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

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1090

[Docket No. CFPB–2012–0040]

RIN 3170–AA30

Defining Larger Participants of the Consumer Debt Collection Market; Correction

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; correction.

SUMMARY: The Bureau of Consumer Financial Protection published in the **Federal Register** of October 31, 2012 a final rule amending the regulation defining larger participants of certain consumer financial product and service markets by adding a new section to define larger participants of a market for consumer debt collection. The final rule contained four typographical errors, which this document corrects.

DATES: This correcting amendment is effective on January 2, 2013.

FOR FURTHER INFORMATION CONTACT: Kali Bracey, Senior Counsel, (202) 435–7141, or Susan Torzilli, Attorney-Advisor, (202) 435–7464, Office of Nonbank Supervision, Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: The Bureau of Consumer Financial Protection (Bureau) published a final rule in the **Federal Register** of October 31, 2012 (77 FR 65775) amending 12 CFR part 1090 by adding a new section to define larger participants of a market for consumer debt collection. The final rule contained four typographical errors, which this document corrects. Three of these errors were incorrect cross-references. The other error was an omission of a subheading designation.

The Bureau finds that there is good cause to publish these corrections without seeking public comment. *See* 5 U.S.C. 553(b)(B). Public comment is unnecessary because the Bureau is correcting inadvertent, technical errors about which there is minimal, if any, basis for substantive disagreement.

Accordingly, in FR Doc. 2012–26467 published on October 31, 2012 (77 FR 65775), make the following corrections:

1. On page 65798, in the second column, in § 1090.105, in paragraph (iii)(C) of the definition of *Annual receipts,* remove the first reference to ''(iii)(B)'' and add ''(ii)'' in its place.

2. On page 65798, in the second column, in § 1090.105, in paragraph (iii)(C) of the definition of *Annual receipts,* remove the second reference to ''(iii)(B)'' and add ''(ii)(B)'' in its place.

3. On page 65798, in the second column, in § 1090.105, in paragraph (iii)(D) of the definition of *Annual receipts,* remove ''(iii)(B)'' and add ''(ii)'' in its place.

4. On page 65798, in the third column, add the paragraph designation ''(b)'' before ''*Test to define larger participants''.*

Dated: November 28, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2012–29438 Filed 12–6–12; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0500; Directorate Identifier 2010–SW–014–AD; Amendment 39–17263; AD 2012–23–07]

RIN 2120–AA64

Airworthiness Directives; Eurocopter Deutschland GmbH Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for all Eurocopter Deutschland GmbH (ECD) Model EC135 helicopters, except the EC 135 P2+ and T2+. This AD requires inspecting each upper and lower plain journal bearing (bearing) and replacing the swashplate assembly with an airworthy swashplate assembly if a bearing is not correctly positioned. This AD was prompted by two reports of the bearings moving in relation to the main rotor swashplate sliding sleeve (sliding sleeve). The actions of this AD are intended to detect shifting of the bearing, which could limit the movement of the collective control and result in subsequent loss of control of the helicopter.

DATES: This AD is effective January 11, 2013.

ADDRESSES: For service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the Docket Operations Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, any incorporated-by-reference service information, the economic evaluation, any comments received, and other information. The street address for the Docket Operations Office (phone: 800–647–5527) is U.S. Department of Transportation, Docket Operations Office, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Gary Roach, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5110, email *gary.b.roach@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

On May 11, 2012, at 77 FR 27661, the **Federal Register** published our notice of proposed rulemaking (NPRM), which proposed to amend 14 CFR part 39 to include an AD that would apply to all Eurocopter Deutschland GmbH (ECD) model EC135 helicopters, except the EC 135 P2+ and T2+. That NPRM proposed to require repetitively inspecting the

bearings and replacing the swashplate assembly if a bearing is not correctly positioned. The NPRM also provided that replacing the swashplate assembly terminated the proposed inspection requirements. The proposed requirements were intended to detect shifting of a bearing, which could limit the movement of the collective control and result in loss of control of the helicopter.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued AD No. 2009–0272, dated December 18, 2009 (AD 2009–0272), to correct an unsafe condition for Eurocopter Model EC 135 and EC 635 helicopters. EASA advises that during two separate pre-flight checks on Model EC 135 helicopters in 2005, it was detected that one of the bearings of the sliding sleeve had moved to the outside of the sliding sleeve. EASA states that this condition, if not detected and corrected, could lead to a complete shift of the bearing to the inside or outside, creating the possibility of a limited movement of the collective, which could result in reduced control of the helicopter.

Comments

We gave the public the opportunity to participate in developing this AD, but we received no comments on the NPRM (77 FR 27661, May 11, 2012).

FAA's Determination

These helicopters have been approved by the aviation authority of Germany and are approved for operation in the United States. Pursuant to our bilateral agreement with Germany, EASA, its technical representative, has notified us of the unsafe condition described in the EASA AD. We are issuing this AD because we evaluated all information provided by EASA and determined the unsafe condition exists and is likely to exist or develop on other helicopters of these same type designs and that air safety and the public interest require adopting the AD requirements as proposed.

Differences Between This AD and the EASA AD

This AD differs from the EASA AD as follows:

- This AD requires the visual inspection to be performed by a mechanic, and repeated every 5 hours TIS. The EASA AD allows the visual inspection to be accomplished by a pilot during a preflight inspection.
- This AD does not require contacting ECD customer service for corrective actions.
- This AD provides terminating action for the inspection requirements for the bearings by replacing the swashplate assembly with a later-design swashplate assembly, part number L623M2005103.
- The EASA AD applies to ECD model EC635 aircraft, and this AD does not because the EC635 does not have an FAA issued type-certificate.

Related Service Information

We reviewed Eurocopter Alert Service Bulletin (ASB) EC135–62A–021, dated June 23, 2005 (EC135–62A–021). EC135–62A–021 describes procedures for visually checking the bearings of the sliding sleeve during preflight. EASA classified this ASB as mandatory and issued AD 2009–0272 to ensure the continued airworthiness of these helicopters.

Costs of Compliance

We estimate that this AD will affect 218 helicopters of U.S. registry and that operators will incur the following costs to comply with this AD:

- Inspecting the bearings requires about 15 minutes at an average labor rate of $85 per hour, for a cost per helicopter of about $22 and a total cost to the U.S. operator fleet of $4,796 per inspection cycle.
- If required, replacing the swashplate assembly will take about 8 work hours at an average labor rate of $85 per hour, and required parts will cost about $38,586, for a total cost per helicopter of $39,266.

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 helicopters identified in this rulemaking action.

Regulatory Findings

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

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2012–23–07 Eurocopter Deutschland GmbH Helicopters: Amendment 39–17263; Docket No. FAA–2012–0500; Directorate Identifier 2010–SW–014–AD.

(a) Applicability

This AD applies to all Eurocopter Deutschland GmbH (ECD) Model EC135 helicopters, except EC 135 P2+ and EC135 T2+, with a swashplate assembly, part number (P/N) L623M2006101, installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as movement of the plain journal bearings to the outside of the main rotor swashplate sliding sleeve (sliding sleeve). This condition could limit movement of the collective and result in subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective January 11, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time unless it has already been accomplished prior to that time.

(e) Required Actions

Within 5 hours time-in-service (TIS), and thereafter at intervals not to exceed 5 hours TIS:

(1) Visually inspect the position of the upper plain journal bearing and determine if it is flush with the sliding sleeve.

Note to paragraph (e)(1) of this AD: Figure 1 of Eurocopter Alert Service Bulletin EC135–62A–021, dated June 23, 2005, which is not incorporated by reference, contains additional information about the inspection.

(2) Visually inspect the lower plain journal bearing and determine if it is recessed 2 millimeters from the sliding sleeve.

(3) If the upper plain journal bearing is not flush with the sliding sleeve or the lower plain journal bearing is not recessed 2 mm, before further flight, replace the swashplate assembly with an airworthy swashplate assembly.

(4) Replacing the swashplate assembly, P/N L623M2006101, with a later designed swashplate assembly, P/N L623M2005103, constitutes a terminating action for the requirements of this AD.

(f) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Safety Management Group, FAA, may approve AMOCs for this AD. Send your proposal to: Gary Roach, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5110, email *gary.b.roach@faa.gov.*

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

(g) Additional Information

(1) Eurocopter Alert Service Bulletin EC135–62A–021, dated June 23, 2005, which is not incorporated by reference, contains additional information about the subject of this AD. For service information identified in this AD, contact American Eurocopter Corporation, 2701 Forum Drive, Grand Prairie, TX 75053–4005, telephone (800) 232–0323, fax (972) 641–3710, or at *http://www.eurocopter.com.* You may review a copy of the service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

(2) The subject of this AD is addressed in European Aviation Safety Agency AD 2009–0272, dated December 18, 2009.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6230: Main Rotor Mast/Swashplate.

Issued in Fort Worth, Texas, on November 8, 2012.

Lance T. Gant,

Acting Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2012–28044 Filed 12–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 6

[Docket No. 121022566–2566–01]

RIN 0605–AA31

Civil Monetary Penalties; Adjustment for Inflation

AGENCY: Office of the Secretary, Commerce.

ACTION: Final rule.

SUMMARY: This final rule is being issued to adjust each civil monetary penalty provided by law within the jurisdiction of the Department of Commerce (the Department). The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, required the head of each agency to adjust its civil monetary penalties (CMP) for inflation no later than October 23, 1996, and requires agencies to make adjustments at least once every four years thereafter. These inflation adjustments will apply only to violations that occur after the effective date of this rule.

DATES: This rule is effective December 7, 2012.

ADDRESSES: Office of General Counsel, Department of Commerce, 1401 Constitution Avenue NW., MS 5876, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Peter Robbins; (202) 482–0846.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410) provided for the regular evaluation of CMPs to ensure that they continue to maintain their deterrent value and that penalty amounts due to the Federal Government are properly accounted for and collected. On April 26, 1996, the Federal Civil Penalties Inflation Adjustment Act of 1990 was amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) to require each agency to issue regulations to adjust its CMPs for inflation at least every four years. The amendment further provided that any resulting increases in a CMP due to the inflation adjustment should apply only to the violations that occur subsequent to the date of the publication in the **Federal Register** of the increased amount of the CMP. The first inflation adjustment of any penalty shall not exceed ten percent of such penalty.

On October 24, 1996, November 1, 2000, December 14, 2004, and December 11, 2008, the Department published in the **Federal Register** a schedule of CMPs adjusted for inflation as required by law. By this publication, CMPs are again being adjusted for inflation as prescribed by law.

A civil monetary penalty is defined as any penalty, fine, or other sanction that:

1. Is for a specific monetary amount as provided by Federal law, or has a maximum amount provided for by Federal law; and,

2. Is assessed or enforced by an agency pursuant to Federal law; and,

3. Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

This regulation adjusts the CMPs that are established by law and assessed or enforced by the Department.

The actual penalty assessed for a particular violation is dependent upon a variety of factors. For example, the National Oceanic and Atmospheric Administration's (NOAA) Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions (Penalty Policy), a compilation of internal guidelines that are used when assessing penalties for violations for most of the statutes NOAA enforces, will be interpreted in a manner consistent with this regulation to maintain the deterrent effect of the penalties recommended therein. The penalty ranges in the Penalty Policy are intended to aid enforcement attorneys in determining the appropriate penalty to assess for a particular violation. The Penalty Policy is maintained and made available to the public on the NOAA Office of the General Counsel, Enforcement Section Web site at: *http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf.*

The inflation adjustments were determined pursuant to the methodology prescribed by Public Law 101–410, which requires the maximum CMP, or the minimum and maximum CMP, as applicable, to be increased by the cost-of-living adjustment. The term ''cost-of-living adjustment'' was defined in Public Law 104–134 to mean the percentage for each CMP by which the Consumer Price Index (CPI) for June of the calendar year preceding the adjustment exceeds the CPI for the

month of June of the calendar year in which the amount of such CMP was last set or adjusted pursuant to law. For the purpose of computing the inflation adjustments, the CPI for June of the calendar year preceding the adjustment means the CPI for June of 2011.

Public Law 101–410 requires each rounded increase to be added to the minimum or maximum penalty amount being adjusted, and the total is the amount of such penalty, as adjusted, subject to the ten percent limitation provided by Public Law 104–134 for the first adjustment.

Rulemaking Requirements

It has been determined that this rule is not significant for purposes of Executive Order 12866.

The Department for good cause finds that notice and opportunity for comment is unnecessary for this rulemaking pursuant to 5 U.S.C. 553(b)(B). It is unnecessary to ask for notice and comment because Public Law 104–134 requires the head of each agency to adjust its civil monetary penalties no later than October 23, 1996, and at least every four years thereafter, and Public Law 101–410, as amended by Public Law 104–134, states how to calculate the inflation adjustments, making such adjustments wholly non-discretionary. This rule merely adjusts the Department's CMP according to the statutory requirements. For the same reasons, there exists good cause to waive the thirty day delay in effectiveness of the rule, pursuant to 5 U.S.C. 553(d)(3).

Because notice and opportunity for comment are not required by 5 U.S.C. 553, or any other law, a Regulatory Flexibility Analysis is not required and none was prepared. This rule does not contain information collection requirements for purposes of the Paperwork Reduction Act.

List of Subjects 15 CFR Part 6

Law enforcement, Penalties.

Dated: November 16, 2012.

Lisa Casias,

Deputy Chief Financial Officer and Director for Financial Management.

For the reasons set forth in the preamble, subtitle A of Title 15 of the Code of Federal Regulations is amended as follows:

PART 6—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

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

Authority: Sec. 4, as amended, and sec. 5, Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–134, 110 Stat. 1321, 28 U.S.C. 2461 note.

■ 2. Section 6.4 is revised as follows:

§ 6.4 Adjustments to penalties.

The civil monetary penalties provided by law within the jurisdiction of the respective agencies or bureaus of the Department, as set forth below in this section, are hereby adjusted in accordance with the inflation adjustment procedures prescribed in Section 5, Pub. L. 101–410, from the amounts of such penalties in effect prior to December 7, 2012, to the amounts of such penalties, as thus adjusted, except for the penalties that are being adjusted for the first time, stated in paragraphs, (a)(1), which became effective on October 21, 1986; (a)(2), which became effective on March 2, 1863; (b)(5), which became effective on December 18, 2006; and (f)(1) and (f)(2), which became effective on December 18, 2010.

(a) Department of Commerce. (1) 31 U.S.C. 3802(a)(1)(D), Program Fraud Civil Remedies Act of 1986, from $5,000 to $5,500.

(2) 31 U.S.C. 3729(a)(1)(G), False Claims Act; minimum from $5,000 to $5,500; maximum from $10,000 to $11,000.

(b) *Bureau of Industry and Security.* (1) 15 U.S.C. 5408(b)(1), Fastener Quality Act—Violation, from $32,500 to $32,500.

(2) 22 U.S.C. 6761(a)(1)(A), Chemical Weapons Convention Implementation Act—Inspection Violation, from $25,000 to $25,000.

(3) 22 U.S.C. 6761(a)(l)(B), Chemical Weapons Convention Implementation Act—Record Keeping Violation, from $5,000 to $5,000.

(4) 50 U.S.C. 1705(a), International Emergency Economic Powers Act (2007)—Violation, from $250,000 to $250,000.

(5) 22 U.S.C. 8142(a), United States Additional Protocol Implementation Act (2006)— Violation, from $25,000 to $27,500.

(c) *Bureau of the Census.* (1) 13 U.S.C. 304, Collection of Foreign Trade Statistics—Delinquency on Delayed Filing of Export Documentation; maximum penalty for each day's delinquency, from $1,000 to $1,000; maximum per violation, from $10,000 to $10,000.

(2) 13 U.S.C. 305(b), Collection of Foreign Trade Statistics—Violations, from $10,000 to $10,000.

(d) Economics and Statistics Administration. 22 U.S.C. 3105(a), International Investment and Trade in Services Act—Failure to Furnish Information; minimum, from $2,500 to $2,500; maximum, from $32,500 to $32,500.

(e) *International Trade Administration.* (1) 19 U.S.C. 81s, Foreign Trade Zone—Violation, from $1,100 to $1,100.

(2) 19 U.S.C. 1677f(f)(4), U.S.-Canada FTA Protective Order—Violation, from $130,000 to $130,000.

(f) *National Oceanic and Atmospheric Administration.* (1) 51 U.S.C. 60123(a)(3), Land Remote Sensing Policy Act of 2010; new penalty $10,000.

(2) 51 U.S.C. 60148(c), Land Remote Sensing Policy Act of 2010, new penalty $10,000.

(3) 16 U.S.C. 773f(a), Northern Pacific Halibut Act of 1982 (2007), from $200,000 to $200,000.

(4) 16 U.S.C. 783, Sponge Act (1914), from $650 to $650.

(5) 16 U.S.C. 957, Tuna Conventions Act of 1950 (1962);

(i) Violation/Subsection (a), from $32,500 to $32,500.

(ii) Subsequent Violation/Subsection (a), from $70,000 to $70,000.

(iii) Violation/Subsection (b), from $1,100 to $1,100.

(iv) Subsequent Violation/Subsection (b), from $6,500 to $6,500.

(v) Violation/Subsection (c), from $140,000 to $140,000.

(6) 16 U.S.C. 971e(e), Atlantic Tunas Convention Act of 1975 (1995), from $140,000 to $140,000.

(7) 16 U.S.C. 972f(b), Eastern Pacific Tuna Licensing Act of 1984;

(i) Violation/Subsections (a)(1)–(3), from $32,500 to $32,500.

(ii) Subsequent Violation/Subsections (a)(1)–(3), from $65,000 to $65,000.

(iii) Violation/Subsections (a)(4)–(5), from $6,500 to $6,500.

(iv) Subsequent Violation/Subsections (a)(4)–(5), from $6,500 to $6,500.

(v) Violation/Subsection (a)(6), from $140,000 to $140,000.

(8) 16 U.S.C. 973f(a), South Pacific Tuna Act of 1988, from $350,000 to $350,000.

(9) 16 U.S.C. 1174(b), Fur Seal Act Amendments of 1983, from $11,000 to $11,000.

(10) 16 U.S.C. 1375(a) (1), Marine Mammal Protection Act of 1972 (1981), from $11,000 to $11,000.

(11) 16 U.S.C. 1385(e), Dolphin Protection Consumer Information Act (1990), from $130,000 to $130,000.

(12) 16 U.S.C. 1437(d)(1), National Marine Sanctuaries Act (1992), from $140,000 to $140,000.

(13) 16 U.S.C. 1540(a)(1), Endangered Species Act of 1973;

(i) Knowing Violation of Section 1538 (1988), from $32,500 to $32,500.

(ii) Other Knowing Violation (1988), from $13,200 to $13,200.

(iii) Otherwise Violation (1978), from $650 to $650.

(14) 16 U.S.C. 1858(a), Magnuson-Stevens Fishery Conservation and Management Act (1990), from $140,000 to $140,000.

(15) 16 U.S.C. 2437(a)(1), Antarctic Marine Living Resources Convention Act of 1984;

(i) Violation, from $6,500 to $6,500.

(ii) Knowing Violation, from $11,000 to $11,000.

(16) 16 U.S.C. 2465(a), Antarctic Protection Act of 1990;

(i) Violation, from $6,500 to $6,500.

(ii) Knowing Violation, from $11,000 to $11,000.

(17) 16 U.S.C. 3373(a), Lacey Act Amendments of 1981;

(i) Sale and Purchase Violation, from $11,000 to $11,000.

(ii) Marking Violation, from $275 to $275.

(iii) False Labeling Violation, from $11,000 to $11,000.

(iv) Other than Marking Violation, from $11,000 to $11,000.

(18) 16 U.S.C. 3606(b)(1), Atlantic Salmon Convention Act of 1982 (1990), from $140,000 to $140,000.

(19) 16 U.S.C. 3637(b), Pacific Salmon Treaty Act of 1985 (1990), from $140,000 to $140,000.

(20) 16 U.S.C. 4016(b)(1)(B), Fish and Seafood Promotion Act of 1986; minimum from $500 to $500; maximum from $6,500 to $6,500.

(21) 16 U.S.C. 5010(a)(1), North Pacific Anadromous Stocks Act of 1992, from $130,000 to $130,000.

(22) 16 U.S.C. 5103(b)(2), Atlantic Coastal Fisheries Cooperative Management Act (1993), from $140,000 to $140,000.

(23) 16 U.S.C. 5154(c)(1), Atlantic Striped Bass Conservation Act (1990), from $140,000 to $140,000.

(24) 16 U.S.C. 5507(a)(1), High Seas Fishing Compliance Act of 1995, from $130,000 to $130,000.

(25) 16 U.S.C. 5606(b), Northwest Atlantic Fisheries Convention Act of 1995, from $140,000 to $140,000.

(26) 16 U.S.C. 6905(c), Western and Central Pacific Fisheries Convention Implementation Act (2007), from $140,000 to $140,000.

(27) 16 U.S.C. 7009(c), Pacific Whiting Act of 2006 (2007); from $140,000 to $140,000.

(28) 22 U.S.C. 1978(e), Fishermen's Protective Act of 1967 (1971);

(i) Violation, from $11,000 to $11,000.

(ii) Subsequent Violation, from $32,500 to $32,500.

(29) 30 U.S.C. 1462(a), Deep Seabed Hard Mineral Resources Act (1980), from $32,500 to $32,500.

(30) 42 U.S.C. 9152(c)(1), Ocean Thermal Energy Conversion Act of 1980, from $32,500 to $32,500.

■ 3. Section 6.5 is revised to read as follows:

§ 6.5 Effective Date of Adjustments.

The adjustments made by § 6.4 of this part, of the penalties there specified, are effective on December 7, 2012, and said penalties, as thus adjusted by the adjustments made by § 6.4 of this part, shall apply only to violations occurring after December 7, 2012, and before the effective date of any future inflation adjustment thereto made subsequent to December 7, 2012 as provided in § 6.6 of this part.

[FR Doc. 2012–28503 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DP–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 744

[Docket No. 121009527–2527–01]

RIN 0694–AF80

Addition of Certain Persons to the Entity List

Correction

In rule document 2012–28919 appearing on pages 71097–71099 in the issue of Thursday, November 29, 2012, make the following changes:

PART 744—[CORRECTED]

1. On page 71099, in the table ''Supplement No. 4 to Part 744—Entity List'', in the fifth column, in the fourth row, ''77 FR [INSERT FR PAGE NUMBER] 11/30/12.'' should read, ''77 FR [INSERT FR PAGE NUMBER] 11/29/12.''

2. On the same page, in the same table, in the same column, in the sixth row, ''77 FR [INSERT FR PAGE NUMBER] 11/30/12.'' should read, ''77 FR [INSERT FR PAGE NUMBER] 11/29/12.''

3. On the same page, in the same table, in the same column, in the tenth row, ''77 FR [INSERT FR PAGE NUMBER] 11/30/12.'' should read, ''77 FR [INSERT FR PAGE NUMBER] 11/29/12.''

[FR Doc. C1–2012–28919 Filed 12–6–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 774

[Docket No. 120320200–2296–01]

RIN 0694–AF62

Editorial Corrections to the Commerce Control List of the Export Administration Regulations

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This final rule corrects reference and typographical errors in the Commerce Control List (CCL) in the Export Administration Regulations (EAR). The corrections are primarily editorial in nature and do not affect license requirements. A technical standard in ECCN 3A991 is revised.

DATES: Effective on December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Robert Monjay, Office of Exporter Services, Bureau of Industry and Security, by telephone (202) 482–2440 or email: *Robert.Monjay@bis.doc.gov.*

SUPPLEMENTARY INFORMATION: This final rule updates seven categories of the Commerce Control List (CCL) to correct spelling and typographical errors and inaccurate internal references, and to provide a complete and more accurate description of controls and the related items on the CCL.

Category 0, Nuclear Materials, Facilities, and Equipment And Miscellaneous Items

ECCN 0A018.c is amended to correct an error in a final rule published by BIS on March 30, 2004 (69 FR 16478, 16480). The March 20, 2004, rule contained duplicative language and did not include the word ECCN prior to a reference to a related ECCN. To correct these errors, this rule removes the phrase ''that were not specifically designed for hunting or sporting purposes'' and adds the word ''ECCN'' before the word ''0A984'' in the Note to 0A018.c.

ECCN 0B001.g.2 is amended to correct an error in a final rule published by BIS on January 15, 1998 (63 FR 2452, 2462). The January 15, 1998, rule included an unnecessary apostrophe in the word ''alloys''. To correct this error, the rule deletes the apostrophe from the word ''alloy's'' in ECCN 0B001.g.2.

Category 1, Special Materials and Related Equipment, Chemicals, ''Microorganisms,'' and ''Toxins''

ECCN 1B999.a and 1C999.f are amended to correct typographical errors in a final rule published by BIS on June 19, 2000 (65 FR 38148, 38162). The June 19, 2000, rule misspelled ''fluorine'' in these two ECCNs. To correct these errors, this rule removes the word ''flourine'' from these two ECCNs and inserts the word ''fluorine'' in its place.

ECCN 1C350 is amended to update the mailing address for the Quarterly Report requirement to the Bureau of Industry and Security. The BIS mailroom is no longer Room 2705. Mail for BIS should now be directed to Room 2099B. Consistent with this room change, this rule changes the references to the ''Room 2705'' in paragraph (e) of the License Requirements Notes 1 to the ''Room 2099B''.

The final paragraph of Category 1, describing the designation EAR99, is amended to correct an error in a final rule published by BIS on January 15, 1998 (63 FR 2452, 2484). The January 15, 1998, rule changed the language of the EAR99 paragraph in Categories 1 and 2 only to ''Items subject to the EAR that are *not* elsewhere controlled by this CCL Category *or* in any other category in the CCL are designated by the number *EAR99.''* To correct this error, this rule removes the language ''controlled by'' and inserts ''specified in'' in its place.

Category 2, Materials Processing

The final paragraph of Category 2, describing the designation EAR99, is amended to correct an error in a final rule published by BIS on January 15, 1998 (63 FR 2452, 2484). The January 15, 1998, rule changed the language of the EAR99 paragraph in Categories 1 and 2 only to ''Items subject to the EAR that are *not* elsewhere controlled by this CCL Category *or* in any other category in the CCL are designated by the number *EAR99.''* To correct this error, this rule removes the language ''controlled by'' and inserts ''specified in'' in its place.

Category 3, Electronics

ECCN 3A991 is amended by revising the technical standard in items paragraph .j.2 from an energy density of 250 Wh/kg or less at 293 K to an energy density of 300 Wh/kg or less at 293 K. A final rule published on July 2, 2012 (77 FR 39354), changed the technical standard in ECCN 3A001, items paragraph .e.1.b, from an energy density exceeding 250 Wh/kg at 293 K to an energy density exceeding 300 Wh/kg at 293 K. When a multilateral regime control standard is modified, the standard practice is to retain the AT control by increasing the technical standard in the corresponding AT-only control. The July 2, 2012 rule did not change the corresponding control in 3A991.j.2. This rule implements that change by increasing the technical standard in items paragraph .j.2 to an energy density of 300 Wh/kg or less at 293 K.

Category 4, Computers

ECCN 4D994 is amended by revising the heading to remove the references to ECCN 4B994 and ECCN 4C994. A final rule published by BIS on June 28, 2010, removed ECCNs 4B994 and 4C994 and reserved Category 4B and 4C in their entirety. The heading of ECCN 4D994 refers to both ECCNs 4B994 and 4C994. It creates confusion to reference ECCNs that no longer exist. To resolve this confusion, this rule removes the phrase ''4B994, and materials controlled by 4C994.''

Category 5, Telecommunications and ''Information Security''

The Title to this Category is amended by modifying the numbering of the subsections to Category 5. ''I. Telecommunications'' is changed to ''Part 1—Telecommunications'' and ''II. 'Information Security''' is changed to ''Part 2—'Information Security' '' to remain consistent with the Wassenaar Arrangement and to make these headings conform to the many references in the regulatory language of the EAR.

Category 5, Part 1. Telecommunications

ECCN 5A101 is amended to correct an error in a final rule published by BIS on May 4, 2004 (69 FR 24508, 24510). The May 4, 2004, rule included the word ''Item'' at the beginning of a note to ECCN 5A101. This rule corrects the error by removing the word ''Item'' from the beginning of the final note to ECCN 5A101.

ECCN 5A991 is amended:

a. By adding ECCN 5E001.c to the Related Controls paragraph. The reference is appropriate to identify potentially applicable controls of technology under ECCN 5E001.c for the ''development'' and ''production'' of commodities controlled under 5A991. This change will improve the ability of users of the Export Administration Regulations to correctly identify the classification of the technologies related to these commodities.

b. To correct an error in a final rule published by BIS on December 10, 2003 (68 FR 68976, 68989). The December 10, 2003, rule moved the note to 5A991.c.10 to before 5A991.c.10. To correct this error, this rule removes the language ''Note: 5A991.c.10 does not control packet switches or routers with ports or lines not exceeding the limits in 5A991.c.10.'' from before 5A991.c.10 and inserts it before 5A991.c.11.

Category 6, Sensors and Lasers

ECCN 6A005.f.3 is amended to correct an error in a final rule published by BIS on May 26, 2011 (76 FR 30538, 30539). The May 26, 2011, rule used the word ''lambda'' in place of the symbol ''λ'' at 6A005.f.3. To correct this error, this rule removes the word ''lambda'' and inserts the symbol ''λ'' in its place.

Category 8, Marine

ECCN 8A992.b is amended to correct an error in a final rule published by BIS on March 5, 1999 (64 FR 18052, 10869). The March 5, 1999 rule used the incorrect spelling of ''autofocusing,'' ''focusing,'' and ''format.'' To correct the error, this rule removes the words ''autofocussing'', ''focussing'', and ''formate'' and inserts ''autofocusing'', ''focusing'', and ''format'' in the respective places in 8A992.b.

Category 9, Aerospace and Propulsion

ECCN 9B116 is amended to correct an error in a final rule published by BIS on November 21, 2002 (67 FR 70157, 70158). The November 21, 2002, rule inserted a reference in the Related Controls paragraph to ''the 'production equipment' controlled in this entry'' while 9B116 controls only ''production facilities.'' There was also a semicolon in place of a comma in the list of related controls. To correct this error, the rule removes the phrase ''production equipment'' and inserts ''production facilities'' in its place and removes the semicolon and inserts a comma in its place. This rule also removes the word ''is'' and inserts the word ''are'' in its place to create subject verb agreement.

Although the Export Administration Act expired on August 20, 2001, the President, through Executive Order 13222 of August 17, 2001, 3 CFR, 2001 Comp., p. 783 (2002), as extended by the Notice of August 15, 2012, 77 FR 49699 (August 16, 2012), has continued the EAR in effect under the International Emergency Economic Powers Act. BIS continues to carry out the provisions of the Export Administration Act, as appropriate and to the extent permitted by law, pursuant to Executive Order 13222.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 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 determined to be not significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule does not affect any paperwork collection. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

3. The Department of Commerce finds that there is good cause under 5 U.S.C. 553(b)(3)(B) to waive the provisions of the Administrative Procedure Act otherwise requiring prior notice and the opportunity for public comment because they are unnecessary. All of the revisions made by this rule, except the modification of the technical standard in ECCN 3A991, are administrative in nature and do not affect the privileges and obligations of the public. Because these revisions are not substantive changes to the EAR, the 30-day delay in effectiveness otherwise required by 5 U.S.C. 553(d) is not applicable. The modification of the technical standard in ECCN 3A991 is to correct an oversight in a final rule published on July 2, 2012 (77 FR 39353), which was published without requiring notice of proposed rulemaking, the opportunity for public participation, or a delay in effective date, as a military and foreign affairs function of the United States (5 U.S.C. 553(a)(1)). As the modification of the technical standard was intended to be included in that final rule, immediate implementation of this correction to the amendments in the July 2, 2012 (77 FR 39353), rule fulfills the United States' international obligation to the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. No other law requires that a notice of proposed rulemaking and opportunity for public comment be given for this rule. The analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) are not applicable.

List of Subjects in 15 CFR Part 774

Exports, Reporting and recordkeeping requirements.

Accordingly, Part 774 of the EAR (15 CFR Parts 730–774) is amended as follows:

PART 774—[AMENDED]

■ 1. The authority citation for Part 774 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.;* 50 U.S.C. 1701 *et seq.;* 10 U.S.C. 7420; 10 U.S.C. 7430(e); 22 U.S.C. 287c, 22 U.S.C. 3201 *et seq.,* 22 U.S.C. 6004; 30 U.S.C. 185(s), 185(u); 42 U.S.C. 2139a; 42 U.S.C. 6212; 43 U.S.C. 1354; 15 U.S.C. 1824a; 50 U.S.C. app. 5; 22 U.S.C. 7201 *et seq.;* 22 U.S.C. 7210; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 15, 2012, 77 FR 49699 (August 16, 2012).

■ 2. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 0, ECCN 0A018 is amended by revising the Note to paragraph (c) of the Items paragraph in the List of Items Controlled section to read as follows:

Supplement No. 1 to Part 774—Commerce Control List

* * * * *

0A018 Items on the Wassenaar Munitions List.

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

c. * * *

Note: 0A018.c does not control weapons used for hunting or sporting purposes that were not specially designed for military use and are not of the fully automatic type, but see ECCN 0A984 concerning shotguns.

* * * * *

■ 3. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 0, ECCN 0B001 is amended by removing the apostrophe from the word ''alloy's'' in paragraph g.2. in the Items paragraph of the List of Items Controlled section.

■ 4. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1, ECCN 1B999 is amended by removing the word ''flourine'' and adding in its place the word ''fluorine'' in paragraph a. of the Items paragraph in the List of Items Controlled section.

■ 5. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1, ECCN 1C350 is amended by removing the phrase ''Room 2705'' and adding its place the phrase ''Room 2099B'' in paragraph e. of License Requirement Notes 1 in the License Requirements section.

■ 6. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1, ECCN 1C999 is amended by removing the word ''flourine'' and adding in its place the word ''fluorine'' in paragraph f. of the Items paragraph in the List of Items Controlled section.

■ 7. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 1 is amended by revising the EAR99 paragraph to read as follows:

Category 1

* * * * *

EAR99 Items Subject to the EAR That Are *Not* Elsewhere Specified in This CCL Category *or* in Any Other Category in the CCL Are Designated by the Number EAR99.

■ 8. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 2 is amended by revising the EAR99 paragraph read as follows:

Category 2

* * * * *

EAR99 Items Subject to the EAR That Are *Not* Elsewhere Specified in This CCL Category *or* in Any Other Category in the CCL Are Designated by the Number EAR99.

■ 9. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 3, ECCN 3A991 is amended by revising paragraph j.2. in the Items paragraph in the List of Items Controlled section to read as follows:

3A991 Electronic Devices and Components not Controlled by 3A001.

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

j. * * *

* * * * *

j.2. Secondary cells having an energy density of 300 Wh/kg or less at 293 K (20 °C).

* * * * *

■ 10. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 4, ECCN 4D994 is amended by revising the heading to read as follows:

4D994 ''Software'' Other Than That Controlled in 4D001 Specially Designed or Modified for the ''Development'', ''Production'', or ''Use'' of Equipment Controlled by 4A101 and 4A994.

* * * * *

■ 11. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 5

is amended by removing the heading ''I. Telecommunications'' and adding in its place ''Part 1—Telecommunications'' to read as follows:

CATEGORY 5—TELECOMMUNICATIONS AND ''INFORMATION SECURITY''

PART 1—TELECOMMUNICATIONS

* * * * *

■ 12. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 5, Part 1, ECCN 5A101 is amended by revising the final Note in the Items paragraph of the List of Items Controlled section to read as follows:

5A101 Telemetering and Telecontrol Equipment, Including Ground Equipment, Designed or Modified for Unmanned Aerial Vehicles or Rocket Systems (Including Ballistic Missile Systems, Space Launch Vehicles, Sounding Rockets, Cruise Missile Systems, Target Drones, and Reconnaissance Drones) Capable of a Maximum ''Range'' Equal to or Greater Than 300 km.

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

Note: 5A101 does not include items not designed or modified for unmanned aerial vehicles or rocket systems (including ballistic missile systems, space launch vehicles, sounding rockets, cruise missile systems, target drones, and reconnaissance drones) capable of a maximum ''range'' equal to or greater than 300 km (*e.g.,* telemetry circuit cards limited by design to reception only and designed for use in personal computers).

* * * * *

■ 13. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 5, Part 1, ECCN 5A991, List of Items Controlled section is amended by:

a. Revising the second sentence of the Related Controls paragraph; and

b. Amending the Items Paragraph by removing the Note that reads ''5A991.c.10 does not control packet switches or routers with ports or lines not exceeding the limits in 5A991.c.10.'' and adding it above paragraph c.11, to read as follows:

5A991 Telecommunication Equipment, Not Controlled by 5A001.

* * * * *

List of Items Controlled

Unit: * * *

Related Controls: * * * *See also* 5E001.c, 5E101 and 5E991.

Related Definitions: * * *

Items:

* * * * *

c. * * *

* * * * *

Note: 5A991.c.10 does not control packet switches or routers with ports or lines not exceeding the limits in 5A991.c.10.

c.11. ''Optical switching'';

* * * * *

■ 14. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 5 is amended by removing the heading ''II. Information Security'' and adding in its place ''Part 2—Information Security'' to read as follows:

CATEGORY 5—TELECOMMUNICATIONS AND ''INFORMATION SECURITY''

* * * * *

PART 2—''INFORMATION SECURITY''

* * * * *

■ 15. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 6, ECCN 6A005, List of Items Controlled section is amended by removing the word ''lambda'' and inserting the symbol ''λ'' in its place in paragraph f.3. of the Items paragraph.

■ 16. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 8, ECCN 8A992, List of Items Controlled section is amended by revising paragraph b. in the Items paragraph to read as follows:

8A992 Vessels, Marine Systems or Equipment, Not Controlled by 8A001, 8A002 or 8A018, and Specially Designed Parts Therefor.

* * * * *

List of Items Controlled

* * * * *

Items:

* * * * *

b. Photographic still cameras specially designed or modified for underwater use, having a film format of 35 mm or larger, and having autofocusing or remote focusing specially designed for underwater use;

* * * * *

■ 17. In Supplement No. 1 to Part 774 (the Commerce Control List), Category 9, ECCN 9B116, List of Items Controlled section is amended by revising the Related Controls paragraph to read as follows:

9B116 Specially Designed ''Production Facilities'' for the Systems, Sub-Systems, and Components Controlled by 9A004 to 9A009, 9A011, 9A012, 9A101, 9A104 to 9A109, 9A111, 9A116 to 9A119.

* * * * *

List of Items Controlled

* * * * *

Related Controls: Although items described in ECCNs 9A004 to 9A009, 9A011, 9A101, 9A104 to 9A109, 9A111, and 9A116 to 9A119 are subject to the export licensing authority of the Department of State, Directorate of Defense Trade Controls (22 CFR part 121), the ''production facilities'' controlled in this entry that are related to these items is subject to the export licensing authority of BIS.

* * * * *

Dated: November 26, 2012.

Kevin J. Wolf,

Assistant Secretary for Export Administration.

[FR Doc. 2012–29143 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–33–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 232

[Docket No. FR–5537–F–02]

RIN–2502–AJ04

Federal Housing Administration (FHA) Section 232 Healthcare Mortgage Insurance Program: Partial Payment of Claims

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule amends the regulations governing FHA's Section 232 Healthcare Mortgage Insurance program (Section 232 program) by establishing the criteria and process by which FHA will accept and pay a partial payment of a claim under the FHA mortgage insurance contract. The Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. Through acceptance and payment of a partial payment of claim, FHA pays the lender a portion of the unpaid principal balance and recasts a portion of the mortgage under terms and conditions determined by FHA, as an alternative to the lender assigning the

entire mortgage to HUD. Partial payment of claim also allows FHA-insured healthcare projects to continue operating and providing services.

DATES: *Effective Date:* January 7, 2013.

FOR FURTHER INFORMATION CONTACT: Kelly Haines, Director, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 6264, Washington, DC 20410–8000; telephone number 202–708–0599 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

A. Background

FHA's Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. A project may include more than one type of facility and financing, and a combination of these uses is acceptable. The Section 232 program is authorized under the National Housing Act (12 U.S.C. 1715w). HUD's regulations for the Section 232 program are codified in 24 CFR part 232. While many aspects of HUD's healthcare facility operations, including the basic contract and eligibility requirements, are governed by the regulations applicable to HUD's multifamily mortgage insurance programs, separate healthcare regulations have been adopted to address program operations specific to healthcare facilities, such as state licensing requirements.[1]

One process well-established and long used in HUD's multifamily housing programs is acceptance of partial payment of claims (PPCs). The regulations implementing the statutory authority to accept PPCs, which FHA adopted in 1985, and which are codified in 24 CFR 207.258b, specifically excluded FHA's Section 232 program from the multifamily PPC process. (See 24 CFR 232.251(a).)

Congress specifically authorized PPCs for the Section 232 program in 1997. (See 12 U.S.C. 1735 f–19.) However, as the regulatory provisions governing the multifamily programs, which predated the 1997 statutory amendments, were not revised to reflect the statutory authority to use PPCs for healthcare facilities, HUD proposed revisions specifically to address PPCs.

B. The Proposed Rule and Public Comments

On July 9, 2012, HUD published a proposed rule at 77 FR 40301, in which it submitted for public comment a proposed revision to the Section 232 program regulations to provide, in regulation, the procedures and criteria for FHA to determine when PPCs should be considered and paid for healthcare facilities.

The proposed regulations governing PPCs in the Section 232 program used the current multifamily program regulations governing PPCs, codified at 24 CFR 207.258b, as a baseline. Those PPC regulations were modified based on FHA's experience in implementing the PPC process in its multifamily housing programs, and in utilizing PPCs in the Section 232 program on a periodic and temporary basis.

The proposed rule added a new § 232.882, entitled ''Partial Payment of Claims,'' to the Section 232 program regulations in 24 CFR part 232 to provide that if the mortgagee elects to assign a mortgage to the FHA Commissioner, under certain circumstances the Commissioner may request the mortgagee to accept a partial payment of the claim. That proposed PPC regulation for the Section 232 program differed from the regulations establishing the PPC process for the multifamily programs primarily because the focus of the Section 232 program is on healthcare facilities.

As stated in the proposed rule preamble and emphasized here in this preamble to the final rule, FHA's partial payment of claim is made pursuant to the contract of mortgage insurance between FHA and the mortgage lender, which are the only parties to the contract. Borrowers and operators are neither parties to the contract of insurance, nor are they third-party beneficiaries, and thus they do not have any rights or expectations in regard to any decision made by FHA to accept or reject a mortgagee's request for a partial payment of claim.

By establishing a standard process and criteria for acceptance and payment of PPCs in the Section 232 program, partial payment of claims can occur more frequently than they do now in the Section 232 program, not only resulting in savings to the FHA insurance fund, but helping to restore a project to financial stability.

The public comment period for the July 9, 2012, proposed rule closed on September 7, 2012, and HUD received one public comment through the *www.regulations.gov* Web site. The commenter, an association of healthcare finance bankers and healthcare consultants, expressed strong support for the proposed PPC change, as it would make the Section 232 program stronger by allowing appropriate use of the partial-payment-of-claim option and provide another tool to help struggling projects. The commenter offered no suggested changes, and urged HUD to implement the final rule as quickly as possible.

C. This Final Rule

In this final rule, HUD adopts the proposed rule without substantive change, but makes an organizational change and makes certain citation revisions as a result of the organizational change. In this final rule, HUD is adding the PPC provisions to subpart B, entitled Contract Rights and Obligations. In the proposed rule, these changes were proposed to be added to subpart D, which is also titled Contract Rights and Obligations, but subpart D follows subpart C, Supplemental Loans to Finance Purchase and Install Fire Safety Equipment, and focuses on payments and claims related to loans to finance the purchase and installation of fire safety equipment. Relocating the PPC provisions to part 232 subpart B, which addresses contract rights and obligations generally under the Section 232 program, was determined to be a more appropriate fit. Further, HUD has made several minor revisions in the final rule stage to conform the references in this rule to the relevant sections describing the claims process to reflect the change from subpart D.

Findings and Certifications

Executive Order 13563, Regulatory Review

The President's Executive Order (EO) 13563, entitled ''Improving Regulation and Regulatory Review,'' was signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This EO requires executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Section 4 of the EO, entitled ''Flexible Approaches,'' provides, in relevant part, that where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and

[1] The regulations codified at 24 CFR part 200 (entitled ''Introduction to FHA programs'') set forth, in a single location of the Code of Federal Regulations, requirements that are generally applicable to FHA programs. The regulations at 24 CFR 232.2 require that facilities meet state licensing requirements.

consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. As this rule will include guidance for PPCs in the Code of Federal Regulations, HUD submits that the changes by this rule to the Section 232 regulations are consistent with the EO's directions. The existing Section 232 regulations provide insufficient guidance to the public on PPCs for the Section 232 program. These changes will reduce risk to the FHA insurance fund by establishing the criteria and process by which FHA will accept and pay a partial payment of the claim under the FHA mortgage insurance contract, as an alternative to the lender assigning the entire mortgage to HUD. It therefore strengthens the Section 232 program, and helps to ensure that healthcare facilities remain financially viable.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule is directed to strengthening HUD's Section 232 program by establishing a process and criteria by which the FHA may allow partial payment of claims for Section 232 projects. As noted under the discussion of EO 13563, establishment of this process also opens up another means by which healthcare project owners can restore troubled projects to financial stability. Acceptance of PPCs helps healthcare project owners and operators to lower project debt, and continue to provide valued healthcare services to the communities they serve. This established process for acceptance of PPCs will help all healthcare project owners, large and small. Additionally, by clarifying and codifying existing requirements, the rule makes it easier for borrowers and operators to comply with their legal obligations. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Information Collection Requirements

The information collection requirements contained in this rule were reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), and assigned OMB Control Numbers 2502–0418.

In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The docket file is available for public inspection.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800–877–8339.

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the Mortgage Insurance Nursing Homes, Intermediate Care Facilities, Board and Care Homes, and Assisted Living Facilities program is 14.129.

List of Subjects in 24 CFR Part 232

Fire prevention, Health facilities, Loan programs—health, Loan programs—housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

Accordingly, for the reasons cited in the preamble, HUD amends part 232 of title 24 of the Code of Federal Regulations as follows:

PART 232—MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, BOARD AND CARE HOMES, AND ASSISTED LIVING FACILITIES

■ 1. The authority citation for 24 CFR part 232 is revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715w, 1735f–19; 42 U.S.C. 3535(d).

■ 2. Add § 232.256 to subpart B to read as follows:

§ 232.256 Partial payment of claims.

(a) When a lender for a loan on a healthcare project becomes eligible to file an insurance claim and to assign the mortgage to the Commissioner pursuant to § 207.258, the Commissioner may request the lender, in lieu of assignment, to accept a partial payment of the claim under the mortgage insurance contract and recast the mortgage, under such terms and conditions as the Commissioner may determine.

(b) The Commissioner may request the lender to participate in a partial payment of claim in lieu of assignment only after a determination that partial payment would be less costly to the Federal Government than other reasonable alternatives for maintaining the project and that would keep the healthcare facility operational to serve community needs. In addition to any findings that may be provided in other guidance, the Commissioner shall base the determination on the findings listed below:

(1) The lender is entitled, after a default as defined in § 207.255, to assign the mortgage in exchange for the payment of insurance benefits;

(2) The relief resulting from partial payment, when considered with other resources available to the project, would

be sufficient to restore the financial viability of the project;

(3) The project is or can (at reasonable cost) be made physically sound;

(4) The current or proposed operator of the facility is satisfactory to the Commissioner, as demonstrated by past experience in operating similar types of healthcare facilities and by state regulatory performance;

(5) The default under the insured mortgage was beyond the control of the borrower and/or operator, or in the case of a transfer of physical assets (TPA), the proposed borrower or operator, unless the Commissioner determines that any borrower/operator deficiencies giving rise to the default have clearly been addressed; and

(6) The project is serving as, or potentially could serve as, a needed nursing home, intermediate care facility, board and care home, or assisted living facility.

(c) Partial payment of a claim under this section shall be made only when:

(1) The property covered by the mortgage is free and clear of all liens other than the insured first mortgage and such other liens as the Commissioner may have approved;

(2) The lender has voluntarily agreed to accept a PPC under the mortgage insurance contract and to recast the remaining mortgage amount under terms and conditions prescribed by the Commissioner; and

(3) The borrower has agreed to repay to the Commissioner an amount equal to the partial payment, with the obligation secured by a second mortgage on the project containing terms and conditions prescribed by the Commissioner. The terms of the second mortgage will be determined on a case-by-case basis to ensure that the estimated project income will be sufficient to cover estimated operating expenses and debt service on the recast insured mortgage. The Commissioner may provide for postponed amortization of the second mortgage.

(d) Payment of insurance benefits under this section shall be in cash.

(e) A lender receiving a partial payment of claim, following the Commissioner's endorsement of the mortgage for full insurance under 24 CFR part 252, will pay HUD a fee in an amount set forth through **Federal Register** notice. HUD, in its discretion, may collect this fee or deduct the fee from any payment it makes in the claim process.

Dated: December 3, 2012.

Carol J. Galante,

Acting Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2012–29545 Filed 12–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9603]

RIN 1545–BJ23

Deduction for Qualified Film and Television Production Costs

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations relating to deductions for the cost of producing qualified film and television productions. These final regulations reflect changes to the law made by the Tax Extenders and Alternative Minimum Tax Relief Act of 2008 and affect taxpayers that produce films and television productions within the United States.

DATES: *Effective Date:* These regulations are effective on December 7, 2012.

Applicability Dates: For dates of applicability, see § 1.181–6.

FOR FURTHER INFORMATION CONTACT: Bernard P. Harvey, (202) 622–4930 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations that amend 26 CFR part 1 to reflect amendments made to section 181 of the Internal Revenue Code of 1986 (Code) by section 502 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Public Law 110–343 (122 Stat. 3765) (October 3, 2008).

On October 19, 2011, the IRS and the Treasury Department published in the **Federal Register** (TD 9552, 76 FR 64816) temporary regulations amending the rules under section 181 for deductions relating to the cost of producing qualified film and television productions to reflect section 502 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008. A notice of proposed rulemaking (REG–146297–09) cross-referencing the temporary regulations was published in the **Federal Register** (76 FR 64879) on the same day. No comments were received from the public in response to the notice of proposed rulemaking. No public hearing was requested or held. The proposed regulations under section 181 are adopted by this Treasury decision and the corresponding temporary regulations are removed.

Effective/Applicability Date

These final regulations apply to qualified film and television productions to which section 181 is applicable and for which the first day of principal photography or in-between animation occurs on or after December 7, 2012. The owner of a qualified film or television production may apply the final regulations to productions to which section 181 applies and for which principal photography or, for an animated production, in-between animation commenced before December 7, 2012.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) and (d) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal author of these regulations is Bernard P. Harvey, Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.181–0 is amended by:
■ 1. Adding the entries for § 1.181–1 paragraphs (a)(6), (b)(1)(ii) and (c)(2).
■ 2. Revising the entry for § 1.181–6 paragraph (b) and removing paragraph (c).

The revision and additions to read as follows:

§ 1.181–0 Table of contents.

* * * * *

§ 1.181–1 Deduction for qualified film and television production costs.

(a) * * *

(6) Post-amendment production.

* * * * *

(b) * * *

(1) * * *

(ii) Post-amendment production.

* * * * *

(c) * * *

(2) Post-amendment production.

* * * * *

§ 1.181–6 Effective/applicability date.

* * * * *

(b) Pre-effective date productions.

§ 1.181–0T [Removed]

■ **Par. 3.** Section 1.181–0T is removed.
■ **Par. 4.** Section 1.181–1 is amended by revising paragraphs (a)(1)(ii), (a)(6), (b)(1)(ii), (b)(2)(vi), and (c)(2) to read as follows:

§ 1.181–1 Deduction for qualified film and television production costs.

(a) * * * (1) * * *

(ii) This section provides rules for determining the owner of a production, the production costs (as defined in paragraph (a)(3) of this section), the maximum amount of aggregate production costs (as defined in paragraph (a)(4) of this section) that may be paid or incurred for a pre-amendment production (as defined in paragraph (a)(5) of this section) for which the owner makes an election under section 181, and the maximum amount of aggregate production costs that may be claimed as a deduction for a post-amendment production (as defined in paragraph (a)(6) of this section) for which the owner makes an election under section 181. Section 1.181–2 provides rules for making the election under section 181. Section 1.181–3 provides definitions and rules concerning qualified film and television productions. Section 1.181–4 provides special rules, including rules for recapture of the deduction. Section 1.181–5 provides examples of the application of §§ 1.181–1 through 1.181–4, while § 1.181–6 provides the effective date of §§ 1.181–1 through 1.181–5.

* * * * *

(6) *Post-amendment production.* The term *post-amendment production* means a qualified film or television production commencing on or after January 1, 2008.

* * * * *

(b) * * * (1) * * *

(ii) *Post-amendment production.* Section 181 permits a deduction for the first $15,000,000 (or, if applicable under paragraph (b)(2) of this section, $20,000,000) of the aggregate production costs of any post-amendment production.

* * * * *

(2) * * *

(vi) *Allocation.* Solely for purposes of determining whether a production qualifies for the higher production cost limit (for pre-amendment productions) or deduction limit (for post-amendment productions) provided under this paragraph (b)(2), compensation to actors (as defined in § 1.181–3(f)(1)), directors, producers, and other relevant production personnel (as defined in § 1.181–3 (f)(2)) is allocated entirely to first-unit principal photography.

* * * * *

(c) * * *

(2) *Post-amendment production.* Amounts not allowable as a deduction under section 181 for a post-amendment production may be deducted under any other applicable provision of the Code.

§ 1.181–1T [Removed]

■ **Par. 5.** Section 1.181–1T is removed.
■ **Par. 6.** Section 1.181–6 is revised to read as follows:

§ 1.181–6 Effective/applicability date.

(a) *In general.* Except as otherwise provided in this section, §§ 1.181–1 through 1.181–5 apply to productions the first day of principal photography for which occurs on or after September 29, 2011. Paragraphs 1.181–1(a)(1)(ii), (a)(6), (b)(1)(ii), (b)(2)(vi), and (c)(2) of § 1.181–1 apply to productions to which section 181 is applicable and for which the first day of principal photography or in-between animation occurs on or after December 7, 2012.

(b) *Pre-effective date productions.* For any taxable year for which the period of limitation on refund or credit under section 6511 has not expired, the owner may apply §§ 1.181–1 through 1.181–5 to any production to which section 181 applies and for which the first day of principal photography (or in-between animation) occurred before December 7, 2012, provided the owner applies all relevant provisions of §§ 1.181–1 through 1.181–5 to the production.

§ 1.181–6T [Removed]

■ **Par. 7.** Paragraph 1.181–6T is removed.

Approved: November 30, 2012.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Mark J. Mazur

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–29630 Filed 12–6–12; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 48

[TD 9604]

RIN 1545–BJ44

Taxable Medical Devices

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that provide guidance on the excise tax imposed on the sale of certain medical devices, enacted by the Health Care and Education Reconciliation Act of 2010 in conjunction with the Patient Protection and Affordable Care Act. The final regulations affect manufacturers, importers, and producers of taxable medical devices.

DATES: *Effective date:* These regulations are effective on December 7, 2012.

Applicability date: These regulations are applicable to sales of taxable medical devices after December 31, 2012.

FOR FURTHER INFORMATION CONTACT: Natalie Payne, Michael Beker, or Stephanie Bland, at (202) 622–3130 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations that provide guidance on the excise tax imposed on the sale of certain medical devices under section 4191 (the medical device excise tax) of the Internal Revenue Code (Code), enacted by section 1405 of the Health Care and Education Reconciliation Act of 2010,

Public Law 111–152 (124 Stat. 1029 (2010)), in conjunction with the Patient Protection and Affordable Care Act, Public Law 111–148 (124 Stat. 119 (2010)) (jointly, the ACA).

On February 7, 2012, the IRS and the Treasury Department published a notice of proposed rulemaking (REG–113770–10) (the proposed regulations) in the **Federal Register** (77 FR 6028). The IRS and the Treasury Department received numerous written comments from the public in response to the proposed regulations. A public hearing was held on May 16, 2012. After consideration of the public written comments and hearing comments, the IRS and the Treasury Department are finalizing the proposed regulations with the changes described in this preamble.

Public comments on the proposed regulations identified two issues that the IRS and the Treasury Department will study further and on which the IRS and the Treasury Department have requested additional comments. Those issues are discussed later in this preamble. Comments with regard to those issues should be submitted in writing and can be mailed to the Office of Associate Chief Counsel (Passthroughs and Special Industries), Re: REG–113770–10, CC:PSI:B7, Room 5314, 1111 Constitution Avenue NW., Washington, DC 20224. All comments received will be available for public inspection at *http://www.regulations.gov* (IRS REG–113770–10).

Explanation of Provisions and Summary of Comments

I. Definition of a ''Taxable Medical Device''

Section 4191(b)(1) provides that, in general, a ''taxable medical device'' is any device, as defined in section 201(h) of the Federal Food, Drug & Cosmetic Act (FFDCA) (codified as amended at 21 U.S.C. 301 *et seq.* (2006)) that is intended for humans.

A. Proposed Regulations

The proposed regulations provide that for purposes of the medical device excise tax, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with the Food and Drug Administration (FDA) under section 510(j) of the FFDCA and 21 CFR part 807, pursuant to FDA requirements. The proposed regulations further provide that if a device is not listed with the FDA, but the FDA later determines that the device should have been listed as a device, the device will be deemed to have been listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

B. Public Comments and the Final Regulations

Listing Requirement

One commenter suggested that the listing rule is overbroad because it includes virtually all types of medical devices in the tax base. The commenter requested that the final regulations narrow the definition of a taxable medical device so that the excise tax is imposed only on devices that Congress specifically intended to subject to the tax.

The final regulations do not adopt this suggestion. Congress linked the definition of a taxable medical device to the definition of a ''device'' under section 201(h) of the FFDCA. In general, the FDA requires a device defined in section 201(h) of the FFDCA that is intended for humans to be listed as device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, subject to certain limited exceptions. The final regulations track this FDA requirement by defining a taxable medical device as a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807. This provides taxpayers with greater certainty as to which devices are subject to the tax.

Biologic Devices

Several commenters requested that the final regulations clarify that the definition of a taxable medical device does not include the category of products reviewed as devices by the FDA Center for Biologics Evaluation and Research (CBER).

In general, CBER licenses biologics, such as *in vitro* diagnostic tests for blood donor screening, after the filing of a Biologics License Application (BLA) under the Public Health Service Act. Biologics are listed with the FDA under 21 CFR part 607.

Under the final regulations a taxable medical device is a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, pursuant to FDA requirements. Therefore, devices that CBER regulates that are listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807 are taxable medical devices. Devices that CBER regulates that are not listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, such as biologics that are listed under 21 CFR part 607, are not taxable medical devices.

Devices ''Intended for Humans''

A number of commenters suggested that certain devices, such as sterilization process indicators, software, and containers used to hold or transport medical products and specimens, should be excluded from the definition of a taxable medical device on the basis that they are not ''intended for humans.'' Commenters argued that even if the FDA requires certain such devices to be listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, the devices should not be taxable medical devices because they are not used in the direct treatment, diagnosis, or monitoring of a patient.

Section 4191 links the definition of a taxable medical device to the definition of a device in section 201(h) of the FFDCA. Section 201(h) of the FFDCA provides generally that the term ''device'' means an instrument, apparatus, etc., that is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals; or intended to affect the structure or any function of the body of man or other animals, and that does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and that is not dependent upon being metabolized for the achievement of its primary intended purposes. Section 201(h) of the FFDCA includes devices intended for ''man'' and devices intended for ''other animals.'' Thus, the phrase ''intended for humans'' included in section 4191(b) limits the definition of a taxable medical device to the devices defined in section 201(h) of the FFDCA that are intended for ''man'' (intended for humans) and excludes from the section 201(h) definition the devices that are intended for ''other animals.''

There is no support in the statute, or in either the legislative history or the Joint Committee on Taxation's General Explanation (Joint Committee on Taxation General Explanation of Tax Legislation Enacted in the 111th Congress (JCS–2–11), March 2011, at 365–367) (JCT General Explanation) for the proposition that Congress included the statutory phrase ''intended for humans'' in section 4191(b) to distinguish between devices defined in section 201(h) of the FFDCA that are intended for use directly on patients or directly in patient care from other devices defined in section 201(h) of the FFDCA that are otherwise used in human medicine. Accordingly, the final regulations do not adopt this suggestion.

Veterinary Devices

One commenter stated that the listing requirement is insufficient to distinguish medical devices for human use from those intended for use in veterinary medicine for purposes of applying the medical device excise tax. The commenter suggested that subjecting devices to the medical device excise tax because the device is listed with the FDA under section 510(j) of the FFDCA disadvantages certain manufacturers. Specifically, the commenter noted that medical device manufacturers selling devices for both human use and veterinary use must pay the excise tax on sales into the veterinary market. The commenter requested that the final regulations provide that devices that are labeled ''not for human use'' or ''veterinary use only'' are not taxable medical devices.

The definition of a device in section 201(h) of the FFDCA includes devices used in veterinary medicine. Section 4191 limits the definition of a taxable medical device to devices described in section 201(h) of the FFDCA that are intended for humans, but does not provide that the device must be intended exclusively for humans. Under existing FDA regulations, a device intended for use exclusively in veterinary medicine is not required to be listed as a device with the FDA, whereas a device intended for use in human medicine is required to be listed as a device with the FDA even if the device may also be used in veterinary medicine. Thus, the FDA's listing requirement effectively tracks those devices that are intended for humans within the meaning of section 4191. Accordingly, the final regulations retain the definition of a taxable medical device from the proposed regulations. Therefore, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807, pursuant to FDA requirements. Because devices that are intended for use exclusively in veterinary medicine are not listed as devices under section 510(j) of the FFDCA and 21 CFR part 807, they are not taxable medical devices within the meaning of section 4191.

Devices That Have Medical and Non-Medical Applications (''Dual Use'' Devices)

The IRS and the Treasury Department received public comments and several informal inquiries on dual use devices. These comments suggested that the sale of a device defined in section 201(h) of the FFDCA that is listed as a device with the FDA under 21 CFR part 807 but that is used for a non-medical purpose should not be subject to the medical device excise tax. One commenter recommended that the sale of a taxable medical device be exempt where the manufacturer or importer can provide evidence that the product was purchased specifically for use in non-medical applications.

One commenter noted that because it sells directly to the end user and installs its devices at the end user's facilities, it can easily identify when it sells a device for a non-medical purpose, as opposed to a medical purpose. The commenter also noted that it must list a device with the FDA even if it makes only some sales of that device for a medical purpose. Accordingly, all of the commenter's sales will be subject to tax, while sales of the same device by competitors who sell the device only for non-medical purposes, and thus do not have to list their devices with the FDA, will not be subject to tax.

The final regulations do not adopt the commenters' suggestions. The language of section 4191 does not limit the definition of a taxable medical device to a device that is intended exclusively for medical purposes. Whether or not a given device is a taxable medical device depends upon whether it is a device defined in section 201(h) of the FFDCA. Although section 4191 provides a number of exemptions, the statute does not provide an exemption based on whether a given end user intends to use a particular device for a medical purpose or a non-medical purpose.

Humanitarian Use Devices

One commenter asked that the final regulations clarify that Humanitarian Use Devices (HUDs) for which the FDA has approved a Humanitarian Device Exemption (HDE) are exempt from the medical device excise tax.

A HUD is a device within the meaning of section 201(h) of the FFDCA that is intended to benefit patients by treating or diagnosing a disease or condition that affects or is manifested in fewer than 4,000 individuals in the United States per year. 21 CFR 814.3(n). A manufacturer must obtain an approved HDE from the FDA to market a HUD. HUDs that are marketed under an HDE exemption are not exempt from the FDA's listing requirements.

There is no statutory basis for excluding HUDs from the definition of taxable medical device. Therefore, the final regulations do not distinguish HUDs from other taxable medical devices, and a HUD that is marketed under an HDE exemption is a taxable medical device unless it falls within one of the statutory exemptions to the tax in section 4191(b)(2), such as the retail exemption.

Software Upgrades

Two commenters asked that the final regulations provide that sales of software upgrades are not taxable. One commenter noted that software upgrades should not be subject to the medical device excise tax where the software itself is not listed but is merely a component part of a listed device. A second commenter suggested that the final regulations should differentiate between a listed software product and software updates.

Under the final regulations, a taxable medical device is a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807. Accordingly, software and software updates that are not required to be separately listed with the FDA do not fall within the definition of a taxable medical device, and sales of such software and software updates are not subject to the tax.

Devices That Should Have Been Listed With the FDA

Two commenters objected to the rule in the proposed regulations that deems a device to have been listed on the date the FDA provides written notice to the manufacturer or importer that corrective action with respect to listing is required. One commenter suggested that the rule be clarified so that a device is not deemed to be listed until the FDA delivers *final* written notice to the manufacturer or importer that corrective action with respect to listing is required.

The final regulations do not adopt this suggestion. If the FDA initially notifies a manufacturer that corrective action with respect to listing is required but later determines that the device is not required to be listed, a credit or refund may be available for tax paid on sales of the device during the intervening period. See section 6416(a) and the regulations under section 6416(a) for rules regarding the requirements for filing a claim for credit or refund.

Devices That Are Not Required To Be Listed With the FDA

The IRS received several informal inquiries on the tax consequences of listing a product as a device with the FDA when the FDA does not require the product to be listed.

If a manufacturer lists a device with the FDA, but the device was not required to be listed, a credit or refund may be available for tax paid on sales of the device once the device has been

de-listed. See section 6416(a) and the regulations under section 6416(a) for rules regarding the requirements for filing a claim for credit or refund.

II. The Retail Exemption

Section 4191(b)(2) provides that the term taxable medical device does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use (the retail exemption).

