dodd-Frank Act's elimination of the ''private adviser'' exemption in section 203(b)(3), an additional two small advisers will become subject to these rules.[824] Further, as a result of the amendments to rule 203A–2, we estimate that 15 additional multi-state small advisers will register with us and be subject to these rules,[825] and 18 pension consultants that are small advisers will be required to withdraw from registration with us and will no longer be subject to these rules.[826] We estimate that four exempt reporting advisers that are small advisers will be subject to rule 204–4, and the amendments to rule 204–1, Form ADV, Form ADV–NR and Form ADV–H to give effect to the Dodd-Frank Act's reporting requirements by exempt reporting advisers.[827] We also estimate that four exempt reporting advisers that are small advisers will be subject to the amendments to rule 206(4)–5. Finally, all investment advisers, whether they are small advisers or not, will be subject to the technical amendments to rules 222–1 and 222–2. The small advisers subject to these amendments include approximately four exempt reporting advisers and approximately 14,600 state-registered advisers.[828]

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The rules and rule amendments we are adopting today impose certain reporting, recordkeeping, and compliance requirements on advisers, including small advisers. The rules and amendments require all of the small advisers registered with us to file an amended Form ADV, require some to file Form ADV–W, and require some to file reports as exempt reporting advisers. The amendments also cause the advisers to be subject to the existing recordkeeping and compliance requirements for SEC-registered advisers. These requirements and the burdens on small advisers are discussed below.[829]

Transition to State Registration

Rule 203A–5 imposes costs on all investment advisers, including small advisers, by requiring *each* investment adviser registered with us on January 1, 2012 to file an amendment to its Form ADV no later than March 30, 2012, and withdraw from Commission registration by June 28, 2012, if no longer

[820] *See supra* section II.A.6.

[821] Rule 0–7(a) [17 CFR 275.0–7(a)].

[822] *See supra* section II.A.7.a.

[823] Based on IARD data as of April 7, 2011, 572 advisers registered with the Commission were small advisers. We have rounded this number to 570 for purposes of this analysis.

[824] We believe that the only small advisers that would become subject to registration as a result of the elimination of the private adviser exemption in section 203(b)(3) would be advisers to private funds that maintain their principal office and place of business in Wyoming. Based on IARD data as of April 7, 2011, we estimate that 28 SEC-registered small advisers are required to be registered with us because they have a principal office and place of business in Wyoming, which is 0.2% of all SEC-registered advisers (28/11,500 SEC-registered advisers = approximately 0.2%). We estimate that a similar proportion of the approximately 750 advisers to private funds that will register with the Commission due to the elimination of the private adviser exemption in section 203(b)(3) would be Wyoming-based small advisers. As a result, we estimate that approximately two small advisers to private funds will register with the Commission (750 private fund advisers × 0.2% = approximately two).

[825] *See supra* note 555.

[826] Based on IARD data as of April 7, 2011, 118 of the advisers that would be considered small advisers rely on the pension consultant exemption from registration. We estimate that approximately 15%, or 18, of these advisers would no longer be eligible to rely on the exemption as amended. This ratio is consistent with our estimate for the PRA burden. *See supra* section VI.E. and note 783.

[827] The only small adviser exempt reporting advisers that would be subject to the rule and amendments would be exempt reporting advisers that maintain their principal office and place of business in Wyoming. The current practical effect of section 203A(a)(1) is to prohibit U.S. advisers with less than $25 million in assets under management from registering with the Commission *unless* they maintain their principal office or place of business in Wyoming. *See* NSMIA Adopting Release, *supra* note 17, at section II.E. Currently, all U.S. states except Wyoming require certain investment advisers to register. See Transition Rule for Ohio Investment Advisers, Investment Advisers Act Release No. 1794, n. 4 (Mar. 25, 1999) [64 FR 15680 (Apr. 1, 1999)]. New rule 204–4 requires an adviser relying on an exemption under new sections 203(l) or (m) of the Advisers Act to complete and file reports on Form ADV. *See* new rule 204–4; *supra* section II.B.1. The exemptions from registration in sections 203(l) and (m) apply to advisers solely to venture capital funds and advisers solely to private funds with less than $150 million in assets under management, respectively. Small Wyoming-based advisers to venture capital funds or private funds may be required to register with the Commission but for the exemptions in section 203(l) or (m). Thus, these advisers would be subject to rule 204–4 and the amendments to rule 204–1, Form ADV, and Form ADV–H to give effect to the Dodd-Frank Act's mandate for reporting by exempt reporting advisers. Assuming that the proportion of registered Wyoming-based small advisers to registered advisers is similar to the proportion of small Wyoming-based exempt reporting advisers to exempt reporting advisers generally, we estimate that approximately four exempt reporting advisers that are small advisers would be subject to rule 204–4 and the amendments to rule 204–1, Form ADV, and Form ADV–H (2,000 exempt reporting advisers × 0.2% = four small Wyoming-based exempt reporting advisers).

[828] Based on IARD data as of January 1, 2011, we estimate that there were approximately 14,600 state-registered advisers. Because section 203A currently precludes most advisers with less than $25 million in assets under management from registering with the Commission, we assume that nearly all of the 14,600 state-registered advisers are small advisers. Therefore, 14,600 small advisers (registered with the states as of January 1, 2011) + 18 small advisers (registering with the states due to the amendment to the pension consultant exemption in rule 203A–2(b)) − 2 small advisers (registering with the Commission due to elimination of the private adviser exemption in section 203(b)(3)) − 15 small advisers (de-registering with the states and registering with the Commission due to the amendment to the multi-state adviser exemption in rule 203A–2(e)) = approximately 14,600 state-registered advisers that are small advisers.

[829] *Supra* sections I. through II. describe these requirements in more detail.

eligible.[830] We estimate that all of the 570 small advisers currently registered with the Commission will file Form ADV, but none will withdraw registration because the Dodd-Frank Act does not change the eligibility requirements for small advisers registered with us since they already rely on one or more of the exemptions from the prohibition on registration.[831]

Switching Between State and Commission Registration

The amendments to rule 203A–1 eliminate the $5 million buffer in current rule 203A–1(a), which permits an adviser to register with the Commission if the adviser has between $25 million and $30 million of assets under management, and replaces it with a similar buffer for mid-sized advisers with assets under management of close to $100 million.[832] By definition, a small adviser under the Advisers Act has less than $25 million in assets under management; as such, these amendments should have no impact on small advisers.[833]

Exemptions From the Prohibition on Registration With the Commission

The amendments we are adopting to two of the three exemptions from the prohibition on registration in rule 203A–2 will cause small advisers to be subject to new reporting, recordkeeping, and other compliance requirements.[834] The amendment to the exemption from the prohibition on registration available to pension consultants in rule 203A–2(b) will increase the minimum value of plan assets on which an adviser must consult from $50 million to $200 million.[835] We estimate that this may cause approximately 18 small adviser pension consultants to be required to withdraw from registration with us by filing Form ADV–W and thus no longer be subject to Commission rules.[836] These advisers will likely need to register with one or more states, and comply with the states' recordkeeping and other regulatory requirements. These additional costs will have a negative impact on competition for these advisers compared to pension consultants with more than $200 million of plan assets that will remain registered with the Commission.

The amendment to the multi-state adviser exemption in rule 203A–2(e) will permit all investment advisers who are required to register as an investment adviser with 15 or more states to register with the Commission, rather than 30 states, as currently required.[837] An adviser relying on this exemption will continue to report certain information on Form ADV[838] and maintain a record of the states in which the investment adviser has determined it would, but for the exemption, be required to register. This will promote competition by making the standards for the multi-state exemption consistent for small and mid-sized advisers. We estimate that, in addition to the approximately 19 small advisers that rely on the exemption currently,[839] approximately 15 will begin relying on the exemption, as amended.[840] Advisers newly relying on the amended exemption will incur costs associated with completing and filing Form ADV for purposes of registration with the Commission, and all of the advisers relying on the exemption will incur the costs associated with keeping records sufficient to demonstrate that they would be required to register with 15 or more states. In addition, these advisers will incur costs of complying with the Advisers Act and our rules, but they may see an absolute reduction in compliance costs by registering with the Commission instead of 15 or more states.[841]

Elimination of Safe Harbor

Eliminating rule 203A–4, which has provided a safe harbor from Commission registration for an investment adviser that is registered with state securities authorities based on a reasonable belief that it is prohibited from registering with the Commission because it does not have at least $30 million of assets under management, will not create new requirements for small advisers.[842] These advisers will not have at least $30 million of assets under management, and advisers have not, in our experience, relied on this safe harbor.

Mid-Sized Advisers

Providing in instructions to Form ADV an explanation of whether a mid-sized adviser is ''required to be registered'' or is ''subject to examination'' by a particular state securities authority for purposes of section 203A(a)(2)'s prohibition on mid-sized advisers from registering with the Commission will not create new reporting requirements for small advisers.[843] The mid-sized adviser requirements will only apply to advisers with assets under management between $25 million and $100 million and therefore will not apply to small advisers.

Exempt Reporting Advisers

Rule 204–4 and the amendments to rules 204–1, Form ADV, and Form ADV–H require exempt reporting advisers to file reports with the Commission electronically on Form ADV and impose reporting requirements on an estimated four small advisers.[844] As discussed above, we estimate that completing and filing Form ADV will cost $2,032 for each exempt reporting adviser.[845] In addition, small exempt reporting advisers would be required to pay an estimated filing fee of $225 annually,[846] for a total of $900 for the estimated four small exempt reporting advisers.[847] Finally, under rule 204–4 exempt reporting advisers that seek a temporary hardship exemption from electronic filing must complete and file Form ADV–H.[848] To the extent any of the four small exempt reporting advisers file Form ADV–H, we have estimated that it would require one burden hour at a total cost of $189.[849]

Amendments to Form ADV

The amendments to Form ADV that we are adopting today will require

[830] New rule 203A–5(b)–(c). *See supra* section II.A.1.

[831] *See* section 410 of the Dodd-Frank Act; rule 203A–2.

[832] *See* amended rule 203A–1; *supra* section II.A.4.

[833] *See* rule 0–7(a)(1).

[834] *See* amended rule 203A–2; *supra* section II.A.5. The elimination of the exemption from the prohibition on Commission registration for NRSROs in rule 203A–2(a) will not affect small advisers because, based on IARD data as of April 7, 2011, none of the advisers registered with us relies on the exemption.

[835] We also are renumbering the rule as rule 203A–2(a). *See* amended rule 203A–2(a); *supra* section II.A.5.b.

[836] *See supra* note 826 and accompanying text.

[837] We also are renumbering the rule as rule 203A–2(d). *See* amended rule 203A–2(d); *supra* section II.A.5.c.

[838] Advisers will be required to: (i) include a representation on Schedule D of Form ADV that the investment adviser has concluded that it must register as an investment adviser with 15 or more states; and (ii) undertake to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 states to register as an investment adviser with those states. *See* amended rule 203A–2(d)(2).

[839] Based on IARD data as of April 7, 2011, 19 advisers checked Item 12 of Part 1A of Form ADV to indicate that they are small advisers and checked Item 2.A.(9) to indicate their basis for SEC registration under the multi-state rule.

[840] *See supra* note 555.

[841] *See supra* section II.A.5.c., note 543 and accompanying text.

[842] Rule 203A–4. *See supra* section II.A.6.

[843] *See* amended Form ADV: Instructions for Part 1A, instr. 2.b.; *supra* section II.A.7.

[844] *See supra* section II.B. and note 827.

[845] *See supra* note 579 and accompanying text. $4,064,000/2,000 = $2,032.

[846] *See supra* notes 567–568 and accompanying text (discussing the potential filing fee).

[847] $225 × 4 small exempt reporting advisers = $900.

[848] New rule 204–4(e).

[849] *See supra* note 596 and accompanying text.

registered advisers to report information that is different from, or in addition to, what is currently required. Approximately 570 currently registered small advisers, and two small advisers currently relying on the private adviser exemption that we expect will register with us, will be subject to these requirements.[850] We expect these 570 advisers will spend, on average, 4.5 hours to respond to the new and amended questions on Form ADV, other than the private fund reporting requirements.[851] We expect the aggregate cost associated with this process will be $651,511.[852] The two anticipated newly registering advisers will spend, in the aggregate, about 101 hours total to complete the form (Part 1 except for the private fund reporting requirements, and Part 2) as well as to amend the form periodically, to prepare brochure supplements, and to deliver codes of ethics to clients,[853] for a total cost of $25,655.[854] In addition, of these approximately 572 registered advisers, we estimate that 50 advise one or more private funds and will have to complete the private fund reporting requirements we are adopting today.[855] We expect this will take 150 hours,[856] in the aggregate, for a total cost of $38,100.[857] The total estimated labor costs associated with our Form ADV amendments that we expect will be borne by small advisers, therefore, are $715,266. Additionally, we estimate that one of the newly registering advisers will use outside legal services to assist them in preparing their Part 2 brochure, for a total non-labor cost of $3,200.[858]

Amendments To Pay To Play Rule

Our amendment to the pay to play rule to make it apply to exempt reporting advisers and foreign private advisers will not create new reporting, recordkeeping, or other compliance requirements for these advisers.[859] Rather, we are adopting this amendment to assure that the rule continues to apply to these advisers and to prevent the unintended narrowing of the rule.[860] Our amendment to the pay to play rule to add registered municipal advisors to the definition of ''regulated persons'' (*i.e.,* those excepted from the rule's ban on third-party solicitation) may create new recordkeeping and compliance requirements on investment advisers that are small advisers subject to the rule to the extent that they have to verify and document that persons that they hire to solicit government entities are indeed registered municipal advisors, if these solicitors do not otherwise meet the ''regulated person'' definition.[861]

Other Amendments

Our amendments to rule 204–2's grandfathering provision are meant to assure that private fund advisers that are required to register as a result of the Dodd-Frank Act's elimination of the private fund exemption in section 203(b)(3) will not face a retroactively imposed recordkeeping requirement.[862] We are also making a technical amendment to rule 204–2(e)(3)(ii) to a cross-reference to the new definition of a private fund in section 202(a)(29) of the Advisers Act.[863] These amendments will not create reporting, recordkeeping, and other compliance requirements for small advisers independent of the reporting, recordkeeping, and other compliance requirements imposed by current rule 204–2.[864]

We do not believe that our technical amendments to rules 0–7 and 222–1 will impose reporting, recordkeeping, and other compliance requirements on small advisers. Our amendment to rule 203–1 will not impose reporting, recordkeeping, and other compliance requirements on small advisers. Rather, it delays reporting, recordkeeping, and other compliance requirements on such advisers to the extent that they currently rely on the ''private adviser'' exemption in section 203(b)(3).[865] Because our amendments to rule 222–2 will require advisers to count clients from whom they do not receive compensation for purposes of the national *de minimis* standard, some small advisers may be required to register with one or more states, and comply with the states' recordkeeping and other regulatory requirements.[866]

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small advisers. In considering whether to adopt the new rules and rule amendments, the Commission considered the following alternatives: (i) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small advisers; (ii)

[850] *See supra* notes 823 and 824 and accompanying text.

[851] *See supra* text preceding note 679. We are calculating costs only of the increased burden because we have previously assessed the costs of the other items of Form ADV for registered advisers and for new advisers attributed to annual growth. The amendments to Form ADV increase neither the burden associated with these items on Form ADV, nor the external costs associated with certain Part 2 requirements.

[852] We expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. Data from the SIFMA Management and Earnings Report, modified to account for an 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, suggest that costs for these positions are $235 and $273 per hour, respectively. 570 advisers × 4.5 hours = 2,565 hours. (1,282.5 hours × $235 = $301,388) + (1,282.5 hours × $273 = $350,123) = $651,511.

[853] 2 advisers × (40.74 hours per adviser to complete entire form (except private fund reporting requirements)) + (1 annual updating amendment × 6.0 hours) + (1 interim updating amendment per year × 0.5 hours) + (1 hour on new brochure supplements) + (1 hour on interim amendments to brochure supplements) + (1.3 hours delivering codes of ethics to clients)) = 101 hours. *See supra* notes 679, 709, 710 and accompanying text.

[854] (50.5 hours × $235 = $11,868) + (50.5 hours × $273 = $13,787) = $25,655. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 618.

[855] Based on IARD data as of April 7, 2011. Form ADV currently asks an adviser to report about investment-related partnerships and limited liability companies advised by the adviser *and* its related persons. As a result, the data we have obtained from IARD over-estimates the average number of funds as a result of reporting of the same fund multiple times by affiliated registered advisers. We note the decrease in the estimated number of small advisers to private funds in the Implementing Proposing Release is primarily attributable to an increase in these advisers' assets under management, rendering them no longer ''small'' for purposes of FRFA. *See* Implementing Proposing Release, *supra* note 7 at n.516 and accompanying text.

[856] We expect these advisers are likely to advise 3 funds each. *See* text accompanying note 698. We estimated above that private fund reporting would take an adviser approximately 1 hour per fund to complete. 50 advisers × 3 hours = 150 hours.

[857] (75 hours × $235 = $17,625) + (75 hours × $273 = $20,475) = $38,100. As noted above, we expect that the performance of this function will most likely be equally allocated between a senior compliance examiner and a compliance manager. *See supra* note 522.

[858] The currently approved burden associated with Form ADV already accounts for similar estimated costs to be incurred by current registrants. The non-labor costs for Form ADV are based on an estimate that 50% of small advisers will retain either legal services (at $3,200) or compliance consulting services (at $3,000) to assist in the preparation of Form ADV. *See supra* notes 668 and 669 and accompanying text.

[859] *See supra* section II.D.1 (discussing this amendment).

[860] *See id.*

[861] *See id.*

[862] *See supra* section II.D.2.b.

[863] *See id.*

[864] The Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3) may require additional small advisers to register with the Commission. Therefore, these small advisers would become subject to rule 204–2 with its reporting, recordkeeping, and other compliance burdens. However, subjecting these entities to rule 204–2 is a function of the Dodd-Frank Act's removal of the private adviser exemption in section 203(b)(3), not our amendments to rule 204–2.

[865] *See supra* section III.B.2.

[866] *See supra* section II.D.2.e (discussing the amendments to rule 222–2).

the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small advisers; (iii) the use of performance rather than design standards; and (iv) an exemption from coverage of the rules, or any part thereof, for such small advisers.

Regarding the first and fourth alternatives, we do not believe that differing compliance or reporting requirements or an exemption from coverage of the new rules or rule amendments, or any part thereof, for small advisers would be appropriate or consistent with investor protection or with Congress's mandate in the Dodd-Frank Act, to the extent the new rule or amendment is being adopted due to a Congressional mandate. Because the protections of the Advisers Act are intended to apply equally to clients of both large and small advisory firms, it would be inconsistent with the purposes of the Act to specify different requirements for small advisers under the new rules and amendments unless expressly required to do so by Congress.

Regarding the second alternative, rule 203A–5 will enable small advisers to easily and efficiently identify whether they are subject to our regulatory authority after the Dodd-Frank Act's amendment to section 203A becomes effective, and will also help minimize any potential uncertainty about the effects of the Dodd-Frank Act on their registration status by providing a simple, efficient means of determining their post-Dodd-Frank registration status as of a specific date. The amendments to rule 203A–1 eliminate the $5 million buffer because it seems unnecessary in light of Congress's determination generally to require most advisers having between $30 million and $100 million of assets under management to be registered with the states,[867] and makes the registration requirements for advisers with assets under management between $25 million and $30 million uniform with the requirements for advisers with assets under management between $30 million and $100 million. The buffer for advisers with close to $100 million of assets under management will prevent advisers from frequently having to switch to and from Commission registration due to market fluctuations and will eliminate the additional associated costs they would therefore incur.[868] Amending the multi-state adviser exemption in rule 203A–2(e) also will consolidate and simplify compliance for small advisers by aligning the rule with the multi-state exemption Congress built into the mid-sized adviser provision under section 410 of the Dodd-Frank Act and by requiring one standard for advisers relying on the exemption.[869] This amendment also will reduce the compliance burdens on advisers required to be registered with at least 15 states, but less than 30, by allowing them to register with a single securities regulator—the Commission. Furthermore, requiring the use of an existing form, Form ADV, and an existing filing system, the IARD, for reporting and registration purposes will clarify and simplify the processes of registering and/or reporting for small advisers because: (i) All of the information collection requirements for both registration and reporting will be consolidated in a single form; (ii) a small exempt reporting adviser will be able to use the same form and filing system both for reporting and for purposes of registering with one or more state securities authorities; and (iii) a small exempt reporting adviser may find that it can no longer rely on an exemption from registration with the Commission and will be able to register simply by filing an amendment to its current Form ADV to apply for registration.[870]

Regarding the third alternative, we do not consider using performance rather than design standards to be consistent with Congress's mandate in the Dodd-Frank Act.

VIII. Effects on Competition, Efficiency and Capital Formation

The Commission is adopting certain new rules and amending others pursuant to its authority under sections 204(a) and 206A of the Advisers Act,[871] and sections 23(a) and 28(e)(2) of the Exchange Act.[872] Section 204(a) of the Advisers Act and section 28(e)(2) of the Exchange Act require the Commission, when engaging in rulemaking under the authority provided in those sections, to consider whether the rule is ''necessary or appropriate in the public interest or for the protection of investors.'' [873] Section 202(c) of the Advisers Act requires that whenever the Commission is engaged in rulemaking and is required, pursuant to the Advisers Act, 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.[874] Section 3(f) of the Exchange Act imposes the same requirements on the Commission's Exchange Act rulemakings.[875] Section 23(a) of the Exchange Act requires the Commission, in adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[876]

The Commission is adopting rule 204–4 and amending rules 203–1, 204–1, and 204–2 and Forms ADV, ADV–NR, and ADV–H.[877] The new rule and rule amendments are designed to give effect to provisions of Title IV of the Dodd-Frank Act.[878] We are adopting new rule 204–4 to require exempt reporting advisers to file reports with the Commission electronically on Form ADV.[879] We are adopting amendments to Form ADV to improve our risk-assessment capabilities and so that it can serve the dual purpose of an SEC reporting form for exempt reporting advisers and, as it is used today, a registration form for both state and SEC-registered firms.[880] In addition to requiring that exempt reporting advisers use Form ADV, rule 204–4 will require these advisers to submit reports through

[867] *See supra* note 426 and accompanying text.

[868] *See supra* note 427 and accompanying text.

[869] *See* amended rule 203A–2(d); *supra* section V.A.1. Under rule 203A–2(e), the prohibition on registration with the Commission does not apply to an investment adviser that is required to register with 30 or more states. Once registered with the Commission, the adviser remains eligible for Commission registration as long as it would be obligated, absent the exemption, to register with at least 25 states. We are amending rule 203A–2(e) to permit all investment advisers required to register as an investment adviser with 15 or more states to register with the Commission.

[870] *See supra* section II.C.

[871] 15 U.S.C. 80b–4(a), 80b–6A.

[872] 15 U.S.C. 78w(a) and 78bb(e)(2).

[873] 15 U.S.C. 80b–4(a) and 78bb(e)(2).

[874] 15 U.S.C. 80b–2(c).

[875] 15 U.S.C. 78c(f).

[876] 15 U.S.C. 78w(a)(2).

[877] In contrast, we are adopting new rule 203A–5 and amendments to rules 203A–1, 203A–2, 203A–3, and 203A–4 pursuant to our authority set forth in sections 203A(a)(2), 203A(c) and 211(a), amendments to rules 0–7, 222–1, and 222–2 pursuant to our authority set forth in section 211(a), and amendments to rule 206(4)–5 pursuant to our authority set forth in sections 206(4) and 211(a). For a discussion of the effects of this new rule and rule amendments on competition, efficiency, and capital formation, see *supra* sections V., VI., and VII. We note that our analysis of the effects on competition, efficiency, and capital formation associated with the requirement that an accountant's report be filed electronically was included in our adoption of substantive amendments to that form. Today, we are making only a technical amendment to Form ADV–E to conform to that prior rulemaking. *See* 2009 Custody Release, *supra* note 310 at section VII.

[878] For a discussion of the overall objectives of our rules and rule amendments, see *supra* section I.

[879] New rule 204–4. *See supra* section II.B.1.

[880] *See supra* sections II.B. and II.C.

the IARD and to pay a filing fee.[881] We are also amending rule 204–1, which addresses when and how advisers must amend their Form ADV, to add a requirement that exempt reporting advisers file updating amendments to reports filed on Form ADV.[882] Finally, we are amending rule 203–1 to allow an adviser that was relying on, and was permitted to rely on, the ''private adviser'' exemption in section 203(b)(3) on July 20, 2011, to delay registering with the Commission until March 30, 2012.[883]

In the Implementing Proposing Release, we solicited comment on whether the proposed rule and rule amendments would, if adopted, promote efficiency, competition, and capital formation. We further encouraged commenters to provide empirical data to support their views. We did not receive any empirical data in this regard concerning the proposed amendments. We received some comments, addressing competition and efficiency generally, which are addressed below.

A. Exempt Reporting Adviser Reporting Requirements

The Dodd-Frank Act provides for the Commission to require reporting by exempt reporting advisers, but it does not indicate the information we should collect or the filing method by which it should be collected. Our choices, in adopting rule 204–4 to require these advisers to complete a subset of items contained in Form ADV and to file through the IARD, and in amending rule 204–1 to impose periodic updating requirements of those filings, will impose costs on exempt reporting advisers.[884] However, as we asserted in the Implementing Proposing Release, our choices also will create efficiencies that benefit both us and filers by taking advantage of an established and proven adviser filing system and avoiding the expense and delay of developing a new form and filing system. Commenters widely agreed with us,[885] with one stating that, in its view, there is ''no reason to create a new form or filing system when the existing ones have been designed for use by advisers and are suitable for that purpose.'' [886] In addition, because an exempt reporting adviser may be required to register on Form ADV with one or more state securities authorities, use of the existing form and filing system (which is shared with the states) should reduce regulatory burdens for them because they can satisfy multiple filing obligations through a uniform reporting instrument.[887] Several commenters agreed and also expressed the view that use of Form ADV and the IARD for exempt reporting advisers would be efficient, because the system is familiar to many advisers.[888] Similarly, commenters agreed with our expectation that regulatory burdens would be diminished for an exempt reporting adviser that later finds it can no longer rely on an exemption and would be required to register with us because the adviser would simply file an amendment to its current Form ADV to apply for Commission registration.[889] Finally, certain items in Form ADV Part 1 are also linked to Form BD, which would create efficiencies if the exempt reporting adviser were to apply for broker-dealer registration.

Using Form ADV and the IARD also will enable investors to access information on our Web site that may have previously been unavailable or not easily attainable, such as whether a prospective exempt reporting adviser has reported disciplinary events and whether its relationships with affiliates present conflicts of interest or potential efficiencies. Indeed, commenters indicated that an investor would be better able to perform due diligence if the information was made available to the public,[890] and could make an informed decision regarding the integrity of a prospective adviser if he or she were able to review the disciplinary history of the exempt reporting adviser and its employees.[891] As we asserted in the Implementing Proposing Release, public access to this information, which may previously have been undisclosed, may promote competition to the extent that it will allow private fund investors to make informed decisions about these advisers, avoiding the burdens and costs associated with selling private funds to switch advisers at a later date, and thereby potentially creating efficiency gains in the marketplace and enhancing allocative efficiency of client assets among investment advisers.[892] The availability of disciplinary information, in particular, about these advisers and their supervised persons may also enhance competition if, for example, firms and personnel with better disciplinary records outcompete those with worse records. Greater competition among advisers may, in turn, benefit clients. Access to the information we are requiring exempt reporting advisers to report may also increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets. This may enhance capital formation by making more assets available for investment and enhancing the allocation of capital generally.