A. Proposed Regulations

The proposed regulations provide a facts and circumstances approach to evaluating whether a medical device is of a type that is generally purchased by the general public at retail for individual use. Under the proposed regulations, a device is considered to be of a type generally purchased by the general public at retail for individual use if (i) the device is regularly available for purchase and use by individual consumers who are not medical professionals, and (ii) the device's design demonstrates that it is not primarily intended for use in a medical institution or office, or by medical professionals.

The proposed regulations provide a non-exclusive list of factors to be considered in determining whether a device is regularly available for purchase and use by individual consumers who are not medical professionals. Those factors are (i) whether consumers who are not medical professionals can purchase the device through retail businesses that also sell items other than medical devices, including drug stores, supermarkets, and similar vendors; (ii) whether consumers who are not medical professionals can safely and effectively use the device for its intended medical purpose with minimal or no training from a medical professional; and (iii) whether the device is classified by the FDA under Subpart D of 21 CFR part 890 (Physical Medicine Devices) (referred to collectively herein as the ''positive factors'').

The proposed regulations also provide a non-exclusive list of factors to be considered in determining whether the design of a device demonstrates that it is primarily intended for use in a medical institution or office, or by medical professionals, and therefore not intended for purchase and use by individual consumers. The factors are (i) whether the device generally must be implanted, inserted, operated, or otherwise administered by a medical professional; (ii) whether the cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer; (iii) whether the device is a Class III device under the FDA system of classification; (iv) whether the device is classified by the FDA under certain enumerated parts or subparts of 21 CFR; and (v) whether the device qualifies as durable medical equipment (DME), prosthetics, orthotics, and supplies (collectively, DMEPOS) for which payment is available exclusively on a rental basis under the Medicare Part B payment rules and is an ''item requiring frequent and substantial servicing'' as defined in 42 CFR 414.222 (referred to collectively herein as the ''negative factors'').

To provide greater certainty, the proposed regulations also include a safe harbor provision that identifies certain categories of medical devices that the IRS and the Treasury Department have determined fall within the retail exemption. The safe harbor includes (i) devices that are identified in the FDA's IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm;* (ii) devices described as ''OTC'' or ''over the counter'' devices in the relevant FDA classification regulation heading; and (iii) devices that are described as ''OTC'' or ''over the counter'' devices in the FDA's product code name, the FDA's device classification name, or the ''classification name'' field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm.* The safe harbor also includes devices that qualify as DMEPOS (as described in Subpart C of 42 CFR part 414 (Parenteral and Enteral Nutrition) and Subpart D of 42 CFR part 414 (Durable Medical Equipment and Prosthetic and Orthotic Devices)) for which payment is available on a purchase basis under Medicare Part B payment rules (in accordance with the fee schedule published by Centers for Medicare and Medicaid Services (CMS)), and are (i) ''prosthetic and orthotic devices,'' as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional; (ii) ''parenteral and enteral nutrients, equipment, and supplies'' as defined in 42 CFR 411.351 and described in 42 CFR 414.102(b); (iii) ''customized items'' as described in 42 CFR 414.224; (iv) ''therapeutic shoes,'' as described in 42 CFR 414.228(c); or (v) supplies necessary for the effective use of DME, as described in section 110.3 of chapter 15 of the Medicare Benefit Policy Manual (Centers for Medicare and Medicaid Studies Publication 100–02).

B. Public Comments and the Final Regulations

1. Sales for Use in a Professional Medical Setting

One commenter asked that the regulations clarify that the mere fact that a particular device is sold for use in medical offices and institutions is not determinative of whether the device falls within the retail exemption.

As the regulations make clear, whether or not a device falls within the retail exemption is based on all relevant facts and circumstances. Therefore, the mere fact that an individual device is sold for use in a professional setting is not determinative of whether that type of device falls within the retail exemption.

2. Facts and Circumstances Test

Nonexclusivity of Factors

Several commenters requested that the final regulations confirm that the factors enumerated in the facts and circumstances test for the retail exemption are non-exclusive, and that other factors may also be relevant in determining whether a particular device qualifies for the retail exemption. Commenters also asked for clarification that a device need not meet every positive factor, and that the fact that a device meets a negative factor is not determinative of whether a device qualifies for the retail exemption.

The final regulations retain the facts and circumstances approach to determining whether a particular device falls within the retail exemption. The facts and circumstances approach requires a balancing of factors enumerated in § 48.4191–2(b)(2). No one factor is determinative. Thus, a device may qualify for the retail exemption without meeting all of the positive factors listed under paragraph § 48.4191–2(b)(2)(i). Additionally, a device may qualify for the retail exemption even if it meets one or more negative factors under paragraph § 48.4191–2(b)(2)(ii).

Accordingly, the final regulations state that there may be facts and circumstances that are relevant in evaluating whether a device is of a type generally purchased by the general public at retail for individual use in addition to those described as factors in § 48.4191–2(b)(2)(i) and (ii). In addition, the final regulations include seven additional examples that illustrate the process for determining whether a device falls within the retail exemption,

including examples that illustrate the balancing of different factors for a particular device.

Purchase at Retail

Several commenters suggested that Internet sales should be included in the factor described in § 48.4191–2(b)(2)(i)(A) that looks to whether consumers who are not medical professionals can purchase the device at certain retail businesses. Other commenters suggested that the fact that consumers who are not medical professionals can purchase a device over the Internet should be a factor that indicates that a device is ''regularly available for purchase and use by individual consumers,'' regardless of whether the Internet site is associated with a bricks and mortar store.

Several commenters also suggested that retail sales should include those made over the telephone.

In addition, several commenters suggested that the retail businesses identified in § 48.4191–2(b)(2)(i)(A) should explicitly include medical supply stores and retailers that primarily sell medical devices (for example, specialty medical stores).

The final regulations adopt all of these suggestions. Under the final regulations, the factor in § 48.4191–2(b)(2)(i)(A) provides that consumers who are not medical professionals can purchase the device in person, over the telephone, or over the Internet, through retail businesses such as drug stores, supermarkets, or medical supply stores and retailers that primarily sell medical devices (for example, specialty medical stores, DMEPOS suppliers, and similar vendors).

Minimal or No Training

One commenter requested that final regulations remove the factor that looks to whether consumers who are not medical professionals can use the device safely and effectively for its intended medical purpose with minimal or no training from a medical professional. The commenter reasoned that many taxable medical devices that would otherwise qualify for the retail exemption require at least some basic level of training. The commenter then noted that the suggestion that training would cause a taxable medical device to no longer qualify for the retail exemption is not appropriate.

The final regulations do not adopt the commenter's suggestion. The IRS and the Treasury Department believe that whether more than minimal training from a medical professional is required to safely and effectively use a device is a relevant consideration. At the same time, however, the factor that considers training is only one of many factors to be considered in determining whether a device falls within the retail exemption, and it is possible that a device could qualify for the retail exemption even if it does not satisfy this factor.

Administered by a Medical Professional

One commenter requested clarification that the phrase ''administered by a medical professional'' in the factor described in § 48.4191–2(b)(2)(ii)(A) does not include the initial and periodic fitting or adjustment with respect to an orthotic or prosthetic device that is not implanted.

The final regulations provide a safe harbor for certain devices that fall under the retail exemption. Prosthetic and orthotic devices, as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional, fall under the retail exemption safe harbor described in § 48.4191–2(b)(2)(iii)(D)(*1*). Accordingly, prosthetic and orthotic devices within the meaning of 42 CFR 414.202 that do not require implantation or insertion by a medical professional are considered to be of a type generally purchased by the general public at retail for individual use, without regard to whether they require initial or periodic fitting or adjustment.

A prosthetic or orthotic device that is not in the safe harbor may qualify for the retail exemption based on an application of the facts and circumstances test. The final regulations include an example of a prosthetic device that falls within the retail exemption.

Cost

Two commenters suggested that the factor enumerated in § 48.4191–2(b)(2)(ii)(B) that considers a device's cost should not be included in the final regulations. One commenter stated that whether or not a device is affordable depends on the consumer's insurance coverage and cost alternatives.

The final regulations do not adopt this suggestion. The final regulations take a facts and circumstances approach to the retail exemption. The facts and circumstances test is comprised of a number of non-exclusive factors; each factor is one of several to be considered in determining whether a device falls within the retail exemption. Devices used in hospitals, doctors offices and other medical institutions, such as x-ray machines, magnetic resonance imaging (MRI) systems, and computed tomography (CT scan) or computed axial tomography (CAT scan) equipment, would likely be prohibitively expensive for an average individual user. Accordingly, the factor that considers cost is meaningful in determining whether a type of device is primarily for use in a medical institution or office or by a medical professional.

Class III Devices

Several commenters requested that the final regulations not include classification as a Class III device as a factor, because the JCT General Explanation noted that the retail exemption is not limited by device class.

The final regulations do not adopt this suggestion. Although the JCT General Explanation notes that the retail exemption is not limited by device class, it does not state that classification in Class I, Class II, or Class III is irrelevant to the determination of whether a device falls within the retail exemption. The IRS and the Treasury Department, in consultation with FDA, have determined that the vast majority of Class III types of devices are not devices that are of a type generally purchased by the general public at retail for individual use. Accordingly, the factor that considers whether a device is a Class III type of device is meaningful in determining whether a type of device is primarily for use in a medical institution or office or by a medical professional.

FDA Classification Categories

Two commenters suggested that 21 CFR part 868 (Anesthesiology Devices) should not be included in the list of FDA classification categories in § 48.4191–2(b)(2)(ii)(D) that suggest that a device is primarily for use in a medical institution or office or by a medical professional. The commenters noted that certain portable oxygen systems are classified in 21 CFR part 868.

One commenter requested that 21 CFR part 876 (Gastroenterology-Urology Devices) be removed from the list of FDA classification categories in § 48.4191–2(b)(2)(ii)(D) because 21 CFR part 876 contains many devices, such as ostomy supplies, that would otherwise fall within the retail exemption.

The final regulations do not remove any FDA classification categories from those enumerated in § 48.4191–2(b)(2)(ii)(D). The IRS and the Treasury Department have determined, after consultation with the FDA, that the overwhelming majority of devices that fall within these regulatory categories are not of a type generally purchased by the general public at retail for

individual use. Further, classification in one of the enumerated parts or subparts is not determinative of whether a device falls within the retail exemption. Devices in these categories must be evaluated in light of all relevant facts and circumstances.

The final regulations include an example that weighs the facts and circumstances with respect to a portable oxygen concentrator, including the fact that it is a device under 21 CFR part 868, and concludes that the portable oxygen concentrator falls within the retail exemption. The final regulations also include an example that illustrates that a urinary ileostomy bag, which is a device under 21 CFR part 876, is included in the safe harbor set forth in § 48.4191–2(b)(2)(iii)(D)(*1*).

Packaging and Labeling

Several commenters suggested that the final regulations include a factor that considers whether a device's packaging and labeling suggests that the device is intended for use by individuals who are not medical professionals. One commenter noted that product labeling that is easy for someone who is not a medical or health care professional to understand suggests that the device is regularly available for purchase and use by individual consumers who are not medical professionals.

The final regulations do not adopt this suggestion. Device manufacturers determine the packaging and labeling of a device. Manufacturers may package and label a device in a consumer-friendly manner, even if the device is of a type that is primarily intended for use in a medical institution or office, or by medical professionals. Therefore, the IRS and the Treasury Department have determined that a device's packaging and labeling are not instructive as to whether a device is generally purchased by the general public at retail for individual use.

Documents Submitted for FDA Notification or Approval

One commenter requested that the final regulations include a factor that looks to whether documents submitted to the FDA, such as a Premarket Notification (510(k)) or application for Premarket Approval (PMA), state that the device is intended for individual use.

The final regulations do not adopt this suggestion. After consultation with the FDA, the IRS and the Treasury Department have determined that documents submitted to the FDA, such as 510(k) documents and PMA applications, are not consistently reliable indicators of whether a device is of a type that is generally purchased by the general public for individual use.

3. Safe Harbor

Durable Medical Equipment, Prosthetics, Orthotics and Supplies

One commenter suggested that the retail exemption safe harbor defined in § 48.4191–2(b)(2)(iii)(D) be expanded to include all devices that fall under the definition of DMEPOS in 42 CFR 414.202.

The final regulations do not adopt this suggestion. However, devices that fall within the definition of DMEPOS that are not included in the retail exemption safe harbor in § 48.4191–2(b)(2)(iii)(D), such as oxygen equipment and other rental durable medical equipment devices, may qualify for the retail exemption by application of the facts and circumstances test. The final regulations provide an example that evaluates whether a portable oxygen concentrator falls within the retail exemption based upon an evaluation of such a device under the facts and circumstances test.

Capped Rental Devices

One commenter suggested that the safe harbor defined in § 48.4191–2(b)(2)(iii)(D) be expanded to include ''capped rental'' devices, within the meaning of 42 CFR 414.229, for which title transfers to the individual user (the Medicare beneficiary) at the end of the rental term.

The category of capped rental DME consists of DME that is not subject to the payment provisions set forth in 42 CFR 414.220 through 42 CFR 414.228. Medicare pays for capped rental DME other than complex rehabilitation power-driven wheelchairs on a rental basis. See 42 CFR 414.229. Payment is made on a rental basis, not to exceed a period of continuous use of longer than 13 months. On the first day after 13 continuous rental months during which payment is made, the supplier must transfer title to the equipment to the Medicare beneficiary. See 42 CFR 414.229(f)(2). Medicare also pays for complex rehabilitation power-driven wheelchairs on a capped rental or lump-sum purchase basis. The supplier of the complex rehabilitation power-driven wheelchair must offer Medicare beneficiaries the option to purchase the complex rehabilitation power-driven wheelchair at the time the equipment is initially furnished. See 42 CFR 414.229(h). If the beneficiary does not elect to purchase the complex rehabilitation power-driven wheelchair, payment is made on a capped rental basis in accordance with the rules described above for other capped rental DME. See 42 CFR 414.229(f).

The IRS and the Treasury Department, in consultation with the Center for Medicare and Medicaid Services (CMS), have determined that, in most instances, the rental period of a capped rental device terminates before the transfer of title. Further, information on the capped rental devices for which title has transferred to the individual user does not suggest a pattern of title transfer for specific types of devices. Accordingly, capped rental devices cannot be categorically said to qualify as devices that are generally purchased by the general public at retail for individual use. They may, however, qualify for the retail exemption by an application of the facts and circumstances test. Therefore, safe harbor treatment is not appropriate for capped rental devices, and the final regulations do not adopt the commenter's suggestion.

Prosthetics and Orthotics

One commenter noted that 42 CFR 414.202 excludes from the definition of prosthetic and orthotic devices medical supplies such as catheters, catheter supplies, ostomy bags, and supplies related to ostomy care that are furnished by a Home Health Agency (HHA) as part of home health services under 42 CFR 409.40(e). The commenter asked that the final regulations address the significance, if any, of the exclusion of products furnished by an HHA on the breadth of the safe harbor in § 48.4191–2(b)(2)(iii)(D)(*1*) for prosthetic and orthotic devices as defined in 42 CFR 414.202.

The IRS and the Treasury Department, in consultation with CMS, have determined that the HHA language in 42 CFR 414.202 is a provision that clarifies that when individual devices are furnished by an HHA, they are payable as home health services under 42 CFR 409 subpart E. The HHA language in 42 CFR 414.202 does not exclude any type of device from the definition of prosthetic and orthotic devices and, therefore, has no impact on the retail exemption safe harbor in § 48.4191–2(b)(2)(iii)(D).

4. ''Of a Type''

Section 4191(b)(2) provides that the term taxable medical device does not include eyeglasses, contact lenses, hearing aids, and any other medical device determined by the Secretary to be of a type that is generally purchased by the general public at retail for individual use. Several commenters requested that final regulations define a ''type'' of device to include all devices

that are categorized in the same FDA product code.

The final regulations do not adopt this suggestion. In consultation with the FDA, the IRS and the Treasury Department determined that the breadth and variety of devices within a particular product code and across product codes can vary greatly. Therefore, the product code designation is generally too broad to be useful in determining which devices fall within the retail exemption.

5. Components of Exempt Devices

One commenter noted that the FDA requires some components of devices to be separately listed as devices. The commenter suggested that the final regulations exempt listed components that are ultimately used as component parts of a device that is exempt under section 4191(b) and § 48.4191–2(b), such as component parts of certain completed prosthetic or orthotic devices.

The safe harbor provision in § 48.4191–2(b)(2)(iii)(D) includes some components of prosthetic and orthotic devices. The IRS and the Treasury Department request public comments to help identify listed components of devices that are exempt under section 4191(b) and § 48.4191–2(b) that are not included in a safe harbor or that do not otherwise fall within the retail exemption by an application of the facts and circumstances test.

6. Dental Devices

Several commenters suggested that dental devices that are customized for an individual patient, such as crowns, bridges, and braces, should qualify for the retail exemption because they are sold directly to individual consumers. Further, one commenter noted that the factor described in § 48.4191–2(b)(2)(ii)(A), which considers whether a device ''generally must be implanted, inserted, operated, or otherwise administered by a medical professional,'' creates an unnecessary distinction between devices that an individual can insert and remove, and devices that a dentist must embed or affix within the patient's mouth.

The final regulations do not create a special rule for dental devices. The final regulations take a facts and circumstances approach to the retail exemption. The facts and circumstances test is comprised of a number of non-exclusive factors. A customized dental device will qualify for the retail exemption if, based on the totality of the facts and circumstances, the device is of a type that is generally purchased by the general public at retail for individual use.

III. Combination Products

A. Proposed Regulations

Combination products are therapeutic and diagnostic products that combine drugs, devices, and/or biological products. See 21 CFR 3.2(e). The proposed regulations tie the definition of taxable medical device to the FDA's listing requirements for devices. Therefore, under the proposed regulations, a combination product that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807 and that does not fall under a statutory exemption, such as the retail exemption, is subject to the medical device excise tax.

B. Public Comments and the Final Regulations

Several commenters requested that the final regulations provide that a manufacturer will not be required to pay the medical device excise tax on a combination product that is taken into account in computing the branded prescription drug (BPD) fee enacted under section 9008 of the ACA.

The final regulations do not adopt this suggestion. The ACA enacted both the medical device excise tax and the BPD fee, but provided no coordination between the provisions. Therefore, there is no statutory basis for providing an exclusion from the tax under section 4191 for a combination product with both a device component and a drug component, even if the combination product is taken into account for purposes of computing the BPD fee. Moreover, the comments did not raise any likely scenarios in which both the BPD fee and the medical device excise tax apply to the same product. Based on consultation with the FDA, the IRS and the Treasury Department anticipate that few, if any, combination products will be subject to both the medical device excise tax and the BPD fee. Accordingly, under the final regulations, a combination product that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807 is a taxable medical device.

IV. Manufacturers Excise Taxes

The ACA added section 4191 to chapter 32, subtitle D of the Code, which relates to taxes imposed on the sales of taxable articles by manufacturers, producers, and importers (commonly referred to as ''manufacturers excise taxes''). Accordingly, the preamble to the proposed regulations states that the existing chapter 32 rules apply to the medical device excise tax.

Definition of a ''Manufacturer''

One commenter requested that the final regulations include a presumption that a manufacturer who lists a device with the FDA is the manufacturer of the device for excise tax purposes.

The final regulations do not adopt this suggestion. There are longstanding rules with respect to the definition of ''manufacturer'' or ''importer'' for chapter 32 purposes. These rules are contained in statutory and regulatory provisions, and they have been developed further through other published guidance and case law. Therefore, the definitions of manufacturer and importer under chapter 32 apply to section 4191; whether a person is considered a manufacturer or importer for FDA purposes is not relevant.

Sale Price

Numerous commenters suggested that the IRS apply the constructive sale price rules with flexibility and sensitivity to data limitations that medical device companies face. The IRS and the Treasury Department recognize that the medical device industry will likely face some implementation issues when the medical device excise tax goes into effect on January 1, 2013, and the IRS intends to work with stakeholders on compliance-related issues, such as the determination of price.

Numerous commenters requested that the final regulations extend the principle of Revenue Ruling 80–273 (1980–2 CB 315) to taxable medical devices. Rev. Rul. 80–273 holds that when a manufacturer or importer sells a taxable article directly to an unrelated end user at retail, the excise tax may be based on a sale price of 75 percent of the retail sale price, after any adjustments under section 4216(a), such as for containers, packing, and transportation charges. The holding applies only to the excise taxes imposed under the Code sections explicitly listed in the revenue ruling. Commenters also requested that the final regulations clarify that sales ''at retail'' in the medical device context include sales to hospitals and other medical service providers. Although the final regulations do not adopt this suggestion, the IRS and the Treasury Department will issue separate interim guidance along with these regulations to address sale price issues and have considered these comments in the context of such guidance.

One commenter requested that the final regulations provide that taxpayers can use transfer pricing under section 482 to determine the taxable sale price of a taxable medical device.

The final regulations do not adopt the commenter's suggestion. Because the standards are not the same under the section 482 regulations and section 4216, an arm's length result determined under section 482 is not an appropriate proxy for the constructive sale price or fair market price under section 4216. While in certain circumstances facts used to support a transfer price for purposes of section 482 may be relevant to determining the sale price under section 4216, transfer pricing documentation or studies developed for purposes of section 482 or section 6662(e) will not be conclusive.

Finally, the IRS received several informal inquiries about whether the 2.3% medical device excise tax may be excluded from the sale price upon which the medical device excise tax is imposed. Section 4216(a) provides that in determining the price for which an article is sold there should be excluded the amount of tax imposed, whether or not stated as a separate charge. See section 4216(a) and § 48.4216(a)–2(a) of the Manufacturers and Retailers Excise Tax Regulations for the rules regarding the exclusion of tax from sale price.

Installment Sales, Leases, and Long-Term Contracts

Several commenters requested transition relief for installment sales and leases of taxable medical devices where the contract is entered into prior to the effective date of the tax on January 1, 2013.

The final regulations do not provide transition relief for all contracts entered into prior to January 1, 2013. However, the final regulations do provide transition relief for contracts entered into prior to March 30, 2010, the date the ACA was enacted. More specifically, the final regulations provide that payments made on or after January 1, 2013, pursuant to a written binding contract for the lease, installment sale, or sale on credit of a taxable medical device that was in effect prior to March 30, 2010, are not subject to tax under section 4191 unless the contract is materially modified on or after March 30, 2010. For purposes of this transition relief, a material modification includes only a modification that materially affects the property to be provided under the contract, the terms of payment under the contract, or the amount payable under the contract. A material modification does not include a modification to the contract required by applicable Federal, State, or local law.

Payments made pursuant to a contract that was entered into on or after March 30, 2010, are subject to tax under section 4191 and the existing provisions of sections 4216(c) and 4217, and §§ 48.4216(c)–1 and 48.4217–2 apply.

Uses

Several commenters requested that the final regulations specifically provide that the following are not taxable uses where the manufacturer receives no direct benefit in the form of money, services, or other property: (i) Demonstration products used for health care professionals and product awareness, such as samples used to demonstrate the type of device to be implanted in a patient; (ii) evaluation products provided to help health care professionals determine whether and when to use, order, purchase, or recommend the device; (iii) loaned devices to facilitate procedures utilizing a sold taxable medical device, such as instruments specifically designed to implant a particular orthopedic joint; (iv) testing and development products; and (v) product donations and charitable contributions.

The final regulations do not adopt this suggestion because it is necessary to have consistent rules for all manufacturers excise taxes. Section 4218 generally imposes a tax on certain uses of an article by the article's manufacturer. In general, under § 48.4218–1(b), if the manufacturer of a taxable article uses the article for any purpose other than in the manufacture of another taxable article, then the manufacturer is liable for tax on the article as if the manufacturer had sold it.

With regard to demonstration products, the provision or use of a taxable medical device as a demonstration product may constitute a taxable use, depending on the facts and circumstances of the arrangement. See Rev. Rul. 60–290 (160–2 CB 331) and Rev. Rul. 72–563 (1972–1 CB 568).

With regard to evaluation and testing products, Rev. Rul. 76–119 (1976–1 CB 345) holds that if a manufacturer uses a taxable article in the testing of another article of its own manufacture, the use of the taxable article is not a taxable use.

The existing chapter 32 rules do not specifically address whether a donation of a taxable article to charity constitutes a taxable use under section 4218. However, the IRS and the Treasury Department will issue separate interim guidance along with these regulations to address donations of taxable medical devices.

Rebates

Several commenters requested that the final regulations provide manufacturers with the option of excluding from the sale price a reasonable estimate of purchase price adjustments for rebates, with a later true-up based on the actual rebate amounts. These commenters suggest that manufacturers have reliable historical data on past rebate performance, so they are able to project rebate amounts with reasonable certainty.

The final regulations do not adopt this suggestion. Section 48.4216(a)–3(c) provides that a manufacturer may take a rebate into account in determining sale price only to the extent the rebate is made prior to the close of the quarter during which the sale associated with the rebate is made. In addition, if the manufacturer subsequently allows a rebate for taxable articles on which tax has been paid, the manufacturer may make a claim for credit or refund of that portion of the tax that is proportionate to the part of the price that is rebated.

Software Sold Together With Services

One commenter requested clarification with respect to the taxability of software that is sold together with services and/or maintenance contracts.

Section 48.4216(a)–1(e) provides that where a taxable article and a nontaxable article are sold by the manufacturer as a unit, the tax attaches to that portion of the manufacturer's sale price of the unit that is properly allocable to the taxable article. Because the definition of a taxable medical device is tied to the FDA's device listing requirements, if the software and service bundle is not listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807 (in other words, if the entire bundle is not a taxable medical device), the medical device excise tax attaches only to the sale of the devices within the bundle that are listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807.

Refurbished and Remanufactured Medical Devices

Several commenters requested guidance on how the medical device excise tax will apply to sales of refurbished and remanufactured medical devices. One commenter requested that the definition of manufacturer in § 48.0–2(a)(4) be clarified to ensure that repairing, refurbishing, or rebuilding an already taxed medical device does not create another taxable medical device and is not considered manufacturing.

The final regulations do not adopt these suggestions. Under existing chapter 32 rules, remanufacturing or refurbishing constitutes manufacture if

the remanufacturing or refurbishing process produces a new and different taxable article. See Rev. Rul. 86–130 (1986–2 CB 179), Rev. Rul. 83–149 (1983–2 CB 186), Rev. Rul. 68–40 (1968–1 CB 452), Rev. Rul. 64–202 (1964–2 CB 431), and Rev. Rul. 58–586 (1958–2 CB 806). If a remanufacturer or refurbisher produces a new and different taxable article, the tax is imposed upon the sale or use of the remanufactured or refurbished article.

Replacement Parts

Two commenters suggested that parts used to replace an existing part or component in a taxable medical device should not be subject to the tax, even if the part or component is listed separately as a device with the FDA.

The final regulations do not adopt this suggestion. Under existing law, if a taxable article is returned to the manufacturer under a warranty and the manufacturer provides a replacement article free or at a reduced price, the tax on the replacement article is computed on the actual amount, if any, paid to the manufacturer for the replacement article. See § 48.4216(a)–3(b) and Rev. Rul. 75–272 (1975–2 CB 421).

With regard to replacements that are not made under warranty, replacement parts that are listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807 are taxable medical devices, and their sale by the manufacturer is generally subject to tax.

Licensing of Software

One commenter requested clarification on whether the licensing of software that is a taxable medical device is a taxable event.

Under existing chapter 32 rules, the manufacturers excise tax generally attaches upon the sale or use of a taxable article by the manufacturer. The lease of a taxable article by the manufacturer is considered a sale. Neither the existing chapter 32 rules nor the final regulations address the issue of whether the licensing of a taxable article is a taxable event. However, the IRS and the Treasury Department will issue separate interim guidance along with these regulations to address this issue.

Consolidated Filing of Form 720

The medical device excise tax is reported on Form 720, Quarterly Federal Excise Tax Return. Several commenters requested that the IRS and the Treasury Department permit manufacturers and importers of taxable medical devices who are members of a affiliated group for income tax purposes to file Form 720 on a consolidated basis.

The final regulations do not adopt this suggestion. Section 1501 provides generally that an affiliated group of corporations shall have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns. There is no similar provision that applies to excise tax. Thus, the privilege to file consolidated returns applies only to income tax returns and not to excise tax returns. Accordingly, for excise tax purposes, each business unit that has or is required to have a separate employer identification number is treated as a separate person with separate tax liability, and each such business unit must file a separate Form 720.

Consolidated Form 637 Registration

Registration through the Form 637 application process is necessary to effectuate tax-free sales. Several commenters requested that final regulations allow one entity in an affiliated group to register on behalf of the group with respect to intra-group sales.

The final regulations do not adopt this suggestion. The IRS and the Treasury Department have determined that it is necessary in the interest of effective tax administration to require each entity with a separate employer identification number to apply for registration under Application for Registration (For Certain Excise Tax Activities) (Form 637) to verify the activity for which the entity seeks registration. Once an entity is registered for a particular activity, the registration does not expire. Therefore, for most entities, the initial application process is the extent of the entity's obligation with respect to registration.

Form 720 Filing Requirements

One commenter suggested that the quarterly reporting requirement is unduly burdensome on small medical device manufacturers. The commenter suggested that the final regulations initially require only annual reporting for small medical device manufacturers to enable those taxpayers to become familiar with the excise tax rules and implement the proper accounting practices and procedures.

The final regulations do not adopt this suggestion. The ACA added section 4191 to chapter 32. Therefore, the existing rules governing chapter 32 apply. Manufacturers excise taxes, including the medical device excise tax, are reported on Form 720. In general, Form 720 must be filed on a quarterly basis. For more information about reporting requirements, see § 40.6011(a)–1(a).

Semimonthly Deposits

Several commenters suggested that the semimonthly deposit requirements under section 6302 are burdensome to medical device manufacturers because device manufacturers have little or no experience with returning and paying federal excise taxes and because manufacturers need time to develop their systems to implement these final regulations. Some of those commenters requested that final regulations specifically carve out taxable medical devices from the deposit rules set forth in section 6302 and the regulations thereunder. Other commenters requested that the IRS and the Treasury Department waive on a reasonable cause basis any tax penalty applicable to the failure to deposit the correct amount of tax.

The final regulations do not carve taxable medical devices out of the semimonthly deposit rules. Therefore, medical device manufacturers will generally be required to make semimonthly deposits of tax unless the manufacturer's net tax liability does not exceed $2,500 for the quarter. See section 6302 and the regulations thereunder for the rules regarding semimonthly deposits.

The IRS and the Treasury Department recognize that the application of the manufacturers excise tax rules, particularly with regard to sale price, may present certain challenges. The IRS and the Treasury Department further recognize that manufacturers and importers in the medical device industry may not have prior experience complying with the rules regarding semimonthly deposits. Given that the tax goes into effect on January 1, 2013, the IRS and the Treasury Department will issue separate interim guidance along with these regulations that addresses penalties under section 6656.

Disregarded Entities

One commenter requested that the IRS and the Treasury Department amend the regulations under section 7701 to allow entities that are disregarded as separate from their owners for income tax purposes to be similarly disregarded for excise tax purposes.

The final regulations do not adopt this suggestion because it is necessary to have a consistent rule for all excise taxes. Specifically, § 1.1361–4(a)(8) and § 301.7701–2(c)(2)(v) treat a qualified subchapter S subsidiary and a single-owner eligible entity that is disregarded as an entity separate from its owner under § 301.7701–2 as a separate entity for purposes of excise taxes imposed by

chapter 32 of the Code. These rules were adopted because of the difficulties that arise from the interaction of the disregarded entity rules and the federal excise tax rules. For example, the manufacturers excise tax rules rely on state law, rather than Federal law, to determine attachment of a tax. See § 48.0–2(b) (providing that excise taxes attach when title to an article passes to the purchaser, which is based on the laws of the local jurisdiction where the sale is made in the absence of express intention of the parties to the sale). Accordingly, a Form 720 reporting the medical device excise tax imposed on sales of taxable medical devices by the manufacturer or importer after December 31, 2012, must be filed under the name and employer identification number of the entity rather than under the name and EIN of the disregarded entity's owner.

Penalties for Failure To File and Failure To Pay Tax; Accuracy-Related Penalties

Several commenters highlighted the compliance challenges associated with implementation of the medical device excise tax. These commenters requested that the IRS and the Treasury Department temporarily waive all tax penalties relating to the filing of Form 720.

The final regulations do not adopt this suggestion. Section 6651(a) imposes penalties for failure to file any return required under subchapter A of chapter 61 and for failure to pay the amount shown as tax on any such return, unless it is shown that the failure is due to reasonable cause and not willful neglect. Under § 301.6651–1(c), a taxpayer may avoid penalties under section 6651 for the failure to file a tax return or pay tax if the taxpayer makes an affirmative showing of all facts necessary to establish a reasonable cause for the taxpayer's failure to file a return or pay tax on time. If the taxpayer exercised ordinary business care and prudence but was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to a reasonable cause to the extent the taxpayer has made a satisfactory showing that the taxpayer exercised ordinary business care and prudence in providing for payment of the taxpayer's tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161–1(b)) if the taxpayer paid on the due date.

Section 6662 imposes an accuracy-related penalty for, among other things, negligence or disregard of the rules or regulations. Under section 6662(c), the term ''negligence'' includes any failure to make a reasonable attempt to comply with the provisions of the Code, and the term ''disregard'' includes any careless, reckless, or intentional disregard.

The IRS and the Treasury Department recognize that the application of the manufacturers excise tax rules may present certain implementation challenges. The IRS and the Treasury Department also recognize that manufacturers and importers in the medical device industry may not have prior experience with filing a Form 720. However, the IRS and the Treasury Department believe that the existing reasonable cause provisions under section 6651(a) and § 301.6651–1(c) and the negligence standard in section 6662 provide taxpayers with an appropriate mechanism for relief. If a penalty is assessed under section 6651 or section 6662, the IRS encourages taxpayers to call the telephone number on the penalty notice to discuss abatement options.

V. Kits

Under the proposed regulations, a taxable medical device is a device that is listed as a device with the FDA under section 510(j) of the FFDCA and 21 CFR part 807. Therefore, under the proposed regulations, a listed kit is a taxable medical device. The proposed regulations define a ''kit'' as a set of two or more articles packaged in a single bag, tray, or box for the convenience of the end user. In addition, the proposed regulations provide that if a kit is a taxable medical device, then the use of other taxable medical devices in the assembly of the kit constitutes ''further manufacture'' within the meaning of section 4221(a)(1) of the Code by the person who produces the kit.

The IRS and the Department of Treasury received numerous public comments regarding kits. Several commenters noted that taxing the kit will result in taxing items contained in the kit that, standing alone, are not taxable medical devices.

Some public comments pointed to certain FDA rules governing kits as evidence that kits should receive a different tax treatment than other devices that are listed with the FDA under section 510(j) of the FFDCA and 21 CFR part 807. The commenters suggested that kits should receive special tax treatment because many kits are not subject to FDA premarket notification requirements.

Additionally, several commenters suggested that the producer of a kit is not a ''manufacturer'' within the meaning of section 48.0–2(a)(4)(i). Other commenters requested that the final regulations exclude kits from the definition of ''further manufacture'' within the meaning of section 4221(a)(1), so that the sale of a kit is not subject to the medical device excise tax.

The final regulations do not explicitly provide that the use of other taxable medical devices in the assembly of the kit constitutes further manufacture, within the meaning of section 4221(a)(1), by the person who produces the kit. The IRS and the Treasury Department will issue separate interim guidance along with these regulations on the treatment of kits for purposes of the medical device excise tax.

Several commentators requested that the final regulations confirm that the use of a kit by a hospital or medical institution that produced the kit is not a taxable use within the meaning of section 4218.

Hospitals or medical institutions that produce kits for their own use are known as self-kitters. Self-kitters are exempt from the FDA's registration and listing requirements. See 21 CFR 807.65(f). Therefore, under the definition of a taxable medical device in both the proposed regulations and the final regulations, a kit produced by a hospital or medical institution for its own use would not be a ''taxable medical device.'' Accordingly, the use of the self-produced kits by the hospital or medical institution would not be a taxable use under the rules of section 4218.

Availability of IRS Documents

The IRS final regulations and revenue rulings cited in this preamble are published in the Internal Revenue Cumulative Bulletin and are available from the Superintendent of Documents, P.O. Box 979050, St. Louis, MO 63197–9000.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because these regulations do not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these regulations was submitted to the Chief Counsel for Advocacy of the Small Business

Administration for comment on its impact on small business. No comments were received.

Drafting Information

The principal authors of these regulations are Natalie Payne and Stephanie Bland, Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 48

Excise taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 48 is amended as follows:

PART 48—MANUFACTURERS AND RETAILERS EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 48 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805. * * *

Section 48.4191–1 also issued under 26 U.S.C. 4191.

Section 48.4191–2 also issued under 26 U.S.C. 4191(b)(2).

§ 48.0–1 [Amended]

■ **Par. 2.** The fourth sentence of § 48.0–1 is amended by removing the language ''and sporting goods'' and adding ''sporting goods, and taxable medical devices'' in its place.

■ **Par. 3.** Subpart L, consisting of §§ 48.4191–1 and 48.4191–2 is added to read as follows:

Subpart L—Taxable Medical Devices

Sec.

48.4191–1 Imposition and rate of tax.
48.4191–2 Taxable medical device.

§ 48.4191–1 Imposition and rate of tax.

(a) *Imposition of tax.* Under section 4191(a), tax is imposed on the sale of any taxable medical device by the manufacturer, producer, or importer of the device. For the definition of the term *taxable medical device,* see § 48.4191–2.

(b) *Rate of tax.* Tax is imposed on the sale of a taxable medical device at the rate of 2.3 percent of the price for which the device is sold. For the definition of the term *price,* see section 4216 and §§ 48.4216(a)–1 through 48.4216(e)–3.

(c) *Liability for tax.* The manufacturer, producer, or importer making the sale of a taxable medical device is liable for the tax imposed by section 4191(a). For rules relating to the determination of who the manufacturer, producer, or importer is for purposes of section 4191, see § 48.0–2(a)(4). For the definition of the term *sale,* see § 48.0–2(a)(5). For rules relating to the lease of an article by the manufacturer, producer, or importer, see section 4217 and § 48.4217–1 through § 48.4217–2. For rules relating to the use of an article by the manufacturer, producer, or importer, see section 4218 and § 48.4218–1 through § 48.4218–5.

(d) *Procedural rules.* For the procedural rules relating to section 4191, see part 40 of this chapter.

(e) *Tax-free sales for further manufacture or export.* For rules relating to tax-free sales of taxable medical devices for further manufacture or export, see section 4221 and § 48.4221–1 through § 48.4221–3.

(f) *Payments made on or after January 1, 2013, pursuant to lease, installment sale, or sale on credit contracts.* For rules relating to the taxability of payments made on or after January 1, 2013, pursuant to a lease, installment sale, or sale on credit contract entered into on or after March 30, 2010, see § 48.4216(c)–1(e)(1). For rules relating to the taxability of payments made on or after January 1, 2013, pursuant to a lease, installment sale, or sale on credit contract entered into before March 30, 2010, see § 48.4216(c)–1(e)(2).

(g) *Effective/applicability date.* This section applies to sales of taxable medical devices on and after January 1, 2013.

§ 48.4191–2 Taxable medical device.

(a) *Taxable medical device*—(1) *In general.* A taxable medical device is any device, as defined in section 201(h) of the Federal Food, Drug, and Cosmetic Act (FFDCA), that is intended for humans. For purposes of this section, a device defined in section 201(h) of the FFDCA that is intended for humans means a device that is listed as a device with the Food and Drug Administration (FDA) under section 510(j) of the FFDCA and 21 CFR part 807, pursuant to FDA requirements.

(2) *Devices that should have been listed with the FDA.* If a device is not listed as a device with the FDA but the FDA determines that the device should have been listed as a device, the device will be deemed to be listed as a device with the FDA as of the date the FDA notifies the manufacturer or importer in writing that corrective action with respect to listing is required.

(b) *Exemptions*—(1) *Specific exemptions.* The term *taxable medical device* does not include eyeglasses, contact lenses, and hearing aids.

(2) *Retail exemption.* The term *taxable medical device* does not include any device of a type that is generally purchased by the general public at retail for individual use (the retail exemption). A device will be considered to be of a type generally purchased by the general public at retail for individual use if it is regularly available for purchase and use by individual consumers who are not medical professionals, and if the design of the device demonstrates that it is not primarily intended for use in a medical institution or office or by a medical professional. Whether a device is of a type described in the preceding sentence is evaluated based on all the relevant facts and circumstances. Factors relevant to this evaluation are enumerated in paragraphs (b)(2)(i) and (ii) of this section. Further, there may be facts and circumstances that are relevant in evaluating whether a device is of a type generally purchased by the general public at retail for individual use in addition to those described in paragraphs (b)(2)(i) and (ii) of this section. The determination of whether a device is of a type that qualifies for the retail exemption is made based on the overall balance of factors relevant to the particular type of device. The fact that a device is of a type that requires a prescription is not a factor in the determination of whether or not the device falls under the retail exemption.

(i) *Regularly available for purchase and use by individual consumers.* The following factors are relevant in determining whether a device is of a type that is regularly available for purchase and use by individual consumers who are not medical professionals:

(A) Whether consumers who are not medical professionals can purchase the device in person, over the telephone, or over the Internet, through retail businesses such as drug stores, supermarkets, or medical supply stores and retailers that primarily sell devices (for example, specialty medical stores, durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) suppliers and similar vendors);

(B) Whether consumers who are not medical professionals can use the device safely and effectively for its intended medical purpose with minimal or no training from a medical professional; and

(C) Whether the device is classified by the FDA under Subpart D of 21 CFR part 890 (Physical Medicine Devices).

(ii) *Primarily for use in a medical institution or office or by a medical professional.* The following factors are relevant in determining whether a

device is designed primarily for use in a medical institution or office or by a medical professional:

(A) Whether the device generally must be implanted, inserted, operated, or otherwise administered by a medical professional;

(B) Whether the cost to acquire, maintain, and/or use the device requires a large initial investment and/or ongoing expenditure that is not affordable for the average individual consumer;

(C) Whether the device is a Class III device under the FDA system of classification;

(D) Whether the device is classified by the FDA under—

(*1*) 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices), 21 CFR part 864 (Hematology and Pathology Devices), 21 CFR part 866 (Immunology and Microbiology Devices), 21 CFR part 868 (Anesthesiology Devices), 21 CFR part 870 (Cardiovascular Devices), 21 CFR part 874 (Ear, Nose, and Throat Devices), 21 CFR part 876 (Gastroenterology—Urology Devices), 21 CFR part 878 (General and Plastic Surgery Devices), 21 CFR part 882 (Neurological Devices), 21 CFR part 886 (Ophthalmic Devices), 21 CFR part 888 (Orthopedic Devices), or 21 CFR part 892 (Radiology Devices);

(*2*) Subpart B, Subpart D, or Subpart E of 21 CFR part 872 (Dental Devices);

(*3*) Subpart B, Subpart C, Subpart D, Subpart E, or Subpart G of 21 CFR part 884 (Obstetrical and Gynecological Devices); or

(*4*) Subpart B of 21 CFR part 890 (Physical Medicine Devices); and

(E) Whether the device qualifies as durable medical equipment, prosthetics, orthotics, and supplies for which payment is available exclusively on a rental basis under the Medicare Part B payment rules, and is an ''item requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

(iii) *Safe Harbor.* The following devices will be considered to be of a type generally purchased by the general public at retail for individual use:

(A) Devices that are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfIVD/Search.cfm.*

(B) Devices that are described as ''OTC'' or ''over the counter'' devices in the relevant FDA classification regulation heading.

(C) Devices that are described as ''OTC'' or ''over the counter'' devices in the FDA's product code name, the FDA's device classification name, or the ''classification name'' field in the FDA's device registration and listing database, available at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfrl/rl.cfm.*

(D) Devices that qualify as durable medical equipment, prosthetics, orthotics, and supplies, as described in Subpart C of 42 CFR part 414 (Parenteral and Enteral Nutrition) and Subpart D of 42 CFR part 414 (Durable Medical Equipment and Prosthetic and Orthotic Devices), for which payment is available on a purchase basis under Medicare Part B payment rules, and are—

(*1*) ''Prosthetic and orthotic devices,'' as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional;

(*2*) ''Parenteral and enteral nutrients, equipment, and supplies'' as defined in 42 CFR 411.351 and described in 42 CFR 414.102(b);

(*3*) ''Customized items,'' as described in 42 CFR 414.224;

(*4*) ''Therapeutic shoes,'' as described in 42 CFR 414.228(c); or

(*5*) Supplies necessary for the effective use of durable medical equipment (DME), as described in section 110.3 of chapter 15 of the Medicare Benefit Policy Manual (Centers for Medicare and Medicaid Studies Publication 100–02).

(iv) *Examples.* The following examples illustrate the rules of this paragraph (b)(2).

Example 1. X manufactures non-sterile absorbent tipped applicators. X sells the applicators to distributors Y and Z, which, in turn, sell the applicators to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of non-sterile absorbent tipped applicators to list the applicators as a device with the FDA. The applicators are classified by the FDA under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KXF.

Absorbent tipped applicators do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the absorbent tipped applicators are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the absorbent tipped applicators at drug stores, supermarkets, cosmetic supply stores or other similar businesses, and can use the applicators safely and effectively for their intended medical purpose without training from a medical professional. Further, the absorbent tipped applicators do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not a Class III device, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the applicators have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and none of the factors under paragraph (b)(2)(ii) of this section tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the applicators are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 2. X manufactures adhesive bandages. X sells the adhesive bandages to distributors Y and Z, which, in turn, sell the bandages to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of adhesive bandages to list the bandages as a device with the FDA. The adhesive bandages are classified by the FDA under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KGX.

Adhesive bandages do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the adhesive bandages are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the adhesive bandages at drug stores, supermarkets, or other similar businesses, and can use the adhesive bandages safely and effectively for their intended medical purpose without training from a medical professional. Further, the adhesive bandages do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the adhesive bandages have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and none of the factors under paragraph (b)(2)(ii) of this section tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the adhesive bandages are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 3. X manufactures snake bite suction kits. X sells the snake bite suction kits to distributors Y and Z, which, in turn, sell the kits to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of snake bite suction kits to list the kits as a device with the FDA. The FDA classifies the snake bit suction kits under 21 CFR part 880 (General Hospital and Personal Use Devices) and product code KYP.

Snake bite suction kits do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the snake bite suction kits are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the snake bite suction kits at sporting goods stores, camping stores, or other similar retail businesses, and can use the kits safely and effectively for their intended medical purpose without training from a medical professional. Further, the snake bite suction kits do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the snake bite suction kits have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and none of the factors under paragraph (b)(2)(ii) of this section tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the snake bite suction kits are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 4. X manufactures denture adhesives. X sells the denture adhesives to distributors Y and Z, which, in turn, sell the adhesives to dental offices and retail businesses. The FDA requires manufacturers of denture adhesives to list the adhesive as a device with the FDA. The FDA classifies the denture adhesives under 21 CFR part 872 (Dental Devices) and product code KXX.

The denture adhesives do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the denture adhesives are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the denture adhesives at drug stores, supermarkets, or other similar businesses, and can use the adhesives safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, the denture adhesives do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the denture adhesives have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and none of the factors under paragraph (b)(2)(ii) of this section tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the denture adhesives are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 5. X manufactures mobile x-ray systems. X sells the x-ray systems to distributors Y and Z, which, in turn, sell the systems generally to medical institutions and offices, as well as medical professionals. The FDA requires manufacturers of mobile x-ray systems to list the systems as a device with the FDA. The FDA classifies the mobile x-ray systems under 21 CFR part 892 (Radiology Devices) and product code IZL.

Mobile x-ray systems do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the mobile x-ray systems are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the mobile x-ray systems over the Internet. However, individual consumers cannot use the x-ray systems safely and effectively for their intended medical purpose without training from a medical professional. Although the mobile x-ray systems are not Class III devices and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222, they need to be operated by a medical professional, may require a large investment and/or ongoing expenditure, and are classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section (21 CFR part 892 (Radiology Devices).

Thus, with regard to the factors under paragraph (b)(2)(i) of this section, the mobile x-ray systems have one factor that tends to show they are regularly available for purchase and use by individual consumers and one factor that tends to show that they are not regularly available for purchase and use by individual consumers. With regard to the factors under paragraph (b)(2)(ii) of this section, the mobile x-ray systems have multiple factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the mobile x-ray systems are not devices that are of a type generally purchased by the general public at retail for individual use.

Example 6. X manufactures pregnancy test kits. X sells the kits to distributors Y and Z, which, in turn, sell the pregnancy test kits to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of pregnancy test kits to list the kits as a device with the FDA. The FDA classifies the kits under 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code LCX.

The pregnancy test kits are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the over the counter pregnancy test kits fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for LCX is ''Kit, Test, Pregnancy, HCG, Over The Counter.'' Therefore, the pregnancy test kits also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section. Accordingly, the pregnancy test kits are devices that are of a type generally purchased by the general public at retail for individual use.

Example 7. X manufactures blood glucose monitors, blood glucose test strips, and lancets. X sells the blood glucose monitors, test strips, and lancets to distributors Y and Z, which, in turn, sell the monitors, test strips, and lancets to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of blood glucose monitors, test strips, and lancets to list the items as devices with the FDA. The FDA classifies the blood glucose monitors under 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the test strips under 21 CFR part 862 (Clinical Chemistry and Clinical Toxicology Devices) and product code NBW. The FDA classifies the lancets under 21 CFR part 878 (General and Plastic Surgery Devices) and product code FMK.

The blood glucose monitors and test strips are included in the FDA's online IVD Home Use Lab Tests (Over-the-Counter Tests) database. Therefore, the blood glucose monitors and test strips fall within the safe harbor set forth in paragraph (b)(2)(iii)(A) of this section. Further, the FDA product code name for NBW is ''System, Test, Blood Glucose, Over the Counter.'' Therefore, the blood glucose monitors and test strips also fall within the safe harbor set forth in paragraph (b)(2)(iii)(C) of this section.

In addition, the lancets are supplies necessary for the effective use of DME as described in chapter 15 of the Medicare Policy Benefit Manual. Therefore, the lancets fall within the safe harbor set forth in paragraph (b)(2)(iii)(D)(*5*) of this section.

Accordingly, the blood glucose monitors, test strips, and lancets are devices that are of a type generally purchased by the general public at retail for individual use.

Example 8. X manufactures single axis endoskeletal knee shin systems, which are used in the manufacture of prosthetic legs. X sells the knee shin systems to Y, a business that makes prosthetic legs. The FDA requires manufacturers of knee shin systems and prosthetic legs to list the items as devices with the FDA. The FDA classifies prosthetic leg components, including knee shin systems, as external limb prosthetic components under Subpart D of 21 CFR part 890.3420 and product code ISH. The FDA classifies prosthetic legs as an external assembled lower limb prosthesis under 21 CFR part 890.3500 and product code ISW/KFX. In addition, the Centers for Medicare and Medicaid Services have assigned the knee shin systems Healthcare Procedure Coding System code L5810.

Prosthetic legs and certain prosthetic leg components, including single axis endoskeletal knee shin systems, fall within the safe harbor for prosthetic and orthotic devices that do not require implantation or

insertion by a medical profession that is set forth in paragraph (b)(2)(iii)(D)(*1*) of this section. Accordingly, both the single axis endoskeletal knee shin systems manufactured by X and the prosthetic legs made by Y are devices that are of a type generally purchased by the general public at retail for individual use.

Example 9. X manufactures mechanical and powered wheelchairs. X sells the wheelchairs to distributors Y and Z, which, in turn, sell the wheelchairs to medical institutions and offices, medical professionals, nursing homes, and retail businesses. The FDA requires manufacturers of manual and powered wheelchairs to list the items as devices with the FDA. The FDA classifies the manual and powered wheelchairs under Subpart D of 21 CFR part 890 (Physical Medicine Devices). The FDA classifies mechanical wheelchairs under product code IOR. The FDA classifies powered wheelchairs under product code product code ITI.

Mechanical and powered wheelchairs do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the mechanical and powered wheelchairs are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the wheelchairs in drug stores, medical specialty stores, or DME suppliers, as well as over the Internet. In addition, individual consumers can use the wheelchairs safely and effectively for their intended medical purpose with minimal or no training from a medical professional, and the wheelchairs are classified by the FDA under Subpart D of 21 CFR part 890 (Physical Medicine Devices). Further, although the wheelchairs may require a large initial investment and/or ongoing expenditure, they do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, are not Class III devices, are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the wheelchairs have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and, at most, only one factor under paragraph (b)(2)(ii) of this section tends to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the mechanical and powered wheelchairs are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 10. X manufactures portable oxygen concentrators. X sells the portable oxygen concentrators to distributors Y and Z, which, in turn, sell the portable oxygen concentrators to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of portable oxygen concentrators to list the items as devices with the FDA. The FDA classifies the oxygen regulators under 21 CFR part 868 (Anesthesiology Devices) and product code CAW.

Portable oxygen concentrators do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the oxygen concentrators are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the portable oxygen concentrators in retail pharmacies, medical specialty stores, or DME suppliers, as well as over the Internet. In addition, individual consumers can use the portable oxygen concentrators safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, although the portable oxygen concentrators are classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, they do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, do not require a large investment and/or ongoing expenditure, are not Class III devices, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the portable oxygen concentrators have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and only one factor under paragraph (b)(2)(ii) of this section that tends to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the portable oxygen concentrators are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 11. X manufactures urinary ileostomy bags. X sells the urinary ileostomy bags to distributors Y and Z, which, in turn, sell the urinary ileostomy bags to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of urinary ileostomy bags to list the items as devices with the FDA. The FDA classifies the urinary ileostomy bags under 21 CFR part 876 (Gastroenterology—Urology Devices) and product code EXH.

The urinary ileostomy bags are ''Prosthetic and orthotic devices,'' as defined in 42 CFR 414.202, that do not require implantation or insertion by a medical professional. Therefore, the urinary ileostomy bags fall within the safe harbor set forth in paragraph (b)(2)(iii)(D)(*1*) of this section. Accordingly, the urinary ileostomy bags are devices that are of a type generally purchased by the general public at retail for individual use.

Example 12. X manufactures nonabsorbable silk sutures. X sells the nonabsorbable silk sutures to distributors Y and Z, which, in turn, sell the nonabsorbable silk sutures to medical institutions and offices, medical professionals, and retail businesses. The FDA requires manufacturers of nonabsorbable silk sutures to list the items as devices with the FDA. The FDA classifies the nonabsorbable silk sutures under 21 CFR part 878 (General and Plastic Surgery Devices) and product code GAP.

Nonabsorbable silk sutures do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the nonabsorbable silk sutures are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals can regularly purchase the nonabsorbable silk sutures over the Internet. However, individual consumers cannot use nonabsorbable silk sutures safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, although the nonabsorbable silk sutures do not require a large investment and/or ongoing expenditure, are not Class III devices, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222, the nonabsorbable silk sutures are classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, and they need to be administered by a medical professional.

Thus, with regard to the factors under paragraph (b)(2)(i) of this section, the nonabsorbable silk sutures have one factor that tends to show they are regularly available for purchase and use by individual consumers and one factor that tends to show that they are not regularly available for purchase and use by individual consumers. With regard to the factors under paragraph (b)(2)(ii) of this section, the nonabsorbable silk sutures have multiple factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the nonabsorbable silk sutures are not devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 13. X manufactures nuclear magnetic resonance imaging (NMRI) systems (also known as magnetic resonance imaging (MRI) systems). X sells the NMRI systems to distributor Y, which, in turn, sells the systems to medical institutions. The FDA requires manufacturers of NMRI systems to list the systems as a device with the FDA. The FDA classifies the magnetic resonance diagnostic device under 21 CFR part 892 (Radiology Devices) and product code LNH.

NMRI systems do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the NMRI systems are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals may be able to regularly purchase the NMRI systems over the Internet. However, individual consumers cannot use the NMRI systems safely and effectively for their intended medical purpose without training from a medical professional. Although the NMRI systems are not Class III devices and are not ''items requiring frequent and substantial servicing'' as defined in 42

CFR 414.222, they need to be operated by a medical professional, and are of a type classified by the FDA under 21 CFR part 892 (Radiology Devices). Further, the cost to acquire, maintain, and/or use the NMRI systems requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer.

Thus, with regard to the factors under paragraph (b)(2)(i), the NMRI systems have, at most, one factor that tends to show that they are regularly available for purchase and use by individual consumers and at least one factor that tends to show that they are not regularly available for purchase and use by individual consumers. With regard to the factors under paragraph (b)(2)(ii), the NMRI systems have multiple factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the NMRI systems are not devices that are of a type generally purchased by the general public at retail for individual use.

Example 14. X manufactures therapeutic AC powered adjustable home use beds. X sells the beds to distributors Y and Z, which, in turn, sell the beds to retail businesses. The FDA requires manufacturers of therapeutic AC powered adjustable home use beds to list the items as devices with the FDA. The FDA classifies the therapeutic AC powered adjustable home use beds under 21 CFR part 880 (General Hospital Devices) and product code LLI.

Therapeutic AC powered adjustable home use beds do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the beds are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Although the beds may require a large initial investment and/or ongoing expenditure, individual consumers who are not medical professionals can regularly purchase the beds in medical specialty stores or from DME suppliers, as well as over the Internet. In addition, individual consumers can use the beds safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Further, the beds are not classified by the FDA under a category described in paragraph (b)(2)(ii)(D) of this section, do not need to be implanted, inserted, operated, or otherwise administered by a medical professional, are not Class III devices, and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222.

Thus, the therapeutic AC powered adjustable home use beds have multiple factors under paragraph (b)(2)(i) of this section that tend to show they are regularly available for purchase and use by individual consumers and, at most, only one factor under paragraph (b)(2)(ii) of this section that tends to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the therapeutic AC powered adjustable home use beds are devices that are of a type that are generally purchased by the general public at retail for individual use.

Example 15. X manufactures powered flotation therapy beds. X sells the beds to distributors Y and Z, which, in turn, sell the beds to medical institutions and offices, and medical professionals. The FDA requires manufacturers of powered flotation therapy beds to list the items as devices with the FDA. The FDA classifies the powered flotation therapy beds under 21 CFR part 890 (Physical Medicine Devices) and product code IOQ.

Powered flotation therapy beds do not fall within a retail exemption safe harbor set forth in paragraph (b)(2)(iii) of this section. Therefore, the determination of whether the beds are devices of a type generally purchased by the general public at retail for individual use must be made on a facts and circumstances basis.

Individual consumers who are not medical professionals may be able to regularly purchase the beds over the Internet. However, individual consumers cannot use the beds safely and effectively for their intended medical purpose with minimal or no training from a medical professional. Although the powered flotation therapy beds are not Class III devices and are not ''items requiring frequent and substantial servicing'' as defined in 42 CFR 414.222, they need to be operated or otherwise administered by a medical professional. Further, the cost to acquire, maintain, and/or use the powered flotation therapy beds requires a large initial investment and/or ongoing expenditure that is not affordable for the average consumer.

Thus, with regard to the factors under paragraph (b)(2)(i) of this section, the powered flotation therapy beds have, at most, one factor that tends to show they are regularly available for purchase and use by individual consumers and at least one factor that tends to show they are not regularly available for purchase and use by individual consumers. With regard to the factors under paragraph (b)(2)(ii) of this section, the powered flotation therapy beds have multiple factors that tend to show they are designed primarily for use in a medical institution or office or by medical professionals. Based on the totality of the facts and circumstances, the powered flotation therapy beds are not devices that are of a type that are generally purchased by the general public at retail for individual use.

(c) *Effective/applicability date.* This section applies to sales of taxable medical devices on and after January 1, 2013.

■ **Par. 4.** Section 48.4216(c)–1 is amended by adding paragraph (e) to read as follows:

§ 48.4216(c)–1 Computation of tax on leases and installment sales.

* * * * *

(e) *Contracts for the lease, installment sale, or sale on credit, of a taxable medical device.* (1) *General rule.* Payments made on or after January 1, 2013, pursuant to a contract for the lease, installment sale, or sale on credit of a taxable medical device that was entered into on or after March 30, 2010, are subject to tax under section 4191, and the provisions of paragraphs (a), (b), and (c) of this section apply.

(2) *Exception for payments made on or after January 1, 2013, pursuant to written binding contracts entered into prior to March 30, 2010.* Payments made on or after January 1, 2013, pursuant to a written binding contract for the lease, installment sale, or sale on credit of a taxable medical device that was in effect prior to March 30, 2010, are not subject to tax under section 4191. This exception includes payments made on or after January 1, 2013, if they are made pursuant to a written binding contract that was entered into prior to March 30, 2010. This exception does not apply to payments made under any contract that is materially modified on or after March 30, 2010. For this purpose, a material modification includes only a modification that materially affects the property to be provided under the contract, the terms of payment under the contract, or the amount payable under the contract. Notwithstanding the foregoing, a material modification does not include a modification to the contract required by applicable Federal, State, or local law.

(3) *Effective/applicability date.* This section applies on and after January 1, 2013.

■ **Par. 5.** Section 48.4221–1 is amended by adding paragraph (a)(2)(vii) to read as follows:

§ 48.4221–1 Tax-free sales; general rule.

(a) * * *

(2) * * *

(vii) The exemptions under section 4221(a)(3) through (a)(6) do not apply to the tax imposed by section 4191 (medical device tax).

* * * * *

■ **Par. 6.** Section 48.6416(b)(2)–2 is amended by adding paragraph (a)(4) to read as follows:

§ 48.6416(b)(2)–2 Exportations, uses, sales and resales included.

(a) * * *

(4) Beginning on January 1, 2013, sections 6416(b)(2)(B), (C), (D), and (E)

do not apply to any tax paid under section 4191 (medical device tax).

* * * * *

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: November 30, 2012.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2012–29628 Filed 12–5–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 25

[Docket No. TTB–2012–0006; T.D. TTB–109; Re: Notice No. 131]

RIN 1513–AB94

Small Brewers Bond Reduction

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Temporary rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) amends its regulation that sets forth the penal sum for a brewer's bond where the excise tax liability of the brewer is reasonably expected to be not more than $50,000 in the current calendar year and the brewer was liable for not more than $50,000 in such taxes in the preceding calendar year. For a period of three years, the penal sum of the required bond will be $1,000 for such brewers who file excise tax returns and remit taxes quarterly. In a related proposed rule published elsewhere in this issue of the **Federal Register**, TTB is soliciting comments from all interested parties on this amended regulatory text, on whether TTB should permanently adopt this change, and on other proposed regulatory changes.

DATES: *Effective Dates:* This temporary rule is effective from December 7, 2012 through December 7, 2015.

FOR FURTHER INFORMATION CONTACT: For questions concerning this document, contact Ramona Hupp, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone 202–453–1039, ext. 110; or by email at *BeerRegs@ttb.gov.*

For questions concerning tax payment procedures and quarterly filing procedures, contact the National Revenue Center, Alcohol and Tobacco Tax and Trade Bureau, 550 Main Street, Suite 8002, Cincinnati, OH 45202–5215; telephone toll free 1–877–882–3277; or by email at *ttbquestions@ttb.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Chapter 51 of the Internal Revenue Code of 1986 (IRC), pertains to the taxation of distilled spirits, wines, and beer (see title 26 of the United State Code (U.S.C.), chapter 51 (26 U.S.C. chapter 51)). With regard to beer, IRC section 5051 (26 U.S.C. 5051) imposes a Federal excise tax on all beer brewed or produced for consumption or sale within the United States or imported into the United States. The rate of the Federal excise tax on beer is $18 for every barrel containing not more than 31 gallons, and a like rate for any other quantity or for fractional parts of a barrel, with an exception that the rate of tax is $7 a barrel for the first 60,000 barrels of beer for a domestic brewer that does not produce more than 2 million barrels in a calendar year. Section 5054 (26 U.S.C. 5054) provides that, in general, the tax imposed on beer under section 5051 shall be determined at the time the beer is removed for consumption or sale, and shall be paid by the brewer in accordance with section 5061 (26 U.S.C. 5061).

IRC section 5061 pertains to the time and method for filing tax returns and payment of the applicable excise taxes. Section 5061 states that Federal excise taxes on distilled spirits, wines, and beer shall be collected on the basis of a return, and that the Secretary of the Treasury (the Secretary) shall by regulation prescribe the period or event for which such return shall be filed.

Section 5061(d)(1) generally requires that the taxes owed on alcohol beverages, including beer, withdrawn under bond, be paid no later than the 14th day after the last day of the semimonthly period during which the withdrawal occurs. Under a special rule, September has three return periods (Section 5061(d)(5)), resulting in a total of 25 returns due each year. Section 5061(d)(4) provides an exception to the semimonthly rule for taxpayers who reasonably expect to be liable for not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in a given calendar year and who had an excise tax liability of not more than $50,000 the previous calendar year. Under this provision, such taxpayers may pay the excise taxes on alcohol beverages withdrawn under bond on a quarterly basis.

Throughout this preamble, TTB may refer to brewers who are eligible to file excise tax returns on a quarterly basis as ''small brewers.'' While there is no specific statutory or regulatory definition as to who is a ''small brewer,'' TTB believes that section 5061(d)(4) of the IRC, which provides an exception to the semimonthly rule for taxpayers whose annual alcohol excise tax liability is not expected to be more than $50,000, and who were liable for not more than $50,000 in such taxes in the preceding calendar year, provides a reasonable standard for determining when a brewer may be considered ''small''.

Section 5401(b) of the IRC (26 U.S.C. 5401(b)) provides that all brewers shall obtain a bond to insure the payment of any taxes owed. The amount of such bond shall be ''in such reasonable penal sum'' as prescribed by the Secretary in regulations ''as necessary to protect and insure collection of the revenue.''

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers chapter 51 of the IRC and its implementing regulations pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in administration and enforcement of these laws. The TTB regulations that implement the provisions of sections 5051, 5054, 5061, and 5401, of the IRC as they relate to beer, are set forth in part 25 of title 27 of the Code of Federal Regulations (CFR).

Penal Sum of the Brewer's Bond

Penal sum amounts of the brewer's bond are set forth in 27 CFR 25.93. For brewers filing tax returns and paying tax semimonthly, the penal sum of the bond must be equal to 10 percent of the maximum amount of tax that the brewer will become liable to pay during the calendar year. For brewers filing tax returns and paying tax quarterly, the penal sum of the bond must be equal to 29 percent of the maximum amount of tax which the brewer will become liable to pay during the calendar year. Under § 25.93(c), the minimum bond amount is set at $1,000 and the maximum bond amount is $500,000.

TTB explained the rationale for the bond amount for quarterly taxpayers in a temporary rule, T.D. TTB–41, published in the **Federal Register** on February 2, 2006 (71 FR 5598), which implemented the quarterly tax payment procedures of section 5061(d)(4) of the

IRC. TTB permanently added the temporary rule to the regulations in T.D. TTB–94, published on August 24, 2011 (76 FR 52862). In T.D. TTB–41, TTB stated that due to the longer deferral period between the accrual of the tax liability and the actual payment of tax, the 10 percent bond coverage provided for semimonthly filers would be inadequate for small brewers who were eligible and opted to pay taxes quarterly.

Brewer's Bond Amount and Its Effect on Quarterly Filing

In recent meetings, beer industry groups and individual brewers have informed TTB that, for small brewers, the increase of the penal sum amount to 29 percent of the brewer's expected maximum tax liability for the year has deterred such brewers from filing returns on a quarterly basis. A review of TTB's records provides data that support this conclusion. At the end of 2011, 2,026 brewers submitted tax returns to TTB, and 1,846 of those brewers paid less than $50,000 in excise tax annually and were eligible to file returns quarterly. Further, the majority of those 1,846 brewers paid much less than $50,000 in excise tax, given that 1,616 of those brewers (87.5 percent) paid annual taxes of $7,000 or less. TTB's records also show that of these 1,616 brewers, 841 (52 percent) filed semimonthly rather than quarterly tax returns.

The effect of § 25.93 is that a brewer who files returns quarterly instead of semimonthly may have to increase its bond coverage. For example, a small brewer with an annual Federal excise tax liability of $40,000 per year who files returns semimonthly must obtain bond coverage of $4,000 (10 percent of $40,000). If the same small brewer opts to file its tax returns quarterly rather than semimonthly, the brewer must increase its bond coverage to 29 percent of its maximum annual tax liability, which would result in a bond amount of $11,600.

The effect of § 25.93 also may mean that small brewers who want to file quarterly would be more than likely ineligible to obtain the minimum bond coverage under § 25.93(c). For example, a small brewer with an annual Federal excise tax liability of $7,000 would have a semimonthly tax liability of less than $300 and would need to obtain only the minimum bond coverage of $1,000. If the same brewer opted to file returns quarterly rather than semimonthly, the quarterly tax liability would be $1,750, making the brewer ineligible for the minimum bond. Instead, the brewer must increase its bond coverage to 29 percent of its maximum annual tax liability, which would be $2,030.

In the case of brewers who are eligible to file quarterly returns, TTB has revisited the issue of whether requiring a penal sum of at least 29 percent of a small brewer's maximum annual tax liability is necessary to establish a ''reasonable penal sum'' that adequately protects and insures collection of the revenue. TTB's tax return statistics reveal that the total sum of Federal excise tax collected from brewers who are liable for not more than $50,000 in taxes annually represents a small amount of the total sum of excise tax collected on beer each year. Small brewers paid approximately $11.5 million, or just over six percent, of the $177.8 million in Federal excise tax on beer collected in 2011. Similar collections occurred in 2010, with small brewers paying approximately $10.15 million, or 5.6 percent, of the $180.6 million in excise tax collected that year.

The Proposed Regulatory Amendment

After discussions with beer industry members and a review of excise tax return data, TTB believes that given the relatively low risk to the revenue, a penal sum of $1,000 for bonds obtained by small brewers is reasonably sufficient to protect and insure collection of the revenue. TTB also believes that amending the regulatory requirements regarding the penal sum of brewers bonds may result in an increase in quarterly filings and tax payments. In addition, TTB believes an increase in quarterly filings and tax payments will lessen costs and increase efficiencies for both TTB and industry members.

To encourage a greater number of eligible small brewers to file excise tax returns and pay taxes quarterly rather than semimonthly, this temporary rule amends 27 CFR 25.93(a) to add a three-year exception to the current penal sum of the brewer's bond. During this three-year period, for brewers who are eligible to and choose to file their tax returns quarterly, the penal sum of the brewer's bond will be a flat $1,000. The temporary rule's three-year period will allow TTB to determine if the adjustment to the bond amount results in increased quarterly tax filing and payment by eligible brewers, and also will allow TTB to confirm the presumption that a $1,000 penal sum of the bond is sufficient to protect and insure collection of the revenue. This temporary rule does not prohibit brewers who are eligible to file quarterly from filing semimonthly or maintaining their current bond amounts.

Public Participation

To submit comments on these regulations, please refer to Notice No. 131, the notice of proposed rulemaking on this subject published in the Proposed Rules section of this issue of the **Federal Register**.

Regulatory Flexibility Act

Because this regulation does not impose a collection of information on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Pursuant to section 7805(f) of the Internal Revenue Code, TTB will submit this temporary rule to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the temporary regulations.

Executive Order 12866

It has been determined that this temporary rule is not a significant regulatory action as defined in E.O. 12866. Therefore, a regulatory assessment is not necessary.

Paperwork Reduction Act

There is no new collection of information imposed by this Treasury decision. There is no change in the reporting or recordkeeping burden resulting from a reduced penal sum for certain small taxpayers.

Inapplicability of Prior Notice and Comment and Delayed Effective Date Procedures

TTB is issuing this temporary final rule without prior notice and comment pursuant to authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' We believe prior notice and comment is unnecessary because we expect the affected public will benefit immediately from a reduced bond amount and be encouraged to lessen their reporting burdens. TTB does not believe there will be any objection to this rule since it is optional and reduces regulatory burdens.

Pursuant to the provisions of 5 U.S.C. 553(d)(1) and (d)(3), TTB is issuing this regulatory amendment without a delayed effective date. As provided for in section 553(d)(1), this amendment lowers the bond requirement for small brewers, thereby relieving a restriction which may have prevented such brewers from choosing to pay their taxes quarterly. TTB also has determined that good cause exists to provide industry

members with immediate relief from the penal sum requirements under the existing regulations, in accordance with section 553(d)(3).

Drafting Information

Gerald M. Isenberg and Ramona Hupp of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document.

List of Subjects in 27 CFR Part 25

Beer, Excise taxes, Reporting and recordkeeping requirements, Surety bonds.

Amendments to the Regulations

Accordingly, for the reasons set forth in the preamble, TTB amends 27 CFR, chapter I, part 25 as set forth below.

PART 25—BEER

■ 1. The authority citation for part 25 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5121, 5122–5124, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

■ 2. Amend § 25.93 by:

■ a. Amending paragraph (a)(2) by removing the word ''For'' in the first sentence after the heading and replacing it with the words ''Except as provided in paragraph (a)(3) of this section, for''; and

■ b. Adding a new paragraph (a)(3) to read as follows:

§ 25.93 Penal sum of bond.

(a) * * *

(3) *Exception.* For a period of three years beginning December 7, 2012 for brewers filing tax returns and remitting taxes quarterly under § 25.164(c)(2), the penal sum of the brewer's bond is $1,000 on beer:

(i) Removed for transfer to the brewery from other breweries owned by the same brewer;

(ii) Removed without payment of tax for export or for use as supplies on vessels and aircraft;

(iii) Removed without payment of tax for use in research, development, or testing; and

(iv) Removed for consumption or sale.

* * * * *

Signed: September 18, 2012.

John J. Manfreda,

Administrator.

Approved: September 28, 2012.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 2012–29488 Filed 12–6–12; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 68

[Docket No. DOD–2009–OS–0034]

RIN 0790–AI50

Voluntary Education Programs

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Defense (DoD) implements policy, assigns responsibilities, and prescribes procedures for the operation of voluntary education programs within DoD. Several of the subject areas in this final rule include: procedures for Service members participating in education programs; guidelines for establishing, maintaining, and operating voluntary education programs including, but not limited to, instructor-led courses offered on-installation and off-installation, as well as via distance learning; procedures for obtaining on-base voluntary education programs and services; minimum criteria for selecting institutions to deliver higher education programs and services on military installations; the establishment of a DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between DoD and educational institutions receiving tuition assistance payments; and procedures for other education programs for Service members and their adult family members. The new requirement for a signed MOU with DoD from participating educational institutions will be effective 60 days following the publication of this final rule in the **Federal Register**.

DATES: This rule is effective January 7, 2013.

FOR FURTHER INFORMATION CONTACT: For specific information on the new DoD Voluntary Education Partnership MOU, go to the DoD MOU site at *http://www.dodmou.com.* There is a ''feedback button'' where questions and concerns can be emailed from Service members, education centers, and institutions. Every email received through the automated feedback button will be recorded, tracked, and resolved by the appropriate DoD official. For general information concerning DoD Voluntary Education Programs, send a written inquiry to Ms. Kerrie Tucker, at the Office of the Under Secretary of Defense (Personnel & Readiness), Military Community & Family Policy, State Liaison and Educational Opportunities, 4800 Mark Center Drive, Suite 14E08, Alexandria, Virginia 22350–2300 or email: *kerrie.tucker@osd.mil.*

SUPPLEMENTARY INFORMATION:

Executive Summary

This final rule implements Voluntary Education Programs for Military Service members. This rule includes educational programs that enable Service members to earn a degree on their off-duty time. Congress has held that men and women serving in the Armed Forces should have at least the same opportunity to advance academically as do civilians who remain outside the military.

Funding for Voluntary Education Programs is authorized by law and is subject to the availability of funds from each Service. Voluntary education programs include tuition assistance (TA) (per 10 U.S.C. 2007), which is administered uniformly across the Services. Subject to appropriations, each Service pays no more than $250.00 per semester-unit for tuition and fees combined. Each Service member participating in off-duty, voluntary education is eligible for up to $4,500.00, in aggregate, for each fiscal year. TA can only be used for courses offered by postsecondary institutions accredited by a national or regional accrediting body recognized by the U.S. Department of Education.

A March 2011 Government Accountability Office report on the DoD TA program recommended the Department take steps to enhance its oversight of schools receiving TA funds. As a result, a DoD Memorandum of Understanding (MOU) requirement was included in this rule, which is designated not only to improve Departmental oversight but also to account for our Service members' unique lifestyle requirements. The purpose of the DoD MOU is to establish a partnership between the Department and institutions to improve educational opportunities while protecting the integrity of each institution's core educational values. This partnership serves to ensure a quality, viable

program exists that provides for our Service members to realize their educational goals, while allowing for judicious oversight of taxpayer dollars.

Public Comments

The Department of Defense published a proposed rule on August 6, 2010 (75 FR 47504–47514). Twenty six submissions were received which contained a total of 110 comments that were reviewed and considered. However, a substantial number of the 110 comments were duplicative, resulting in 35 actual comments. These 35 comments were grouped into just 9 topics and addressed below.

Comment: We received a comment which recommended the document recognize the potential for adjudications to arise, and that a long-term point of contact be specified to address adjudication; this should include, name, phone number and email address of the contact office.

Response: For tracking purposes, a ''feedback button'' was developed on the DoD Voluntary Education Partnership MOU Web page to specifically address questions and concerns from Service members, education centers, and institutions. The homepage for DoD Voluntary Education (*http://apps.mhf.dod.mil/voled*) also contains a link where personnel can register their voluntary education concerns. Every entry received through the automated feedback button will be recorded, tracked, and resolved by the appropriate DoD official. For general information concerning DoD Voluntary Education Programs, personnel can send a written inquiry to Ms. Kerrie Tucker, at the Office of the Under Secretary of Defense (Personnel & Readiness), Military Community & Family Policy, State Liaison and Educational Opportunities, 4800 Mark Center Drive, Suite 14E08, Alexandria, Virginia, 22350–2300 or email: *kerrie.tucker@osd.mil.*

Comment: Several commenters addressed concerns about the new requirement for schools to agree to participate in a 'third party review' process that will evaluate voluntary education programs and the delivery of their educational opportunities to Service members. One commenter requested additional information concerning a waiver to this review. Since this review process will be contracted to a company outside DoD, the selected contractor will be responsible for the procedures connected with the actual review process which could include a possible waiver process. Another commenter suggested the DoD contracted 'third party' evaluator(s) accompany the Distance Education and Training Committee (DETC) accreditation committees since the vast majority of DETC accredited distance education institutions are very small with small enrollments of Service members. In the long run, this may help to conserve DoD resources, give DoD a broader view of the institution, and help institutions keep their tuitions low.

Response: The comments received have been noted; however the final decision will be made by the selected DoD contractor for the complete 'third party review' process.

Comment: A commenter stated that the responsibilities on page 47508: under 68.5, section (g)(2), were not in concert with the earlier section (d)(6), which states the Director of DANTES will serve ''as the Executive Secretary at the Interservice Voluntary Education Board meeting convened annually to review DANTES' programs * * *'' Since the DANTES Director does not serve as the Executive Secretary at the other quarterly meetings of the Interservice Voluntary Education Board, the commenter suggested section (g)(2) be rewritten as noted in (d)(6) so that the DANTES Director's Executive Secretary responsibilities do not expand beyond the annual Board meeting convened to review the DANTES mission and programs.

Response: This comment was accepted and the appropriate changes were made, which included deleting section (g)(2) and keeping section (d)(6) as is. However, the final rule lists the operational procedures relating to DANTES in section 68.6

Comment: Multiple comments were received with alternative language for the provision on tuition assistance and how it should be applied with regards to various fees as stated on page 47508, under 68.6, Procedures, section (a)(2)(ii)(D).

Response: Several recommended language alternatives were submitted and a combination statement was developed. This section now includes the following additional statement to the last sentence: ''* * *are charged to all students and 100 percent refundable.''

Comment: The majority of the comments received focused on Appendix A to part 68, section 4.a. on page 47512 on the 'One Single Rate to TA' and questions relating to the actual implementation, especially with schools operating in several different states.

Response: The term 'one single rate tuition rate' pertains to the institution at a specific geographic location, not nationwide. The intent of this paragraph is to ensure that all Service members (i.e., Soldiers, Airmen, Sailors, or Marines) attending the same institution, at the same location, enrolled in the same course, be charged the same amount of tuition assistance without regard to their Service component. Additionally, if an institution has more than one mode of delivery for their courses, the 'one single tuition rate' will be the same for all participating Service members without regard to their Service component within each mode of delivery. Institutions with more than one campus will sign one DoD Voluntary Education Partnership MOU from their home, main, or parent campus, if that home, main, or parent campus signatory is responsible of all of the campuses. A listing of the specific campus locations will be included in the DoD MOU and provided by the home, main, or parent campus signatory. However, if each campus operates as a separate business entity for purposes such as handling third-party payments, then each campus signatory will sign a separate DoD MOU.

Comment: A commenter questioned the verbiage in Appendix A to Part 68 (Paragraph 5b. (7)) concerning class cancellations. It currently states: The institution will: ''Inform the installation education advisor about class cancellations for classroom-based courses on military installations no later than seven calendar days prior to the beginning of the term.'' At the commenter's school, approximately 40% of the registrations occur the week before the beginning of the term and during the week the term starts. The proposed rule would result in cancelling classes that, in their experience, the majority of which would gain sufficient enrollment prior to class start. In view of the above, suggest that the installation education advisor have the flexibility to set the class cancellation policy based on the situation at that installation.

Response: Suggestion to change the verbiage for this paragraph was accepted and reads as follows: ''Inform the installation education advisor about cancellations for classroom-based classes on military installations per the guidelines set forth in the separate installation MOU.''

Comment: A commenter requested clarification on the needs assessment requirement stated in section 68.6, subsection (b)(1)(v) and (b)(3)(v). As stated, it was unclear to the commenter who was ultimately responsible for the administration of the needs assessment.

Response: The comment was accepted and clarification was added to the referenced paragraphs which includes:

* * *periodic needs assessments conducted by the appropriate installation official (normally the Education Services Officer) for programs provided on the installation. The installation needs assessment process is used to determine such items as staffing requirements, course offerings, size of facilities, funding, or other standards for delivery of educational programs.''

Comment: Several comments were received concerning the Service-specific addendums. One commenter submitted a correction to the Navy addendum for the address to mail an official transcript. Another commenter suggested the Navy addendum be reworded concerning the response time.

Response: The Navy address was corrected in Appendix E to Part 68, 2.c.(7) and paragraph 2.c.(5) now reads: ''Institutions will strive to respond to email messages from students within a reasonable period of time—generally within two workdays, unless extenuating circumstances would justify additional time.''

Comment: Multiple narrative comments were received from the general public which contained opinions, ideas, and observations, with no concrete recommendations for valid changes. However, one commenter stated, ''Recognition that any required indemnification by public educational institutions in the MOU(s) may be limited by state and governing board limits.''

Response: A new paragraph was added to section 68.6, Procedures, paragraph (a)(16) which reads: ''To the extent that any provision of the standard language of the DoD Voluntary Education Partnership MOU template in appendices A, B, C, D, and E to this part, results from DoD policy that conflicts with a state law or regulation, the DASD(MCFP) may authorize amending the standard language of the DoD Voluntary Education Partnership MOU template on a case-by-case basis to the extent permissible by Federal law or regulation.''

Additional clarifications were made in the final rule based on comments received from the Institutions during the implementation process of the DoD Voluntary Education Partnership Memorandum of Understanding (MOU). DoD received several concerns and apprehensions in signing the DoD MOU from institutions of higher learning (IHLs). DoD decided to work with the public stakeholders (American Council on Education, IHLs, and key veteran and military service organizations) to address these concerns by providing additional clarification to the terminology contained in the DoD MOU. These clarifications use IHL terminology instead of DoD language in the DoD MOU and definition of terms in section 68.3.

The IHLs concerns included the following key provisions in the DoD MOU contained in Appendix A to Part 68:

- Adhering to the Servicemembers Opportunity Colleges (SOC) Consortium Principles, Criteria, and Military Student Bill of Rights (sections 3.e. and f.);
- Waiving degree residency requirements (sections 3.e. and f.);
- Recognizing, accepting, and awarding military training and education where appropriate (sections 3.e. and f.); and
- Providing an evaluated education plan to military students (section 4.c.); DoD extended the deadline for IHLs to sign the DoD MOU to 60 days following the publication of this final rule in the **Federal Register** to provide the IHLs with sufficient time to reassess the agreed-upon terminology. All of the concerns from the IHLs were addressed, however the DoD MOU is voluntary and as such, DoD cannot mandate that a postsecondary institution sign. If there are institutions that choose not to participate in the Military Tuition Assistance Program, the Military Services will assist Service members to find schools that have the same program and will transfer credits the Service members have already earned. They will also provide counseling to assist them in identifying additional or alternative funding.

The changes listed below are contained in the final rule and include the following main recommendations:

- The addition of paragraph (b) in section 68.1, Purpose. Although the content for this paragraph was already stated in section 68.6, Procedures, paragraph (a)(15), it was not stated in the 'Purpose' of this part. In the final rule, paragraph (b) in section 68.1 of this part states the new policy, which requires a signed DoD MOU from educational institutions providing education programs through the DoD TA Program.
- To increase clarity connected with the duties relating to the Interservice Voluntary Education Board and DANTES, the operational procedures listed for both topics were moved from section 68.5, ''Responsibilities'' and consolidated into section 68.6, ''Procedures''. Previously, the proposed rule included operational procedures for the Board and DANTES in sections 68.5 and 68.6 of this part, which caused confusion to the reader.
- DoD received recommendations to include an implementation statement for the DoD MOU since the initial effective date of January 1, 2012, has passed. DoD also received requests to provide educational institutions with sufficient time to coordinate the DoD MOU through their legal and supervisory channels. The final rule now states a signed MOU with DoD from participating educational institutions will be effective 60 days following the publication of this final rule on the **Federal Register**.
- The U.S. Air Force and the U.S. Navy requested to delete their indemnification paragraphs contained in Appendix B and Appendix E to Part 68, due to conflicts with state laws for all of the public institutions wanting to participate in the military TA program.

Regulatory Procedures

Executive Order 12866, ''Regulatory Planning and Review'' and Executive Order 13563, ''Improving Regulation and Regulatory Review''

It has been certified that 32 CFR part 68 is an economically significant regulatory action. The rule has an annual effect on the economy of $100 million or more.

The rule does not:

- Adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in these Executive Orders.

Funding for Voluntary Education Programs is authorized by law and is subject to the availability of funds from each Service. Voluntary education programs include tuition assistance (per section 2007 of title 10, United States Code), which is administered uniformly across the Services. As per the National Defense Authorization Act (NDAA) FY08, each of the Services may also provide TA to activated Service members of the Selected Reserves and Individual Ready Reserve. For Fiscal Year 2010 (FY10), the Services executed approximately $800 million for Off-Duty and Voluntary Education Programs. This total amount included tuition assistance costs of approximately

$542M. The Services have currently budgeted the same amount for FY11 tuition assistance costs.

Sec. 202, Pub. L. 104–4, ''Unfunded Mandates Reform Act''

It has been certified that 32 CFR part 68 does not contain a Federal mandate that may result in expenditure by State, local and tribal governments, in aggregate, or by the private sector, of $100 million or more in any one year.

Public Law 96–354, ''Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been certified that 32 CFR part 68 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. The rule updates policy and procedures for the voluntary education programs within DoD for Service members and their adult eligible family members. Guidance on voluntary education programs is available through the Education Centers located on military installations.

Public Law 96–511, ''Paperwork Reduction Act''

It has been certified that 32 CFR part 68 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, ''Federalism''

It has been certified that 32 CFR part 68 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

- The States;
- The relationship between the National Government and the States; or
- The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 68

Adult education, Armed forces, Colleges and universities, Education, Educational study programs, Government contracts, Military personnel, Student aid.

Accordingly, 32 CFR part 68 is added to read as follows:

PART 68—VOLUNTARY EDUCATION PROGRAMS

Sec.

68.1 Purpose.
68.2 Applicability.
68.3 Definitions.
68.4 Policy.
68.5 Responsibilities.
68.6 Procedures.
Appendix A to Part 68—DOD Voluntary Education Partnership Memorandum of Understanding (MOU) Between DOD Office of the Under Secretary of Defense For Personnel and Readiness (USD(P&R)) and [Name of Educational Institution]
Appendix B to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Air Force
Appendix C to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Army
Appendix D to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Marine Corps
Appendix E to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Navy

Authority: 10 U.S.C. 2005, 2007.

§ 68.1 Purpose.

This part:

(a) Implements policy, assigns responsibilities, and prescribes procedures for the operation of voluntary education programs in the Department of Defense.

(b) Establishes new policy stating criteria for tuition assistance (TA) and the requirement for a memorandum of understanding (MOU) from all educational institutions providing educational programs through the DoD TA Program.

(c) Establishes the Interservice Voluntary Education Board.

§ 68.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

§ 68.3 Definitions.

The following terms and their definitions are for the purpose of this part:

Academic. Having to do with general or liberal arts education, rather than technical or vocational.

Academic skills. Competencies in English, reading, writing, speaking, mathematics, and computer skills that are essential to successful job performance and new learning. Also referred to as functional or basic skills.

Active Guard and Reserve (AGR). National Guard or Reserve members of the Selected Reserve (SELRES) who are ordered to active duty or full-time National Guard duty for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the Reserve Component units or duties as prescribed in 10 U.S.C. 12310. All AGR members must be assigned against an authorized mobilization position in the unit they support. (Includes Navy full-time support (FTS), Marine Corps Active Reserve (ARs), and Coast Guard Reserve Personnel Administrators (RPAs)).

American Council on Education. The major coordinating body for all of the Nation's higher education institutions. Seeks to provide leadership and a unifying voice on key higher education issues and publishes the ''Guide to the Evaluation of Educational Experiences in the Armed Services.''

Annual TA Ceiling. The maximum dollar amount authorized for each Service member for TA per fiscal year. Each Service member participating in off-duty voluntary education programs shall be entitled to the full amount authorized each fiscal year in accordance with DoD policy.

Army/American Council on Education Registry Transcript System. An automated official document generated by the Army/ACE Registry Transcript System which can be sent directly from the Army American Council on Education Registry Transcript System Center to the educational institution to articulate a soldier's military experience and training and the American Council on Education-recommended college credit for this training and experience.

Degree requirements. A planning document provided by the educational institution that outlines general required courses to complete an educational program. The planning document presents the general education and major-related course requirements, degree competencies (e.g., foreign language, computer literacy), and elective course options that students may choose for specified program of study.

Education advisor. A professionally qualified, subject matter expert or program manager in the education field at the installation education center. The following position titles may also be used for an education advisor: Education Services Specialist, Education Services Officer (ESO), Voluntary Education Director, Navy College Office Director, and Education and Training Section (ETS) Chief.

Education center. A military installation facility, including office space, classrooms, laboratories, and other features, that is staffed with professionally qualified personnel and

to conduct voluntary education programs. For Navy, this is termed the ''Navy College Office.''

Educational plan. A planning document provided by the educational institution that outlines general degree requirements for graduation. Typically an educational plan presents the general education and major-related course requirements, degree competencies (e.g., foreign language, computer literacy), and elective course options that students may choose for a specified program of study. This document is required from the institution upon the successful completion of six semester hours by the Service member at the institution.

Eligible adult family member. The adult family member, over the age of 18, of an active duty, Reserve, National Guardsman, or DoD civilian with a valid DoD identification card.

Evaluated educational plan. An official academic document provided by the educational institution that:

(1) Articulates all degree requirements required for degree completion or in the case of a non-degree program, all educational requirements for completion of the program;

(2) Identifies all courses required for graduation in the individual's intended academic discipline and level of postsecondary study; and

(3) Includes an evaluation of all successfully completed prior coursework, and evaluated credit for military training and experience, and other credit sources applied to the institutional degree requirements. For participating SOC Degree Network System institutions, SOC Army Degrees, SOC Navy Degrees, SOC Marine Corps Degrees, or SOC Coast Guard Degrees Student Agreement serves as this documented educational plan.

Individual Ready Reserve (IRR). A manpower pool consisting principally of individuals who have had training, have previously served in the Active Component or in the SELRES, and have some period of their military service obligation or other contractual obligation remaining. Some individuals volunteer to remain in the IRR beyond their military service or contractual obligation and participate in programs providing a variety of professional assignments and opportunities for earning retirement points and military benefits.

Military Voluntary Education Review (MVER). A third-party evaluation of voluntary education programs covered by the DoD Voluntary Education Partnership MOU.

Needs assessment. A process used to determine the staffing requirements, course offerings, size of facilities, funding, or other standards for delivery of educational programs.

Off-duty. Time when the Service member is not scheduled to perform official duties.

Ready Reserve. Composed of military members of the Reserve and National Guard, organized in units or as individuals, or both, and liable for involuntary order to active duty in time of war or national emergency pursuant to 10 U.S.C. 12310 and 12301 and 14 U.S.C. 712 in the case of members of the Coast Guard Reserve. The Ready Reserve consists of the SELRES, the IRR, and the Inactive National Guard.

Sailor/Marine American Council on Education Registry Transcript System. An automated official document generated by the Sailor/Marine American Council on Education Registry Transcript System, which can be sent directly from the Sailor/Marine ACE Registry Transcript System Operations Center to the educational institution to articulate a Sailor's or Marine's military experience and training and the American Council on Education recommended college credit for this training and experience.

SELRES or *Selected Reserve.* Those units and individuals within the Ready Reserve designated by their respective Service as essential to wartime missions and must therefore maintain a higher priority over all other Reserves. The SELRES includes Reserve unit members (including members in the training pipeline and drilling Reservists in units), Individual Mobilization Augmentees, and Active Guard/Reserve members.

Semester-hour TA Cap. The maximum dollar amount authorized for TA per semester-hour credit. A Service shall pay no more than the established DoD cap.

SOC or *Servicemembers Opportunity Colleges.* A consortium of over 1,800 colleges and universities, created in 1972 that seeks to enhance the educational opportunities to Service members who may have difficulty in completing college programs due to frequent military moves.

TA or *tuition assistance.* Funds provided by the Military Services or U.S. Coast Guard to pay a percentage of the charges of an educational institution for the tuition of an active duty, Reserve or National Guard member of the Military Services, or Coast Guard member, enrolled in approved courses of study during off-duty time.

Top-Up. An option, under chapter 30 of the Montgomery G.I. Bill and Post-9/11 G.I. Bill, that enables active duty Service members to receive from the Department of Veterans Affairs those tuition and fee costs that exceed the amount of TA provided to the Service member by his or her Service.

Troops-to-Teachers program (TTT). A Department of Education program administered by the DoD to help recruit quality teachers for schools that serve low-income families throughout America. TTT helps relieve teacher shortages, especially in math, science, special education, and other high-needs subject areas, and assists military personnel in making successful transitions to second careers in teaching.

Voluntary education programs. Continuing, adult, or postsecondary education programs of study that Service members elect to participate in during their off-duty time, and that are available to other members of the military community.

§ 68.4 Policy.

It is DoD policy, consistent with DoD Directive 1322.08E, that:

(a) Members of the Military Services serving on active duty or members of the Selected Reserve (SELRES) shall be afforded the opportunity to complete their high school education through a state-funded or Service component sponsored program, earn an equivalency diploma, improve their academic skills or level of literacy, enroll in career and technical education schools, receive college credit for military training and experience in accordance with the American Council on Education's ''Guide to the Evaluation of Educational Experiences in the Armed Services'' (available at *http://www.militaryguides.acenet.edu/*), take tests to earn college credit, and enroll in postsecondary education programs that lead to industry-recognized credentials, and undergraduate and graduate degrees.

(b) Subject to the availability of funds, Service members' costs to participate in the DoD Voluntary Education Program as authorized by Section 2007 of title 10, United States Code (U.S.C.), shall be reduced through financial support, including tuition assistance that is administered uniformly across the Military Services.

(c) Information and counseling about voluntary education programs shall be readily available and easy to access so that Service members are encouraged to make maximum use of the educational opportunities available.

(d) Institutions accredited by a national or regional accrediting agency recognized by the U.S. Department of Education shall be encouraged to provide degree programs on military installations and the Military Services

shall facilitate their operations on the installations.

(e) To the extent that space is otherwise available, eligible adult family members of Service members, DoD civilian employees and their eligible adult family members, and military retirees may enroll in postsecondary education programs offered on a military installation at no cost to the individual Service TA programs.

§ 68.5 Responsibilities.

(a) *Under Secretary of Defense for Personnel and Readiness (USD(P&R)).* The USD(P&R) shall:

(1) Monitor implementation of and ensure compliance with this part and DoD Directive 1322.08E (see *http://www.dtic.mil/whs/directives/corres/pdf/132208p.pdf*).

(2) Establish rates of tuition assistance (TA) to ensure uniformity across the Military Services as required by DoD Directive 1322.08E, DoD Instruction (DoDI) 1322.25 (see *http://www.dtic.mil/whs/directives/corres/pdf/132225p.pdf*), and this part.

(3) Establish, under the provisions of DoDI 5105.18, the Interservice Voluntary Education Board, which will be composed of full-time or permanent part-time federal employees.

(4) Maintain a program to assess the effectiveness of the voluntary education programs.

(5) Issue written guidance annually for the funding and operation of the Defense Activity for Non-Traditional Education Support (DANTES).

(b) *Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)).* The ASD(R&FM), under the authority, direction, and control of the USD(P&R) shall:

(1) Provide administrative assistance to the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MCFP)), in support of the voluntary education programs.

(2) Respond to matters that are referred to by the DASD(MCFP).

(c) *Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MCFP)).* The DASD(MCFP), under the authority, direction, and control of the ASD(R&FM), shall:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances by personnel under his or her authority, direction, and control.

(2) Oversee the DoD Voluntary Education Program.

(3) Provide ongoing and routine clarifying guidance for the DoD Voluntary Education Program.

(4) Provide representatives to professional education and cross-agency panels addressing issues impacting the DoD Voluntary Education Program, its regulatory scope, clientele, and partners.

(5) Designate the Voluntary Education Chief within the Office of the DASD(MCFP) as the Chair of the Interservice Voluntary Education Board and oversee implementation of Board and DANTES procedures as detailed in § 68.6 of this part.

(d) *Assistant Secretary of Defense for Reserve Affairs (ASD(RA)).* The ASD(RA), under the authority, direction, and control of the USD(P&R), shall:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances by personnel under his or her authority, direction, and control.

(2) Appoint a representative to serve on the Interservice Voluntary Education Board.

(3) Arrange the assignment of, on a rotating basis, a field grade officer, to serve as the Reserve Component Advisor to the Voluntary Education Chief within the Office of DASD(MCFP).

(e) *Secretaries of the Military Departments.* The Secretaries of the Military Departments shall:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances.

(2) Establish, maintain, coordinate, and operate voluntary education programs that encompass a broad range of educational experiences including, but not limited to, academic skills development, high school completion programs, career and technical education programs, and programs leading to the award of industry-recognized credentials, and undergraduate and graduate degrees.

(3) Require that sufficient funding is available to provide Service members with TA support consistent with the requirements in section 68.6 and appendices A, B, C, D, and E to this part.

(4) Require that educational counseling is available to Service members so they will have sufficient information and guidance to plan an appropriate program of study.

(5) Require that voluntary education programs participate in the established DoD third-party review process (i.e., MVER).

(i) The third-party review assesses the quality, delivery, and coordination of the voluntary education programs provided to military personnel on the installation, in the community, and via distance learning (DL). It assists in improving the quality of the delivery of these programs through recommendations to institutions, installations, and the Military Services.

(ii) Waivers to the third-party review must be submitted to and approved by the Voluntary Education Chief within the Office of the DASD(MCFP).

(6) Provide one representative to serve on the Interservice Voluntary Education Board responsible for their Services' voluntary education policy from each of the following Military Services: Army, Navy, Air Force, and Marine Corps. Each Service representative's membership will be on a permanent basis and changed only when their voluntary education policy position is changed.

(7) Assign, on a rotating basis, a senior enlisted Service member in pay grade E–9 to serve as the DANTES enlisted advisor.

(8) Require that military test control officers and test centers comply with the guidance and procedures published in the DANTES Examination Program Handbook, available at *http://www.dantes.doded.mil/Sub%20Pages/Exams/Docs/DEPH_part1.pdf.*

(9) Require that personnel who provide counseling, advice, and program management related to voluntary education programs have access to the DoD Voluntary Education homepage and other Web sites so they can provide current and accurate information to Service members.

(10) Provide opportunities for Service members to access the Internet, where available, to enroll in and complete postsecondary courses that are part of their approved educational plan leading to an educational goal.

(f) *Secretary of the Navy.* The Secretary of the Navy, as the DoD Executive Agent (DoD EA) for DANTES pursuant to DoD Directive 1322.08E and DoD Directive 5101.1, and in addition to the responsibilities in § 68.5 of this part of this section, shall:

(1) Transmit annual guidance issued by the USD(P&R) to DANTES.

(2) Require that the Director, DANTES, provide updates on DANTES plans, operations, and activities to the USD(P&R).

(3) Through its civilian personnel system, advertise the position of Director, DANTES, when the position is vacated and appoint the Director, DANTES, in accordance with the procedures outlined in § 68.6.

§ 68.6 Procedures.

(a) *TA for Service members participating in education programs.* (1) TA shall be available for Service members participating in high school completion and approved courses from accredited undergraduate or graduate

education programs or institutions. Approved courses are those that are part of an identified course of study leading to a postsecondary certificate or degree and non-degree oriented language courses integral to the Defense Language Transformation Roadmap (available at *http://www.defense.gov/news/Mar2005/d20050330roadmap.pdf).*

(i) Use of TA for non-degree oriented language courses is limited to those published by the Under Secretary of Defense (P&R) on the DoD Strategic Language List.

(ii) Dominant-in-the-force languages and languages deemed by DoD as already having sufficient strategic capacity authorized will not be funded under section 2007, except for assignments outside the continental United States.

(2) TA shall be applied as follows:

(i) For 100 percent of the cost of approved high school completion programs for Service members who have not been awarded a high school or equivalency diploma and who are enrolled in such programs.

(ii) In support of the voluntary education and training of active duty Service members during their off-duty periods, each Military Service shall pay all or a portion, as specified in paragraphs (a)(2)(ii)(A) through (F) of this section, of the charges of an educational institution for education and training during the member's off-duty periods.

(A) When an institution's charges are up to or less than the limit of per semester-hour of credit or its equivalent, as specified in DoDI 1322.25, the responsible Service shall pay the entire amount charged by the institution. In computing credit equivalency, the following conversions shall apply: 1 quarter-hour credit = ⅔ semester-hour credit; and 45 contact hours shall be considered equivalent to one semester-hour credit when neither semester- nor quarter-hours are specified for the education or training for which the Service member is enrolled.

(B) When an institution's charges exceed the per semester-hour of credit, or its equivalent limit as specified in DoDI 1322.25,the responsible Service shall pay no more than the specified limit per semester-unit for tuition and fees combined.

(C) Each Service member participating in off-duty, voluntary education shall be allowed up to the fiscal year limit amount specified in DoDI 1322.25.

(D) Covered charges include those that are submitted to the Service by the educational institution for tuition, instructional fees, laboratory fees, computer fees, and other fees directly related to the specific course enrollment of that member in that educational institution, are charged to all students, and 100 percent refundable.

(E) TA funds are not to be used for the purchase of books. Additionally, institutional education revenue generated from military TA funds cannot be used to support textbook grants or scholarships.

(F) To be eligible to receive TA, a Service member must meet the minimum requirement of successfully completing basic training. Reserve Component members are exempt from the requirement to first attend basic training before authorized to receive TA. Additional, respective Service requirements must be met to include training qualification, unit assignment, and time in service criteria.

(iii) The TA rate, credit cap, and annual per capita ceiling, shall be reviewed periodically in consideration of inflation and other effects, and shall be applicable uniformly whether instruction is delivered traditionally in-the-classroom or through distance education. Rates of TA other than as identified in paragraphs (a)(2)(ii)(A) through (F) of this section are not authorized.

(3) TA is available to a commissioned officer on active duty, other than an officer serving in the Ready Reserves (addressed in paragraphs (4)(i) and (5)(i) of this section), only if the officer agrees to remain on active duty, for a period of at least two years after the completion of the education or training for which TA was paid (see 10 U.S.C. 2007).

(4) The Secretary of the Military Department concerned may only make TA available to a member of the SELRES, pursuant to 10 U.S.C. 2007, under the following conditions:

(i) In the case of a commissioned officer, the officer must agree to remain a member of the SELRES for at least four years after completion of the education or training for which TA is paid.

(ii) In the case of an enlisted member, the Secretary concerned may require the member of the SELRES to enter into an agreement to remain a member of the SELRES for up to four years after completion of the education or training for which TA is paid.

(5) The Secretary of the Military Department concerned may only make TA available to a member of the IRR who has a military occupational specialty designated by the Secretary concerned pursuant to 10 U.S.C. 2007 and only under the following conditions:

(i) In the case of a commissioned officer, the officer must agree to remain a member of the SELRES or IRR for at least four years after completion of the education or training for which TA was paid.

(ii) In the case of an enlisted member, the Secretary concerned may require the member of the IRR to enter into an agreement to remain a member of the IRR for up to four years after completion of the education or training for which TA is paid.

(6) Members performing Active Guard and Reserve (AGR) duty under either 10 U.S.C. 12310 or active duty under 14 U.S.C. 712 are eligible for TA under paragraph (a)(4) of this section.

(7) The Secretary of the Military Department concerned may make TA available to National Guard members in accordance with paragraph (a)(4), except for National Guard members assigned to the Inactive National Guard.

(8) Reimbursement and repayment requirements:

(i) If a commissioned officer or member of the RR does not fulfill a specified Service obligation as required by section 2007 of 10 U.S.C., they are subject to the repayment provisions of section 303a(e) of title 37 U.S.C.

(ii) For other conditions pursuant to 10 U.S.C. 2005, the Secretary concerned may require a Service member to enter into a written agreement when providing advanced education assistance. If the Service member does not fulfill any terms or conditions as prescribed by the Secretary concerned, the Service member will be subject to the repayment provisions of 37 U.S.C. 303a(e).

(iii) Pursuant to 37 U.S.C. 303a(e), the Secretary concerned may establish procedures for determining the amount of the repayment required from the Service member and the circumstances under which an exception to the required repayment may be granted.

(iv) Reimbursement will be required from the Service member if a successful course completion is not obtained. For the purpose of reimbursement, a successful course completion is defined as a grade of ''D'' or higher for undergraduate courses, a ''C'' or higher for graduate courses and a ''Pass'' for ''Pass/Fail'' grades. The Secretary of the Military Department will establish recoupment processes for unsuccessful completion of courses.

(9) Students using TA must maintain a cumulative grade point average (GPA) of 2.0 or higher after completing 15 semester hours, or equivalent, in undergraduate studies, or a GPA of 3.0 or higher in graduate studies on a 4.0 grading scale.

(10) TA shall not be authorized for any course for which a Service member receives reimbursement in whole or in

part from any other Federal source when the payment would constitute a duplication of benefits. Academic institutions have the responsibility to notify the Service if there is any duplication of benefits, determine the amount of credit that should be returned, and credit the amount back to the Service. The use of funds related to veterans' benefits to supplement TA received by active duty and Reserve component personnel is authorized in accordance with applicable U.S. Department of Veterans Affairs guidelines.

(11) Pell Grants may be used in conjunction with TA assistance, including their use to pay that portion of tuition costs not covered by TA.

(12) TA shall be provided for courses provided by institutions awarding degrees based on demonstrated competency, if:

(i) Competency rates are equated to semester or quarter units of credit, and

(ii) The institution publishes traditional grade correlations with ''Pass/Fail'' grades, and

(iii) The institution provides a breakdown by course equivalent for Service members.

(13) Enrollment in a professional practicum integral to these types of programs is also authorized. However, normal DoD TA caps and ceilings apply; the cost of expanded levels of enrollment over and above these enrollment levels and normal caps and ceilings must be borne by the student.

(14) When used for postsecondary training or education, TA shall be provided only for courses offered by postsecondary institutions accredited by a national or regional accrediting body recognized by the U.S. Department of Education.

(15) Sixty days following the publication of this part in the **Federal Register**, to receive TA, an institution's home campus must be a signatory of the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) in appendices A, B, C, D, and E to this part, and the MOU must be posted on the DoD Web site. One DoD Voluntary Education Partnership MOU with the institution's home campus will cover any program offered by the institution, regardless of location.

(16) To the extent that any provision of the standard language of the DoD Voluntary Education Partnership MOU template in appendices A, B, C, D, and E to this part, results from DoD policy that conflicts with a state law or regulation, the DASD(MCFP) may authorize amending the standard language of the DoD Voluntary Education Partnership MOU template on a case-by-case basis to the extent permissible by Federal law or regulation.

(b) *Guidelines for establishing, maintaining, and operating voluntary education programs.* (1) Education programs established under this part by each Military Service shall:

(i) Provide for the academic, technical, intellectual, personal, and professional development of Service members, thereby contributing to the readiness of the Military Services and the quality of life of Service members and their families.

(ii) Increase Service members' opportunities for advancement and leadership by reinforcing their academic skills and occupational competencies with new skills and knowledge.

(iii) Lead to a credential, such as a high school diploma, certificate, or college degree, signifying satisfactory completion of the educational program.

(iv) Include an academic skills program, which allows personnel to upgrade their reading, writing, computation, and communication abilities in support of academic skills and military occupations and careers. Academic skills programs may include English as a Second Language and basic science.

(v) Include programs and college offerings that support findings from periodic needs assessments conducted by the appropriate installation official (normally the Education Services Officer) for programs provided on the installation. The installation needs assessment process is used to determine such items as staffing requirements, course offerings, size of facilities, funding, or other standards for delivery of educational programs. Duplication of course offerings on an installation should be avoided. However, the availability of similar courses through correspondence or electronic delivery shall not be considered duplication.

(vi) Be described in a publication or on-line source that includes on-installation educational programs, programs available at nearby installations, and colleges and universities nearby the installation.

(2) Each Military Service, in cooperation with community educational service providers, shall provide support essential to operating effective education programs. This support includes:

(i) Adequate funds for program implementation, administration, and TA.

(ii) Adequately trained staff to determine program needs, counsel students, provide testing services, and procure educational programs and services.

(iii) Adequate and appropriate classroom, laboratory, and office facilities and equipment, including computers.

(iv) Access to telecommunications networks, computers, and libraries at times convenient to active duty personnel.

(3) In operating its programs, each Military Service shall:

(i) Provide to newly assigned personnel, as part of their orientation to each new installation or unit of assignment for Reserve component personnel, information about voluntary education programs available at that installation, unit, or State for RC personnel.

(ii) Maintain participants' educational records showing education accomplishments and educational goals.

(iii) Provide for the continuing professional development of their education services staff, including the participation of field staff in professional, as well as Service-sponsored, conferences, symposiums, and workshops.

(iv) Provide educational services, including TA counseling, academic advice and testing to their personnel and to personnel of other Services (including the U.S. Coast Guard when operating as a service in the Navy) who are assigned for duty at installations of the host Service.

(v) Continually assess the state of its voluntary education programs and periodically conduct a formal needs assessment by the appropriate installation official (normally the Education Services Officer) to ensure that the best possible programs are available to their members at each installation or in their State or area command for RC personnel. It is essential that a formal needs assessment be conducted if there is a significant change in the demographic profile of the installation population.

(4) Eligible adult family members of Service members, DoD civilian employees and their eligible adult family members, and military retirees may participate in installation postsecondary education programs on a space-available basis at no cost to the individual Service TA programs.

(5) At locations where an educational program that is offered on an installation is not otherwise conveniently available outside the installation, civilians who are not directly employed by the DoD or other Federal agencies, and who are not eligible adult family members of DoD personnel, may be allowed to

participate in installation educational programs. While such participation contributes to positive community relations, participation must be on a student-funded, space-available basis at no cost to the individual Service TA programs, after the registration of Service members, DoD civilian employees, eligible adult family members, and military retirees. Additionally, a review of these potential participants by the relevant installation ethics counselor may be required as part of the installation commander's access requirements if the educational institution has been approved to operate on the base. Participation may also be subject to the terms of status-of-forces or other regulating agreements.

(6) Education centers and Navy College offices shall maintain liaison with appropriate State planning and approving agencies and coordinating councils to ensure that planning agencies for continuing, adult, or postsecondary education are aware of the educational needs of military personnel located within their jurisdiction.

(7) In supporting a high school completion program, each Military Service shall:

(i) Ensure that all Service members with less than a high school education have the opportunity to attain a high school diploma or its equivalent.

(ii) Ensure that neither a Military Service nor DANTES issues a certificate or similar document to Service members based on performance on high school equivalency tests. Military Services shall recognize attainment of high school completion or equivalency only after a State- or territory-approved agency has awarded the appropriate credential.

(iii) Pay 100 percent of the cost of high school equivalency instruction or proficiency testing and credentialing for Service members.

(iv) Ensure that Service sponsored high school diploma programs are delivered by institutions that are accredited by a regional accrediting body or recognized by a State's secondary school authority.

(c) *Procedures for obtaining voluntary education programs and services on military installations.* (1) Educational institutions interested in providing education and training opportunities on a military installation will provide their proposals to the installation education advisor, who will review and analyze these proposals on behalf of the installation commander.

(2) To obtain viable educational programs on a military installation, the installation education advisor shall communicate the installation's educational needs to a wide variety of potential providers.

(3) A military installation seeking to obtain educational programs shall provide to interested providers:

(i) The level of instruction desired and specific degree programs being sought.

(ii) A demographic profile of the installation population and probable volume of participation in the program.

(iii) Facilities (availability of space), equipment, supporting services that the installation will provide without charge, and level of security that can be expected.

(iv) A copy of this part.

(v) Special requirements such as:

(A) Format (e.g., distance, evening, or weekend classes), independent study, short seminar, or other mode of delivery of instruction.

(B) Unique scheduling problems related to the operational mission of the installation.

(C) Any installation restrictions, limitations, or special considerations relevant to using an alternate delivery system (DL, etc.).

(D) Available computer hardware and supporting equipment.

(E) Electrical, satellite, and network capabilities at the site.

(5) A Military Service considering an alternate delivery provider shall ascertain:

(i) If students will need special training or orientation for special courses or programs or for alternate delivery methods (DL, etc.) and, if so, how students will receive such orientation.

(ii) What electronic equipment and technical support are necessary at local sites.

(iii) If it will be necessary to have on-site facilitators.

(6) In evaluating proposals, potential providers must meet, at a minimum, the following criteria:

(i) Programs satisfy objectives defined by the most recent needs assessment.

(ii) Programs, courses, and completion requirements are the same as those at the provider's main administrative and academic campus.

(iii) The institution granting undergraduate academic credit must adhere to the Servicemembers Opportunity Colleges (SOC) Consortium Principles and Criteria (available at *http://www.soc.aascu.org/socconsortium/PublicationsSOC.html*) regarding the transferability of credit and the awarding of credit for military training and experience.

(iv) The provider is prepared to offer academic counseling and flexibility in accommodating special military schedules.

(v) Institutions agree to sign the DoD Voluntary Education Partnership MOU.

(7) In evaluating proposals, potential alternative delivery providers must meet, at a minimum, the following additional criteria:

(i) Documentation shows that courses offered using the alternative delivery mode have been used successfully for at least two years.

(ii) The program and delivery method address the needs of the population to be served.

(iii) Support systems exist to back up the delivery method.

(iv) Institutions agree to sign the DoD Voluntary Education Partnership MOU.

(8) In establishing education programs on military installations, appropriate U.S. Government officials shall seek favorable tuition rates, student services, and instructional support from providers.

(d) *Minimum criteria for selecting institutions to deliver higher education programs and services on military installations.* To be selected, institutions must:

(1) Be chartered or licensed by a State government or the Federal Government, and have State approval for the use of veterans' educational benefits for the courses to be offered.

(2) Be accredited by a national or regional accrediting agency recognized by the U.S. Department of Education.

(3) Conduct programs only from among those offered or authorized by the main administrative and academic office in accordance with standard procedures for authorization of degree programs by the institution.

(4) Ensure main administrative and academic office approval in faculty selection, assignment, and orientation; and participation in monitoring and evaluation of programs. Adjunct or part-time faculty shall possess comparable qualifications as full-time permanent faculty members.

(5) Conduct on-installation courses that carry identical credit values, represent the same content and experience, and use the same student evaluation procedures as courses offered through the main administrative and academic campus.

(6) Maintain the same admission and graduation standards that exist for the same programs at the main administrative and academic office, and include credits from courses taken off-campus in establishing academic residency to meet degree requirements.

(7) Provide library and other reference and research resources, in either print or electronic format, that are appropriate

and necessary to support course offerings.

(8) Establish procedures to maintain regular communication between central institutional academic leadership and administrators and off-campus representatives and faculty. (Any institution's proposal must specify these procedures.)

(9) Provide students with regular and accessible counseling services either electronically or in-person.

(10) Charge tuition and fees that are not more than those charged to nonmilitary students.

(11) Have established policies for awarding credit for military training by examinations, experiential learning, and courses completed using modes of delivery other than instructor-delivered, on-site classroom instruction.

(e) *Interservice Voluntary Education Board.* Under the authority, direction, and control of the Voluntary Education Chief within the Office of the DASD(MCFP), the Interservice Voluntary Education Board is composed of full-time or permanent part-time employees of DoD or military members, and consists of one representative responsible for policy from the Office of the ASD(RA), and one representative responsible for policy each from the Army, Navy, Air Force, and Marine Corps. The Director, DANTES, shall serve as an ex-officio member. Meeting quarterly, the Board shall:

(1) Provide a forum for the exchange of information and discussion of issues related to voluntary education programs.

(2) Develop recommendations for changes in policies and procedures.

(3) Develop recommendations for DANTES' activities and operations that support voluntary education programs.

(4) Review and prioritize DANTES activities that support DoD voluntary education programs, to include budget execution and recommend execution year adjustments.

(5) Develop recommended policy and program guidance for DANTES for the Five-Year Defense Plan.

(f) *DANTES.* (1) Guidance and recommendations for DANTES shall be developed with the advice of the Interservice Voluntary Education Board.

(2) The selection and rating of the Director, DANTES shall be as follows:

(i) The DASD(MCFP) will convene and chair the search committee responsible for replacing the Director, DANTES, when the position is vacated. At the request of the USD(P&R), the Secretaries of the Military Departments will provide a senior manager to sit on the search committee. The committee will recommend the best qualified candidate to the Secretary of the Navy, as the DoD EA for DANTES, for possible appointment as the Director, DANTES.

(ii) The DoD EA for DANTES will designate the rater of the Director, DANTES. The Director, State Liaison and Educational Opportunity within the Office of the USD(P&R), MCFP, will provide input to the DoD EA designated rater concerning the performance of the Director, DANTES.

(3) DANTES shall:

(i) Develop, update, maintain and generate a registry of, and required reports pertaining to, MOUs of institutions approved to receive military TA for traditional and DL programs and courses.

(ii) Support the Service voluntary education programs by executing the program outlined in this part and the annual USD(P&R) guidance.

(iii) Provide execution information to the Interservice Voluntary Education Board quarterly and provide information required to assist with the program objective memorandum development as requested by the Board.

(iv) Support DoD off-duty, voluntary education programs and conduct special projects and developmental activities in support of education-related DoD functions.

(v) Assist the Military Services in providing high-quality and valuable educational opportunities for Service members, their eligible adult family members, and DoD personnel, and assist personnel in achieving professional and personal educational objectives. This role includes the consolidated management of programs that prevent duplication of effort among the Services. Through its activities, DANTES supports DoD recruitment, retention, and the transition efforts.

(vi) Assume responsibilities and functions that include:

(A) Managing and facilitating the delivery of a wide variety of examinations including the General Equivalency Diploma test, college admissions, credit-by-examination programs, and an extensive number of certification examinations.

(B) Upon request, issuing transcripts for the United States Armed Forces Institute and the examination and certification programs.

(C) Managing the contract through which former DoD Dependents Schools students can obtain copies of archived transcripts.

(D) Managing the contract and functions related to the evaluation of educational experiences in the Military Services that are covered by the contract.

(E) Providing or developing and distributing educational materials, reference books, counseling publications, educational software, and key educational resource information to DoD, the Military Services, and the installations.

(F) Managing the SOC program contract and related functions.

(G) Managing the DoD contract that provides for periodic third-party reviews of DoD voluntary education programs (i.e., Military Voluntary Education Review (MVER)).

(H) Managing the voluntary education programs for the Voluntary Education Management Information System, which includes gathering, collating, and verifying participation and cost data from the Services. Providing requisite consolidated reports to USD(P&R), pursuant DoD Instruction 1322.9 (see *http://www.dtic.mil/whs/directives/corres/pdf/132209p.pdf*).

(I) Establishing, maintaining, and updating systems and processes to administer, track, process updates to, and generate reports from the centrally managed DoD Voluntary Education Partnership Memorandums of Understanding (MOUs) between DoD and institutions offering coursework to military personnel and their eligible adult family members, as specified in appendices A, B, C, D, and E to this part.

(J) Managing the DoD independent study catalog and its support systems, as required.

(K) Negotiating, administering, and coordinating contracts for DoD Worldwide Education Symposiums in support of and in conjunction with the Interservice Voluntary Education Board.

(L) Establishing, refining, updating, and maintaining a DoD voluntary education presence on the Internet. Maintaining necessary infrastructure to ensure that information on the Internet is always current and available to leadership, agency personnel, the public, and others.

(M) Administering the TTT program in accordance with the TTT MOU negotiated by DoD with the Department of Education.[1]

(N) Monitoring new technological developments, providing reports, cost analyses, and recommendations on educational innovations, and conducting special projects requested by the Department of Defense and the Services, approved by the Interservice Voluntary Education Board, and as reflected and approved in DANTES' annual policy guidance.

[1] For copies of this MOU or information on the Troops-to-Teachers Program, email: *ttt@navy.mil* or call 1–800–231–6242.

(O) Conducting staff development training on DANTES' policies, procedures, and practices related to voluntary education testing programs, and providing additional training as requested by the Office of the Secretary of Defense and the Services.

(P) Serving as the Defense Media Activity's point of contact for information on DANTES programs for military personnel.

(Q) Providing support, as requested, to DoD and Service Quality of Life and Transition support programs.

(R) Providing other support in mission areas as directed by the USD(P&R) and the DASD(MCFP).

(vii) Maintain liaison with education services officials of the Military Services, and appropriate Federal and State agencies and educational associations, in matters related to the DANTES mission and assigned functions.

(viii) Serve on panels and working groups designated by the DASD(MCFP).

(ix) Serve as the Executive Secretary at the Interservice Voluntary Education Board meeting convened annually to review DANTES programs and to develop recommendations for inclusion in annual policy guidance for DANTES. In this role, the Director, DANTES, shall coordinate the meeting, prepare the agenda, review and analyze DANTES programs and initiatives outlined in the prior year's operational plan, and provide minutes after the meeting.

(x) Maintain the repository for the DoD Voluntary Education Partnership MOU between USD(P&R) and partner institutions, to include Service-specific addendums. DANTES shall:

(A) Administer the system that stores the repository of the MOUs per guidance from USD(P&R).

(B) Create and maintain a database for all signed documents.

(C) Publish an Internet-based list of all institutions that have signed partnership agreements.

(xi) Provide data analyses and generate reports required by DoD and the Interservice Voluntary Education Board as needed.

Appendix A to Part 68—DOD Voluntary Education Partnership Memorandum of Understanding (MOU) Between DoD Office of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and [Name of Educational Institution]

1. *Preamble.*

a. Providing access to quality postsecondary education opportunities is a strategic investment that enhances the U.S. Service member's ability to support mission accomplishment and successfully return to civilian life. A forward-leaning, lifelong learning environment is fundamental to the maintenance of a mentally powerful and adaptive leadership-ready force. Today's fast-paced and highly mobile environment, where frequent deployments and mobilizations are required to support the Nation's policies and objectives, requires DoD to sponsor postsecondary educational programs using a variety of learning modalities that include instructor-led courses offered both on- and off-installation, as well as distance learning options. All are designed to support the professional and personal development and progress of the Service members and our DoD civilian workforce.

b. Making these postsecondary programs available to the military community as a whole further provides Service members, their eligible adult family members, DoD civilian employees, and military retirees ways to advance their personal education and career aspirations and prepares them for future career and technical pursuits, both inside and outside of DoD. This helps strengthen the Nation by producing a well-educated citizenry and ensures the availability of a significant quality-of-life asset that enhances recruitment and retention efforts in an all-volunteer force.

2. *Purpose.*

a. This MOU articulates the commitment and agreement educational institutions provide to DoD by accepting funds via each Service's tuition assistance (TA) program in exchange for education services.

b. This MOU is not an obligation of funds, guarantee of program enrollments by DoD personnel, their eligible adult family members, DoD civilian employees, and retirees in an educational institution's academic programs, or a guarantee for installation access.

c. This MOU covers courses delivered by educational institutions through all modalities. These include, but are not limited to, classroom instruction, distance education (i.e., web-based, CD–ROM, or multimedia) and correspondence courses.

d. This MOU includes high school programs, academic skills programs, and adult education programs for military personnel and their eligible adult family members.

e. This MOU articulates regulatory and governing directives and instructions:

(1) Eligibility of DoD recipients is governed by federal law, DoD Instruction 1322.25, DoD Directive 1322.08E, and the cognizant Military Service's policies, regulations, and fiscal constraints.

(2) Postsecondary educational programs provided to Service members using TA on military installations outside of the United States, shall be operated in accordance with guidance from DoD Instruction 1322.25, DoD Instruction 1322.19, section 1212 of Public Law 99–145, as amended by section 518 of Public Law 101–189; and under the terms of the Tri-Services contract currently in effect.

f. This MOU is subject at all times to Federal law and the rules, guidelines, and regulations of DoD. Any conflicts between this MOU and such Federal law, rules, guidelines, and regulations will be resolved in favor of the Federal law, rules, guidelines, or regulations.

3. *Educational Institution (Including Certificate and Degree Granting Educational Institutions) Requirements for TA.* Educational institutions must:

a. Sign and adhere to requirements of this MOU, including Service-specific addendums as appropriate, prior to being eligible to receive TA payments.

(1) Those educational institutions that have a current MOU with DoD will sign this MOU:

(a) At the expiration of their current MOU;

(b) In accordance with the provisions of paragraph 6.f.; or

(c) At the request of DoD or the specific Military Service holding a separate current MOU. The DoD Voluntary Education Partnership MOU (which includes the Service-specific addendums) is required for an institution to participate in the DoD TA Program. An ''installation MOU'' (which is separate from this MOU) is only required if an institution is operating on a military installation. The installation MOU:

1. Contains the installation-unique requirements that the installation's education advisor coordinated, documented, and retained; is approved by the appropriate Service voluntary education representative; and is presented to the installation commander for final approval.

2. Cannot conflict with the DoD Voluntary Education Partnership MOU and governing regulations.

(2) Educational institutions must comply with this MOU and the requirements in Service-specific addendums that do not conflict with governing Federal law and rules, guidelines, and regulations, which include, but are not limited to, Title 10 of the U.S. Code; DoD Directive 1322.08E, ''Voluntary Education Programs for Military Personnel''; DoD Instruction 1322.25, ''Voluntary Education Programs''; DoD Instruction 1322.9, ''Voluntary Education Programs for Military Personnel-Management Information System''; DoD Instruction 1322.19, ''Voluntary Education Programs in Overseas Areas''; and all installation requirements imposed by the installation commander, if the educational institution has been approved to operate on a particular base. Educational institutions failing to comply with the requirements set forth in this MOU may receive a letter of warning, be denied the opportunity to establish new programs, have their MOU terminated, be removed from the installation, and may have the approval of the issuance of TA withdrawn by the Service concerned.

b. Be accredited by a national or regional accrediting agency recognized by the U.S. Department of Education.

c. Comply with the regulatory guidance provided by DoD and the Services.

d. Participate in the Military Voluntary Education Review (MVER) process when requested. This requirement applies not only to institutions providing courses on military installations, but also to those institutions that provide postsecondary instruction that is not located on the military installation or via DL.

e. If the institution is a member of the Servicemembers Opportunity Colleges (SOC), the institution shall:

(1) Adhere to the SOC Consortium Principles, Criteria, and Military Student Bill

of Rights. (located at *http://www.soc.aascu.org/socconsortium/PublicationsSOC.html*).

(2) Provide processes to determine credit awards and learning acquired for specialized military training and occupational experience when applicable to a Service member's degree program.

(3) Recognize and use the American Council on Education (ACE) Guide to the Evaluation of Educational Experiences in the Armed Services to determine the value of learning acquired in military service. Award credit for appropriate learning acquired in military service at levels consistent with ACE Guide recommendations and/or those transcripted by the Community College of the Air Force, when applicable to a Service member's program.

f. If an institution elects not to be a member of SOC, the institution shall:

(1) Disclose its transfer credit policies prior to a Service member's enrollment.

(a) If the institution accepts transfer credit from other accredited institutions, then the institution agrees to evaluate these credits in conformity with the principles set forth in the Joint Statement on the Transfer and Award of Credit developed by members of the American Association of Collegiate Registrars and Admissions Officers, the American Council on Education, and the Council for Higher Education Accreditation. The institution will then award appropriate credit, to the extent practicable within the framework of its institutional mission and academic policies.

(b) Decisions about the amount of transfer credit accepted, and how it will be applied to the student's program, shall be left to the institution.

(2) Disclose its policies on how they award academic credit for prior learning experiences, including military training and experiential learning opportunities provided by the Military Services, at or before a Service member's enrollment.

(a) In so far as the institution's policies generally permit for the award of credit for comparable prior learning experiences, the institution agrees to evaluate the learning experiences documented on the Service member's official Service transcripts, and, if appropriate, award credit.

(b) The official Service transcripts for military training and experience documentation are: Army/ACE Registry Transcript System, the Sailor/Marine ACE Registry Transcript System, the Community College of the Air Force transcript, and the Coast Guard Institute transcript.

(c) If general policy permits, transfer credit may:

1. Replace a required course within the major;

2. Apply as an optional course within the major;

3. Apply as a general elective;

4. Apply as a basic degree requirement; or

5. Waive a prerequisite.

(d) Decisions about the amount of experiential learning credit awarded, and how it will be applied to the student's program, shall be left to the institution. Once an institution has evaluated a particular military training or experiential learning opportunity for a given program, the institution may rely on its prior evaluation to make future decisions about awarding credit to Service members with the same military training and experience documentation, provided that the course content has not changed.

(3) Disclose to Service members any academic residency requirements pertaining to the student's program of study, including total and any final year or final semester residency requirement at or before the time the student enrolls in the program.

(4) Disclose basic information about the institution's programs and costs, including tuition, fees, and other charges to the Service member. This information shall be made readily accessible without requiring the Service member to disclose any personal or contact information.

(5) Prior to enrollment, provide Service members access to an institutional financial aid advisor who will provide a clear and complete explanation of available financial aid, to include Title IV of the Higher Education Act of 1965, as amended, and appropriate loan counseling before offering, recommending, or signing up a student for a loan.

(6) Prior to enrollment, provide Service members with information on institutional ''drop/add,'' withdrawal, and readmission policies and procedures to include information on the potential impact of military duties (such as unanticipated deployments or mobilization, activation, and temporary duty assignments) on the student's academic standing and financial responsibilities. For example, a Service member's military duties may require relocation to an area where he or she is unable to maintain consistent computer connectivity with the institution, which could have implications for the Service member's enrollment status. This information will also include an explanation of the institution's grievance policy and process.

(7) Conduct academic screening and competency testing; make course placement based on student readiness.

(8) Designate a person or office at the institution that will serve as a point of contact for Service members seeking information about available, appropriate academic counseling, financial aid counseling, and student support services at the institution. The point of contact:

(a) Shall have a basic understanding of the military tuition assistance program and veterans' education benefits, and a familiarity with institutional services available to assist Service members.