Several commenters, however, stated that public availability of the information we proposed to be reported would impose costs on advisers (and in some cases their supervised persons or owners) including the potential loss of business to competitors, as the information was not typically made available to others previously and may not be required of unregistered competitors.[893] Some commenters

[881] New rule 204–4(b). New rule 204–4(e) also allows exempt reporting advisers having unanticipated technical difficulties that prevent submission of a filing to the IARD system to request a temporary hardship exemption from electronic filing requirements by filing Form ADV–H. We are also adopting technical amendments to Form ADV–H for this purpose.

[882] *See* amended rule 204–1; *supra* section II.B.3.

[883] *See* amended rule 203–1(e); *supra* section III.B.2.

[884] For a discussion of the costs of the reporting obligations we are applying to exempt reporting advisers, see section V.B.2.

[885] Two commenters urged that we create a separate reporting system. Merkl Implementing Letter; Seward Letter. *See also* Shearman Letter (making arguments regarding the potential for investor confusion, but not advocating use of a different form or reporting system). However, as we stated above, the expense and delay of developing a system with adequate functionality, which neither commenter addressed, argues against these commenters' recommendations for a new form and electronic filing system. *See supra* section II.B.1.

[886] ABA Committees Letter. *See also* AFL–CIO Letter; NRS Letter; Better Markets Letter; NASAA Letter; ABA Committees Letter. We anticipate that the IARD's ability to pre-populate prior responses and allow drop-down boxes for common responses will also save time for advisers.

[887] *See supra* note 170 and accompanying text.

[888] *See* Better Markets Letter; NRS Letter; NASAA Letter. Responding to our request for comment regarding the possible use of EDGAR in place of the IARD, one commenter argued that ''[s]uch an approach would be confusing and burdensome for any adviser that transitions between [exempt reporting adviser] and Commission-registered status.'' ABA Committees Letter.

[889] *See* ABA Committees Letter; Better Markets Letter; NRS Letter; NASAA Letter. Form ADV, as amended, permits an adviser to transition from filing reports with us to applying for registration under the Act by simply amending its Form ADV; the adviser would check the box to indicate it is filing an initial application for registration, complete the items it did not have to answer as an exempt reporting adviser, and update the pre-populated items that it already has on file. *See* amended Form ADV: General Instruction 15 (providing procedural guidance to advisers that no longer meet the definition of exempt reporting adviser).

[890] Merkl Implementing Letter.

[891] CII Letter.

[892] *See* Implementing Proposing Release, *supra* note 7, at section VII.A.

[893] *See* BCLBE Letter; NRS Letter; Seward Letter (claiming that the reporting may be valuable to the Commission, but making the information publicly available would provide little benefit to investors,

Continued

expressed concerns that some of the information we proposed to require also could include proprietary or competitively sensitive information regarding private funds.[894] We have responded to some of these concerns by declining to adopt certain questions that commenters suggested could require particularly proprietary or competitively sensitive information, such as certain data about beneficial owners.[895] Nonetheless, as discussed above in greater detail, based on section 210 of the Act, which presumes reports submitted to us by advisers will be publicly available, together with the Freedom of Information Act, which generally supports disclosure of such documents, we decline to deny the public access to all of this information at this time.[896]

Finally, to the extent that the information we collect and the filing method by which we collect it impose costs on exempt reporting advisers that are then passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. As we acknowledged in the Implementing Proposing Release, this may result in inefficiencies in the market for advisory services and hinder capital formation.[897]

B. Risk-Assessment Amendments to Form ADV

The amendments to Form ADV we are adopting today are designed to improve advisers' disclosure of their business practices (particularly those relating to advising private funds), non-advisory activities, financial industry affiliations, and conflicts of interest. Private fund reporting, in particular, will benefit private fund investors and other market participants and will provide us and other policy makers with better data. Better data will enhance our ability to form and frame regulatory policies regarding the private fund industry and fund advisers and to evaluate the effect of our policies and programs on this industry. Private fund reporting will provide us with important information about this rapidly growing segment of the U.S. financial system. Additionally, data about which advisers have $1 billion or more in total balance sheet assets will enable us to identify the advisers that are covered by section 956 of the Dodd-Frank Act, which addresses certain incentive-based compensation arrangements.

As acknowledged above with respect to exempt reporting advisers, there may also be a competitive impact among registered investment advisers as a result of the collection of the additional information on Form ADV in connection with the amendments we are adopting today. We raised several examples of competitive impacts in the Implementing Proposing Release.[898] For instance, information regarding the amount of assets under management by specific types of clients could be used by competitors when marketing their own advisory services.[899] We are adopting a modified version of this item as it was proposed, which we expect will alleviate commenters' concerns about the costs and burdens of the proposed item,[900] but which we do not expect will alter this competitive impact. Another example we noted in the Implementing Proposing Release includes the information concerning private funds that registered and exempt reporting advisers are required to submit on Form ADV, which could assist private fund investors in assessing investment choices or screening funds based on certain parameters, such as the identification of certain fund service providers or gatekeepers. Amendments we are adopting to Form ADV will not prevent this information from being used by other financial service providers (such as banks or broker-dealers) that do not provide similar information publicly.

We continue to believe that increased competition among investment advisers (both exempt reporting and registered) and other financial service providers will result in capital being allocated more efficiently, benefiting clients and certain advisers. Commenters did not address the above examples or provide empirical data about the competitive effects of the proposal.

Finally, as noted above and in the Implementing Proposing Release, better disclosure may increase clients' and prospective clients' trust in investment advisers, which may encourage them to seek professional investment advice and encourage them to invest their financial assets.[901] This also may enhance capital formation by making more assets available for investment and enhancing the allocation of capital generally. On the other hand, if the rule amendments we are adopting increase costs for investment advisers and these cost increases are passed on to clients, this may deter clients from seeking professional investment advice and investing their financial assets. This may result in inefficiencies in the market for advisory services and hinder capital formation.

C. Other Amendments

Finally, we are amending rule 203–1 to allow an adviser that was relying on, and was permitted to rely on, the ''private adviser'' exemption in section 203(b)(3) on July 20, 2011, to delay registering with the Commission until March 30, 2012. We believe that this temporary extension of the registration deadline will assure an orderly transition to registration and thus will promote efficiency. We believe that this temporary extension will have minimal, if any, effects on competition or capital formation.

We are also amending rule 204–2 to cross-reference the new definition of private fund and add a grandfathering provision relieving firms that were exempt from registration prior to the effectiveness of the Dodd-Frank Act's elimination of the ''private adviser'' exemption from certain recordkeeping obligations applicable to registered advisers.[902] Finally, we are amending Forms ADV–NR and Form ADV–H to provide for their use by exempt reporting advisers. The amendments to rule 204–2, Form ADV–NR, and Form ADV–H are technical in nature. We do not anticipate that they will have any bearing on efficiency, competition, or capital formation.

IX. Statutory Authority

The Commission is removing rules 202(a)(11)–1, 203(b)(3)–1, and 203(b)(3)–2 under the Investment Advisers Act of 1940 pursuant to the authority set forth in section 211(a) of the Investment Advisers Act of 1940 [15 U.S.C. 80b–11(a)], adopting new rule 203A–5 and amendments to rules 203A–2, 203A–3, and 203A–4 under the Advisers Act pursuant to the authority set forth in sections 203A(c) and 211(a) of the Advisers Act [15 U.S.C. 80b–3A(c) and 80b–11(a)]; amendments to rule 203A–1 under the Advisers Act pursuant to the authority set forth in

and asserting that the benefits were insufficient to justify the costs).

[894] *See, e.g.,* MFA Letter; NVCA Letter; O'Melveny Letter. Another commenter, however, refuted these competitive concerns, stating that none of the items that exempt reporting advisers would complete would require the disclosure of proprietary or competitively sensitive information. Merkl Implementing Letter.

[895] *See supra* notes 245–247 and accompanying text.

[896] *See supra* section II.B.3.

[897] *See* Implementing Proposing Release, *supra* note 7, at section VII.A.

[898] *See id.* at section VII.B.

[899] *See supra* section II.C.2. (discussing Item 5.D.(2)).

[900] *See id. See* IAA General Letter.

[901] *See* Implementing Proposing Release, *supra* note 7, at section VII.B.

[902] *See supra* section II.D.2.b.

sections 203A(a)(2)(B)(ii) (as amended by section 410 of the Dodd-Frank Act), 203A(c), and 211(a) of the Advisers Act [15 U.S.C. 80b–3A(a)(2)(B)(ii), 80b–3A(c), and 80b–11(a)]; amendments to rule 203–1 under the Advisers Act pursuant to the authority set forth in section 206A of the Advisers Act [15 U.S.C. 80b–6A]; new rule 204–4 and amendments to rules 204–1 and 204–2 under the Advisers Act pursuant to the authority set forth in sections 204 and 211(a) of the Advisers Act [15 U.S.C. 80b–4 and 80b–11(a)]; amendments to rule 206(4)–5 under the Advisers Act pursuant to authority set forth in sections 206(4) and 211(a) of the Advisers Act [15 U.S.C. 80b–6(4) and 80b–11(a)]; amendments to rules 0–7, 222–1, and 222–2 under the Advisers Act pursuant to authority set forth in section 211(a) of the Advisers Act [15 U.S.C. 80b–11(a)]; and to amend Form ADV under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], sections 23(a) and 28(e)(2) of the Exchange Act [15 U.S.C. 78w(a) and 78bb(e)(2)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; Form ADV–NR under section 19(a) of the Securities Act of 1933 [15 U.S.C. 77s(a)], section 23(a) of the Exchange Act [15 U.S.C. 78w(a)], section 319(a) of the Trust Indenture Act of 1939 [15 U.S.C. 77sss(a)], section 38(a) of the Investment Company Act [15 U.S.C. 78a–37(a)], and sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a)]; Form ADV–H pursuant to the authority set forth in sections 203(c)(1), 204, and 211(a) of the Advisers Act [15 U.S.C. 80b–3(c)(1), 80b–4, 80b–11(a)]; and Form ADV–E pursuant to authority set forth in sections 204, 206(4), and 211(a) of the Advisers Act [15 U.S.C. 80b–4, 80b–6(4), and 80b–11(a)].

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements; Securities.

Text of Rule and Form Amendments

For the reasons set out in the preamble, Title 17 Chapter II of the Code of Federal Regulations is amended as follows.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

■ 1. The authority citation for Part 275 is amended by revising the general authority and by adding authority for sections 275.203A–3, 275.203A–5, 275.204–1 and 275.204–4 in numerical order to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

Section 275.203A–3 is also issued under 15 U.S.C. 80b–3a.

Section 275.203A–5 is also issued under 15 U.S.C. 80b–3a.

* * * * *

Section 275.204–1 is also issued under sec. 407 and 408, Pub. L. 111–203, 124 Stat. 1376.

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Section 275.204–4 is also issued under sec. 407 and 408, Pub. L. 111–203, 124 Stat. 1376.

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§ 275.0–7 [Amended]

■ 2. Section 275.0–7 is amended by revising the reference to ''Section 203A(a)(2)'' in paragraph (a)(1) to read ''Section 203A(a)(3).''

§ 275.202(a)(11)–1 [Removed]

■ 3. Section 275.202(a)(11)–1 is removed.

■ 4. Section 275.203–1 is amended by adding paragraph (e) to read as follows:

§ 275.203–1 Application for investment adviser registration.

* * * * *

(e) *''Private adviser'' transition rule.* If you are exempt from registration with the Commission as an investment adviser under, and are not registered in reliance on, section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)) on July 20, 2011, you are exempt from registration with the Commission as an investment adviser until March 30, 2012, provided that you:

(1) During the course of the preceding twelve months, have had fewer than fifteen clients; and

(2) Neither hold yourself out generally to the public as an investment adviser nor act as an investment adviser to any investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a), or a company which has elected to be a business development company pursuant to section 54 of that Act (15 U.S.C. 80a–54) and has not withdrawn its election.

§ 275.203(b)(3)–1 [Removed]

■ 5. Section 275.203(b)(3)–1 is removed.

§ 275.203(b)(3)–2 [Removed]

■ 6. Section 275.203(b)(3)–2 is removed.

■ 7. Section 275.203A–1 is revised to read as follows:

§ 275.203A–1 Eligibility for SEC registration; Switching to or from SEC registration.

(a) *Eligibility for SEC registration of mid-sized investment advisers*—If you are an investment adviser described in section 203A(a)(2)(B) of the Act (15 U.S.C. 80b–3a(a)(2)(B)):

(1) *Threshold for SEC registration and registration buffer.* You may, but are not required to register with the Commission if you have assets under management of at least $100,000,000 but less than $110,000,000, and you need not withdraw your registration unless you have less than $90,000,000 of assets under management.

(2) *Exceptions.* This paragraph (a) does not apply if:

(i) You are an investment adviser to an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) or to a company which has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940 (15 U.S.C. 80a–54), and has not withdrawn the election; or

(ii) You are eligible for an exemption described in § 275.203A–2 of this chapter.

(b) *Switching to or from SEC registration*—

(1) *State-registered advisers—switching to SEC registration.* If you are registered with a state securities authority, you must apply for registration with the Commission within 90 days of filing an annual updating amendment to your Form ADV reporting that you are eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b–3(l), (m)).

(2) *SEC-registered advisers—switching to State registration.* If you are registered with the Commission and file an annual updating amendment to your Form ADV reporting that you are not eligible for SEC registration and are not relying on an exemption from registration under sections 203(l) or 203(m) of the Act (15 U.S.C. 80b–3(l), (m)), you must file Form ADV–W (17 CFR 279.2) to withdraw your SEC registration within 180 days of your fiscal year end (unless you then are eligible for SEC registration). During this period while you are registered with both the Commission and one or more state securities authorities, the Act and applicable State law will apply to your advisory activities.

■ 8. Section 275.203A–2 is amended by:
■ a. Removing paragraph (a);
■ b. Redesignating paragraphs (b) through (f) as paragraphs (a) through (e);
■ c. Revising newly designated paragraph (a)(1);
■ d. Revising the reference to ''paragraph (b) of this section'' in the introductory text of newly designated paragraph (a)(2) to read ''paragraph (a) of this section'';
■ e. Revising newly designated paragraph (c)(1);
■ f. Revising newly designated paragraph (d)(1);
■ g. Further redesignating newly designated paragraphs (d)(2) and (d)(3) as paragraphs (d)(2)(i) and (d)(2)(ii);
■ h. Adding new introductory text to paragraph (d)(2) and revising newly designated paragraphs (d)(2)(i) and (d)(2)(ii);
■ i. Further redesignating newly designated paragraph (d)(4) as paragraph (d)(3);
■ j. Revising the reference to ''paragraph (f) of this section'' in newly designated paragraphs (e)(1)(ii), (e)(1)(iii), and (e)(2) to read ''paragraph (e) of this section'';
■ k. Revising the reference to ''paragraph (f)(1)(i) of this section'' in newly designated paragraphs (e)(1)(ii) and (e)(3) to read ''paragraph (e)(1)(i) of this section'';
■ l. Revising the reference to ''paragraph (c) of this section'' in newly designated paragraph (e)(1)(iii) to read ''paragraph (b) of this section''; and
■ m. Revising the reference ''§ 275.203(b)(3)–1'' in newly designated paragraph (e)(3) to read ''§ 275.202(a)(30)–1''.

The revisions and additions read as follows:

§ 275.203A–2 Exemptions from prohibition on Commission registration.

(a) *Pension Consultants.* (1) An investment adviser that is a ''pension consultant,'' as defined in this section, with respect to assets of plans having an aggregate value of at least $200,000,000.

* * * * *

(c) * * *

(1) Immediately before it registers with the Commission, is not registered or required to be registered with the Commission or a state securities authority of any State and has a reasonable expectation that it would be eligible to register with the Commission within 120 days after the date the investment adviser's registration with the Commission becomes effective;

* * * * *

(d) * * *

(1) Upon submission of its application for registration with the Commission, is required by the laws of 15 or more States to register as an investment adviser with the state securities authority in the respective States, and thereafter would, but for this section, be required by the laws of at least 15 States to register as an investment adviser with the state securities authority in the respective States;

(2) Elects to rely on paragraph (d) of this section by:

(i) Indicating on Schedule D of its Form ADV that the investment adviser has reviewed the applicable State and federal laws and has concluded that, in the case of an application for registration with the Commission, it is required by the laws of 15 or more States to register as an investment adviser with the state securities authorities in the respective States or, in the case of an amendment to Form ADV, it would be required by the laws of at least 15 States to register as an investment adviser with the state securities authorities in the respective States, within 90 days prior to the date of filing Form ADV; and

(ii) Undertaking on Schedule D of its Form ADV to withdraw from registration with the Commission if the adviser indicates on an annual updating amendment to Form ADV that the investment adviser would be required by the laws of fewer than 15 States to register as an investment adviser with the state securities authority in the respective States, and that the investment adviser would be prohibited by section 203A(a) of the Act (15 U.S.C. 80b–3a(a)) from registering with the Commission, by filing a completed Form ADV–W within 180 days of the adviser's fiscal year end (unless the adviser then is eligible for SEC registration); and

* * * * *

■ 9. Section 275.203A–3 is amended by revising paragraph (a)(4) and adding paragraphs (d) and (e) to read as follows:

§ 275.203A–3 Definitions.

* * * * *

(a) * * *

(4) Supervised persons may rely on the definition of ''client'' in § 275.202(a)(30)–1 to identify clients for purposes of paragraph (a)(1) of this section, except that supervised persons need not count clients that are not residents of the United States.

* * * * *

(d) *Assets under management.* Determine ''assets under management'' by calculating the securities portfolios with respect to which an investment adviser provides continuous and regular supervisory or management services as reported on the investment adviser's Form ADV (17 CFR 279.1).

(e) *State securities authority.* ''State securities authority'' means the securities commissioner or commission (or any agency, office or officer performing like functions) of any State.

§ 275.203A–4 [Removed and reserved]

■ 10. Section 275.203A–4 is removed and reserved.

■ 11a. Effective July 21, 2011, § 275.203A–5 is added to read as follows:

§ 275.203A–5 Transition rules.

(a) *Temporary exemption from prohibition on Commission registration for mid-sized investment advisers.* Until January 1, 2012, the prohibition of section 203A(a)(2) of the Act (15 U.S.C. 80b–3a(a)(2)) does not apply to an investment adviser registered with the Commission on July 21, 2011.

(b) [Reserved]

■ 11b. Effective September 19, 2011, § 275.203A–5 is amended by adding paragraphs (b) and (c) to read as follows:

§ 275.203A–5 Transition rules.

* * * * *

(b) *SEC-registered advisers—Form ADV filing.* Every investment adviser registered with the Commission on January 1, 2012 shall file an amendment to Form ADV (17 CFR 279.1) no later than March 30, 2012 and shall determine its assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing the Form ADV.

(c) *Mid-sized investment advisers—withdrawing from Commission registration.*

(1) If an investment adviser registered with the Commission on January 1, 2012 would be prohibited from registering with the Commission under section 203A(a)(2) of the Act (15 U.S.C. 80b–3a(a)(2)), and is not otherwise exempted by § 275.203A–2 from such prohibition, such investment adviser shall withdraw from registration with the Commission by filing Form ADV–W (17 CFR 279.2) no later than June 28, 2012. During this period while an investment adviser is registered with both the Commission and one or more state securities authorities, the Act and applicable State law will apply to the investment adviser's advisory activities.

(2) If, prior to the effective date of the withdrawal from registration of an investment adviser on Form ADV–W, the Commission has instituted a proceeding pursuant to section 203(e) of the Act (15 U.S.C. 80b–3(e)) to suspend or revoke registration, or pursuant to section 203(h) of the Act (15 U.S.C. 80b–3(h)) to impose terms or conditions upon withdrawal, the withdrawal from

registration shall not become effective except at such time and upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

■ 12. Section 275.204–1 is amended by revising the heading, paragraph (b), the Note to paragraphs (a) and (b), and paragraph (c), to read as follows:

§ 275.204–1 Amendments to Form ADV.

* * * * *

(b) *Electronic filing of amendments.*

(1) Subject to paragraph (c) of this section, you must file all amendments to Part 1A of Form ADV and Part 2A of Form ADV electronically with the IARD, unless you have received a continuing hardship exemption under § 275.203–3. You are not required to file with the Commission amendments to brochure supplements required by Part 2B of Form ADV.

(2) If you have received a continuing hardship exemption under § 275.203–3, you must, when you are required to amend your Form ADV, file a completed Part 1A and Part 2A of Form ADV on paper with the SEC by mailing it to FINRA.

Note to paragraphs (a) and (b): Information on how to file with the IARD is available on our Web site at *http://www.sec.gov/iard.* For the annual updating amendment: Summaries of material changes that are not included in the adviser's brochure must be filed with the Commission as an exhibit to Part 2A in the same electronic file; and if you are not required to prepare a brochure, a summary of material changes, or an annual updating amendment to your brochure, you are not required to file them with the Commission. See the instructions for Part 2A of Form ADV.

(c) *Transition to electronic filing.* If you are required to file a brochure and your fiscal year ends on or after December 31, 2010, you must amend your Form ADV by electronically filing with the IARD one or more brochures that satisfy the requirements of Part 2A of Form ADV (as amended effective October 12, 2010) as part of the next annual updating amendment that you are required to file.

* * * * *

■ 13. Section 275.204–2 is amended by:

■ a. Removing paragraph (l);

■ b. In paragraph (a)(14)(ii), revising the reference to ''assets under management'' to read ''regulatory assets under management''; and

■ c. Revising paragraph (e)(3)(ii) to read as follows:

§ 275.204–2 Books and records to be maintained by investment advisers.

* * * * *

(e) * * *

(3) * * *

(ii) *Transition rule.* If you are an investment adviser that was, prior to July 21, 2011, exempt from registration under section 203(b)(3) of the Act (15 U.S.C. 80b–3(b)(3)), as in effect on July 20, 2011, paragraph (e)(3)(i) of this section does not require you to maintain or preserve books and records that would otherwise be required to be maintained or preserved under the provisions of paragraph (a)(16) of this section to the extent those books and records pertain to the performance or rate of return of such private fund (as defined in section 202(a)(29) of the Act (15 U.S.C. 80b–2(a)(29)), or other account you advise for any period ended prior to your registration, provided that you continue to preserve any books and records in your possession that pertain to the performance or rate of return of such private fund or other account for such period.

* * * * *

■ 14. Section 275.204–4 is added to read as follows:

§ 275.204–4 Reporting by exempt reporting advisers.

(a) *Exempt reporting advisers.* If you are an investment adviser relying on the exemption from registering with the Commission under section 203(l) or (m) of the Act (15 U.S.C. 80b–3(l) or 80b–3(m)), you must complete and file reports on Form ADV (17 CFR 279.1) by following the instructions in the Form, which specify the information that an exempt reporting adviser must provide.

(b) *Electronic filing.* You must file Form ADV electronically with the Investment Adviser Registration Depository (IARD) unless you have received a hardship exemption under paragraph (e) of this section.

Note to paragraph (b): Information on how to file with the IARD is available on the Commission's Web site at *http://www.sec.gov/iard.*

(c) *When filed.* Each Form ADV is considered filed with the Commission upon acceptance by the IARD.

(d) *Filing fees.* You must pay FINRA (the operator of the IARD) a filing fee. The Commission has approved the amount of the filing fee. No portion of the filing fee is refundable. Your completed Form ADV will not be accepted by FINRA, and thus will not be considered filed with the Commission, until you have paid the filing fee.

(e) *Temporary hardship exemption.*

(1) *Eligibility for exemption.* If you have unanticipated technical difficulties that prevent submission of a filing to the IARD, you may request a temporary hardship exemption from the requirements of this chapter to file electronically.

(2) *Application procedures.* To request a temporary hardship exemption, you must:

(i) File Form ADV–H (17 CFR 279.3) in paper format no later than one business day after the filing that is the subject of the ADV–H was due; and

(ii) Submit the filing that is the subject of the Form ADV–H in electronic format with the IARD no later than seven business days after the filing was due.

(3) *Effective date—upon filing.* The temporary hardship exemption will be granted when you file a completed Form ADV–H.

(f) *Final report.* You must file a final report in accordance with instructions in Form ADV when:

(1) You cease operation as an investment adviser;

(2) You no longer meet the definition of exempt reporting adviser under paragraph (a); or

(3) You apply for registration with the Commission.

Note to paragraph (f): You do not have to pay a filing fee to file a final report on Form ADV through the IARD.

■ 15. Section 275.206(4)–5 is amended by:

■ a. In paragraph (f)(2)(i), removing the term ''individual'' and adding in its place the term ''person''; and

■ b. Revising paragraphs (a)(1), (a)(2) introductory text, (a)(2)(i), (d), and (f)(9) to read as follows:

§ 275.206(4)–5 Political contributions by certain investment advisers.

(a) * * *

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, as defined in section 275.204–4(a), to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers

Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is:

(A) A regulated person; or

(B) An executive officer, general partner, managing member (or, in each case, a person with a similar status or function), or employee of the investment adviser; and

* * * * *

(d) *Further prohibition.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of Advisers Act (15 U.S.C. 80b–6(4)), it shall be unlawful for any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b–3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates to do anything indirectly which, if done directly, would result in a violation of this section.

* * * * *

(f) * * *

(9) *Regulated person* means:

(i) An investment adviser registered with the Commission that has not, and whose covered associates have not, within two years of soliciting a government entity:

(A) Made a contribution to an official of that government entity, other than as described in paragraph (b)(1) of this section; and

(B) Coordinated or solicited any person or political action committee to make any contribution or payment described in paragraphs (a)(2)(ii)(A) and (B) of this section;

(ii) A ''broker,'' as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)) or a ''dealer,'' as defined in section 3(a)(5) of that Act (15 U.S.C. 78c(a)(5)), that is registered with the Commission, and is a member of a national securities association registered under 15A of that Act (15 U.S.C. 78o–3), provided that:

(A) The rules of the association prohibit members from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on broker-dealers than this section imposes on investment advisers and that such rules are consistent with the objectives of this section; and

(iii) A ''municipal advisor'' registered with the Commission under section 15B of the Exchange Act and subject to rules of the Municipal Securities Rulemaking Board, provided that:

(A) Such rules prohibit municipal advisors from engaging in distribution or solicitation activities if certain political contributions have been made; and

(B) The Commission, by order, finds that such rules impose substantially equivalent or more stringent restrictions on municipal advisors than this section imposes on investment advisers and that such rules are consistent with the objectives of this section.

* * * * *

§ 275.222–1 [Amended]

■ 16. Section 275.222–1 is amended by revising the phrase ''Principal place of business'' to read ''Principal office and place of business'' in both the heading and the first sentence of paragraph (b).

■ 17. Section 275.222–2 is revised to read as follows:

§ 275.222–2 Definition of ''client'' for purposes of the national de minimis standard.

For purposes of section 222(d)(2) of the Act (15 U.S.C. 80b–18a(d)(2)), an investment adviser may rely upon the definition of ''client'' provided by § 275.202(a)(30)–1, without giving regard to paragraph (b)(4) of that section.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

■ 18. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b.

§ 279.1 [Amended]

■ 19. Form ADV [referenced in § 279.1] is amended by:

■ a. In the instructions to the form, revising the section entitled ''Form ADV: General Instructions.'' The revised version of Form ADV: General Instructions is attached as Appendix A;

■ b. In the instructions to the form, revising the section entitled ''Form ADV: Instructions for Part 1A.'' The revised version of Form ADV: Instructions for Part 1A is attached as Appendix B;

■ c. In the instructions to the form, revising the section entitled ''Form ADV: Glossary of Terms.'' The revised version of Form ADV: Glossary of Terms is attached as Appendix C;

■ d. In the form, revising Part 1A. The revised version of Form ADV, Part 1A is attached as Appendix D;

■ e. In the form, revising the reference to ''proceeding'' in Item 3.D. of Part 2B to read ''hearing or formal adjudication'';

■ f. In the form, revising the reference to ''assets under management'' in the Note to Item 4.E of Part 2A to read ''regulatory assets under management''; and

■ g. In the form, revising the section entitled ''Form ADV: Domestic Investment Adviser Execution Page.'' The revised version of Form ADV: Domestic Investment Adviser Execution Page is attached as Appendix E.

The revisions read as follows:

Note: The text of Form ADV does not and the amendments will not appear in the Code of Federal Regulations.

* * * * *

Form ADV: Part 2B

* * * * *

Item 3. * * *

D. Any other hearing or formal adjudication in which a professional attainment, designation, or license of the supervised person was revoked or suspended because of a violation of rules relating to professional conduct. If the supervised person resigned (or otherwise relinquished the attainment, designation, or license) in anticipation of such a hearing or formal adjudication (and the adviser knows, or should have known, of such resignation or relinquishment), disclose the event.

* * * * *

§ 279.3 [Amended]

■ 20. Form ADV–H [referenced in § 279.3] is amended by revising the form. The revised version of Form ADV–H is attached as Appendix F.

Note: The text of Form ADV–H does not and the amendments will not appear in the Code of Federal Regulations.

§ 279.4 [Amended]

■ 21. Form ADV–NR [referenced in § 279.4] is amended by revising the form. The revised version of Form ADV–NR is attached as Appendix G.

Note: The text of Form ADV–NR does not and the amendments will not appear in the Code of Federal Regulations.

§ 279.8 [Amended]

■ 22. Form ADV–E [referenced in § 279.4] is amended by revising the form. The revised version of Form ADV–E is attached as Appendix H.

Note: The text of Form ADV–E does not and the amendments will not appear in the Code of Federal Regulations.

Dated: June 22, 2011.

By the Commission.

Elizabeth M. Murphy,

Secretary.

BILLING CODE 8011–01–P

APPENDIX A

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT FORM BY EXEMPT REPORTING ADVISERS**

Form ADV: General Instructions

Read these instructions carefully before filing Form ADV. Failure to follow these instructions, properly complete the form, or pay all required fees may result in your application or report being delayed or rejected.

In these instructions and in Form ADV, "you" means the investment adviser (i.e., the advisory firm). If you are a "separately identifiable department or division" (SID) of a bank, "you" means the SID, rather than your bank, unless the instructions or the form provide otherwise. Terms that appear in *italics* are defined in the Glossary of Terms to Form ADV.

Special One-Time Dodd-Frank Transition Filing for SEC-Registered Advisers:

- Form ADV amendment: If you are a mid-sized adviser registered with us on July 21, 2011 you must maintain your SEC registration and comply with the Advisers Act until January 1, 2012, unless you file a "full withdrawal" on Form ADV-W to withdraw from registration in all of the jurisdictions with which you are registered (or have an application for registration pending). See Advisers Act sections 203 and 203A(a)(2); SEC rule 203A-5(a). For example, you may file Form ADV-W and withdraw your registration with us and any *state securities authorities* before January 1, 2012 because you are exempt from registration under section 203 of the Act and state securities laws or are no longer in business, but you may not switch to state registration until after January 1, 2012.

  If you are registered or have an application for registration pending with the SEC on January 1, 2012, you must file an amendment to Form ADV no later than March 30, 2012. File an *annual updating amendment* if your annual amendment is due during this period, or file an other-than-annual amendment. See SEC rule 204-1. You must update your responses to all items and corresponding sections of Schedules A, B, C and D, including the reporting of your regulatory assets under management determined within 90 days of the filing. See SEC rule 203A-5(b). If you are no longer eligible for Commission registration, you must mark Item 2.A.(13) of Form ADV, Part 1A. You should amend your *brochure* if any information has become materially inaccurate. See Form ADV, Part 2A, Instructions 4 and 6.

- Form ADV-W filing: If you are no longer eligible for Commission registration, you must withdraw your Commission registration by filing Form ADV-W no later than June 28, 2012. See SEC rule 203A-5(c)(1). You should consult state law or

the *state securities authority* for the states in which you are "doing business" as soon as possible to determine if you are required to register in these states and to begin the registration process. See General Instruction 1. Until you file your Form ADV-W with the SEC, you will remain subject to SEC regulation, and you also will be subject to regulation in any states where you register. See SEC rule 203A-1(b)(2).

Failure to amend your Form ADV or file Form ADV-W, as required by this instruction, is a violation of SEC rules and could lead to your registration being revoked.

1. Where can I get more information on Form ADV, electronic filing, and the IARD?

The SEC provides information about its rules and the Advisers Act on its website: <http://www.sec.gov/iard>.

NASAA provides information about state investment adviser laws and state rules, and how to contact a *state securities authority*, on its website: <http://www.nasaa.org>.

FINRA provides information about the IARD and electronic filing on the IARD website: <http://www.iard.com>.

2. What is Form ADV used for?

Investment advisers use Form ADV to:

- Register with the Securities and Exchange Commission
- Register with one or more *state securities authorities*
- Amend those registrations;

- Report to the SEC as an *exempt reporting adviser*
- Report to one or more *state securities authorities* as an *exempt reporting adviser*
- Amend those reports; and
- Submit a final report as an *exempt reporting adviser*

3. How is Form ADV organized?

Form ADV contains four parts:

- Part 1A asks a number of questions about you, your business practices, the *persons* who own and *control* you, and the *persons* who provide investment advice on your behalf.
    - All advisers registering with the SEC or any of the *state securities authorities* must complete Part 1A.
    - *Exempt reporting advisers* (that are not also registering with any *state securities authority*) must complete only the following Items of Part 1A: 1, 2, 3, 6, 7, 10, and 11, as well as corresponding schedules. *Exempt reporting advisers* that are registering with any *state securities authority* must complete all of Form ADV.

Part 1A also contains several supplemental schedules. The items of Part 1A let you know which schedules you must complete.

- Schedule A asks for information about your direct owners and executive officers.
- Schedule B asks for information about your indirect owners.
- Schedule C is used by paper filers to update the information required by Schedules A and B (see Instruction 16).
- Schedule D asks for additional information for certain items in Part 1A.
- Disclosure Reporting Pages (or DRPs) are schedules that ask for details about disciplinary events involving you or your *advisory affiliates*.

- Part 1B asks additional questions required by *state securities authorities*. Part 1B contains three additional DRPs. If you are applying for SEC registration or are registered only with the SEC, you do not have to complete Part 1B. (If you are filing electronically and you do not have to complete Part 1B, you will not see Part 1B.)

- Part 2A requires advisers to create narrative *brochures* containing information about the advisory firm. The requirements in Part 2A apply to all investment advisers registered with or applying for registration with the SEC, but do not apply to *exempt reporting advisers*.

- Part 2B requires advisers to create *brochure supplements* containing information about certain *supervised persons*. The requirements in Part 2B apply to all investment advisers registered with or applying for registration with the SEC, but do not apply to *exempt reporting advisers*.

4. When am I required to update my Form ADV?

- SEC- and State-Registered Advisers:

  - Annual updating amendments: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all items, including corresponding sections of Schedules A, B, C, and D. You must submit your summary of material changes required by Item 2 of Part 2A either in the *brochure* (cover page or the page immediately thereafter) or as an exhibit to your *brochure*.

  - Other-than-annual amendments: In addition to your *annual updating amendment*, if you are registered with the SEC or a *state securities authority*, you must amend your Form ADV, including corresponding sections of Schedules A, B, C, and D, by filing additional amendments (other-than-annual amendments) promptly if:

    - information you provided in response to Items 1, 3, 9 (except 9.A.(2), 9.B.(2), 9.E., and 9.F.), or 11 of Part 1A or Items 1, 2.A. through 2.F., or 2.I. of Part 1B becomes inaccurate in any way;

- information you provided in response to Items 4, 8, or 10 of Part 1A or Item 2.G. of Part 1B becomes materially inaccurate; or
- information you provided in your *brochure* becomes materially inaccurate (see note below for exceptions)

Notes: Part 1: If you are submitting an other-than-annual amendment, you are not required to update your responses to Items 2, 5, 6, 7, 9.A.(2), 9.B.(2), 9.E., 9.F., or 12 of Part 1A or Items 2.H. or 2.J. of Part 1B even if your responses to those items have become inaccurate.

Part 2: You must amend your *brochure supplements* (see Form ADV, Part 2B) promptly if any information in them becomes materially inaccurate. If you are submitting an other-than-annual amendment to your *brochure*, you are not required to update your summary of material changes as required by Item 2. You are not required to update your *brochure* between annual amendments solely because the amount of *client* assets you manage has changed or because your fee schedule has changed. However, if you are updating your *brochure* for a separate reason in between annual amendments, and the amount of *client* assets you manage listed in response to Item 4.E or your fee schedule listed in response to Item 5.A has become materially inaccurate, you should update that item(s) as part of the interim amendment.

- If you are an SEC-registered adviser, you are required to file your *brochure* amendments electronically through IARD. You are not required to file amendments to your *brochure supplements* with the SEC, but you must maintain a copy of them in your files.
- If you are a state-registered adviser, you are required to file your *brochure* amendments and *brochure supplement* amendments with the appropriate *state securities authorities* through IARD.

- Exempt reporting advisers:
  - Annual Updating Amendments: You must amend your Form ADV each year by filing an *annual updating amendment* within 90 days after the end of your fiscal year. When you submit your *annual updating amendment*, you must update your responses to all required items, including corresponding sections of Schedules A, B, C and D.
  - Other-than-Annual Amendments: In addition to your *annual updating amendment*, you must amend your Form ADV by filing additional amendments (other-than-annual amendments) promptly if:
    - information you provided in response to Items 1, 3, or 11 becomes inaccurate in any way; or

- information you provided in response to Item 10 becomes materially inaccurate.

Failure to update your Form ADV, as required by this instruction, is a violation of SEC rules or similar state rules and could lead to your registration being revoked.

5. Part 2 of Form ADV was amended recently. When do I have to comply with the new requirements?

If you are applying for registration with the SEC: As of January 1, 2011, every application for registration must include a narrative *brochure* prepared in accordance with the requirements of (amended) Part 2A of Form ADV. See SEC rule 203-1. The SEC will no longer accept any application that does not include a *brochure*(s) that satisfies the requirements of (amended) Part 2 of Form ADV.

If you already are registered with the SEC: Until you file your first *annual updating amendment* for your fiscal year that ended on or after December 31, 2010, you may (but are not required to) submit a narrative *brochure* that meets the requirements of (amended) Part 2A of Form ADV. If you do not do this, you must continue to comply with the requirements for preparing, delivering, and offering "old" Part II of Form ADV. Your first *annual updating amendment* must contain a narrative *brochure* that meets the requirements of (amended) Part 2A of Form ADV.

Note: Until you are required to meet the requirements of (amended) Part 2, you can satisfy the requirements related to "old" Part II by updating the information in your "old" Part II whenever it becomes materially inaccurate. You must deliver "old" Part II or a *brochure* containing at least the information contained in "old" Part II to prospective *clients* and annually offer it to current *clients*. You are not required to file "old" Part II with the SEC, but you must keep a copy in your files, and provide it to the SEC staff upon request.

If you are applying for registration or are registered with one or more *state securities authorities*, contact the appropriate *state securities authorities* or check <http://www.nasaa.org> for more information about the implementation deadline for the amended Part 2.

6. Where do I sign my Form ADV application or amendment?

You must sign the appropriate Execution Page. There are three Execution Pages at the end of the form. Your initial application, your initial report (in the case of an *exempt reporting adviser*), and all amendments to Form ADV must include at least one Execution Page.

- If you are applying for or are amending your SEC registration, or if you are reporting as an *exempt reporting adviser* or amending your report, you must sign and submit either a:
  - Domestic Investment Adviser Execution Page, if you (the advisory firm) are a resident of the United States; or

- *Non-Resident* Investment Adviser Execution Page, if you (the advisory firm) are not a resident of the United States.

- If you are applying for or are amending your registration with a *state securities authority*, you must sign and submit the State-Registered Investment Adviser Execution Page.

7. Who must sign my Form ADV or amendment?

The individual who signs the form depends upon your form of organization:

- For a sole proprietorship, the sole proprietor.
- For a partnership, a general partner.
- For a corporation, an authorized principal officer.
- For a "separately identifiable department or division" (SID) of a bank, a principal officer of your bank who is directly engaged in the management, direction, or supervision of your investment advisory activities.
- For all others, an authorized individual who participates in managing or directing your affairs.

The signature does not have to be notarized, and in the case of an electronic filing, should be a typed name.

8. How do I file my Form ADV?

Complete Form ADV electronically using the Investment Adviser Registration Depository (IARD) if:

- You are filing with the SEC (and submitting *notice filings* to any of the *state securities authorities*), or

- You are filing with a *state securities authority* that requires or permits advisers to submit Form ADV through the IARD.

  Note: SEC rules require advisers that are registered or applying for registration with the SEC, or that are reporting to the SEC as an *exempt reporting adviser*, to file electronically through the IARD system. See SEC rules 203-1 and 204-4.

To file electronically, go to the IARD website (<www.iard.com>), which contains detailed instructions for advisers to follow when filing through the IARD.

Complete Form ADV (Paper Version) on paper if:

- You are filing with the SEC or a *state securities authority* that requires electronic filing, but you have been granted a continuing hardship exemption. Hardship exemptions are described in Instruction 17.

- You are filing with a *state securities authority* that permits (but does not require) electronic filing and you do not file electronically.

9. How do I get started filing electronically?

First, obtain a copy of the IARD Entitlement Package from the following website: <http://www.iard.com/GetStarted.asp>. Second, request access to the IARD system for your firm by completing and submitting the IARD Entitlement Package. The IARD Entitlement Package must be submitted on paper. Mail the forms to: FINRA Entitlement Group, P.O. Box 9495, Gaithersburg, MD 20898-9495.

When FINRA receives your Entitlement Package, they will assign a *CRD* number (identification number for your firm) and a user I.D. code and password (identification number and system password for the individual(s) who will submit Form ADV filings for your firm). Your firm may request an I.D. code and password for more than one individual. FINRA also will create a financial account for you from which the IARD will deduct filing fees and any state fees you are required to pay. If you already have a *CRD* account with FINRA, it will also serve as your IARD account; a separate account will not be established.

Once you receive your *CRD* number, user I.D. code and password, and you have funded your account, you are ready to file electronically.

Questions regarding the Entitlement Process should be addressed to FINRA at 240.386.4848.

10. If I am applying for registration with the SEC, or amending my SEC registration, how do I make *notice filings* with the *state securities authorities*?

If you are applying for registration with the SEC or are amending your SEC registration, one or more *state securities authorities* may require you to provide them with copies of your SEC filings. We call these filings "*notice filings*." Your *notice filings* will be sent electronically to the states that you check on Item 2.C. of Part 1A. The *state securities authorities* to which you send *notice filings* may charge fees, which will be deducted from the account you establish with FINRA. To determine which *state securities authorities* require SEC-registered advisers to submit *notice filings* and to pay fees, consult the relevant state investment adviser law or *state securities authority*. See General Instruction 1.

If you are granted a continuing hardship exemption to file Form ADV on paper, FINRA will enter your filing into the IARD and your *notice filings* will be sent electronically to the *state securities authorities* that you check on Item 2.C. of Part 1A.

11. I am registered with a state. When must I switch to SEC registration?

If at the time of your *annual updating amendment* you meet at least one of the requirements for SEC registration in Item 2.A.(1) to (12) of Part 1A, you must register with the SEC within 90 days after you file the *annual updating amendment*. Once you register with the SEC, you are

subject to SEC regulation, regardless of whether you remain registered with one or more states. See SEC rule 203A-1(b)(2). Each of your *investment adviser representatives*, however, may be subject to registration in those states in which the representative has a place of business. See Advisers Act section 203A(b)(1); SEC rule 203A-3(a). For additional information, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

12. I am registered with the SEC. When must I switch to registration with a *state securities authority*?

If you check box 13 in Item 2.A. of Part 1A to report on your *annual updating amendment* that you are no longer eligible to register with the SEC, you must withdraw from SEC registration within 180 days after the end of your fiscal year by filing Form ADV-W. See SEC rule 203A-1(b)(2). You should consult state law or the *state securities authority* for the states in which you are "doing business" to determine if you are required to register in these states. See General Instruction 1. Until you file your Form ADV-W with the SEC, you will remain subject to SEC regulation, and you also will be subject to regulation in any states where you register. See SEC rule 203A-1(b)(2).

13. I am an *exempt reporting adviser*. When must I submit my first report on Form ADV?

- All exempt reporting advisers:
  You must submit your initial Form ADV filing within 60 days of relying on the exemption from registration under either section 203(l) of the Advisers Act as an adviser solely to one or more venture capital funds or section 203(m) of the Advisers Act because you act solely as an adviser to private funds and have assets under management in the United States of less than $150 million.

- Additional instruction for advisers switching from being registered to being exempt reporting advisers:
  If you are currently registered as an investment adviser (or have an application for registration pending) with the SEC or with a *state securities authority*, you must file a Form ADV-W to withdraw from registration in the jurisdictions where you are switching. You must submit the Form ADV-W before submitting your first report as an exempt reporting adviser.

14. I am an *exempt reporting adviser*. Is it possible that I might be required to also register with or submit a report to a *state securities authority*?

Yes, you may be required to register with or submit a report to one or more *state securities authorities*. If you are required to register with one or more *state securities authorities*, you must complete all of Form ADV. See General Instruction 3. If you are required to submit a report to one or more *state securities authorities*, check the box(es) in Item 2.C. of Part 1A next to the state(s) you would like to receive the report. Each of your *investment adviser representatives* may also be subject to registration requirements. For additional information

about the requirements that may apply to you, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

15. What do I do if I no longer meet the definition of an "*exempt reporting adviser*"?

- Advisers Switching to SEC Registration:

  - You may no longer be an *exempt reporting adviser* and may be required to register with the SEC if you wish to continue doing business as an investment adviser. For example, you may be relying on section 203(l) and wish to accept a *client* that is not a venture capital fund as defined in SEC rule 203(l)-1, or you may have been relying on SEC rule 203(m)-1 and reported in Section 2.B. of Schedule D to your *annual updating amendment* that you have *private fund* assets of $150 million or more.

    - If you are relying on section 203(l), unless you qualify for another exemption, you would violate the Advisers Act's registration requirement if you accept a *client* that is not a venture capital fund as defined in SEC rule 203(l)-1 before the SEC approves your application for registration. You must submit your final report as an *exempt reporting adviser* and apply for SEC registration in the same filing.

    - If you were relying on SEC rule 203(m)-1 and you reported in Section 2.B. of Schedule D to your *annual updating amendment* that you have *private fund* assets of $150 million or more, you must register with the SEC unless you qualify for another exemption. If you have complied with all SEC reporting requirements applicable to an *exempt reporting adviser* as such, you have up to 90 days after filing your *annual updating amendment* to apply for SEC registration, and you may continue doing business as a *private fund* adviser during this time. You must submit your final report as an *exempt reporting adviser* and apply for SEC registration in the same filing. Unless you qualify for another exemption, you would violate the Advisers Act's registration requirement if you accept a *client* that is not a *private fund* during this transition period before the SEC approves your application for registration, and you must comply with all SEC reporting requirements applicable to an *exempt reporting adviser* as such during this 90-day transition period. If you have not complied with all SEC reporting requirements applicable to an *exempt reporting adviser* as such, this 90-day transition period is not available to you. Therefore, if the transition period is not available to you, and you do not qualify for another exemption, your application for registration must be approved by the SEC before you meet or exceed SEC rule 203(m)-1's $150 million asset threshold.

- You will be deemed in compliance with the Form ADV filing and reporting requirements until the SEC approves or denies your application. If your application is approved, you will be able to continue business as a registered adviser.

- If you register with the SEC, you may be subject to state *notice filing* requirements. To determine these requirements, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

Note: If you are relying on SEC rule 203(m)-1 and you accept a *client* that is not a *private fund*, you will lose the exemption provided by SEC rule 203(m)-1 immediately. To avoid this result, you should apply for SEC registration in advance so that the SEC has approved your registration before you accept a *client* that is not a *private fund.*

The 90-day transition period described above also applies to investment advisers with their *principal offices and places of business* outside of the United States with respect to their *clients* who are *United States persons* (*e.g.*, the adviser would not be eligible for the 90-day transition period if it accepted a *client* that is a *United States person* and is not a *private fund*).

- Advisers Not Switching to SEC Registration:

  - You may no longer be an *exempt reporting adviser* but may not be required to register with the SEC or may be prohibited from doing so. For example, you may cease to do business as an investment adviser, become eligible for an exemption that does not require reporting, or be ineligible for SEC registration. In this case, you must submit a final report as an *exempt reporting adviser* to update only Item 1 of Part 1A of Form ADV.

  - You may be subject to state registration requirements. To determine these requirements, consult the investment adviser laws or the *state securities authority* for the particular state in which you are "doing business." See General Instruction 1.

16. Are there filing fees?

Yes. These fees go to support and maintain the IARD. The IARD filing fees are in addition to any registration or other fee that may be required by state law. You must pay an IARD filing fee for your initial application, your initial report, and each *annual updating amendment*. There is no filing fee for an other-than-annual amendment, a final report as an *exempt reporting adviser*, or Form ADV-W. The IARD filing fee schedule is published at <http://www.sec.gov/iard>; <http://www.nasaa.org>; and <http://www.iard.com>.

If you are submitting a paper filing under a continuing hardship exemption (see Instruction 17), you are required to pay an additional fee. The amount of the additional fee depends on whether you are filing Form ADV or Form ADV-W. (There is no additional fee for filings

made on Form ADV-W.) The hardship filing fee schedule is available by contacting FINRA at 240.386.4848.

17. What if I am not able to file electronically?

If you are required to file electronically but cannot do so, you may be eligible for one of two types of hardship exemptions from the electronic filing requirements.

- A **temporary hardship exemption** is available if you file electronically, but you encounter unexpected difficulties that prevent you from making a timely filing with the IARD, such as a computer malfunction or electrical outage. This exemption does not permit you to file on paper; instead, it extends the deadline for an electronic filing for seven business days. See SEC rules 203-3(a) and 204-4(e).

- A **continuing hardship exemption** may be granted if you are a small business and you can demonstrate that filing electronically would impose an undue hardship. You are a small business, and may be eligible for a continuing hardship exemption, if you are required to answer Item 12 of Part 1A (because you have assets under management of less than $25 million) and you are able to respond "no" to each question in Item 12. See SEC rule 0-7.

  If you have been granted a continuing hardship exemption, you must complete and submit the paper version of Form ADV to FINRA. FINRA will enter your responses into the IARD. As discussed in General Instruction 16, FINRA will charge you a fee to reimburse it for the expense of data entry.

18. I am eligible to file on paper. How do I make a paper filing?

When filing on paper, you must:

- Type all of your responses.
- Include your name (the same name you provide in response to Item 1.A. of Part 1A) and the date on every page.
- If you are amending your Form ADV:
  - complete page 1 and circle the number of any item for which you are changing your response.
  - include your SEC 801-number (if you have one), or your 802-number (if you have one), and your CRD number (if you have one) on every page.
  - complete the amended item in full and circle the number of the item for which you are changing your response.
  - to amend Schedule A or Schedule B, complete and submit Schedule C.

Where you submit your paper filing depends on why you are eligible to file on paper:

- If you are filing on paper because you have been granted a continuing hardship exemption, submit one manually signed Form ADV and one copy to: IARD Document Processing, FINRA, P.O. Box 9495, Gaithersburg, MD 20898-9495.

  If you complete Form ADV on paper and submit it to FINRA but you do not have a continuing hardship exemption, the submission will be returned to you.

- If you are filing on paper because a state in which you are registered or in which you are applying for registration allows you to submit paper instead of electronic filings, submit one manually signed Form ADV and one copy to the appropriate *state securities authorities*.

19. Who is required to file Form ADV-NR?

Every *non-resident* general partner and *managing agent* of all SEC-registered advisers and *exempt reporting advisers*, whether or not the adviser is resident in the United States, must file Form ADV-NR in connection with the adviser's initial application or report. A general partner or *managing agent* of an SEC-registered adviser or *exempt reporting adviser* who becomes a *non-resident* after the adviser's initial application or report has been submitted must file Form ADV-NR within 30 days. Form ADV-NR must be filed on paper (it cannot be filed electronically).

Submit Form ADV-NR to the SEC at the following address:

> Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549; Attn: Branch of Registrations and Examinations.

Failure to file Form ADV-NR promptly may delay SEC consideration of your initial application.

Federal Information Law and Requirements

Sections 203 and 204 of the Advisers Act [15 U.S.C. §§ 80b-3 and 80b-4] authorize the SEC to collect the information required by Form ADV. The SEC collects the information for regulatory purposes, such as deciding whether to grant registration. Filing Form ADV is mandatory for advisers who are required to register with the SEC and for *exempt reporting advisers*. The SEC maintains the information submitted on this form and makes it publicly available. The SEC may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17.

SEC's Collection of Information

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Advisers Act authorizes the

SEC to collect the information on Form ADV from investment advisers. See 15 U.S.C. §§ 80b-3 and 80b-4. Filing the form is mandatory.

The form enables the SEC to register investment advisers and to obtain information from and about *exempt reporting advisers*. Every applicant for registration with the SEC as an adviser, and every *exempt reporting adviser*, must file the form. See 17 C.F.R. § 275.203-1 and 204-4. By accepting a form, however, the SEC does not make a finding that it has been completed or submitted correctly. The form is filed annually by every adviser, no later than 90 days after the end of its fiscal year, to amend its registration or its report. It is also filed promptly during the year to reflect material changes. See 17 C.F.R. § 275.204-1. The SEC maintains the information on the form and makes it publicly available through the IARD.

Anyone may send the SEC comments on the accuracy of the burden estimate on page 1 of the form, as well as suggestions for reducing the burden. The Office of Management and Budget has reviewed this collection of information under 44 U.S.C. § 3507.

The information contained in the form is part of a system of records subject to the Privacy Act of 1974, as amended. The SEC has published in the Federal Register the Privacy Act System of Records Notice for these records.

APPENDIX B

FORM ADV (Paper Version)

- UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND
- REPORT BY EXEMPT REPORTING ADVISERS

Form ADV: Instructions for Part 1A

These instructions explain how to complete certain items in Part 1A of Form ADV.

1. Item 1: Identifying Information

a. **Separately Identifiable Department or Division of a Bank.** If you are a "separately identifiable department or division" (SID) of a bank, answer Item 1.A. with the full legal name of your bank, and answer Item 1.B. with your own name (the name of the department or division) and all names under which you conduct your advisory business. In addition, your *principal office and place of business* in Item 1.F. should be the principal office at which you conduct your advisory business. In response to Item 1.I., the website addresses you list on Schedule D should be sites that provide information about your own activities, rather than general information about your bank.

b. **Item 1.O.: Assets.** For purposes of Item 1.O. only, "assets" refers to your total assets, rather than the assets you manage on behalf of clients. Determine your total assets using the total assets shown on the balance sheet for your most recent fiscal year end.