(b) Does not need to be exclusively dedicated to providing these services and, as appropriate, may refer the Service member to other individuals, both on and off-campus, with an ability to provide these services.

g. Adopt an institutional policy banning inducements (including any gratuity, favor, discount, entertainment, hospitality, loan, transportation, lodging, meals, or other item having a monetary value of more than a de minimus amount) to any individual or entity (other than salaries paid to employees or fees paid to contractors in conformity with all applicable laws) for the purpose of securing enrollments of Service members or obtaining access to TA funds as part of efforts to eliminate aggressive marketing aimed at Service members.

h. Refrain from high-pressure recruitment tactics as part of efforts to eliminate aggressive marketing aimed at Service members. Such tactics include making multiple unsolicited phone calls to Service members for the purpose of securing their enrollment.

i. Refrain from providing any commission, bonus, or other incentive payment based directly or indirectly on securing enrollments or Federal financial aid (including TA funds) to any persons or entities engaged in any student recruiting, admission activities, or making decisions regarding the award of student financial assistance. These tactics as discouraged as part of efforts to eliminate aggressive marketing aimed at Service members.

4. *TA Program Requirements for Educational Institutions.*

a. *One Single Tuition Rate.* All Service members attending the same institution, at the same location, enrolled in the same course, will be charged the same tuition rate without regard to their Service component. This single tuition rate includes active duty Service members and the National Guard and Reservists who are activated under Title 10 and using Title 10 Military Tuition Assistance, in order to assure that tuition rate distinctions are not made based on the Service members' branches of Service.

(1) It is understood tuition rates may vary by mode of delivery (traditional or online), at the differing degree levels and programs, and residency designations (in-state or out-of-state). Tuition rates may also vary based on full-time or part-time status, daytime vs. evening classes, or matriculation date, such as in the case of a guaranteed tuition program.

(2) It is also understood that some States have mandated State rates for Guard and Reservists within the State. (Those Guard and Reservists not activated on title 10, U.S. Code orders).

b. *Course Enrollment Information.* The educational institutions will provide course enrollment, course withdrawal, course cancellation, course completion or failure, grade, verification of degree completion, and billing information to the TA issuing Service's education office, as outlined in the Service's regulations and instructions.

(1) Under section 1232g of title 20, United States Code (also known as ''The Family Educational Rights and Privacy Act'' and hereinafter referred to as ''FERPA''), DoD recognizes that institutions are required to obtain consent before sharing personally identifiable non-directory information with a third party. Service members must authorize the institutions to release and forward course enrollment information required in 4.b. to DoD prior to approval of course enrollment using tuition assistance.

(2) If an institution wants to ensure confidentiality during the transmission of data to the third party, then the institution can contact the appropriate Service TA management point of contact to discuss security and confidentiality concerns prior to transmitting information.

c. *Degree Requirements and Evaluated Education Plans.*

(1) Institutions will disclose general degree requirements for the Service member's educational program (education plan) to the member and his or her Service. These requirements, typically articulated in the institution's course catalog, should:

(a) Include the total number of credits needed for graduation.

(b) Divide the coursework students must complete in accordance with institutional academic policies into general education, required, and elective courses.

(c) Articulate any additional departmental or graduate academic requirements, such as satisfying institutional and major field grade point average requirements, a passing grade in any comprehensive exams, or completion of a thesis or dissertation.

(2) In addition to providing degree requirements, the institution shall provide to Service members who have previous coursework from other accredited institutions and relevant military training and experiential learning an evaluated educational plan that indicates how many, if any, transfer credits it intends to award and how these will be applied toward the Service member's educational program. The evaluated educational plan will be provided within 60 days after the individual has selected a degree program and all required official transcripts have been received.

(3) When a Service member changes his or her educational goal or major at the attending school and the Services' education advisor approves the change, then the institution will provide a new evaluated educational plan to the Service member and the Service. Only courses listed in the Service member's education plan will be approved for TA.

(4) Degree requirements in effect at the time of each Service member's enrollment will remain in effect for a period of at least one year beyond the program's standard length, provided the Service member is in good academic standing and has been continuously enrolled or received an approved academic leave of absence. Adjustments to degree requirements may be made as a result of formal changes to academic policy pursuant to institutional or departmental determination, provided that:

(a) They go into effect at least two years after affected students have been notified; or

(b) In instances when courses or programs are no longer available or changes have been mandated by a State or accrediting body, the institution shall work with affected Service members to identify substitutions that would not hinder the student from graduating in a timely manner.

d. *Approved and TA Eligible Courses.*

(1) *Approved Courses.* If an eligible Service member decides to use TA, educational institutions will enroll him or her only after the TA is approved by the individual's Service. Service members will be solely responsible for all tuition costs without this prior approval. This requirement does not prohibit an educational institution from pre-registering a Service member in a course in order to secure a slot in the course. If a school enrolls the Service member before the appropriate Service approves Military TA, then the Service member could be responsible for the tuition. All Military TA must be requested and approved prior to the start date of the course. The Military TA is approved on a course-by-course basis and only for the specific course(s) and class dates that a Service member requests. If a military student ''self-identifies'' their eligibility and the Service has not approved the funding, then the Service member will be solely responsible for all tuition costs, not the Service.

(2) *TA Eligible Courses.* Courses shall be considered eligible for TA if they are:

(a) Part of an individual's evaluated educational plan; or

(b) Prerequisites for courses within the individual's evaluated educational plan; or

(c) Required for acceptance into a higher-level degree program, unless otherwise specified by Service regulations.

e. *Use of Financial Aid with TA.*

(1) ''Top-Up'' eligible active duty DoD personnel may use this Montgomery or Post-9/11 G.I. Bill benefit in conjunction with TA funds from their Service to cover those course costs to the Service member that exceed the amount of TA paid by his or her Service. Reserve Component members who have paid for Chapter 30 G.I. Bill benefits may use those benefits concurrently with TA. Reserve Component members who have earned entitlement for the Post-9/11 G.I., Bill may combine VA benefits and TA as long as the combined benefits do not total more than 100 percent of the actual costs of tuition and fees.

(2) DoD personnel are entitled to consideration for all forms of financial aid that educational institutions make available to students at their home campus. Educational institution financial aid officers shall provide information and application processes for scholarships, fellowships, grants, loans, etc., to DoD TA recipients.

(3) Service members identified as eligible DoD TA recipients, who qualify for Pell Grants through the Department of Education's student aid program, shall have their TA benefits applied to their educational institution's account prior to the application of their Pell Grant funds to their account. Unlike TA funds, which are tuition-restricted, Pell Grant funds are not tuition-restricted and may be applied to other allowable charges on the account.

f. *Administration of Tuition and Fees.*

(1) The Services will provide TA in accordance with DoD- and Service-appropriate regulations. Any additional fees will be paid by the Service member to the institution at the time of registration in accordance with the institution's policy.

(2) TA will be limited to tuition and reimbursable fees that are specifically required as a condition of enrollment in a particular course or term of enrollment of the Service member in that educational institution, are charged to all students and are refundable to the same extent as tuition in accordance with the institution's tuition refund policy. At a minimum, tuition and fees must be 100 percent refundable up until the start of the course.

(3) Tuition charged to a Service member will in no case exceed the rate charged to nonmilitary students, unless agreed upon in writing by both the institution and the Service.

(4) Institutions shall provide their tuition and fee charges for each degree program to the Services on an annual basis. Any changes in the tuition and fee charges will be provided to and justified to all the Services, as soon as possible, but not fewer than 90 days prior to implementation. If the MOU is with a single educational institution, at a single location, with only one Service, the justification will be provided to that Service, which will then provide that information to the other Services.

(a) Tuition and fees at many public institutions are established by entities over which they have no jurisdiction, such as State legislatures and boards. As such, in some instances tuition and fees decisions will not be made within the 90-day requirement window.

(b) When this happens, the institution should request a waiver (via the DoD MOU Web page) and provide the Services with the new tuition and fee charges. This will ensure the correct rates are applied when a Service member requests tuition and fees to attend the State institution.

(5) Refunds of Government-funded TA will be paid in accordance with the institution's published refund policy and will go to the Service, not to the Service member.

(6) The institution will refund to the Service the total amount of tuition and fees paid for a course that is cancelled by the institution.

(7) TA invoicing information is located in the Service-specific addendums attached to this MOU.

g. *Course Cancellations.* Institutions are responsible for notifying Service members of class cancellations for both classroom and DL courses.

h. *Materials and Electronic Accessibility.*

(1) Institutions will ensure that course materials are readily available, either electronically or in print medium, and provide information about where the student may obtain class materials at the time of enrollment or registration.

(2) Institutional representatives shall refrain from encouraging or requiring students to purchase course materials prior to confirmation of sufficient enrollments to conduct the class. Students will be encouraged to verify course acceptance by CCAF (Air Force only) or other program(s), with the installation education advisor before enrolling or requesting TA.

(3) Institutions will provide, where available, electronic access to their main administrative and academic center's library materials, professional services, relevant periodicals, books, and other academic reference and research resources in print or online format that are appropriate or necessary to support the courses offered. Additionally, institutions will ensure adequate print and non-print media resources to support all courses being offered are available at base or installation library facilities, on-site Institution resource areas, or via electronic transmission.

i. *Graduation Achievement Recognition.*

(1) The educational institution shall issue, at no cost to the Government, documentation

as proof of completion, such as a diploma or certificate, to each student who completes the respective program requirements and meets all financial obligations.

(2) In accordance with Service requirements, the institution shall provide the Service concerned with a list of those TA recipients who have completed a certificate, diploma, or degree program. The list will include the degree level, major, and program requirements completion date.

(3) The academic credentials for certificate, diploma, or degree completion should reflect the degree-granting institution and campus authorized to confer the degree.

(a) If the Service member attends a branch of a large, multi-branch university system, the diploma may indicate the credential of the specific campus or branch of the institution from which the student received his or her degree.

(b) Credentials should be awarded to Service members with the same institutional designation as non-Service members who completed the same course work for a degree from the same institution.

(4) The institution shall provide students with the opportunity to participate in a graduation ceremony.

j. *Reporting Requirements and Performance Metrics.*

(1) The institution shall provide reports via electronic delivery on all DoD TA recipients for programs and courses offered to personnel as required by the cognizant Service. This includes, but is not limited to, TA transactions, final course grades to include incompletes and withdrawals, degrees awarded, certificates earned, evaluated educational plans, courses offered, class rosters of Service members, and military graduation.

(a) All reporting and transmitting of this information shall be done in conformity with all applicable privacy laws, including FERPA.

(b) Institutions shall respond to these requests in a timely fashion, which will vary based on the specific nature and scope of the information requested.

(2) The cognizant Service may evaluate the institution's overall effectiveness in administering its academic program, courses, and customer satisfaction to DoD. A written report of the findings will be provided to the institution. The institution shall have 90 calendar days to review the report, investigate if required, and provide a written response to the findings.

(3) The Services may request reports from an institution at any time, but not later than 2 years after termination of the MOU with such institution. Responses to all requests for reports shall be provided within a reasonable period of time, and generally within 14 calendar days. Institutional response time will depend on the specific information sought by the Services in the report.

5. *Requirements and Responsibilities for the Delivery of On-Installation Voluntary Education Programs and Services.*

a. The requirements in this section pertain to institutions operating on a military installation. An installation MOU:

(1) Is required if an institution is operating on a military installation.

(2) Contains only the installation-unique requirements coordinated, documented, and retained by the installation's education advisor, with concurrence from the appropriate Service voluntary education representative, and presented to the installation commander for final approval.

(3) Cannot conflict with the DoD Voluntary Education Partnership MOU and governing regulations.

b. Educational institutions shall:

(1) Agree to have a separate installation MOU if they have a Service agreement to provide on-installation courses or degree programs. The installation MOU contains the installation-unique requirements that will be coordinated, documented, and retained by the installation's education advisor, with concurrence from the appropriate Service voluntary education representative, and presented to the installation commander for final approval.

(2) Comply with the installation-unique requirements in the installation MOU that do not conflict with the DoD Voluntary Education Partnership MOU and governing regulations.

(3) Agree to coordinate degree programs offered on the installation with the installation's education advisor, who will receive approval from the installation commander, prior to the opening of classes for registration.

(4) Admit candidates to the institution's on-installation programs at their discretion; however, priority for registration in installation classes will be given in the following order:

(a) Service members.

(b) Federally funded DoD civilian employees.

(c) Eligible adult family members of Service members and DoD civilian employees.

(d) Military retirees.

(e) Non-DoD personnel.

(5) Provide the installation's education advisor, as appropriate, a tentative annual schedule of course offerings to ensure that the educational needs of the military population on the installation are met and to ensure no course or scheduling conflicts with other on-installation programs.

(6) Provide instructors for their installation courses who meet the criteria established by the institution to qualify for employment as a faculty member on the main administrative and academic center.

(7) Inform the installation education advisor about cancellations for classroom-based classes on military installations per the guidelines set forth in the separate installation MOU.

c. The Services' designated installation representative (usually the installation education advisor), shall be responsible for determining the local voluntary education program needs for the serviced military population and for selecting the off-duty educational programs to be provided on the installation, in accordance with the Services' policies. The Service, in conjunction with the educational institution, shall provide support services essential to operating effective educational programs. All services provided will be commensurate with the availability of resources (personnel, funds, and equipment). This support includes:

(1) Classroom and office space, as available. The Service will determine the adequacy of provided space.

(2) Repairs as required to maintain office and classroom space in ''good condition'' as determined by the Service, and utility services for the offices and classrooms of the institution located on the installation (e.g., electricity, water, and heat).

(3) Standard office and classroom furnishings within available resources. No specialized equipment will be provided.

(4) Janitorial services in accordance with installation facility management policies and contracts.

d. The Service reserves the right to disapprove installation access to any employee of the institution employed to carry out any part of this MOU.

e. Operation of a privately owned vehicle by institution employees on the installation will be governed by the installation's policies.

f. The installation education advisor will check with his or her Service's responsible office for voluntary education prior to allowing an educational institution to enter into an MOU with the installation.

6. *Review, Modifications, Signatures, Effective Date, Expiration Date, and Cancellation Provision.*

a. *Review.* The signatories (or their successors) will review this MOU periodically in coordination with the Services, but no less than every five years to consider items such as current accreditation status, updated program offerings, and program delivery services.

b. *Modifications.* Modifications to this MOU will be in writing and, except for those required due to a change in State or Federal law, shall be subject to approval by both of the signatories below, or their successors.

c. *Signatures.* The authorized signatory for DoD shall be designated by the USD(P&R). The authorized signatory for the institution will be determined by the institution.

d. *Effective Date.* This MOU is effective on the date of the later signature.

e. *Expiration Date.* This MOU will expire five years from the effective date, unless terminated or updated prior to that date in writing by DoD or the Institution.

f. *Cancellation Provision.* This MOU may be cancelled by either DoD or the Institution 30 days after receipt of the written notice from the cancelling party,

FOR THE DEPARTMENT OF DEFENSE:

_____

DESIGNATED SIGNATORY

_____

DATE

FOR THE INSTITUTION:

_____

PRESIDENT or Designee

_____

DATE

Appendix B to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Air Force

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the United States Air Force (USAF). The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the USAF to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. USAF Education and Training Section (ETS) Chief. The USAF ETS Chief shall:

(1) Maintain a continuing liaison with the designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ETS Chief will assist the Institution representative to provide military and USAF culture orientation to the Institution personnel.

(2) Review requests from Institutions with no on-installation MOU for permission of installation access and space within the ETS to counsel current students, provide information briefings and materials, attend education fairs, and provide other informational services approved by the installation commander. Approval depends on the installation commander. Approval of any school eligible for Military TA will be extended equally to all such schools; same time allotment, space, and frequency.

(3) Assist the Institution or refer them to the information technology contractor for training in the use of the Academic Institution Portal (AI Portal) regarding input of Institution information, degree offerings, tuition rates, grades, invoices, degree completions, and search tools pre-built into the USAF online Voluntary Education System.

b. Institutions shall:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the USAF ETS Chief.

(2) Provide general degree requirements to each airman for his or her education program and the ETS as soon as he or she decides to register with the Institution and while awaiting final evaluation of transfer credits.

(3) Assume responsibility for the administration and proctoring of all course examinations not normally administered and proctored within the traditional, in-the-classroom setting.

(4) Provide to airmen, upon their request, information on Institution policies including, but not limited to, course withdrawal dates and penalties, course cancellation procedures, course grade publication, fees (covered by military tuition assistance (Mil TA) and not covered by Mil TA), billing practices, and policy regarding incompletion of a course. Face-to-face counseling is not required.

(5) Register and use the AI Portal to input Institution basic information, degree offerings, tuition rates, invoice submission, course grades submission, degree completions, and to pull pre-established educational institution reports while conducting business with the USAF.

(6) Submit one consolidated invoice per term via the AI Portal for each class in which active duty military airmen are enrolled using Mil TA. Submission will be made during the term, no earlier than after the final add/drop/census date, and no later than 30 calendar days after the end of the term.

(7) Submit course grades via the AI Portal for each class in which active duty military airmen are enrolled using Mil TA. Submission will be made no later than 30 calendar days after the end of the term.

(8) Accept the Government Purchase Card (GPC) for payment of Mil TA when the Institution accepts credit cards for any part of Institution business. If an institution does not accept credit cards:

(a) The Air Force may grant the institution a waiver from these requirements for any tuition and fee payments for the program in which the active duty military airman is enrolled.

(b) The Air Force and the institution must negotiate the terms of the waiver, which are incorporated by reference into the terms of the MOU.

(c) The institution should be aware that payment could be delayed because the Air Force currently has an automatic payment system for credit card use. If a waiver is granted, the Air Force must use a paper-based system.

(9) Provide a list of program graduates via the AI Portal consisting of student name, program title, program type (such as bachelor's degree), and date of graduation no later than 30 calendar days after the end of the term in which graduation requirements are completed. If the AI Portal is not available, provide directly to the base Education and Training Section.

c. Institutions with no on-installation MOU are authorized to request permission for installation access and space within the ETS to counsel current students, provide information briefings and materials, attend education fairs, and other informational services. Approval depends on the installation commander. If approval is granted, then all other permissions will be authorized equally for any school eligible for Military TA; the same time allotment, space, and frequency.

d. All Institutions with an on-installation MOU or invitation for an on-installation activity, such as an educational fair, are authorized to counsel or provide information on any of their programs.

3. *Additional Guidelines*

a. In addition to DoD policy outlined in the DoD MOU, the authorization of Mil TA is further governed by Air Force Instruction (AFI) 36–2306, as well as applicable policy and guidance.

b. Installation access of non-DoD and non-installation personnel is at the discretion of the installation commander. Access once provided can be revoked at any time due to military necessity or due to conduct that violates installation rules or policies.

c. No off-base school will be given permanent space or scheduled for regularly recurring time on-base for student counseling.

Appendix C to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Army

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the United States Army. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the U.S. Army to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Army Education Services Officer (ESO):* In support of this addendum, the Army ESO shall maintain a continuing liaison with a designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ESO will provide assistance to the Institution representative to provide military and Army culture orientation to the Institution personnel.

b. *Institutions.* The Institution will:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the Army ESO.

(2) Adopt the GoArmyEd processes. GoArmyEd is the Army Continuing Education System (ACES) centralized and streamlined management system for the Army's postsecondary voluntary education programs. Existing MOUs or Memorandums of Agreement, Tri-Services contracts, or other contracts that Institutions may have with military installations and ACES remain in place and should be supplemented with DoD Instruction 1322.25.

(3) Agree to all of the terms in the ACES policies and procedures, available at *https://www.hrc.army.mil/site/education/GoArmyEd_School_Instructions.html,* such as: Invoicing, grades, reports, library references, etc. For non-Letter of Instruction (LOI) institutions satisfying paragraph 3.f. of this DoD MOU, any requirements in ACES policies and procedures requiring institutions to be a member of SOC are hereby waived.

(4) Institutions currently participating with GoArmyEd as LOI and non-LOI schools, may continue to do so at the discretion of Headquarters, ACES. Non-LOI schools will be subject to the requirements of paragraphs 2.b.(2) and 2.b.(3) of this DoD MOU only to

the extent that their existing non-LOI agreement with the U.S. Army provides.

Appendix D to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Marine Corps

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the U.S. Marine Corps. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the U.S. Marine Corps to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Marine Corps Education Services Officer (ESO):* In support of this addendum, the Marine Corps ESO shall maintain a continuing liaison with a designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ESO will provide assistance to the Institution representative to provide military and Marine Corps culture orientation to the Institution personnel.

b. *Institution.* The Institution will:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the Marine Corps ESO.

(2) Provide open enrollment during a designated time periods in courses conducted through media (e.g., portable media devices or computer-aided). Those courses shall be on an individual enrollment basis.

(3) When operating on a Marine base, provide all required equipment when the Institution provides instruction via media.

(4) When operating on a Marine base, provide library services to the Marine Corps base/installation for students in the form of research and reference materials (e.g., books, pamphlets, magazines) of similar quality to the support provided students on the institution's home campus. Services shall also include research and reference material in sufficient quantity to meet curriculum and program demands. Materials shall be, at a minimum, the required readings of the instructor(s) for a particular course or program, or the ability for the student to request a copy of such material, from the institution's main library, without any inconvenience or charge to the student (e.g., a library computer terminal that may allow students to order material and have it mailed to their residence).

(5) Route publicity generated for an installation community through the base ESO.

(6) Permit employment of off-duty military personnel or Government civilian employees by the institution, provided such employment does not conflict with the policies set forth in DoD Regulation 5500.7–R. However, Government personnel employed in any way in the administration of this addendum will be excluded from such employment because of conflict of interest.

3. *Billing Procedures, And Formal Grades.*

a. Comply with wide area work flow process for invoicing tuition assistance.

b. Grades shall be submitted through the Navy College Management Information System grade entry application.

c. Grade reports shall be provided to the Naval Education and Training Professional Development and Technology Center within 30 days of term ending or completion of the course, whichever is earlier.

Appendix E to Part 68—Addendum for Education Services Between [Name of Educational Institution] and the U.S. Navy

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the U.S. Navy. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the Department of the Navy to provide funds to the academic Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Commanding Officer responsible for execution of the Voluntary Education Program.* The commanding officer responsible for execution of the voluntary education program *shall:*

(1) Determine the local voluntary education program needs for the Navy population to be served and recommend to the installation commander the educational programs to be offered on the base;

(2) Administer this agreement and provide program management support;

(3) Manage the Navy College Program Distance Learning Partnership (NCPDLP) agreements.

b. *Navy College Office (NCO):* In support of this addendum, the NCO will maintain a continuing liaison with the designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The NCO will provide assistance to the Institution representative to provide military and Navy culture orientation to the Institution personnel.

c. *Institution.* The Institution will:

(1) If a distance learning partner institution:

(i) Comply with NCPDLP agreements, if an institution participates in NCPDLP.

(ii) Provide a link to the academic institution through the Navy College Program Web Site, only if designated as an NCPDLP school.

(iii) Display the academic Institution's advertising materials (i.e., pamphlets, posters, and brochures) at all NCOs, only if designated as an NCPDLP school.

(2) Appoint and designate an Institution representative to maintain a continuing liaison with the NCO staff.

(3) Comply with wide area work flow processes for invoicing of tuition assistance. Grades will be submitted to the Navy College Management Information System grade entry application.

(4) Ensure library resource arrangements are in accordance with the standards of the Institution's accrediting association and the State regulatory agency having jurisdiction over the academic Institution.

(5) Respond to email messages from students within a reasonable period of time—generally within two workdays, unless extenuating circumstances would justify additional time.

(6) Comply with host command procedures before starting instructor-based courses on any Navy installation. The NCO shall negotiate a separate agreement with the academic Institution in concert with the host command procedures.

(7) Mail an official transcript indicating degree completion, at no cost to the sailor or the Government to: Center for Personal and Professional Development, ATTN: Virtual Education Center, 1905 Regulus Ave., Suite 234, Virginia Beach, VA 23461–2009.

Dated: November 29, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–29497 Filed 12–6–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–0953]

Special Local Regulation; Southern California Annual Marine Events for the San Diego Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce special local regulations during the San Diego Parade of Lights, held on December 09 and December 16, 2012 from 5:30 p.m. to 8:30 p.m. on the San Diego Bay. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels of the regatta, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain

of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced on December 9 and December 16, 2012 from 5:30 p.m. until 8:30 p.m. each day.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Petty Officer Bryan Gollogly, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11-PF-MarineEventsSanDiego@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 in support of the San Diego Parade of Lights (Item 5 on Table 1 of 33 CFR 100.1101). The Coast Guard will enforce the special local regulations between the northern portion of the San Diego Bay ship channel from Seaport Village to the Shelter Island Basin on December 09 and on December 16, 2012 from 5:30 p.m. until 8:30 p.m. each day. The event consists of approximately eighty paddle, powerboats, and sailboats, ranging from ten to eighty feet in length outfitted with Christmas lights. The participating vessels will start near the west side of Shelter Island, proceed to the Coronado Bay Bridge, cross the main shipping channel, and finish in the vicinity of the USN Carrier Basin.

Under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from entering into, transiting through, or anchoring within this safety zone unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1101 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 extensive advance notification of this enforcement period via the Local Notice to Mariners, Broadcast Notice to Mariners, state, or local agencies.

Dated: November 18, 2012.

S.M. Mahoney,

Captain of the Port San Diego, United States Coast Guard.

[FR Doc. 2012–29594 Filed 12–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2012–0974]

Special Local Regulation; Southern California Annual Marine Events for the San Diego Captain of the Port Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the special local regulations during the Mission Bay Parade of Lights, on the waters of Mission Bay, San Diego, California from 6 p.m. to 8 p.m. on 08 December 2012. These special local regulations are necessary to provide for the safety of the participants, crew, spectators, sponsor vessels of the race, and general users of the waterway. During the enforcement period, persons and vessels are prohibited from entering into, transiting through, or anchoring within this special local regulation unless authorized by the Captain of the Port, or his designated representative.

DATES: The regulations in 33 CFR 100.1101 will be enforced on December 8, 2012 from 6 p.m. until 8 p.m.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or email Petty Officer Deborah Metzger, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *D11-PF-MarineEventsSanDiego@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the special local regulations in 33 CFR 100.1101 in support of the annual Mission Bay Parade of Lights (Item 6 on Table 1 of 33 CFR 100.1101). The Coast Guard will enforce the special local regulations in the main entrance of the channel, in Sail Bay and in the vicinity of the southern tip of Fiesta Island on December 08, 2012 from 6 p.m. to 8 p.m.

Under the provisions of 33 CFR 100.1101, persons and vessels are prohibited from entering into, transiting through, or anchoring within this special local regulation unless authorized by the Captain of the Port, or his designated representative. The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1101 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 extensive advance notification of this enforcement period via the Local Notice to Mariners, state, or local agencies.

Dated: November 15, 2012.

S.M. Mahoney,

Captain of the Port San Diego, United States Coast Guard.

[FR Doc. 2012–29595 Filed 12–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2012–1053]

RIN 1625–AA00

Safety Zone; Bridge Demolition Project; Indiana Harbor Canal, East Chicago, IN

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the Indiana Harbor Canal in East Chicago, Indiana. This safety zone is intended to restrict vessels from a portion of the Indiana Harbor Canal due to the demolition Project on the Cline Avenue Bridge. This temporary safety zone is necessary to protect the surrounding public and vessels from the hazards associated with the demolition project.

DATES: This rule is effective from 12 p.m. on December 2, 2012 until 3 p.m. on December 8, 2012. This rule will be enforced from 12:00 p.m. until 5:00 p.m. on December 2, 2012 and from 8:00 a.m. until 3:00 p.m. on December 8, 2012.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2012–1053 and are available online by going to *www.regulations.gov,* inserting USCG–2012–1053 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, contact or email MST1 Joseph McCollum, U.S. Coast Guard Sector Lake Michigan, at 414–747–7148 or *Joseph.P.McCollum@uscg.mil.* If you have questions on viewing the docket,

call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable and contrary to the public interest. The final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect vessels from the hazards associated with the demolition project on the Cline Avenue bridge, which are discussed further below.

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**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would be impracticable and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish regulated navigation areas and limited access areas: 33 U.S.C. 1231; 46 U.S.C. chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

On December 2nd and 8th, 2012, Walsh Construction Company will be conducting demolition on portions of the Cline Avenue bridge in East Chicago, IN. The Captain of the Port, Sector Lake Michigan, has determined that this demolition project will pose a significant risk to public safety and property. Such hazards include loss of life and property in the proximity of explosives, and collisions among vessels and contractors involved in the demolition project.

The Coast Guard had established the same safety zone for October 27 and November 10, again for November 3 and 10, and once again for December 1, 2012. However, as a result of scheduling changes and the setback from the discovery of steel beams at the demo site, the planned demolition date was postponed twice. Walsh Construction Company has requested another postponement because of unexpected delays associated with the removal of the steel beams. Considering the delicate nature of explosive work on a transportation structure, this rule was written to accommodate the Construction Company's need to properly prepare the bridge for demolition on a later date.

C. Discussion of Rule

With the aforementioned hazards in mind, the Captain of the Port, Sector Lake Michigan, has determined that this temporary safety zone is necessary to ensure the safety of persons and vessels during the demolition project on the Cline Avenue Bridge. This zone is effective from 12 p.m. on December 2, 2012 until 3 p.m. on December 8, 2012. This zone will be enforced from 12:00 p.m. until 5:00 p.m. on December 2, 2012 and from 8:00 a.m. until 3:00 p.m. on December 8, 2012.

The safety zone will encompass all waters of the Indiana Harbor Canal in the vicinity of the Cline Avenue Bridge at approximate position 41°39′ 4.3″ N and 87°27′ 54.3″ W (NAD 83).

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

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS). We conclude that this rule is not a significant regulatory action because we anticipate that it will have minimal impact on the economy, will not interfere with other agencies, will not adversely alter the budget of any grant or loan recipients, and will not raise any novel legal or policy issues. The safety zone created by this rule will be small and enforced for a limited duration of time on only two days. Under certain conditions, moreover, vessels may still transit through the safety zone when permitted by the Captain of the Port.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in a portion of Indiana Harbor Canal on December 2 and 8, 2012.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: This safety zone would be effective and thus subject to enforcement, for a limited duration of time on only two days. Traffic may be allowed to pass through the zone with the permission of the Captain of the Port. The Captain of the Port can be reached via VHF channel 16. Before the activation of the zone, we will issue local Broadcast Notice to Mariners.

3. Assistance for Small Entities

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

Small businesses may send comments on the actions of Federal employees

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

4. Collection of Information

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

5. Federalism

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

6. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

7. Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

8. Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

9. Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

10. Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

11. Energy Effects

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

12. Technical Standards

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

13. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a safety zone and, therefore it is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 46 U.S.C. Chapters 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T09–1053 to read as follows:

§ 165.T09–1053 Safety Zone; Bridge Demolition Project, Indiana Harbor Canal, East Chicago, Indiana.

(a) *Location.* The safety zone will encompass all waters of the Indiana Harbor Canal in the vicinity of the Cline Avenue Bridge at approximate position 41°39′4.3″ N and 87°27′54.3″ W (NAD 83).

(b) *Effective and Enforcement Period.* This rule is effective from 12 p.m. on December 2, 2012 until 3 p.m. on December 8, 2012. This rule will be enforced from 12:00 p.m. until 5:00 p.m. on December 2, 2012 and from 8:00 a.m. until 3:00 p.m. on December 8, 2012.

(c) *Regulations.*

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

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

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

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

Dated: November 29, 2012.

M.W. Sibley,

Captain, U. S. Coast Guard, Captain of the Port, Sector Lake Michigan.

[FR Doc. 2012–29593 Filed 12–6–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Part 685

RIN 1840–AD05

[Docket ID ED–2012–OPE–0010]

William D. Ford Federal Direct Loan Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Announcement of early implementation date.

SUMMARY: The U.S. Department of Education (Department) issues this document to establish the date for the early implementation of William D. Ford Federal Direct Loan (Direct Loan) program regulations that establish a new income-contingent repayment plan based on the President's ''Pay As You Earn'' repayment initiative (the Pay As You Earn repayment plan).

DATES: The early implementation date for §§ 685.208(k)(1) and 685.209(a), published November 1, 2012 (77 FR 66087), is December 21, 2012.

FOR FURTHER INFORMATION CONTACT: For information about the Pay As You Earn repayment plan or how to apply for Pay As You Earn repayment, the Federal Student Aid Information Center (FSAIC) at 1–800–4FEDAID (1–800–433–3243). For information on the establishment of the early implementation date, Jeff Baker at 1–202–377–3000.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 482(c) of the Higher Education Act of 1965, as amended (HEA), requires that regulations affecting programs under title IV of the HEA be published in final form by November 1 prior to the start of the award year (July 1) to which they apply. However, that section also permits the Secretary to designate any regulation as one that an entity subject to the regulations may choose to implement earlier and the conditions for early implementation.

On November 1, 2012, the Department issued final regulations in 34 CFR part 685 for the Pay As You Earn repayment plan (77 FR 66087). In the preamble to the final regulations, the Secretary announced the Department's intent to implement the new Direct Loan program regulations establishing the Pay As You Earn repayment plan as soon as possible.

Implementation Date of These Regulations

The Secretary is exercising the authority under section 482(c) of the HEA to designate the following amended regulations in 34 CFR part 685 for early implementation beginning on December 21, 2012, at the discretion of individual borrowers:

(1) § 685.208(k)(1).

(2) § 685.209(a).

If a borrower elects to implement the Pay As You Earn repayment plan early in accordance with this notice, the borrower will have the rights and be subject to the obligations under both §§ 685.208(k)(1) and 685.209(a). To implement the Pay As You Earn Plan early, a Direct Loan borrower must request to repay his or her eligible loans under that plan.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

(Catalog of Federal Domestic Assistance Number: 84.268.)

Dated: December 3, 2012.

Arne Duncan,

Secretary of Education.

[FR Doc. 2012–29525 Filed 12–6–12; 8:45 am]

BILLING CODE 4000–01–P

POSTAL SERVICE

39 CFR Part 20

International Mail: Product Rate and Fee Changes

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: On October 11, 2012, the Postal Service filed a notice of international mailing services price adjustments with the Postal Regulatory Commission (PRC), effective on January 27, 2013. On October 23, 2012, the USPS™ published a proposed rule in the **Federal Register** with changes to *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®). The proposed rule included changes that we would adopt to implement the changes coincident with the price adjustments and classification changes, including changes resulting from the Postal Regulatory Commission granting the Postal Service's request in Docket No. MC2012–44 to transfer First-Class Mail International® packages (small packets) and rolls from the market-dominant product list to the competitive product list. This final rule conveys the comments received on the proposal and the final mailing standards.

DATES: Effective January 27, 2013.

FOR FURTHER INFORMATION CONTACT: Rick Klutts at 813–877–0372.

SUPPLEMENTARY INFORMATION: On October 23, 2012, the USPS™ published a proposed rule in the **Federal Register** (77 FR 64768) with changes to *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM®).

Prices will be available under Docket Number R2013–1 on the Postal Regulatory Commission's Web site at *www.prc.gov.*

Comments

We received comments from 93 respondents on various aspects of the proposed changes. The comments and responses are included in the applicable subject matter sections below.

Price Adjustment

Two respondents were in favor of the price adjustment, stating the overall increase was modest and will increase Postal Service revenue.

Global Forever Stamps

Three respondents were in favor of the Global Forever® stamp, stating this concept will benefit mailers by having one stamp for all international destinations for letter-size mailpieces, and may be used regardless of future increases.

Restricted Delivery

Three respondents supported the discontinuance of outbound international restricted delivery service stating the Postal Service should

''streamline'' their product offering of low volume items.

International Reply Coupons

Three respondents supported the discontinuance of selling international reply coupons, stating the Postal Service should ''streamline'' their product offering of low volume items.

Ninety-one respondents opposed the discontinuance of international reply coupons. Of these, 63 respondents identified themselves as U.S. amateur radio operators who rely on international reply coupons to confirm radio contacts through the exchange of ''QSL cards'' and who stated that no other practical way exists for this kind of exchange. Some of the other comments from the group of 91 included the following statements: (1) ''In many countries, it's either illegal to possess or mail foreign currency, or currency is routinely stolen from the mail;'' (2) ''In many countries the amateur radio operators do not have funds available to answer QSL requests as their income is much lower than we consider average in the United States;'' (3) ''There is no alternative mechanism to supply foreign correspondents with return postage;'' and (4) ''As a minimum, the USPS should continue to sell IRC's at the www.usps.com store or through a few dispersed Post Offices that would sell them by mail to people beyond reasonable driving distance.''

As prescribed in the Postal Regulatory Commission's (PRC) Order No. 1541, the PRC approved the Postal Service's proposal to discontinue outbound international reply coupons, while retaining inbound international reply coupon service. The PRC determined that the proposal to discontinue outbound international reply coupons was not inconsistent with the statute, and acknowledged that the small number of consumers, such as amateur radio operators, who purchase international outbound reply coupons, will no longer be able to do so, but they will still have options. For countries to which money orders may be sent, once the U.S. sender ascertains (or estimates) the cost of sending the QSL card from the foreign country to the U.S., the U.S. sender can obtain and send a money order in that amount. Finally, senders and recipients may find it more convenient and less costly to use an online payment service to transmit the cost of mailing a QSL card.

The Postal Service hereby adopts the following changes to *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM), which is incorporated by reference in the *Code of Federal Regulations.* See 39 CFR 20.1.

List of Subjects in 39 CFR Part 20

Foreign relations, International postal services.

Accordingly, 39 CFR part 20 is amended as follows:

PART 20—[AMENDED]

■ 1. The authority citation for 39 CFR part 20 continues to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 407, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

■ 2. Revise the following sections of the *Mailing Standards of the United States Postal Service,* International Mail Manual (IMM) as follows:

* * * * *

Mailing Standards of the United States Postal Service, International Mail Manual (IMM)

* * * * *

1 International Mail Services

* * * * *

130 Mailability

* * * * *

134 Valuable Articles

134.1 Service Options

The following services can be used to send the articles noted in 134.2:

[Revise item 134.1a to read as follows:]

a. First-Class Mail International service with Registered Mail service or First-Class Package International service with Registered Mail service.

* * * * *

135 Mailable Dangerous Goods

135.1 Infectious Substances

* * * * *

135.12 Type of Mail

[Revise 135.12 to read as follows:]

Category B infectious substances must be sent only by First-Class Package International Service or the Priority Mail International Small Flat Rate Priced Boxes using Registered Mail™ service. Nonregulated materials defined in DMM 601.10.17.3 and exempt human or animal specimens defined in DMM 601.10.17.2d are mailable by First-Class Package International Service when properly packaged as described in DMM 601.10.17.

* * * * *

135.3 Packaging, Marking, Labeling

135.31 Category B Infectious Substances

[Revise the first sentence in 135.12 to read as follows:]

A material that is classified as a Category B infectious substance and that meets the definition in DMM 601.10.17.2a2 must be triple-packaged as described in DMM 601.10.17.4, must meet the packaging requirements in 49 CFR 173.199, and must be sent only by First-Class Package International Service using Registered Mail service.***

* * * * *

135.5 Radioactive Materials

Shipments containing radioactive materials are acceptable in international mail subject to the provisions of DMM 601 and of Publication 52, *Hazardous, Restricted, and Perishable Mail,* and under the following conditions:

[Revise item 135.5a to read as follows:]

a. Shipments may be sent only by First-Class Mail International service, First-Class Package International Service, or Priority Mail International Flat Rate Envelopes or Small Flat Rate Priced Boxes with Registered Mail service.

* * * * *

138 Perishable Matter

138.1 Animals

All live or dead animals are nonmailable, except the following:

* * * * *

[Revise item 138.1c(4) to read as follows:]

(4) They are sent by First-Class Mail International service, First-Class Package International Service, or Priority Mail International Flat Rate Envelopes or Small Flat Rate Priced Boxes.

* * * * *

140 International Mail Categories

141 Definitions

141.1 General

[Revise 141.1 to read as follows:]

There are five principal categories of international mail that are primarily differentiated from one another by speed of service. They are Global Express Guaranteed® (GXG®) service, Express Mail International® service, Priority Mail International® service, First-Class Mail International® service, and First-Class Package International Service™.

* * * * *

141.4 Priority Mail International

[Revise the second sentence of 141.4 to read as follows:]

*** This classification is primarily designed to accommodate larger and heavier shipments whose size and/or weight exceeds the limits for First-Class Mail International, or First-Class Package International Service.***

* * * * *

141.5 First-Class Mail International

[Revise 141.5 in its entirety to read as follows (this revision also deletes the ''Note''):]

First-Class Mail International is a generic term for mailpieces that are letter-size or flat-size that weigh 4 pounds or less, and that have a value that is $400 or less. First-Class Mail International items may contain any letter-size or flat-size mailable matter that is not prohibited by the destination country. Aerogrammes are no longer available for purchase. Previously purchased aerogrammes are mailable at the applicable First-Class Mail International letter-size price. At the sender's option, extra services, such as Registered Mail and return receipt, may be added on a country-specific basis.

142 Official Mail

* * * * *

142.4 General Secretariat of the Organization of American States (OAS)

[Add an introduction to 142.4 and revise items a and b to read as follows:]

The following standards apply when mail is sent as OAS General Secretariat official mail:

a. Unregistered First-Class Mail International and First-Class Package International Service items bearing the return address of the OAS General Secretariat and weighing not more than 4 pounds are accepted without postage when addressed to the OAS member countries listed in 142.4c.

b. Items sent other than First-Class Mail International or First-Class Package International Service with extra services may *not* be provided for OAS General Secretariat official mail without the prepayment of postage or the fee for the extra service requested.

* * * * *

142.5 Pan American Sanitary Bureau Mail

[Revise 142.5 in its entirety to read as follows:]

The following standards apply when mail is sent as OAS General Secretariat official mail:

a. Unregistered First-Class Mail International and First-Class Package International Service items bearing the return address of the Pan American Sanitary Bureau and weighing not more than 4 pounds are accepted without postage affixed when addressed to an OAS member country listed in 142.4c or to Cuba.

b. Items with the Pan American Sanitary Bureau return address that are sent other than First-Class Mail International or First-Class Package International Service, or that request extra services must prepay all postage and fees.

150 Postage

* * * * *

152 Payment Methods

* * * * *

152.3 Stamps

152.31 Types of Stamps

[As explained in an upcoming revision article, and to be effective November 5, 2012 (which is before these revisions on mailing services will be effective), we will switch the order of sections 152.2 and 152.3 (so that ''Stamps'' will be the title of 152.3) and will revise the renumbered 152.3. Then, effective January 27, 2013, we will revise the renumbered 152.31 and revise item d and insert a new item e to read as follows:]

The following types of stamps may be used to pay for postage and fees for extra services listed under chapter 3 for all single-piece international mail transactions:

* * * * *

d. *Forever Stamps (domestic):* A domestic *Forever* stamp's value is linked to the domestic First-Class Mail single-piece 1-ounce letter price that is in effect on the day of use (mailing) regardless of when the stamp is purchased and regardless of how prices may change in the future.

e. *Global Forever Stamps:* A *Global Forever* stamp's value is linked to the First-Class Mail International single-piece 1-ounce machinable letter price that is in effect on the day of use (mailing). *Global Forever* Stamps can be used to mail a postcard or 1-ounce machinable letter-size mailpiece anywhere in the world, regardless of when the stamp is purchased and regardless of how prices may change in the future. *Global Forever* stamps are round and always bear the words ''Global Forever.'' In addition, mailers may use the *Global Forever* stamp, as postage for any type of single-piece international or domestic mailpiece. Their value (regardless of purchase date) is always equal to the First-Class Mail International single-piece 1-ounce machinable letter price that is in effect on the day of use (mailing).

[Revise 153.32 to read as follows:]

152.32 Additional Postage for Nondenominated Postage Stamps, Forever Stamps or Forever Print-on-Demand Indicias

Since international postage prices are always higher than the comparable domestic postage prices, mailers who affix a single nondenominated postage stamp or a domestic *Forever* stamp to their outbound mailpieces must add additional postage to comply with the international price schedule.

* * * * *

2 Conditions for Mailing

* * * * *

240 First-Class Mail International

241 Description and Physical Characteristics

241.1 General

[Revise 241.1 to read as follows:]

The First-Class Mail International® classification encompasses the categories of international mail that before May 14, 2007, were categorized as airmail letter-post and economy letter-post, postcards, and printed matter.

241.2 Physical Characteristics

* * * * *

241.23 Physical Standards—Large Envelopes (Flats)

* * * * *

241.232 Dimensions and Characteristics

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[Revise the ''Note'' to read as follows:]

Note: *The length of a large envelope (flat) is always the longest dimension. The height is the dimension perpendicular to the length. A First-Class Mail International large envelope (flat) that does not meet the standards in 241.23 is not eligible for the large envelope (flat) size price and is charged the applicable First-Class Package International Service (small packet) price.*

* * * * *

241.24 Physical Standards — Packages (Small Packets)

[Delete in its entirety section 241.24 titled ''Physical Standards—Packages (Small Packets).''.]

* * * * *

242 Eligibility

* * * * *

242.4 Extra Services

* * * * *

[*Delete in its entirety section 242.44 titled ''Restricted Delivery.''*]

243 Prices and Postage Payment Methods

243.1 Prices

243.11 Prices and Price Application—General

[*Revise 243.11 in its entirety to read as follows:*]

First-Class Mail International cards, letters, and large envelopes (flats) are *charged postage for each addressed piece according to its weight and price group. For prices, see* Notice 123, *Price List.*

* * * * *

243.13 Destinating Countries and Price Groups

[*Revise 243.13 to read as follows:*]

See the Individual Country Listings to determine the country-specific price group for First-Class Mail International. For postage prices, see Notice 123, *Price List.*

[*Delete Exhibit 243.13 in its entirety.*]

* * * * *

244 Mail Preparation

* * * * *

[*Revise the title to 244.2 to read as follows:*]

244.2 Markings

The following markings apply to First-Class Mail International items:

* * * * *

[*Delete current item 244.2 b in its entirety and redesignate current item c as the new item b, and revise new item b to read as follows:*]

b. First-Class Mail International letters and large envelopes (flats) that qualify as free matter for the blind or physically handicapped must bear the marking ''Free Matter for the Blind or Physically Handicapped'' in the upper-right corner of the address side of the mailpiece. See 274.2.

244.3 Sealing

[*Revise the second sentence of 244.3 to read as follows:*]

* * * Mailpieces not sealed by conventional means, such as moistening the gummed flaps on envelopes, must be closed in such a manner as to prevent the contents from falling out or being damaged during postal handling and transport.* * *

244.4 Packaging

[*Revise the introductory text of 244.4 to read as follows:*]

The following packaging methods may be used for First-Class Mail International letter-size and flat-size items:

* * * * *

[*Delete current item 244.4d in its entirety, and redesignate current items e and f, as items d and e.*]

* * * * *

270 Free Matter for the Blind or Other Physically Handicapped Persons

* * * * *

272 Postage Prices

Postage is free for the following eligible items marked ''Free Matter for the Blind or Physically Handicapped'':

[Revise item 272a and b and insert new items c and d to read as follows:]

a. A First-Class Mail International item.

b. The Priority Mail International Flat Rate Envelopes.

c. The Priority Mail Small Flat Rate Priced Boxes.

d. A Priority Mail International parcel weighing up to 15 pounds.

* * * * *

273 Weight and Size Limits

273.1 Weight Limit

[*Revise the first paragraph of 273.1 to read as follows:*]

For First-Class Mail International or First-Class Package International Service items, or the Priority Mail International Flat Rate Envelopes and Small Flat Rate Priced Boxes, the weight limit is 4 pounds.

* * * * *

273.2 Size Limits

[*Revise 273.2 in its entirety to read as follows:*]

For First-Class Mail International items, see 241.2.

For First-Class Package International Service items, see 251.2

For Priority Mail International parcels, see 231.2.

274 Mail Preparation

* * * * *

274.2 Marking

[*Revise 274.2 in its entirety to read as follows:*]

In addition to the markings required in 244.2 for First-Class Mail International items, in 254.2 for First-Class Package International Service items and in 234.2 for Priority Mail International parcels, free matter must be marked ''Free Matter for the Blind or Handicapped'' in the upper right-hand corner of the address side of the mailpiece.

* * * * *

275 Extra Services

* * * Only the following extra services are authorized:

[*Revise item 275a to read as follows:*]

* * * * *

a. Registered Mail service for First-Class Mail International items, First-Class Package International Service items, and Priority Mail International Flat Rate Envelopes or Small Flat Rate Priced Boxes.

* * * * *

3 Extra Services

310 Certificate of Mailing

311 Individual Pieces

* * * * *

311.2 Availability

311.21 At Time of Purchase

A customer may purchase a certificate of mailing (individual pieces) when sending the following:

* * * * *

[Insert new item 311.21c and redesignate current items c through f as items d through g.]

c. Unregistered for First-Class Package International Service items.

* * * * *

311.3 Fees

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311.32 Three or More Individual Pieces

[Revise 311.32 to read as follows:]

When mailing three or more pieces, the mailer may optionally use PS Form 3877. In addition to the correct postage, the mailer must pay the certificate of mailing fee for each article on PS Form 3877 by affixing ordinary (uncanceled) stamps, meter imprints, or PC Postage imprints to the PS Form 3877. Mailers paying for the postage with a permit imprint may also pay the fee at the time of mailing using the same permit imprint account. For a separate fee, the mailer may request a duplicate copy of PS Form 3877 after mailing (see 311.22). See Notice 123, *Price List.*

* * * * *

312 Bulk Quantities—Certificate of Mailing

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312.2 Availability

312.21 At Time of Entry

A customer may purchase a certificate of bulk mailing when sending the following identical-weight items:

* * * * *

[Insert new item 312.21c and redesignate current items c through f as d through g.]

c. Unregistered for First-Class Package International Service items.

* * * * *

312.3 Fees

[Revise 312.3 to read as follows:]

In addition to the correct postage, the applicable certificate of bulk mailing fee must be paid for mailings of identical-weight pieces reported on PS Form 3606. The mailer may pay the fee by ordinary (uncanceled) stamps, meter imprints, or PC Postage imprints by affixing them to the form. Mailers paying for the postage with a permit imprint also may pay the fee, at the time of mailing, with the same permit imprint account. For a separate fee, the mailer may request a duplicate copy of PS Form 3606 after mailing (see 312.22). See Notice 123, *Price List,* for all applicable fees.

* * * * *

330 Registered Mail

* * * * *

332 Availability

* * * Registered Mail service is available for the following types of mail:

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[Add new item d to read as follows:]

d. First-Class Package International Service items, including free matter for the blind items.

* * * * *

334 Processing Requests

334.1 Mailing Receipt and Registration Number

* * * * *

334.13 Accepting Clerk's Responsibility

The accepting clerk must:

* * * * *

[Revise item 334.13d. to read as follows:]

d. Enter the registration fee and postage plus the return receipt fee, if applicable, on the receipt.

* * * * *

[Revise the title and text of 334.5 to read as follows:]

334.5 Return Receipt

Return receipts can be purchased for Registered Mail items to most countries. (See 340 and 350 and Individual Country Listings.)

* * * * *

350 Restricted Delivery

[Revise 350 in its entirety to read as follows (this replaces all the current text from 351 through 354.2):]

Restricted delivery service is no longer available and was discontinued effective January 27, 2013. It was limited to First-Class Mail International items, the Priority Mail International Flat Rate Envelopes and the Small Flat Rate Priced Boxes when used in conjunction with Registered Mail service.

[Delete 351 through 354.2 in their entirety.]

* * * * *

380 Supplemental Services

381 International Reply Coupons

[Revise 381 in its entirety to read as follows:]

381.1 Description

As of January 27, 2013, the U.S. Postal Service no longer sells international reply coupons. However, coupons previously sold by the U.S. Postal Service can still be used or exchanged (see 381.2). The following standards apply to international reply coupons:

a. The sender of a letter may prepay a reply by purchasing reply coupons that are sold and exchangeable for postage stamps by participating postal administrations in member countries of the Universal Postal Union.

b. International reply coupons (in French, *Coupons-Reponse Internationaux*) are printed in blue ink on paper that has the letters ''UPU'' in large characters in the watermark. The front of each coupon is printed in French. The reverse side of the coupon shows the text relating to its use in German, English, Arabic, Chinese, Spanish, and/or Russian.

381.2 Previously Sold Coupons and Exchange Value

The following standards apply to the exchange of international reply coupons:

a. International reply coupons sold by the United States Postal Service prior to January 27, 2013, are exchangeable in any other member country for a stamp or stamps representing the minimum postage on an unregistered air letter. Unused U.S. coupons (that is, those with the U.S. selling price stamped on them that are not ultimately redeemed by recipients in other countries) may be exchanged only by the original purchaser for United States postage stamps at a discount of 1 cent below the purchase price.

b. With the exceptions noted in 381.3d, international reply coupons purchased in foreign countries are exchangeable at U.S. Post Office facilities toward the purchase of postage stamps and embossed stamped envelopes at the current maximum First-Class Mail International 1-ounce, letter-size price, per coupon, irrespective of the country where they were purchased. See Notice 123, *Price List.*

381.3 Processing Requests

The following standards apply when processing international reply coupons:

a. Under Universal Postal Union's regulations, participating member countries are *not* required to place a control stamp or postmark on the international reply coupons that they sell. Therefore some foreign issue reply coupons that are tendered for redemption may bear the name of the issuing country (generally in French) rather than the optional control stamp or postmark. Such coupons are exchangeable for U.S. postage as specified in 381.2b.

b. A Post Office facility redeeming an unused U.S. coupon must postmark it in the unpostmarked circle. A Post Office facility exchanging a foreign reply coupon must postmark it. Post Office facilities must not accept foreign coupons that already bear a United States Postal Service postmark.

c. The only valid version of the international reply coupons printed by the Universal Postal Union is Item Number 330800, which is approximately 3.75 inches by 6 inches, has a barcode on the reverse side, and has an expiration date of December 31, 2013. This policy is for international reply coupons issued by the United States before January 27, 2013 as well as for those issued by foreign postal administrations.

d. Reply coupons formerly issued by the Postal Union of the Americas and Spain are no longer valid. These coupons are printed in green ink and bear the caption *Cupon Respuesta America-Espanol.* Customers possessing any of these coupons should return them to their correspondents in the country of issue for redemption through the selling post office.

e. Postmasters must process exchanged foreign and redeemed U.S. international reply coupons as prescribed in 11–6.6, ''International Reply Coupons'' in Handbook F–101, *Field Accounting Procedures.*

* * * * *

4 Treatment of Outbound Mail

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420 Unpaid and Shortpaid Mail

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423 Shortpaid Mail

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423.2 Disposition

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423.24

[Revise the title of 423.24 to read as follows:]

423.24 First-Class Mail International Items (Including Postcards), First-Class Mail Package International Service, Airmail M-bags, Priority Mail International Flat Rate Envelopes, and Priority Mail International Small Flat Rate Priced Boxes

423.241 Items Paid With a Permit Imprint or USPS-Produced PVI Label

[Revise the text of 423.241 to read as follows:]

Regardless of the amount of deficiency, consider as paid in full each shortpaid First-Class Mail International item (including a postcard), First-Class Package International Service, Airmail M-bag, Priority Mail International Flat Rate Envelope, and Priority Mail International Small Flat Rate Priced Box that is paid with a permit imprint or USPS-produced postage validation imprinter (PVI) label, and dispatch it to the appropriate International Service Center (ISC).

423.242 Items Paid With Any Other Postage Payment Method

[Revise the text of the introduction of 423.242 to read as follows:]

The disposition of a shortpaid First-Class Mail International item (including a postcard), First-Class Package International Service, Airmail M-bag, Priority Mail International Flat Rate Envelope, and Priority Mail International Small Flat Rate Priced Box that is paid with a postage payment method other than a permit imprint or USPS-produced PVI label is based on the amount of the deficiency, as follows:

* * * * *

7 Treatment of Inbound Mail

* * * * *

770 Undeliverable Mail

771 Mail of Domestic Origin

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[Revise 771.5 in its entirety to read as follows:]

771.5 Return Charges for Letter-Post Items

771.51 General

Except as noted in 771.52, any undeliverable-as-addressed mail item listed below that a foreign postal administration returns to the U.S. sender is *not* subject to the payment of return charges. This provision applies to postal items that were originally entered at the following rates of postage:

a. Priority Mail International Flat Rate Envelope.

b. Priority Mail International Small Flat Rate Priced Box.

c. First-Class Mail International (including postcards).

d. First-Class Package International Service.

e. Airmail M-bag.

f. International Priority Airmail (IPA), including M-bags.

g. International Surface Air Lift (ISAL), including M-bags.

771.52 Exceptions

Delivery Post Office facilities should collect return charges from the U.S. sender under the following circumstances:

a. If a returned letter-post item listed in 771.51 bears a short-paid endorsement that was originally applied by the Postal Service dispatching exchange office, the delivery office should collect the amount of the postage deficiency that would otherwise have been collected from the foreign addressee.

b. If a returned letter-post item listed in 771.51 bears a collection instruction that was applied by an International Service Center (ISC), international exchange office, or mail recovery center, the delivery office should collect the ''due amount'' that is specified on the mailpiece.

* * * * *

780 Items Mailed Abroad by or on Behalf of Senders in the United States

781 Payment Required

* * * * *

781.2 Handling Charges

[Revise 781.2 to read as follows:]

Undeliverable-as-addressed mail returned to the sender for which outbound postage was not paid to the U.S. Postal Service is subject to the payment of handling charges. On delivery to the sender, the sender may be charged the applicable First-Class Mail International or First-Class Package International Service price for the weight and shape of the returned piece.

* * * * *

9 Inquiries, Indemnities, and Refunds

* * * * *

920 Inquiries and Claims

921 Inquiries

* * * * *

921.2 Initiating an Inquiry

* * * * *

Exhibit 921.2 Time Limits for Inquiries

[Revise the ''Note'' in Exhibit 921.2 to read as follows:]

Note: Inquires are not accepted for First-Class Mail International items, First-Class Package International Service items, Priority Mail International Flat Rate Envelopes or Small Flat Rate Priced Boxes, or M-bags.

* * * * *

940 Postage Refunds

[Revise the title of 941 to read as follows:]

941 Postage Refunds for First-Class Mail International, First-Class Package International Service, and Priority Mail International

941.1 General

[Revise 941.1 to read as follows:]

A refund may be made when postage, extra service fees, or other charges have been paid on the following First-Class Mail International, First-Class Package International Service, or Priority Mail International items:

a. Items for which full service was not rendered.

b. Items that were paid in excess of the proper price.

* * * * *

Country Price Groups and Weight Limits

[Revise the text to read as follows:]

Listed below are the countries and their price groups and weight limits for the five principal categories of international mail. Complete tables of prices and weights appear in the Individual Country Listings (ICLs).

* * * * *

[Revise footnote 2 to read as follows:]

2. First-Class Mail International maximum weights: Letters, 3.5 ozs.; Large Envelopes (flats), 4 lbs. Note that the heading in the maximum weight column lists both ounces and pounds (''ozs./lbs.'') and that there are two numbers in the entry for each country (''3.5/4'')—this indicates that the maximum weight for Letters is 3.5 ozs., and that the maximum weight for Large Envelopes (flats) is 4 lbs. For First-Class Package International Service, maximum weight is 4 lbs.

* * * * *

[Revise footnote 5 to read as follows:]

5. Korea, Democratic People's Republic of (North Korea): First-Class Package International Service is not available. In addition, Priority Mail International parcel services are not available, including the Small Flat Rate Priced Boxes. Priority Mail International Flat Rate Envelopes (maximum weight: 4 lbs.) may be used. Regardless of mail

class, dutiable items and merchandise are prohibited.

* * * * *

[In the table, revise the heading for ''First-Class Mail International'' to read as ''First-Class Mail International and First-Class Package International Service'']

* * * * *

Individual Country Listings

* * * * *

First-Class Mail International (240)

* * * * *

[For each country that offers First-Class Mail International service, revise the introductory text to read as follows, however, retain the country's current Price Group designation.]:

For the prices and maximum weights for letters, large envelopes (flats) and postcards, see Notice 123, *Price List.*

Size Limits

[For each country that offers First-Class Mail International service, revise the text to read as follows:]

Letters: See 241.212

Postcards: See 241.221

Large Envelopes (Flats): See 241.232

* * * * *

Matter for the Blind (270)

[For each country that offers Matter for the Blind, revise the first paragraph to read as follows:]

Free when sent as First-Class Mail International or First-Class Package International Service, or in Priority Mail International Flat Rate Envelopes or the Small Flat Rate Priced Boxes. Weight limit: 4 pounds.

Extra Services

Certificate of Mailing (313)

[For each country that offers certificate of mailing service, revise the fees to read as follows:]

	Fee
Individual Pieces	
Individual article (PS Form 3817)	$1.20
Firm mailing books (PS Form 3877), per article listed (minimum 3)	0.44
Duplicate copy of PS Form 3817 or PS Form 3877 (per page)	1.20
Bulk Quantities	
First 1,000 pieces (or fraction thereof)	7.05
Each additional 1,000 pieces (or fraction thereof)	0.85
Duplicate copy of PS Form 3606	1.20

* * * * *

International Business Reply Service (382)

[For each country that offers International Business Reply service, revise the fees to read as follows:]

Fee: Envelopes up to 2 ounces $1.75; Cards $1.25

* * * * *

International Reply Coupons (381)

[For each country revise the text to read as follows:]

Discontinued January 27, 2013

* * * * *

Registered Mail (330)

[For each country that offers international Registered Mail service, revise the fee to read as follows:]

Fee: $12.95

* * * * *

Restricted Delivery (350)

[For each country revise the text to read as follows:]

Discontinued January 27, 2013

Return Receipt (340)

[For each country that offers international return receipt service, revise the fee to read as follows:]

Fee: $3.50

* * * * *

We will publish an appropriate amendment to 39 CFR part 20 to reflect these changes.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–29434 Filed 12–6–12; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2010–0154; FRL–9760–1]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; The 2002 Base Year Emissions Inventory for the Washington County, MD Nonattainment Area for the 1997 Fine Particulate Matter National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the fine particulate matter ($PM_{2.5}$) 2002 base year emissions inventory portion of the Maryland State Implementation Plan (SIP) revision submitted by the State of Maryland, through the Maryland Department of the Environment (MDE), on June 6, 2008. The emissions inventory is part of the June 6, 2008 SIP revision that was submitted to meet nonattainment requirements related to the Washington County, Maryland nonattainment area for the 1997 $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) SIP. EPA is approving the 2002 base year $PM_{2.5}$ emissions inventory in accordance with the requirements of the Clean Air Act (CAA).

DATES: This final rule is effective on January 7, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2010–0154. All documents in the docket are listed in the *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 *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 Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Asrah Khadr, (215) 814–2071, or by email at *khadr.asrah@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On September 26, 2012 (77 FR 59156), EPA published a notice of proposed rulemaking (NPR) for the State of Maryland. The NPR proposed approval of the 2002 base year emissions inventory portion of the Maryland SIP revision. The formal SIP revision was submitted by the State of Maryland on June 6, 2008 (Revision #08–05).

II. Summary of SIP Revision

The 2002 base year emissions inventory submitted by MDE on June 6, 2008 includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are nitrogen oxides (NO_X), volatile organic

compounds (VOCs), $PM_{2.5}$, coarse particles (PM_{10}), ammonia (NH_3), and sulfur dioxide (SO_2). EPA has reviewed the results, procedures and methodologies for the base year emissions inventory submitted by MDE. The year 2002 was selected by MDE as the base year for the emissions inventory per 40 CFR 51.1008(b). A discussion of the emissions inventory development as well as the emissions inventory can be found in the June 6, 2008 SIP submittal and in the NPR. Specific requirements of the base year inventory and the rationale for EPA's 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 the 2002 base year $PM_{2.5}$ emissions inventory as a revision to the Maryland 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. 804(2).

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 February 5, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action pertaining to the $PM_{2.5}$ 2002 base year emissions inventory portion of the Maryland SIP 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, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: November 21, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart V—Maryland

■ 2. In § 52.1070, the table in paragraph (e) is amended by adding at the end of the table an entry for 2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(e) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
* *	*	*	*	*
2002 Base Year Emissions Inventory for the 1997 fine particulate matter ($PM_{2.5}$) standard.	Washington County, Maryland 1997 $PM_{2.5}$ nonattainment area.	6/6/08	12/7/12 [*Insert page number where the document begins*].	§ 52.1075(m)

■ 3. In § 52.1075, paragraph (m) is added to read as follows:

§ 52.1075 Base year emissions inventory.

* * * * *

(m) EPA approves as a revision to the Maryland State Implementation Plan the 2002 base year emissions inventory for the Washington County, Maryland 1997 fine particulate matter ($PM_{2.5}$) nonattainment area submitted by the Maryland Department of Environment on June 6, 2008. The 2002 base year emissions inventory includes emissions estimates that cover the general source categories of point sources, non-road mobile sources, area sources, on-road mobile sources, and biogenic sources. The pollutants that comprise the inventory are nitrogen oxides (NO_X), volatile organic compounds (VOCs), $PM_{2.5}$, coarse particles (PM_{10}), ammonia (NH_3), and sulfur dioxide (SO_2).

[FR Doc. 2012–29611 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0120; FRL–9710–3]

Revisions to the California State Implementation Plan, for Imperial County, Placer County and Ventura County Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Imperial County Air Pollution Control District (ICAPCD), Placer County Air Pollution Control District (PCAPCD) and Ventura County Air Pollution Control District (PCAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are approving local rules that address emission statements for ICAPCD and PCAPCD and definitions for VCAPCD.

DATES: This rule is effective on February 5, 2013 without further notice, unless EPA receives adverse comments by January 7, 2013. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2012–0120, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *Email: steckel.andrew@epa.gov.*

3. *Mail or Deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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.

Docket: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material, large maps), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov*.

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

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted/ amended	Submitted
ICAPCD	116	Emissions Statement and Certification	02/23/10	07/20/10

TABLE 1—SUBMITTED RULES—Continued

Local agency	Rule No.	Rule title	Adopted/ amended	Submitted
PCAPCD	503	Emission Statement	08/10/10	12/10/10
VCAPCD	2	Definitions	04/12/11	09/27/11

On August 25, 2010, EPA determined that the submittal for ICAPCD Rule 116 met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review. On January 13, 2011, and October 24, 2011, respectively, the submittals of PCAPCD Rule 503 and VCAPCD Rule 2 were determined to meet the completeness criteria.