2. Item 2: SEC Registration and SEC Report by *Exempt Reporting Advisers*

If you are registered or applying for registration with the SEC, you must indicate in Item 2.A. why you are eligible to register with the SEC by checking at least one of the boxes.

a. **Item 2.A.(1): Adviser with Regulatory Assets Under Management of $100 Million or More.** You may check box 1 only if your response to Item 5.F.(2)(c) is $100 million or more, or you are filing an *annual updating amendment* with the SEC and your response to Item 5.F.(2)(c) is $90 million or more. While you may register with the SEC if your regulatory assets under management are at least $100 million but less than $110 million, you must register with the SEC if your regulatory assets under management are $110 million or more. If you are a SEC-registered adviser, you may remain registered with the SEC if your regulatory assets under management are $90 million or more. See SEC rule 203A-1(a). Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

If you are a state-registered adviser and you report on your *annual updating amendment* that your regulatory assets under management increased to $100 million or more, you may register with the SEC. If your regulatory assets under management increased to $110 million or more, you must register with the SEC within 90 days after you file that *annual*

updating amendment. See SEC rule 203A-1(b)(1) and Form ADV General Instruction 11.

b. **Item 2.A.(2): Mid-Sized Adviser.** You may check box 2 only if your response to Item 5.F(2)(c) is $25 million or more but less than $100 million, and you satisfy one of the requirements below. Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

You must register with the SEC if you meet at least one of the following requirements:

- You are not required to be registered as an investment adviser with the *state securities authority* of the state where you maintain your *principal office and place of business* pursuant to that state's investment adviser laws. If you are exempt from registration with that state or are excluded from the definition of investment adviser in that state, you must register with the SEC. You should consult the investment adviser laws or the *state securities authority* for the particular state in which you maintain your *principal office and place of business* to determine if you are required to register in that state. See General Instruction 1.

- You are not subject to examination by the *state securities authority* of the state where you maintain your *principal office and place of business*. To determine whether such *state securities authority* does not conduct such examinations, see: http://www.sec.gov/divisions/investment/midsizedadviserinfo.htm.

See section 203A(a)(2) of the Advisers Act.

c. **Item 2.A.(5): Adviser to an Investment Company.** You may check box 5 only if you currently provide advisory services under an investment advisory contract to an investment company registered under the Investment Company Act of 1940 and the investment company is operational (i.e., has assets and shareholders, other than just the organizing shareholders). See sections 203A(a)(1)(B) and 203A(a)(2)(A) of the Advisers Act. Advising investors about the merits of investing in mutual funds or recommending particular mutual funds does not make you eligible to check this box.

d. **Item 2.A.(6): Adviser to a Business Development Company.** You may check box 6 only if your response to Item 5.F.(2)(c) is $25 million or more of regulatory assets under management, and you currently provide advisory services under an investment advisory contract to a company that has elected to be a business development company pursuant to section 54 of the Investment Company Act of 1940, that has not withdrawn the election, and that is operational (i.e., has assets and shareholders, other than just the organizing shareholders). See section 203A(a)(2)(A) of the Advisers Act. Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management.

e. **Item 2.A.(7): Pension Consultant.** You may check box 7 only if you are eligible for the pension consultant exemption from the prohibition on SEC registration.

- You are eligible for this exemption if you provided investment advice to employee benefit plans, governmental plans, or church plans with respect to assets having an aggregate value of $200 million or more during the 12-month period that ended within 90 days of filing this Form ADV. You are not eligible for this exemption if you only advise plan participants on allocating their investments within their pension plans. See SEC rule 203A-2(a).

- To calculate the value of assets for purposes of this exemption, aggregate the assets of the plans for which you provided advisory services at the end of the 12-month period. If you provided advisory services to other plans during the 12-month period, but your employment or contract terminated before the end of the 12-month period, you also may include the value of those assets.

f. **Item 2.A.(8): Related Adviser.** You may check box 8 only if you are eligible for the related adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(b). You are eligible for this exemption if you *control*, are *controlled* by, or are under common *control* with an investment adviser that is registered with the SEC, and you have the same *principal office and place of business* as that other investment adviser. Note that you may not rely on the SEC registration of an Internet adviser under rule 203A-2(e) in establishing eligibility for this exemption. See SEC rule 203A-2(e)(1)(iii). If you check box 8, you also must complete Section 2.A.(8) of Schedule D.

g. **Item 2.A.(9): Newly-Formed Adviser.** You may check box 9 only if you are eligible for the newly-formed-adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(c). You are eligible for this exemption if:

- immediately before you file your application for registration with the SEC, you were not registered or required to be registered with the SEC or a *state securities authority;* and

- at the time of your formation, you have a reasonable expectation that within 120 days of registration you will be eligible for SEC registration.

If you check box 9, you also must complete Section 2.A.(9) of Schedule D.

You must file an amendment to Part 1A of your Form ADV that updates your response to Item 2.A. within 120 days after the SEC declares your registration effective. You may not check box 9 on your amendment; since this exemption is available only if you are not registered, you may not "re-rely" on this exemption. If you indicate on that amendment

(by checking box 13) that you are not eligible to register with the SEC, you also must file a Form ADV-W to withdraw your SEC registration no later than 120 days after your registration was declared effective. You should contact the appropriate *state securities authority* to determine how long it may take to become state-registered sufficiently in advance of when you are required to file Form ADV-W to withdraw from SEC registration.

Note: If you expect to be eligible for SEC registration because of the amount of your regulatory assets under management, that amount must be $100 million or more no later than 120 days after your registration is declared effective.

h. **Item 2.A.(10): Multi-State Adviser.** You may check box 10 only if you are eligible for the multi-state adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(d). You are eligible for this exemption if you are required to register as an investment adviser with the *state securities authorities* of 15 or more states. If you check box 10, you must complete Section 2.A.(10) of Schedule D. You must complete Section 2.A.(10) of Schedule D in each *annual updating amendment* you submit.

If you check box 10, you also must:

- create and maintain a list of the *states* in which, but for this exemption, you would be required to register;
- update this list each time you submit an *annual updating amendment* in which you continue to represent that you are eligible for this exemption; and
- maintain the list in an easily accessible place for a period of not less than five years from each date on which you indicate that you are eligible for the exemption.

If, at the time you file your *annual updating amendment*, you are required to register in less than 15 *states* and you are not otherwise eligible to register with the SEC, you must check box 13 in Item 2.A. You also must file a Form ADV-W to withdraw your SEC registration. See Part 1A Instruction 2.j.

i. **Item 2.A.(11): Internet Adviser.** You may check box 11 only if you are eligible for the Internet adviser exemption from the prohibition on SEC registration. See SEC rule 203A-2(e). You are eligible for this exemption if:

- you provide investment advice to your *clients* through an interactive website. An interactive website means a website in which computer software-based models or applications provide investment advice based on personal information each *client* submits through the website. Other forms of online or Internet investment advice do not qualify for this exemption;

- you provide investment advice to all of your *clients* exclusively through the interactive website, except that you may provide investment advice to fewer than 15

clients through other means during the previous 12 months; and

- you maintain a record demonstrating that you provide investment advice to your *clients* exclusively through an interactive website in accordance with these limits.

j. **Item 2.A.(13): Adviser No Longer Eligible to Remain Registered with the SEC.** You must check box 13 if:

- you are registered with the SEC;
- you are filing an *annual updating amendment* to Form ADV in which you indicate in response to Item 5.F.(2)(c) that you have regulatory assets under management of less than $90 million; and
- you are not eligible to check any other box (other than box 13) in Item 2.A. (and are therefore no longer eligible to remain registered with the SEC).

You must withdraw from SEC registration within 180 days after the end of your fiscal year by filing Form ADV-W. Until you file your Form ADV-W, you will remain subject to SEC regulation, and you also will be subject to regulation in the *states* in which you register. See SEC rule 203A-1(b)(2).

k. **Item 2.B.: Reporting by *Exempt Reporting Advisers*.** You may check box 2.B.(1) only if you qualify for the exemption from SEC registration as an adviser solely to one or more venture capital funds. See SEC rule 203(l)-1. You may check box 2.B.(2) only if you qualify for the exemption from SEC registration because you act solely as an adviser to *private funds* and have assets under management in the United States of less than $150 million. See SEC rule 203(m)-1. You may check both boxes to indicate that you qualify for both exemptions. You should check box 2.B.(3) if you act solely as an adviser to *private funds* but you are no longer eligible to check box 2.B.(2) because you have assets under management in the United States of $150 million or more. If you check box 2.B.(2) or (3), you also must complete Section 2.B. of Schedule D.

3. Item 3: Form of Organization

If you are a "separately identifiable department or division" (SID) of a bank, answer Item 3.A. by checking "other." In the space provided, specify that you are a "SID of" and indicate the form of organization of your bank. Answer Items 3.B. and 3.C. with information about your bank.

4. Item 4: Successions

a. **Succession of an SEC-Registered Adviser.** If you (1) have taken over the business of an investment adviser or (2) have changed your structure or legal status (e.g., form of

organization or state of incorporation), a new organization has been created, which has registration obligations under the Advisers Act. There are different ways to fulfill these obligations. You may rely on the registration provisions discussed in the General Instructions, or you may be able to rely on special registration provisions for "successors" to SEC-registered advisers, which may ease the transition to the successor adviser's registration.

To determine if you may rely on these provisions, review "Registration of Successors to Broker-Dealers and Investment Advisers," Investment Advisers Act Release No. 1357 (Dec. 28, 1992). If you have taken over an adviser, follow Part 1A Instruction 4.a(1), Succession by Application. If you have changed your structure or legal status, follow Part 1A Instruction 4.a(2), Succession by Amendment. If either (1) you are a "separately identifiable department or division" (SID) of a bank that is currently registered as an investment adviser, and you are taking over your bank's advisory business; or (2) you are a SID currently registered as an investment adviser, and your bank is taking over your advisory business, then follow Part 1A Instruction 4.a(1), Succession by Application.

(1) **Succession by Application.** If you are not registered with the SEC as an adviser, and you are acquiring or assuming substantially all of the assets and liabilities of the advisory business of an SEC-registered adviser, file a new application for registration on Form ADV. You will receive new registration numbers. You must file the new application within 30 days after the succession. On the application, make sure you check "yes" to Item 4.A., enter the date of the succession in Item 4.B., and complete Section 4 of Schedule D.

Until the SEC declares your new registration effective, you may rely on the registration of the adviser you are acquiring, but only if the adviser you are acquiring is no longer conducting advisory activities. Once your new registration is effective, a Form ADV-W must be filed with the SEC to withdraw the registration of the acquired adviser.

(2) **Succession by Amendment.** If you are a new investment adviser formed solely as a result of a change in form of organization, a reorganization, or a change in the composition of a partnership, and there has been no practical change in *control* or management, you may amend the registration of the registered investment adviser to reflect these changes rather than file a new application. You will keep the same registration numbers, and you should not file a Form ADV-W. On the amendment, make sure you check "yes" to Item 4.A., enter the date of the succession in Item 4.B., and complete Section 4 of Schedule D. You must submit the amendment within 30 days after the change or reorganization.

b. **Succession of a State-Registered Adviser.** If you (1) have taken over the business of an investment adviser or (2) have changed your structure or legal status (e.g., form of

organization or state of incorporation), a new organization has been created, which has registration obligations under state investment adviser laws. There may be different ways to fulfill these obligations. You should contact each state in which you are registered to determine that state's requirements for successor registration. See Form ADV General Instruction 1.

5. Item 5: Information About Your Advisory Business

a. **Newly-Formed Advisers:** Several questions in Item 5 that ask about your advisory business assume that you have been operating your advisory business for some time. Your response to these questions should reflect your current advisory business (i.e., at the time you file your Form ADV), with the following exceptions:

- base your response to Item 5.E. on the types of compensation you expect to accept;
- base your response to Item 5.G. and Item 5.J. on the types of advisory services you expect to provide during the next year; and
- skip Item 5.H.

b. **Item 5.F: Calculating Your Regulatory Assets Under Management.** In determining the amount of your regulatory assets under management, include the securities portfolios for which you provide continuous and regular supervisory or management services as of the date of filing this Form ADV.

(1) **Securities Portfolios**. An account is a securities portfolio if at least 50% of the total value of the account consists of securities. For purposes of this 50% test, you may treat cash and cash equivalents (i.e., bank deposits, certificates of deposit, bankers acceptances, and similar bank instruments) as securities. You must include securities portfolios that are:

(a) your family or proprietary accounts;

(b) accounts for which you receive no compensation for your services; and

(c) accounts of *clients* who are not *United States persons*.

For purposes of this definition, treat all of the assets of a *private fund* as a securities portfolio, regardless of the nature of such assets. For accounts of *private funds*, moreover, include in the securities portfolio any uncalled commitment pursuant to which a *person* is obligated to acquire an interest in, or make a capital contribution to, the *private fund*.

(2) **Value of Portfolio**. Include the entire value of each securities portfolio for which you provide continuous and regular supervisory or management services. If you provide

continuous and regular supervisory or management services for only a portion of a securities portfolio, include as regulatory assets under management only that portion of the securities portfolio for which you provide such services. Exclude, for example, the portion of an account:

(a) under management by another *person*; or

(b) that consists of real estate or businesses whose operations you "manage" on behalf of a *client* but not as an investment.

Do not deduct any outstanding indebtedness or other accrued but unpaid liabilities.

(3) **Continuous and Regular Supervisory or Management Services.**

General Criteria. You provide continuous and regular supervisory or management services with respect to an account if:

(a) you have *discretionary authority* over and provide ongoing supervisory or management services with respect to the account; or

(b) you do not have *discretionary authority* over the account, but you have ongoing responsibility to select or make recommendations, based upon the needs of the *client*, as to specific securities or other investments the account may purchase or sell and, if such recommendations are accepted by the *client*, you are responsible for arranging or effecting the purchase or sale.

Factors. You should consider the following factors in evaluating whether you provide continuous and regular supervisory or management services to an account.

(a) **Terms of the advisory contract.** If you agree in an advisory contract to provide ongoing management services, this suggests that you provide these services for the account. Other provisions in the contract, or your actual management practices, however, may suggest otherwise.

(b) **Form of compensation.** If you are compensated based on the average value of the *client's* assets you manage over a specified period of time, that suggests that you provide continuous and regular supervisory or management services for the account. If you receive compensation in a manner similar to either of the following, that suggests you do not provide continuous and regular supervisory or management services for the account --

(i) you are compensated based upon the time spent with a *client* during a *client* visit; or

(ii) you are paid a retainer based on a percentage of assets covered by a financial plan.

(c) **Management practices.** The extent to which you actively manage assets or provide advice bears on whether the services you provide are continuous and regular supervisory or management services. The fact that you make infrequent trades (e.g., based on a "buy and hold" strategy) does not mean your services are not "continuous and regular."

Examples. You may provide continuous and regular supervisory or management services for an account if you:

(a) have *discretionary authority* to allocate *client* assets among various mutual funds;

(b) do not have *discretionary authority*, but provide the same allocation services, and satisfy the criteria set forth in Instruction 5.b.(3);

(c) allocate assets among other managers (a "manager of managers"), but only if you have *discretionary authority* to hire and fire managers and reallocate assets among them; or

(d) you are a broker-dealer and treat the account as a brokerage account, but only if you have *discretionary authority* over the account.

You do not provide continuous and regular supervisory or management services for an account if you:

(a) provide market timing recommendations (i.e., to buy or sell), but have no ongoing management responsibilities;

(b) provide only *impersonal investment advice* (e.g., market newsletters);

(c) make an initial asset allocation, without continuous and regular monitoring and reallocation; or

(d) provide advice on an intermittent or periodic basis (such as upon *client* request, in response to a market event, or on a specific date (e.g., the account is reviewed and adjusted quarterly)).

(4) **Value of Regulatory Assets Under Management**. Determine your regulatory assets under management based on the current market value of the assets as determined within 90 days prior to the date of filing this Form ADV. Determine market value using the same method you used to report account values to *clients* or to calculate fees for investment advisory services.

In the case of a *private fund*, determine the current market value (or fair value) of the *private fund*'s assets and the contractual amount of any uncalled commitment pursuant

to which a person is obligated to acquire an interest in, or make a capital contribution to, the *private fund*.

(5) **Example.** This is an example of the method of determining whether an account of a *client* other than a *private fund* may be included as regulatory assets under management.

The *client's* portfolio consists of the following:

$ 6,000,000	stocks and bonds
$ 1,000,000	cash and cash equivalents
$ 3,000,000	non-securities (collectibles, commodities, real estate, etc.)
$10,000,000	Total Assets

First, is the account a securities portfolio? The account is a securities portfolio because securities as well as cash and cash equivalents (which you have chosen to include as securities) ($6,000,000 + $1,000,000 = $7,000,000) comprise at least 50% of the value of the account (here, 70%). (See Instruction 5.b(1)).

Second, does the account receive continuous and regular supervisory or management services? The entire account is managed on a *discretionary* basis and is provided ongoing supervisory and management services, and therefore receives continuous and regular supervisory or management services. (See Instruction 5.b.(3)).

Third, what is the entire value of the account? The entire value of the account ($10,000,000) is included in the calculation of the adviser's total regulatory assets under management.

6. Item 7: Financial Industry Affiliations and Private Fund Reporting

Item 7.B. and Section 7.B. of Schedule D ask questions about the *private funds* that you advise. You are required to complete a Section 7.B.(1) of Schedule D for each *private fund* that you advise, except in certain circumstances described under Item 7.B. and below.

a. If your *principal office and place of business* is outside the United States, for purposes of Item 7 and Section 7.B. of Schedule D you may disregard any *private fund* that, during your last fiscal year, was not a *United States person*, was not offered in the United States, and was not beneficially owned by any *United States person*.

b. When filing Section 7.B.(1) of Schedule D for a *private fund*, you must acquire an identification number for the fund by logging onto the IARD website and using the private fund identification number generator. You must continue to use the same identification number whenever you amend Section 7.B.(1) for that fund. If you file a Section 7.B.(1) for a *private fund* for which an identification number has already been

acquired by another adviser, you must not acquire a new identification number, but must instead utilize the existing number. If you choose to complete a single Section 7.B.(1) for a master-feeder arrangement under instruction 6.d. below, you must acquire an identification number also for each feeder fund.

c. If any *private fund* has issued two or more series (or classes) of equity interests whose values are determined with respect to separate portfolios of securities and other assets, then each such series (or class) should be regarded as a separate *private fund*. In Section 7.B.(1) and 7.B.(2) of Schedule D, next to the name of the *private fund*, list the name and identification number of the specific series (or class) for which you are filing the sections. This only applies with respect to series (or classes) that you manage as if they were separate funds and not a fund's side pockets or similar arrangements.

d. In the case of a master-feeder arrangement (see questions 6-7 of Section 7.B.(1) of Schedule D), instead of completing a Section 7.B.(1) for each of the master fund and each feeder fund, you may complete a single Section 7.B.(1) for the master-feeder arrangement under the name of the master fund if the answers to questions 8, 10, 21 and 23 through 28 are the same for all of the feeder funds (or, in the case of questions 24 and 25, if the feeder funds do not use a prime broker or custodian). If you choose to complete a single Section 7.B.(1), you should disregard the feeder funds, except for the following:

(1) **Question 11**: State the gross assets for the master-feeder arrangement as a whole.

(2) **Question 12**: List the lowest minimum investment commitment applicable to any of the master fund and the feeder funds.

(3) **Questions 13-16**: Answer by aggregating all investors in the master-feeder arrangement (but do not count the feeder funds themselves as investors).

(4) **Questions 19-20**: For purposes of these questions, the *private fund* means any of the master fund or the feeder funds. In answering the questions, moreover, disregard the feeder funds' investment in the master fund.

(5) **Question 22**: List all of the Form D SEC file numbers of any of the master fund and feeder funds.

e. Additional Instructions:

(1) **Question 9: Investment in Registered Investment Companies:** For purposes of this question, disregard any open-end management investment company regulated as a money market fund under rule 2a-7 under the Investment Company Act if the *private fund* invests in such a company in reliance on rule 12d1-1 under the same Act.

(2) **Question 10: Type of *Private Fund*:** For purposes of this question, the following definitions apply:

"Hedge fund" means any *private fund* (other than a securitized asset fund):

(a) with respect to which one or more investment advisers (or related persons of investment advisers) may be paid a performance fee or allocation calculated by taking into account unrealized gains (other than a fee or allocation the calculation of which may take into account unrealized gains solely for the purpose of reducing such fee or allocation to reflect net unrealized losses);

(b) that may borrow an amount in excess of one-half of its net asset value (including any committed capital) or may have gross notional exposure in excess of twice its net asset value (including any committed capital); or

(c) that may sell securities or other assets short or enter into similar transactions (other than for the purpose of hedging currency exposure or managing duration).

A commodity pool is categorized as a hedge fund solely for purposes of this question. For purposes of this definition, do not net long and short positions. Include any borrowings or notional exposure of another person that are guaranteed by the *private fund* or that the *private fund* may otherwise be obligated to satisfy.

"Liquidity fund" means any *private fund* that seeks to generate income by investing in a portfolio of short-term obligations in order to maintain a stable net asset value per unit or minimize principal volatility for investors.

"Private equity fund" means any *private fund* that is not a hedge fund, liquidity fund, real estate fund, securitized asset fund, or venture capital fund and does not provide investors with redemption rights in the ordinary course.

"Real estate fund" means any *private fund* that is not a hedge fund, that does not provide investors with redemption rights in the ordinary course, and that invests primarily in real estate and real estate related assets.

"Securitized asset fund" means any *private fund* whose primary purpose is to issue asset backed securities and whose investors are primarily debt-holders.

"Venture capital fund" means any *private fund* meeting the definition of venture capital fund in rule 203(l)-1 under the Advisers Act.

"Other *private fund*" means any *private fund* that is not a hedge fund, liquidity fund, private equity fund, real estate fund, securitized asset fund, or venture capital fund.

(3) **Question 11: Gross Assets.** Report the assets of the *private fund* that you would include in calculating your regulatory assets under management according to instruction 5.b above.

(4) **Questions 19-20: Other clients' investments:** For purposes of these questions, disregard any feeder fund's investment in its master fund. (*See* questions 6-7 for the definition of "master fund" and "feeder fund.")

7. Item 10: *Control Persons*

If you are a "separately identifiable department or division" (SID) of a bank, identify on Schedule A your bank's executive officers who are directly engaged in managing, directing, or supervising your investment advisory activities, and list any other *persons* designated by your bank's board of directors as responsible for the day-to-day conduct of your investment advisory activities, including supervising *employees* performing investment advisory activities.

8. Additional Information.

If you believe your response to an item in Form ADV Part 1A requires further explanation, or if you wish to provide additional information, you may do so on Schedule D, in the Miscellaneous section. Completion of this section is optional.

APPENDIX C

GLOSSARY OF TERMS

1. **Advisory Affiliate:** Your advisory affiliates are (1) all of your officers, partners, or directors (or any ***person*** performing similar functions); (2) all ***persons*** directly or indirectly ***controlling*** or ***controlled*** by you; and (3) all of your current ***employees*** (other than ***employees*** performing only clerical, administrative, support or similar functions).

   If you are a "separately identifiable department or division" (SID) of a bank, your ***advisory affiliates*** are: (1) all of your bank's ***employees*** who perform your investment advisory activities (other than clerical or administrative ***employees***); (2) all ***persons*** designated by your bank's board of directors as responsible for the day-to-day conduct of your investment advisory activities (including supervising the ***employees*** who perform investment advisory activities); (3) all ***persons*** who directly or indirectly ***control*** your bank, and all ***persons*** whom you ***control*** in connection with your investment advisory activities; and (4) all other ***persons*** who directly manage any of your investment advisory activities (including directing, supervising or performing your advisory activities), all ***persons*** who directly or indirectly ***control*** those management functions, and all ***persons*** whom you ***control*** in connection with those management functions. *[Used in: Part 1A, Items 7, 11, DRPs; Part 1B, Item 2]*

2. **Annual Updating Amendment:** Within 90 days after your firm's fiscal year end, your firm must file an "annual updating amendment," which is an amendment to your firm's Form ADV that reaffirms the eligibility information contained in Item 2 of Part 1A and updates the responses to any other item for which the information is no longer accurate. *[Used in: General Instructions; Part 1A Instructions, Introductory Text, Item 2; Part 2A, Instructions, Appendix 1 Instructions; Part 2B, Instructions]*

3. **Brochure:** A written disclosure statement that you must provide to ***clients*** and prospective ***clients***. See SEC rule 204-3; Form ADV, Part 2A. *[Used in: General Instructions; Used throughout Part 2]*

4. **Brochure Supplement:** A written disclosure statement containing information about certain of your ***supervised persons*** that your firm is required by Part 2B of Form ADV to provide to ***clients*** and prospective ***clients***. See SEC rule 204-3; Form ADV, Part 2B. *[Used in: General Instructions; Used throughout Part 2]*

5. **Charged:** Being accused of a crime in a formal complaint, information, or indictment (or equivalent formal charge). *[Used in: Part 1A, Item 11; DRPs]*

6. **Client:** Any of your firm's investment advisory clients. This term includes clients from which your firm receives no compensation, such as family members of your supervised persons. If your firm also provides other services (*e.g.*, accounting services), this term does not include clients that are not investment advisory clients. *[Used throughout Form ADV and Form ADV-W]*

7. **Control:** The power, directly or indirectly, to direct the management or policies of a ***person***, whether through ownership of securities, by contract, or otherwise.

   - Each of your firm's officers, partners, or directors exercising executive responsibility (or ***persons*** having similar status or functions) is presumed to control your firm.

   - A ***person*** is presumed to control a corporation if the ***person***: (i) directly or indirectly has the right to vote 25 percent or more of a class of the corporation's voting securities; or (ii) has the power to sell or direct the sale of 25 percent or more of a class of the corporation's voting securities.

   - A ***person*** is presumed to control a partnership if the ***person*** has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the partnership.

   - A ***person*** is presumed to control a limited liability company ("LLC") if the ***person***: (i) directly or indirectly has the right to vote 25 percent or more of a class of the interests of the LLC; (ii) has the right to receive upon dissolution, or has contributed, 25 percent or more of the capital of the LLC; or (iii) is an elected manager of the LLC.

   - A ***person*** is presumed to control a trust if the ***person*** is a trustee or ***managing agent*** of the trust.

   [Used in: General Instructions; Part 1A, Instructions, Items 2, 7, 10, 11, 12, Schedules A, B, C, D; DRPs]

8. **Custody:** Holding, directly or indirectly, client funds or securities, or having any authority to obtain possession of them. You have custody if a ***related person*** holds, directly or indirectly, client funds or securities, or has any authority to obtain possession of them, in connection with advisory services you provide to clients. Custody includes:

   - Possession of client funds or securities (but not of checks drawn by clients and made payable to third parties) unless you receive them inadvertently and you return them to the sender promptly, but in any case within three business days of receiving them;

   - Any arrangement (including a general power of attorney) under which you are authorized or permitted to withdraw client funds or securities maintained with a custodian upon your instruction to the custodian; and

   - Any capacity (such as general partner of a limited partnership, managing member of a limited liability company or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives you or your supervised person legal ownership of or access to client funds or securities. *[Used in: Part 1A, Item 9; Part 1B, Instructions, Item 2; Part 2A, Items 15, 18]*

9. **Discretionary Authority or Discretionary Basis:** Your firm has discretionary authority or manages assets on a discretionary basis if it has the authority to decide which securities to purchase and sell for the ***client***. Your firm also has discretionary authority if it has the authority to decide which investment advisers to retain on behalf of the ***client***. *[Used in: Part 1A, Instructions, Item 8; Part 1B, Instructions; Part 2A, Items 4, 16, 18; Part 2B, Instructions]*

10. **Employee:** This term includes an independent contractor who performs advisory functions on your behalf. *[Used in: Part 1A, Instructions, Items 1, 5, 11; Part 2B, Instructions]*

11. **Enjoined:** This term includes being subject to a mandatory injunction, prohibitory injunction, preliminary injunction, or a temporary restraining ***order***. *[Used in: Part 1A, Item 11; DRPs]*

12. **Exempt Reporting Adviser:** An investment adviser that qualifies for the exemption from registration under section 203(l) of the Advisers Act because it is an adviser solely to one or more venture capital funds, or under rule 203(m)-1 of the Advisers Act because it is an adviser solely to ***private funds*** and has assets under management in the United States of less than $150 million. *[Used in: Throughout Part 1A; General Instructions; Form ADV-H; Form ADV-NR]*

13. **Felony:** For jurisdictions that do not differentiate between a felony and a ***misdemeanor***, a felony is an offense punishable by a sentence of at least one year imprisonment and/or a fine of at least $1,000. The term also includes a general court martial. *[Used in: Part 1A, Item 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

14. **FINRA CRD** or **CRD:** The Web Central Registration Depository ("CRD") system operated by FINRA for the registration of broker-dealers and broker-dealer representatives. *[Used in: General Instructions, Part 1A, Item 1, Schedules A, B, C, D, DRPs; Form ADV-W, Item 1]*

15. **Foreign Financial Regulatory Authority:** This term includes (1) a foreign securities authority; (2) another governmental body or foreign equivalent of a ***self-regulatory organization*** empowered by a foreign government to administer or enforce its laws relating to the regulation of ***investment-related*** activities; and (3) a foreign membership organization, a function of which is to regulate the participation of its members in the activities listed above. *[Used in: Part 1A, Items 1, 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

16. **Found:** This term includes adverse final actions, including consent decrees in which the respondent has neither admitted nor denied the findings, but does not include agreements, deficiency letters, examination reports, memoranda of understanding, letters of caution, admonishments, and similar informal resolutions of matters. *[Used in: Part 1A, Item 11; Part 1B, Item 2; Part 2A, Item 9; Part 2B, Item 3]*

17. **Government Entity:** Any state or political subdivision of a state, including (i) any agency, authority, or instrumentality of the state or political subdivision; (ii) a plan or pool of assets ***controlled*** by the state or political subdivision or any agency, authority, or instrumentality thereof; and (iii) any officer, agent, or employee of the state or political subdivision or any agency, authority, or instrumentality thereof, acting in their official capacity. *[Used in: Part 1A, Item 5]*

18. **High Net Worth Individual:** An individual who is a "qualified client" under rule 205-3 of the Advisers Act or who is a "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940. *[Used in: Part 1A, Item 5; Schedule D]*

19. **Home State:** If your firm is registered with a ***state securities authority***, your firm's "home state" is the state where it maintains its ***principal office and place of business***. *[Used in: Part 1B, Instructions]*

20. **Impersonal Investment Advice:** Investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts. *[Used in: Part 1A, Instructions; Part 2A, Instructions; Part 2B, Instructions]*

21. **Independent Public Accountant:** A public accountant that meets the standards of independence described in rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)). *[Used in: Item 9; Schedule D]*

22. **Investment Adviser Representative:** *Any of your firm's* ***supervised persons*** *(except* those that provide only ***impersonal investment advice***) is an investment adviser representative, if --

    - the ***supervised person*** regularly solicits, meets with, or otherwise communicates with your firm's ***clients***,
    - the ***supervised person*** has more than five ***clients*** who are natural persons and not ***high net worth individuals***, and
    - more than ten percent of the ***supervised person's*** clients are natural persons and not ***high net worth individuals.***

    NOTE: If your firm is registered with the ***state securities authorities*** and not the SEC, your firm may be subject to a different state definition of "investment adviser representative." Investment adviser representatives of SEC-registered advisers may be required to register in each state in which they have a place of business.

    [Used in: General Instructions; Part 1A, Item 7; Part 2B, Item 1]

23. **Investment-Related:** Activities that pertain to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with an investment adviser, broker-dealer, municipal securities dealer, government securities broker or dealer, issuer, investment company, futures sponsor, bank, or savings association). *[Used in: Part 1A, Items, 7, 11, DRPs; Part 1B, Item 2; Part 2A, Items 9 and 19; Part 2B, Items 3, 4 and 7]*

24. **Involved:** Engaging in any act or omission, aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act. *[Used in: Part 1A, Item 11; Part 2A, Items 9 and 19; Part 2B, Items 3 and 7]*

25. **Legal Entity Identifier:** A "legal entity identifier" assigned by or on behalf of an internationally recognized standards setting body and required for reporting purposes by the U.S. Department of the Treasury's Office of Financial Research or a financial regulator.

26. **Management Persons:** Anyone with the power to exercise, directly or indirectly, a ***controlling*** influence over your firm's management or policies, or to determine the general investment advice given to the ***clients*** of your firm.

    Generally, all of the following are management persons:

    - Your firm's principal executive officers, such as your chief executive officer, chief financial officer, chief operations officer, chief legal officer, and chief compliance officer; your directors, general partners, or trustees; and other individuals with similar status or performing similar functions;

    - The members of your firm's investment committee or group that determines general investment advice to be given to ***clients***; and

    - If your firm does not have an investment committee or group, the individuals who determine general investment advice provided to ***clients*** (if there are more than five people, you may limit your firm's response to their supervisors).

    [Used in: Part 1B, Item 2; Part 2A, Items 9, 10 and 19]

27. **Managing Agent:** A managing agent of an investment adviser is any ***person***, including a trustee, who directs or manages (or who participates in directing or managing) the affairs of any unincorporated organization or association that is not a partnership. *[Used in: General Instructions; Form ADV-NR; Form ADV-W, Item 8]*

28. **Minor Rule Violation:** A violation of a ***self-regulatory organization*** rule that has been designated as "minor" pursuant to a plan approved by the SEC. A rule violation may be designated as "minor" under a plan if the sanction imposed consists of a fine of $2,500 or less,

and if the sanctioned ***person*** does not contest the fine. (Check with the appropriate ***self-regulatory organization*** to determine if a particular rule violation has been designated as "minor" for these purposes.) *[Used in: Part 1A, Item 11]*

29. **Misdemeanor:** For jurisdictions that do not differentiate between a ***felony*** and a misdemeanor, a misdemeanor is an offense punishable by a sentence of less than one year imprisonment and/or a fine of less than $1,000. The term also includes a special court martial. *[Used in: Part 1A, Item 11; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

30. **Non-Resident:** (a) an individual who resides in any place not subject to the jurisdiction of the United States; (b) a corporation incorporated in or that has its ***principal office and place of business*** in any place not subject to the jurisdiction of the United States; and (c) a partnership or other unincorporated organization or association that is formed in or has its ***principal office and place of business*** in any place not subject to the jurisdiction of the United States. *[Used in: General Instructions; Form ADV-NR]*

31. **Notice Filing:** SEC-registered advisers may have to provide ***state securities authorities*** with copies of documents that are filed with the SEC. These filings are referred to as "notice filings." *[Used in: General Instructions; Part 1A, Item 2; Execution Page(s); Form ADV-W]*

32. **Order:** A written directive issued pursuant to statutory authority and procedures, including an order of denial, exemption, suspension, or revocation. Unless included in an order, this term does not include special stipulations, undertakings, or agreements relating to payments, limitations on activity or other restrictions. *[Used in: Part 1A, Items 2 and 11; Schedule D; DRPs; Part 2A, Item 9; Part 2B, Item 3]*

33. **Performance-Based Fee:** An investment advisory fee based on a share of capital gains on, or capital appreciation of, ***client*** assets. A fee that is based upon a percentage of assets that you manage is not a performance-based fee. *[Used in: Part 1A, Item 5; Part 2A, Items 6 and 19]*

34. **Person:** A natural person (an individual) or a company. A company includes any partnership, corporation, trust, limited liability company ("LLC"), limited liability partnership ("LLP"), sole proprietorship, or other organization. *[Used throughout Form ADV and Form ADV-W]*

35. **Principal Office and Place of Business:** Your firm's executive office from which your firm's officers, partners, or managers direct, ***control***, and coordinate the activities of your firm. *[Used in: Part 1A, Instructions, Items 1 and 2; Schedule D; Form ADV-W, Item 1]*

36. **Private Fund:** An issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act. *[Used in: Part 1A, Items 2, 5, 7, and 9; Schedule D; General Instructions; Part 1A, Instructions]*

37. **Proceeding:** This term includes a formal administrative or civil action initiated by a governmental agency, ***self-regulatory organization*** or ***foreign financial regulatory authority***; a ***felony*** criminal indictment or information (or equivalent formal charge); or a ***misdemeanor*** criminal information (or equivalent formal charge). This term does not include other civil litigation, investigations, or arrests or similar charges effected in the absence of a formal criminal indictment or information (or equivalent formal charge). *[Used in: Part 1A, Item 11; DRPs; Part 1B, Item 2; Part 2A, Item 9; Part 2B, Item 3]*

38. **Related Person:** Any ***advisory affiliate*** and any ***person*** that is under common ***control*** with your firm. *[Used in: Part 1A, Items 7, 8, 9; Schedule D; Form ADV-W, Item 3; Part 2A, Items 10, 11, 12, 14; Part 2A, Appendix 1, Item 6]*

39. **Self-Regulatory Organization** or **SRO:** Any national securities or commodities exchange, registered securities association, or registered clearing agency. For example, the Chicago Board of Trade ("CBOT"), FINRA and New York Stock Exchange ("NYSE") are self-regulatory organizations. *[Used in: Part 1A, Item 11; DRPs; Part 1B, Item 2; Part 2A, Items 9 and 19; Part 2B, Items 3 and 7]*

40. **Sponsor:** A sponsor of a ***wrap fee program*** sponsors, organizes, or administers the program or selects, or provides advice to ***clients*** regarding the selection of, other investment advisers in the program. *[Used in: Part 1A, Item 5; Schedule D; Part 2A, Instructions, Appendix 1 Instructions]*

41. **State Securities Authority:** The securities commissioner or commission (or any agency, office or officer performing like functions) of any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States. *[Used throughout Form ADV]*

42. **Supervised Person:** Any of your officers, partners, directors (or other ***persons*** occupying a similar status or performing similar functions), or ***employees***, or any other ***person*** who provides investment advice on your behalf and is subject to your supervision or ***control***. *[Used throughout Part 2]*

43. **United States person:** This term has the same meaning as in rule 203(m)-1 under the Advisers Act, which includes any natural person that is resident in the United States. *[Used in: Part 1A, Instructions; Item 5; Schedule D]*

44. **Wrap Brochure** or **Wrap Fee Program Brochure:** The written disclosure statement that ***sponsors*** of ***wrap fee programs*** must provide to each of their ***wrap fee program clients***. *[Used in: Part 2, General Instructions; Used throughout Part 2A, Appendix 1]*

45. **Wrap Fee Program:** Any advisory program under which a specified fee or fees not based directly upon transactions in a ***client's*** account is charged for investment advisory services

(which may include portfolio management or advice concerning the selection of other investment advisers) and the execution of ***client*** transactions. *[Used in: Part 1, Item 5; Schedule D; Part 2A, Instructions, Item 4, used throughout Appendix 1; Part 2B, Instructions]*

APPENDIX D

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT BY EXEMPT REPORTING ADVISERS**

PART 1A

WARNING: Complete this form truthfully. False statements or omissions may result in denial of your application, revocation of your registration, or criminal prosecution. You must keep this form updated by filing periodic amendments. See Form ADV General Instruction 4.

Check the box that indicates what you would like to do (check all that apply):

SEC or State Registration:
- ☐ Submit an initial application to register as an investment adviser with the SEC.
- ☐ Submit an initial application to register as an investment adviser with one or more states.
- ☐ Submit an *annual updating amendment* to your registration for your fiscal year ended _____.
- ☐ Submit an other-than-annual amendment to your registration.

SEC or State Report by *Exempt Reporting Advisers*:
- ☐ Submit an initial report to the SEC.
- ☐ Submit a report to one or more *state securities authorities*.
- ☐ Submit an *annual updating amendment* to your report for your fiscal year ended _____.
- ☐ Submit an other-than-annual amendment to your report.
- ☐ Submit a final report.

Item 1 Identifying Information

Responses to this Item tell us who you are, where you are doing business, and how we can contact you.

A. Your full legal name (if you are a sole proprietor, your last, first, and middle names):

_____

B. Name under which you primarily conduct your advisory business, if different from Item 1.A.

_____

List on Section 1.B. of Schedule D any additional names under which you conduct your advisory business.

C. If this filing is reporting a change in your legal name (Item 1.A.) or primary business name (Item 1.B.), enter the new name and specify whether the name change is of ☐ your legal name or ☐ your primary business name:

_____

D. (1) If you are registered with the SEC as an investment adviser, your SEC file number: 801-_____

(2) If you report to the SEC as an *exempt reporting adviser*, your SEC file number: 802-_____

E. If you have a number ("*CRD* Number") assigned by the *FINRA's CRD* system or by the IARD system, your *CRD* number: _____

If your firm does not have a CRD number, skip this Item 1.E. Do not provide the CRD number of one of your officers, employees, or affiliates.

F. *Principal Office and Place of Business*

(1) Address (do not use a P.O. Box):

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

List on Section 1.F. of Schedule D any office, other than your principal office and place of business, at which you conduct investment advisory business. If you are applying for registration, or are registered, with one or more state securities authorities, you must list all of your offices in the state or states to which you are applying for registration or with whom you are registered. If you are applying for SEC registration, if you are registered only with the SEC, or if you are reporting to the SEC as an exempt reporting adviser, list the largest five offices in terms of numbers of employees.

(2) Days of week that you normally conduct business at your *principal office and place of business*:

☐ Monday - Friday ☐ Other: _____

Normal business hours at this location: _____

(3) Telephone number at this location: _____
(area code) (telephone number)

(4) Facsimile number at this location: _____
(area code) (facsimile number)

G. Mailing address, if different from your *principal office and place of business* address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

H. If you are a sole proprietor, state your full residence address, if different from your *principal office and place of business* address in Item 1.F.:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

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I. Do you have one or more websites? Yes ☐ No ☐

If "yes," list all website addresses on Section 1.I. of Schedule D. If a website address serves as a portal through which to access other information you have published on the web, you may list the portal without listing addresses for all of the other information. Some advisers may need to list more than one portal address. Do not provide individual electronic mail (e-mail) addresses in response to this Item.

J. Provide the name and contact information of your Chief Compliance Officer: If you are an *exempt reporting adviser*, you must provide the contact information for your Chief Compliance Officer, if you have one. If not, you must complete Item 1.K. below.

_____
(name)

_____
(other titles, if any)

_____ _____
(area code) (telephone number) (area code) (facsimile number)

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

_____
(electronic mail (e-mail) address, if Chief Compliance Officer has one)

K. Additional Regulatory Contact Person: If a person other than the Chief Compliance Officer is authorized to receive information and respond to questions about this Form ADV, you may provide that information here.

_____
(name)

_____
(titles)

_____ _____
(area code) (telephone number) (area code) (facsimile number)

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

_____
(electronic mail (e-mail) address, if contact person has one)

L. Do you maintain some or all of the books and records you are required to keep under Section 204 of the Advisers Act, or similar state law, somewhere other than your *principal office and place of business*?

Yes ☐ No ☐

If "yes," complete Section 1.L. of Schedule D.

M. Are you registered with a *foreign financial regulatory authority*? Yes ☐ No ☐

Answer "no" if you are not registered with a foreign financial regulatory authority, even if you have an affiliate that is registered with a foreign financial regulatory authority. If "yes," complete Section 1.M. of Schedule D.

N. Are you a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934?

Yes ☐ No ☐

If "yes," provide your CIK number (Central Index Key number that the SEC assigns to each public reporting company): _____

O. Did you have $1 billion or more in assets on the last day of your most recent fiscal year?

Yes ☐ No ☐

P. Provide your *Legal Entity Identifier* if you have one: _____

A *legal entity identifier* is a unique number that companies use to identify each other in the financial marketplace. In the first half of 2011, the *legal entity identifier* standard was still in development. You may not have a *legal entity identifier*.

Item 2

SEC Registration

Responses to this Item help us (and you) determine whether you are eligible to register with the SEC. Complete this Item 2.A. only if you are applying for SEC registration or submitting an *annual updating amendment* to your SEC registration.

A. To register (or remain registered) with the SEC, you must check **at least one** of the Items 2.A.(1) through 2.A.(12), below. If you are submitting an *annual updating amendment* to your SEC registration and you are no longer eligible to register with the SEC, check Item 2.A.(13). Part 1A Instruction 2 provides information to help you determine whether you may affirmatively respond to each of these items.

You (the adviser):

☐ (1) are a **large advisory firm** that either:

(a) has regulatory assets under management of $100 million (in U.S. dollars) or more, or

(b) has regulatory assets under management of $90 million (in U.S. dollars) or more at the time of filing its most recent *annual updating amendment* and is registered with the SEC;

☐ (2) are a **mid-sized advisory firm** that has regulatory assets under management of $25 million (in U.S. dollars) or more but less than $100 million (in U.S. dollars) and you are either:

(a) not required to be registered as an adviser with the *state securities authority* of the state where you maintain your *principal office and place of business*, or

(b) not subject to examination by the *state securities authority* of the state where you maintain your *principal office and place of business*;

*Click **HERE** for a list of states in which an investment adviser, if registered, would not be subject to examination by the state securities authority.*

☐ (3) have your *principal office and place of business* **in Wyoming** (which does not regulate advisers);

☐ (4) have your *principal office and place of business* **outside the United States**;

☐ (5) are **an investment adviser (or sub-adviser) to an investment company** registered under the Investment Company Act of 1940;

☐ (6) are **an investment adviser to a company which has elected to be a business development company** pursuant to section 54 of the Investment Company Act of 1940 and has not withdrawn the election, and you have at least $25 million of regulatory assets under management;

☐ (7) are a **pension consultant** with respect to assets of plans having an aggregate value of at least $200,000,000 that qualifies for the exemption in rule 203A-2(a);

☐ (8) are a **related adviser** under rule 203A-2(b) that *controls,* is *controlled* by, or is under common *control* with, an investment adviser that is registered with the SEC, and your *principal office and place of business* is the same as the registered adviser;

If you check this box, complete Section 2.A.(8) of Schedule D.

☐ (9) are a **newly formed adviser** relying on rule 203A-2(c) because you expect to be eligible for SEC registration within 120 days;

If you check this box, complete Section 2.A.(9) of Schedule D.

☐ (10) are a **multi-state adviser** that is required to register in 15 or more states and is relying on rule 203A-2(d);

If you check this box, complete Section 2.A.(10) of Schedule D.

☐ (11) are an **Internet adviser** relying on rule 203A-2(e);

☐ (12) have **received an SEC order** exempting you from the prohibition against registration with the SEC;

If you check this box, complete Section 2.A.(12) of Schedule D.

☐ (13) are **no longer eligible** to remain registered with the SEC.

SEC Reporting by *Exempt Reporting Advisers*

B. Complete this Item 2.B. only if you are reporting to the SEC as an *exempt reporting adviser.* Check all that apply. You:

☐ (1) qualify for the exemption from registration as an adviser solely to one or more venture capital funds;

☐ (2) qualify for the exemption from registration because you act solely as an adviser to *private funds* and have assets under management in the United States of less than $150 million;

☐ (3) act solely as an adviser to *private funds* but you are no longer eligible to check box 2.B.(2) because you have assets under management in the United States of $150 million or more.

If you check box (2) or (3), complete Section 2.B. of Schedule D.

State Securities Authority Notice Filings and State Reporting by *Exempt Reporting Advisers*

C. Under state laws, SEC-registered advisers may be required to provide to *state securities authorities* a copy of the Form ADV and any amendments they file with the SEC. These are called *notice filings*. In addition, *exempt reporting advisers* may be required to provide *state securities authorities* with a copy of reports and any amendments they file with the SEC. If this is an initial application or report, check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to direct your *notice filings* or reports to additional state(s), check the box(es) next to the state(s) that you would like to receive notice of this and all subsequent filings or reports you submit to the SEC. If this is an amendment to your registration to stop your *notice filings* or reports from going to state(s) that currently receive them, uncheck the box(es) next to those state(s).

☐ AL	☐ CT	☐ HI	☐ KY	☐ MN	☐ NH	☐ OH	☐ SC	☐ VI
☐ AK	☐ DE	☐ ID	☐ LA	☐ MS	☐ NJ	☐ OK	☐ SD	☐ VA
☐ AZ	☐ DC	☐ IL	☐ ME	☐ MO	☐ NM	☐ OR	☐ TN	☐ WA
☐ AR	☐ FL	☐ IN	☐ MD	☐ MT	☐ NY	☐ PA	☐ TX	☐ WV
☐ CA	☐ GA	☐ IA	☐ MA	☐ NE	☐ NC	☐ PR	☐ UT	☐ WI
☐ CO	☐ GU	☐ KS	☐ MI	☐ NV	☐ ND	☐ RI	☐ VT	

If you are amending your registration to stop your notice filings or reports from going to a state that currently receives them and you do not want to pay that state's notice filing or report filing fee for the coming year, your amendment must be filed before the end of the year (December 31).

Item 3 Form of Organization

A. How are you organized?

☐ Corporation ☐ Sole Proprietorship ☐ Limited Liability Partnership (LLP)
☐ Partnership ☐ Limited Liability Company (LLC) ☐ Limited Partnership (LP)
☐ Other (specify):_____

If you are changing your response to this Item, see Part 1A Instruction 4.

B. In what month does your fiscal year end each year? _____

C. Under the laws of what state or country are you organized? _____

If you are a partnership, provide the name of the state or country under whose laws your partnership was formed. If you are a sole proprietor, provide the name of the state or country where you reside.

If you are changing your response to this Item, see Part 1A Instruction 4.

Item 4 Successions

A. Are you, at the time of this filing, succeeding to the business of a registered investment adviser?

☐ Yes ☐ No

If "yes," complete Item 4.B. and Section 4 of Schedule D.

B. Date of Succession: _____
(mm/dd/yyyy)

If you have already reported this succession on a previous Form ADV filing, do not report the succession again. Instead, check "No." See Part 1A Instruction 4.

Item 5 Information About Your Advisory Business

Responses to this Item help us understand your business, assist us in preparing for on-site examinations, and provide us with data we use when making regulatory policy. Part 1A Instruction 5.a. provides additional guidance to newly formed advisers for completing this Item 5.

Employees

If you are organized as a sole proprietorship, include yourself as an employee in your responses to Item 5.A and Items 5.B.(1), (2), (3), (4), and (5). If an employee performs more than one function, you should count that employee in each of your responses to Items 5.B.(1), (2), (3), (4) and (5).

A. Approximately how many *employees* do you have? Include full- and part-time *employees* but do not include any clerical workers.

_____

B.

(1) Approximately how many of the *employees* reported in 5.A. perform investment advisory functions (including research)?

_____

(2) Approximately how many of the *employees* reported in 5.A. are registered representatives of a broker-dealer?

_____

(3) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives*?

_____

(4) Approximately how many of the *employees* reported in 5.A. are registered with one or more *state securities authorities* as *investment adviser representatives* for an investment adviser other than you?

_____

(5) Approximately how many of the *employees* reported in 5.A. are licensed agents of an insurance company or agency?

_____

(6) Approximately how many firms or other *persons* solicit advisory *clients* on your behalf?

_____

In your response to Item 5.B.(6), do not count any of your employees and count a firm only once – do not count each of the firm's employees that solicit on your behalf.

Clients

In your responses to Items 5.C. and 5.D. do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

C. (1) To approximately how many *clients* did you provide investment advisory services during your most recently completed fiscal year?

☐ 0 ☐ 1-10 ☐ 11-25 ☐ 26-100

If more than 100, how many? _____ (round to the nearest 100)

(2) Approximately what percentage of your *clients* are non-*United States persons*? _____%

D. *For purposes of this Item 5.D., the category "individuals" includes trusts, estates, and 401(k) plans and IRAs of individuals and their family members, but does not include businesses organized as sole proprietorships.*
The category "business development companies" consists of companies that have made an election pursuant to section 54 of the Investment Company Act of 1940. Unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, check "None" in response to Item 5.D.(1)(d) and do not check any of the boxes in response to Item 5.D.(2)(d).

(1) What types of *clients* do you have? Indicate the approximate percentage that each type of *client* comprises of your total number of *clients*. If a *client* fits into more than one category, check all that apply.

	None	Up to 10%	11-25%	26-50%	51-75%	76-99%	100%
(a) Individuals (other than *high net worth individuals*)	☐	☐	☐	☐	☐	☐	☐
(b) *High net worth individuals*	☐	☐	☐	☐	☐	☐	☐
(c) Banking or thrift institutions	☐	☐	☐	☐	☐	☐	☐
(d) Investment companies	☐	☐	☐	☐	☐	☐	☐
(e) Business development companies	☐	☐	☐	☐	☐	☐	☐
(f) Pooled investment vehicles (other than investment companies)	☐	☐	☐	☐	☐	☐	☐
(g) Pension and profit sharing plans (but not the plan participants)	☐	☐	☐	☐	☐	☐	☐
(h) Charitable organizations	☐	☐	☐	☐	☐	☐	☐
(i) Corporations or other businesses not listed above	☐	☐	☐	☐	☐	☐	☐
(j) State or municipal *government entities*	☐	☐	☐	☐	☐	☐	☐
(k) Other investment advisers	☐	☐	☐	☐	☐	☐	☐
(l) Insurance companies	☐	☐	☐	☐	☐	☐	☐

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(m) Other: _____ ☐ ☐ ☐ ☐ ☐ ☐ ☐

(2) Indicate the approximate amount of your regulatory assets under management (reported in Item 5.F. below) attributable to each of the following type of *client*. If a *client* fits into more than one category, check all that apply.

	None	Up to 25%	Up to 50%	Up to 75%	>75%
(a) Individuals (other than *high net worth individuals*)	☐	☐	☐	☐	☐
(b) *High net worth individuals*	☐	☐	☐	☐	☐
(c) Banking or thrift institutions	☐	☐	☐	☐	☐
(d) Investment companies	☐	☐	☐	☐	☐
(e) Business development companies	☐	☐	☐	☐	☐
(f) Pooled investment vehicles (other than investment companies)	☐	☐	☐	☐	☐
(g) Pension and profit sharing plans (but not the plan participants)	☐	☐	☐	☐	☐
(h) Charitable organizations	☐	☐	☐	☐	☐
(i) Corporations or other businesses not listed above	☐	☐	☐	☐	☐
(j) State or municipal *government entities*	☐	☐	☐	☐	☐
(k) Other investment advisers	☐	☐	☐	☐	☐
(l) Insurance companies	☐	☐	☐	☐	☐
(m) Other: _____	☐	☐	☐	☐	☐

Compensation Arrangements

E. You are compensated for your investment advisory services by (check all that apply):

☐ (1) A percentage of assets under your management
☐ (2) Hourly charges
☐ (3) Subscription fees (for a newsletter or periodical)
☐ (4) Fixed fees (other than subscription fees)
☐ (5) Commissions
☐ (6) *Performance-based fees*
☐ (7) Other (specify): _____

Regulatory Assets Under Management

F. (1) Do you provide continuous and regular supervisory or management services to securities portfolios? ☐ Yes ☐ No

(2) If yes, what is the amount of your regulatory assets under management and total number of accounts?