B. Are there other versions of these rules?

There are no previous versions of ICAPCD Rule 116 and PCAPCD Rule 503 in the SIP. We approved an earlier version of VCAPCD Rule 2 into the SIP on March 7, 2011 (76 FR 12280).

C. What is the purpose of the submitted rules revisions?

Section 110(a) of the CAA requires states to submit regulations that control volatile organic compounds, oxides of nitrogen, particulate matter, and other air pollutants which harm human health and the environment. These rules were developed as part of the local agency's program to control these pollutants.

ICAPCD Rule 116 will require owners and/or operators of stationary sources emitting VOC or NO_X emissions to provide the ICAPCD with an annual statement of actual emissions of these pollutants certified by a responsible official of the company.

PCAPCD Rule 503 details how every stationary source permitted by the District with actual or potential emissions in excess of 10 tons per year or more of NO_X or VOC report their actual emissions. The rule describes the District's current emissions reporting system using the Renewal Information Request.

VCAPCD Rule 2 is being amended by adding new definitions and revisions to existing definitions.

EPA's technical support documents (TSD) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

These rules describe administrative provisions and definitions that support emission controls found in other local agency requirements. In combination with the other requirements, these rules must be enforceable (see section 110(a) of the Act) and must not relax existing requirements (see sections 110(l) and 193). EPA policy that we used to evaluate enforceability requirements consistently includes the Bluebook (''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988) and the Little Bluebook (''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001).

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability and SIP relaxations. The TSDs have more information on our evaluation.

C. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by January 7, 2013, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on February 5, 2013. This will incorporate these rules into the federally enforceable SIP.

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.

III. Statutory and Executive Order Reviews

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country

located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 5, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: July 19, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

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

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(381)(i)(A)(*6*), (389)(i)(B)(*4*), and (404)(i)(C) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(381) * * *

(i) * * *

(A) * * *

(*6*) Rule 116, ''Emissions Statement and Certification,'' adopted on February 23, 2010.

* * * * *

(389) * * *

(i) * * *

(B) * * *

(*4*) Rule 503, ''Emission Statement,'' amended on August 12, 2010.

* * * * *

(404) * * *

(i) * * *

(C) Ventura County Air Pollution Control District.

(*1*) Rule 2, ''Definitions,'' adopted on October 22, 1968, as revised through April 12, 2011.

* * * * *

[FR Doc. 2012–29117 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 122

[EPA–HQ–OW–2012–0195; FRL–9758–9]

RIN 2040–AF42

Revisions to Stormwater Regulations To Clarify That an NPDES Permit Is Not Required for Stormwater Discharges From Logging Roads

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is revising its Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a National Pollutant Discharge Elimination System (NPDES) permit is not required for these stormwater discharges.

DATES: This final rule is effective on January 7, 2013.

ADDRESSES: The record for this rulemaking is available for inspection and copying at the Water Docket, located at the EPA Docket Center (EPA/DC), EPA West 1301 Constitution Avenue NW., Washington, DC 20004. The record is also available via the EPA Dockets at *http://www.regulations.gov* under docket number EPA–HQ–OW–2012–0195.

FOR FURTHER INFORMATION CONTACT: For further information on this notice, you may contact Jeremy Bauer, EPA Headquarters, Office of Water, Office of Wastewater Management via email at *bauer.jeremy@epa.gov* or telephone at 202–564–2775.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Applicability

This action does not impose requirements on any entity. The action clarifies the status of stormwater discharges from logging roads. Those with an interest in such discharges may be interested in this action. If you have questions regarding the applicability of this rule, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. Copies of This Document and Other Information

This document is available for download at *http://www.epa.gov/npdes/stormwater/forestroads* or under docket EPA–HQ–OW–2012–0195.

II. Background

A. Purpose

The EPA is promulgating this final rule to address the stormwater discharges identified under *Northwest Environmental Defense Center* v. *Brown,* 640 F.3d 1063 (9th Cir. 2011) (*NEDC*).

The final rule clarifies that, for the purposes of assessing whether stormwater discharges are ''associated with industrial activity,'' the only facilities under SIC code 2411 that are ''industrial'' are: rock crushing, gravel washing, log sorting, and log storage. This clarifies, contrary to the Ninth Circuit's decision in NEDC, that discharges of stormwater from silviculture facilities other than the four specifically named silviculture facilities identified above do not require an NPDES permit.[1]

[1] This rulemaking responds to the uncertainty created by the Ninth Circuit's holding in *NEDC* that certain channeled discharges of stormwater from logging roads constitute point source discharges, bringing them within the Section 402 NPDES

B. Statutory Authority and Regulatory History

The objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. 1251(a). To that end, the Act provides that the discharge of any pollutant by any person shall be unlawful, except in compliance with other provisions of the statute. Generally, the Act provides for a permit program for the addition to waters of the United States of a pollutant from a point source, defined as ''any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.'' 33 U.S.C. 1362(14). In 1987 Congress amended the Clean Water Act by adding section 402(p), that created a temporary moratorium on NPDES permits for stormwater discharges, except for certain listed categories, and gave the EPA discretion to designate other stormwater discharges for regulation. 33 U.S.C. 1342(p).

For the initial phase, section 402(p)(1) created a temporary moratorium on NPDES permits for stormwater discharges from point sources except for those listed in section 402(p)(2), which includes discharges for which a permit had already been issued; discharges from large municipal separate storm sewer systems; and ''industrial discharges.'' Congress did not define industrial discharges, allowing the EPA to define the term. For subsequent phases, section 402(p)(5) directs the EPA to conduct studies, in consultation with the states, for ''identifying those stormwater discharges or classes of stormwater discharges for which permits are not required''; ''determining to the maximum extent practicable, the nature and extent of pollutants in such discharges''; and ''establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.'' Section 402(p)(6) directs the Agency to issue regulations, in consultation with state and local officials, based on such studies. The section allows the EPA flexibility in issuing regulations to address designated stormwater discharges where appropriate and does not require the use of NPDES permits or any specific regulatory approach. Specifically, the section states that the regulations ''shall establish priorities, establish requirements for state stormwater management programs, and establish expeditious deadlines'' and may include ''performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.'' 33 U.S.C. 1342(p)(6). This flexibility is unique to stormwater discharges and is different than the treatment of stormwater discharges listed in section 402(p)(2)(B) of the Act, which requires a permit for a stormwater discharge ''associated with industrial activity.''

Prior to the 1987 Amendments, there were numerous questions regarding the appropriate means of regulating stormwater discharges within the NPDES program due to the water quality impacts of stormwater, the variable nature of stormwater, the large number of stormwater discharges, and the limited resources of permitting agencies. The EPA undertook numerous regulatory actions, which resulted in extensive litigation, in an attempt to address these unique discharges.

The EPA's Silvicultural Rule (40 CFR 122.27) predates the 1987 amendments to the Clean Water Act that created section 402(p) for stormwater controls. The Agency defined silvicultural point source as part of the Silvicultural Rule to specify which silvicultural discharges were to be included in the NPDES program. The rule defines silvicultural point source to mean any ''discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States'' and further explains that ''the term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff.''

In 1990, following the 1987 amendments that directed the Agency to develop regulations requiring permits for large municipal separate storm sewer systems and stormwater ''discharges associated with industrial activity,'' the EPA promulgated the Phase I stormwater regulations. (55 FR 47990, November 16, 1990). The EPA defined in the Phase I regulations ''storm water discharge associated with industrial activity'' which is not defined by the Act. In describing the scope of the term ''associated with industrial activity,'' several members of Congress explained in the legislative history that the term applied if a discharge was ''directly related to manufacturing, processing or raw materials storage areas at an industrial plant.'' (Vol. 132 Cong. Rec. H10932, H10936 (daily ed. October 15, 1986); Vol. 133 Cong. Rec. H176 (daily ed. January 8, 1987)). The Phase I rule clarified the regulatory definition of ''associated with industrial activity'' by adopting the language used in the legislative history and supplementing it with a description of various types of areas (e.g., material handling sites, sites used for the storage and maintenance of material handling equipment, etc.) that are directly related to an industrial process and to industrial facilities identified by the EPA. The supplemental language in the Phase I rule also includes the term ''immediate access road.'' The EPA considers ''immediate access roads'' to refer to roads which are exclusively or primarily dedicated for use by the industrial facility. *See* 55 FR 47990, 48009 (Nov. 16, 1990). These ''immediate access roads'' do not include public access roads that are state, county, or federal roads such as highways or Bureau of Land Management roads which happen to be used by the facility. *See id.* The Phase I regulation defines the term ''storm water discharge associated with industrial activity'' to include stormwater discharges from facilities identified in the rule by standard industrial classification or ''SIC'' code at 40 CFR 122.26(b)(14). The Phase I regulation included in the definition of that term SIC code 24 (Lumber and Wood Products) which includes 2411 (logging), but the Agency also had specified in the Phase I rule that the term does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA's regulations, including the Silvicultural Rule. As discussed above, the EPA had previously specified under the Silvicultural Rule which silvicultural discharges were to be included in the NPDES program (40 CFR 122.27). The EPA intended to regulate those same ''silvicultural point source[s]'' under the Phase I rule (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) and to exclude from the Phase I regulation stormwater runoff from other silvicultural activities. For the ''silvicultural point source[s]'' (i.e., rock crushing, gravel washing, log sorting, and log storage facilities) regulated

permitting framework. This final rule, by clarifying what constitutes a discharge ''associated with industrial activity,'' makes clear that such discharges do not require NPDES permits even if they are point source discharges. We note that the Supreme Court has granted review of the *NEDC* case for the October 2012 term.

under the Phase I rule, the term ''storm water discharge associated with industrial activity'' includes ''immediate access roads'' (40 CFR 122.26(b)(14)(ii)). Unlike ''immediate access roads'' associated with industrial facilities, many logging roads have multiple uses, including recreation and general transportation, and commonly extend over long distances (i.e.; may not provide ''immediate access'' to an industrial site). The intent of the EPA in this rulemaking is that the NPDES program requirements be implemented with regard to ''immediate access roads'' in the same way they were implemented prior to the decision by the Ninth Circuit.

In developing the second phase of stormwater regulations, the EPA submitted to Congress in March 1995 a report that presented the nature of stormwater discharges from municipal and industrial facilities that were not already regulated under the Phase I regulations (U.S. Environmental Protection Agency, Office of Water. 1995. Storm Water Discharges Potentially Addressed by Phase II of the National Pollutant Discharge Elimination System Storm Water Program: Report to Congress. Washington, DC. EPA 833–K–94–002). On December 8, 1999, the EPA published the Phase II stormwater regulations to address stormwater discharges from small municipal separate storm sewer systems and construction sites that disturb one to five acres. (64 FR 68722, December 8, 1999). The EPA retains the authority to designate additional stormwater discharges for regulation at a later date under either CWA section 402(p)(2)(E) or 402(p)(6).

The Phase II regulations for stormwater controls were challenged in *Environmental Defense Center* v. *US EPA,* 344 F.3d 832 (9th Cir. 2003) (*EDC* v. *EPA*). In that case, petitioners contended that the EPA arbitrarily failed to regulate discharges from forest roads under the Phase II rule. The court held that the EPA failed to consider the petitioners' comments and remanded the issue to the EPA ''so that it may consider in an appropriate proceeding Petitioner's contention that § 402(p)(6) requires the EPA to regulate forest roads. The EPA may then either accept Petitioners' arguments in whole or in part, or reject them on the basis of valid reasons that are adequately set forth to permit judicial review.'' *Id.* at 863.

More recently, in *Northwest Environmental Defense Center* v. *Brown,* 640 F.3d 1063 (9th Cir. 2011) (*NEDC*), a citizen suit was filed alleging violations of the Clean Water Act for discharging stormwater from ditches alongside two logging roads in state forests without a permit. The court held that because the stormwater runoff from the two roads in question is collected by and then discharged from a system of ditches, culverts and channels, there was a point source discharge of industrial stormwater for which an NPDES permit is required. As discussed above, the Agency specified in the Phase I rule that the term ''storm water discharge associated with industrial activity'' does not include discharges from facilities or activities excluded from the NPDES program under other parts of the EPA's regulations, including the aforementioned Silvicultural Rule. The EPA intends through this regulation to more clearly limit Phase I applicability to only those silvicultural facilities that are ''rock crushing, gravel washing, log sorting, and log storage facilities.''

In response to the partial remand under *Environmental Defense Center, Inc. (EDC)* v. *US EPA,* 344 F.3d 832 (9th Cir. 2003), the Agency continues to review available information on the water-quality impacts of stormwater discharges from forest roads, which include logging roads as discussed above, as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency's section 402(p) rulemaking authority. The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well suited to address the complexity of forest road ownership, management, and use.

In the interim, the EPA notes that Congress has directed that permits are not required for stormwater discharges for logging roads. Under the continuing resolution passed in September, 2012, until March 27, 2013, the Administrator may not require an NPDES permit or directly or indirectly require any state to require a permit, for discharges of stormwater runoff from roads, the construction, use, or maintenance of which are associated with silvicultural activities.

III. EPA's Proposed Revisions and Public Comments Received on Proposed Rule

A. Proposed Revisions

The EPA proposed to revise 40 CFR 122.26(b)(14)(ii) to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under SIC code 2411 that are ''industrial'' are rock crushing, gravel washing, log sorting, and log storage. This revision does not remove any existing exemptions. Though the existing language in 40 CFR 122.26(b)(14)(ii) excepts SIC code 2434, wood kitchen cabinets, the wood kitchen cabinets category remains covered in a separate subsection. *See id.* at 122.26(b)(14)(xi) (listing ''Facilities covered under Standard Industrial Classifications 20, 21, 22, 23, 2434 * * *'' as engaging in industrial activity for purposes of the industrial stormwater regulations).

B. Public Comments

The EPA received 85 comment letters on its ''Notice of Proposed Revisions to Stormwater Regulations to Clarify That an NPDES Permit is not Required for Stormwater Discharges From Logging Roads'' (77 FR 53834, September 4, 2012). The Agency had previously announced its plan to propose these revisions in an earlier notice, ''Notice of Intent to Revise Stormwater Regulations To Specify That an NPDES Permit is Not Required for Stormwater Discharges From Logging Roads and To Seek Comment on Approaches for Addressing Water Quality Impacts From Forest Road Discharges'' (77 FR 30473, May 23, 2012). While the EPA has reviewed and is considering the comments received in response to the May 23 Notice of Intent, the Agency explained in its September 4 proposal that the EPA is not developing responses to those comments as part of this rulemaking.

The EPA has reviewed and considered all of the comments received on the proposed revisions. Many commenters expressed support for the EPA's proposal. Most agreed with the objective to clarify the applicability of Phase I stormwater regulations but some suggested alternate language or approaches to reach that objective. For example, some suggested that the EPA simply state in its regulations that stormwater discharges from logging roads do not require a NPDES permit. Others recommended that the EPA assert that logging roads are nonpoint sources and therefore would not require a NPDES permit.

The EPA believes that the final language clarifies the applicability of Phase I stormwater regulations to stormwater discharges from logging roads. The final language indicates explicitly which facilities are included in the definition of stormwater discharges ''associated with industrial activity'' (i.e., ''Facilities classified within Standard Industrial Classification 24, Industry Group 241

that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities''). Moreover, the final language further explains that ''not included are all other types of silvicultural facilities.''

Many commenters suggested that the EPA delay finalizing the rule until after the Supreme Court rules on *Decker* v. *Northwest Environmental Defense Center,* No. 11–388, and *Georgia-Pacific West* v. *Northwest Environmental Defense Center,* No. 11–347. Some suggested that the Agency should have sought relief from the Supreme Court or Congress. The EPA disagrees with these commenters because today's action ends any uncertainty created by the Ninth Circuit's holding in *NEDC* administratively by clarifying what constitutes a discharge ''associated with industrial activity'' in connection with silvicultural activities. By moving to finalize this rule expeditiously, the EPA is providing the regulatory certainty needed in the wake of the Ninth Circuit's decision and is reaffirming the EPA's long-standing regulatory position regarding the applicability of stormwater regulations to logging roads. In doing so, this final rule cancels out any on-the-ground impact of the Ninth Circuit's decision. Further, the EPA actions are consistent with *amicus curiae* briefs filed by the United States Department of Justice (DOJ) on May 24 and again on September 4, which described to the public and to the Supreme Court the administrative steps that the EPA would take to clarify ''expeditiously'' that an NPDES permit is not required for stormwater discharges from logging roads.

Some commenters disagreed with the EPA's proposal, asserting that at least a subset of stormwater discharges from logging roads is truly industrial in nature and that those discharges should require NPDES permits. The EPA clarifies the applicability of Phase I stormwater regulations to stormwater discharges from logging roads and the Agency's rationale in section II.B of this preamble. As the EPA notes, the Agency did not intend logging roads themselves to be regulated as industrial facilities and its view has not changed since EPA first issued the Phase I stormwater rule. The EPA is revising that rule to clarify the Agency's original intent.

Some commenters asserted that the water quality impacts of stormwater discharges from logging roads and other forest roads are well-documented and suggested that the Agency should regulate them. Other commenters pointed to existing programs and suggested that a national regulation is unnecessary. Some asserted that existing state, federal, and tribal programs are insufficient to protect water quality. Others commented that the Agency already has all of the information it needs in order to regulate stormwater discharges from forest roads and suggested that if information gaps remain, the Agency should specify what information is needed and indicate on what schedule that information will be collected.

The EPA is not proposing new regulations for stormwater discharges from forest roads, including logging roads, at this time. While the EPA has not developed a specific schedule for addressing stormwater discharges from forest roads, the Agency notes that, in response to the partial remand under *EDC* v. *US EPA,* the Agency continues to review available information on the water quality impacts of stormwater discharges from forest roads, which include logging roads, as well as existing practices to control those discharges and is considering a range of options to address such discharges, which could include designating a subset of stormwater discharges from forest roads for regulation under the Agency's section 402(p) rulemaking authority. The EPA believes that the broad range of flexible approaches under section 402(p)(6) may be well-suited to address the complexity of forest road ownership, management, and use.

IV. Final Rule

The EPA has made no revisions to the proposed rule. The EPA is revising 40 CFR 122.26(b)(14)(ii) to clarify that for the purposes of defining stormwater discharges associated with industrial activity, the only activities under SIC code 2411 that are ''industrial'' are rock crushing, gravel washing, log sorting, and log storage. This revision does not remove any existing exemptions. Though the existing language in 40 CFR 122.26(b)(14)(ii) excepts SIC code 2434, wood kitchen cabinets, the wood kitchen cabinets category remains covered in a separate subsection. *See id.* at 122.26(b)(14)(xi) (listing ''Facilities covered under Standard Industrial Classifications 20, 21, 22, 23, 2434 * * *'' as engaging in industrial activity for purposes of the industrial stormwater regulations.)

As discussed in this preamble, the EPA did not intend logging roads themselves to be regulated as industrial facilities, but, in light of *NEDC,* the EPA is modifying 40 CFR 122.26(b)(14) to clarify the Agency's intent. The EPA believes that stormwater discharges from forest roads, including logging roads, should be evaluated under section 402(p)(6) of the Clean Water Act because the section allows for a broad range of flexible approaches, including non-permitting approaches, that may be better suited to address the complexity of forest road ownership, management, and use.

V. Economic Impact

The final rule clarifies existing regulations and does not impose new regulatory requirements. As a result this action has no economic, public health, or environmental impacts.

VI. Statutory and Executive Order Review

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is a ''significant regulatory action.'' Accordingly, the EPA submitted this action to the Office of Management and Budget (OMB) for review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) and any changes made in response to OMB recommendations have been documented in the docket for this action.

B. Paperwork Reduction Act

This action does not impose any new information collection burden as it serves only to clarify existing regulations. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR 122.26) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2040–0004. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business ''as defined by the Small Business Administration's (SBA)

regulations at 13 CFR 121.201;'' (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This rule will not impose any requirements on small entities. Rather, the rule clarifies that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that an NPDES permit is not required for these stormwater discharges.

D. Unfunded Mandates Reform Act (UMRA)

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. This action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. This action clarifies existing regulations and has no economic impact. Thus, it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government as specified in Executive Order 13132 (64 FR 43255, November 2, 1999).

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

The action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because it is not economically significant as defined in Executive Order 12866. Moreover, this action clarifies existing regulations and has no economic, public health, or environmental impacts.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

The action is not a ''significant energy action'' as defined in Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Additionally, the change does not involve the installation of treatment or other components that use a measurable amount of energy.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs the EPA to provide Congress, through OMB, explanations when the EPA decides not to use available and applicable voluntary consensus standards.

The action clarifies existing regulations and makes no change to existing standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission. Agencies must do this by identifying and addressing as appropriate any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

The EPA has determined that this action does not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The action clarifies existing regulations and has no economic, public health, or environmental impacts.

K. Congressional Review Act

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 rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. 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). This rule will be effective January 7, 2013.

List of Subjects in 40 CFR Part 122

Environmental protection, Water pollution control.

Dated: November 30, 2012.

Lisa P. Jackson,

Administrator.

For the reasons set out in the preamble, 40 CFR part 122 is amended as follows:

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 1. The authority citation for part 122 continues to read as follows:

Authority: 33 U.S.C. 1251 et seq.

Subpart B—Permit Application and Special NPDES Program Requirements

■ 2. Section 122.26 is amended by revising paragraph (b)(14)(ii) to read as follows:

§ 122.26 Storm water discharges (applicable to State NPDES programs, see § 123.25).

* * * * *

(b) * * *

(14) * * *

(ii) Facilities classified within Standard Industrial Classification 24, Industry Group 241 that are rock crushing, gravel washing, log sorting, or log storage facilities operated in connection with silvicultural activities defined in 40 CFR 122.27(b)(2)–(3) and Industry Groups 242 through 249; 26 (except 265 and 267), 28 (except 283), 29, 311, 32 (except 323), 33, 3441, 373;

(not included are all other types of silviculture facilities);

* * * * *

[FR Doc. 2012–29688 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0472; FRL–9371–7]

Zeta Cypermethrin; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of zeta-cypermethrin in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 7, 2012. Objections and requests for hearings must be received on or before February 5, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0472, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; email address: *ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0472 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 5, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0472, by one of the following methods:

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

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** issue of August 4, 2010 (75 FR 46924) (FRL–8834–9), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0E7717) by the IR–4 Project, Rutgers, The State University of New Jersey, 500 College Rd. East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.418 be amended by establishing tolerances for residues of the insecticide zeta-cypermethrin, in or on pistachio at 0.05 parts per million (ppm), artichoke, globe at 0.80 ppm; barley, grain at 1.7 ppm; barley, hay at 5.0 ppm; barley, straw at 19.0 ppm; buckwheat, grain at 1.7 ppm; buckwheat, hay at 5.0 ppm; buckwheat, straw at 19.0 ppm; oat, grain at 1.7 ppm; oat, hay at 5.0 ppm; oat, straw at 19.0 ppm; rye, grain at 1.7 ppm; rye, hay at 5.0 ppm; and rye, straw at 19.0 ppm. That document referenced a summary of the petition prepared by FMC, the registrant, which is available in the docket, *http://www.regulations.gov.* A comment was received on the notice of filing. EPA's response to this comment is discussed in Unit IV.C.

In the **Federal Register** issue of February 25, 2011 (76 FR 10584) (FRL–8863–3), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 0E7804) by the IR–4 Project, Rutgers, The State University of New Jersey, 500 College Rd. East, Suite 201 W, Princeton, NJ 08540. The petition requested that 40 CFR 180.418 be amended by establishing tolerances for residues of the insecticide zeta-cypermethrin, (*S*-cyano(3-phenoxyphenyl) methyl (±))(cis-trans 3-(2,2-dichloroethenyl)-2,2 dimethylcyclopropanecarboxylate and

its inactive *R*-isomers, in or on avocado, black sapote, canistel, mamey sapote, mango, papaya, sapodilla, and star apple at 0.45 ppm. That document referenced a summary of the petition prepared by FMC, the registrant, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petitions, EPA has modified the levels for which tolerances are being established for some commodities. The reason for these changes is explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for zeta-cypermethrin including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with zeta-cypermethrin follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

The petitions for registration of these new uses of zeta-cypermethrin rely on zeta-cypermethrin data, as well as previously submitted data for the related registered insecticide cypermethrin, and the pending new active ingredient alpha-cypermethrin. Alpha-cypermethrin, cypermethrin, and zeta-cypermethrin are all pyrethroid insecticides and are isomer mixtures of the same chemical. Cypermethrin consists of a mixture of eight isomers (four diastereoisomeric pairs). Zeta-cypermethrin is composed of four of the eight isomers of cypermethrin, and also contains one of the isomers in alpha-cypermethrin. Alpha-cypermethrin consists of two of the four cis-isomers of cypermethrin.

Alpha-cypermethrin, cypermethrin, and zeta-cypermethrin have been evaluated for a variety of toxic effects in experimental toxicity studies. Behavioral changes commonly seen with type II pyrethroids were consistently noted in the toxicology database. These included tremors, gait abnormalities, limb conditions, ataxia, and hypersensitivity. Additionally, body weight changes were routinely observed and mortality was seen in a few studies in rats and dogs. Clinical signs were also noted in all acute neurotoxicity studies. Decreased activity, gait abnormalities, tremors, limb conditions, and hypersensitivity were observed at the mid and high doses. Additionally, slight nerve degeneration was seen in the acute neurotoxicity study with alpha-cypermethrin at the high dose. In the subchronic neurotoxicity studies with cypermethrin and zeta-cypermethrin, similar behavioral effects were seen along with decreased food consumption, body weight, and body weight gain.

Dermal toxicity studies are available for zeta-cypermethrin (rat) and cypermethrin (rabbit), in which local irritation was observed in rats and rabbits at the highest doses tested. No systemic effects were observed in the 21-day dermal study in the rat conducted with zeta-cypermethrin at dose levels up to 1,000 milligram/kilogram/day (mg/kg/day). In the dermal toxicity study in rabbits with cypermethrin, systemic effects were observed (focal necrosis of the liver, decreased testicular weights, and decreased body weight in females). However, these observations in the rabbit were not used for risk assessment because the testing method (i.e., abraded skin) does not simulate actual exposure and results in compromised test conditions. Additionally, there would be physiological differences between abraded and non-abraded animals, further undermining the relevance of these results for risk assessment.

Developmental toxicity and reproduction studies are available for the cypermethrins. In the developmental toxicity studies in rats with cypermethrin and zeta-cypermethrin, there was no evidence of developmental toxicity up to the highest doses tested. Maternal toxicity included decreased body weight gain and food consumption in both chemicals. Splayed limbs, spasms, and hypersensitivity to noise and convulsions were seen with cypermethrin, and ataxia, urine-stained abdominal fur, and fecal-stained fur were seen with zeta-cypermethrin. In the developmental toxicity study in rats with alpha-cypermethrin, offspring effects were limited to decreased fetal body weight. Maternal effects observed in the study were unsteady gait, piloerection, limb splay, and hypersensitivity to sound and touch at the same dose. In the developmental toxicity studies in rabbits with alpha-cypermethrin, cypermethrin, and zeta-cypermethrin, there was no evidence of developmental toxicity up to the highest dose tested. Maternal effects seen with cypermethrin included decreased body weight gain, anorexia, abdomino-genital staining, decreased feces, and red or pink material in the pan. With alpha-cypermethrin, maternal effects were body weight loss and decreased food consumption. Multi-generation reproduction studies in rats are available for cypermethrin and zeta-cypermethrin. In the reproduction study with cypermethrin, decreased body weight gain was observed in adult animals and decreased body weight was seen in offspring animals at the highest dose tested. In the reproduction study with zeta-cypermethrin, decreased body weight gain and mortality were observed in offspring animals in the presence of mortality, increased brain weights, decreased body weights, and neurotoxicity in maternal animals.

No effects were observed in an immunotoxicity study in rats with alpha-cypermethrin up to the limit dose.

Cypermethrin is classified as a Group C ''Possible human carcinogen,'' based on an increased incidence of lung adenomas and adenomas plus carcinomas combined in females in a mouse carcinogenicity study. The presence of common benign tumors (lung adenomas), in one species (mice) and one sex (female), with no increase in the proportion of malignant tumors or decrease in the time-to-tumor occurrence, together with the lack of

mutagenic activity, was not considered strong enough to warrant a linear or no-threshold approach to quantitation of human cancer risk. Quantification of risk using a non-linear approach (i.e., acute population adjusted dose (aPAD), acute reference dose (aRfD)) will adequately account for all chronic toxicity, including carcinogenicity that could result from exposure to cypermethrin. While the Agency would typically use a chronic population adjusted dose (cPAD) to protect for cancer concerns, use of the aPAD is protective because increasing toxicity with increasing duration of exposure is not demonstrated for the cypermethrins. The no-observed-adverse-effect-level (NOAEL) observed in the mouse cancer study in which tumors were observed is 14 mg/kg/day, 2-fold higher than the point of departure (POD) used for acute risk assessment. The lowest-observed-adverse-effect-level (LOAEL) in the mouse cancer study is 57 mg/kg/day based on liver effects, not tumor formation. The tumors were seen at 229 mg/kg/day. The acute POD of 7.16 mg/kg/day selected for risk assessment is 32-fold lower than the dose that induced lung tumors in mice. Only the mouse study with cypermethrin resulted in tumor formation, no evidence of carcinogenicity was observed in cancer studies in rats with cypermethrin or mice with alpha-cypermethrin.

Acute lethality studies conducted with alpha-cypermethrin, cypermethrin, and zeta-cypermethrin indicate moderate acute toxicity via the oral route and low toxicity via the acute dermal or inhalation routes. Additionally, mild irritation was seen in primary eye and skin irritation studies but no dermal sensitization was observed.

Specific information on the studies received and the nature of the adverse effects caused by zeta-cypermethrin as well as the NOAEL and the LOAEL from the toxicity studies can be found at *http://www.regulations.gov* on pp. 60–67 of the document entitled ''Zeta-Cypermethrin—Human Health Risk Assessment for New Poultry House Use and Agricultural Uses on Tropical Fruit, Artichoke, Barley, Oat, Rye, Buckwheat, and Pistachio'' in docket ID number EPA–HQ–OPP–2010–0472.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological PODs and levels of concern (LOCs) to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. The PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for zeta-cypermethrin used for human risk assessment is shown in Table 1 of this unit.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ZETA-CYPERMETHRIN FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (children ≥ 6 years old and adults).	Wolansky $BMDL_{1SD}$ = 7.16 mg/kg. UF_A = 10x UF_H =10x FQPA SF = 1x	Acute RfD = 0.07 mg/kg/day. aPAD = 0.07 mg/kg/day	Wolansky BMD = 11.20 mg/kg based on motor activity.
Acute dietary (children <6 years old)	Wolansky $BMDL_{1SD}$ = 7.16 mg/kg. UF_A = 10x UF_H =10x FQPA SF = 3x	Acute RfD = 0.07 mg/kg/day. aPAD = 0.023 mg/kg/day	Wolansky BMD = 11.20 mg/kg based on motor activity.
Chronic dietary (All populations)	Because of the rapid reversibility of the most sensitive neurotoxicity endpoint used for quantifying risks, there is no increase in hazard with increasing dosing duration, and therefore the acute dietary endpoint is protective for chronic exposure		
Incidental oral short-term (1 to 30 days) ...	Wolansky $BMDL_{1SD}$ = 7.16 mg/kg. UF_A = 10x UF_H =10x FQPA SF = 3x	LOC for MOE = 300	Wolansky BMD = 11.20 mg/kg based on motor activity.
Inhalation short-term (1 to 30 days) (children <6 years old).	NOAEL = 0.01 mg/L ..... HEC = 0.008 mg/L HED = 1.15 mg/kg/day UF_A = 3x UF_H = 10x FQPA SF = 3x	LOC for MOE = 100	21-Day inhalation study in the rat. LOAEL = 0.05 mg/L based on increased salivation.

TABLE 1—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR ZETA-CYPERMETHRIN FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Inhalation short-term (1 to 30 days) (children ≥ 6 years old and adults).	NOAEL = 0.01 mg/L HEC = 0.008 mg/L HED = 1.15 mg/kg/day UF_A = 3x UF_H = 10x FQPA SF = 1x	LOC for MOE = 30	21-Day inhalation study in the rat. LOAEL = 0.05 mg/L based on increased salivation.
Cancer (oral, dermal, inhalation)	Zeta-cypermethrin has been classified as a possible human carcinogen. Because of the rapid reversibility of the most sensitive neurotoxicity endpoint used for quantifying risks, there is no increase in hazard with increasing dosing duration. Therefore, the acute dietary endpoint is protective of the endpoints from repeat dosing studies, including cancer dietary exposures.		

1SD = 1 standard deviation. BMD = benchmark dose. BMDL = benchmark dose (lower limit of a 95% confidence interval). FQPA SF = Food Quality Protection Act Safety Factor. HEC = human equivalent concentration. HED = human equivalent dose. L = Liter. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to zeta-cypermethrin, EPA considered exposure under the petitioned-for tolerances as well as all existing zeta-cypermethrin tolerances in 40 CFR 180.418. EPA assessed dietary exposures from zeta-cypermethrin in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure.

Such effects were identified for zeta-cypermethrin. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA conducted a partially refined (probabilistic) dietary exposure assessment to determine the exposure and risk estimates which result from all the existing uses of cypermethrin and zeta-cypermethrin, as well as proposed new uses of alpha-cypermethrin and zeta-cypermethrin. Anticipated residues from USDA Pesticide Data Program (PDP) monitoring data, field trial data, and empirical processing factors were used where appropriate. Percent crop treated (PCT) estimates were used for some commodities.

ii. *Chronic exposure.* Based on the data summarized in Unit III.A., there is no increase in hazard from repeated exposures to zeta-cypermethrin; the acute dietary exposure assessment is protective for chronic dietary exposures because acute exposure levels are higher than chronic exposure levels. Accordingly, a dietary exposure assessment for the purpose of assessing chronic dietary risk was not conducted.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or non-linear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier non-cancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. As noted in Unit III.A., the Agency has determined that quantification of risk using a non-linear approach (i.e., aPAD) will adequately account for all chronic toxicity, including carcinogenicity that could result from exposure to zeta-cypermethrin. Additionally, because an assessment of cancer risk would estimate exposure based on average residue levels and the acute assessment used high-end residue levels, the acute dietary assessment will be protective of any cancer effects resulting from consumption of zeta-cypermethrin residues in foods.

iv. *Anticipated residue and percent crop treated (PCT) information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The following maximum PCT estimates were used in the acute dietary risk assessment for the following crops that are currently registered for zeta-cypermethrin/cypermethrin: Almonds, 2.5%; apples, 2.5%; broccoli, 30%; cabbage, 30%; carrot, 10%; cauliflower, 25%; celery, 60%; cherries, 5%; grapefruit, 50%; green beans, 20%; green peas, 15%; lemon, 2.5%; lettuce, 65%; orange, 45%; peach, 5%; peppers,

30%; potato, 5%; spinach, 45%; sweet corn, 20%; tomato, 10%; and watermelon, 10%.

The following average PCT estimates were used to calculate average dietary exposures in order to assess short-term aggregate risk to the cypermethrins for the following crops that are currently registered for cypermethrin/zeta-cypermethrin: Almonds, 1%; apples, 1%; broccoli, 20%; cabbage, 15%; carrot, 2.5%; cauliflower, 15%; celery, 35%; cherries, 5%; grapefruit, 35%; green beans, 15%; green peas, 10%; lemon, 1%; lettuce, 55%; orange, 35%; peach, 2.5%; peppers, 15%; potato, 1%; spinach, 30%; sweet corn, 15%; tomato, 5%; and watermelon, 2.5%.

In most cases, EPA uses available data from the United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which zeta-cypermethrin may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for zeta-cypermethrin in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of zeta-cypermethrin. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of zeta-cypermethrin for acute exposures are estimated to be 3.77 parts per billion (ppb) for surface water and 0.0036 ppb for ground water. The annual average typically used for chronic exposures are estimated to be 0.066 ppb for surface water and 0.0036 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For acute dietary risk assessment, the water concentration value of 3.77 ppb was used to assess the contribution to drinking water. For the purpose of assessing short-term aggregate risk (i.e., food, drinking water, and residential exposures) the chronic water concentration value of 0.066 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Cypermethrin and zeta-cypermethrin are registered for use on a variety of indoor and outdoor residential environments including: Lawns, gardens, pets, and indoor surfaces and spaces.

EPA assessed residential exposure using the following assumptions: The quantitative exposure/risk assessment developed for residential handlers is based on the following scenarios:

- Mixer/loader/applicator using hose-end sprayer on turf.
- Mixer/loader/applicator using backpack on turf and gardens.
- Mixer/loader/applicator using manually pressurized handwand for indoor surfaces.
- Application via aerosol can for indoor surfaces and space.

Since a dermal endpoint was not identified, only a quantitative inhalation handler exposure assessment was performed. Residential handler inhalation exposure estimates were calculated based on a human equivalent concentration and human equivalent dose which reflect 24 hours of exposure. Since handler exposure is expected to be significantly less than 24 hours, the inhalation exposure estimates are sufficiently protective of all scenarios (turf, gardens, and indoor surface space). Although there is potential inhalation exposure resulting from the application of dog tags and spot-on products for pets, inhalation exposure is considered negligible for these scenarios and therefore a quantitative assessment was not performed for these uses.

There is the potential for post-application exposure for individuals as a result of being in an environment that has been previously treated with cypermethrin or zeta-cypermethrin. Post-application inhalation exposure resulting from activities on or around previously treated turf is generally not assessed; the combination of low vapor pressure for chemicals typically used as active ingredients in outdoor residential pesticide products and dilution in outdoor air is likely to result in minimal inhalation exposure. Therefore, a quantitative post-application inhalation exposure assessment for cypermethrin turf uses was not conducted. Since a dermal endpoint was not identified, and indoor post-application inhalation exposure resulting from aerosol space sprays, foggers, and pet (i.e., dog tag, spot-on) uses is negligible, the only potential post-application exposure pathways of concern are incidental oral for children, and post-application inhalation exposure for adults and children resulting from indoor crack and crevice applications made with a manually pressurized handwand. The quantitative exposure/risk assessment for residential post-application exposures is based on the following scenarios:

- Incidental oral (hand-to-mouth, object-to-mouth, and soil ingestion) exposure from turf for children.
- Incidental oral (hand-to-mouth and object-to-mouth) exposure from indoor foggers for children.
- Incidental oral (hand-to-mouth and object-to-mouth) exposure from pets for children.

• Inhalation exposure for adults and children resulting from crack and crevice application to an indoor surface.

• Incidental oral (hand-to-mouth and object-to-mouth) exposure for children from indoor surface applications.

Risk estimates resulting from different exposure routes may be combined when it is likely that they can occur simultaneously based on the use pattern and when the toxicological effects across different routes of exposure are the same. Although, in the case of children, inhalation and incidental oral exposure routes share a common toxicological endpoint, risk estimates were not combined for those routes for turf, indoor fogger, and pet since post-application inhalation exposure is considered negligible. However, inhalation and incidental oral exposures were combined for post-application risk assessment associated with the indoor crack and crevice use. Inhalation and incidental oral routes have different LOCs. Therefore, in order to combine exposure from the various routes the aggregate risk index (ARI) approach is used to estimate exposure and risk. When this approach is used, aggregate risks are not of concern provided the calculated ARI is greater than one.

The incidental oral scenarios from indoor exposure following crack and crevice applications and outdoor exposure from turf were not combined, not only because they are not likely to co-occur, but also because combining these scenarios would be overly conservative due to the conservative nature of each of the individual assessments.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

The Agency is required to consider the cumulative risks of chemicals sharing a common mechanism of toxicity. The Agency has determined that the pyrethroids and pyrethrins, including zeta-cypermethrin, share a common mechanism of toxicity. The members of this group share the ability to interact with voltage-gated sodium channels, ultimately leading to neurotoxicity. The cumulative risk assessment for the pyrethroids/pyrethrins was published in the **Federal Register** issue of November 9, 2011 (76 FR 69726) (FRL–8888–9), and is available at *http://www.regulations.gov* in the docket, EPA–HQ–OPP–2011–0746. Further information about the determination that pyrethroids and pyrethrins share a common mechanism of toxicity may be found in document ID number EPA–HQ–OPP–2008–0489–0006.

The cypermethrins were included in a recent cumulative risk assessment for pyrethrins and pyrethroids. The proposed new uses of zeta-cypermethrin will not significantly impact the cumulative assessment because, in the cumulative assessment, residential exposure was the greatest contributor to the total exposure. As there are no new residential uses for the cypermethrins, the proposed new uses will have no impact on the residential component of the cumulative risk estimates.

Dietary exposures make a minor contribution to total pyrethroid exposure. The dietary exposure assessment performed in support of the pyrethroid cumulative was much more highly refined than that performed for the single chemical. The dietary exposure assessment for the single chemical included conservative assumptions, using field trial data for many commodities, including the proposed new uses with the assumption of 100 PCT, and the most sensitive apical endpoint in the cypermethrins hazard database was selected to derive the POD. Additionally, the POD selected for zeta-cypermethrin is specific to the cypermethrins, whereas the POD selected for the cumulative assessment was based on common mechanism of action data that are appropriate for all 20 pyrethroids included in the cumulative assessment.

For information regarding EPA's efforts to evaluate the risk of exposure to pyrethroids, refer to *http://www.epa.gov/oppsrrd1/reevaluation/pyrethroids-pyrethrins.html.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional 10-fold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act Safety Factor (FQPA SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* In guideline developmental and reproduction studies with the cypermethrins, there was no evidence of increased qualitative or quantitative susceptibility in rats or rabbits.

In a guideline Developmental Neurotoxicity (DNT) study with zeta-cypermethrin, there was increased sensitivity in the offspring based on body weight changes in pups (5–10%) in the absence of treatment-related effects in maternal animals. Although, there was a 5–8% decrease in maternal body weight in this study, a body weight decrease of <10% is generally not considered adverse in adults, as this is considered to be within the range of variability because the magnitude of body weight *per* se is typically small (as an example, a 3 gram (g) decrease in body weight from a 338 g rat), and adults are no longer in the growth/development phase. In contrast, the offspring are at a stage of growth and development and are therefore expected to be gaining rather than losing weight. Thus, a smaller percent decrease in body weight is considered adverse in the young relative to adults. In the case of zeta-cypermethrin, the decrease in body weight of the young is comparable to adults; however, it was considered adverse in the young but not in the adults. This disparity in interpretation leads to an apparent increase in sensitivity in the young; however, concern is reduced since the magnitude of body weight decrements was similar in adult and young animals. The results from the DNT study are very similar to results observed in the reproduction studies where body weight changes (decreased body weight gain) were seen in maternal and offspring animals at doses similar to those in the DNT study, with no indication of increased susceptibility. Therefore, there is no residual concern for effects observed in the study. Additionally, there are well characterized dose responses with clear NOAELs and LOAELs for effects seen in the DNT and reproduction studies and the endpoints and PODs selected for risk assessment are protective.

High-dose LD_{50} studies (studies assessing what dose results in lethality to 50% of the tested population) in the scientific literature indicate that pyrethroids can result in increased quantitative sensitivity in the young, specifically in the form of neurotoxicity. Examination of pharmacokinetic and

pharmacodynamic data indicates that the sensitivity observed at high doses is related to pyrethroid age-dependent pharmacokinetics—the activity of enzymes associated with the metabolism of pyrethroids. With otherwise equivalent administered doses for adults and juveniles, predictive pharmacokinetic models indicate that the differential adult-juvenile pharmacokinetics will result in a 3X greater dose at the target organ in juveniles compared to adults. No evidence of increased quantitative or qualitative susceptibility was seen in the pyrethroid scientific literature related to pharmacodynamics (the effect of pyrethroids at the target tissue) both with regard to inter-species differences between rats and humans and to differences between juveniles and adults. Specifically, there are *in vitro* pharmacodynamic data and *in vivo* data indicating similar responses between adult and juvenile rats at low doses and data indicating that the rat is a conservative model compared to the human based on species-specific pharmacodynamics of homologous sodium channel isoforms in rats and humans.

3. *Conclusion.* EPA is reducing the FQPA SF to 3X for infants and children less than 6 years of age. For the general population, including children greater than 6 years of age, EPA is reducing the FQPA SF to 1X. The decisions regarding the FQPA SFs being used are based on the following considerations:

i. The toxicology database for the cypermethrins is not complete. While the database is considered to be complete with respect to the guideline toxicity studies for zeta-cypermethrin, EPA lacks additional data to fully characterize the potential for juvenile sensitivity to neurotoxic effects of pyrethroids. In light of the literature studies indicating a possibility of increased sensitivity in juvenile rats at high doses, EPA has requested proposals for study protocols which could identify and quantify potential juvenile sensitivity. However, when evaluated together, the toxicity studies for alpha-cypermethrin, cypermethrin, and zeta-cypermethrin can be used to characterize toxic effects including potential developmental and reproductive toxicity, immunotoxicity, and neurotoxicity. Acceptable developmental toxicity studies in rats and rabbits, reproduction studies in rats, neurotoxicity studies (Acute Neurotoxicity (ACN), Subchronic Neurotoxicity (SCN), and DNT) in rats, and immunotoxicity studies in rats are available. In addition, route-specific dermal and inhalation studies are available.

ii. After reviewing the extensive body of data and peer-reviewed literature on pyrethroids, the Agency has reached a number of conclusions regarding fetal and juvenile sensitivity for pyrethroids, including the following:

- Based on an evaluation of over 70 guideline toxicity studies for 24 pyrethroids submitted to the Agency, including prenatal developmental toxicity studies in rats and rabbits, and pre- and postnatal multi-generation reproduction toxicity studies and DNTs in rats in support of pyrethroid registrations, there is no evidence that pyrethroids directly impact developing fetuses. None of the studies show any indications of fetal toxicity at doses that do not cause maternal toxicity.
- Increased susceptibility was seen in offspring animals in the DNT study with zeta-cypermethrin (decreased pup body weights) and DNT and reproduction studies with beta-cyfluthrin (decreased body weights and tremors). However, the reductions in body weight and the other non-specific effects occur at higher doses than neurotoxicity, the effect of concern for pyrethroids. The available developmental and reproduction guideline studies in rats with zeta-cypermethrin did not show increased sensitivity in the young to neurotoxic effects. Overall, findings of increased sensitivity in juvenile animals in pyrethroid studies are rare. Therefore, the residual concern for the postnatal effects is reduced.
- High-dose LD_{50} studies (studies assessing what dose results in lethality to 50% of the tested population) in the scientific literature indicate that pyrethroids can result in increased quantitative sensitivity to juvenile animals. Examination of pharmacokinetic and pharmacodynamic data indicates that the sensitivity observed at high doses is related to pyrethroid age-dependent pharmacokinetics—the activity of enzymes associated with the metabolism of pyrethroids. Furthermore, a rat physiologically-based pharmacokinetic (PBPK) model predicts a three-fold increase of pyrethroid concentration in juvenile brain compared to adults at high doses.
- *In vitro* pharmacodynamic data and *in vivo* data indicate that adult and juvenile rats have similar responses to pyrethroids at low doses and therefore juvenile sensitivity is not expected at relevant environmental exposures. Further, data also show that the rat is a conservative model compared to the human based on species-specific pharmacodynamics of homologous sodium channel isoforms.

iii. There are no residual uncertainties with regard to dietary and residential exposure. The dietary exposure assessments are based on high-end health protective residue levels (that account for parent and metabolites of concern), processing factors, and PCT assumptions. Furthermore, conservative, upper-bound assumptions were used to determine exposure through drinking water and residential sources, such that these exposures have not been underestimated.

Taking all of this information into account, EPA has reduced the FQPA SF for women of child-bearing age and children over 6 to 1X because there is no evidence in the over 70 guideline toxicity studies submitted to the Agency, including prenatal developmental toxicity studies in rats and rabbits, and multi-generation reproduction toxicity studies and DNTs in rats, that pyrethroids directly impact developing fetuses. Additionally, none of the studies show any indications of fetal toxicity at doses that do not cause maternal toxicity. Because there remains some uncertainty as to juvenile sensitivity due to the findings in the high-dose LD_{50} studies, EPA is retaining a FQPA SF for infants and children less than 6 years of age. By age 6, the metabolic system is expected to be at or near adult levels thus reducing concerns for potential age-dependant sensitivity related to pharmacokinetics. EPA is seeking additional data to further characterize the potential neurotoxicity for pyrethroids. However, EPA has reliable data that show that reducing the FQPA SF to 3X will protect the safety of infants and children. These data include:

- Data from guideline studies with zeta-cypermethrin at relatively high doses that show no sensitivity with regard to neurotoxic effects (the most sensitive effect for the pyrethroids) and no residual concern regarding overall juvenile sensitivity (i.e., sensitivity seen in body weight changes occurred at doses above the level chosen for the POD).
- Data showing that the potential sensitivity at high doses is likely due to pharmacokinetics.
- A rat PBPK model predicting a three-fold increase of pyrethroid concentration in juvenile brain compared to adults at high doses due to age-dependent pharmacokinetics.
- Data indicating that the rat is a conservative model compared to the human based on species-specific pharmacodynamics of homologous sodium channel isoforms.

For several reasons, EPA concludes these data show that a 3X factor is protective of the safety of infants and children. First, it is likely that the extensive guideline studies with zeta-cypermethrin showing no neurotoxicity sensitivity between adults and juveniles better characterize the potential sensitivity of juvenile animals than the LD_{50} studies. The high doses that produced juvenile sensitivity in the literature studies are well above normal dietary or residential exposure levels of pyrethroids to juveniles and lower levels of exposure anticipated from dietary and residential uses are not expected to overwhelm the juvenile's ability to metabolize pyrethroids, as occurred with the high doses used in the literature studies. The fact that a greater sensitivity to the neurotoxicity of pyrethroids is not found in guideline studies following *in utero* exposures (based on 76 studies for 24 pyrethroids) supports this conclusion, despite the relatively high doses used in the studies. Second, *in vitro* and *in vivo* data indicate similar pharmacodynamic response to pyrethroids between juvenile and adult rats. Finally, as indicated, pharmacokinetic modeling only predicts a 3X difference between juveniles and adults. Therefore, the FQPA SF of 3X is protective of potential juvenile sensitivity.

The portion of the uncertainty factor that accounts for potential pharmacodynamic differences between animals and rats (i.e., the inter-species extrapolation factor) are likely to overstate the risk of zeta-cypermethrin given the data showing similarities in pharmacodynamics between animals and humans. For the inter-species factor, the pharmacodynamic portion of the factor is generally considered to be 3X, however for pyrethroids the actual difference is likely to be lower than 3X. In addition, there are data that show that there are no lifestage pharmacodynamic differences between young and adult rats. Standard uncertainty factors, such as those used in the zeta-cypermethrin risk assessment, assume that there will be such differences. Finally, as indicated, pharmacokinetic modeling only predicts a 3X difference between juveniles and adults. Thus, even if there is increased juvenile neurotoxic sensitivity and even if the existing inter-species factor does not provide extra protection due to the conservative nature of their pharmacodynamic components for pyrethroids, the 3X additional factor will protect the young.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to alpha-cypermethrin, cypermethrin, and zeta-cypermethrin will occupy 87% of the aPAD for all infants less than 1 year old and children 1–2 years old, the population groups receiving the greatest exposure.

2. *Chronic risk.* Based on the data summarized in Unit III.A., there is no increase in hazard with increasing dosing duration. Furthermore, chronic dietary exposures will be lower than acute exposures. Therefore, the acute aggregate assessment is protective of potential chronic aggregate exposures.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Cypermethrin and zeta-cypermethrin are currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to cypermethrin and zeta-cypermethrin.

For assessing short-term aggregate risk, the average dietary exposure estimate was used since it represents a background exposure level from food and drinking water that may co-occur with residential exposures. Dietary, inhalation, and incidental oral (hand to mouth) risks for children, and dietary and inhalation risks for adults were combined in this assessment, since the toxicological endpoints were the same. However, the LOC values for children younger than 6 years old were different for oral and inhalation exposure, with an incidental oral LOC of 300, and an inhalation LOC of 100. Likewise, the inhalation and dietary LOCs for adults were different, with an inhalation LOC of 30 and a dietary LOC of 100. Therefore, the respective risk estimates are combined using the ARI approach. When this approach is used, aggregate risks are not of concern provided the calculated ARI is greater than 1. The ARI for adults was calculated to be 56 and the ARI for children was 2.3. Because these ARIs are greater than 1, the risk estimates are not of concern.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). An intermediate-term aggregate risk assessment was not conducted because zeta-cypermethrin is acutely toxic and does not increase in potency with repeated dosing. Because the neurotoxicity POD used for acute risk assessment is lower (more protective) than PODs for longer durations of exposure and acute and short-term exposure levels are higher than longer term exposure levels, the acute and short-term aggregate assessments are protective for intermediate-term aggregate risks anticipated from cypermethrin and zeta-cypermethrin exposure.

5. *Aggregate cancer risk for U.S. population.* For the reasons discussed in Unit III.A. (cancer effects are non-linear and appear at higher doses than acute effects) and Unit III.E.2. (chronic exposures are lower than acute exposures), the acute aggregate assessment is protective of potential cancer risk.

6. *Determination of safety.* Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population or to infants and children from aggregate exposure to alpha-cypermethrin, cypermethrin, and zeta-cypermethrin residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate tolerance-enforcement methods are available in ''PAM Volume II'' for determining residues of alpha-cypermethrin, cypermethrin, and zeta-cypermethrin in plant (Method I) and livestock (Method II) commodities. Both methods are gas chromatographic methods with electron-capture detection (GC/ECD), and have undergone successful Agency petition method validations (PMVs). Method I has a limit of detection (LOD) of 0.01 ppm, and Method II has LODs of 0.005 ppm in milk, and 0.01 ppm in livestock tissues. These methods are not stereospecific; thus no distinction is made between residues of cypermethrin (all 8 stereoisomers), zeta-cypermethrin

(enriched in 4 isomers) and alpha-cypermethrin (2 isomers).

B. International Residue Limits

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

There are multiple Codex MRLs for zeta-cypermethrin, but all are in conjunction with MRLs for total cypermethrin isomers (no MRLs have been established solely for zeta-cypermethrin). However, although the definitions of the covered isomers in the Codex MRLs and U.S. tolerances differ formally, they are effectively harmonized since the tolerance enforcement methods are not stereo-specific, and thus do not distinguish between residues of alpha-cypermethrin, cypermethrin, and zeta-cypermethrin. For enforcement purposes, the same moiety is being regulated. These tolerances will result in harmonized MRLs between EPA and Codex for mango (at 0.7 ppm) and papaya (at 0.5 ppm). The tolerances for artichoke, barley, buckwheat, oats, and rye will not be harmonized with Codex for the following reasons. In the case of artichoke, Codex has set a lower MRL of 0.1 ppm based on field trials conducted with alpha-cypermethrin with a different use pattern, including a lower use rate and longer pre-harvest interval (PHI). The Agency's tolerance for artichoke of 0.6 ppm is supported by the submitted residue data, with a higher use rate and shorter PHI. In addition, for grains (barley, oats, buckwheat, and rye), the Codex MRLs assume a post-harvest treatment whereas the proposed use pattern in the United States is for pre-harvest treatment.

C. Response to Comments

A comment was received that objected to the proposed tolerances primarily because of the amounts of pesticides already consumed and carried by the American population.

The Agency understands the commenter's concerns and recognizes that some individuals believe that pesticides should be banned completely. However, under the existing legal framework provided by FFDCA section 408, EPA is authorized to establish pesticide tolerances or exemptions where persons seeking such tolerances or exemptions have demonstrated that the pesticide meets the safety standard imposed by that statute. This citizen's comment appears to be directed at the underlying statute and not EPA's implementation of it; the citizen has made no contention that EPA has acted in violation of the statutory framework.

D. Revisions to Petitioned-for Tolerances

The Agency has modified the levels for which tolerances are being established for artichoke, globe (0.80 to 0.60 ppm); barley, grain (1.7 to 3.0 ppm); barley, hay (5.0 to 6.0 ppm); barley, straw (19.0 to 20 ppm); buckwheat, grain (1.7 to 3.0 ppm); buckwheat, hay (5.0 to 6.0 ppm); buckwheat, straw (19.0 to 20.0 ppm); oat, grain (1.7 to 3.0 ppm); oat, hay (5.0 to 6.0 ppm); oat, straw (19.0 to 20.0 ppm); rye, grain (1.7 to 3.0 ppm); rye, hay (5.0 to 6.0 ppm); rye, straw (19.0 to 20.0 ppm); mango (0.45 to 0.70 ppm); and avocado; canistel; papaya; sapodilla; sapote, black; sapote, mamey; and star apple (0.45 to 0.50 ppm). These revisions are due to either EPA's use of the Organization for Economic Cooperation and Development (OECD) tolerance calculation procedures or to harmonize with Codex MRLs.

Also, EPA has revised the tolerance expression to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of zeta-cypermethrin not specifically mentioned.

2. That compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of the insecticide, zeta-cypermethrin, (*S*-cyano(3-phenoxyphenyl) methyl (±))(cis-trans 3-(2,2-dichloroethenyl)-2,2 dimethylcyclopropanecarboxylate), including its metabolites and degradates in or on pistachio at 0.05 ppm; artichoke, globe at 0.60 ppm; barley, grain at 3.0 ppm; barley, hay at 6.0 ppm; barley, straw at 20 ppm; buckwheat, grain at 3.0 ppm; buckwheat, hay at 6.0 ppm; buckwheat, straw at 20.0 ppm; oat, grain at 3.0 ppm; oat, hay at 6.0 ppm; oat, straw at 20.0 ppm; rye, grain at 3.0 ppm; rye, hay at 6.0 ppm; rye, straw at 20.0 ppm; mango at 0.70 ppm; and avocado; canistel; papaya; sapodilla; sapote, black; sapote, mamey; and star apple at 0.50 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined

that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA) (15 U.S.C. 272 note).

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 30, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.418, revise the introductory text of paragraph (a)(2) and alphabetically add the following commodities to the table in paragraph (a)(2) to read as follows:

§ 180.418 Cypermethrin and an isomer zeta-cypermethrin; tolerances for residues.

(a) * * *

(2) Tolerances are established for residues of zeta-cypermethrin, (*S*-cyano(3-phenoxyphenyl) methyl (±))(cis-trans 3-(2,2-dichloroethenyl)-2,2 dimethylcyclopropanecarboxylate), including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only total cypermethrin, cyano(3-phenoxyphenyl)methyl 3-(2,2-dichloroethenyl)-2,2-dimethylcyclopropane carboxylate, in or on the commodity.

Commodity	Parts per million
* * * * *	
Artichoke, globe	0.60
Avocado	0.50
Barley, grain	3.0
Barley, hay	6.0
Barley, straw	20.0
* * * * *	
Buckwheat, grain	3.0
Buckwheat, hay	6.0
Buckwheat, straw	20.0
* * * * *	
Canistel	0.50
* * * * *	
Mango	0.70
* * * * *	
Oat, grain	3.0
Oat, hay	6.0
Oat, straw	20.0
* * * * *	
Papaya	0.50
* * * * *	
Pistachio	0.05
* * * * *	
Rye, grain	3.0
Rye, hay	6.0
Rye, straw	20.0
* * * * *	
Sapodilla	0.50
Sapote, black	0.50
Sapote, mamey	0.50
* * * * *	
Star apple	0.50
* * * * *	

* * * * *

[FR Doc. 2012–29683 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0759; FRL–9371–3]

Buprofezin Pesticide Tolerances; Technical Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; technical correction.

SUMMARY: EPA issued a final rule in the **Federal Register** of Wednesday, October 17, 2012, concerning buprofezin pesticide tolerances. This document corrects a typographical error.

DATES: This final rule correction is effective December 7, 2012.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0759, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Amaris Johnson, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–9542; email address: *johnson.amaris@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this action apply to me?

The Agency included in the final rule a list of those who may be potentially affected by this action.

II. What does this technical correction do?

The preamble for FR Doc. 2012–25548 published in the **Federal Register** issue of Wednesday, October 17, 2012 (77 FR 63745) (FRL–9364–9) is corrected as follows: On page 63750, third column, under Unit IV. D., *Revisions to Petitoned-for Tolerances,* in the second paragraph, correct the last word in the paragraph, which now reads ''Logan'' to read ''Longan.''

III. Why is this correction issued as a final rule?

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(3)(B)) provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment. EPA has determined that there is good cause for making this technical correction final without prior proposal and opportunity for comment, because it is

a typographical error only. EPA finds that this constitutes good cause under 5 U.S.C. 553(b)(3)(B).

IV. Do any of the statutory and executive order reviews apply to this action?

This technical correction only revises the spelling of one commodity and does not otherwise change the original final rule. As a technical correction, this action is not subject to the statutory and executive order review requirements. For information about the statutory and executive order review requirements as they relate to the final rule, see Unit VI. in the **Federal Register** of October 17, 2012 (77 FR 63745) (FRL–9364–9).

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: November 30, 2012.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR part 180 is corrected as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.511, remove from the table in paragraph (a), the entry for ''Logan'' and add an entry for ''Longan'' to read as follows:

§ 180.511 Buprofezin; tolerances for residues.

(a) * * *

Commodity	Parts per million
* * * * *	
Longan	0.30
* * * * *	

* * * * *

[FR Doc. 2012–29680 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 495

[CMS–0046–IFC]

RIN 0938–AR71

Office of the Secretary

45 CFR Part 170

RIN 0991–AB89

Health Information Technology: Revisions to the 2014 Edition Electronic Health Record Certification Criteria; and Medicare and Medicaid Programs; Revisions to the Electronic Health Record Incentive Program

AGENCY: Office of the National Coordinator for Health Information Technology (ONC) and Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services.

ACTION: Interim final rule with comment period.

SUMMARY: The Department of Health and Human Services (HHS) is issuing this interim final rule with comment period to replace the Data Element Catalog (DEC) standard and the Quality Reporting Document Architecture (QRDA) Category III standard adopted in the final rule published on September 4, 2012 in the **Federal Register** with updated versions of those standards. This interim final rule with comment period also revises the Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs by adding an alternative measure for the Stage 2 meaningful use (MU) objective for hospitals to provide structured electronic laboratory results to ambulatory providers, correcting the regulation text for the measures associated with the objective for hospitals to provide patients the ability to view online, download, and transmit information about a hospital admission, and making the case number threshold exemption for clinical quality measure (CQM) reporting applicable for eligible hospitals and critical access hospitals (CAHs) beginning with FY 2013. This rule also provides notice of CMS's intention to issue technical corrections to the electronic specifications for CQMs released on October 25, 2012.

DATES: *Effective Date:* This interim final rule with comment period is effective January 7, 2013.

The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of January 7, 2013.

Comment Date: To be assured consideration, written or electronic comments must be received at one of the addresses provided below, no later than 5 p.m. on February 5, 2013.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments, identified by RIN 0991–AB89 or RIN 0938–AR71, by any of the following methods (please do not submit duplicate comments).

- *Federal eRulemaking Portal:* Follow the instructions for submitting comments. Attachments should be in Microsoft Word, Adobe PDF, or Excel; however, we prefer Microsoft Word. *http://www.regulations.gov*.
- *Regular, Express, or Overnight Mail:* Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave. SW., Washington, DC 20201. Please submit one original and two copies.
- *Hand Delivery or Courier:* Office of the National Coordinator for Health Information Technology, Attention: Steven Posnack, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave. SW., Washington, DC 20201. Please submit one original and two copies. (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 mail drop slots located in the main lobby of the building.)

Inspection of Public Comments: All comments received before the close of the comment period will be available for public inspection, including any personally identifiable or confidential business information that is included in a comment. Please do not include anything in your comment submission that you do not wish to share with the general public. Such information includes, but is not limited to: A person's social security number; date of birth; driver's license number; state identification number or foreign country equivalent; passport number; financial account number; credit or debit card

number; any personal health information; or any business information that could be considered to be proprietary. We will post all comments received before the close of the comment period at *http://www.regulations.gov*.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave. SW., Washington, DC 20201 (call ahead to the contact listed below to arrange for inspection).

FOR FURTHER INFORMATION CONTACT:

Steven Posnack, Director, Federal Policy Division, Office of Policy and Planning, Office of the National Coordinator for Health Information Technology, 202–690–7151, for EHR technology standards and certification criteria issues.

Elizabeth Holland, (410) 786–1309, or Robert Anthony, (410) 786–6183, for Medicare EHR Incentive Program issues.

David Koppel, (410) 786–3255, for Medicaid EHR Incentive Program issues.

Maria Michaels, (410) 786–2809, for clinical quality measures issues.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Basis

1. Standards, Implementation Specifications, and Certification Criteria

The Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), was enacted on February 17, 2009. The HITECH Act amended the Public Health Service Act (PHSA) and created ''Title XXX—Health Information Technology and Quality'' (Title XXX) to improve health care quality, safety, and efficiency through the promotion of HIT and electronic health information exchange.

Section 3004(b)(3) of the PHSA titled ''Subsequent Standards Activity'' provides that the ''Secretary shall adopt additional standards, implementation specifications, and certification criteria as necessary and consistent'' with the schedule published by the HIT Standards Committee. We consider this provision in the broader context of the HITECH Act to grant the Secretary the authority and discretion to adopt standards, implementation specifications, and certification criteria that have been recommended by the HIT Standards Committee and endorsed by the National Coordinator, as well as other appropriate and necessary HIT standards, implementation specifications, and certification criteria.

2. HIT Certification Programs

Section 3001(c)(5) of the PHSA provides the National Coordinator with the authority to establish a certification program or programs for the voluntary certification of HIT. Specifically, section 3001(c)(5)(A) specifies that the ''National Coordinator, in consultation with the Director of the National Institute of Standards and Technology, shall keep or recognize a program or programs for the voluntary certification of health information technology as being in compliance with applicable certification criteria adopted under this subtitle'' (that is, certification criteria adopted by the Secretary under section 3004 of the PHSA). The certification program(s) must also ''include, as appropriate, testing of the technology in accordance with section 13201(b) of the [HITECH] Act.''