	U.S. Dollar Amount	Total Number of Accounts
Discretionary:	(a) $_____.00	(d) _____

Non-Discretionary:	(b) $_____.00	(e) _____
Total:	(c) $_____.00	(f) _____

Part 1A Instruction 5.b. explains how to calculate your regulatory assets under management. You must follow these instructions carefully when completing this Item.

Advisory Activities

G. What type(s) of advisory services do you provide? Check all that apply.

- ☐ (1) Financial planning services
- ☐ (2) Portfolio management for individuals and/or small businesses
- ☐ (3) Portfolio management for investment companies (as well as "business development companies" that have made an election pursuant to section 54 of the Investment Company Act of 1940)
- ☐ (4) Portfolio management for pooled investment vehicles (other than investment companies)
- ☐ (5) Portfolio management for businesses (other than small businesses) or institutional *clients* (other than registered investment companies and other pooled investment vehicles)
- ☐ (6) Pension consulting services
- ☐ (7) Selection of other advisers (including *private fund* managers)
- ☐ (8) Publication of periodicals or newsletters
- ☐ (9) Security ratings or pricing services
- ☐ (10) Market timing services
- ☐ (11) Educational seminars/workshops
- ☐ (12) Other (specify): _____

Do not check Item 5.G.(3) unless you provide advisory services pursuant to an investment advisory contract to an investment company registered under the Investment Company Act of 1940, including as a subadviser. If you check Item 5.G.(3), report the 811 or 814 number of the investment company or investment companies to which you provide advice in Section 5.G. of Schedule D.

H. If you provide financial planning services, to how many *clients* did you provide these services during your last fiscal year?

☐ 0 ☐ 1-10 ☐ 11-25 ☐ 26-50 ☐ 51-100 ☐ 101-250 ☐ 251 – 500
☐ More than 500 If more than 500, how many? _____ (round to the nearest 500)

In your responses to this Item 5.H., do not include as "clients" the investors in a private fund you advise, unless you have a separate advisory relationship with those investors.

I. If you participate in a *wrap fee program*, do you (check all that apply):

- ☐ (1) *sponsor* the *wrap fee program*?
- ☐ (2) act as a portfolio manager for the *wrap fee program*?

If you are a portfolio manager for a wrap fee program, list the names of the programs and their sponsors in Section 5.I.(2) of Schedule D.

If your involvement in a wrap fee program is limited to recommending wrap fee programs to your clients, or you advise a mutual fund that is offered through a wrap fee program, do not check either Item 5.I.(1) or 5.I(2).

J. In response to Item 4.B. of Part 2A of Form ADV, do you indicate that you provide investment advice only with respect to limited types of investments? ☐ Yes ☐ No

Item 6 Other Business Activities

In this Item, we request information about your firm's other business activities.

A. You are actively engaged in business as a (check all that apply):

☐ (1) broker-dealer (registered or unregistered)
☐ (2) registered representative of a broker-dealer
☐ (3) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
☐ (4) futures commission merchant
☐ (5) real estate broker, dealer, or agent
☐ (6) insurance broker or agent
☐ (7) bank (including a separately identifiable department or division of a bank)
☐ (8) trust company
☐ (9) registered municipal advisor
☐ (10) registered security-based swap dealer
☐ (11) major security-based swap participant
☐ (12) accountant or accounting firm
☐ (13) lawyer or law firm
☐ (14) other financial product salesperson (specify): _____

If you engage in other business using a name that is different from the names reported in Items 1.A. or 1.B, complete Section 6.A. of Schedule D.

B. (1) Are you actively engaged in any other business not listed in Item 6.A. (other than giving investment advice)? ☐ Yes ☐ No

(2) If yes, is this other business your primary business? ☐ Yes ☐ No

If "yes," describe this other business on Section 6.B.(2) of Schedule D, and if you engage in this business under a different name, provide that name.

(3) Do you sell products or provide services other than investment advice to your advisory *clients*? ☐ Yes ☐ No

If "yes," describe this other business on Section 6.B.(3) of Schedule D, and if you engage in this business under a different name, provide that name.

Item 7 Financial Industry Affiliations and *Private Fund* Reporting

In this Item, we request information about your financial industry affiliations and activities. This information identifies areas in which conflicts of interest may occur between you and your *clients*.

A. This part of Item 7 requires you to provide information about you and your *related persons*, including foreign affiliates. Your *related persons* are all of your *advisory affiliates* and any *person* that is under common *control* with you.

You have a *related person* that is a (check all that apply):

☐ (1) broker-dealer, municipal securities dealer, or government securities broker or dealer (registered

or unregistered)

- ☐ (2) other investment adviser (including financial planners)
- ☐ (3) registered municipal advisor
- ☐ (4) registered security-based swap dealer
- ☐ (5) major security-based swap participant
- ☐ (6) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (7) futures commission merchant
- ☐ (8) banking or thrift institution
- ☐ (9) trust company
- ☐ (10) accountant or accounting firm
- ☐ (11) lawyer or law firm
- ☐ (12) insurance company or agency
- ☐ (13) pension consultant
- ☐ (14) real estate broker or dealer
- ☐ (15) sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
- ☐ (16) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

For each related person, including foreign affiliates that may not be registered or required to be registered in the United States, complete Section 7.A. of Schedule D.

You do not need to complete Section 7.A. of Schedule D for any related person if: (1) you have no business dealings with the related person in connection with advisory services you provide to your clients; (2) you do not conduct shared operations with the related person; (3) you do not refer clients or business to the related person, and the related person does not refer prospective clients or business to you; (4) you do not share supervised persons or premises with the related person; and (5) you have no reason to believe that your relationship with the related person otherwise creates a conflict of interest with your clients.

You must complete Section 7.A. of Schedule D for each related person acting as qualified custodian in connection with advisory services you provide to your clients (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)), regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

B. Are you an adviser to any *private fund*? ☐ Yes ☐ No

If "yes," then for each private fund that you advise, you must complete a Section 7.B.(1) of Schedule D, except in certain circumstances described in the next sentence and in Instruction 6 of the Instructions to Part 1A. If another adviser reports this information with respect to any such private fund in Section 7.B.(1) of Schedule D of its Form ADV (e.g., if you are a subadviser), do not complete Section 7.B.(1) of Schedule D with respect to that private fund. You must, instead, complete Section 7.B.(2) of Schedule D.

In either case, if you seek to preserve the anonymity of a private fund client by maintaining its identity in your books and records in numerical or alphabetical code, or similar designation, pursuant to rule 204-2(d), you may identify the private fund in Section 7.B.(1) or 7.B.(2) of Schedule D using the same code or designation in place of the fund's name.

Item 8 Participation or Interest in *Client* Transactions

In this Item, we request information about your participation and interest in your *clients'* transactions. This information identifies additional areas in which conflicts of interest may occur between you and your *clients*.

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Like Item 7, Item 8 requires you to provide information about you and your *related persons*, including foreign affiliates.

Proprietary Interest in *Client* Transactions

A. Do you or any *related person*:	Yes	No
(1) buy securities for yourself from advisory *clients*, or sell securities you own to advisory *clients* (principal transactions)?	☐	☐
(2) buy or sell for yourself securities (other than shares of mutual funds) that you also recommend to advisory *clients*?	☐	☐
(3) recommend securities (or other investment products) to advisory *clients* in which you or any *related person* has some other proprietary (ownership) interest (other than those mentioned in Items 8.A.(1) or (2))?	☐	☐

Sales Interest in *Client* Transactions

B. Do you or any *related person*:	Yes	No
(1) as a broker-dealer or registered representative of a broker-dealer, execute securities trades for brokerage customers in which advisory *client* securities are sold to or bought from the brokerage customer (agency cross transactions)?	☐	☐
(2) recommend purchase of securities to advisory *clients* for which you or any *related person* serves as underwriter, general or managing partner, or purchaser representative?	☐	☐
(3) recommend purchase or sale of securities to advisory *clients* for which you or any *related person* has any other sales interest (other than the receipt of sales commissions as a broker or registered representative of a broker-dealer)?	☐	☐

Investment or Brokerage Discretion

C. Do you or any *related person* have *discretionary authority* to determine the:	Yes	No
(1) securities to be bought or sold for a *client's* account?	☐	☐
(2) amount of securities to be bought or sold for a *client's* account?	☐	☐
(3) broker or dealer to be used for a purchase or sale of securities for a *client's* account?	☐	☐
(4) commission rates to be paid to a broker or dealer for a *client's* securities transactions?	☐	☐

	Yes	No
D. If you answer "yes" to C.(3) above, are any of the brokers or dealers *related persons*?	☐	☐
E. Do you or any *related person* recommend brokers or dealers to *clients*?	☐	☐

F. If you answer "yes" to E above, are any of the brokers or dealers *related persons*? ☐ ☐

G. (1) Do you or any *related person* receive research or other products or services other than execution from a broker-dealer or a third party ("soft dollar benefits") in connection with *client* securities transactions? ☐ ☐

(2) If "yes" to G.(1) above, are all the "soft dollar benefits" you or any *related persons* receive eligible "research or brokerage services" under section 28(e) of the Securities Exchange Act of 1934? ☐ ☐

H. Do you or any *related person*, directly or indirectly, compensate any *person* for *client* referrals? ☐ ☐

I. Do you or any *related person*, directly or indirectly, receive compensation from any *person* for *client* referrals? ☐ ☐

In responding to Items 8.H and 8.I., consider all cash and non-cash compensation that you or a related person gave to (in answering Item 8.H) or received from (in answering Item 8.I) any person in exchange for client referrals, including any bonus that is based, at least in part, on the number or amount of client referrals.

Item 9 Custody

In this Item, we ask you whether you or a *related person* has *custody* of *client* (other than *clients* that are investment companies registered under the Investment Company Act of 1940) assets and about your custodial practices.

A. (1) Do you have *custody* of any advisory *clients'*:	Yes	No
(a) cash or bank accounts?	☐	☐
(b) securities?	☐	☐

If you are registering or registered with the SEC, answer "No" to Item 9.A.(1)(a) and (b) if you have custody solely because (i) you deduct your advisory fees directly from your clients' accounts, or (ii) a related person has custody of client assets in connection with advisory services you provide to clients, but you have overcome the presumption that you are not operationally independent (pursuant to Advisers Act rule 206(4)-(2)(d)(5)) from the related person.

(2) If you checked "yes" to Item 9.A.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which you have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $_____	(b) _____

If you are registering or registered with the SEC and you have custody solely because you deduct your advisory fees directly from your clients' accounts, do not include the amount of those assets and the number of those clients in your response to Item 9.A.(2). If your related person has custody of client assets in connection with advisory services you provide to clients, do not include the amount of those assets and the number of those clients in your response to Item 9.A.(2). Instead, include that information in your response to Item 9.B.(2).

FORM ADV Part 1A Page 15 of 19	Your Name_____ *CRD* Number_____ Date_____ SEC 801- or 802 Number_____

B. (1) In connection with advisory services you provide to *clients*, do any of your *related persons* have *custody* of any of your advisory *clients'*:

	Yes	No
(a) cash or bank accounts?	☐	☐
(b) securities?	☐	☐

You are required to answer this item regardless of how you answered Item 9.A.(1)(a) or (b).

(2) If you checked "yes" to Item 9.B.(1)(a) or (b), what is the approximate amount of *client* funds and securities and total number of *clients* for which your *related persons* have *custody*:

U.S. Dollar Amount	Total Number of *Clients*
(a) $_____	(b) _____

C. If you or your *related persons* have *custody* of *client* funds or securities in connection with advisory services you provide to *clients*, check all the following that apply:

☐ (1) A qualified custodian(s) sends account statements at least quarterly to the investors in the pooled investment vehicle(s) you manage.

☐ (2) An *independent public accountant* audits annually the pooled investment vehicle(s) that you manage and the audited financial statements are distributed to the investors in the pools.

☐ (3) An *independent public accountant* conducts an annual surprise examination of *client* funds and securities.

☐ (4) An *independent public accountant* prepares an internal control report with respect to custodial services when you or your *related persons* are qualified custodians for *client* funds and securities.

If you checked Item 9.C.(2), C.(3) or C.(4), list in Section 9.C. of Schedule D the accountants that are engaged to perform the audit or examination or prepare an internal control report. (If you checked Item 9.C.(2), you do not have to list auditor information in Section 9.C. of Schedule D if you already provided this information with respect to the private funds you advise in Section 7.B.(1) of Schedule D).

D. Do you or your *related person(s)* act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*?

	Yes	No
(1) you act as a qualified custodian	☐	☐
(2) your *related person(s)* act as qualified custodian(s)	☐	☐

If you checked "yes" to Item 9.D.(2), all related persons that act as qualified custodians (other than any mutual fund transfer agent pursuant to rule 206(4)-2(b)(1)) must be identified in Section 7.A. of Schedule D, regardless of whether you have determined the related person to be operationally independent under rule 206(4)-2 of the Advisers Act.

E. If you are filing your *annual updating amendment* and you were subject to a surprise examination by an *independent public accountant* during your last fiscal year, provide the date (MM/YYYY) the examination commenced: _____

F. If you or your *related persons* have *custody* of *client* funds or securities, how many *persons*, including, but not limited to, you and your *related persons*, act as qualified custodians for your *clients* in connection with advisory services you provide to *clients*? _____

Item 10 Control Persons

In this Item, we ask you to identify every *person* that, directly or indirectly, *controls* you.

If you are submitting an initial application or report, you must complete Schedule A and Schedule B. Schedule A asks for information about your direct owners and executive officers. Schedule B asks for information about your indirect owners. If this is an amendment and you are updating information you reported on either Schedule A or Schedule B (or both) that you filed with your initial application or report, you must complete Schedule C.

A. Does any *person* not named in Item 1.A. or Schedules A, B, or C, directly or indirectly, *control* your management or policies? ☐ Yes ☐ No

If yes, complete Section 10.A. of Schedule D.

B. If any *person* named in Schedules A, B, or C or in Section 10.A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934, please complete Section 10.B. of Schedule D.

Item 11 Disclosure Information

In this Item, we ask for information about your disciplinary history and the disciplinary history of all your *advisory affiliates*. We use this information to determine whether to grant your application for registration, to decide whether to revoke your registration or to place limitations on your activities as an investment adviser, and to identify potential problem areas to focus on during our on-site examinations. One event may result in "yes" answers to more than one of the questions below.

Your *advisory affiliates* are: (1) all of your current *employees* (other than *employees* performing only clerical, administrative, support or similar functions); (2) all of your officers, partners, or directors (or any *person* performing similar functions); and (3) all *persons* directly or indirectly *controlling* you or *controlled* by you. If you are a "separately identifiable department or division" (SID) of a bank, see the Glossary of Terms to determine who your *advisory affiliates* are.

If you are registered or registering with the SEC or if you are an exempt reporting adviser, you may limit your disclosure of any event listed in Item 11 to ten years following the date of the event. If you are registered or registering with a state, you must respond to the questions as posed; you may, therefore, limit your disclosure to ten years following the date of an event only in responding to Items 11.A.(1), 11.A.(2), 11.B.(1), 11.B.(2), 11.D.(4), and 11.H(1)(a). For purposes of calculating this ten-year period, the date of an event is the date the final order, judgment, or decree was entered, or the date any rights of appeal from preliminary orders, judgments, or decrees lapsed.

You must complete the appropriate Disclosure Reporting Page ("DRP") for "yes" answers to the questions in this Item 11.

	Yes	No
Do any of the events below involve you or any of your *supervised persons?*	☐	☐

FORM ADV Part 1A Page 17 of 19	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

For "yes" answers to the following questions, complete a Criminal Action DRP:

	Yes	No
A. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*?	☐	☐
(2) been *charged* with any *felony*?	☐	☐

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.A.(2) to charges that are currently pending.

B. In the past ten years, have you or any *advisory affiliate*:		
(1) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to a *misdemeanor* involving: investments or an *investment-related* business, or any fraud, false statements, or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	☐	☐
(2) been *charged* with a *misdemeanor* listed in Item 11.B.(1)?	☐	☐

If you are registered or registering with the SEC, or if you are reporting as an exempt reporting adviser, you may limit your response to Item 11.B.(2) to charges that are currently pending.

For "yes" answers to the following questions, complete a Regulatory Action DRP:

	Yes	No
C. Has the SEC or the Commodity Futures Trading Commission (CFTC) ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	☐	☐
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of SEC or CFTC regulations or statutes?	☐	☐
(3) *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) entered an *order* against you or any *advisory affiliate* in connection with *investment-related* activity?	☐	☐
(5) imposed a civil money penalty on you or any *advisory affiliate*, or *ordered* you or any *advisory affiliate* to cease and desist from any activity?	☐	☐
D. Has any other federal regulatory agency, any state regulatory agency, or any *foreign financial regulatory authority*:		
(1) ever *found* you or any *advisory affiliate* to have made a false statement or omission, or been dishonest, unfair, or unethical?	☐	☐
(2) ever *found* you or any *advisory affiliate* to have been *involved* in a violation of *investment-related* regulations or statutes?	☐	☐

	Yes	No
(3) ever *found* you or any *advisory affiliate* to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) in the past ten years, entered an *order* against you or any *advisory affiliate* in connection with an *investment-related* activity?	☐	☐
(5) ever denied, suspended, or revoked your or any *advisory affiliate's* registration or license, or otherwise prevented you or any *advisory affiliate*, by *order*, from associating with an *investment-related* business or restricted your or any *advisory affiliate's* activity?	☐	☐
E. Has any *self-regulatory organization* or commodities exchange ever:		
(1) *found* you or any *advisory affiliate* to have made a false statement or omission?	☐	☐
(2) *found* you or any *advisory affiliate* to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the SEC)?	☐	☐
(3) *found* you or any *advisory affiliate* to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☐
(4) disciplined you or any *advisory affiliate* by expelling or suspending you or the *advisory affiliate* from membership, barring or suspending you or the *advisory affiliate* from association with other members, or otherwise restricting your or the *advisory affiliate's* activities?	☐	☐
F. Has an authorization to act as an attorney, accountant, or federal contractor granted to you or any *advisory affiliate* ever been revoked or suspended?	☐	☐
G. Are you or any *advisory affiliate* now the subject of any regulatory *proceeding* that could result in a "yes" answer to any part of Item 11.C., 11.D., or 11.E.?	☐	☐

For "yes" answers to the following questions, complete a Civil Judicial Action DRP:

	Yes	No
H. (1) Has any domestic or foreign court:		
(a) in the past ten years, *enjoined* you or any *advisory affiliate* in connection with any *investment-related* activity?	☐	☐
(b) ever *found* that you or any *advisory affiliate* were *involved* in a violation of *investment-related* statutes or regulations?	☐	☐
(c) ever dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you or any *advisory affiliate* by a state or *foreign financial regulatory authority*?	☐	☐

(2) Are you or any *advisory affiliate* now the subject of any civil *proceeding* that could result in a "yes" answer to any part of Item 11.H(1)? ☐ ☐

Item 12 Small Businesses

The SEC is required by the Regulatory Flexibility Act to consider the effect of its regulations on small entities. In order to do this, we need to determine whether you meet the definition of "small business" or "small organization" under rule 0-7.

Answer this Item 12 only if you are registered or registering with the SEC and you indicated in response to Item 5.F.(2)(c) that you have regulatory assets under management of less than $25 million. You are not required to answer this Item 12 if you are filing for initial registration as a state adviser, amending a current state registration, or switching from SEC to state registration.

For purposes of this Item 12 only:

- Total Assets refers to the total assets of a firm, rather than the assets managed on behalf of *clients*. In determining your or another *person's* total assets, you may use the total assets shown on a current balance sheet (but use total assets reported on a consolidated balance sheet with subsidiaries included, if that amount is larger).

- *Control* means the power to direct or cause the direction of the management or policies of a *person*, whether through ownership of securities, by contract, or otherwise. Any *person* that directly or indirectly has the right to vote 25 percent or more of the voting securities, or is entitled to 25 percent or more of the profits, of another *person* is presumed to *control* the other *person*.

	Yes	No
A. Did you have total assets of $5 million or more on the last day of your most recent fiscal year?	☐	☐

If "yes," you do not need to answer Items 12.B. and 12.C.

B. Do you:

(1) *control* another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) $25 million or more on the last day of its most recent fiscal year?	☐	☐
(2) *control* another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	☐	☐

C. Are you:

(1) *controlled* by or under common *control* with another investment adviser that had regulatory assets under management (calculated in response to Item 5.F.(2)(c) of Form ADV) of $25 million or more on the last day of its most recent fiscal year?	☐	☐
(2) *controlled* by or under common *control* with another *person* (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year?	☐	☐

FORM ADV Schedule A	Your Name_____ Date_____	SEC File No._____ *CRD* No._____

Direct Owners and Executive Officers

1. Complete Schedule A only if you are submitting an initial application or report. Schedule A asks for information about your direct owners and executive officers. Use Schedule C to amend this information.

2. Direct Owners and Executive Officers. List below the names of:

   (a) each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Legal Officer, Chief Compliance Officer (Chief Compliance Officer is required if you are registered or applying for registration and cannot be more than one individual), director and any other individuals with similar status or functions;

   (b) if you are organized as a corporation, each shareholder that is a direct owner of 5% or more of a class of your voting securities, unless you are a public reporting company (a company subject to Section 12 or 15(d) of the Exchange Act);

   Direct owners include any *person* that owns, beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 5% or more of a class of your voting securities. For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

   (c) if you are organized as a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 5% or more of your capital;

   (d) in the case of a trust that directly owns 5% or more of a class of your voting securities, or that has the right to receive upon dissolution, or has contributed, 5% or more of your capital, the trust and each trustee; and

   (e) if you are organized as a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 5% or more of your capital, and (ii) if managed by elected managers, all elected managers.

3. Do you have any indirect owners to be reported on Schedule B? ☐ Yes ☐ No

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner or executive officer is an individual.

5. Complete the Title or Status column by entering board/management titles; status as partner, trustee, sole proprietor, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are:

NA - less than 5%	B - 10% but less than 25%	D - 50% but less than 75%
A - 5% but less than 10%	C - 25% but less than 50%	E - 75% or more

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.
   (b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.
   (c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Title or Status	Date Title or Status Acquired MM YYYY	Ownership Code	*Control Person* PR	*CRD* No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.

FORM ADV Schedule B	Your Name_____ Date_____	SEC File No._____ *CRD* No._____

Indirect Owners

1. Complete Schedule B only if you are submitting an initial application or report. Schedule B asks for information about your indirect owners; you must first complete Schedule A, which asks for information about your direct owners. Use Schedule C to amend this information.

2. Indirect Owners. With respect to each owner listed on Schedule A (except individual owners), list below:

   (a) in the case of an owner that is a corporation, each of its shareholders that beneficially owns, has the right to vote, or has the power to sell or direct the sale of, 25% or more of a class of a voting security of that corporation;

   For purposes of this Schedule, a *person* beneficially owns any securities: (i) owned by his/her child, stepchild, grandchild, parent, stepparent, grandparent, spouse, sibling, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, sharing the same residence; or (ii) that he/she has the right to acquire, within 60 days, through the exercise of any option, warrant, or right to purchase the security.

   (b) in the case of an owner that is a partnership, all general partners and those limited and special partners that have the right to receive upon dissolution, or have contributed, 25% or more of the partnership's capital;

   (c) in the case of an owner that is a trust, the trust and each trustee; and

   (d) in the case of an owner that is a limited liability company ("LLC"), (i) those members that have the right to receive upon dissolution, or have contributed, 25% or more of the LLC's capital, and (ii) if managed by elected managers, all elected managers.

3. Continue up the chain of ownership listing all 25% owners at each level. Once a public reporting company (a company subject to Sections 12 or 15(d) of the Exchange Act) is reached, no further ownership information need be given.

4. In the DE/FE/I column below, enter "DE" if the owner is a domestic entity, "FE" if the owner is an entity incorporated or domiciled in a foreign country, or "I" if the owner is an individual.

5. Complete the Status column by entering the owner's status as partner, trustee, elected manager, shareholder, or member; and for shareholders or members, the class of securities owned (if more than one is issued).

6. Ownership codes are: C - 25% but less than 50% D - 50% but less than 75% E - 75% or more F - Other (general partner, trustee, or elected manager)

7. (a) In the *Control Person* column, enter "Yes" if the *person* has *control* as defined in the Glossary of Terms to Form ADV, and enter "No" if the *person* does not have *control*. Note that under this definition, most executive officers and all 25% owners, general partners, elected managers, and trustees are *control persons*.
   (b) In the PR column, enter "PR" if the owner is a public reporting company under Sections 12 or 15(d) of the Exchange Act.
   (c) Complete each column.

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Entity in Which Interest is Owned	Status	Date Status Acquired MM	Date Status Acquired YYYY	Ownership Code	Control Person	PR	CRD No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.

FORM ADV Schedule C	Your Name_____ Date_____	SEC File No._____ *CRD* No._____

Amendments to Schedules A and B

1. Use Schedule C only to amend information requested on either Schedule A or Schedule B. Refer to Schedule A and Schedule B for specific instructions for completing this Schedule C. Complete each column.

2. In the Type of Amendment column, indicate "A" (addition), "D" (deletion), or "C" (change in information about the same *person*).

3. Ownership codes are:
   NA - less than 5%
   A - 5% but less than 10%
   B - 10% but less than 25%
   C - 25% but less than 50%
   D - 50% but less than 75%
   E - 75% or more
   G - Other (general partner, trustee, or elected member)

4. List below all changes to Schedule A (Direct Owners and Executive Officers):

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Type of Amendment	Title or Status	Date Title or Status Acquired MM/YYYY	Ownership Code	Control Person	PR	CRD No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.

5. List below all changes to Schedule B (Indirect Owners):

FULL LEGAL NAME (Individuals: Last Name, First Name, Middle Name)	DE/FE/I	Type of Amendment	Title or Status	Date Title or Status Acquired MM/YYYY	Ownership Code	Control Person	PR	CRD No. If None: S.S. No. and Date of Birth, IRS Tax No. or Employer ID No.

FORM ADV Schedule D Page 1 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 1.B. Other Business Names

List your other business names and the jurisdictions in which you use them. You must complete a separate Schedule D Section 1.B. for each business name.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name _____ Jurisdictions _____

SECTION 1.F. Other Offices

Complete the following information for each office, other than your *principal office and place of business*, at which you conduct investment advisory business. You must complete a separate Schedule D Section 1.F. for each location. If you are applying for SEC registration, if you are registered only with the SEC, or if you are an *exempt reporting adviser*, list only the largest five offices (in terms of numbers of *employees*).

Check only one box: ☐ Add ☐ Delete

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

_____ _____
(area code) (telephone number) (area code) (facsimile number)

SECTION 1.I. Website Addresses

List your website addresses. You must complete a separate Schedule D Section 1.I. for each website address.

Check only one box: ☐ Add ☐ Delete

Website Address: _____

SECTION 1.L. Location of Books and Records

Complete the following information for each location at which you keep your books and records, other than your *principal office and place of business*. You must complete a separate Schedule D Section 1.L. for each location.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name of entity where books and records are kept: _____

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

_____ _____
(area code) (telephone number) (area code) (facsimile number)

This is (check one): ☐ one of your branch offices or affiliates.
☐ a third-party unaffiliated recordkeeper.
☐ other.