Section 13201(b) of the HITECH Act requires that with respect to the development of standards and implementation specifications, the Director of the National Institute of Standards and Technology (NIST), in coordination with the HIT Standards Committee, ''shall support the establishment of a conformance testing infrastructure, including the development of technical test beds.'' The HITECH Act also indicates that ''[t]he development of this conformance testing infrastructure may include a program to accredit independent, non-Federal laboratories to perform testing.''

3. Medicare and Medicaid Electronic Health Record (EHR) Incentive Programs

We described the legislative basis for the Medicare and Medicaid EHR Incentive Programs in our Stage 1 and 2 final rules. Such legislative basis remains the same for this interim final rule with comment period. We refer readers to the Stage 1 and 2 final rules (75 FR 44316 through 44317; 77 FR 53970) for discussions of legislative basis, including sections 1848(o), 1853(l) and (m), 1886(n), 1814(l), 1903(a)(3)(F), and 1903(t) of the Social Security Act (the Act).

B. Regulatory History

1. Standards, Implementation Specifications, and Certification Criteria Rules

In the September 4, 2012 **Federal Register** (77 FR 54163), the Secretary issued a final rule (the ''2014 Edition EHR certification criteria final rule'') that adopted the 2014 Edition EHR certification criteria and a revised Certified EHR Technology (CEHRT) definition. The standards, implementation specifications, and certification criteria adopted by the Secretary in the final rule established the capabilities that CEHRT must include in order to, at a minimum, support the achievement of meaningful use (MU) by eligible professionals (EPs), eligible hospitals, and critical access hospitals (CAHs) under the Medicare and Medicaid EHR Incentive Programs beginning with the EHR reporting periods in FY/CY 2014.

The Secretary previously issued an interim final rule (75 FR 2014, January 13, 2010) and final rule (75 FR 44590, July 28, 2010) which adopted an initial set of standards, implementation specifications, and certification criteria and a CEHRT definition to support MU (the ''2011 Edition EHR certification criteria final rule''). In the October 13, 2010 **Federal Register** (75 FR 62686), an interim final rule with comment period was issued to remove certain implementation specifications related to public health surveillance that had been previously adopted in the final rule.

2. HIT Certification Programs Rules

In the 2014 Edition EHR certification criteria final rule previously mentioned above, ONC made revisions to the permanent certification program, including changing the program's name to the ONC HIT Certification Program. Previously, the Secretary issued a final rule on January 7, 2011 (76 FR 1262) establishing the permanent certification program's requirements (now called the ONC HIT Certification Program) and a final rule on June 24, 2010 (75 FR 36158) establishing the temporary certification program.

3. Medicare and Medicaid EHR Incentive Programs Rules

CMS's final rule (the ''Stage 2 final rule'') implementing Stage 2 of meaningful use appeared in the September 4, 2012 **Federal Register** (77 FR 53968). The final rule also contained some revisions to Stage 1 of meaningful use, beginning with EHR reporting periods in FY/CY 2013. A correction notice appeared in the October 23, 2012 **Federal Register** (77 FR 64755).

II. Provisions of the Interim Final Rule With Comment Period

A. Adoption and Incorporation by Reference of Newer Versions of the DEC and QRDA III Standards

1. Data Element Catalog

In the 2014 Edition EHR certification criteria final rule (77 FR 54163), we adopted the Data Element Catalog (DEC), August 2012 version, standard at 45 CFR 170.204(c) and incorporated the standard by reference at 45 CFR 170.299(m)(5). The DEC is included in the certification criterion at 45 CFR 170.314(c)(1), which requires EHR technology presented for certification to be able to electronically record all of the data identified in the DEC that would be necessary to calculate each clinical quality measure (CQM).

On October 25, 2012, CMS released the final 2014 CQM electronic specifications (e-specifications).[1] In preparation for that release, we performed a gap analysis to determine whether the DEC, August 2012 version (now referred to as ''DEC version 1.0'') still appropriately specified all of the data that EHR technology would need to capture to support these final 2014 CQM e-specifications. Based on that analysis, we determined that the version of the DEC we adopted in the final rule needed to be updated in order to correctly align with data capture expectations expressed by numerous 2014 CQM e-specifications. Working with our colleagues at the National Library of Medicine (NLM), a new version of the DEC (version 1.1) [2] is now available that fully aligns with the final 2014 CQM e-specifications. By replacing the version of the DEC that is currently incorporated by reference at 45 CFR 170.299(m)(5) with an updated version (Data Element Catalog, Version 1.1 (October 2012)), EHR technology certified under the ONC HIT Certification Program will be capable of supporting the electronic capture of all of the necessary data for CQM calculation and submission by EPs, eligible hospitals, and CAHs for the Medicare and Medicaid EHR Incentive Programs. Based on our expectation that EHR technology testing and certification will begin in January 2013, if we do not act now to immediately update the version of the DEC currently incorporated by reference, EHR technology would be required to be tested and certified to DEC version 1.0 and thus capture, in some cases, less data than necessary to support the accurate calculation and reporting of the 2014 CQMs. As a consequence, CMS and the States would then receive incomplete CQM data from EPs, eligible hospitals, and CAHs. Therefore, we are replacing the version of the DEC that is currently incorporated by reference at 45 CFR 170.299(m)(5) with the updated version (DEC, Version 1.1 (October 2012)) that we are adopting as the standard referenced by the 2014 Edition EHR certification criterion at 45 CFR 170.314(c)(1).

2. Quality Reporting Document Architecture (QRDA) Category III (QRDA III)

In the 2014 Edition EHR certification criteria final rule, we adopted the QRDA III, Release 1, standard at 45 CFR 170.205(k) and incorporated the standard by reference at 45 CFR 170.299(f)(14). The QRDA III is included in the certification criterion at 45 CFR 170.314(c)(3), which requires EHR technology presented for certification to be capable of electronically creating a data file for transmission of clinical quality measurement data in accordance with QRDA III and that can be electronically accepted by CMS.

As noted in the 2014 Edition EHR certification criteria final rule (77 FR 54232), we adopted QRDA III (specifically, Quality Reporting Document Architecture Category III, Release 1, Implementation Guide for CDA Release 2 (US Realm) Based on HL7 CDA Release 2.0, August 2012) even though it had not been balloted because we expected it to become a normative standard in the near future and agreed with CMS's decision to select this format rather than developing its own CMS-defined XML template because QRDA III is a product of several years of industry consensus work. The QRDA III standard has now been successfully balloted (specifically, HL7 Implementation Guide for CDA® Release 2: Quality Reporting Document Architecture—Category III, DSTU Release 1 (US Realm) Draft Standard for Trial Use, November 2012).[3] The November 2012 balloted version of QRDA III clarifies ambiguities in the August version we adopted; specifically, certain data that would need to be included in any QRDA III file submitted to CMS, such as a provider's National Provider Identifier (NPI) or Taxpayer Identification Number (TIN) in order for the electronic submission to be properly processed. Additionally, some of the required components have been changed to optional in the November 2012 balloted version of the standard, which may reduce the burden for EHR technology developers. Finally, we are making this change because CMS intends to implement its electronic submission systems to receive QRDA III files formatted according to the November 2012 balloted version. For these reasons, we are replacing the version of the QRDA III that is currently incorporated by reference at 45 CFR 170.299(f)(14) with the November 2012 balloted version of QRDA III that we are adopting as the standard referenced by the 2014 Edition EHR certification criterion at 45 CFR 170.314(c)(3).

B. Revisions to the Medicare and Medicaid EHR Incentive Programs

1. Meaningful Use Criteria

a. Stage 2 Hospital Objective for Providing Electronic Lab Results to Ambulatory Providers

In the Stage 2 final rule (77 FR 54041 through 54043), we included the following objective and measure in the Stage 2 menu set for eligible hospitals and CAHs at 42 CFR 495.6(m)(6)(i) and (ii):

Objective: Provide structured electronic lab results to ambulatory providers.

Measure: Hospital labs send structured electronic clinical lab results to the ordering provider for more than 20 percent of electronic lab orders received.

The measure denominator is limited to lab orders received electronically by the hospital. In our response to comments in the Stage 2 final rule (77 FR 54042), we recognized that this measure is based on some degree of electronic health information exchange taking place between the hospital and the ordering provider. The measure denominator assumes that if a hospital does not receive a lab order electronically, it would be less likely to send the results electronically to the ordering provider. Upon further consideration, however, in cases where hospitals send a large number of lab results electronically in response to orders they receive through non-electronic means (for example, by phone or on paper), the measure might not capture a hospital's performance of the objective. In addition, a hospital that receives a very small percentage of its total lab orders electronically could have difficulty meeting the measure threshold regardless of the number of lab results it sends electronically to ordering providers. For example, if a hospital receives 10,000 lab orders and responds to 4,000 with structured electronic clinical lab results, but only

[1] *http://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/2014_ClinicalQualityMeasures.html.*

[2] *http://www.nlm.nih.gov/healthit/dec/.*

[3] *http://www.hl7.org/permalink/?CDAR2_IG_QRDA_CATIII_R1_NOV.*

100 of those orders were received electronically and of those 18 were responded to with structured electronic clinical lab results, then the hospital would score 18/100 and fail to meet the measure's 20-percent threshold despite sending 4,000 structured electronic clinical lab results.

While we continue to believe that most hospitals will find it advantageous to use the existing measure, for the reasons discussed previously, we are adding an alternative measure for this objective. Hospitals can meet either the existing measure or the alternative measure to satisfy the objective. The alternative measure is ''Hospital labs send structured electronic clinical lab results to the ordering provider for more than 20 percent of lab orders received'' at § 495.6(m)(6)(ii)(B). The denominator, numerator, and threshold for this alternative measure are as follows:

- *Denominator:* The number of lab orders received from ambulatory providers.
- *Numerator:* The number of lab orders in the denominator for which structured electronic clinical lab results were sent to the ordering provider.
- *Threshold:* The resulting percentage must be greater than 20 percent.

The existing measure of ''Hospital labs send structured electronic clinical lab results to the ordering provider for more than 20 percent of electronic lab orders received'' will be redesignated as 42 CFR 495.6(m)(6)(ii)(A). We clarify the numerator, denominator, and threshold of the existing measure as follows:

- *Denominator:* The number of electronic lab orders received from ambulatory providers.
- *Numerator:* The number of lab orders in the denominator for which structured electronic clinical lab results were sent to the ordering provider.
- *Threshold:* The resulting percentage must be greater than 20 percent.

b. Stages 1 and 2 Hospital Objective for View, Download, and Transmit

In the Stage 2 final rule (77 FR 54041 through 54043), we included the following objective and two associated measures in the Stage 2 core set for eligible hospitals and CAHs at 42 CFR 495.6(l)(8)(i) and (ii). We also included the objective and measure in the Stage 1 core set for eligible hospitals and CAHs at 42 CFR 495.6(f)(12)(i)(B) and (ii)(B).

Objective: Provide patients the ability to view online, download, and transmit information about a hospital admission.

Measures: (A) More than 50 percent of all patients who are discharged from the inpatient or emergency department (POS 21 or 23) of an eligible hospital or CAH have their information available online within 36 hours of discharge; and

(B) More than 5 percent of all patients who are discharged from the inpatient or emergency department (POS 21 or 23) of an eligible hospital or CAH (or their authorized representative) view, download or transmit to a third party their information during the EHR reporting period.

In the Stage 2 final rule (77 FR 53968), we inadvertently omitted the word ''unique'' from the regulation text for the two measures. We described in the preamble of the final rule (77 FR 54040) the denominators of the measures as ''Number of unique patients discharged from an eligible hospital's or CAH's inpatient or emergency department (POS 21 or 23) during the EHR reporting period.'' However, the regulation text for these measures incorrectly refers to ''all patients'' instead of ''all unique patients.'' Because we intended for the regulation text to be consistent with the measure specifications as described in the preamble, we are correcting the regulation text at § 495.6(f)(12)(ii)(B), (l)(8)(ii)(A), and (l)(8)(ii)(B) to clarify that these measures are based on the number of unique patients discharged from a hospital's inpatient or emergency department during the EHR reporting period.

2. Case Number Threshold Exemption for CQM Reporting for Hospitals

In the Stage 2 proposed rule, CMS solicited comments on whether a case number threshold would be appropriate for hospital clinical quality measures reporting, given the apparent burden on hospitals that very seldom have the types of cases addressed by certain measures. We requested comments on whether such thresholds should be established for 2013, noting that the issue would be mitigated beginning in 2014 by our proposal to establish a larger menu set of CQMs from which hospitals would select.

As we stated in the Stage 2 final rule (77 FR 54080), many commenters noted that the implementation of a case number threshold for hospital CQM reporting would help reduce the burden placed on hospitals that very seldom have cases that would be counted in the denominator of certain CQMs. Commenters suggested a variety of possible implementation mechanisms, but all commenters responded to the premise that the threshold would be in effect in FY 2013.

In the Stage 2 final rule, we adopted a policy that would apply beginning in FY 2014. Under such policy, eligible hospitals and CAHs with 5 or fewer inpatient discharges per quarter or 20 or fewer inpatient discharges per year (Medicare and non-Medicare combined), as defined by a CQM's denominator population, would be exempted from reporting on that CQM. We stated that the exemption would be available in all stages of meaningful use beginning in FY 2014, but that eligible hospitals and CAHs that submit CQMs through attestation (because they are demonstrating meaningful use for the first time) would not be able to qualify for the exemption. We explained that the burden of submitting aggregate population and sample size counts in order to qualify for the exemption would be at least equal to the effort required to obtain and attest to the calculated CQM data.

Upon further review of this policy, we believe there are valid reasons to make this policy applicable for EHR reporting periods in FY 2013, as well as for eligible hospitals and CAHs that are submitting their CQMs through attestation. For FY 2013, eligible hospitals and CAHs are required to submit information on each of the 15 CQMs that were finalized for FYs 2011 and 2012 in the Stage 1 final rule (75 FR 44418 through 44420). Because they do not have a choice as to which CQMs to report for FY 2013, hospitals may experience the burden of revising workflow in order to accurately report on CQMs for which they have fewer than 20 cases per year. In addition, after considering the workflow redesign costs that could be incurred by training staff to input data used in calculating low-volume CQMs, we have re-assessed the burdens of attesting to calculated CQM data and submitting aggregate population and sample size counts in order to qualify for the exemption.

Therefore, we are finalizing a case threshold exemption that is applicable for eligible hospitals and CAHs in all stages of meaningful use beginning with FY 2013. Eligible hospitals and CAHs that are demonstrating meaningful use for the first time and submitting their CQMs using attestation would be able to qualify for the exemption. Eligible hospitals and CAHs with 5 or fewer discharges during the relevant EHR reporting period (if attesting to a 90-day EHR reporting period), or 20 or fewer discharges during the year (if attesting to a full year EHR reporting period) as defined by the CQM's denominator population would be exempted from reporting on that CQM.

In FY 2013, since the reporting requirement is to report all 15 of the CQMs finalized in the Stage 1 final rule, invoking the case threshold exemption would reduce the number of CQMs a hospital would be required to report by

the number of CQMs for which it does not meet the case threshold of discharges as described earlier. For example, if the hospital submitted aggregate population and sample size data reflecting 4 stroke patients discharged in FY 2013, then the hospital would be exempt from reporting the CQMs that include stroke patients as part of the denominator population (that is, the 7 stroke CQMs out of the total 15 CQMs). Therefore, this hospital would successfully meet the CQM reporting requirements in FY 2013 if they submit the 8 remaining CQMs. If a hospital does not reach the case threshold for all 15 CQMs, the hospital would be exempt from reporting all CQMs.

Beginning in FY 2014, the reporting requirement is to report 16 CQMs covering at least 3 domains from a list of 29 CQMs. The hospital would follow the same process as in FY 2013, but in order to be exempted from reporting fewer than 16 CQMs it would need to qualify for the case threshold exemption for more than 13 of the 29 CQMs. If the hospital does not meet the case threshold for 13 or fewer CQMs, the hospital would be able to report at least 16 CQMs. Likewise, if the CQMs for which the hospital can meet the case threshold of discharges do not cover at least 3 domains, the hospital would be exempt from the requirement to cover the remaining domains. For example, if the hospital does not meet the case threshold of discharges for 13 CQMs, and thus could report 16 CQMs, but the 16 CQMs cover only 2 of the 3 domains, then the hospital would be exempt from covering the third domain.

To be eligible for the exemption, Medicare-eligible hospitals and CAHs must use the same process outlined in the Stage 2 final rule (see 77 FR 54080), including submitting aggregate population and sample size counts for Medicare and non-Medicare discharges as defined by the CQM's denominator population for the EHR reporting period no later than November 30 after the end of the fiscal year containing the EHR reporting period (for example, November 30, 2013 for the hospital's EHR reporting period that occurs in FY 2013). Medicaid-only hospitals, including children's hospitals, must report this same information to the state to which they attest, in a manner specified by that state.

3. Technical Corrections to CQM Electronic Specifications

During the time period since the final 2014 CQM e-specifications were released on October 25, 2012, we have identified technical errors in a few of the e-specifications that, if not corrected, would produce inaccurate results. In order to maintain the integrity of the CQM(s) affected by such errors, and to allow for accurate reporting of the measure(s), CMS will issue technical corrections to the e-specifications released on October 25, 2012. We expect to issue these corrections on or around December 21, 2012. In order to meet this date, we are encouraging individuals and organizations (in particular, vendors and system implementers) that have identified logic or other technical issues with any of the e-specifications released on October 25, 2012 to submit the issues to the following email address no later than December 10, 2012 (*HIT_quality_measurement@CMS.hhs.gov*). The corrected e-specifications will be required both for certification and reporting purposes.

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of the rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive the notice and comment procedure if the Secretary finds good cause that a notice and comment procedure is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the final notice or rule that is issued.

A. Adoption of Newer Versions of the DEC and QRDA III Standards

Under the regulatory framework we have established, EHR technology will be certified under the ONC HIT Certification Program and subsequently used by EPs, eligible hospitals, and CAHs to participate in the Medicare and Medicaid EHR Incentive Programs. We believe it would be contrary to the public interest if EHR technology is required to be certified to the versions of the DEC and QRDA III standards that we adopted in the 2014 Edition EHR certification criteria final rule. With respect to the DEC standard, the EHR technology would not be fully capable of electronically capturing all potentially necessary CQM data for electronic submission to CMS or the States under the Medicare and Medicaid EHR Incentive Programs. With respect to the QRDA III standard, the August 2012 version did not specify certain data that would need to be included in a QRDA III file submitted to CMS in order for the electronic submission to be properly processed. As we noted in section II.A.1 of this interim final rule with comment period, this update is necessary to prevent EHR technology from being required to be tested and certified to DEC version 1.0 and thus capture, in some cases, less data than necessary to support the accurate calculation and reporting of the 2014 CQMs. As a consequence, this would lead to CMS and the States receiving incomplete CQM data from EPs, eligible hospitals, and CAHs. Similarly, with respect to our adoption of the November 2012 balloted version of QRDA III, we believe that this step is necessary for a number of reasons, including: (1) The changes in the November 2012 version provide necessary clarifications that reduce implementation ambiguity and ensure that the data CMS needs to properly process electronically submitted QRDA III files is captured and transmitted; and (2) CMS's intentions to implement its electronic submission systems to receive QRDA III files formatted according to the November 2012 balloted version. Accordingly, by adopting the new versions of the DEC and QRDA III standards in this interim final rule with comment period to replace the previously adopted versions, we can facilitate the development and certification of EHR technology to standards that can fully support the electronic capture and electronic submission of CQM data under the Medicare and Medicaid EHR Incentive Programs, which benefits the public interest.

Finally, because testing and certification of EHR technology to the 2014 Edition EHR certification criteria is expected to begin in January 2013, updating these standards in advance would avoid the scenario where EHR technology would be certified to different versions of these standards, and consequently, some EHR technology may need to be re-developed and re-certified to meet the new versions of the standards. Based on this timeframe for EHR technology developers, and the additional time providers will need for adoption and implementation of certified EHR technology, we believe it would be impracticable and contrary to the public interest to undergo notice and comment rulemaking to adopt the new versions of the DEC and QRDA III standards.

B. Modifications to Meaningful Use Hospital Objectives

The alternative measure for the Stage 2 hospital objective of ''provide structured electronic lab results to ambulatory providers'' (42 CFR 495.6(m)(6)) that we are finalizing in this rule relieves a restriction on eligible

hospitals and CAHs. The correction of the regulation text for the measures associated with the hospital objective of ''provide patients the ability to view online, download, and transmit information about a hospital admission'' (42 CFR 495.6(f)(12)(i)(B) and 495.6(l)(8)(i)) is necessary to ensure accurate certification of EHR technologies. It would also be impracticable and contrary to the public interest to engage in notice and comment rulemaking to finalize these modifications. Because these measures are percentage-based, they are linked to the certification criteria that ONC has adopted at 45 CFR 170.314(g)(1) and (g)(2). Thus, if we did not institute these changes in a timely manner, it could potentially delay the certification of EHR technology to the 2014 Edition EHR certification criteria, which as noted in the preceding section is expected to begin in January 2013. A delay in the availability of certified EHR technology could negatively affect hospitals' ability to make informed purchasing decisions and shorten their timeframe to implement EHR technology certified to the 2014 Edition EHR certification criteria. We believe many hospitals would benefit from the certainty of knowing these changes as they begin their planning and analysis in advance of purchasing and updating their EHR technology. Furthermore, if there were to be a delay in the certification of EHR technology to the criteria adopted at 45 CFR 170.314(g)(1) and (g)(2), it could prevent hospitals from adopting and using 2014 Edition EHR technology to meet the CEHRT definition in FY 2013. For these reasons, there is good cause to make the changes to the objectives and measures effective prior to receiving public comment.

C. Case Number Threshold Exemption for CQM Reporting

The low case number threshold exemption we are finalizing in this rule relieves a restriction on eligible hospitals and CAHs. It also is contrary to the public interest, impracticable, and unnecessary to engage in notice and comment rulemaking to finalize this exemption. As CMS already received comments regarding the exemption being available for those hospitals reporting CQMs beginning in FY 2013, we believe it would be unnecessary to engage in another round of comments. In addition, eligible hospitals and CAHs require immediate notification of the exemption to be able to invoke it for EHR reporting periods in FY 2013; it would not be possible to engage in notice and comment rulemaking in time. It also benefits the public interest if eligible hospitals and CAHs, to the extent possible, do not encounter the burden of complying with reporting on CQMs for which they have case numbers beneath our thresholds. For these reasons, there is good cause to make the case number threshold exemption effective prior to receiving public comment.

IV. Response to Comments

Because of the 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 of that document.

V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 35).

VI. Regulatory Impact Statement

We have examined the impact of this interim final rule with comment period as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (February 2, 2011), the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), section 1102(b) of the Social Security Act, section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), and Executive Order 13132 on Federalism (August 4, 1999).

A. Executive Orders 12866 and 13563—Regulatory Planning and Review Analysis

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This interim final rule with comment period does not reach the economic threshold and, thus, is not considered a major rule. Therefore, an RIA has not been prepared.

B. Regulatory Flexibility Act and Social Security Act Section 1102(b)

The Regulatory Flexibility Act (RFA) requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. Similarly, CMS is also required by section 1102(b) of the Act to prepare an RIA if a rule will have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. We do not believe that the changes in this interim final rule with comment period alter any of the prior analyses we performed for the 2014 Edition EHR certification criteria final rule or the Stage 2 final rule; and therefore, the Secretary certifies that this interim final rule with comment period will not have a significant impact on a substantial number of small entities.

C. Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule (including an interim final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has federalism implications. Because this interim final rule with comment period does not impose any costs on state or local governments, the requirements of Executive Order 13132 are not applicable.

D. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 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. The current inflation-adjusted statutory threshold is approximately $139 million. This interim final rule with comment period will not impose an unfunded mandate on state, local, and tribal governments or on the private sector that will reach the threshold level.

The Office of Management and Budget reviewed this interim final rule with comment period.

List of Subjects

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.

45 CFR Part 170

Computer technology, Electronic health record, Electronic information system, Electronic transactions, Health, Health care, Health information technology, Health insurance, Health records, Hospitals, Incorporation by reference, Laboratories, Medicaid, Medicare, Privacy, Reporting and recordkeeping requirements, Public health, Security.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR part 495 and the Department amends 45 CFR subtitle A, subchapter D, part 170 as set forth below:

Title 42—Public Health

PART 495—STANDARDS FOR THE ELECTRONIC HEALTH RECORD TECHNOLOGY INCENTIVE PROGRAM

■ 1. The authority citation 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).

■ 2. Section 495.6 is amended as follows:

■ a. In paragraph (f)(12)(ii)(B), by removing the phrase ''all patients who are discharged'' and adding in its place the phrase ''all unique patients who are discharged''.

■ b. In paragraphs (l)(8)(ii)(A) and (B), by removing the phrases ''all patients who are discharged'' and adding in its place the phrases ''all unique patients who are discharged''.

■ c. By revising paragraph (m)(6)(ii).

The revision reads as follows:

§ 495.6 Meaningful use objectives and measures for EPs, eligible hospitals, and CAHs.

* * * * *

(m) * * *

(6) * * *

(ii) *Measures.* Hospital labs send structured electronic clinical lab results to the ordering provider for more than 20 percent of—

(A) The electronic lab orders received; or

(B) The lab orders received.

Title 45—Public Welfare

PART 170—HEALTH INFORMATION TECHNOLOGY STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA AND CERTIFICATION PROGRAMS FOR HEALTH INFORMATION TECHNOLOGY

■ 3. The authority citation for part 170 continues to read as follows:

Authority: 42 U.S.C. 300jj–11; 42 U.S.C 300jj–14; 5 U.S.C. 552.

■ 4. Amend § 170.299 by revising paragraphs (f)(14) and (m)(5) to read as follows:

§ 170.299 Incorporation by reference.

* * * * *

(f) * * *

(14) HL7 Implementation Guide for CDA® Release 2: Quality Reporting Document Architecture—Category III, DSTU Release 1 (US Realm) Draft Standard for Trial Use, November 2012, IBR approved for § 170.205.

* * * * *

(m) * * *

(5) Data Element Catalog, Version 1.1, October 2012, IBR approved for § 170.204.

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Section 3004 of the Public Health Service Act and Sections 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program);

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: December 3, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Dated: December 3, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2012–29607 Filed 12–4–12; 4:15 pm]

BILLING CODE 4150–45–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120718253–2644–02]

RIN 0648–BC30

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery Off the Southern Atlantic States; Transferability of Black Sea Bass Pot Endorsements

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement a revision of a disapproved action from Amendment 18A (the Resubmittal) to the Fishery Management Plan (FMP) for the Snapper-Grouper Fishery of the South Atlantic Region (Amendment 18A), as prepared and submitted by the South Atlantic Fishery Management Council (Council). This final rule allows black sea bass pot endorsements to be transferred under specific conditions. The intent of this rule is to implement the transferability action originally submitted in Amendment 18A, as clarified in the Resubmittal.

DATES: This rule is effective January 7, 2013.

ADDRESSES: Electronic copies of Amendment 18A and the Resubmittal may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/SASnapperGrouperHomepage.htm.* Amendment 18A includes an Environmental Impact Statement (EIS), a Regulatory Flexibility Act Analysis (RFA), a Regulatory Impact Review, and a Fishery Impact Statement. The Resubmittal includes a Regulatory Impact Review and a Fishery Impact Statement.

FOR FURTHER INFORMATION CONTACT: Kate Michie, 727–824–5305.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On August 22, 2012, NMFS published a notice of availability for the Rebsubmittal and requested public

comments (77 FR 50672). On September 10, 2012, NMFS published a proposed rule and requested public comments (77 FR 55448). The rationale for the actions in this final rule can be found in the proposed rule, Amendment 18A, and the Resubmittal, and are not repeated here. The Resubmittal was approved by the Secretary on November 20, 2012.

This rule allows transfer of a black sea bass pot endorsement to an individual or entity that holds or simultaneously obtains a valid South Atlantic Unlimited Snapper-Grouper Permit. In order to be transferred, a black sea bass pot endorsement must be valid or renewable. Black sea bass pot endorsements may be transferred independently from the South Atlantic Unlimited Snapper-Grouper Permit with which it is associated. Landings history will not be transferred with the endorsement. NMFS will attribute black sea bass landings to the associated South Atlantic Unlimited Snapper-Grouper Permit regardless of whether the landings occurred before or after the endorsement was issued. Black sea bass pot endorsements will not be renewed automatically with the South Atlantic Snapper-Grouper Unlimited Permit with which it is associated. The endorsement must be renewed separately from the permit on the Federal Permit Application for Vessels Fishing in the Exclusive Economic Zone (EEZ).

This rule also revises codified text in § 622.40, regarding issuance of the identification tags for black sea bass pots. Endorsement holders order identification tags through NMFS and a supplier issues the identification tags. Endorsement holders must apply for new tags each permit year at the same time they renew their permit and endorsement. Finally, this rule removes and reserves paragraph (a)(2) in § 622.43, thereby removing obsolete quota closure provisions for South Atlantic octocorals.

Comments and Responses

NMFS received four comments on the Resubmittal and the proposed rule, from three snapper-grouper fishery participants. One commenter opposed allowing the transfer of black sea bass pot endorsements and two commenters supported the action.

Comment 1: One commenter preferred that black sea bass pot endorsements retire with fishermen, or that black sea bass pots be phased out by not allowing black sea bass pot endorsements to be transferred, which could slowly shift the entire commercial sector to a strictly hook-and-line fishery.

Response: The Council considered not allowing black sea bass pot endorsements to be transferred, which would have allowed the endorsement to retire with the fisherman. However, the Council chose to allow black sea bass pot endorsements to be transferred in order to maintain a consistent level of participation in the black sea bass pot segment of the snapper-grouper fishery and promote the harvest of black sea bass at optimum yield.

Comment 2: Two commenters suggested allowing fishermen who did not qualify for an endorsement to reenter the black sea bass pot segment of the snapper-grouper fishery as the quota (ACL) increases.

Response: This issue is outside the scope of this rulemaking, which implements a transferability provision for black sea bass pot endorsements. The Council did not consider and this rule does not address allowing increased participation in the black sea bass pot segment of the snapper-grouper fishery.

Comment 3: One commenter recommended removing the black sea bass size limits, or reverting the size limit back to 8 inches (20.3 cm) in order to reduce regulatory discards and give poor people access to lower priced small black sea bass while allowing fishermen to harvest more of the ACL.

Response: The Council considered the issue of minimum size limits for black sea bass in Amendment 18A; however, minimum size limits were not considered in the Resubmittal, and are outside the scope of this rulemaking.

Comment 4: Two commenters supported allowing black sea bass pot endorsements to be transferred.

Response: NMFS agrees. Allowing black sea bass pot endorsements to be transferred will maintain a consistent level of participation in the black sea bass pot segment of the snapper-grouper fishery and promote the harvest of black sea bass at optimum yield.

Changes From the Proposed Rule

The proposed rule made editorial changes to the first sentence in the codified text at 50 CFR 622.4(a)(2)(xv). After further consideration, NMFS has determined that these changes are unnecessary. The codified text at § 622.4(a)(2)(xv), which established the South Atlantic black sea bass pot endorsement, should remain consistent with the codified text at 50 CFR § 622.4(a)(2)(xiv), which established the Eastern Gulf reef fish bottom longline endorsement. Thus, the proposed changes to the first sentence of § 622.4(a)(2)(xv) will not be implemented in the final rule.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that the actions contained in this final rule are necessary for the conservation and management of the snapper-grouper fishery in the South Atlantic and that they are consistent with the FMP, the Resubmittal, other provisions of the Magnuson-Stevens Act, and other applicable law.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel 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. NMFS did not receive any comments or other new information concerning this certification. As a result, no Final Regulatory Flexibility Analysis is required and none has been prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 3, 2012.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.4, the introductory text of paragraph (a)(2)(xv) is revised, paragraph (a)(2)(xv)(D) is added, and the first sentence in paragraph (g)(1) is revised to read as follows:

§ 622.4 Permits and fees.

(a) * * *

(2) * * *

(xv) *South Atlantic black sea bass pot endorsement.* For a person aboard a vessel, for which a valid commercial vessel permit for South Atlantic snapper-grouper unlimited has been issued, to use a black sea bass pot in the South Atlantic EEZ, a valid South Atlantic black sea bass pot endorsement must have been issued to the vessel and

must be on board. A permit or endorsement that has expired is not valid. This endorsement must be renewed annually and may only be renewed if the associated vessel has a valid commercial vessel permit for South Atlantic snapper-grouper unlimited or if the endorsement and associated permit are being concurrently renewed. The RA will not reissue this endorsement if the endorsement is revoked or if the RA does not receive a complete application for renewal of the endorsement within 1 year after the endorsement's expiration date.

* * * * *

(D) *Transferability.* A valid or renewable black sea bass pot endorsement may be transferred between any two entities that hold, or simultaneously obtain, a valid South Atlantic snapper-grouper unlimited permit. Endorsements may be transferred independently from the South Atlantic snapper-grouper unlimited permit. NMFS will attribute black sea bass landings to the associated South Atlantic snapper-grouper unlimited permit regardless of whether the landings occurred before or after the endorsement was issued. Only legal landings reported in compliance with applicable state and Federal regulations are acceptable.

* * * * *

(g) * * *

(1) * * * A vessel permit, license, or endorsement or a dealer permit or endorsement issued under this section is not transferable or assignable, except as provided in paragraph (m) of this section for a commercial vessel permit for Gulf reef fish, in paragraph (o) of this section for a king mackerel gillnet permit, in paragraph (q) of this section for a commercial vessel permit for king mackerel, in paragraph (r) of this section for a charter vessel/headboat permit for Gulf coastal migratory pelagic fish or Gulf reef fish, in paragraph (s) of this section for a commercial vessel moratorium permit for Gulf shrimp, in § 622.17(c) for a commercial vessel permit for golden crab, in § 622.18(b) for a commercial vessel permit for South Atlantic snapper-grouper, in § 622.19(b) for a commercial vessel permit for South Atlantic rock shrimp, in § 622.4(a)(2)(xiv)(D) for an eastern Gulf reef fish bottom longline endorsement, and in § 622.4(a)(2)(xv)(D) for a South Atlantic black sea bass pot endorsement.

* * *

* * * * *

■ 3. In § 622.40, paragraph (d)(1)(i)(D) is revised to read as follows:

§ 622.40 Limitations on traps and pots.

* * * * *

(d) * * *

(1) * * *

(i) * * *

(D) A vessel that has on board a valid Federal commercial permit for South Atlantic snapper-grouper and a South Atlantic black sea bass pot endorsement that fishes in the South Atlantic EEZ on a trip with black sea bass pots, may possess only 35 black sea bass pots per vessel per permit year. Each black sea bass pot in the water or onboard a vessel in the South Atlantic EEZ, must have a valid identification tag attached. Endorsement holders must apply for new tags each permit year through NMFS to replace the tags from the previous year.

* * * * *

§ 622.43 [Amended]

■ 4. In § 622.43, paragraph (a)(2) is removed and reserved.

[FR Doc. 2012–29625 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 110208116–2233–02]

RIN 0648–BA75

Atlantic Highly Migratory Species; Electronic Dealer Reporting Requirements; Correction

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

ACTION: Final rule; correction.

SUMMARY: This action is a technical amendment to a rule not yet in effect. It contains a correction to the final regulations regarding electronic dealer reporting, which published August 8, 2012, with an effective date of January 1, 2013.

DATES: Effective January 1, 2013, and is applicable beginning January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Delisse Ortiz or Karyl Brewster-Geisz at 301–427–8503, or Jackie Wilson at 240–338–3936.

SUPPLEMENTARY INFORMATION:

Background

On June 28, 2011 (76 FR 37750), NMFS published a proposed rule that would among other things, require electronic dealer reporting for all federal Atlantic HMS dealers. On August 8, 2012 (77 FR 47303), the final rule for electronic dealer reporting was published, with a delayed implementation of January 1, 2013. On June 22, 2012 (77 FR 37647), NMFS published a proposed rule that would implement the International Commission for the Conservation of Atlantic Tunas (ICCAT) Recommendation 11–08, which prohibits retaining, transshipping, or landing silky sharks caught in association with ICAAT fisheries. On October 4, 2012 (77 FR 60632), NMFS published a final rule that implemented these silky shark management measures, with an effective date of November 5, 2012.

Need for Correction

Both the silky shark rule and the electronic dealer reporting rule made changes to regulatory text at § 635.31(c)(6). This document corrects the final electronic dealer reporting rule by revising the first sentence of § 635.31(c)(6) to make it consistent with amendments made to that section in the shark rule. The shark rule became effective on November 5, 2012, after publication, but prior to the effective date, of the electronic dealer final rule. Without this technical amendment, when the electronic dealer rule becomes effective on January 1, 2013, it would inadvertently undo the dealer prohibition on purchasing (first receiving) silky sharks contained in the shark rule and codified in § 635.31(c)(6). All other information remains unchanged and will not be repeated in this correction.

Correction of Publication

In the final rule that published in the **Federal Register** Wednesday, August 8, 2012 (77 FR 47303), the following correction is made. On page 47317, in column 3, in § 635.31, paragraph (c)(6) is correctly revised to read as follows:

§ 635.31 Restrictions on sale and purchase.

* * * * *

(c) * * *

(6) A dealer issued a permit under this part may not first receive silky sharks, oceanic whitetip sharks or scalloped, smooth, or great hammerhead sharks from an owner or operator of a fishing vessel with pelagic longline gear on board, or from the owner of a fishing vessel issued both a HMS Charter/Headboat permit and a commercial shark permit when tuna, swordfish or billfish are on board the vessel,

offloaded from the vessel, or being offloaded from the vessel.

* * * * *

Dated: December 3, 2012.

Alan D. Risenhoover,

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

[FR Doc. 2012–29519 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 050613158–5262–03]

RIN 0648–BB59

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Extension of Emergency Fishery Closure Due to the Presence of the Toxin That Causes Paralytic Shellfish Poisoning (PSP)

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

ACTION: Temporary rule; emergency action; extension of effective period; request for comments.

SUMMARY: This temporary rule extends a closure of Federal waters. The U.S. Food and Drug Administration has determined that oceanographic conditions and alga sampling data suggest that the northern section of the Temporary Paralytic Shellfish Poison Closure Area remain closed to the harvest of bivalve molluscan shellfish, with the exception of sea scallop adductor muscles harvested and shucked at sea, and that the southern area remain closed to the harvest of whole or roe-on scallops. The regulations contained in the temporary rule, emergency action, first published in 2005, and have been subsequently extended several times at the request of the U.S. Food and Drug Administration. NMFS is publishing the regulatory text associated with this closure in this temporary emergency rule in order to ensure that current regulations accurately reflect the codified text that has been modified and extended numerous times, so that the public is aware of the regulations being extended.

DATES: The amendments to § 648.14, in amendatory instruction 2, are effective from January 1, 2013, through December 31, 2013. The expiration date of the temporary emergency action published on December 8, 2010 (75 FR 76315), and extended on November 22, 2011 (76 FR 72125), is further extended through December 31, 2013. Comments must be received by January 7, 2013.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2011–0260 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov*. To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2011–0260 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to John K. Bullard, Regional Administrator, Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930–2298. Mark on the outside of the envelope, ''Comments on PSP Closure.''
- *Fax:* (978) 281–9135; Attn: Jason Berthiaume.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will 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). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone: (978) 281–9177, fax: (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

On June 10, 2005, the U.S. Food and Drug Administration (FDA) requested that NMFS close an area of Federal waters off the coasts of New Hampshire and Massachusetts to fishing for bivalve shellfish intended for human consumption due to the presence in those waters of toxins (saxotoxins) that cause PSP. These toxins are produced by the alga *Alexandrium fundyense,* which can form blooms commonly referred to as red tides. Red tide blooms, also known as harmful algal blooms (HABs), can produce toxins that accumulate in filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death from PSP.

On June 16, 2005, NMFS published an emergency rule (70 FR 35047) closing the area recommended by the FDA (i.e., the Temporary PSP Closure Area). Since 2005, the closure has been extended several times and the area has been expanded and divided into northern and southern components. The Northern Temporary PSP Closure Area remained closed to the harvest of all bivalve molluscan shellfish, while the Southern Temporary PSP Closure Area was reopened to the harvest of Atlantic surfclams, ocean quahogs, and sea scallop adductor muscles harvested and shucked at sea. The current closure will expire on December 31, 2012, and this action extends this closure for 1 additional year, through December 31, 2013.

The boundaries of the northern component of the Temporary PSP Closure Area comprise Federal waters bounded by the following coordinates specified in Table 1 below. Under this emergency rule, this area remains closed to the harvest of Atlantic surfclams, ocean quahogs, and whole or roe-on scallops.

TABLE 1—COORDINATES FOR THE NORTHERN TEMPORARY PSP CLOSURE AREA

Point	Latitude	Longitude
1	43°00′ N	71°00′ W
2	43°00′ N	69°00′ W
3	41°39′ N	69°00′ W
4	41°39′ N	71°00′ W
5	43°00′ N	71°00′ W

The boundaries of the southern component of the Temporary PSP Closure Area comprise Federal waters bound by the following coordinates specified in Table 2. Under this emergency rule, the Southern Temporary PSP Closure Area remains closed only to the harvest of whole or roe-on scallops.

TABLE 2—COORDINATES FOR THE SOUTHERN TEMPORARY PSP CLOSURE AREA

Point	Latitude	Longitude
1	41°39′ N	71°00′ W
2	41°39′ N	69°00′ W
3	40°00′ N	69°00′ W
4	40°00′ N	71°00′ W
5	41°39′ N	71°00′ W

Classification

This action is issued pursuant to section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1855(c). Pursuant to section 5 U.S.C. 553(b)(B) of the Administrative Procedure Act, the Assistant Administrator for Fisheries finds there is good cause to waive prior notice and an opportunity for public comment on this action as notice and comment would be impracticable and contrary to the public interest due to a public health emergency, and public comment has been solicited concurrently with each of the extensions of this action, as detailed and responded to below. In addition, under section 553(d)(3) there is good cause to waive the 30-day delay in effectiveness due to a public health emergency. The original emergency closure was in response to a public health emergency. Toxic algal blooms are responsible for the marine toxin that causes PSP in persons consuming affected shellfish. People have become seriously ill and some have died from consuming affected shellfish under similar circumstances. Pursuant to section 305(c)(3)(C) of the Magnuson-Stevens Act, the closure to the harvest of shellfish, as modified on September 9, 2005, and re-instated on October 18, 2005, may remain in effect until the circumstances that created the emergency no longer exist, provided the public has had an opportunity to comment after the regulation was published, and, in the case of a public health emergency, the Secretary of Health and Human Services concurs with the Commerce Secretary's action. During the initial comment period, June 16, 2005, through August 1, 2005, no comments were received. Two comments have been received after the re-opening of the southern component of the Temporary PSP Closure Area on September 9, 2005. One commenter described the overall poor quality of water in Boston Harbor, but provided no evidence to back these claims. The other commenter expressed reluctance to re-opening a portion of the closure area without seeing the results of the FDA tests. Data used to make determinations regarding closing and opening of areas to certain types of fishing activity are collected from Federal, state, and private laboratories. NOAA maintains a Red Tide Information Center (*http://oceanservice.noaa.gov/redtide/*), which can be accessed directly or through the Web site listed in the **ADDRESSES** section. Information on test results, modeling of algal bloom movement, and general background on red tide can be accessed through this information center. While NMFS is the agency with the authority to promulgate the emergency regulations, it modified the regulations on September 9, 2005, at the request of the FDA, after the FDA determined that the results of its tests warranted such action. If necessary, the regulations may be terminated at an earlier date, pursuant to section 305(c)(3)(D) of the Magnuson-Stevens Act, by publication in the **Federal Register** of a notice of termination, or extended further to ensure the safety of human health.

This emergency action is exempt from the procedures of the Regulatory Flexibility Act because the rule is issued without opportunity for prior notice and opportunity for public comment.

This rule is not significant for the purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 30, 2012.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 648 is amended to read 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 § 648.14, paragraphs (a)(10)(iii) and (a)(10)(iv) are added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(10) * * *

(iii) Fish for, harvest, catch, possess or attempt to fish for, harvest, catch, or possess any bivalve shellfish, including Atlantic surfclams, ocean quahogs, and mussels, with the exception of sea scallops harvested only for adductor muscles and shucked at sea, unless issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing the collection of shellfish for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(A) 43°00′ N. lat., 71°00′ W. long.;

(B) 43°00′ N. lat., 69°00′ W. long.;

(C) 41°39′ N. lat., 69°00′ W. long.;

(D) 41°39′ N. lat., 71°00′ W. long.; and then ending at the first point.

(iv) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess any sea scallops, except for sea scallops harvested only for adductor muscles and shucked at sea, unless issued and possessing on board a Letter of Authorization (LOA) from the Regional Administrator authorizing collection of shellfish for biological sampling and operating under the terms and conditions of said LOA, in the area of the U.S. Exclusive Economic Zone bound by the following coordinates in the order stated:

(A) 41°39′ N. lat., 71°00′ W. long.;

(B) 41°39′ N. lat., 69°00′ W. long.;

(C) 40°00′ N. lat., 69°00′ W. long.;

(D) 40°00′ N. lat., 71°00′ W. long.; and then ending at the first point.

* * * * *

[FR Doc. 2012–29517 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111213751–2102–02]

RIN 0648–XC377

Fisheries of the Exclusive Economic Zone Off Alaska; Other Flatfish, Other Rockfish, Pacific Ocean Perch, Sculpin, and Squid in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; apportionment of reserves; request for comments.

SUMMARY: NMFS apportions amounts of the non-specified reserve to the initial total allowable catch of Bering Sea Pacific ocean perch, Aleutian Islands other rockfish, Bering Sea and Aleutian Islands (BSAI) other flatfish, BSAI sculpin, and BSAI squid in the BSAI

management area. This action is necessary to allow the fisheries to continue operating. It is intended to promote the goals and objectives of the fishery management plan for the BSAI management area.

DATES: Effective December 4, 2012 through 2400 hrs, Alaska local time, December 31, 2012. Comments must be received at the following address no later than 4:30 p.m., Alaska local time, December 19, 2012.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2012–0243, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0243 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on that line.
- *Mail:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.
- *Fax:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Fax comments to 907–586–7557.
- *Hand delivery to the Federal Building:* Address written comments to Glenn Merrill, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region NMFS, Attn: Ellen Sebastian. Deliver comments to 709 West 9th Street, Room 420A, Juneau, AK.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address) submitted voluntarily by the sender will 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). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the (BSAI) exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2012 initial total allowable catch (ITAC) of Bering Sea (BS) Pacific ocean perch in the BSAI was established as 4,854 metric tons (mt), the 2012 ITAC of Aleutian Islands (AI) other rockfish was established as 485 mt, the 2012 ITAC of BSAI other flatfish was established as 3,200 mt, the 2012 ITAC of BSAI sculpin was established as 5,200 mt, and the 2012 ITAC of BSAI squid was established as 425 mt by the final 2012 and 2013 harvest specifications for groundfish of the BSAI (77 FR 10669, February 23, 2012). This includes apportionments of the non-specified reserve to BSAI other flatfish and BSAI squid in two separate actions (77 FR 46641, August 6, 2012 and 77 FR 44172, July 27, 2012, respectively). In accordance with § 679.20(a)(3) the Regional Administrator, Alaska Region, NMFS, has reviewed the most current available data and finds that the ITACs for BS Pacific ocean perch, AI other rockfish, BSAI other flatfish, BSAI sculpin, and BSAI squid in the BSAI need to be supplemented from the non-specified reserve in order to promote efficiency in the utilization of fishery resources in the BSAI and allow fishing operations to continue.

Therefore, in accordance with § 679.20(b)(3), NMFS apportions from the non-specified reserve of groundfish 856 mt to the BS Pacific ocean perch ITAC, 85 mt to the AI other rockfish ITAC, 400 mt to the BSAI other flatfish ITAC, 550 mt to the BSAI sculpin ITAC, and 275 mt to the BSAI squid ITAC in the BSAI. These apportionments are consistent with § 679.20(b)(1)(i) and do not result in overfishing of any target species because the revised ITACs are equal to or less than the specifications of the acceptable biological catch in the final 2012 and 2013 harvest specifications for groundfish in the BSAI (77 FR 10669, February 23, 2012).

The harvest specification for the 2012 ITACs included in the harvest specifications for groundfish in the BSAI are revised as follows: 5,710 mt for BS Pacific ocean perch, 570 mt for AI other rockfish, 3,600 mt for BSAI other flatfish, 5,750 mt for BSAI sculpin, and 700 mt for BSAI squid.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA) finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) and § 679.20(b)(3)(iii)(A) as such a requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the apportionment of the non-specified reserves of groundfish to the BS Pacific ocean perch, AI other rockfish, BSAI other flatfish, BSAI sculpin, and BSAI squid fisheries in the BSAI. Immediate notification is necessary to allow for the orderly conduct and efficient operation of this fishery, to allow the industry to plan for the fishing season, and to avoid potential disruption to the fishing fleet and processors. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of November 30, 2012.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Under § 679.20(b)(3)(iii), interested persons are invited to submit written comments on this action (see **ADDRESSES**) until December 19, 2012.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: December 3, 2012.

Emily H. Menashes,

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

[FR Doc. 2012–29622 Filed 12–4–12; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 236
Friday, December 7, 2012

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 61

[NRC–2011–0012]

RIN 3150–AI92

Low-Level Waste Disposal

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory basis and preliminary rule language; second request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations that govern low-level radioactive waste (LLRW) disposal facilities to require new and revised site-specific analyses and to permit the development of criteria for waste acceptance based on the results of these analyses. These amendments will ensure that waste streams that are significantly different in terms of radiological characteristics (e.g., half-life) from those considered in the technical basis for the current regulations can be disposed of safely and meet the performance objectives for land disposal of LLRW. These amendments will also increase the use of site-specific information to ensure that public health and safety would continue to be protected.

The NRC is publishing a second version of preliminary rule language and has revised the regulatory basis document that will support this rulemaking. NRC is taking this action to inform interested stakeholders of the current status of the NRC's activities and to solicit public comments on the preliminary rule language. The regulatory basis document is being made available to inform stakeholder comments on the preliminary rule language. The NRC is not requesting comments on the regulatory basis.

DATES: Comments on the preliminary rule language should be submitted no later than January 7, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this preliminary rule language, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2011–0012. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2011–0012. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive a reply email confirming that we have received your comments, contact us directly at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew Carrera, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone 301–415–1078, email *Andrew.Carrera@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2011–0012 when contacting the NRC about the availability of information for this document. You may access information related to this document, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2011–0012.
- *NRC's Public Document Room (PDR):* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search.*'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this notice is provided the first time that a document is referenced.

The November 2012 preliminary rule language is available electronically under ADAMS Accession Number ML12311A444. The regulatory basis document, ''Regulatory Analysis for Proposed Revisions to Low-Level Waste Disposal Requirement (10 CFR Part 61),'' that supports this rulemaking is available under ADAMS accession number ML12306A480.

B. Submitting Comments

Please include Docket ID NRC–2011–0012 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submissions. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment

submissions available to the public or entering the comment submissions into ADAMS.

II. Discussion

The NRC is proposing to amend its regulations, in part 61 Title 10 of the *Code of Federal Regulations (*10 CFR), ''Licensing Requirements for Land Disposal of Radioactive Waste,'' to require new and revised site-specific analyses and to permit the development of criteria for waste acceptance based on the results of these analyses. These amendments will ensure that waste streams that are significantly different in terms of radiological characteristics (e.g., half-life) from those considered in the technical basis for the current regulations can be disposed of safely and meet the performance objectives. These amendments will also increase the use of site-specific information to ensure that public health and safety would continue to be protected. These changes would revise the existing site-specific analysis for protection of the general population to include a 10,000-year compliance period (i.e., performance assessment); add a new site-specific analysis for the protection of inadvertent intruders that would include a 10,000-year compliance period and a dose limit (i.e., intruder assessment); add a new long-term analysis for certain long-lived wastes that would include a post-10,000-year performance period; and revise the pre-closure analysis to include updates to the performance assessment, intruder assessment, and long-term analyses. The NRC would also be adding a new requirement to develop criteria for the acceptance of waste for disposal based on either the results of these analyses or the existing waste classification requirements. While the existing regulatory requirements are adequate to protect public health and safety, these amendments would enhance the safe disposal of LLRW. The NRC is also proposing additional changes to the regulations for disposal licensees to reduce ambiguity, facilitate implementation, and better align the requirements with current health and safety standards. This rule would affect LLRW disposal facilities that are regulated by the NRC or the Agreement States.

In May, 2011, the NRC published preliminary rule language (76 FR 24831) and the associated regulatory basis document for public comment. Since then, the NRC staff received additional directions from the Commission in a Staff Requirements Memorandum to COMWDM–11–0002/COMGEA–11–0002 (ADAMS accession number ML120190360). The Commission directed staff to expand the limited-scope revision regarding site-specific analyses to bring a clearer, risk-informed approach to Part 61. Based on the Commission's direction, the NRC staff revised the regulatory basis document associated with this rulemaking and developed a second (November 2012) version of the preliminary rule language.

The NRC is inviting stakeholders to comment on the November 2012 preliminary rule language. The NRC is publishing the November 2012 preliminary rule language and its associated regulatory basis to provide increased awareness to interested stakeholders, inform stakeholders of the current status of the NRC's activities, and solicit public comments on the November 2012 preliminary rule language. The November 2012 preliminary rule language and its associated regulatory basis document supercede the May 2011 versions.

The NRC will review and consider any comments on the November 2012 preliminary rule language received by January 7, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date. Stakeholders will have additional opportunity to comment on the proposed rule when it is published in accordance with the provisions of the Administrative Procedures Act. The NRC will respond to all stakeholder comments in the Statements of Consideration for the final rule.

The NRC may post updates to the preliminary rule language on the Federal rulemaking Web site under Docket ID NRC–2011–0012. The *Regulations.gov* Web site allows members of the public to set-up email alerts so that they may be notified when documents are added to a docket. Users are notified via email at an email address provided at the time of registration for the notification. Directions for signing up for the email alerts can be found at *http://www.regulations.gov.* To do so, navigate to a docket folder you are interested in and then click the ''Sign up for Email Alerts'' link.

Dated at Rockville, Maryland, this 30th day of November, 2012.

For the Nuclear Regulatory Commission.

Deborah Jackson,

Deputy Director, Division of Intergovernmental Liaison and Rulemaking, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–29527 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 91, 121, 125 and 135

[Docket No.: FAA–2012–0953]

Policy Statement on Occupational Safety and Health Standards for Aircraft Cabin Crewmembers

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces the availability of a proposed policy statement regarding the regulation of some occupational safety and health conditions affecting cabin crewmembers on aircraft by the Occupational Safety and Health Administration (OSHA). This policy statement will enhance occupational safety and health in the aircraft cabin by establishing the extent to which OSHA requirements may apply to the working conditions of aircraft cabin crew while they are onboard aircraft in operation.

DATES: Send comments on or before January 7, 2013.

ADDRESSES: Send comments identified by docket number FAA–2012–0953 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov*, including any personal information the

commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this proposed policy statement, contact Gene Kirkendall, Part 121 Air Carrier Operations Branch (AFS–220), Flight Standards Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–8166; email *Gene.Kirkendall@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate by submitting written comments, data, or views on the policy statement. The most helpful comments reference a specific portion of the policy statement, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit only one time.

The FAA will file in the docket all comments it receives, as well as a report summarizing each substantive public contact with FAA personnel concerning this notice. The FAA will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. The proposed policy statement is available for review in the assigned docket at *http://www.regulations.gov.*

Background

On July 10, 1975, the FAA published a notice in the **Federal Register** setting forth the FAA's determination that its authority to promote the safety of civil aircraft operations included occupational safety and health for aircraft crewmembers. The FAA Modernization and Reform Act of 2012 currently requires the FAA to initiate development of a policy statement to set forth the circumstances in which the requirements of the OSHA may be applied to crewmembers while working in an aircraft. Since this proposed policy statement changes an existing FAA policy that has been in effect for 37 years, and this new policy would change the extent of FAA's jurisdiction over cabin crewmembers, FAA believes that the aviation industry as well as all interested parties should have the opportunity to comment on the proposed policy statement before it is implemented.

Therefore, this notice is requesting comment on the proposed policy statement which is available for review in the assigned docket.

Issued in Washington, DC, on November 29, 2012.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. 2012–29631 Filed 12–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 25

[Docket No. TTB–2012–0006; Notice No. 131; Re: T.D. TTB–109]

RIN 1513–AB94

Small Brewers Bond Reduction

AGENCY: Alcohol and Tobacco Tax and Trade Bureau, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: Elsewhere in this issue of the **Federal Register**, the Alcohol and Tobacco Tax and Trade Bureau (TTB) is publishing a temporary rule that for a period of three years modifies the penal sum for a brewer's bond where the excise tax liability of the brewer is reasonably expected to be not more than $50,000 in the current calendar year and the brewer was liable for not more than $50,000 in such taxes in the preceding calendar year. Under the temporary rule, for the next three years, the penal sum of the required bond is $1,000 for such brewers who file excise tax returns and remit taxes quarterly. In this document, TTB proposes to adopt the $1,000 penal sum amount for the brewer's bond for such brewers as a permanent regulatory change. This document also proposes amendments to the regulatory text to require that such brewers file Federal excise tax returns and payments quarterly, as well as submit reports of operations quarterly. Finally, TTB is soliciting comments on how the TTB regulations governing brewers' operations might be modified to reduce the burden on brewers and, at the same time, meet all statutory requirements and protect the revenue.

DATES: TTB must receive comments on or before February 5, 2013.

ADDRESSES: You may send comments on the proposals contained in this document to one of the following addresses:

- *http://www.regulations.gov:* To submit comments via the Internet, use the comment form for this document as posted within Docket No. TTB–2012–0006 at ''Regulations.gov,'' the Federal e-rulemaking portal;
- *U.S. Mail:* Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005;
- *Hand Delivery/Courier in Lieu of Mail:* Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

See the Public Participation section of this document for specific instructions and requirements for submitting comments, and for information on how to request a public hearing.

You may view copies of this document, the related temporary rule, selected supporting materials, and any comments TTB receives about this proposal within Docket No. TTB–2012–0006 at *http://www.regulations.gov.* A link to this Regulations.gov docket is posted on the TTB Web site at *http://www.ttb.gov/beer/beer-rulemaking.shtml* under Notice No. 131. You also may view copies of this document, the related temporary rule, all supporting materials, and any comments TTB receives about this proposal by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. Please call 202–453–2270 to make an appointment.

FOR FURTHER INFORMATION CONTACT: Ramona Hupp, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; telephone 202–453–1039, ext. 110 or email *BeerRegs@ttb.gov.*

SUPPLEMENTARY INFORMATION:

Background

TTB Authority

Chapter 51 of the Internal Revenue Code of 1986 (IRC), pertains to the taxation of distilled spirits, wines, and beer (see title 26 of the United States

Code (U.S.C.), chapter 51 (26 U.S.C. chapter 51)). With regard to beer, IRC section 5051 (26 U.S.C. 5051) imposes a Federal excise tax on all beer brewed or produced, and removed for consumption or sale within the United States or imported into the United States. The rate of the Federal excise tax on beer is $18 for every barrel containing not more than 31 gallons, and a like rate for any other quantity or for fractional parts of a barrel, with an exception that the rate of tax is $7 a barrel for the first 60,000 barrels of beer for a domestic brewer that does not produce more than 2 million barrels in a calendar year. Section 5054 (26 U.S.C. 5054) provides that, in general, the tax imposed on beer under section 5051 shall be determined at the time the beer is removed for consumption or sale, and shall be paid by the brewer in accordance with section 5061 (26 U.S.C. 5061).

Section 5061 pertains to the time and method for filing tax returns and payment of the applicable excise taxes. Section 5061 states that Federal excise taxes on distilled spirits, wines, and beer shall be collected on the basis of a return, and that the Secretary of the Treasury (the Secretary) shall, by regulation, prescribe the period or event for which such return shall be filed. Section 5061(d)(1) generally requires that the excise taxes owed on alcohol beverages, including beer, withdrawn under bond be paid no later than the 14th day after the last day of the semimonthly period during which the withdrawal occurs. Under a special rule, September has three return periods (Section 5061(d)(5)), resulting in a total of 25 returns due each year. Section 5061(d)(4) provides an exception to the semimonthly rule for taxpayers who reasonably expect to be liable for not more than $50,000 in alcohol excise taxes in a given calendar year and who had an excise tax liability of not more than $50,000 the previous calendar year. Under this provision, such taxpayers may pay the excise taxes on alcohol beverages withdrawn under bond on a quarterly basis.

Section 5401(b) (26 U.S.C. 5401(b)) provides that all brewers shall obtain a bond to insure the payment of any taxes owed. The amount of such bond shall be ''in such reasonable penal sum'' as prescribed by the Secretary in regulations ''as necessary to protect and insure collection of the revenue.''

Section 5415 of the IRC (26 U.S.C. 5415) requires brewers to keep records and to make true and accurate ''returns'' of their brewing and associated operations at the times and for such periods as the Secretary prescribes by regulation. The implementing regulations refer to these ''returns'' as ''reports'' of operations.

The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers chapter 51 of the IRC and its implementing regulations pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in administration and enforcement of these laws. Regulations that implement the provisions of sections 5051, 5054, 5061, 5401, and 5415 of the IRC, as they relate to beer, are set forth in part 25 of title 27 of the Code of Federal Regulations (CFR).

Reducing Burdens on Regulated Industries

Executive Order 13563, Improving Regulation and Regulatory Review (E.O. 13563), signed by the President on January 18, 2011, required Federal agencies to conduct retrospective analyses of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them as appropriate. E.O. 13563 also required each agency to develop plans to review its regulations. The Department of the Treasury (Treasury) issued its Plan for Retrospective Analysis of Existing Rules (the Plan) on August 22, 2011. In developing the Plan, Treasury requested input from its Bureaus and Offices to help identify regulations that should be modified or updated. TTB identified a number of rulemaking proposals that were specifically included in the Plan, one of which concerned revision to the beer regulations contained in 27 CFR part 25. The proposal included in the Plan states:

> Revisions to the Beer Regulations (Part 25): Under the authority of the Internal Revenue Code, TTB regulates activities at breweries. The regulations of Title 27 of the Code of Federal Regulations, Part 25, address the qualification of breweries, bonds and taxation, removals without payment of tax, and records and reporting. Brewery regulations were last revised in 1986 and need to be updated to reflect changes to the industry, including the increased number of small (''craft'') brewers. In an advance notice of proposed rulemaking, TTB plans to solicit comments regarding potential ways to decrease the regulatory burden on industry members (including but not limited to streamlining and/or reducing the reporting and recordkeeping requirements for the industry, including small business members) and increase efficiency for both the industry and TTB. Upon consideration of comments received, TTB intends to develop and propose specific regulatory changes.

In September 2011, TTB met with representatives and members of the Brewers Association, a trade organization that promotes the interests of small and independent brewers in the United States, to discuss reducing the regulatory burdens on smaller brewers. During this meeting, the representatives and members put forth a number of suggestions toward that goal. TTB also met with members of the Oregon Brewers Guild in February 2012, and discussed the current regulatory burdens imposed on smaller brewers.

There is no specific statutory or regulatory definition as to who is a ''small'' brewer. However, for taxpayers whose annual alcohol excise tax liability is not reasonably expected to be more than $50,000 in the current calendar year, and who were liable for not more than $50,000 in such taxes in the preceding calendar year, there is, under section 5061(d)(4) of the IRC, a quarterly tax return and tax payment exception to the semimonthly rule. TTB believes that the requirements for qualifying for this exception provide a reasonable standard for determining when a brewer may be considered ''small''. A recent analysis of tax returns submitted to TTB by brewers reveals that the vast majority of brewers would be deemed ''small'' under this standard. At the end of calendar year 2011, there were 2,026 brewers submitting Federal excise tax returns to TTB, and 1,846 of those brewers (91 percent) paid less than $50,000 in excise tax annually. In fact, the vast majority of those 1,846 ''small'' brewers actually paid much less than $50,000, given that 1,616 of those brewers (87.5 percent) paid annual taxes of $7,000 or less. (Hereafter, for the purposes of this document, the term ''small brewers'' refers to brewers who are eligible to file excise tax returns on a quarterly basis.)

TTB's tax return statistics also indicate that the total sum of excise tax collected from small brewers represents a small amount of the total sum of excise tax collected on beer each year. Small brewers, though making up more than 90 percent of the total number of brewers who pay tax, cumulatively paid just over six percent (approximately $11.5 million) of the $177.8 million in total excise tax on beer collected in 2011. In 2010, small brewers paid 5.6 percent (approximately $10.15 million) of the $180.6 million in excise tax collected that year.

Statutory requirements for brewers include filing tax returns and paying excise taxes, obtaining a brewer's bond,

and filing reports of operations. Under TTB's current regulations, there are options that a small brewer must consider. First, the regulations provide that a small brewer may file tax returns and pay taxes either semimonthly or quarterly. However, different bond amounts may apply, depending on which option the small brewer selects. With regard to filing reports of operations, the general regulatory rule is that monthly reports are required, but a brewer who produces less than 10,000 barrels a year may opt to file reports of operations quarterly (27 CFR 25.297). Under these regulations, a small brewer must be aware of different eligibility standards regarding tax returns, tax payments, and reporting. Taken in their entirety, these regulations may be difficult for small brewers to fully understand and use to their best advantage.

Accordingly, TTB is proposing to simplify its beer regulations for the more than 90 percent of brewers who were liable for not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year and reasonably expect to be liable for not more than $50,000 in such taxes during the current calendar year. As discussed in greater detail below, under the proposed regulations these brewers:

- Must obtain a bond with a penal sum of $1,000, the minimum amount of bond under our current regulations, with no required adjustments to the amount of the bond; and
- Must file their tax returns, remit tax payments, and submit reports of operations on a quarterly basis.

With regard to the bond requirement, TTB is issuing a temporary rule that, for a period of three years, sets the penal sum for a brewer's bond for small brewers at a flat $1,000 (see T.D. TTB–109 published in the rules section of this issue of the **Federal Register**). As discussed in greater detail below, TTB proposes in this document to adopt the $1,000 penal sum amount of the bond for small brewers as a permanent regulatory change.

By lowering the required bond amount and lessening the number of required excise tax returns and operations reports for small brewers, TTB believes these proposals will lessen costs and increase efficiencies for those businesses. TTB notes that the regulatory proposals contained in this document also will reduce the administrative burden on TTB. If small brewers submitted quarterly returns and operations reports, TTB would reduce the overall time the Bureau spends processing these forms.

As noted above and stated in the Plan, TTB initially intended to publish an advance notice of proposed rulemaking (ANPRM) to solicit written comments from the public before proposing changes to its regulations in part 25. After discussions with industry groups and members, analyzing available data, and reviewing its existing regulations and requirements, TTB believes that it should propose for immediate consideration changes to its regulations that would reduce the excise tax return filing and operations reporting burdens on small brewers. Compared to publishing an ANPRM and awaiting comments before proposing specific changes to the regulations, the proposals in this document would accelerate change in the regulations and thus provide more immediate and significant relief from existing regulatory burdens. However, TTB does not intend that the proposed regulatory changes outlined in this rulemaking cover all the changes to part 25 regulations that may be appropriate. Therefore, in this document, TTB also is soliciting comments from the brewing industry and the public on other changes TTB could make to its part 25 beer regulations that could further reduce the regulatory burden on brewers and at the same time meet statutory requirements and regulatory objectives.

Discussion of Proposed Regulatory Changes

Penal Sum of the Brewer's Bond

Penal sum amounts of the brewer's bond are set forth in the TTB regulations at 27 CFR 25.93. In the related temporary rule, T.D. TTB–109, published in the rules section of this issue of the **Federal Register**, TTB explains its reasons for modifying the bond amount to a flat $1,000 penal sum for small brewers. By doing so, TTB hopes to encourage such brewers to file tax returns and pay taxes quarterly rather than semimonthly without the need to obtain a bond with a greater penal sum. The temporary rule contains a discussion of how the previous bond requirements for these small brewers could require such brewers to increase their bond amount coverage when they file Federal excise tax returns and remit taxes quarterly rather than semimonthly. The modified bond amount set forth in the temporary rule is effective for three years from December 7, 2012.

In this document, TTB proposes to eliminate the option to file excise tax returns and remit taxes semimonthly for small brewers, and thus require such brewers to file excise tax returns and pay taxes quarterly. Consistent with that proposal, TTB also proposes to adopt the flat $1,000 penal sum of the bond requirement for such brewers as a permanent rule. This change to the regulations governing the penal sum of the bond facilitates the change to quarterly excise tax returns and payment of tax because it eliminates differences between bond amounts based on when the brewer files tax returns and how much tax is owed. Thus, a small brewer who files excise tax returns and pays taxes quarterly will not have to increase its bond coverage under any circumstance.

Through this document, TTB seeks comments on the temporary rule, which modifies bond requirements for a period of three years, as well as the proposal outlined in this document that TTB permanently adopt the change in the required bond amount to a flat $1,000 for small brewers.

Quarterly Tax Returns for Small Brewers

In 2005, section 11127 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Public Law 109–59, 119 Stat. 1144 (''the Act'') amended section 5061(d) of the IRC to allow certain Federal alcohol excise taxpayers to pay taxes quarterly. Prior to the Act semimonthly tax returns were required. In a temporary rule, T.D. TTB–41, published in the **Federal Register** on February 2, 2006 (71 FR 5598), TTB implemented the new quarterly tax payment procedures of IRC section 5061(d)(4) by amending its regulations, including 27 CFR 25.164(c) pertaining to brewers. Section 25.164(c) requires all brewers who defer payment of tax to file returns and pay tax semimonthly, with the exception that a brewer may choose to use a quarterly return period if the brewer was liable for not more than $50,000 in taxes imposed by 26 U.S.C. 5051 and 7652 with respect to beer in the preceding calendar year and if that brewer reasonably expects to be liable for not more than $50,000 in such taxes during the current calendar year. TTB adopted this regulatory change as a final rule in T.D. TTB–94, published in the **Federal Register** on August 24, 2011 (76 FR 52862).

In adopting the quarterly tax payment provisions, T.D. TTB–41 also made corresponding changes to the required penal sum of the brewers bond specifically applicable to quarterly taxpayers in order to fully secure the increase in deferred tax liability. T.D. TTB–41 provided that if a taxpayer otherwise eligible for the new quarterly payment procedure did not wish to

adjust the penal sum of their bond, that taxpayer should be allowed to continue to make tax payments and file returns on a semimonthly basis, and the quarterly payment procedure was treated as optional rather than mandatory for taxpayers who did not wish to adjust their bond coverage.

TTB estimates that filing quarterly excise returns reduces a brewer's paperwork burden from 18.75 hours per year (based on an estimate of 45 minutes to prepare and submit a semimonthly return) to just three hours per year. However, many small brewers do not file quarterly; in 2011, of the 1,846 brewers eligible to file quarterly excise returns more than half (1,095) chose to file semimonthly excise tax returns.

Section 5061(a) provides that ''[t]he Secretary shall, by regulation, prescribe the period or event for which such return shall be filed, the time for filing such return, the information to be shown in such return, and the time for payment of such tax.'' As discussed above, TTB is proposing to permanently remove the bond disincentive for filing Federal excise tax returns and remitting tax payments quarterly. In the interest of reducing regulatory burdens on small brewers, and creating reporting and administrative efficiencies for both small brewers and TTB, TTB also proposes to amend the regulatory text in § 25.164(c) to require quarterly filing of Federal excise tax returns and payments for all small brewers.

Report of Operations

Section 25.297 of the TTB regulations (27 CFR 25.297) implements the statutory requirement in 26 U.S.C. 5415 that brewers file periodic reports of their brewing and associated operations. Under § 25.297, as a general rule, brewers are required to submit monthly a Brewer's Report of Operations (TTB Form 5130.9). Section 25.297(a) and (b), provide an exception to the monthly reporting requirement, allowing brewers who produce less than 10,000 barrels of beer per calendar year to submit their report of brewery operations quarterly instead of monthly.

The baseline for optional quarterly operations reporting under § 25.297 (less than 10,000 barrels of production per calendar year) is different from the baseline established for optional filing quarterly tax returns under § 25.164 (liable for not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year and reasonably expect to be liable for not more than $50,000 in such taxes during the current calendar year). The less than 10,000 barrels a year baseline was adopted by TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF) in T.D. ATF–345, and published in the **Federal Register** on July 28, 1993 (58 FR 40355). The rationale for adopting the less than 10,000 barrels per year baseline is contained in ATF Notice No. 755, published in the **Federal Register** on September 28, 1992 (57 FR 44525). In Notice No. 755, ATF stated that nearly 99 percent of beer excise tax is paid by breweries producing more than 10,000 barrels of beer per year, and that monthly reports from large breweries would still provide most of the data needed for the monthly statistics that ATF (and currently TTB) provides to the industry.

TTB proposes to change § 25.297 in several ways. First, TTB proposes to use as the baseline for filing quarterly reports of operation the ''not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year and reasonably expect to be liable for not more than $50,000 in such taxes during the current calendar year'' standard, rather than the ''less than 10,000 barrels of beer'' per annum standard that currently exists. TTB believes that there is no justifiable rationale for maintaining separate standards for which brewers shall file quarterly tax returns and which brewers shall file quarterly operations reports. Both standards are intended to reduce burdens on small brewers; however, the flexibility to change one of the standards is available only to the operations reporting standard that has been set through regulation. The ''not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year and reasonably expect to be liable for not more than $50,000 in such taxes during the current calendar year'' standard applicable to quarterly tax return filing is set by law in section 5061(d)(4) of the IRC and therefore cannot be changed by TTB through regulation.

TTB has reviewed its quarterly operations reporting statistical records, and these records indicate that changing the current quarterly operations reporting eligibility standard to be consistent with the quarterly tax return eligibility standard would impact only a small number of brewers. At the current reduced tax rate of $7 a barrel, removal of 10,000 barrels per year equates to $70,000 in taxes owed per annum. In 2011, there were 41 brewers whose annual tax liability was between $50,000 and $70,000, and only 7 of those filed operations reports on a quarterly basis. Similarly, in 2010, there were 27 brewers whose annual tax liability was between $50,000 and $70,000; and of whom only 3 filed operations reports on a quarterly basis.

Secondly, TTB proposes to make quarterly operations reporting for eligible brewers mandatory rather than optional. TTB believes that mandating quarterly operations reporting would reduce regulatory burdens on small brewers, and create administrative efficiencies for TTB.

Simplifying the bond requirement, and creating consistencies between the tax return and remittance requirement and the operations reporting requirement, will make it easier for small brewers to understand and comply with the TTB regulations. These changes also make it easier for TTB to administer its regulatory program while providing adequate protection to the revenue.

Finally, TTB proposes to include a reference in § 25.297 to TTB Form 5130.26, which is available to certain brewers as an alternative to TTB Form 5130.9.

Part 25 Update

Consistent with the intent of the ANPRM described in the Plan, as discussed above, TTB also seeks comments on other changes regarding part 25 regulations that brewers and other interested parties believe TTB should consider. Because the Administrative Procedure Act (5 U.S.C. 553) generally requires that the public have notice of and an opportunity to comment on regulatory changes prior to their adoption as final rules, TTB may not be able to adopt in any final rule the recommended changes that are outside the scope of the changes proposed in this document. However, TTB will consider such comments to determine if it should propose additional regulatory changes and conduct separate rulemaking on those proposed changes.

Public Participation

Comments Invited

TTB invites comments from interested members of the public on the proposed regulatory changes contained in this document. Please provide specific information in support of your comments. Comments that merely express a preference for or against the proposed regulation do not provide a basis for agency action.

TTB specifically invites comments on the expected economic impact of the proposed rule, especially the impact on small businesses. TTB is interested in hearing from small brewers as to how they would be impacted by the proposed rule, and in particular on what

the economic impact of these proposals on small brewers might be. Please explain in detail and provide specific cost data.

In addition to comments on the proposed regulatory amendments, TTB solicits comments on other changes to the beer regulations in part 25 that could further reduce the regulatory burden on brewers and at the same time meet statutory requirements and regulatory objectives. As indicated above, while such comments may not be the subject of the final rulemaking document on these proposed regulatory changes, TTB may use such comments for the purpose of proposing additional regulatory changes in a separate rulemaking action.

Submitting Comments

Please submit your comments by the closing date shown above in this document. You may submit comments in one of the following three ways:

- *Federal e-Rulemaking Portal:* You may send comments via the online comment form associated with this document in Docket No. TTB–2012–0006 on ''Regulations.gov,'' the Federal e-rulemaking portal, at *http://www.regulations.gov.* A direct link to that docket is available under Notice No. 131 on the TTB Web site at *http://www.ttb.gov/beer/beer-rulemaking.shtml.* Supplemental files may be attached to comments submitted via Regulations.gov. For information on how to use Regulations.gov, click on the site's Help tab.
- *U.S. Mail:* You may send comments via postal mail to the Director, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005.
- *Hand Delivery/Courier:* You may hand-carry your comments or have them hand-carried to the Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Suite 200–E, Washington, DC 20005.

Your comments must reference Notice No. 131 and include your name and mailing address. Your comments also must be made in English, be legible, and be written in language acceptable for public disclosure. TTB does not accept anonymous comments, does not acknowledge receipt of comments, and considers all comments as originals.

In your comment, please indicate if you are commenting on your own behalf or on behalf of an entity such as a small brewer or other business. If you are commenting on behalf of an entity, your comment must include the entity's name as well as your name and position title. If you comment via Regulations.gov, please also enter the entity's name in the ''Organization'' blank of the comment form. If you comment via U.S. mail, please submit your entity's comment on letterhead.

You may also write to the Administrator before the comment closing date to ask for a public hearing. The Administrator reserves the right to determine whether to hold a public hearing.

Confidentiality

All submitted comments and attachments are part of the public record and subject to public disclosure. Do not enclose any material in your comments that you consider confidential or inappropriate for public disclosure.

Public Disclosure

On the Federal e-rulemaking portal, Regulations.gov, TTB will post, and the public may view, copies of this document, the related temporary rule, and any electronic or mailed comments we receive about these proposals. A direct link to the Regulations.gov docket containing this document and the posted comments received on it is available on the TTB Web site at *http://www.ttb.gov/beer/beer-rulemaking.shtml* under Notice No. 131. You may also reach the docket containing this document and its related comments through the Regulations.gov search page at *http://www.regulations.gov.*

All posted comments will display the commenter's name, organization (if any), city, and State, and, in the case of mailed comments, all address information, including email addresses. TTB may omit voluminous attachments or material that the Bureau considers unsuitable for posting.

You and other members of the public may view copies of this document, the related temporary rule, and any electronic or mailed comments TTB receives about these proposals by appointment at the TTB Information Resource Center, 1310 G Street NW., Washington, DC 20005. You may also obtain copies at 20 cents per 8.5- x 11-inch page. Contact the TTB information specialist at the above address or by telephone at 202–453–2270 to schedule an appointment or to request copies of comments or other materials.

Regulatory Flexibility Act

Pursuant to the requirements of the Regulatory Flexibility Act (5 U.S.C. chapter 6) TTB certifies that this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities. As discussed below in the Paperwork Reduction Act section of this document, the changes TTB proposes in this rulemaking would have the effect of lessening current reporting requirements on small businesses. The proposal that small brewers submit their excise tax returns quarterly would reduce their current reporting burden from 18.75 hours per year to 3 hours per year and the proposal that small brewers submit their report of operations quarterly would reduce current reporting burdens from 12 hours per year to 4 hours. Accordingly, a regulatory flexibility analysis is not required.

Executive Order 12866

It has been determined that this document is not a significant regulatory action as defined in E.O. 12866. Therefore, a regulatory assessment is not necessary.

Paperwork Reduction Act

There are two collections of information approved by the Office of Management and Budget (OMB) that would be affected by the adoption of these proposed regulatory changes. These collections of information, approved in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), are the Excise Tax Return (TTB Form 5000.24) and the Brewer's Report of Operations and the Brewpub Report of Operations (TTB Form 5130.9 and TTB Form 5130.26), which are associated with OMB control numbers 1513–0083 and 1513–0007, respectively.

OMB Control Number 1513–0083

TTB bases the estimated reporting burdens submitted to OMB for the Excise Tax Return (OMB Control Number 1513–0083) on the total number of all TTB-regulated industry members who pay taxes, including beverage alcohol producers and tobacco products manufacturers. In order to estimate the burden-hour savings specific to brewers, we have based the estimates below solely on the current number of individuals holding Brewer's Notices. TTB estimates that it takes 45 minutes to complete TTB Form 5000.24. The proposed mandate that small brewers submit their excise tax returns quarterly would reduce their current reporting burden from 18.75 hours per year to just 3 hours per year. In addition, it would reduce the estimated annual reporting burden to 8,913 hours; this represents an estimated savings of 15,777 hours.

TTB estimates that, as a result of the proposed regulatory amendments (and reflecting the estimated number of monthly and quarterly tax return filers),

the total annual burden for tax return submissions will be as follows:

- Estimated number of respondents: 2,026 (180 filing semi-monthly; 1,846 filing quarterly).
- Estimated annual frequency of responses: 25 for semi-monthly reporting; 4 for quarterly reporting.
- Estimated total annual reporting burden: 8,913 hours (3,375 hours filing semi-monthly and 5,538 hours filing quarterly).
- Estimated annual burden hours per respondent: 18.75 hours for semi-monthly filing; 3 hours for quarterly filing.

OMB Control Number 1513–0007

TTB estimates that it takes 1 hour to complete the Brewer's Report of Operations or the Brewpub Report of Operations (TTB Form 5130.9 and TTB Form 5130.26). Therefore, the proposed mandate that small brewers submit their report of operations quarterly would reduce their current reporting burdens from 12 hours to 4 hours per year. That is a savings of 8 hours for each small brewer not currently filing these reports quarterly. In addition, it would reduce the estimated annual reporting burden to 9,544 hours, which is an estimated savings of 2,608 hours.

Based on the current number of individuals holding Brewer's Notices, TTB estimates that, as a result of the proposed regulatory amendments (and reflecting the estimated number of brewers filing monthly and quarterly operations reports), the total annual burden for the brewers operations reporting will be as follows:

- Estimated number of respondents: 180 reporting monthly; 1,846 reporting quarterly.
- Estimated annual frequency of responses: 12 for monthly reporting; 4 for quarterly reporting.
- Estimated total annual reporting burden: 9,544 hours (2,160 hours for monthly reporting and 7,384 hours for quarterly reporting).
- Estimated annual burden hours per respondent: 12 hours for monthly reporting; 4 hours for quarterly reporting.

Comments on the two collections of information should be sent to OMB to Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503; or email to *OIRA_submission@omb.eop.gov*. A copy also should be sent to the Alcohol and Tobacco Tax and Trade Bureau by any of the methods previously described. Comments on the information collection should be submitted not later than February 5, 2013. Comments are specifically requested concerning:

- Whether the two collections of information submitted to OMB are necessary for the proper performance of the functions of the Alcohol and Tobacco Tax and Trade Bureau, including whether the information will have practical utility;
- The accuracy of the estimated burdens associated with the two collections of information submitted to OMB;
- How to enhance the quality, utility, and clarity of the information to be collected;
- How to minimize the burden of complying with the proposed revisions of the collections of information, including the application of automated collection techniques or other forms of information technology; and
- Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Drafting Information

Gerald M. Isenberg and Ramona Hupp of the Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, drafted this document.

List of Subjects in 27 CFR Part 25

Beer, Excise taxes, Reporting and recordkeeping requirements, Surety bonds.

Amendments to the Regulations

Accordingly, for the reasons set forth in the preamble, TTB proposes to amend 27 CFR, chapter I, part 25 as set forth below.

PART 25—BEER

1. The authority citation for part 25 continues to read as follows:

Authority: 19 U.S.C. 81c; 26 U.S.C. 5002, 5051–5054, 5056, 5061, 5121, 5122–5124, 5222, 5401–5403, 5411–5417, 5551, 5552, 5555, 5556, 5671, 5673, 5684, 6011, 6061, 6065, 6091, 6109, 6151, 6301, 6302, 6311, 6313, 6402, 6651, 6656, 6676, 6806, 7342, 7606, 7805; 31 U.S.C. 9301, 9303–9308.

2. Amend § 25.93 by revising paragraph (a)(2) to read as follows:

§ 25.93 Penal sum of bond.

(a) * * *

(2) *Brewers filing quarterly tax returns.* For brewers who were liable for not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year, who reasonably expect to be liable for not more than $50,000 in such taxes during the current calendar year, and who file tax returns and remit taxes quarterly under § 25.164(c)(3), the penal sum of the brewers bond is $1,000 on beer:

(i) Removed for transfer to the brewery from other breweries owned by the same brewer;

(ii) Removed without payment of tax for export or for use as supplies on vessels and aircraft;

(iii) Removed without payment of tax for use in research, development, or testing; and

(iv) Removed for consumption or sale.

* * * * *

3. Amend § 25.164 by:

a. Amending the first sentence in paragraph (c)(1) by removing the words '', and chooses to use,''; and

b. Amending the first sentence in paragraph (c)(2) by removing the words ''may choose to'' and replacing them with ''shall''.

4. Amend § 25.297 by revising the section heading and paragraphs (b) and (c) to read as follows:

§ 25.297 Report of Operations, Form 5130.9 or Form 5130.26.

* * * * *

(b) *Quarterly report of operations.* (1) For calendar quarters commencing after [the effective date of the final rule], a brewer who was liable for not more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 in the preceding calendar year and reasonably expects to be liable for not more than $50,000 in such taxes during the current calendar year shall file quarterly Form 5130.9 or Form 5130.26. For purposes of this section, ''reasonably expects'' means that the brewer was liable for not more than $50,000 in taxes the previous year and that there is no other existing or anticipated circumstances known to the brewer (such as an increase in production capacity) that would cause the brewer's liability to increase beyond that level.

(2) If a brewer determines that it will be liable for more than $50,000 in taxes with respect to beer imposed by 26 U.S.C. 5051 and 7652 during the current calendar year, the brewer shall file the Brewer's Report of Operations, Form 5130.9, for that month and for each subsequent month of that calendar year. When filing the last quarterly report, a brewer shall state in the ''Remarks'' section of Form 5130.9 or Form 5130.26 that it will be liable for more than $50,000 in taxes for the current calendar year and will henceforth submit monthly filings.

(3) The appropriate TTB officer may at any time require a brewer who is filing Form 5130.9 or Form 5130.26 quarterly to file such report monthly on

Form 5130.9 if there is a jeopardy to the revenue.

(c) *Retention.* The brewer shall retain a copy of Form 5130.9 or Form 5130.26 as part of the brewery records.

Signed: September 18, 2012.

John J. Manfreda,

Administrator.

Approved: September 28, 2012.

Timothy E. Skud,

Deputy Assistant Secretary (Tax, Trade, and Tariff Policy).

[FR Doc. 2012–29487 Filed 12–6–12; 8:45 am]

BILLING CODE 4810–31–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0120; FRL–9710–2]

Revisions to the California State Implementation Plan, Imperial County, Placer County, and Ventura County Air Pollution Control Districts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Imperial County Air Pollution Control District (ICAPCD), Placer County Air Pollution Control District (PCAPCD) and Ventura County Air Pollution Control District (PCAPCD) portions of the California State Implementation Plan (SIP). Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), we are proposing to approve local rules that address emission statements for ICAPCD and PCAPCD and definitions for VCAPCD.

DATES: Any comments on this proposal must arrive by January 7, 2013.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2012–0120], by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov.* Follow the on-line instructions.

2. *Email: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *www.regulations.gov* or email. *www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send email directly to EPA, your email address will be automatically captured and included as part of the public comment. 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: Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov*, some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Cynthia Allen, EPA Region IX, (415) 947–4120, *allen.cynthia@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: ICAPCD Rule 116, PCAPCD Rule 503, and VCAPCD Rule 2. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: July 19, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2012–29363 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120924487–2487–01]

RIN 0648–XC263

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

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

ACTION: Proposed rule.

SUMMARY: NMFS proposes to implement the annual catch limit (ACL), harvest guideline (HG), annual catch target (ACT) and associated annual reference points for Pacific mackerel in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of July 1, 2012, through June 30, 2013. This rule is proposed according to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). The proposed 2012–2013 ACL or maximum HG for Pacific mackerel is 40,514 metric tons (mt). The proposed ACT, which will be the directed fishing harvest target, is 30,386 mt. If the fishery attains the ACT, the directed fishery will close, reserving the difference between the ACL and ACT (10,128 mt) as a set aside for incidental landings in other CPS fisheries and other sources of mortality. This rule is intended to conserve and manage the Pacific mackerel stock off the U.S. West Coast.

DATES: Comments must be received by January 7, 2013.

ADDRESSES: You may submit comments on this document identified by NOAA–NMFS–2012–0215 by any of the following methods:

• *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*. To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2012–0215 in the keyword search. Locate the document you wish to comment on

from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.

• *Mail:* Submit written comments to Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802.

• *Fax:* (562) 980–4047.

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will 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). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the report ''Pacific Mackerel (*Scomber japonicus*) Stock Assessment for USA Management in the 2011–12 Fishing Year'' and the Environmental Assessment/Regulatory Impact Review for this action may be obtained from the Southwest Regional Office (see **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: During public meetings each year, the estimated biomass for Pacific mackerel is presented to the Pacific Fishery Management Council's (Council) Coastal Pelagic Species (CPS) Management Team (Team), the Council's CPS Advisory Subpanel (Subpanel) and the Council's Scientific and Statistical Committee (SSC), where the biomass and the status of the fisheries are reviewed and discussed. The biomass estimate is then presented to the Council along with the calculated overfishing limit (OFL) and available biological catch (ABC), annual catch limit (ACL) and harvest guideline (HG) and/or annual catch target (ACT) recommendations and comments from the Team, Subpanel and SSC. Following review by the Council and after hearing public comment, the Council adopts a biomass estimate and makes its catch level recommendations to NMFS.

The purpose of this proposed rule is to implement the 2012–2013 ACL, HG, ACT and other annual catch reference points, including OFL and an ABC that takes into consideration uncertainty surrounding the current estimate of biomass, for Pacific mackerel in the U.S. EEZ off the Pacific coast. (The EEZ off the Pacific Coast encompasses ocean waters seaward of the outer boundary of state waters, which is 3 nautical miles off the coast, out to a line 200 nautical miles from the coast.) The CPS FMP and its implementing regulations require NMFS to set these annual catch levels for the Pacific mackerel fishery based on the annual specification framework in the FMP. This framework includes a harvest control rule that determines the maximum HG, the primary management target for the fishery, for the current fishing season. The HG is based, in large part, on the current estimate of stock biomass. The harvest control rule in the CPS FMP is HG = [(Biomass − Cutoff) * Fraction * Distribution] with the parameters described as follows:

1. *Biomass.* The estimated stock biomass of Pacific mackerel for the 2012–2013 management season is 211,126 mt.

2. *Cutoff.* This is the biomass level below which no commercial fishery is allowed. The FMP established this level at 18,200 mt.

3. *Fraction.* The harvest fraction is the percentage of the biomass above 18,200 mt that may be harvested.

4. *Distribution.* The average portion (currently 70%) of the total Pacific mackerel biomass that is estimated to be in the U.S. EEZ off the Pacific coast, based on the average historical larval distribution obtained from scientific cruises and the distribution of the resource according to the logbooks of aerial fish-spotters.

At the June 2012 Council meeting, the Council recommended management measures for the Pacific mackerel fishery. These management measures were based on the 2011 full stock assessment, which estimated the biomass of Pacific mackerel to be 211,126 mt. The 2011 full stock assessment of Pacific mackerel was reviewed by a Stock Assessment Review Panel in May 2011, and was approved in June 2011 by the SSC as the best available science for use in management. Based on recommendations from the Council's SSC and other advisory bodies, the Council recommended and NOAA Fisheries (NMFS) is proposing, an OFL of 44,336 mt, an ABC of 42,375 mt, an ACL and maximum harvest guideline (HG) of 40,514 mt, and an ACT of 30,386 mt for the 2012–2013 Pacific mackerel fishing year. These catch specifications are based on the biomass estimate for Pacific mackerel and the control rules established in the CPS FMP.

If the ACT is attained, the directed fishery will close, and the difference between the ACL and ACT (10,128 mt) will be reserved as a set aside for incidental landings in other CPS fisheries and other sources of mortality. In that event, incidental harvest measures will be in place for the remainder of the fishing year, including a 45 percent incidental catch allowance when Pacific mackerel are landed with other CPS. In other words, no more than 45 percent by weight of the CPS landed per trip may be Pacific mackerel, except that up to 1 mt of Pacific mackerel could be landed without landing any other CPS. Upon the fishery attaining the ACL/HG (40,514 mt), no vessels in CPS fisheries may retain Pacific mackerel. The purpose of the incidental set-aside and allowance of an incidental fishery is to allow for the restricted incidental landings of Pacific mackerel in other fisheries, particularly other CPS fisheries, when the directed fishery is closed to reduce potential discard of Pacific mackerel and allow for continued prosecution of other important CPS fisheries.

The NMFS Southwest Regional Administrator will publish a notice in the **Federal Register** announcing the date of any closure to either directed or incidental fishing. Additionally, to ensure the regulated community is informed of any closure NMFS will also make announcements through other means available, including fax, email, and mail to fishermen, processors, and state fishery management agencies.

Detailed information on the fishery and the stock assessment are found in the report ''Pacific Mackerel (*Scomber japonicus*) Stock Assessment for USA Management in the 2011–12 Fishing Year'' (see **ADDRESSES**).

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Fishery Conservation and Management Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the CPS FMP, other provisions of the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law, subject to further consideration after public comment.

These proposed specifications are exempt from review under Executive Order 12866.

Pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities, for the reasons as follows:

The purpose of this proposed rule is to implement the 2012–2013 annual specifications for Pacific mackerel in the U.S. EEZ off the Pacific coast. The CPS FMP and its implementing regulations require NMFS to set an OFL, ABC, ACL and HG or ACT for the Pacific mackerel fishery based on the harvest control rules in the FMP. The specific harvest control rule is applied to the current stock biomass estimate to derive the annual HG, which is used to manage the commercial take of Pacific mackerel.

The U.S. Small Business Administration defines small businesses engaged in fishing as those vessels with annual revenues of or below $4 million. The small entities that would be affected by the proposed action are the vessels that compose the West Coast CPS finfish fleet. Pacific mackerel harvest is one component of CPS fisheries off the U.S. West Coast, which primarily includes the fisheries for Pacific sardine, northern anchovy and market squid. Pacific mackerel are principally caught off southern California within the limited entry portion (south of 39 degrees N. latitude; Point Arena, California) of the fishery. Fifty-eight vessels are currently permitted in the Federal CPS limited entry fishery off California. The average annual per vessel revenue in 2011 for the West Coast CPS finfish fleet was well below $4 million; therefore, all of these vessels therefore are considered small businesses under the RFA. Because each affected vessel is a small business, this proposed rule has an equal effect on all of these small entities, and therefore will impact a substantial number of these small entities in the same manner.

The profitability of these vessels as a result of this proposed rule is based on the average Pacific mackerel ex-vessel price per mt. NMFS used average Pacific mackerel ex-vessel price per mt to conduct a profitability analysis because cost data for the harvesting operations of CPS finfish vessels was limited or unavailable. For the 2011–2012 fishing year the HG was 40,514 mt and was divided into a directed fishery (or ACT) of 30,386 mt and an incidental fishery of 10,128 mt. Approximately 1,900 mt of this HG was harvested in 2011–2012 fishing season with an estimated ex-vessel value of $456,000 mt. Using these figures, the average 2011/2012 ex-vessel price per mt of Pacific mackerel was approximately $240.

The proposed ACL/HG for the 2012/2013 Pacific mackerel fishing season is 40,514 mt, with a directed fishing harvest target or ACT of 30,386 mt. This season's directed fishing target is the same as the previous year. If the fleet were to take the entire 2012–2013 ACT, and assuming a coastwide average ex-vessel price per mt of $220 (average of 2010 and 2011 ex-vessel), the potential revenue to the fleet would be approximately $6.6 million. However, this result will depend greatly on market forces within the fishery, and on the regional availability of the resource to the fleet and the fleets' ability to find schools of Pacific mackerel. The annual average U.S. Pacific mackerel harvest from 2001 to 2010 is approximately 4,500 mt, and over the last 10 years landings have averaged approximately 6,000 mt without exceeding 10,000 mt. As a result, it is unlikely that the ACT proposed in this rule will limit the potential profitability of the fleet from Pacific mackerel. Accordingly, vessels' profits are not expected to be altered as a result of this rule as it relates to recent catches in the fishery and the previous season's regulation.

Based on the disproportionality and profitability analysis above, this rule, if adopted, will not have a significant economic impact on a substantial number of these small entities. As a result, an Initial Regulatory Flexibility Analysis is not required, and none has been prepared.

There are no reporting, record-keeping, or other compliance requirements required by this proposed rule. Additionally, no other Federal rules duplicate, overlap or conflict with this proposed rule.

This action does not contain a collection-of-information requirement for purposes of the Paper Reduction Act.

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

Dated: December 3, 2012.

Alan D. Risenhoover,

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

[FR Doc. 2012–29621 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 77, No. 236
Friday, December 7, 2012

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

December 3, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food and Nutrition Service

Title: Generic Clearance for the Development of Nutrition Education Messages and Products for the General Public.

OMB Control Number: 0584–0523.

Summary of Collection: The Center for Nutrition Policy and Promotion (CNPP) of the U.S. Department of Agriculture conducts consumer research to identify key issues of concern related to understanding and use of the *Dietary Guidelines for Americans* (DGA), as well as the tools and resources used to implement the Dietary Guidelines—previously known as the *MyPyramid* food guidance system. The *Dietary Guidelines,* a primary source of dietary health information, are issued jointly by the USDA and Health and Human Services and serve as the cornerstone of Federal nutrition policy and form the basis for nutrition education efforts of these agencies. After the release of the 2010 DGA a new communication initiative built around USDA's new *MyPlate* icon, including the resources at *ChooseMyPlate.gov,* was launched. *MyPlate* is a visual cue supported by Dietary Guidelines messages to help consumer make better food choices.

Need and Use of the Information: CNPP will collect information to develop practical and meaningful nutrition and physical activity guidance for Americans to help improve their health. The collected information will also be used to expand the knowledge base concerning how the *Dietary Guidelines for Americans* recommendations and messages supporting *MyPlate* are understood and how they can be used by consumers to improve balance of their food intake with physical energy expenditure for good health. If this information is not collected, USDA's ability to incorporate messages and materials that are practical, meaningful, and relevant for the intended audience in any proposed update of the Dietary Guidelines for Americans or related resources at *Choosemyplate.gov* will be impaired.

Description of Respondents: Individuals or households.

Number of Respondents: 57,000.

Frequency of Responses: Reporting: Other (as desired).

Total Burden Hours: 12,004.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–29603 Filed 12–6–12; 8:45 am]

BILLING CODE 3410–30–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Schillinger Genetics, Inc. of West Des Moines, Iowa, an exclusive license to U.S. Patent No. 7,951,537, ''Development of Low Allergen Soybean Seeds Using Molecular Markers for the P34 Allele,'' issued on May 31, 2011.

DATES: Comments must be received on or before January 7, 2013.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Schillinger Genetics, Inc. of West Des Moines, Iowa has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the

requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Robert Griesbach,

Acting Assistant Administrator.

[FR Doc. 2012–29549 Filed 12–6–12; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to City Center Farms, LLC of Phoenix, Arizona, an exclusive license to U.S. Patent No. 6,613,378, ''SUGAR-BASED EDIBLE ADHESIVES'', issued on September 2, 2003.

DATES: Comments must be received on or before January 7, 2013.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as City Center Farms, LLC of Phoenix, Arizona has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Robert Griesbach,

Acting Assistant Administrator.

[FR Doc. 2012–29550 Filed 12–6–12; 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: NIST, Hollings Manufacturing Extension Partnership (HMEP) Program Application Requirements.

OMB Control Number: 0693–0056.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved collection).

Number of Respondents: 12.

Average Hours per Response: 112.

Burden Hours: 1,344.

Needs and Uses: The object of NIST Hollings Manufacturing Extension Partnership (HMEP) Program is to enhance productivity, technological performance, and strengthen the global competitiveness of small- and medium-sized U.S.-based manufacturing firms.

Affected Public: Not-for-profit institutions; State or local government; consortia of not-for-profit institutions.

Frequency: Annually.

Respondent's Obligation: Required to obtain benefits.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@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, Fax number (202) 395–5167, or via the Internet at *Jasmeet_K_Seehra@omb.eop.gov*.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–29572 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1870]

Reorganization of Foreign-Trade Zone 43 Under Alternative Site Framework, Battle Creek, MI

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the City of Battle Creek, Michigan, grantee of Foreign-Trade Zone 43, submitted an application to the Board (FTZ Docket B–57–2012, docketed 7–30–2012) for authority to reorganize under the ASF with a service area of Allegan, Barry, Berrien, Branch, Calhoun, Cass, Clinton, Eaton, Ingham, Ionia, Jackson, Kalamazoo, St. Joseph and Van Buren Counties, Michigan, in and adjacent to the Battle Creek Customs and Border Protection port of entry, FTZ 43's existing Site 1 would be categorized as a magnet site and existing Site 8 would be categorized as a usage-driven site;

Whereas, notice inviting public comment was given in the **Federal Register** (77 FR 46376–46377, 8–3–2012) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 43 under the alternative site framework is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the zone, to a five-year ASF sunset provision for magnet sites that would terminate authority for Site 1 if not activated by November 30, 2017, and to a three-year ASF sunset provision for usage-driven sites that would terminate authority for Site 8 if no foreign-status merchandise is admitted for a *bona fide* customs purpose by November 30, 2015.

Signed at Washington, DC, this 30th day of November 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–29655 Filed 12–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–803]

Polyethylene Terephthalate Film, Sheet, and Strip From the United Arab Emirates; Preliminary Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on polyethylene terephthalate film, sheet, and strip (PET Film) from the United Arab Emirates (UAE). The period of review (POR) is November 1, 2010, through October 31, 2011. The review covers two producer/exporters of the subject merchandise—JBF RAK LLC (JBF) and FLEX Middle East FZE (FLEX). The Department preliminarily determines that sales of subject merchandise have been made below normal value by JBF and that FLEX did not make sales of subject merchandise below normal value.

DATES: *Effective Date:* December 7, 2012

FOR FURTHER INFORMATION CONTACT: Andrew Huston, or Gene Calvert, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4261 or (202) 482–3586, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The products covered by the order are all gauges of raw, pre-treated, or primed polyethylene terephthalate film, whether extruded or co-extruded. Excluded are metallized films and other finished films that have had at least one of their surfaces modified by the application of a performance-enhancing resinous or inorganic layer more than 0.00001 inches thick. Also excluded is roller transport cleaning film which has at least one of its surfaces modified by application of 0.5 micrometers of SBR latex. Tracing and drafting film is also excluded. Polyethylene terephthalate film is classifiable under subheading 3920.62.00.90 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of the order is dispositive.

Methodology

The Department is conducting this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act.

For a full description of the methodology underlying our conclusions, *see* the Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from the United Arab Emirates'' (Preliminary Decision Memorandum), dated concurrently with these results and hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of Review

As a result of our review, we preliminarily determine the following weighted-average dumping margins exist for the period November 1, 2010, through October 31, 2011:

Manufacturer/exporter	Weighted-average margin (percent)
JBF RAK LLC	5.31
FLEX Middle East FZE	0.00

Disclosure and Public Comment

The Department intends to disclose the calculations used in our analysis to parties in this review within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Interested parties are invited to comment on the preliminary results of this review. Pursuant to 19 CFR 351.309(c)(1)(ii), interested parties may submit case briefs not later than 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may not be filed later than five days after the time limit for filing case briefs.[1] Parties who submit case briefs or rebuttal briefs in this review are requested to submit with each brief: (1) A statement of the issue, (2) a brief summary of the argument, and (3) a table of authorities.[2] Executive summaries should be limited to five pages total, including footnotes.[3]

Pursuant to 19 CFR 351.310(c), any interested party may request a hearing within 30 days of the publication of this notice in the **Federal Register**. If a hearing is requested, the Department will notify interested parties of the hearing schedule. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS within 30 days after the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs.

We intend to issue the final results of this administrative review, including the results of our analysis of issues raised by the parties in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**, unless otherwise extended.[4]

Assessment Rates

Upon issuing the final results of the review, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties

[1] *See* 19 CFR 351.309(d)(1).

[2] *See* 19 CFR 351.309(c)(2), (d)(2).

[3] *See id.*

[4] *See* section 751(a)(3)(A) of the Act.

on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review.

For any individually examined respondents whose weighted-average dumping margin is above *de minimis,* we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[5] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific assessment rate calculated in the final results of this review is above *de minimis.* Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of PET Film from the UAE entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies under review will be the rate established in the final results of this review (except, if the rate is zero or *de minimis,* no cash deposit will be required); (2) 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 period; (3) if the exporter is not a firm covered in this review, a prior review, or the less-than-fair-value investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.05 percent, the all-others rate established in the investigation.[6] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

These preliminary results of administrative review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 30, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

1. Comparisons to Normal Value
2. Product Comparisons
3. Arm's-Length Test
4. Date of Sale
5. JBF's Margin Calculation
6. FLEX's Margin Calculation
7. Currency Conversions

[FR Doc. 2012–29643 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–908]

Sodium Hexametaphosphate From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In response to requests from interested parties, the Department of Commerce (the ''Department'') is conducting the third administrative review of the antidumping duty order on sodium hexametaphosphate (''sodium hex'') from the People's Republic of China (''PRC'') for the period of review (''POR'') March 1, 2011, through February 29, 2012. The Department has preliminarily determined that there are no reviewable entries during the POR.

DATES: *Effective Date:* December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Walker, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone 202.482.0413.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The scope of this order consists of sodium hexametaphosphate.[1] The merchandise subject to this order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') statistical reporting number 2835.39.5000. However, it may also be imported as a blend or mixture under heading 3824.90.3900. Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description, available in the *Order* remains dispositive.[2]

Preliminary Finding of No Shipments

Hubei Xingfa Chemical Group Co., Ltd. (''Hubei Xingfa'') and Sichuan Mianzhu Norwest Phosphate Co. (''Norwest'') submitted timely-filed certifications that they had no sales of subject merchandise to the United States during the POR.[3] The Department also received information from U.S. Customs and Border Protection (''CBP'') indicating that there were no reviewable transactions from Hubei Xingfa or Norwest during the POR. Therefore, we preliminarily determine that Hubei Xingfa and Norwest had no reviewable transactions of subject merchandise during the POR. Because Hubei Xingfa and Norwest submitted timely no-shipment certifications and CBP data indicated that there were no reviewable transactions for these companies during the POR, we preliminarily determine that these two companies will retain their separate rate from the previous

[5] In these preliminary results, the Department applied the assessment rate calculation methodology adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[6] *See Polyethylene Terephthalate Film, Sheet, and Strip from Brazil, the People's Republic of China and the United Arab Emirates: Antidumping Duty Orders and Amended Final Determination of Sales at Less Than Fair Value for the United Arab Emirates,* 73 FR 66595, 66597 (November 10, 2008).

[1] *See* ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Sodium Hexametaphosphate from the People's Republic of China,'' (''Preliminary Decision Memorandum'') from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with these results and hereby adopted by this notice.

[2] *See Notice of Antidumping Duty Order: Sodium Hexametaphosphate from the People's Republic of China,* 73 FR 14772 (March 19, 2008) (''*Order*'').

[3] *See* Hubei Xingfa's letter dated May 4, 2012; *see also* Norwest's letter dated June 29, 2012.

administrative review. For a full description of the methodology underlying our conclusions, *see* the Preliminary Decision Memorandum.[4] The Preliminary Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (''CRU''), room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/*. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

PRC-Wide Entity

There are 13 other companies also under review in this segment, none of which have a separate rate from a prior segment of this proceeding.[5] Because these companies have not established their eligibility for a separate rate, the Department preliminarily determines that they will continue to be considered part of the PRC-wide entity.[6]

Preliminary Results of Review

The Department preliminarily determines that the following weighted-average dumping margin exists:

Exporter	Weighted average dumping margin
PRC-wide Entity[7]	188.05

Public Comment

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically in IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.[8] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined. Parties should confirm by telephone the date, time, and location of the hearing. Interested parties are invited to comment on the preliminary results of this review.

The Department will consider case briefs filed by interested parties within 30 days after the date of publication of this notice in the **Federal Register**.[9] Interested parties may file rebuttal briefs, limited to issues raised in the case briefs.[10] The Department will consider rebuttal briefs filed not later than five days after the time limit for filing case briefs. Parties who submit arguments are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities cited. The Department intends to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. The Department recently announced a refinement to its assessment practice in NME cases. Pursuant to this refinement in practice, for entries that were not reported by companies examined during this review, the Department will instruct CBP to liquidate such entries at the NME-wide rate. In addition, if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the NME-wide rate.[11]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (2) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate will be that for the PRC-wide entity; and (3) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under section 351.402(f)(2) of the Department's regulations to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and section 351.221(b)(4) of the Department's regulations.

[4] *See* Preliminary Decision Memorandum.

[5] These companies are: Aditya Birla Chemicals (Thailand) Ltd., Anhui Technology Import & Export Co., Ltd., Anshan Career Economic Trade Co., Ltd., Blue Science Limited, Boon Stream Chemical International Trade, Chengdu Boon Stream Chemical Industry Co., Ltd., Dezhou Hualude Hardware Products Co. Ltd., Gatehouse International Freight Ltd., Henan Sinchems Imp and Exp Co., Ltd., Hubei Xingfa Chemical Export Import Co. Ltd., Rushan Wooyoung Trading Co., Ltd., Unison Chemical Industrial Co, Ltd. and Zhejiang Chun-an Foreign Trade Co.

[6] *See* the Preliminary Decision Memorandum.

[7] The PRC-wide entity includes Aditya Birla Chemicals (Thailand) Ltd., Anhui Technology Import & Export Co., Ltd., Anshan Career Economic Trade Co., Ltd., Blue Science Limited, Boon Stream Chemical International Trade, Chengdu Boon Stream Chemical Industry Co., Ltd., Dezhou Hualude Hardware Products Co. Ltd., Gatehouse International Freight Ltd., Henan Sinchems Imp and Exp Co., Ltd., Hubei Xingfa Chemical Export Import Co. Ltd., Rushan Wooyoung Trading Co., Ltd., Unison Chemical Industrial Co, Ltd. and Zhejiang Chun-an Foreign Trade Co.

[8] *See* section 351.310(c) of the Department's regulations.

[9] *See* section 351.309(c)(1)(ii) of the Department's regulations.

[10] *See* section 351.309(d) of the Department's regulations.

[11] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Dated: November 29, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–29642 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–423–808]

Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010–2011

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

SUMMARY: On June 1, 2012, the Department of Commerce (the Department) published the preliminary results of the antidumping duty order on stainless steel plate in coils (steel plate) from Belgium.[1] This review covers one manufacturer/exporter of the subject merchandise: Aperam Stainless Belgium N.V. (AS Belgium). The period of review (POR) is May 1, 2010, through April 30, 2011.

Based on our analysis of the comments received, we have made changes to the *Preliminary Results.* For the final dumping weighted-average dumping margin, *see* the ''Final Results of Review'' section below.

DATES: *Effective Date:* December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Jolanta Lawska at 202–482–8362; Office of AD/CVD Operations 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2012, the Department published in the **Federal Register** the *Preliminary Results.* We invited interested parties to comment on the *Preliminary Results.* On September 17, 2012, the Department received case briefs from AS Belgium and the petitioners.[2] On September 24, 2012, the Department received rebuttal briefs from AS Belgium and the petitioners. No party requested a hearing.

On July 29, 2012, the Department issued a memorandum extending the time period for issuing the final results of the administrative review from September 27, 2012, to November 28, 2012.[3] As explained in the memorandum from the Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the final results of this review is now November 30, 2012.[4]

On October 22, 2012, the Department issued a post-preliminary analysis memorandum in which addressed the petitioners' targeted dumping allegations.[5] On October 29, 2012, AS Belgium submitted its case brief on the post-preliminary analysis memorandum. On November 2, 2012, the petitioners submitted their rebuttal brief to AS Belgium's case brief.

Scope of the Order

The merchandise subject to the order is certain stainless steel plate in coils. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) item numbers 7219.11.00.30, 7219.11.00.60, 7219.12.00.02, 7219.12.00.05, 7219.12.00.06, 7219.12.00.20, 7219.12.00.21, 7219.12.00.25, 7219.12.00.26, 7219.12.00.50, 7219.12.00.51, 7219.12.00.55, 7219.12.00.56, 7219.12.00.65, 7219.12.00.66, 7219.12.00.70, 7219.12.00.71, 7219.12.00.80, 7219.12.00.81, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, and 7220.90.00.60. Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description, available in the order, remains dispositive.[6]

Analysis of Comments Received

All issues raised in the case briefs, rebuttal briefs, and post-preliminary comments by parties to this administrative review are addressed in the Issues and Decision Memorandum for the Final Results of the Administrative Review of Stainless Steel Plate in Coils from Belgium from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration (Decision Memorandum), dated concurrently with this notice and which is hereby adopted by this notice.

A list of the issues which parties raised is attached to this notice as Appendix I. The Decision Memorandum is a public document and is on file in the Central Records Unit (CRU), room 7046 of the main Department of Commerce building, as well as electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the CRU. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/.* The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of comments received for AS Belgium, we have recalculated AS Belgium's weighted-average dumping margin. AS Belgium's adjustments are discussed in detail in the accompanying final calculation memorandum.[7]

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[1] *See Stainless Steel Plate in Coils From Belgium: Notice of Preliminary Results of Antidumping Duty Administrative Review,* 77 FR 32517 (June 1, 2012) (*Preliminary Results*).

[2] The petitioners are Alleghany Ludlum Corporation, North American Stainless, United Auto Workers Local 3303, Zanesville Arco Independent Organization, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (AFL–CIO/CLC).

[3] *See* Memorandum from Eric B. Greynolds, Program Manager, to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations titled ''Antidumping Duty Administrative Review: Stainless Steel Plate in Coils from Belgium. Extension of Deadline for Final Results,'' (June 29, 2012).

[4] *See* Memorandum from Paul Piquado, Assistant Secretary for Import Administration regarding ''Tolling of Administrative Deadline as Result of the Government Closure during Hurricane Sandy,'' dated October 31, 2012.

[5] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations to Paul Piquado, Assistant Secretary for Import Administration, 2010/2011 Review of the Antidumping Duty Orders on Stainless Steel Plate in Coils (Steel Plate) from Belgium: Post-Preliminary Analysis Memorandum, dated October 22, 2012 (Post-Preliminary Analysis).

[6] *See Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan,* 64 FR 27756 (May 21, 1999).

[7] *See* Memorandum to the File from Jolanta Lawska, Case Analyst entitled ''Calculation Memorandum for Aperam Stainless Belgium N.V. (AS Belgium) for the Final Results of the 10th Administrative Review of Stainless Steel Plate in Coils from Belgium,'' dated November 30, 2012.

Calculation of Constructed Value (CV) and Selling Expense Ratios

As discussed in the *Preliminary Results,* we based normal value (NV) for AS Belgium on CV because there were no above-cost sales for comparison purposes. Therefore, in accordance with section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (the Act), which provides for the use of ''any reasonable method'' to determine an amount for CV selling expenses and profit in the absence of actual data, we relied on the CV selling expense and profit ratio calculated for ASB in the 2007–2008 review, the most recently completed review in this case. *See Preliminary Results,* 77 FR at 62520.

The respondent and the petitioners raised several issues in their case and rebuttal briefs regarding the Department's use of the 2007–2008 CV selling expense and profit ratios. As discussed in detail in the Decision Memorandum, after considering the comments by interested parties, we have determined for these final results that the 2010 audited financial statements of Aperam S.A. (AS Belgium's parent) represent the most reasonable data available on the record for determining CV profit.

With respect to selling expenses for the final results the Department has determined that it would be inappropriate to rely on AS Belgium's 2007/2008 financial data for calculating a selling expense ratio. For the final results, the Department finds that it is more appropriate to use AS Belgium's information from the current review to derive the selling expense ratio. For further information, *see* the Decision Memorandum at Comment 3.

Bundled Sales

For these final results, the Department has not found that the record supports the petitioners' allegations of bundling. Because our analysis includes business-proprietary information, for a full discussion, *see* Memorandum to the File through Eric B. Greynolds from Jolanta Lawska, Case Analyst, entitled, ''Calculation Memorandum for Aperam Stainless Belgium N.V. (AS Belgium) for the Final Results of the 10th Administrative Review of Stainless Steel Plate in Coils from Belgium,'' dated November 30, 2012.

Targeted Dumping

As noted in the *Preliminary Results,* the petitioners requested that the Department use an alternative comparison method, making average-to-transaction comparisons of normal value to constructed export price with respect to AS Belgium. The petitioners' request that the Department apply the average-to-transaction method for steel plate from Belgium in this administrative review was based on an allegation of targeted dumping. After publication of the *Preliminary Results,* the petitioners urged the Department to conduct the targeted-dumping analysis, as currently applied in antidumping investigations, in this administrative review to ascertain whether AS Belgium engaged in targeted dumping.[8] The Department issued a post-preliminary analysis regarding targeted dumping on October 22, 2012.[9]

After consideration of the case and rebuttal briefs from interested parties, the Department has continued to address the petitioner's targeted dumping allegation in these final results. As a result of the application of its targeted dumping analysis, the Department continues to find a pattern of constructed export prices for comparable merchandise that differs significantly among certain purchasers, regions, and time periods. *See* the Decision Memorandum at Comment 2. We further find that the observed price differences cannot be taken into account using the average-to-average method. Specifically, the average-to-average methodology yields a weighted-average dumping margin that is meaningfully different than the weighted-average dumping calculated using the average-to-transaction methodology. As a result, the Department has used the average-to-transaction method to calculate AS Belgium's weighted-average dumping margin on steel plate from Belgium for the period May 1, 2010, through April 30, 2011. Using the average-to-transaction method we calculated a weighted-average dumping margin of 0.82 percent for AS Belgium.

Verification

The petitioners requested that the Department conduct verification of AS Belgium's home market and U.S. market sales databases in accordance with 19 CFR 351.307(b)(1)(iv). *See* the Decision Memorandum at Comment 3. The Department has conducted verification of AS Belgium in the most recently completed administrative review. Further, we find that no good cause for verification exists within the meaning of 19 CFR 351.307(b)(1)(iv). Therefore, in accordance with 19 CFR 351.307(b)(1), we determined not to verify AS Belgium in this administrative review. *Id.*

[8] *See* the Decision Memorandum at Comment 2.

[9] *See* Post-Preliminary Analysis.

Final Results of Review

As a result of our review, we determined that the following weighted-average dumping margin exists for the period May 1, 2010, through April 30, 2011.

Manufacturer/exporter	Weighted-average dumping margin
Aperam Stainless Belgium N.V	0.82%

Antidumping Duty Assessment

The Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Since the weighted-average dumping margin is above *de minimis,* we calculated importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the importer's examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).[10] We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review since the importer-specific assessment rate calculated in the final results of this review is above *de minimis* (*i.e.,* 0.50 percent). Where either a respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003). This clarification will apply to entries of subject merchandise during the POR produced by the respondent for which it did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see id.*

[10] In these final results, the Department applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

Cash Deposit Requirements

The following antidumping duty deposit rates will be effective upon publication of the final results of this administrative review for all shipments of steel plate from Belgium entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results, as provided for by section 751(a)(1) of the Act: (1) For AS Belgium, the cash deposit rate will be the rate established in the final results of this review; (2) if the exporter is not a firm covered in this review, but was covered in a previous review or the original less-than-fair-value (LTFV) investigation, the cash deposit rate will continue to be the company-specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) if neither the exporter nor the manufacturer is a firm covered by this review, a prior review, or the LTFV investigation, the cash deposit rate will be 8.54 percent *ad valorem,* the ''all-others'' rate established in the LTFV investigation.[11] These deposit rates, when imposed, shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties. *See* 19 CFR 351.402(f)(3).

Notification to Interested Parties

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

These final results of review are issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 30, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix

List of Comments

Comment 1: Bundled Pricing
Comment 2: Targeted Dumping
Comment 3: Constructed Value (CV) Profit and Selling Expense Ratios
Comment 4: Verification
Comment 5: Customs Instructions

[FR Doc. 2012–29645 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–809]

Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) is conducting an administrative review of the antidumping duty order on circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea). The period of review (POR) is November 1, 2010, through October 31, 2011, and the review covers two producers/exporters of the subject merchandise, Husteel Co., Ltd. (Husteel) and Hyundai HYSCO (HYSCO). We have preliminarily found that one respondent has made sales of the subject merchandise at prices below normal value. We are also rescinding this review for seven other producers/exporters.

DATES: *Effective Date:* December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Mary Kolberg, or Jennifer Meek, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone (202) 482–1785 or (202) 482–2778, respectively.

Scope of the Order

The merchandise subject to the order is circular welded non-alloy steel pipe and tube. The product is currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, and 7306.30.50.90. Although the HTS subheadings are provided for convenience and customs purposes, the written product description, available in *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review,* 63 FR 32833 (June 16, 1998), remains dispositive.

Partial Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to the following parties because the review requests were timely withdrawn: Dongbu Steel Co., Ltd., SeAH Steel Corporation, A-JU Besteel Co., Ltd., Kumkang Industrial Co., Ltd., Nexteel Co., Ltd., Korea Iron & Steel Co., Ltd., and Union Steel Co., Ltd.

Methodology

The Department has conducted this review in accordance with section 751(a)(2) of the Tariff Act of 1930, as amended (the Act). Constructed export price is calculated in accordance with section 772 of the Act. Normal value is calculated in accordance with section 773 of the Act. In accordance with section 773(b) of the Act, we disregarded certain sales made by Husteel and HYSCO in the home market which were made at below-cost prices.

For a full description of the methodology underlying our conclusions, *see* the memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Preliminary Decision Memorandum for the Administrative Review of the Antidumping Duty Order on Circular Welded Non-Alloy Steel Pipe from the Republic of Korea'' dated concurrently with this notice (''Preliminary Decision Memorandum''), which is hereby adopted by this notice. The Preliminary Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available to

[11] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Belgium,* 64 FR 15476 (March 31, 1999).

registered users at *http://iaaccess.trade.gov* and is available to all parties in the Central Records Unit, Room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the Internet at *http://www.trade.gov/ia/frn/index.html*. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Results of the Review

As a result of this review, we preliminarily determine that the following weighted-average dumping margins exist for the respondents for the period November 1, 2010, through October 31, 2011.

Manufacturer/exporter	Weighted-average dumping margin (percent)
Husteel Co., Ltd.	6.54
Hyundai HYSCO	0.00

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with these preliminary results within five days of the date of publication of this notice.[1] Pursuant to 19 CFR 351.309(c), interested parties may submit cases briefs not later than the later of 30 days after the date of publication of this notice. Rebuttal briefs, limited to issues raised in the case briefs, may be filed not later than five days after the date for filing case briefs.[2] Parties who submit case briefs or rebuttal briefs in this proceeding are encouraged to submit with each argument: (1) A statement of the issue; (2) a brief summary of the argument; and (3) a table of authorities.[3] Case and rebuttal briefs should be filed using IA ACCESS.[4]

Pursuant to 19 CFR 351.310(c), interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, filed electronically via IA ACCESS. An electronically filed document must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Standard Time within 30 days after the date of publication of this notice.[5] Requests should contain: (1) The party's name, address and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. Issues raised in the hearing will be limited to those raised in the respective case briefs. The Department will issue the final results of this administrative review, including the results of its analysis of the issues raised in any written briefs, not later than 120 days after the date of publication of this notice, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

For Husteel and HYSCO, upon issuance of the final results, the Department shall determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries covered by this review. Husteel and HYSCO reported the name of the importer of record and the entered value for all of their sales to the United States during the POR. If Husteel and HYSCO's weighted-average dumping margins are above *de minimis* (*i.e.,* 0.50 percent) in the final results of this review, we will calculate an importer-specific assessment rate on the basis of the ratio of the total amount of dumping calculated for the importer's examined sales and the total entered value of those sales in accordance with 19 CFR 351.212(b)(1).

The Department clarified its ''automatic assessment'' regulation on May 6, 2003. This clarification will apply to entries of subject merchandise during the POR produced by Husteel and HYSCO for which they did not know its merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

For Husteel and HYSCO, we intend to issue instructions to CBP 15 days after publication of the final results of this review.

For the rescinded companies, 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 to CBP 15 days after the date of publication of this notice.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the notice of final results of administrative review for all shipments of CWP from Korea entered, or withdrawn from warehouse, for consumption on or after the date of publication as provided by section 751(a)(2) of the Act: (1) The cash deposit rate for HYSCO and Husteel will be the rate established in the final results of this administrative review; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; (4) the cash deposit rate for all other manufacturers or exporters will continue to be 4.80 percent, the ''all others'' rate established in the order.[6] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder and, with respect to companies which we rescind in part as a final reminder, to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The Department is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

[1] *See* 19 CFR 351.224(b).

[2] *See* 19 CFR 351.309(d).

[3] *See* 19 CFR 351.309(c)(2) and (d)(2).

[4] *See* 19 CFR 351.303.

[5] *See* 19 CFR 351.310(c).

[6] *See Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea (Korea), Mexico, and Venezuela, and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea,* 57 FR 49453 (November 2, 1992).

Dated: December 3, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

Targeted Dumping Allegations
Application of the Average-to-Transaction Methodology
Results of the Targeted Dumping Analysis
Comparisons to Normal Value
Product Comparisons
Date of Sale
Level of Trade/Constructed Export Price Offset
Constructed Export Price
Normal Value
A. Selection of Comparison Market
B. Affiliated Party Transactions and Arm's Length Test
C. Cost of Production
1. Calculation of Cost of Production
2. Test of Comparison Market Sales Prices
3. Results of the COP Test
D. Constructed Value
E. Calculation of Normal Value Based on Comparison Market Prices Currency Conversion

[FR Doc. 2012–29635 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–980]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: Based on an affirmative final determination by the U.S. International Trade Commission (ITC), the Department of Commerce (the Department) is issuing a countervailing duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (PRC). On November 30, 2012, the ITC notified the Department of its affirmative determination of material injury to a U.S. industry.[1]

DATES: *Effective Date:* December 7, 2012.

FOR FURTHER INFORMATION CONTACT: Gene Calvert, Jun Jack Zhao, or Emily Halle, AD/CVD Operations, Office 6, Import Administration, U.S. Department of Commerce, Room 7866, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3586, (202) 482–1396, or (202) 482–0176, respectively.

SUPPLEMENTARY INFORMATION:

Case History

In accordance with section 705(d) of the Tariff Act of 1930, as amended (the Act), on October 17, 2012, the Department published its final determination in the countervailing duty investigation of solar cells from the PRC.[2]

Scope of the Order

The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise under consideration are included in the scope of this order.

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding $10{,}000_{mm2}$ in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this order; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this order.

Merchandise covered by this order is currently classified in the Harmonized Tariff System of the United States (''HTSUS'') under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000.[3] These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.

Countervailing Duty Order

On November 30, 2012, the ITC notified the Department of its final determination, pursuant to section 705(b)(1)(A)(i) of the Act, that an industry in the United States is materially injured as a result of subsidized imports from the PRC. The ITC also determined that critical circumstances do not exist with respect to subject imports from the PRC.

As a result of the ITC's final determination, in accordance with section 706(a) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, countervailing duties on unliquidated entries of solar cells from the PRC entered, or withdrawn from warehouse, for consumption on or after March 26, 2012, the date on which the Department published its preliminary countervailing duty determination in the **Federal Register,** and before July 24, 2012, the date on which the Department instructed CBP to discontinue the suspension of liquidation in accordance with section 703(d) of the Act. Section 703(d) of the Act states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months. Entries of solar cells from the PRC made on or after July 24, 2012, and prior to the date of publication of the ITC's final determination in the **Federal Register** are not liable for the assessment of countervailing duties, due

[1] *See Crystalline Silicon Photovoltaic Cells and Modules from China,* Investigation Nos. 701–TA–481 and 731–TA–1190 (Final), USITC Publication 4360 (November 2012).

[2] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination,* 77 FR 63788 (October 17, 2012).

[3] U.S. Customs and Border Protection (CBP) provided notification that HTSUS number 8501.31.8000 should be added to the scope of the order, as certain articles under this number might fall within the scope. *See* the May 16, 2012 Memorandum to The File, ''ACE Case Reference File Update.''

to the Department's discontinuation, effective July 24, 2012, of the suspension of liquidation.

The ITC determined that critical circumstances do not exist with respect to subject imports from the PRC. Because of the ITC's negative determination of critical circumstances, the Department will direct CBP to refund all cash deposits collected on entries of solar cells from the PRC which were entered, or withdrawn from warehouse, for consumption on or after December 27, 2011, and before March 26, 2012. The interest provisions of section 778 of the Act do not apply.

In accordance with section 706 of the Act, the Department will direct CBP to reinstitute the suspension of liquidation of solar cells from the PRC, effective the date of publication of the ITC's notice of final determination in the **Federal Register,** and to assess, upon further advice from the Department pursuant to section 706(a)(1) of the Act, countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates for the subject merchandise. On or after the date of publication of the ITC's final injury determination in the **Federal Register,** CBP must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rates noted below:

Company	Subsidy rate
Changzhou Trina Solar Energy Co., Ltd.; Trina Solar (Changzhou) Science and Technology Co., Ltd. (collectively, Trina Solar)	15.97 percent *ad valorem.*
Wuxi Suntech Power Co., Ltd.; Luoyang Suntech Power Co., Ltd.; Suntech Power Co., Ltd.; Yangzhou Rietech Renewal Energy Co., Ltd.; Zhenjiang Huantai Silicon Science & Technology Co., Ltd.; Kuttler Automation Systems (Suzhou) Co., Ltd.; Shenzhen Suntech Power Co., Ltd.; Wuxi Sunshine Power Co., Ltd.; Wuxi University Science Park International Incubator Co., Ltd.; Yangzhou Suntech Power Co., Ltd.; and Zhenjiang Rietech New Energy Science & Technology Co., Ltd; (collectively, Wuxi Suntech)	14.78 percent *ad valorem.*
All Others Rate	15.24 percent *ad valorem.*

This notice constitutes the countervailing duty order with respect to solar cells from the PRC pursuant to section 706(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7046 of the main Commerce building, for copies of an updated list of countervailing duty orders currently in effect.

This countervailing duty order is issued and published in accordance with sections 705(c)(2) and 706 of the Act, and 19 CFR 351.211.

Dated: December 3, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–29669 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–979]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 7, 2012.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (the ''Department'') and the International Trade Commission (''ITC''), the Department is issuing an antidumping duty order on crystalline silicon photovoltaic cells, whether or not assembled into modules (''solar cells''), from the People's Republic of China (''PRC''). In addition, the Department is amending its final determination to correct certain ministerial errors.

FOR FURTHER INFORMATION CONTACT: Jeffrey Pedersen, Krisha Hill, or Drew Jackson, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2769, (202) 482–4037, or (202) 482–4406, respectively.