Briefly describe the books and records kept at this location. _____

_____

FORM ADV Schedule D Page 2 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 1.M. Registration with *Foreign Financial Regulatory Authorities*

List the name and country, in English, of each *foreign financial regulatory authority* with which you are registered. You must complete a separate Schedule D Section 1.M. for each *foreign financial regulatory authority* with whom you are registered.

Check only one box: ☐ Add ☐ Delete

Name of *Foreign Financial Regulatory Authority* _____
Name of Country _____

SECTION 2.A.(8) Related Adviser

If you are relying on the exemption in rule 203A-2(b) from the prohibition on registration because you *control*, are *controlled* by, or are under common *control* with an investment adviser that is registered with the SEC and your *principal office and place of business* is the same as that of the registered adviser, provide the following information:

Name of Registered Investment Adviser _____
CRD Number of Registered Investment Adviser _____
SEC Number of Registered Investment Adviser 801-_____

SECTION 2.A.(9) Newly Formed Adviser

If you are relying on rule 203A-2(c), the newly formed adviser exemption from the prohibition on registration, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations. You must make both of these representations:

☐ I am not registered or required to be registered with the SEC or a *state securities authority* and I have a reasonable expectation that I will be eligible to register with the SEC within 120 days after the date my registration with the SEC becomes effective.

☐ I undertake to withdraw from SEC registration if, on the 120th day after my registration with the SEC becomes effective, I would be prohibited by Section 203A(a) of the Advisers Act from registering with the SEC.

SECTION 2.A.(10) Multi-State Adviser

If you are relying on rule 203A-2(d), the multi-state adviser exemption from the prohibition on registration, you are required to make certain representations about your eligibility for SEC registration. By checking the appropriate boxes, you will be deemed to have made the required representations.

If you are applying for registration as an investment adviser with the SEC, you must make both of these representations:

☐ I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of 15 or more states to register as an investment adviser with the *state securities authorities* in those states.

☐ I undertake to withdraw from SEC registration if I file an amendment to this registration indicating that I would be required by the laws of fewer than 15 states to register as an investment adviser with the *state securities authorities* of those states.

If you are submitting your *annual updating amendment*, you must make this representation:

☐ Within 90 days prior to the date of filing this amendment, I have reviewed the applicable state and federal laws and have concluded that I am required by the laws of at least 15 states to register as an investment adviser with the *state securities authorities* in those states.

FORM ADV Schedule D Page 3 of 13	Your Name_____ *CRD* Number_____ Date_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 2.A.(12) SEC Exemptive *Order*

If you are relying upon an SEC *order* exempting you from the prohibition on registration, provide the following information:

Application Number: 803-_____ Date of *order*: _____ (mm/dd/yyyy)

SECTION 2.B. *Private Fund* Assets

If you check Item 2.B.(2) or (3), what is the amount of the *private fund* assets that you manage? _____.

NOTE: "*Private fund* assets" has the same meaning here as it has under rule 203(m)-1. If you are an investment adviser with its *principal office and place of business* outside of the United States only include *private fund* assets that you manage at a place of business in the United States.

SECTION 4 Successions

Complete the following information if you are succeeding to the business of a currently registered investment adviser. If you acquired more than one firm in the succession you are reporting on this Form ADV, you must complete a separate Schedule D Section 4 for each acquired firm. See Part 1A Instruction 4.

Name of Acquired Firm _____

Acquired Firm's SEC File No. (if any) 801- _____ Acquired Firm's *CRD* Number (if any) _____

SECTION 5.G.(3) Advisers to Registered Investment Companies and Business Development Companies

If you check Item 5.G (3), what is the SEC file number (811 or 814 number) of each of the registered investment companies and business development companies to which you act as an adviser pursuant to an advisory contract? You must complete a separate Schedule D Section 5.G.(3) for each registered investment company and business development company to which you act as an adviser.

Check only one box: ☐ Add ☐ Delete

SEC File Number 811- or 814-_____

SECTION 5.I.(2) *Wrap Fee Programs*

If you are a portfolio manager for one or more *wrap fee programs*, list the name of each program and its *sponsor*. You must complete a separate Schedule D Section 5.I.(2) for each *wrap fee program* for which you are a portfolio manager.

Check only one box: ☐ Add ☐ Delete ☐ Amend

Name of *Wrap Fee Program* _____

Name of *Sponsor* _____

FORM ADV Schedule D Page 4 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

SECTION 6.A. Names of Your Other Businesses

If you are actively engaged in other business using a different name, provide that name and the other line(s) of business.

☐ Add ☐ Delete ☐ Amend

Other Business Name: _____

Other line(s) of business in which you engage using this name: (check all that apply)

- ☐ (1) broker-dealer (registered or unregistered)
- ☐ (2) registered representative of a broker-dealer
- ☐ (3) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
- ☐ (4) futures commission merchant
- ☐ (5) real estate broker, dealer, or agent
- ☐ (6) insurance broker or agent
- ☐ (7) bank (including a separately identifiable department or division of a bank)
- ☐ (8) trust company
- ☐ (9) registered municipal advisor
- ☐ (10) registered security-based swap dealer
- ☐ (11) major security-based swap participant
- ☐ (12) accountant or accounting firm
- ☐ (13) lawyer or law firm
- ☐ (14) other financial product salesperson (specify): _____

SECTION 6.B.(2) Description of Primary Business

Describe your primary business (not your investment advisory business):

_____

_____

_____

If you engage in that business under a different name, provide that name:

_____

_____

_____

SECTION 6.B.(3) Description of Other Products and Services

Describe other products or services you sell to your client. You may omit products and services that you listed in Section 6.B.2. above.

_____

_____

_____

If you engage in that business under a different name, provide that name:

_____

_____

_____

SECTION 7.A. Financial Industry Affiliations

Complete a separate Schedule D Section 7.A. for each *related person* listed in Item 7.A.

Check only one box: ☐ Add ☐ Delete ☐ Amend

FORM ADV Schedule D Page 5 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

1. Legal Name of *Related Person*: _____
2. Primary Business Name of *Related Person*: _____
3. *Related Person*'s SEC File Number (if any) (*e.g.*, 801-, 8-, 866-, 802-) _____
4. *Related Person's CRD* Number (if any): _____
5. *Related Person* is: (check all that apply)

   ☐ (a) broker-dealer, municipal securities dealer, or government securities broker or dealer
   ☐ (b) other investment adviser (including financial planners)
   ☐ (c) registered municipal advisor
   ☐ (d) registered security-based swap dealer
   ☐ (e) major security-based swap participant
   ☐ (f) commodity pool operator or commodity trading advisor (whether registered or exempt from registration)
   ☐ (g) futures commission merchant
   ☐ (h) banking or thrift institution
   ☐ (i) trust company
   ☐ (j) accountant or accounting firm
   ☐ (k) lawyer or law firm
   ☐ (l) insurance company or agency
   ☐ (m) pension consultant
   ☐ (n) real estate broker or dealer
   ☐ (o) sponsor or syndicator of limited partnerships (or equivalent), excluding pooled investment vehicles
   ☐ (p) sponsor, general partner, managing member (or equivalent) of pooled investment vehicles

6. Do you *control* or are you *controlled* by the *related person*? ☐ Yes ☐ No
7. Are you and the *related person* under common *control*? ☐ Yes ☐ No
8. (a) Does the *related person* act as a qualified custodian for your *clients* in connection with advisory services you provide to *clients*? ☐ Yes ☐ No

   (b) If you are registering or registered with the SEC and you have answered "yes" to question 8.(a) above, have you overcome the presumption that you are not operationally independent (pursuant to rule 206(4)-(2)(d)(5)) from the *related person* and thus are not required to obtain a surprise examination for your *clients'* funds or securities that are maintained at the *related person*? ☐ Yes ☐ No

   (c) If you have answered "yes" to question 8.(a) above, provide the location of the *related person*'s office responsible for *custody* of your *clients'* assets:

   _____
   (number and street)

   _____
   (city) (state/country) (zip+4/postal code)

9. (a) If the *related person* is an investment adviser, is it exempt from registration? ☐ Yes ☐ No

   (b) If the answer is yes, under what exemption? _____

10. (a) Is the *related person* registered with a *foreign financial regulatory authority?* ☐ Yes ☐ No

    (b) If the answer is yes, list the name and country, in English, of each *foreign financial regulatory authority* with which the *related person* is registered. _____

11. Do you and the *related person* share any *supervised persons*? ☐ Yes ☐ No

FORM ADV Schedule D Page 6 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

12. Do you and the *related person* share the same physical location? ☐ Yes ☐ No

SECTION 7.B.(1) *Private Fund* Reporting

Check only one box: ☐ Add ☐ Delete ☐ Amend

A. PRIVATE FUND

Information About the *Private Fund*

1. (a) Name of the *private fund*: _____

   (b) *Private fund* identification number: _____

2. Under the laws of what state or country is the *private fund* organized: _____

3. Name(s) of General Partner, Manager, Trustee, or Directors (or persons serving in a similar capacity):

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   _____

4. The *private fund* (check all that apply; you must check at least one):

   ☐ (1) qualifies for the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act of 1940

   ☐ (2) qualifies for the exclusion from the definition of investment company under section 3(c)(7) of the Investment Company Act of 1940

5. List the name and country, in English, of each *foreign financial regulatory authority* with which the *private fund* is registered.

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   English Name of *Foreign Financial Regulatory Authority* _____ Name of Country _____

6. (a) Is this a "master fund" in a master-feeder arrangement? ☐ Yes ☐ No

   (b) If yes, what is the name and *private fund* identification number (if any) of the feeder funds investing in this *private fund*?

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   _____ _____

   (c) Is this a "feeder fund" in a master-feeder arrangement? ☐ Yes ☐ No

   (d) If yes, what is the name and *private fund* identification number (if any) of the master fund in which this *private fund* invests?

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   _____ _____

   NOTE: You must complete question 6 for each master-feeder arrangement regardless of whether you are filing a single Schedule D, Section 7.B.(1) for the master-feeder arrangement or reporting on the funds separately.

FORM ADV Schedule D Page 7 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

7. If you are filing a single Schedule D, Section 7.B.(1) for a master-feeder arrangement according to the instructions to this Section 7.B.(1), for each of the feeder funds answer the following questions:

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   (a) Name of the *private fund*: _____

   (b) *Private fund* identification number: _____

   (c) Under the laws of what state or country is the *private fund* organized: _____

   (d) Name(s) of General Partner, Manager, Trustee, or Directors (or persons serving in a similar capacity):

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   _____

   (e) The *private fund* (check all that apply; you must check at least one):

   ☐ (1) qualifies for the exclusion from the definition of investment company under section 3(c)(1) of the Investment Company Act of 1940

   ☐ (2) qualifies for the exclusion from the definition of investment company under section 3(c)(7) of the Investment Company Act of 1940

   (f) List the name and country, in English, of each *foreign financial regulatory authority* with which the *private fund* is registered.

   Check only one box: ☐ Add ☐ Delete ☐ Amend

   English Name of *Foreign Financial Regulatory Authority* _____ Name of Country _____

   NOTE: For purposes of questions 6 and 7, in a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund"). A fund would also be a "feeder fund" investing in a "master fund" for purposes of this question if it issued multiple classes (or series) of shares or interests, and each class (or series) invests substantially all of its assets in a single master fund.

8. (a) Is this *private fund* a "fund of funds"? ☐ Yes ☐ No

   (b) If yes, does the *private fund* invest in funds managed by you or by a *related person?* ☐ Yes ☐ No

   NOTE: For purposes of this question only, answer "yes" if the fund invests 10 percent or more of its total assets in other pooled investment vehicles, whether or not they are also *private funds*, or registered investment companies.

9. During your last fiscal year, did the *private fund* invest in securities issued by investment companies registered under the Investment Company Act of 1940 (other than "money market funds," to the extent provided in Instruction 6.e.)? ☐ Yes ☐ No

10. What type of fund is the *private fund*?

    ☐ hedge fund ☐ liquidity fund ☐ private equity fund ☐ real estate fund ☐ securitized asset fund ☐ venture capital fund

    ☐ Other *private fund*: _____

    NOTE: For funds of funds, refer to the funds in which the *private fund* invests. For definitions of these fund types, please see Instruction 6 of the Instructions to Part 1A.

11. Current gross asset value of the *private fund*: $_____

FORM ADV Schedule D Page 8 of 13	Your Name_____ *CRD* Number_____ Date_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

Ownership

12. Minimum investment commitment required of an investor in the *private fund*: $_____

NOTE: Report the amount routinely required of investors who are not your *related persons* (even if different from the amount set forth in the organizational documents of the fund).

13. Approximate number of the *private fund*'s beneficial owners: ____

14. What is the approximate percentage of the *private fund* beneficially owned by you and your *related persons*:

_____%

15. What is the approximate percentage of the *private fund* beneficially owned (in the aggregate) by funds of funds:

_____%

16. What is the approximate percentage of the *private fund* beneficially owned by *non-United States persons*:

_____%

Your Advisory Services

17. (a) Are you a subadviser to this *private fund*? ☐ Yes ☐ No

(b) If the answer to question 17(a) is "yes," provide the name and SEC file number, if any, of the adviser of the *private fund*. If the answer to question 17(a) is "no," leave this question blank. _____

18. (a) Do any other investment advisers advise the *private fund*? ☐ Yes ☐ No

(b) If the answer to question 18(a) is "yes," provide the name and SEC file number, if any, of the other advisers to the *private fund*. If the answer to question 18(a) is "no," leave this question blank.

Check only one box: ☐ Add ☐ Delete ☐ Amend

_____ _____

19. Are your *clients* solicited to invest in the *private fund*? ☐ Yes ☐ No

20. Approximately what percentage of your *clients* has invested in the *private fund*? _____%

Private Offering

21. Does the *private fund* rely on an exemption from registration of its securities under Regulation D of the Securities Act of 1933?
☐ Yes ☐ No

22. If yes, provide the *private fund*'s Form D file number (if any):

Check only one box: ☐ Add ☐ Delete ☐ Amend

021-_____

FORM ADV Schedule D Page 9 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

B. SERVICE PROVIDERS

☐ Check this box if you are filing this Form ADV through the IARD system and want the IARD system to create a new Schedule D, Section 7.B.(1) with the same service provider information you have given here in Questions 23 - 28 for a new *private fund* for which you are required to complete Section 7.B.(1) If you check the box, the system will pre-fill those fields for you, but you will be able to manually edit the information after it is pre-filled and before you submit your filing.

Auditors

23. (a) (1) Are the *private fund*'s financial statements subject to an annual audit? ☐ Yes ☐ No

(2) Are the financial statements prepared in accordance with U.S. GAAP? ☐ Yes ☐ No

If the answer to 23(a)(1) is "yes," respond to questions (b) through (f) below. If the *private fund* uses more than one auditing firm, you must complete questions (b) through (f) separately for each auditing firm.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(b) Name of the auditing firm: _____

(c) The location of the auditing firm's office responsible for the *private fund's* audit (city, state and country): _____

(d) Is the auditing firm an *independent public accountant*? ☐ Yes ☐ No

(e) Is the auditing firm registered with the Public Company Accounting Oversight Board? ☐ Yes ☐ No

(f) If "yes" to (e) above, is the auditing firm subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules? ☐ Yes ☐ No

(g) Are the *private fund*'s audited financial statements distributed to the *private fund*'s investors? ☐ Yes ☐ No

(h) Does the report prepared by the auditing firm contain an unqualified opinion? ☐ Yes ☐ No ☐ Report Not Yet Received

If you check "Report Not Yet Received," you must promptly file an amendment to your Form ADV to update your response when the report is available.

Prime Broker

24. (a) Does the *private fund* use one or more prime brokers? ☐ Yes ☐ No

If the answer to 24(a) is "yes," respond to questions (b) through (e) below for each prime broker the *private fund* uses. If the *private fund* uses more than one prime broker, you must complete questions (b) through (e) separately for each prime broker.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(b) Name of the prime broker: _____

(c) If the prime broker is registered with the SEC, its registration number: 8-_____

(d) Location of prime broker's office used principally by the *private fund* (city, state and country):

_____

(e) Does this prime broker act as custodian for some or all of the *private fund*'s assets? ☐ Yes ☐ No

Custodian

25. (a) Does the *private fund* use any custodians (including the prime brokers listed above) to hold some or all of its assets? ☐ Yes ☐ No

If the answer to 25(a) is "yes," respond to questions (b) through (f) below for each custodian the *private fund* uses. If the *private fund* uses more than one custodian, you must complete questions (b) through (f) separately for each custodian.

FORM ADV Schedule D Page 10 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

Check only one box: ☐ Add ☐ Delete ☐ Amend

(b) Legal name of custodian: _____

(c) Primary business name of custodian: _____

(d) The location of the custodian's office responsible for *custody* of the *private fund*'s assets (city, state and country): _____

(e) Is the custodian a *related person* of your firm? ☐ Yes ☐ No

(f) If the custodian is a broker-dealer, provide its SEC registration number (if any) 8-_____

Administrator

26. (a) Does the *private fund* use an administrator other than your firm? ☐ Yes ☐ No

If the answer to 26(a) is "yes," respond to questions (b) through (f) below. If the *private fund* uses more than one administrator, you must complete questions (b) through (f) separately for each administrator.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(b) Name of administrator: _____

(c) Location of administrator (city, state and country): _____

(d) Is the administrator a *related person* of your firm? ☐ Yes ☐ No

(e) Does the administrator prepare and send investor account statements to the *private fund*'s investors?

☐ Yes (provided to all investors) ☐ Some (provided to some but not all investors) ☐ No (provided to no investors)

(f) If the answer to 26(e) is "no" or "some," who sends the investor account statements to the (rest of the) *private fund*'s investors? If investor account statements are not sent to the (rest of the) private fund's investors, respond "not applicable."
_____.

27. During your last fiscal year, what percentage of the *private fund*'s assets (by value) was valued by a *person*, such as an administrator, that is not your *related person*?

_____%

Include only those assets where (i) such person carried out the valuation procedure established for that asset, if any, including obtaining any relevant quotes, and (ii) the valuation used for purposes of investor subscriptions, redemptions or distributions, and fee calculations (including allocations) was the valuation determined by such person.

Marketers

28. (a) Does the *private fund* use the services of someone other than you or your *employees* for marketing purposes? ☐ Yes ☐ No

You must answer "yes" whether the person acts as a placement agent, consultant, finder, introducer, municipal advisor or other solicitor, or similar person. If the answer to 28(a) is "yes", respond to questions (b) through (g) below for each such marketer the *private fund* uses. If the *private fund* uses more than one marketer, you must complete questions (b) through (g) separately for each marketer.

Check only one box: ☐ Add ☐ Delete ☐ Amend

FORM ADV Schedule D Page 11 of 13	Your Name_____ *CRD* Number_____ Date_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

(b) Is the marketer a *related person* of your firm? ☐ Yes ☐ No

(c) Name of the marketer: _____

(d) If the marketer is registered with the SEC, its file number (*e.g.*, 801-, 8-, or 866-): _____ and *CRD* Number (if any) _____

(e) Location of the marketer's office used principally by the *private fund* (city, state and country):
_____

(f) Does the marketer market the *private fund* through one or more websites? ☐ Yes ☐ No

(g) If the answer to 28(f) is "yes," list the website address(es): _____

SECTION 7.B.(2) *Private Fund* Reporting

(1) Name of the *private fund* _____

(2) *Private fund* identification number _____

(3) Name and SEC File number of adviser that provides information about this *private fund* in Section 7.B.(1) of Schedule D of its Form ADV filing _____, 801- _____ or 802-_____

(4) Are your *clients* solicited to invest in this *private fund*? ☐ Yes ☐ No

In answering this question, disregard feeder funds' investment in a master fund. For purposes of this question, in a master-feeder arrangement, one or more funds ("feeder funds") invest all or substantially all of their assets in a single fund ("master fund"). A fund would also be a "feeder fund" investing in a "master fund" for purposes of this question if it issued multiple classes (or series) of shares or interests, and each class (or series) invests substantially all of its assets in a single master fund.

SECTION 9.C. *Independent Public Accountant*

You must complete the following information for each *independent public accountant* engaged to perform a surprise examination, perform an audit of a pooled investment vehicle that you manage, or prepare an internal control report. You must complete a separate Schedule D Section 9.C. for each *independent public accountant*.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Name of the *independent public accountant*: _____

(2) The location of the *independent public accountant*'s office responsible for the services provided:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

(3) Is the *independent public accountant* registered with the Public Company Accounting Oversight Board? ☐ Yes ☐ No

(4) If yes to (3) above, is the *independent public accountant* subject to regular inspection by the Public Company Accounting Oversight Board in accordance with its rules? ☐ Yes ☐ No

(5) The *independent public accountant* is engaged to:

FORM ADV Schedule D Page 12 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

A. ☐ audit a pooled investment vehicle
B. ☐ perform a surprise examination of *clients'* assets
C. ☐ prepare an internal control report

(6) Does any report prepared by the *independent public accountant* that audited the pooled investment vehicle or that examined internal controls contain an unqualified opinion? ☐ Yes ☐ No ☐ Report Not Yet Received

If you check "Report Not Yet Received," you must promptly file an amendment to your Form ADV to update your response when the accountant's report is available.

SECTION 10.A. *Control Persons*

You must complete a separate Schedule D Section 10.A. for each *control person* not named in Item 1.A. or Schedules A, B, or C that directly or indirectly *controls* your management or policies.

Check only one box: ☐ Add ☐ Delete ☐ Amend

(1) Firm or Organization Name

_____

(2) *CRD* Number (if any) _____ Effective Date _____ (mm/dd/yyyy) Termination Date _____ (mm/dd/yyyy)

(3) Business Address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

(4) Individual Name (if applicable) (Last, First, Middle)

_____

(5) *CRD* Number (if any) _____ Effective Date _____ (mm/dd/yyyy) Termination Date _____ (mm/dd/yyyy)

(6) Business Address:

_____
(number and street)

_____
(city) (state/country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

(7) Briefly describe the nature of the *control*:

_____
_____
_____

SECTION 10.B. *Control Person* Public Reporting Companies

If any person named in Schedules A, B, or C, or in Section 10 A. of Schedule D is a public reporting company under Sections 12 or 15(d) of the Securities Exchange Act of 1934 , please provide the following information (you must complete a separate Schedule D Section 10.B. for each public reporting company):

FORM ADV Schedule D Page 13 of 13	Your Name_____ Date_____	*CRD* Number_____ SEC 801- or 802 Number_____

Certain items in Part 1A of Form ADV require additional information on Schedule D. Use this Schedule D to report details for items listed below. Report only new information or changes/updates to previously submitted information. Do not repeat previously submitted information.

This is an ☐ INITIAL or ☐ AMENDED Schedule D

(1) Full legal name of the public reporting company: _____

(2) The public reporting company's CIK number (Central Index Key number that the SEC assigns to each reporting company):

_____

Miscellaneous

You may use the space below to explain a response to an Item or to provide any other information.

_____
_____
_____
_____
_____
_____
_____
_____

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Items 11.A. or 11.B. of Form ADV.

Check item(s) being responded to: ☐ 11.A(1) ☐ 11.A(2) ☐11.B(1) ☐11.B(2)

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

Multiple counts of the same charge arising out of the same event(s) should be reported on the same DRP. Unrelated criminal actions, including separate cases arising out of the same event, must be reported on separate DRPs. Use this DRP to report all charges arising out of the same event. One event may result in more than one affirmative answer to the items listed above.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is Registered:	☐a firm ☐an individual ☐Yes ☐No

Name (For individuals, Last, First, Middle)

- ☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.
- ☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or *advisory affiliate's* favor.
- ☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____
_____
_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. If charge(s) were brought against an organization over which you or an *advisory affiliate* exercise(d) *control*: Enter organization name, whether or not the organization was an *investment-related* business and your or the *advisory affiliate's* position, title, or relationship.

2. Formal Charge(s) were brought in: (include name of Federal, Military, State or Foreign Court, Location of Court - City or County and State or Country, Docket/Case number).

3. Event Disclosure Detail (Use this for both organizational and individual charges.)

   A. Date First *Charged* (MM/DD/YYYY): ☐ Exact ☐ Explanation

   If not exact, provide explanation: _____

   B. Event Disclosure Detail (include Charge(s)/Charge Description(s), and for each charge provide: (1) number of counts, (2) *felony* or *misdemeanor*, (3) plea for each charge, and (4) product type if charge is *investment-related*).

   C. Did any of the Charge(s) within the Event involve a *felony*? ☐ Yes ☐ No

   D. Current status of the Event? ☐ Pending ☐ On Appeal ☐ Final

   E. Event Status Date (complete unless status is Pending) (MM/DD/YYYY):

   ☐ Exact ☐ Explanation

   If not exact, provide explanation: _____

4. Disposition Disclosure Detail: Include for each charge (a) Disposition Type (e.g., convicted, acquitted, dismissed, pretrial, etc.), (b) Date, (c) Sentence/Penalty, (d) Duration (if sentence-suspension, probation, etc.), (e) Start Date of Penalty, (f) Penalty/Fine Amount, and (g) Date Paid.

(continued)

CRIMINAL DISCLOSURE REPORTING PAGE (ADV)
(continuation)

5. Provide a brief summary of circumstances leading to the charge(s) as well as the disposition. Include the relevant dates when the conduct which was the subject of the charge(s) occurred. (Your response must fit within the space provided.)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Items 11.C., 11.D., 11.E., 11.F. or 11.G. of Form ADV.

Check item(s) being responded to:

☐ 11.C(1)	☐ 11.C(2)	☐ 11.C(3)	☐ 11.C(4)	☐ 11.C(5)
☐ 11.D(1)	☐ 11.D(2)	☐ 11.D(3)	☐ 11.D(4)	☐ 11.D(5)
☐ 11.E(1)	☐ 11.E(2)	☐ 11.E(3)	☐ 11.E(4)	
☐ 11.F.	☐ 11.G.			

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Items 11.C., 11.D., 11.E., 11.F. or 11.G. Use only one DRP to report details related to the same event. If an event gives rise to actions by more than one regulator, provide details for each action on a separate DRP.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is ☐ a firm ☐ an individual Registered: ☐ Yes ☐ No

Name (For individuals, Last, First, Middle)

☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.

☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or *advisory affiliate's* favor.

If you are registered or registering with a *state securities authority*, you may remove a DRP for an event you reported only in response to Item 11.D(4), and only if that event occurred more than ten years ago. If you are registered or registering with the SEC, you may remove a DRP for any event listed in Item 11 that occurred more than ten years ago.

☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____

_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. Regulatory Action initiated by:
☐ SEC ☐ Other Federal ☐ State ☐ *SRO* ☐ Foreign

(Full name of regulator, *foreign financial regulatory authority*, federal, state or *SRO*)

_____

2. Principal Sanction (check appropriate item):

☐ Civil and Administrative Penalty(ies)/Fine(s)	☐ Disgorgement	☐ Restitution
☐ Bar	☐ Expulsion	☐ Revocation
☐ Cease and Desist	☐ Injunction	☐ Suspension
☐ Censure	☐ Prohibition	☐ Undertaking
☐ Denial	☐ Reprimand	☐ Other _____

Other Sanctions:

_____
_____
_____

3. Date Initiated (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation: _____

4. Docket/Case Number:

5. *Advisory Affiliate* Employing Firm when activity occurred which led to the regulatory action (if applicable):

6. Principal Product Type (check appropriate item):

☐ Annuity(ies) - Fixed	☐ Derivative(s)	☐ Investment Contract(s)
☐ Annuity(ies) - Variable	☐ Direct Investment(s) - DPP & LP Interest(s)	☐ Money Market Fund(s)
☐ CD(s)	☐ Equity - OTC	☐ Mutual Fund(s)
☐ Commodity Option(s)	☐ Equity Listed (Common & Preferred Stock)	☐ No Product
☐ Debt - Asset Backed	☐ Futures - Commodity	☐ Options
☐ Debt - Corporate	☐ Futures - Financial	☐ Penny Stock(s)
☐ Debt - Government	☐ Index Option(s)	☐ Unit Investment Trust(s)
☐ Debt - Municipal	☐ Insurance	☐ Other _____

Other Product Types:

_____
_____

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

7. Describe the allegations related to this regulatory action (your response must fit within the space provided):

8. Current status? ☐ Pending ☐ On Appeal ☐ Final

9. If on appeal, regulatory action appealed to (SEC, *SRO*, Federal or State Court) and Date Appeal Filed:

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 13 only.

10. How was matter resolved (check appropriate item):

☐ Acceptance, Waiver & Consent (AWC)
☐ Consent
☐ Decision
☐ Decision & *Order* of Offer of Settlement
☐ Dismissed
☐ *Order*
☐ Settled
☐ Stipulation and Consent
☐ Vacated
☐ Withdrawn
☐ Other _____

11. Resolution Date (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation: _____

12. Resolution Detail:

A. Were any of the following Sanctions *Ordered* (check all appropriate items)?

☐ Monetary/Fine ☐ Revocation/Expulsion/Denial ☐ Disgorgement/Restitution

Amount: $ ☐ Censure ☐ Cease and Desist/Injunction ☐ Bar ☐ Suspension

B. Other Sanctions *Ordered*:

Sanction detail: if suspended, *enjoined* or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification by exam/retraining was a condition of the sanction, provide length of time given to requalify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against you or an *advisory affiliate*, date paid and if any portion of penalty was waived:

(continued)

REGULATORY ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

13. Provide a brief summary of details related to the action status and (or) disposition and include relevant terms, conditions and dates (your response must fit within the space provided).

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)

GENERAL INSTRUCTIONS

This Disclosure Reporting Page (DRP ADV) is an ☐ INITIAL ***OR*** ☐ AMENDED response used to report details for affirmative responses to Item 11.H. of Part 1A and Item 2.F. of Part 1B of Form ADV.

Check Part 1A item(s) being responded to: ☐ 11.H(1)(a) ☐ 11.H(1)(b) ☐ 11.H(1)(c) ☐ 11.H(2)
Check Part 1B item(s) being responded to: ☐ 2.F(1) ☐ 2.F(2) ☐ 2.F(3) ☐ 2.F(4) ☐ 2.F(5)

Use a separate DRP for each event or *proceeding*. The same event or *proceeding* may be reported for more than one *person* or entity using one DRP. File with a completed Execution Page.

One event may result in more than one affirmative answer to Item 11.H. of Part 1A or Item 2.F. of Part 1B. Use only one DRP to report details related to the same event. Unrelated civil judicial actions must be reported on separate DRPs.

PART I

A. The *person(s)* or entity(ies) for whom this DRP is being filed is (are):
- ☐ You (the advisory firm)
- ☐ You and one or more of your *advisory affiliates*
- ☐ One or more of your *advisory affiliates*

If this DRP is being filed for an *advisory affiliate*, give the full name of the *advisory affiliate* below (for individuals, Last name, First name, Middle name).

If the *advisory affiliate* has a *CRD* number, provide that number. If not, indicate "non-registered" by checking the appropriate box.

Your Name	Your *CRD* Number

ADV DRP - *ADVISORY AFFILIATE*

CRD Number	This *advisory affiliate* is	☐ a firm	☐ an individual
	Registered:	☐ Yes	☐ No

Name (For individuals, Last, First, Middle)

- ☐ This DRP should be removed from the ADV record because the *advisory affiliate(s)* is no longer associated with the adviser.
- ☐ This DRP should be removed from the ADV record because: (1) the event or *proceeding* occurred more than ten years ago or (2) the adviser is registered or applying for registration with the SEC and the event was resolved in the adviser's or advisory affiliate's favor.

If you are registered or registering with a *state securities authority*, you may remove a DRP for an event you reported only in response to Item 11.H.(1)(a), and only if that event occurred more than ten years ago. If you are registered or registering with the SEC, you may remove a DRP for any event listed in Item 11 that occurred more than ten years ago.

- ☐ This DRP should be removed from the ADV record because it was filed in error, such as due to a clerical or data-entry mistake. Explain the circumstances:

_____
_____
_____

B. If the *advisory affiliate* is registered through the IARD system or *CRD* system, has the *advisory affiliate* submitted a DRP (with Form ADV, BD or U-4) to the IARD or *CRD* for the event? If the answer is "Yes," no other information on this DRP must be provided.
☐ Yes ☐ No

NOTE: The completion of this form does not relieve the *advisory affiliate* of its obligation to update its IARD or *CRD* records.

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

PART II

1. Court Action initiated by: (Name of regulator, *foreign financial regulatory authority, SRO*, commodities exchange, agency, firm, private plaintiff, etc.)

2. Principal Relief Sought (check appropriate item):

☐ Cease and Desist ☐ Disgorgement ☐ Money Damages (Private/Civil Complaint) ☐ Restraining Order
☐ Civil Penalty(ies)/Fine(s) ☐ Injunction ☐ Restitution ☐ Other _____

Other Relief Sought:

3. Filing Date of Court Action (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

4. Principal Product Type (check appropriate item):

☐ Annuity(ies) - Fixed
☐ Annuity(ies) - Variable
☐ CD(s)
☐ Commodity Option(s)
☐ Debt - Asset Backed
☐ Debt - Corporate
☐ Debt - Government
☐ Debt - Municipal
☐ Derivative(s)
☐ Direct Investment(s) - DPP & LP Interest(s)
☐ Equity - OTC
☐ Equity Listed (Common & Preferred Stock)
☐ Futures - Commodity
☐ Futures - Financial
☐ Index Option(s)
☐ Insurance
☐ Investment Contract(s)
☐ Money Market Fund(s)
☐ Mutual Fund(s)
☐ No Product
☐ Options
☐ Penny Stock(s)
☐ Unit Investment Trust(s)
☐ Other _____

Other Product Types:

5. Formal Action was brought in (include name of Federal, State or Foreign Court, Location of Court - City or County and State or Country, Docket/Case Number):

6. *Advisory Affiliate* Employing Firm when activity occurred which led to the civil judicial action (if applicable):

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

7. Describe the allegations related to this civil action (your response must fit within the space provided):

8. Current status? ☐ Pending ☐ On Appeal ☐ Final

9. If on appeal, action appealed to (provide name of court) and Date Appeal Filed (MM/DD/YYYY):

10. If pending, date notice/process was served (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

If Final or On Appeal, complete all items below. For Pending Actions, complete Item 14 only.

11. How was matter resolved (check appropriate item):

☐ Consent ☐ Judgment Rendered ☐ Settled
☐ Dismissed ☐ Opinion ☐ Withdrawn ☐ Other

12. Resolution Date (MM/DD/YYYY): ☐ Exact ☐ Explanation

If not exact, provide explanation:

13. Resolution Detail:

A. Were any of the following Sanctions Ordered or Relief Granted (check appropriate items)?

☐ Monetary/Fine ☐ Revocation/Expulsion/Denial ☐ Disgorgement/Restitution

Amount: $ ☐ Censure ☐ Cease and Desist/Injunction ☐ Bar ☐ Suspension

B. Other Sanctions:

(continued)

CIVIL JUDICIAL ACTION DISCLOSURE REPORTING PAGE (ADV)
(continuation)

C. Sanction detail: if suspended, *enjoined* or barred, provide duration including start date and capacities affected (General Securities Principal, Financial Operations Principal, etc.). If requalification by exam/retraining was a condition of the sanction, provide length of time given to requalify/retrain, type of exam required and whether condition has been satisfied. If disposition resulted in a fine, penalty, restitution, disgorgement or monetary compensation, provide total amount, portion levied against you or an *advisory affiliate*, date paid and if any portion of penalty was waived:

14. Provide a brief summary of circumstances related to the action(s), allegation(s), disposition(s) and/or finding(s) disclosed above (your response must fit within the space provided).

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION**
  AND
- **REPORT BY EXEMPT REPORTING ADVISERS**

DOMESTIC INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the Secretary of State or other legally designated officer, of the state in which you maintain your *principal office and place of business* and any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are submitting a *notice filing*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having *custody* or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

SEC 1707 (MM-11)
File 4 of 4

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION AND**
- **REPORT BY EXEMPT REPORTING ADVISERS**

STATE-REGISTERED INVESTMENT ADVISER EXECUTION PAGE

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial application for state registration and all amendments to registration.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint the legally designated officers and their successors, of the state in which you maintain your *principal office and place of business* and any other state in which you are applying for registration or amending your registration, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which you maintain your *principal office and place of business* or of any state in which you are applying for registration, or amending your registration.

2. State-Registered Investment Adviser Affidavit

If you are subject to state regulation, by signing this Form ADV, you represent that, you are in compliance with the registration requirements of the state in which you maintain your *principal place of business* and are in compliance with the bonding, capital, and recordkeeping requirements of that state.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

APPENDIX E

FORM ADV (Paper Version)

- **UNIFORM APPLICATION FOR INVESTMENT ADVISER REGISTRATION**
  AND
- **REPORT BY EXEMPT REPORTING ADVISERS**

NON-RESIDENT INVESTMENT ADVISER EXECUTION	PAGE 1

You must complete the following Execution Page to Form ADV. This execution page must be signed and attached to your initial submission of Form ADV to the SEC and all amendments.

1. Appointment of Agent for Service of Process

By signing this Form ADV Execution Page, you, the undersigned adviser, irrevocably appoint each of the Secretary of the SEC, and the Secretary of State or other legally designated officer, of any other state in which you are submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration (a) arises out of any activity in connection with your investment advisory business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of any state in which you are submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

3. *Non-Resident* Investment Adviser Undertaking Regarding Books and Records

By signing this Form ADV, you also agree to provide, at your own expense, to the U.S. Securities and Exchange Commission at its principal office in Washington D.C., at any Regional or District Office of the Commission, or at any one of its offices in the United States, as specified by the Commission, correct, current, and complete copies of any or all records that you are required to maintain under Rule 204-2 under the Investment Advisers Act of 1940. This undertaking shall be binding upon you, your heirs, successors and assigns, and any *person* subject to your written irrevocable consents or powers of attorney or any of your general partners and *managing agents*.

Signature

I, the undersigned, sign this Form ADV on behalf of, and with the authority of, the *non-resident* investment adviser. The investment adviser and I both certify, under penalty of perjury under the laws of the United States of America, that the information and statements made in this ADV, including exhibits and any other information submitted, are true and correct, and that I am signing this Form ADV Execution Page as a free and voluntary act.

I certify that the adviser's books and records will be preserved and available for inspection as required by law. Finally, I authorize any *person* having custody or possession of these books and records to make them available to federal and state regulatory representatives.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Adviser *CRD* Number: _____

OMB APPROVAL
OMB Number: 3235-0538
Expires: November 30, 2013
Estimated average burden
hours per response . . .1.00

APPENDIX F

Form ADV-H
APPLICATION FOR A TEMPORARY OR CONTINUING HARDSHIP EXEMPTION

Item 1 Type of Exemption

You are (check one):

- ☐ Requesting a Temporary Hardship Exemption; or
- ☐ Applying for a Continuing Hardship Exemption

A. If you are requesting a temporary hardship exemption, this Form ADV-H is for your (check one)

- ☐ Initial SEC Application
- ☐ *Annual updating amendment* to SEC Registration
- ☐ Other-than-annual amendment to SEC Registration
- ☐ Initial report to the SEC as an *exempt reporting adviser*
- ☐ *Annual updating amendment* to your report as an *exempt reporting adviser*
- ☐ Submit an other-than-annual amendment to your report as an *exempt reporting adviser*
- ☐ Submit a final report an *exempt reporting adviser*

B. If you are applying for a continuing hardship exemption, this Form ADV-H is for all filings between the date you file this form and _____.
MM / DD / YYYY

Only an adviser that is a "small business" (as defined by SEC rule 0-7) is eligible for a continuing hardship exemption. To determine whether you are eligible for a continuing hardship exemption, review Item 12 of the Form ADV that you filed most recently with the SEC to answer the following questions:

Were you required to answer Item 12 of Part 1A of Form ADV? Yes ☐ No ☐

Did you check "yes" to any question on Item 12 of Part 1A of Form ADV? Yes ☐ No ☐

If you were not required to answer Item 12 or checked "yes" to any question on Item 12, you are not eligible for a continuing hardship exemption and must submit electronic filings to the IARD system.

Item 2 Identifying Information

SEC File number: 801 - _____ or 802 - _____

CRD Number (if you have one)_____

A. Your full legal name (if you are a sole proprietor, state your last, first, and middle names):

_____

B. *Principal Office and Place of Business*
Address (do not use a P.O. Box):

_____
(number and street)

_____
(city) (state) (country) (zip+4/postal code)

If this address is a private residence, check this box: ☐

C. Name and telephone number of the individual filing this Form ADV-H:

_____
(name) (title) (area code) (telephone number)

Item 3 Information Relating to the Hardship

A. If you are filing to request a temporary hardship exemption, attach a separate page that:

1. Describes the nature and extent of the temporary technical difficulties when you attempt to submit the filing in electronic format.

2. Describes the extent to which you previously have submitted documents in electronic format with the same hardware and software that you are unable to use to submit this filing.

3. Describes the burden and expense of employing alternative means (*e.g.* public library, service provider) to submit the filing in electronic format in a timely manner.

4. Provides any other reasons why a temporary hardship exemption is warranted.

B. If you are applying for a continuing hardship exemption, your application will be granted or denied based on the following items. You should attach a separate page to this Form ADV-H that:

1. Explains the reason(s) that the necessary hardware and software are not available without unreasonable burden and expense.

2. Describes the burden and expense of employing alternative means (*e.g.* public library, service provider) to submit your filings in electronic format in a timely manner.

3. Justifies the time period requested in Item 1 of this Form ADV-H.

4. Provides any other reasons why a continuing hardship exemption is warranted.

Item 4 How to Submit Your Form ADV-H

Sign this Form ADV-H. You must preserve in your records a copy of the Form ADV-H that you file. Mail one manually signed Form ADV-H and one copy to U.S. Securities and Exchange Commission, Branch of Regulations and Examinations, Mail Stop 0-25, 100 F Street, NE, Washington, DC 20549.

Item 5 Execution

I, the undersigned, have signed this Form ADV-H on behalf of, and with the authority of, the adviser requesting a temporary hardship exemption or applying for a continuing hardship exemption. The undersigned and the adviser represent that the information and statements made in this ADV-H, including any other information submitted, are true. The undersigned and the adviser further agree to waive any claim against the administrator of the IARD for errors made in good faith that may occur when converting to electronic format this Form ADV-H or any paper filing made in reliance of a continuing hardship exemption.

Signature: _____ Date: _____

Printed Name: _____ Title: _____

PRIVACY ACT STATEMENT. Section 203(c)(1) of the Advisers Act [15 U.S.C. § 80b-3(c)(1)] authorizes the Commission to collect the information required by Form ADV-H. The Commission collects this information for regulatory purposes, such as processing requests for temporary hardship exemptions and determining whether to grant a continuing hardship exemption. Filing Form ADV-H is mandatory for investment advisers requesting a temporary or continuing hardship exemption. The Commission maintains the information submitted on Form ADV-H and makes it publicly available. The Commission may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17. The information contained in Form ADV-H is part of a system of records subject to the Privacy Act of 1974, as amended. The Commission has published in the Federal Register the Privacy Act System of Records Notice for these records.

SEC'S COLLECTION OF INFORMATION. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Section 203(c)(1) of the Advisers Act authorizes the Commission to collect the

information on this Form from applicants. *See* 15 U.S.C. § 80b-3(c)(1). Filing of this Form is mandatory for an investment adviser to request an exemption from the electronic filing requirements. The principal purpose of this collection of information is to enable the Commission to process requests for temporary hardship exemptions and to determine whether to grant a continuing hardship exemption. By accepting a form, however, the Commission does not make a finding that it has been completed or submitted correctly. The Commission will maintain files of the information on Form ADV-H and will make the information publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on page one of Form ADV-H, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507.

OMB APPROVAL	
OMB Number:	3235-0240
Expires:	October 31, 2013
Estimated average burden hours per response	1.00

APPENDIX G

Form ADV-NR

APPOINTMENT OF AGENT FOR SERVICE OF PROCESS BY NON-RESIDENT GENERAL PARTNER AND NON-RESIDENT MANAGING AGENT OF AN INVESTMENT ADVISER

You must submit this Form ADV-NR if you are a *non-resident* general partner or a *non-resident managing agent* of any investment adviser (domestic or *non-resident*). Form ADV-NR must be signed and submitted in connection with the adviser's initial Form ADV submission. If the mailing address you list below changes, you must file an amended Form ADV-NR to provide the current address. If you become a *non-resident* general partner or a *non-resident managing agent* after the date the adviser files its initial Form ADV, you must file Form ADV-NR with the Commission within 30 days of the date that you became a *non-resident* general partner or a *non-resident managing agent*. If you serve as a general partner or *managing agent* for multiple advisers, you must submit a separate Form ADV-NR for each adviser.

1. Appointment of Agent for Service of Process

By signing this Form ADV-NR, you, the undersigned *non-resident* general partner or *non-resident managing agent,* irrevocably appoint each of the Secretary of the SEC, and the Secretary of State, or equivalent officer, of the state in which the adviser referred to in this form maintains its *principal office and place of business*, if applicable, and any other state in which the adviser is applying for registration, amending its registration, or submitting a *notice filing*, as your agents to receive service, and agree that such *persons* may accept service on your behalf, of any notice, subpoena, summons, *order* instituting *proceedings*, demand for arbitration, or other process or papers, and you further agree that such service may be made by registered or certified mail, in any federal or state action, administrative *proceeding* or arbitration brought against you in any place subject to the jurisdiction of the United States, if the action, *proceeding* or arbitration: (a) arises out of any activity in connection with the investment adviser's business that is subject to the jurisdiction of the United States, and (b) is *founded*, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these acts, or (ii) the laws of the state in which the adviser referred to in this Form maintains its *principal office and place of business*, if applicable, or of any state in which the adviser is applying for registration, amending its registration, or submitting a *notice filing*.

2. Appointment and Consent: Effect on Partnerships

If you are organized as a partnership, this irrevocable power of attorney and consent to service of process will continue in effect if any partner withdraws from or is admitted to the partnership, provided that the admission or withdrawal does not create a new partnership. If the partnership dissolves, this irrevocable power of attorney and consent shall be in effect for any action brought against you or any of your former partners.

Signature

I, the undersigned *non-resident* general partner or *non-resident managing agent,* certify, under penalty of perjury under the laws of the United States of America, that the information contained in this Form ADV-NR is true and correct and that I am signing this Form ADV-NR as a free and voluntary act.

Signature of Partner or Agent:

_____ Date: _____

Printed Name: _____ Title: _____

Mailing Address of Partner or Agent (no P.O. Boxes):

_____

_____

_____

_____

_____

Signature of Investment Adviser:

_____ Date: _____

Printed Name: _____ Title: _____

Adviser SEC File Number: 801-_____ or 802-_____

Adviser *CRD* Number: _____

Adviser Name: _____

PRIVACY ACT STATEMENT. Section 211(a) of the Advisers Act [15 U.S.C. § 80b-11(a)] authorizes the Commission to collect the information required by Form ADV-NR. The Commission collects this information to ensure that a non-resident general partner or managing agent of an investment adviser appoints an agent for service of process in the United States. Filing Form ADV-NR is mandatory for non-resident general partners and non-resident managing agents of investment advisers. The Commission maintains the information submitted on Form ADV-NR and makes it publicly available. The Commission may return forms that do not include required information. Intentional misstatements or omissions constitute federal criminal violations under 18 U.S.C. § 1001 and 15 U.S.C. § 80b-17. The information contained in Form ADV-NR is part of a system of records subject to the Privacy Act of 1974, as amended. The Commission has published in the Federal Register the Privacy Act System of Records Notice for these records.

SEC'S COLLECTION OF INFORMATION. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Section 211(a) of the Advisers Act authorizes the Commission to collect the information on this Form from applicants. *See* 15 U.S.C. § 80b-11(a). Filing of this Form is mandatory for non-resident general partners or managing agents of investment advisers. The principal purpose of this collection of information is to ensure that a non-resident general partner or managing agent of an investment adviser appoints an agent for service of process in the United States. The Commission will maintain files of the information on Form ADV-NR and will make the information publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on page one of Form ADV-NR, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. § 3507.

Appendix H

OMB APPROVAL	
OMB Number:	3235-0361
Expires:	March 31, 2013
Estimated average burden hours per response	0.05

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM ADV-E

Certificate of Accounting of Client Securities and Funds in the Possession or Custody of an Investment Adviser
Pursuant to Rule 206(4)-2 [17 CFR 275.206(4)-2]

1. Investment Adviser Act SEC File Number: 801-	Date examination completed:

2. State Identification Number:

AL	AK	AZ	AR	CA
CO	CT	DE	DC	FL
GA	HI	ID	IL	IN
IA	KS	KY	LA	ME
MD	MA	MI	MN	MS
MO	MT	NE	NV	NH
NJ	NM	NY	NC	ND
OH	OK	OR	PA	RI
SC	SD	TN	TX	UT
VT	VI	VA	WA	WV
WI	WY	PUERTO RICO	Other (specify):	

3. Full name of investment adviser (if individual, state last, first, middle name):

4. Name under which business is conducted, if different from above:

5. Address of principal place of business (number, street, city, state, zip code):

INSTRUCTIONS

This Form must be completed by investment advisers that have custody of client funds or securities and that are subject to an annual surprise examination. This Form may *not* be used to amend any information included in an investment adviser's registration statement (e.g., business address).

Investment Adviser

1. All items must be completed by the investment adviser.
2. Give this Form to the independent public accountant that, in compliance with rule 206(4)-2 under the Investment Advisers Act of 1940 (the "Act") or applicable state law, examines client funds and securities in the custody of the investment adviser within 120 days of the time chosen by the accountant for the surprise examination and upon such accountant's resignation or dismissal from, or other termination of, the engagement, or if the accountant removes itself or is removed from consideration for being reappointed.

Accountant

3. The independent public accountant performing the surprise examination must submit electronically on the Investment Adviser Registration Depository:

   (i) this Form and a certificate of accounting (*i.e.*, accountant's report) required by rule 206(4)-2 under the Act or applicable state law within 120 days of the time chosen by the accountant for the surprise examination, and
   (ii) this Form and a statement, within four business days of its resignation or dismissal from, or other termination of, the engagement, or removing itself or being removed from consideration for being reappointed, that includes
      (A) the date of such resignation, dismissal, removal, or other termination, and the name, address, and contact information of the accountant, and
      (B) an explanation of any problems relating to examination scope or procedure that contributed to such resignation, dismissal, removal, or other termination:

THIS FORM MUST BE GIVEN TO YOUR INDEPENDENT PUBLIC ACCOUNTANT

SEC'S COLLECTION OF INFORMATION. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Sections 203(c)(1) and 204 of the Advisers Act authorize the Commission to collect the information on this Form from applicants. *See* 15 U.S.C. §§ 80b-3(c)(1) and 80b-4. Filing of this Form is mandatory. The principal purpose of this collection of

information is to make the examination certificates filed by an accountant pursuant to Rule 206(4)-2(a)(3)(ii)(B) under the Adviser Act (after that accountant has verified by actual examination the securities and funds of clients in the custody of an investment adviser) more accessible for inspection by the Commission staff and the public and will facilitate verification of compliance with examination requirements. *See* 17 CFR §275.206(4)-2(a)(3)(ii)(B). The Commission will maintain files of the information on Form ADV-E and will make the information publicly available. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on page one of Form ADV-E, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. §3507. The applicable Private Act system of records is SEC-2, and the routine uses of the records are set forth at 40 FR 39255 (Aug. 27, 1975) and 41 FR 5318 (Feb. 5, 1976).

[FR Doc. 2011–16318 Filed 7–18–11; 8:45 am]

BILLING CODE 8011–01–C

FEDERAL REGISTER

Vol. 76 Tuesday,
No. 138 July 19, 2011

Part IV

The President

Proclamation 8692—Captive Nations Week, 2011

Federal Register
Vol. 76, No. 138
Tuesday, July 19, 2011

Presidential Documents

Title 3—

The President

Proclamation 8692 of July 15, 2011

Captive Nations Week, 2011

By the President of the United States of America

A Proclamation

There are times in the course of history when the actions of ordinary people yearning for freedom ignite the desires of people everywhere. Such brave actions led to the birth of our Nation, the fall of the Soviet Union, and countless other achievements that have shaped our world. During Captive Nations Week, we remember the men and women throughout the world still suffering under oppressive regimes, and we underscore our commitment to advancing freedom's cause.

President Dwight D. Eisenhower issued the first Captive Nations Week Proclamation in 1959 amidst an escalating Cold War, affirming America's support for the individual liberties of those living under Communist oppression. Our world has transformed dramatically since President Eisenhower first proclaimed Captive Nations Week. The burst of freedom following the fall of the Berlin Wall and the collapse of the Soviet Union led to the emergence of new democracies that are now steadfast allies of the United States and key contributors to the expansion of human rights worldwide.

With each generation, people have breathed new life into democratic ideals, striving for personal freedom, political and economic reform, and justice. The United States stands firmly behind all those who seek to exercise their basic human rights. We will continue to oppose the use of violence and repression and support the universal rights of freedom of religion, expression, and peaceful assembly; equality for men and women under the rule of law; and the right of people to choose their leaders.

This week, we rededicate ourselves to promoting democratic values, economic development, and respect for human dignity, and we express our solidarity with freedom-seeking people everywhere whose future reflects our greatest hope for peace.

The Congress, by joint resolution approved July 17, 1959 (73 Stat. 212), has authorized and requested the President to issue a proclamation designating the third week of July of each year as ''Captive Nations Week.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim July 17 through July 23, 2011, as Captive Nations Week. I call upon the people of the United States to reaffirm our deep commitment to all those working for human rights and dignity around the world.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth day of July, in the year of our Lord two thousand eleven, and of the Independence of the United States of America the two hundred and thirty-sixth.

[FR Doc. 2011–18367
Filed 7–18–11; 11:15 am]
Billing code 3195–W1–P

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H.R. 2279/P.L. 112–21

Airport and Airway Extension Act of 2011, Part III (June 29, 2011; 125 Stat. 233)

S. 349/P.L. 112–22

To designate the facility of the United States Postal Service located at 4865 Tallmadge Road in Rootstown, Ohio, as the ''Marine Sgt. Jeremy E. Murray Post Office''. (June 29, 2011; 125 Stat. 236)

S. 655/P.L. 112–23

To designate the facility of the United States Postal Service located at 95 Dogwood Street in Cary, Mississippi, as the ''Spencer Byrd Powers, Jr. Post Office''. (June 29, 2011; 125 Stat. 237)

Last List June 28, 2011

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