SUPPLEMENTARY INFORMATION:

Background

In accordance with sections 735(d) and 777(i)(1) of the Tariff Act of 1930, as amended (''Act''), on October 17, 2012, the Department published the final determination of sales at less than fair value, and affirmative final determination of critical circumstances, in part, in the antidumping duty investigation of solar cells from the PRC.[1] On November 30, 2012, the ITC notified the Department of its affirmative determination of material injury to a U.S. industry.[2] In addition, the ITC notified the Department of its final determination that critical circumstances do not exist with respect to imports of solar cells from the PRC that are subject to the Department's affirmative critical circumstances finding.[3]

Scope of the Order

The merchandise covered by this order is crystalline silicon photovoltaic cells, and modules, laminates, and panels, consisting of crystalline silicon photovoltaic cells, whether or not partially or fully assembled into other products, including, but not limited to, modules, laminates, panels and building integrated materials.

This order covers crystalline silicon photovoltaic cells of thickness equal to or greater than 20 micrometers, having a p/n junction formed by any means, whether or not the cell has undergone other processing, including, but not limited to, cleaning, etching, coating, and/or addition of materials (including, but not limited to, metallization and conductor patterns) to collect and forward the electricity that is generated by the cell.

Merchandise under consideration may be described at the time of importation as parts for final finished products that are assembled after importation, including, but not limited to, modules, laminates, panels, building-integrated modules, building-integrated panels, or other finished goods kits. Such parts that otherwise meet the definition of merchandise

[1] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part,* 77 FR 63791 (October 17, 2012) (''*Final Determination*'').

[2] *See Crystalline Silicon Photovoltaic Cells and Modules from China (Investigation Nos. 701–TA–481 and 731–TA–1190 (Final), USITC Publication 4360, November 2012).*

[3] *See id.*

under consideration are included in the scope of this order.

Excluded from the scope of this order are thin film photovoltaic products produced from amorphous silicon (a-Si), cadmium telluride (CdTe), or copper indium gallium selenide (CIGS).

Also excluded from the scope of this order are crystalline silicon photovoltaic cells, not exceeding 10,000mm [2] in surface area, that are permanently integrated into a consumer good whose function is other than power generation and that consumes the electricity generated by the integrated crystalline silicon photovoltaic cell. Where more than one cell is permanently integrated into a consumer good, the surface area for purposes of this exclusion shall be the total combined surface area of all cells that are integrated into the consumer good.

Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this order; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this order.

Merchandise covered by this order is currently classified in the Harmonized Tariff System of the United States (''HTSUS'') under subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030, and 8501.31.8000.[4] These HTSUS subheadings are provided for convenience and customs purposes; the written description of the scope of this order is dispositive.

Amendment to the Final Determination

On October 17, 2012, the Department published its affirmative final determination in this proceeding.[5] On October 19, 2012, Wuxi Suntech Power Co., Ltd. (''Wuxi Suntech'') respondent in the investigation, submitted timely ministerial error allegations and requested that the Department correct the alleged ministerial errors in the dumping margin calculations. On October 24, 2012, Solar World Industries America, Inc., (''Petitioner'') submitted timely rebuttal comments. No other interested party submitted ministerial error allegations or replied to Wuxi Suntech's submission.

After analyzing all interested party comments and rebuttals, we have determined, in accordance with section 735(e) of the Act and 19 CFR 351.224(e), that we made the following ministerial errors in our calculations for the *Final Determination* with respect to Wuxi Suntech:

- In calculating net U.S. price, we incorrectly overstated the amount of certain advertising expenses that we deducted from gross price.
- In calculating the weighted average unit value of reported silicon wafers, we incorrectly overstated the quantity of silicon wafers purchased from non-market economy suppliers.

In addition to correcting the ministerial errors described above, we corrected an error regarding the valuation of Wuxi Suntech's installation manuals.[6]

In the *Final Determination,* we determined that a number of companies, in addition to the mandatory respondents, qualified for a separate rate.[7] Since the cash deposit rate for the separate rate respondents is based on the average of the margins for the mandatory respondents, and the margin for Wuxi Suntech changed as a result of the aforementioned ministerial errors, we have revised the calculation of the dumping margin for the separate rate respondents in the amended final determination.[8] The amended weighted average dumping margins are provided, below.

Antidumping Duty Order

As noted above, on November 30, 2012, in accordance with section 735(d) of the Act, the ITC notified the Department of its final determination in this investigation, in which it found material injury with respect to solar cells from the PRC. Because the ITC determined that imports of solar cells from the PRC are materially injuring a U.S. industry, unliquidated entries of such merchandise from the PRC, entered or withdrawn from warehouse, are subject to the assessment of antidumping duties.

Therefore, in accordance with section 736(a)(1) of the Act, the Department will direct CBP to assess, upon further instruction by the Department, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price (or constructed export price) of the merchandise, for all relevant entries of solar cells from the PRC. These antidumping duties will be assessed on unliquidated entries from the PRC entered, or withdrawn from warehouse, for consumption on or after May 25, 2012, the date on which the Department published its *Preliminary Determination,*[9] but will not include entries occurring after the expiration of the provisional measures period and before publication of the ITC's final injury determination as further described below.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we will instruct CBP to continue to suspend liquidation on entries of subject merchandise from the PRC. We will also instruct CBP to require cash deposits equal to the estimated amount by which the normal value exceeds the U.S. price as indicated in the chart below. These cash deposit rates will be adjusted, where appropriate, for export subsidies. These instructions suspending liquidation will remain in effect until further notice.

Accordingly, effective on the date of publication of the ITC's final affirmative injury determination, CBP will require, at the same time as importers would normally deposit estimated duties on this subject merchandise, a cash deposit equal to the estimated weighted-average antidumping duty margins as discussed above, adjusted, where appropriate, for export subsidies.[10] The ''PRC-wide'' rate applies to all exporters of subject merchandise not specifically listed.

Provisional Measures

Section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months except where exporters representing a significant proportion of exports of the subject merchandise request the Department to extend that four-month period to no more than six months. At the request of exporters that account for a significant proportion of exports of solar cells from the PRC, we extended the four-month period to no more than six months.[11] In the underlying investigation, the Department published the *Preliminary*

[4] U.S. Customs and Border Protection (''CBP'') provided notification that HTSUS number 8501.31.8000 should be added to the scope of the investigation, as certain articles under this number may fall within the scope. *See* Memorandum from Gene H. Calvert through Mark Hoadley to the File, ''ACE Case Reference File Update,'' dated May 16, 2012.

[5] *See Final Determination.*

[6] For a detailed discussion of all alleged ministerial errors, as well as the Department's analysis, *see* memorandum regarding, ''Ministerial Error Memorandum, Amended Final Determination of Sales at Less Than Fair Value: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China,'' dated concurrently with this notice (''Ministerial Error Memorandum'').

[7] *See Final Determination.*

[8] *See* Ministerial Error Memorandum.

[9] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Affirmative Preliminary Determination of Critical Circumstances,*77 FR 31309 (May 25, 2012) (''*Preliminary Determination*'').

[10] *See* section 736(a)(3) of the Act.

[11] *See Preliminary Determination.*

Determination on May 25, 2012.[12] Therefore, the six-month period beginning on the date of the publication of the *Preliminary Determination* ended on November 21, 2012. Furthermore, section 737(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of solar cells from the PRC entered, or withdrawn from warehouse, for consumption after November 21, 2012, the date provisional measures expired, and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will resume on and after the date of publication of the ITC's final injury determination in the **Federal Register**.

The weighted-average dumping margins are as follows:

Exporter	Producer	Weighted-average percent margin
Changzhou Trina Solar Energy Co., Ltd. and Trina Solar (Changzhou) Science & Technology Co., Ltd.	Changzhou Trina Solar Energy Co., Ltd	18.32
	Trina Solar (Changzhou) Science & Technology Co., Ltd	18.32
Wuxi Suntech Power Co., Ltd., Luoyang Suntech Power Co., Ltd., Suntech Power Co., Ltd. and Wuxi Sun-shine Power Co., Ltd.	Wuxi Suntech Power Co., Ltd	29.14
	Luoyang Suntech Power Co., Ltd	29.14
	Suntech Power Co., Ltd	29.14
	Wuxi Sun-shine Power Co., Ltd	29.14
Baoding Tianwei Yingli New Energy Resources Co., Ltd	Baoding Tianwei Yingli New Energy Resources Co., Ltd	24.48
	Yingli Energy (China) Company Limited	24.48
Tianwei New Energy (Chengdu) PV Module Co., Ltd	Tianwei New Energy (Chengdu) PV Module Co., Ltd	24.48
Canadian Solar International Limited	Canadian Solar Manufacturing (Changshu) Inc	24.48
	Canadian Solar Manufacturing (Luoyang) Inc	24.48
Canadian Solar Manufacturing (Changshu) Inc	Canadian Solar Manufacturing (Changshu), Inc	24.48
Canadian Solar Manufacturing (Luoyang) Inc	Canadian Solar Manufacturing (Luoyang), Inc	24.48
Hanwha Solarone (Qidong) Co., Ltd	Hanwha Solarone (Qidong) Co., Ltd	24.48
CEEG (Shanghai) Solar Science Technology Co., Ltd	CEEG (Shanghai) Solar Science Technology Co., Ltd	24.48
	CEEG Nanjing Renewable Energy Co., Ltd	24.48
CEEG Nanjing Renewable Energy Co., Ltd	CEEG Nanjing Renewable Energy Co., Ltd	24.48
Jiawei Solarchina Co., Ltd	Jiawei Solarchina (Shenzhen) Co., Ltd	24.48
Yingli Energy (China) Company Limited	Yingli Energy (China) Company Limited	24.48
	Baoding Tianwei Yingli New Energy Resources Co., Ltd	24.48
LDK Solar Hi-tech (Nanchang) Co., Ltd	LDK Solar Hi-tech (Nanchang) Co., Ltd	24.48
LDK Solar Hi-tech (Suzhou) Co., Ltd	LDK Solar Hi-tech (Suzhou) Co., Ltd	24.48
Jiawei Solarchina (Shenzhen) Co., Ltd	Jiawei Solarchina (Shenzhen) Co., Ltd	24.48
Changzhou NESL Solartech Co., Ltd	Changzhou NESL Solartech Co., Ltd	24.48
China Sunergy (Nanjing) Co., Ltd	China Sunergy (Nanjing) Co., Ltd	24.48
Chint Solar (Zhejiang) Co., Ltd	Chint Solar (Zhejiang) Co., Ltd	24.48
Suzhou Shenglong PV-Tech Co., Ltd	Suzhou Shenglong PV–TECH Co., Ltd	24.48
tenKsolar (Shanghai) Co., Ltd	tenKsolar (Shanghai) Co., Ltd	24.48
Upsolar Group, Co., Ltd	HC Solar Power Co., Ltd	24.48
	Zhiheng Solar Inc	24.48
	Zhejiang Leye Photovoltaic Science & Technology Co., Ltd	24.48
	Tianwei New Energy (Chengdu) PV Module Co., Ltd	24.48
	Zhejiang ZG-Cells Co., Ltd	24.48
	Zhejiang Xinshun Guangfu Science and Technology Co., Ltd	24.48
	Zhejiang Jiutai New Energy Co., Ltd	24.48
Wanxiang Import & Export Co., Ltd	Zhejiang Wanxiang Solar Co., Ltd	24.48
Jinko Solar Import and Export Co., Ltd	Jinko Solar Co., Ltd	24.48
JinkoSolar International Limited	Jinko Solar Co., Ltd	24.48
CNPV Dongying Solar Power Co., Ltd	CNPV Dongying Solar Power Co., LTD	24.48
CSG PVTech Co., Ltd	CSG PVTech Co., Ltd	24.48
Delsolar Co., Ltd	DelSolar (Wujiang) Ltd	24.48
Dongfang Electric (Yixing) MAGI Solar Power Technology Co., Ltd.	Dongfang Electric (Yixing) MAGI Solar Power Technology Co., Ltd.	24.48
Eoplly New Energy Technology Co., Ltd	Eoplly New Energy Technology Co., Ltd	24.48
ERA Solar Co., Ltd	ERA Solar Co., Ltd	24.48
ET Solar Energy Limited	ET Solar Industry Limited	24.48
Hangzhou Zhejiang University Sunny Energy Science and Technology Co., Ltd.	Hangzhou Zhejiang University Sunny Energy Science and Technology Co., Ltd.	24.48
Himin Clean Energy Holdings Co., Ltd	Himin Clean Energy Holdings Co., Ltd	24.48
JA Solar Technology Yangzhou Co., Ltd	JingAo Solar Co., Ltd	24.48
Jetion Solar (China) Co., Ltd	Jetion Solar (China) Co., Ltd	24.48
Jiangsu Green Power PV Co., Ltd	Jiangsu Green Power PV Co., Ltd	24.48
Jiangsu Sunlink PV Technology Co., Ltd	Jiangsu Sunlink PV Technology Co., Ltd	24.48
JingAo Solar Co., Ltd	JingAo Solar Co., Ltd	24.48
Konca Solar Cell Co., Ltd	Konca Solar Cell Co., Ltd	24.48
Leye Photovoltaic Co., Ltd	Leye Photovoltaic Co., Ltd	24.48

[12] *See Preliminary Determination.*

Exporter	Producer	Weighted-average percent margin
Lightway Green New Energy Co., Ltd	Lightway Green New Energy Co., Ltd	24.48
Motech (Suzhou) Renewable Energy Co., Ltd	Motech (Suzhou) Renewable Energy Co., Ltd	24.48
Ningbo ETDZ Holdings, Ltd	Hangzhou Zhejiang University Sunny Energy Science and Technology Co., LTD.	24.48
Ningbo Komaes Solar Technology Co., Ltd	Ningbo Komaes Solar Technology Co., Ltd	24.48
Ningbo Qixin Solar Electrical Appliance Co., Ltd	Ningbo Qixin Solar Electrical Appliance Co., Ltd	24.48
Ningbo Ulica Solar Science & Technology Co., Ltd	Ningbo Ulica Solar Science & Technology Co., Ltd	24.48
Perlight Solar Co., Ltd	Perlight Solar Co., Ltd	24.48
Risen Energy Co., Ltd	Risen Energy Co., Ltd	24.48
Shanghai BYD Company Limited	Shanghai BYD Company Limited	24.48
Shanghai JA Solar Technology Co., Ltd	Shanghai JA Solar Technology Co., Ltd	24.48
Shanghai Solar Energy Science & Technology Co., Ltd	Shanghai Solar Energy Science & Technology Co., Ltd	24.48
Shenzhen Topray Solar Co., Ltd	Shenzhen Topray Solar Co., Ltd	24.48
Solarbest Energy-Tech (Zhejiang) Co., Ltd	Solarbest Energy-Tech (Zhejiang) Co., Ltd	24.48
Sopray Energy Co., Ltd	Sopray Energy Co., Ltd	24.48
Sumec Hardware & Tools Co., Ltd	Phono Solar Technology Co., Ltd	24.48
Sun Earth Solar Power Co., Ltd	Sun Earth Solar Power Co., Ltd	24.48
Yuhuan Sinosola Science & Technology Co., Ltd	Yuhuan Sinosola Science & Technology Co., Ltd	24.48
Yuhuan Solar Energy Source Co., Ltd	Yuhuan Solar Energy Source Co., Ltd	24.48
Zhejiang Jiutai New Energy Co., Ltd	Zhejiang Topoint Photovoltaic Co., Ltd	24.48
Zhejiang Shuqimeng Photovoltaic Technology Co., Ltd	Zhejiang Shuqimeng Photovoltaic Technology Co., Ltd	24.48
Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company.	Zhejiang Sunflower Light Energy Science & Technology Limited Liability Company.	24.48
PRC-Wide Rate		249.96

With regard to the ITC's negative critical circumstances determination on imports of the solar cells from the PRC, we will instruct CBP to lift suspension and to release any bond or other security, and refund any cash deposit made, to secure the payment of estimated antidumping duties with respect to entries of the merchandise entered, or withdrawn from warehouse, for consumption on or after February 25, 2012 (*i.e.,* 90 days prior to the date of publication of the *Preliminary Determination*), but before May 25, 2012.

This notice constitutes the antidumping duty order with respect to solar cells from the PRC pursuant to section 736(a) of the Act. Interested parties may contact the Department's Central Records Unit, Room 7043 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order and amended final determination are published in accordance with sections 736(a) and 735(e) of the Act and 19 CFR 351.211 and 351.224(e).

Dated: December 3, 2012.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

[FR Doc. 2012–29668 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–818]

Lemon Juice From Argentina: Final Results of the Expedited First Sunset Review of the Suspended Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* December 7, 2012.

SUMMARY: On August 1, 2012, the Department of Commerce (''Department'') published in the **Federal Register** the notice of initiation of the sunset review of the suspended antidumping duty investigation on lemon juice from Argentina. The Department has conducted an expedited sunset review of this suspended investigation. As a result of this sunset review, the Department finds that termination of the suspended antidumping duty investigation would be likely to lead to continuation or recurrence of dumping at the rates identified in the ''Final Results of Review'' section of this notice.

FOR FURTHER INFORMATION CONTACT: Julie Santoboni or Anne D'Alauro, Office of Policy, Bilateral Agreements Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone (202) 482–3063 and (202) 482–4830, respectively.

SUPPLEMENTARY INFORMATION:

Background

On August 1, 2012, the Department initiated a sunset review of the suspended antidumping duty investigation on lemon juice from Argentina, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''). *See Initiation of Five-Year (''Sunset'') Review,* 77 FR 45589 (August 1, 2012). The Department received a notice of intent to participate from domestic interested party Ventura Coastal LLC (''Ventura''), a joint venture between Ventura Coastal and Sunkist Growers, Inc. (petitioner in the underlying investigation), within the deadline specified in 19 CFR 351.218(d)(1)(i). Ventura claimed interested party status under section 771(9)(C) of the Act as a manufacturer, producer, or wholesaler in the United States of a domestic like product.

On August 31, 2012, the Department received a substantive response from Ventura. In addition to meeting the other requirements of 19 CFR 351.218(d)(3), Ventura provided information on the volume and value of Argentine exports of lemon juice to the United States. The Department received no responses from other parties to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department conducted an expedited (120-day) sunset review.

As explained in the memorandum from the Assistant Secretary for Import

Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from October 29, through October 30, 2012. Thus, all deadlines in this segment of the proceeding have been extended by two days. The revised deadline for the final results of this review is now December 2, 2012. *See* Memorandum to the Record from Paul Piquado, Assistant Secretary for Import Administration, regarding ''Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Hurricane,'' dated October 31, 2012.

Scope of the Suspended Investigation

The merchandise covered by the suspended investigation includes certain lemon juice for further manufacture, with or without addition of preservatives, sugar, or other sweeteners, regardless of the GPL (grams per liter of citric acid) level of concentration, brix level, brix/acid ratio, pulp content, clarity, grade, horticulture method (e.g., organic or not), processed form (e.g., frozen or not-from-concentrate), FDA standard of identity, the size of the container in which packed, or the method of packing.

Excluded from the scope are: (1) Lemon juice at any level of concentration packed in retail-sized containers ready for sale to consumers, typically at a level of concentration of 48 GPL; and (2) beverage products such as lemonade that typically contain 20% or less lemon juice as an ingredient.

Lemon juice is classifiable under subheadings 2009.39.6020, 2009.31.6020, 2009.31.4000, 2009.31.6040, and 2009.39.6040 of the Harmonized Tariff Schedule of the United States (HTSUS). While HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this Agreement is dispositive.

Analysis of Comments Received

All issues raised in this review are addressed in the Issues and Decision Memorandum (''Decision Memorandum'') from Lynn Fischer Fox, Deputy Assistant Secretary for Policy & Negotiations, to Paul Piquado, Assistant Secretary for Import Administration, dated concurrently with this notice, which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margin of dumping likely to prevail if the suspended investigation were revoked. Parties can find a complete discussion of all issues raised in the review and the corresponding recommendations in this public memorandum, which is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit in room 7046 of the main Commerce building. In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at *http://ia.ita.doc.gov/frn.* The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

Pursuant to sections 752(c)(1) and (3) of the Act, we find that termination of the suspended antidumping duty investigation on lemon juice from Argentina would be likely to lead to continuation or recurrence of dumping and that the magnitude of the margin of dumping likely to prevail if the suspended investigation were terminated is 85.64 percent for San Miguel, 128.5 percent for Citrusvil and 113.52 percent for all other exporters.

This notice also serves as the only reminder to parties subject to administrative protective order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective orders is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the final results and notice in accordance with sections 751(c), 752(c), and 777(i)(1) of the Act.

Dated: December 3, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–29666 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Environmental Solutions Toolkit

AGENCY: International Trade Administration, DOC.

ACTION: Notice and Request for Comment.

SUMMARY: This notice sets forth a request for input from U.S. businesses capable of exporting their goods or services relevant to reducing air pollution from oil and natural gas production and processing. The Department of Commerce continues to develop the web-based *U.S. Environmental Solutions Toolkit* to be used by foreign environmental officials and foreign end-users of environmental technologies that will outline U.S. approaches to a series of environmental problems and highlight participating U.S. vendors of relevant U.S. technologies. The Toolkit will support the President's National Export Initiative by fostering export opportunities for the U.S. environmental industry, as well as advancing global environmental protection.

DATES: U.S. companies capable of exporting goods or services relevant to the environmental issue outlined above that are interested in participating in the U.S. Environmental Solutions Toolkit should self-identify by December 31, 2012, at 5:00 p.m. Eastern Daylight Time (EDT).

ADDRESSES: Please indicate interest in participating in the U.S. Environmental Solutions Toolkit by post, email, or fax to the attention of Todd DeLelle, Office of Energy & Environmental Industries, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave. NW., Room 4053, Washington, DC 20230; 202–482–4877; email e*nvirotech@trade.gov;* fax 202–482–5665.

SUPPLEMENTARY INFORMATION: The development of the *U.S. Environmental Solutions Toolkit* requires the identification of U.S. vendors capable of supplying relevant goods and services to foreign buyers. United States exporters interested in being listed on the Toolkit Web site are encouraged to submit their company's name, Web site address, contact information, and oil and natural gas air emissions reduction solution categories of interest from the following list: (a) Glycol dehydrators; (b) absorption towers; (c) flash tanks.

For purposes of participation in the Toolkit, ''United States exporter'' has the meaning found in 15 U.S.C. 4721(j), which provides: ''United States exporter means (A) a United States citizen; (B) a corporation, partnership, or other association created under the laws of the United States or of any State; or (C) a foreign corporation, partnership, or other association, more than 95 percent of which is owned by persons described in subparagraphs (A) and (B), that exports, or seeks to export, goods or

services produced in the United States * * *.''

An expression of interest in being listed on the Toolkit Web site in response to this notice will serve as a certification that the company is a United States exporter, as defined by 15 U.S.C. § 4721(j), and seeks to export environmental solutions that fall within the category or categories indicated in your response. Responding to this notification constitutes consent to participate in the Toolkit and to the public sharing of the company name. It also constitutes consent to the inclusion of the name of the company on the Toolkit Web site. The company name will be listed along with a link to the company-specific Web site you indicate in your response to this notice. No additional company information will be posted.

The U.S. Environmental Solutions Toolkit will refer users in foreign markets to U.S. approaches to solving environmental problems and to U.S. companies that can export related technologies. The Toolkit Web site will note that its contents and links do not constitute an official endorsement or approval by the U.S. Commerce Department or the U.S. Government of any of the companies, Web sites, products, or services listed.

FOR FURTHER INFORMATION CONTACT: Mr. Todd DeLelle, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. (Phone: 202–482–4877; Fax: 202–482–5665; email: *todd.delelle@trade.gov*).

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2012–29653 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Environmental Solutions Toolkit

AGENCY: International Trade Administration, DOC.

ACTION: Notice and request for comment.

SUMMARY: This notice sets forth a request for input from U.S. businesses capable of exporting their goods or services relevant to emissions control from non-road diesel engines. These engines are utilized by machines that perform a wide range of functions, including excavators and other construction equipment; farm tractors and other agricultural equipment; heavy forklifts; airport ground service equipment; and utility equipment such as generators, pumps, and compressors. The Department of Commerce continues to develop the web-based *U.S. Environmental Solutions Toolkit* to be used by foreign environmental officials and foreign end-users of environmental technologies that will outline U.S. approaches to a series of environmental problems and highlight participating U.S. vendors of relevant U.S. technologies. The Toolkit will support the President's National Export Initiative by fostering export opportunities for the U.S. environmental industry, as well as advancing global environmental protection.

DATES: U.S. companies capable of exporting goods or services relevant to the environmental issue outlined above that are interested in participating in the U.S. Environmental Solutions Toolkit should self-identify by December 31, 2012, at 5:00 p.m. Eastern Daylight Time (EDT).

ADDRESSES: Please indicate interest in participating in the U.S. Environmental Solutions Toolkit by post, email, or fax to the attention of Todd DeLelle, Office of Energy & Environmental Industries, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave. NW., Room 4053, Washington, DC 20230; 202–482–4877; email *envirotech@trade.gov;* fax 202–482–5665.

SUPPLEMENTARY INFORMATION: The development of the *U.S. Environmental Solutions Toolkit* requires the identification of U.S. vendors capable of supplying relevant goods and services to foreign buyers. United States exporters interested in being listed on the Toolkit Web site are encouraged to submit their company's name, Web site address, contact information, and non-road diesel engine emissions reduction solution categories of interest from the following list: (a) Diesel oxidation catalysts; (b) diesel particulate filters.

For purposes of participation in the Toolkit, ''United States exporter'' has the meaning found in 15 U.S.C. 4721(j), which provides: ''United States exporter means (A) a United States citizen; (B) a corporation, partnership, or other association created under the laws of the United States or of any State; or (C) a foreign corporation, partnership, or other association, more than 95 percent of which is owned by persons described in subparagraphs (A) and (B), that exports, or seeks to export, goods or services produced in the United States * * *.''

An expression of interest in being listed on the Toolkit Web site in response to this notice will serve as a certification that the company is a United States exporter, as defined by 15 U.S.C. § 4721(j), and seeks to export environmental solutions that fall within the category or categories indicated in your response. Responding to this notification constitutes consent to participate in the Toolkit and to the public sharing of the company name. It also constitutes consent to the inclusion of the name of the company on the Toolkit Web site. The company name will be listed along with a link to the company-specific Web site you indicate in your response to this notice. No additional company information will be posted.

The U.S. Environmental Solutions Toolkit will refer users in foreign markets to U.S. approaches to solving environmental problems and to U.S. companies that can export related technologies. The Toolkit Web site will note that its contents and links do not constitute an official endorsement or approval by the U.S. Commerce Department or the U.S. Government of any of the companies, Web sites, products, or services listed.

FOR FURTHER INFORMATION CONTACT: Mr. Todd DeLelle, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. (Phone: 202–482–4877; Fax: 202–482–5665; email: *todd.delelle@trade.gov*).

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2012–29658 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

U.S. Environmental Solutions Toolkit

AGENCY: International Trade Administration, DOC.

ACTION: Notice and Request for Comment.

SUMMARY: This notice sets forth a request for input from U.S. businesses capable of exporting their goods or services relevant to nitrogen oxide (NO_X) emissions control from power plants. The Department of Commerce continues to develop the web-based *U.S. Environmental Solutions Toolkit* to be used by foreign environmental officials and foreign end-users of environmental technologies that will outline U.S.

approaches to a series of environmental problems and highlight participating U.S. vendors of relevant U.S. technologies. The Toolkit will support the President's National Export Initiative by fostering export opportunities for the U.S. environmental industry, as well as advancing global environmental protection.

DATES: U.S. companies capable of exporting goods or services relevant to the environmental issue outlined above that are interested in participating in the U.S. Environmental Solutions Toolkit should self-identify by December 31, 2012, at 5:00 p.m. Eastern Daylight Time (EDT).

ADDRESSES: Please indicate interest in participating in the U.S. Environmental Solutions Toolkit by post, email, or fax to the attention of Todd DeLelle, Office of Energy & Environmental Industries, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Ave. NW., Room 4053, Washington, DC 20230; 202–482–4877; email *envirotech@trade.gov;* fax 202–482–5665.

SUPPLEMENTARY INFORMATION: The development of the *U.S. Environmental Solutions Toolkit* requires the identification of U.S. vendors capable of supplying relevant goods and services to foreign buyers. United States exporters interested in being listed on the Toolkit Web site are encouraged to submit their company's name, Web site address, contact information, and NO_X reduction solution categories of interest from the following list:

(a) Low NO_X burners;

(b) Selective catalytic reduction;

(c) Selective non-catalytic reduction.

For purposes of participation in the Toolkit, ''United States exporter'' has the meaning found in 15 U.S.C. 4721(j), which provides: ''United States exporter means (A) a United States citizen; (B) a corporation, partnership, or other association created under the laws of the United States or of any State; or (C) a foreign corporation, partnership, or other association, more than 95 percent of which is owned by persons described in subparagraphs (A) and (B), that exports, or seeks to export, goods or services produced in the United States. * * *''

An expression of interest in being listed on the Toolkit Web site in response to this notice will serve as a certification that the company is a United States exporter, as defined by 15 U.S.C. § 4721(j), and seeks to export environmental solutions that fall within the category or categories indicated in your response. Responding to this notification constitutes consent to participate in the Toolkit and to the public sharing of the company name. It also constitutes consent to the inclusion of the name of the company on the Toolkit Web site. The company name will be listed along with a link to the company-specific Web site you indicate in your response to this notice. No additional company information will be posted.

The U.S. Environmental Solutions Toolkit will refer users in foreign markets to U.S. approaches to solving environmental problems and to U.S. companies that can export related technologies. The Toolkit Web site will note that its contents and links do not constitute an official endorsement or approval by the U.S. Commerce Department or the U.S. Government of any of the companies, Web sites, products, or services listed.

FOR FURTHER INFORMATION CONTACT: Mr. Todd DeLelle, Office of Energy & Environmental Industries (OEEI), International Trade Administration, Room 4053, 1401 Constitution Avenue NW., Washington, DC 20230. (Phone: 202–482–4877; Fax: 202–482–5665; email: *todd.delelle@trade.gov*).

Edward A. O'Malley,

Director, Office of Energy and Environmental Industries.

[FR Doc. 2012–29671 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA713

Endangered Species; File No. 16547–01

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

ACTION: Notice; receipt of application for a permit modification.

SUMMARY: Notice is hereby given that the United States Fish and Wildlife Service, 11110 Kimages Road; Charles City, Virginia 23030 [Albert Spells: Responsible Party], has requested a modification to scientific research Permit No. 16547 authorizing scientific research on endangered Atlantic sturgeon.

DATES: Written, telefaxed, or email comments must be received on or before January 7, 2013.

ADDRESSES: The modification request and related documents are available for review by selecting ''Records Open for Public Comment'' from the Features box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov/,* and then selecting File No. 16547–01 from the list of available applications. These documents are also available upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930; phone (978) 281–9328; fax (978) 281–9394.

Written comments on this application should be submitted to the Chief, Permits, and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by email to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on the application(s) would be appropriate.

FOR FURTHER INFORMATION CONTACT: Malcolm Mohead or Colette Cairns, (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject modification to Permit No. 16547, issued on April 11, 2012 (77 FR 21754), is requested under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 16547 currently authorizes the permit holder to: Evaluate the abundance of Atlantic sturgeon within the Chesapeake Distinct Population Segment (DPS); including the Chesapeake Bay and its tributaries above and below 22 parts per thousand salinity. Researchers are currently authorized to capture adult, juvenile and early life stages (ELS) of Atlantic sturgeon using gill nets, trawls, fyke nets, trammel nets, pound nets and egg mats; and to measure, weigh, tissue sample, PIT and Floy tag appropriately sized animals. A subset can be tagged either externally or internally with telemetry tags dependent on the life stage (adult, sub-adult and juvenile) and the salinity level where captured; or

also externally satellite tagged. The permit holder now requests authorization to: Telemetry tag adult or juvenile Atlantic sturgeon with either internal or external telemetry tags without respect to salinity level of the Chesapeake Bay and tributaries in the borders of Virginia and Maryland. The numbers of adult and sub-adult Atlantic sturgeon taken would be reduced from 425 to 350 per year, while numbers of juvenile Atlantic sturgeon taken would be reduced from 175 to 125 annually. However, there would be an option added to internally telemetry tag 50 juvenile Atlantic sturgeon; and the numbers of ELS would also be increased from 25 to 50 annually while using a film crew to document the activity. The modification would be valid until the permit expires on April 5, 2017.

Dated: November 30, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–29522 Filed 12–6–12; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions from the Procurement List.

SUMMARY: The Committee is proposing to add products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes products previously furnished by such agencies.

DATES: *Comments Must Be Received On or Before:* 1/7/2013.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or To Submit Comments Contact: Patricia Briscoe, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the products and services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following products and services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Products

Products

NSN: 7510–00–NIB–0889—Protector, Document, 7-hole, Medium Weight, Clear, 8½″ × 11″
NSN: 7510–00–NIB–1882—Folders, Project, 8½″ × 11″, Clear
NPA: L.C. Industries for the Blind, Inc., Durham, NC
Contracting Activity: General Services Administration, New York, NY
Coverage: A-List for the Total Government Requirement as aggregated by the General Services Administration.

Floor Mat, Anti-Fatigue, Ribbed Vinyl

NSN: 7220–00–NIB–0440—2′ × 3′, Black
NSN: 7220–00–NIB–0441—3′ × 5′, Black
NPA: Wiscraft, Inc., Milwaukee, WI
Contracting Activity: General Services Administration, Fort Worth, TX
Coverage: A-List for the Total Government Requirement as aggregated by the General Services Administration.

Group 1 and 2 Spices

NSN: 8950–01–E60–7765—Black Pepper, Ground Gourmet, 1.5 oz
NSN: 8950–01–E60–7766—Black Pepper, Ground, Gourment, 16 oz, can
NSN: 8950–01–E60–7767—Black Pepper, Ground, Gourmet, 16 oz
NSN: 8950–01–E60–7768—Black Pepper, Ground, Gourment, 18 oz, can
NSN: 8950–01–E60–7769—Black Pepper, Ground, Gourmet, 18 oz
NSN: 8950–01–E60–7770—Black Pepper, Ground Gourmet, 5 lb
NSN: 8950–01–E60–8234—Black Pepper, Cracked, 18 oz metal can
NSN: 8950–01–E60–8235—Black Pepper, Cracked, 18 oz
NSN: 8950–01–E60–8236—Black Pepper, Cracked, 16 oz metal can
NSN: 8950–01–E60–8237—Black Pepper, Cracked, 16 oz
NSN: 8950–01–E60–8238—Black Pepper, Whole, 16 oz metal can
NSN: 8950–01–E60–8239—Black Pepper, Whole, 16 oz
NSN: 8950–01–E60–8240—Black Pepper, Whole, 18 oz metal can
NSN: 8950–01–E60–8241—Black Pepper, Whole, 18 oz
NSN: 8950–01–E60–5749—Paprika, 16 oz
NSN: 8950–01–E60–5751—Garlic Powder, 16 oz
NSN: 8950–01–E60–5752—Garlic Powder, 6 lbs
NSN: 8950–01–E60–5753—Garlic, Granulated, 25 oz
NSN: 8950–01–E60–5754—Garlic, Granulated, 12 oz
NSN: 8950–01–E60–0102—Seasoning, Taco, 24 oz
NSN: 8950–01–E60–9152—Ginger, Ground, 16 oz
NSN: 8950–01–E60–9155—Pepper, Cayenne, 14 oz
NSN: 8950–01–E61–0099—Seasoning, Taco, 9 oz
NSN: 8950–01–E61–0100—Seasoning, Taco, 11 oz
NSN: 8950–01–E61–0101—Seasoning, Taco, 23 oz
NSN: 8950–01–E61–0103—Steak Seasoning, Canadian Style, 29 oz
NSN: 8950–01–E61–0104—Ginger, Ground, 14 oz
NSN: 8950–01–E61–0105—Ginger, Ground, 15 oz
NSN: 8950–01–E61–0106—Pepper, Cayenne, 1.5 oz
NSN: 8950–01–E61–0107—Pepper, Cayenne, 16 oz
NSN: 8950–01–E61–0108—Pepper, Red, Ground, 16 oz
NSN: 8950–01–E60–9147—Pepper, Lemon, Seasoning, 28 oz
NSN: 8950–01–E60–9150—Cinnamon, Ground, 16 oz
NSN: 8950–01–E60–9456—All Purpose Seasoning w/o Salt, 2.5 oz
NSN: 8950–01–E60–9457—All Purpose Seasoning w/o Salt, 6.75 oz
NSN: 8950–01–E60–9458—All Purpose Seasoning w/o Salt, 10 oz
NSN: 8950–01–E60–9459—All Purpose Seasoning w/o Salt, 20 oz
NSN: 8950–01–E60–9460—All Purpose Seasoning w/o Salt, 28 oz
NSN: 8950–01–E60–9461—Chili Powder, Dark, 16 oz
NSN: 8950–01–E60–9462—Chili Powder, Light 17 oz
NSN: 8950–01–E60–9463—Chili Powder, Light, 18 oz
NSN: 8950–01–E60–9464—Chili Powder, Dark, 20 oz
NSN: 8950–01–E60–9465—Chili Powder, Light, 5 lb
NSN: 8950–01–E60–9466—Pepper, Lemon, Seasoning, 26 oz
NSN: 8950–01–E60–9467—Pepper, Lemon, Seasoning, 27 oz
NSN: 8950–01–E60–9468—Cinnamon Maple Seasoning, 30 oz
NSN: 8950–01–E60–9469—Cinnamon, Ground, 15 oz
NSN: 8950–01–E60–9470—Cinnamon, Ground, 18 oz
NSN: 8950–01–E60–9471—Cinnamon, Ground, 5 lbs
NSN: 8950–01–E60–9472—Cinnamon Sticks, 2¾″ in length, 8 oz
NPA: CDS Monarch, Rochester, NY
Contracting Activity: Department of Veterans Affairs, NAC, Hines, IL
Coverage: C-List for 100% of the requirement of the Department of Veteran's Affairs as aggregated by the Department of Veterans Affairs National Acquisition Center, Hines, IL.

Services

Service Type/Location: Custodial Service,

Social Security Administration (SSA), West High Rise and West Low Rise Buildings, 6401 Security Blvd., Baltimore, MD
NPA: Goodwill Industries of the Chesapeake, Inc., Baltimore, MD
Contracting Activity: Social Security Administration, HDQTRS—Office of Acquisition & Grants, Baltimore, MD
Service Type/Location: Grounds Maintenance, National Plant Germplasm Quarantine Center, Building 580, Powder Mill Road, Beltsville, MD
NPA: NW Works, Inc., Winchester, VA
Contracting Activity: Dept of Agriculture, Animal and Plant HLTH INSP SVC, Minneapolis, MN
Service Type/Locations: Secure Document Destruction, Internal Revenue Service, IRS Office: 5000 Corporate Drive, Holtsville, NY, IRS Office: 1 Corporate Drive, Holtsville, NY
NPAs: NISH, Vienna, VA (Prime Contractor) NYSARC, Inc., NYC Chapter, New York, NY (Subcontractor)
Contracting Activity: Dept of Treasury, Internal Revenue Service, Washington, DC

Deletions

The following products are proposed for deletion from the Procurement List:

Products

Pad, Writing Paper (Easel)

NSN: 7530–00–NIB–0306.
Contracting Activity: General Services Administration, New York, NY

Nonfat Dry Milk

NSN: 8910–00–NSH–0001
NPAs: CW Resources, Inc., New Britain, CT, Transylvania Vocational Services, Inc., Brevard, NC, Knox County Association for Retarded Citizens, Inc., Vincennes, IN
Contracting Activity: Dept of Agriculture, Foreign Service Operations International Services Division, Washington, DC

Cloth, Abrasive

NSN: 5350–00–187–6275—Aluminum-oxide, 50 Grit, Drill Back, Grey, 50 Yard, 1″
NSN: 5350–00–187–6297—Aluminum-oxide, 50 Grit, Drill Back, Grey, 50 Yard, 2″
NSN: Louisiana Association for the Blind, Shreveport, LA
Contracting Activity: General Services Administration, Fort Worth, TX

Patricia Briscoe,

Deputy Director, Business Operations, (Pricing and Information Management).

[FR Doc. 2012–29604 Filed 12–6–12; 8:45 am]

BILLING CODE 6353–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting Notice

TIME AND DATE: Wednesday, December 12, 2012, 10:00 a.m.–12:00 p.m.

PLACE: Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Commission Meeting—Open to the Public.

Matters To Be Considered

Briefing Matters
1. Certificates of Compliance
2. Fiscal Year 2013 Operating Plan

A live Web cast of the Meeting can be viewed at *www.cpsc.gov/webcast.*

For a recorded message containing the latest agenda information, call (301) 504–7948.

CONTACT PERSON FOR MORE INFORMATION: Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504–7923.

Dated: December 5, 2012.

Todd A. Stevenson,

Secretary.

[FR Doc. 2012–29733 Filed 12–5–12; 4:15 pm]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Air Force

U.S. Air Force Scientific Advisory Board Notice of Meeting

AGENCY: U.S. Air Force Scientific Advisory Board, Department of the Air Force, DOT.

ACTION: Meeting Notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces that a United States Air Force Scientific Advisory Board (SAB) quarterly meeting will take place 15–16 January 2013 at the SAFTAS Conference and Innovation Center, 1550 Crystal Drive, Plaza Level, Arlington, VA 22202. The SAB will meet 15 January 2013, from 7:45 a.m. to 5:00 p.m., with the sessions from 7:45 a.m.–9:45 a.m. and 4:30 p.m.–5:00 p.m., open to the public. The meeting on 16 January 2013 will be from 07:45 a.m.–11:45 a.m. and is closed to the public.

The purpose of this Air Force Scientific Advisory Board quarterly meeting is to introduce the FY13 SAB study topics tasked by the Secretary of the Air Force: countering electro-optical and infrared targeting system threats to our aircraft, disaggregation of satellite mission applications, and communicating in a contested environment. The SAB will receive presentations that address relevant subjects to these studies and the SAB mission. This board meeting will also include the publication status of the FY12 studies, the latest updates on the ongoing study outbriefs, as well as discussion of the SAB's review of Air Force Research Laboratory (AFRL) science and technology investments. The remaining FY13 Board schedule will also be discussed.

In accordance with 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, The Administrative Assistant of the Air Force, in consultation with the Air Force General Counsel, has agreed that the public interest requires some sessions of the United States Air Force Scientific Advisory Board meeting be closed to the public because they will discuss information and matters covered by sections 5 U.S.C. 552b(c) (1). Any member of the public wishing to provide input to the SAB should submit a written statement in accordance with 41 CFR 102–3.140(c) and section 10(a)(3) of the Federal Advisory Committee Act and the procedures described in this paragraph. Written statements can be submitted to the Designated Federal Officer at the address detailed below at any time. Statements being submitted in response to the agenda mentioned in this notice must be received by the Designated Federal Officer at the address listed below at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after this date may not be provided to or considered by the SAB until its next meeting. The Designated Federal Officer will review all timely submissions with the SAB Chairperson and ensure they are provided to members of the SAB before the meeting that is the subject of this notice.

FOR FURTHER INFORMATION CONTACT: The United States Air Force Scientific Advisory Board Deputy Executive Director and Designated Federal Officer, Lt Col Derek Lincoln, 240–612–5502, AF/SB, 1500 West Perimeter Road, Ste. #3300, Joint Base Andrews, MD 20762, *Derek.Lincoln@pentagon.af.mil.*

Henry Williams Jr,

DAF, Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2012–29588 Filed 12–6–12; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–481–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to the PJM OATT & OA re Day-ahead and Balancing Operating Reserves to be effective 12/1/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5343.
Comments Due: 5 p.m. ET 12/14/12.

Docket Numbers: ER13–482–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Western IA November 2012 Biannual Filing to be effective 2/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5389.
Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–483–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.13(a)(2)(iii: Western WDT November 2012 Biannual Filing to be effective 2/1/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5392.
Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–484–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Revisions to PJM's OATT Attachments O & P re Insurance Provisions Pro Forma ISA to be effective 1/30/2013.
Filed Date: 11/30/12.
Accession Number: 20121130–5393.
Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–485–000.
Applicants: PJM Interconnection, L.L.C.
Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: PJM Queue Nos. T167/Y1–048/Y1–066; First Revised SA 2442 to be effective 10/31/2012.
Filed Date: 11/30/12.
Accession Number: 20121130–5394.
Comments Due: 5 p.m. ET 12/21/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29582 Filed 12–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–668–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits ELMP Status Report and Planned Implementation date.
Filed Date: 11/19/12.
Accession Number: 20121119–5128.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: ER13–471–000.
Applicants: California Independent System Operator Corporation.
Description: 2012–11–29 Amendment to Implement Financial and Credit Policy Enhancements to be effective 2/1/2013.
Filed Date: 11/29/12.
Accession Number: 20121129–5097.
Comments Due: 5 p.m. ET 12/20/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29580 Filed 12–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2905–001.
Applicants: Scotia Capital Energy Inc.
Description: Notice of Succession to be effective 11/29/2012.
Filed Date: 11/28/12.
Accession Number: 20121128–5111.
Comments Due: 5 p.m. ET 12/19/12.

Docket Numbers: ER10–2179–013; ER10–2181–013; ER10–2182–013.
Applicants: R.E. Ginna Nuclear Power Plant, LLC, Calvert Cliffs Nuclear Power Plant, LLC, Nine Mile Point Nuclear Station, LLC.
Description: Supplement to July 6, 2012 Notice of Non-Material Change in Status of Nine Mile Point Nuclear Station, LLC, et al.
Filed Date: 11/20/12.
Accession Number: 20121120–5080.
Comments Due: 5 p.m. ET 12/10/12.

Docket Numbers: ER12–2654–003.
Applicants: Netsales & Arts, Inc.
Description: mbr_tar to be effective 9/30/2012.
Filed Date: 11/28/12.
Accession Number: 20121128–5161.
Comments Due: 5 p.m. ET 12/19/12.

Docket Numbers: ER13–469–000.
Applicants: Southwest Power Pool, Inc.
Description: 2501 Waverly Wind Farm, LLC GIA to be effective 11/14/2012.
Filed Date: 11/28/12.
Accession Number: 20121128–5158.
Comments Due: 5 p.m. ET 12/19/12.

Docket Numbers: ER13–470–000.
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: 11–28–12 Carved-Out GFA Filing to be effective 1/28/2013.

Filed Date: 11/28/12.

Accession Number: 20121128–5160.

Comments Due: 5 p.m. ET 12/19/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR § 385.211 and § 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 29, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29579 Filed 12–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1790–008; ER10–2468–002; ER10–2596–002; ER10–2597–002; ER11–3589–003; ER11–3325–003.

Applicants: BP Energy Company, Fowler Ridge Wind Farm LLC, Fowler Ridge II Wind Farm LLC, Fowler Ridge III Wind Farm LLC, Long Island Solar Farm, LLC, Whiting Clean Energy, Inc.

Description: Notification of non-material change in status of BP Energy Company, et. al.

Filed Date: 11/30/12.

Accession Number: 20121130–5271.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER12–2654–004.

Applicants: Netsales & Arts, Inc.

Description: mbr_tar to be effective 9/30/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5005.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–172–001.

Applicants: Midland Cogeneration Venture Limited Partnership.

Description: Amendment to Filing of Revision to Market-Based Rate Tariff to be effective 11/29/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5001.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–472–000.

Applicants: Northern States Power Company, a Wisconsin Corporation.

Description: 2012_11_29_NSPW CRNL Opt to Purch Agrmt–136 to be effective 1/1/2013.

Filed Date: 11/29/12.

Accession Number: 20121129–5183.

Comments Due: 5 p.m. ET 12/20/12.

Docket Numbers: ER13–473–000.

Applicants: Puget Sound Energy, Inc.

Description: OATT Revised Cover Sheet to be effective 11/14/2011.

Filed Date: 11/30/12.

Accession Number: 20121130–5000.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–474–000.

Applicants: Fitchburg Gas and Electric Light Company, ISO New England Inc.

Description: Conforming and Clean-up Chges to Sec II, Sch. 21—FGE to be effective 12/31/9998.

Filed Date: 11/30/12.

Accession Number: 20121130–5018.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–475–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits tariff filing per 35.13(a)(2)(iii: SGIA & Distribution Service Agmt Industry 600 Brea Canyon Roof Top Solar Project to be effective 1/30/2013.

Filed Date: 11/30/12.

Accession Number: 20121130–5146.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–476–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits tariff filing per 35.13(a)(2)(iii: 2491 Westar Energy, Inc. NITSA NOA to be effective 11/1/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5147.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–477–000.

Applicants: PJM Interconnection, L.L.C., Virginia Electric and Power Company.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Dominion submits Interconnection Service Agmt No. 3453 among Dominion & Progress to be effective 12/1/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5166.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–478–000.

Applicants: East Kentucky Power Cooperative, Inc.

Description: Petition of East Kentucky Power Cooperative to Submit an Out-of-Time Fixed Resource Requirement Plan to PJM.

Filed Date: 11/30/12.

Accession Number: 20121130–5170.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–479–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35.15: Notice of Termination of SunEdison's FRV Regulus to be effective 10/26/2012.

Filed Date: 11/30/12.

Accession Number: 20121130–5203.

Comments Due: 5 p.m. ET 12/21/12.

Docket Numbers: ER13–480–000.

Applicants: ISO New England Inc. & Bangor Hydro-Electric Company.

Description: Bangor Hydro Electric Company and ISO New England Inc. Notice of Cancellation of Original Service Agreement No. 66.

Filed Date: 11/30/12.

Accession Number: 20121130–5209.

Comments Due: 5 p.m. ET 12/21/12.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES13–10–000.

Applicants: FirstEnergy Service Company, Jersey Central Power & Light Co.

Description: Supplement to Application of FirstEnergy Service Company.

Filed Date: 11/30/12.

Accession Number: 20121130–5313.

Comments Due: 5 p.m. ET 12/10/12.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: November 30, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29581 Filed 12–6–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. EL13–27–000; QF86–613–007]

Western Power and Steam, Inc.; Notice of Petition for Declaratory Order

Take notice that on November 30, 2012, pursuant to section 292.205(c) of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure implementing the Public Utility Regulatory Policies Act of 1978, as amended, 18 CFR 292.205(c), Western Power and Stream, Inc. (Western) filed a petition for declaratory order requesting a limited waiver, for calendar year 2012, of the qualifying facility operating and efficiency standards set forth in sections 292.205(a)(1) and 292.205 (a)(2)(i)(B) of the Commission's regulations for the topping-cycle cogeneration facility owned and operated by Western located at Bakersfield, California.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on December 31, 2012.

Dated: December 3, 2012.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2012–29578 Filed 12–6–12; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9006–4]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements.

Filed 11/26/2012 Through 11/30/2012.

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at:*http://www.epa.gov/compliance/nepa/eisdata.html.*

Supplementary Information: As of October 1, 2012, EPA will not accept paper copies or CDs of EISs for filing purposes; all submissions on or after October 1, 2012 must be made through e-NEPA.

While this system eliminates the need to submit paper or CD copies to EPA to meet filing requirements, electronic submission does not change requirements for distribution of EISs for public review and comment. To begin using e-NEPA, you must first register with EPA'selectronic reporting site—*https://cdx.epa.gov/epa_home.asp.*

EIS No. 20120374, Draft EIS, NOAA, 00, Amendment 5 to the Consolidated Atlantic Highly Migratory Species Fishery Management Plan, Atlantic Ocean, Caribbean Sea, and Gulf of Mexico, Comment Period Ends: 02/12/2013, Contact: Peter Cooper 301–427–8503. Due to an oversight, the above document should have appeared in the 11/23/2012 FR Notice.

EIS No. 20120375, Draft EIS, FHWA, FL, U.S. 301 (State Road 200) CR 227 to CR 233, Improvements, Bradford County, FL, Comment Period Ends: 01/22/2013, Contact: Joseph Sullivan 850–553–2248.

EIS No. 20120376, Draft EIS, USFWS, AZ, Pima County Multi-Species Conservation Plan, Pima County, AZ, Comment Period Ends: 03/15/2013, Contact: Jeff Servoss 520–670–6150, ext. 231

EIS No. 20120377, Draft EIS, RUS, ND, Antelope Valley Station to Neset Transmission Project, Mercer, Dunn, Billings, Williams, McKenzie, and Mountrail Counties, ND, Comment Period Ends: 01/22/2013, Contact: Dennis Rankin 202–720–1953.

EIS No. 20120378, Draft EIS, USACE, OK, Eufaula Lake Shoreline Management Plan Revision and Master Plan Supplement, Pittsburg, McIntosh, Haskell, Latimer, Muskogee, and Okmulgee Counties, OK, Comment Period Ends: 01/22/2013, Contact: Jeff Knack 918–669–7666.

Amended Notices

EIS No. 20120320, Draft EIS, FTA, MN, Southwest Transitway Construction and Operation Light Rail Transit, Hennepin County, MN, Comment Period Ends: 12/31/2012, Contact: Marisol Simon 312–353–2789.

Revision to FR Notice Published 10/12/2012; Extending Comment Period from 12/11/2012 to 12/31/2012.

Dated: December 4, 2012.

Cliff Rader,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2012–29685 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9759–2]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed consent decree; request for public comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), notice is hereby given of a proposed consent decree to address a lawsuit filed by Sierra Club in the United States District Court for the District of Columbia: *Sierra Club* v. *Jackson,* No. 1:08–cv–00424 RWR (D. DC). Sierra Club filed a complaint alleging that EPA failed to meet its obligations under section 112(e)(1)(E) of

the CAA to promulgate emission standards for hazardous air pollutant emissions from brick and structural clay products manufacturing facilities and clay ceramics manufacturing facilities located at major sources by November 15, 2000. The proposed consent decree establishes deadlines for EPA's proposed and final actions for meeting these obligations.

DATES: Written comments on the proposed consent decree must be received by January 7, 2013.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2012–0905, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Scott Jordan, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–7508; fax number (202) 564–5603; email address: *jordan.scott@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by Sierra Club seeking to compel EPA to promulgate emission standards for hazardous air pollutant emissions from brick and structural clay products manufacturing facilities and clay ceramics manufacturing facilities located at major sources under section 112(e)(1)(E) of the CAA. Under the proposed consent decree, EPA shall no later than August 30, 2013, sign a notice of proposed rulemaking to set national emission standards for hazardous air pollutants (''NESHAP'') pursuant to section 112(d) of the CAA, 42 U.S.C. 7412(d), for brick and structural clay products manufacturing facilities and clay ceramics manufacturing facilities located at major sources. In addition, under the proposed consent decree, EPA shall no later than July 31, 2014, sign a notice of final rulemaking to set NESHAP for the source categories covered by the proposed rule.

The proposed consent decree further requires that, within 10 business days of signing a proposed or final rule, EPA shall deliver a notice of such action to the Office of the Federal Register for publication and that once EPA fulfills its obligations under the decree it may move to have the decree terminated.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed consent decree from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines, based on any comment submitted, that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2012–0905) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or on paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD–ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going

through *www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 29, 2012.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2012–29687 Filed 12–6–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Determination of Insufficient Assets To Satisfy Claims Against Financial Institution in Receivership

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice; correction.

SUMMARY: The FDIC has determined that insufficient assets exist in the receivership of Darby Bank and Trust Co., Vidalia, Georgia, to make any distribution on general unsecured claims, and therefore such claims will recover nothing and have no value.

DATES: The FDIC made its determination on November 19, 2012.

FOR FURTHER INFORMATION CONTACT: If you have questions regarding this notice, you may contact an FDIC Claims Agent at (904) 256–3925. Written correspondence may also be mailed to FDIC as Receiver of Darby Bank and Trust Co., Attention: Claims Agent, 8800 Baymeadows Way West, Jacksonville, FL 32256.

SUPPLEMENTARY INFORMATION: On November 12, 2010, Darby Bank and Trust Co., Vidalia, Georgia, (FIN #10312) was closed by the Georgia Department of Banking and Finance, and the Federal Deposit Insurance Corporation (''FDIC'') was appointed as its receiver (''Receiver''). In complying with its statutory duty to resolve the institution in the method that is least costly to the deposit insurance fund (see 12 U.S.C. 1823(c)(4)), the FDIC facilitated a transaction with Ameris Bank, Moultrie, Georgia, to acquire all of the deposits and most of the assets of the failed institution.

Section 11(d)(11)(A) of the FDI Act, 12 U.S.C. 1821(d)(11)(A), sets forth the order of priority for distribution of amounts realized from the liquidation or other resolution of an insured depository institution to pay claims. Under the statutory order of priority, administrative expenses and deposit liabilities must be paid in full before any distribution may be made to general unsecured creditors or any lower priority claims.

As of September 30, 2012, the maximum value of assets that could be available for distribution by the Receiver, together with maximum possible recoveries on professional liability claims against directors, officers, and other professionals, as well as potential tax refunds, was $125,488,526. As of the same date, administrative expenses and depositor liabilities equaled $173,303,177, exceeding available assets and potential recoveries by at least $47,814,651. Accordingly, the FDIC has determined that insufficient assets exist to make any distribution on general unsecured creditor claims (and any lower priority claims) and therefore all such claims, asserted or unasserted, will recover nothing and have no value.

On November 27, 2011, the FDIC published a notice in the **Federal Register** (77 FR 70779), incorrectly reciting that the date of determination was November 11, 2012. This correction recites the actual date of determination.

Dated: November 28, 2012.

Valerie J. Best,

Assistant Executive Secretary.

[FR Doc. 2012–29615 Filed 12–6–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission.

TIME AND DATE: December 12, 2012—10:00 a.m.

PLACE: 800 North Capitol Street NW., First Floor Hearing Room, Washington, DC.

STATUS: The meeting will be held in Open Session.

Matters To Be Considered

1. Discussion of Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries.

2. Staff Briefing and Discussion on Use of Alternative Dispute Resolution in Enforcement Proceedings.

3. Docket No. 11–22: Non-Vessel-Operating Common Carrier Negotiated Rate Arrangements; Tariff Filing Exemption.

CONTACT PERSON FOR MORE INFORMATION: Karen V. Gregory, Secretary, (202) 523–5725.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2012–29747 Filed 12–5–12; 4:15 pm]

BILLING CODE 6730–01–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 December 24, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *The Guttau Family consisting of Michael K. Guttau, Judith Ann Guttau, and the Heidi Guttau-Fox and Joshua Guttau Irrevocable Living Trust, Treynor, Iowa, Heidi Ann Guttau-Fox, Minden, Iowa, and Joshua Michael Guttau,* Treynor, Iowa, as Trustees, as group acting in concert, to retain voting shares of Treynor Bancshares, Inc., and thereby indirectly retain voting shares of Treynor State Bank, both in Treynor, Iowa.

Board of Governors of the Federal Reserve System, December 4, 2012.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2012–29606 Filed 12–6–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10450 and CMS–10079]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS) is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* New collection; *Title:* Consumer Assessment of Healthcare Providers and Systems (CAHPS) Survey for Physician Quality Reporting; *Use:* The Physician Quality Reporting System (PQRS) was established in 2006 as a voluntary ''pay-for-reporting'' program that allows physicians and other eligible healthcare professionals to report information to Medicare about the quality of care provided to beneficiaries who have certain medical conditions. PQRS provides incentive payments to physicians who report quality data. Since program inception, these results have not been publicly available for use by consumers.

The Physician Compare Web site was launched December 30, 2010, to meet requirements set forth by Section 10331 of the Affordable Care Act (ACA). The ACA requires CMS to establish a Physician Compare Web site by January 1, 2011, containing information on physicians enrolled in the Medicare program and other eligible professionals who participate in the Physician Quality Reporting Initiative. By no later than January 1, 2013 (and for reporting periods beginning no earlier than January 1, 2012), CMS is required to implement a plan to make information on physician performance publicly available through Physician Compare. A key component of the reporting requirements under the ACA is public reporting on physician performance that includes patient experience measures. The collection and reporting of a Consumer Assessment of Healthcare Providers and Systems (CAHPS) survey for Physician Quality Reporting will fulfill this requirement.

The U.S. Department of Health and Human Services (HHS) has developed the National Quality Strategy that was called for under the ACA to create national aims and priorities to guide local, state, and national efforts to improve the quality of health care. This strategy has established six priorities that support the three-part aim. The three-part aim focuses on better care, better health, and lower costs through improvement. The six priorities include: Making care safer by reducing harm caused by the delivery of care; ensuring that each person and family are engaged as partners in their care; promoting effective communication and coordination of care; promoting the most effective prevention and treatment practices for the leading causes of mortality, starting with cardiovascular disease; working with communities to promote wide use of best practices to enable healthy living; and making quality care more affordable for individuals, families, employers, and governments by developing and spreading new health care delivery models. Because the CAHPS Survey for Physician Quality Reporting focuses on patient experience implementation of the survey supports the six national priorities for improving care, particularly engaging patients and families in care and promoting effective communication and coordination.

This survey supports the administration of the Quality Improvement Organizations Program (QIO). The Social Security Act, as set forth in Part B of Title XI—Section 1862(g), established the Utilization and Quality Control Peer Review Organization Program, now known as the QIO Program. The statutory mission of the QIO Program is to improve the effectiveness, efficiency, economy, and quality of services delivered to Medicare beneficiaries. This survey will provide patient experience of care data that is an essential component of assessing the quality of services delivered to Medicare beneficiaries. It also would permit beneficiaries to have this information to help them choose health care providers that provide services that meet their needs and preferences, thus encouraging providers to improve quality of care that Medicare beneficiaries receive. *Form Number:* CMS–10450 (OCN: 0938–New); *Frequency:* Annual; *Affected Public:* Individuals and Households; *Number of Respondents:* 234,600 *Total Annual Responses:* 117,300; *Total Annual Hours:* 39,530. (For policy questions regarding this collection contact Regina Chell at 410–786–6551. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection;

Title of Information Collection: Hospital Wage Index Occupational Mix Survey and Supporting Regulations in 42 CFR, Section 412.64; *Use:* Section 304(c) of Public Law 106–554 amended section 1886(d)(3)(E) of the Social Security Act to require CMS to collect data every 3 years on the occupational mix of employees for each short-term, acute care hospital participating in the Medicare program, in order to construct an occupational mix adjustment to the wage index, for application beginning October 1, 2004 (the FY 2005 wage index). The purpose of the occupational mix adjustment is to control for the effect of hospitals' employment choices on the wage index. Refer to the summary of changes document for a list of current changes. *Form Number:* CMS–10079 (OMB#: 0938–0907); *Frequency:* Reporting—Yearly, Biennially and Occasionally ; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 3,500; *Total Annual Responses:* 3,500; *Total Annual Hours:* 1,680,000. (For policy questions regarding this collection contact Gerry Mondowney at 410–786–1172. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995*, or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

In commenting on the proposed information collections please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in one of the following ways by February 5, 2013:

1. *Electronically.* You may submit your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or

Submission'' or ''More Search Options'' to find the information collection document(s) accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: December 4, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–29627 Filed 12–6–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10333 and CMS–10381]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title:* Consumer Assistance Program Grants *Use:* Section 1002 of the Affordable Care Act provides for the establishment of consumer assistance (or ombudsman) programs, starting in FY 2010. Federal grants will support these programs. These programs will assist consumers with filing complaints and appeals, assist consumers with enrollment into health coverage, collect data on consumer inquiries and complaints to identify problems in the marketplace, educate consumers on their rights and responsibilities, and with the establishment of the new Exchange marketplaces, resolve problems with premium credits for Exchange coverage. Importantly, these programs must provide detailed reporting on the types of problems and questions consumers may experience with health coverage, and how these problems and questions are resolved. In order to strengthen oversight, the law requires programs to report data to the Secretary of the Department of Health and Human Services (HHS). ''As a condition of receiving a grant under subsection (a), an office of health insurance consumer assistance or ombudsman program shall be required to collect and report data to the Secretary on the types of problems and inquiries encountered by consumers'' (Sec. 2793 (d)). Analysis of this data reporting will help identify patterns of practice in the insurance marketplaces and uncover suspected patterns of noncompliance. HHS must share program data reports with the Departments of Labor and Treasury, and state regulators. Program data also can offer CCIIO one indication of the effectiveness of state enforcement, affording opportunities to provide technical assistance and support to state insurance regulators and, in extreme cases, inform the need to trigger federal enforcement.

The 60-day **Federal Register** notice published on July 27, 2012, and the comment period ended September 25, 2012. We received a total of 21 comments. All comments were summarized, consolidated (where overlap existed), and addressed. The majority of comments involved feedback on providing CAPs with more flexibility in collecting and reporting data. The implementation of a new progress report will allow CAPs to provide more information about their progress and activities. In addition, CMS received comments suggesting that collection of all of the CMS-required data elements is difficult and that adjustments to pre-existing databases is too expensive and laborious. CMS recognizes these concerns and acknowledges that CAPs are in the best situation to determine the level of information that is able to be collected for any given consumer. CMS also received comments suggesting that CMS provide guidance to CAPs on how to accurately measure savings to consumers. CMS has provided CAPs with suggestions on ways to calculate recovered benefits and will explore whether more comprehensive guidance is necessary. The comments received in response to the 60-day notice have not resulted in a change in burden estimates. *Form Number:* CMS–10333 (OCN: 0938–1097); *Frequency:* Quarterly and Annual; *Affected Public:* Private Sector: State, Local, or Tribal Governments; *Number of Respondents:* 56; *Total Annual Responses:* 504; *Total Annual Hours:* 261 hours. (For policy questions regarding this collection contact Eliza Bangit at 301–492–4219. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title:* ICD–10 Industry Readiness Assessment; *Use:* The Congress addressed the need for a consistent framework for electronic transactions and other administrative simplification issues in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191, enacted on August 21, 1996. Through subtitle F of title II of HIPAA, the Congress added to title XI of the Social Security Act (the Act) a new Part C, entitled ''Administrative Simplification.'' Part C of title XI of the Act now consists of sections 1171 through 1180, which define various terms and impose several requirements on HHS, health plans, health care clearinghouses, and certain health care providers concerning the transmission of health information. Specifically, HIPAA requires the Secretary of HHS to adopt standards that covered entities are required to use in conducting certain health care administrative transactions, such as claims, remittance, eligibility, and claims status requests and responses. Findings from the ICD–10 industry readiness assessment will be used by CMS to understand each sector's progress toward compliance and to determine what communication and educational efforts can best help affected entities obtain the tools and resources they need to achieve timely compliance with ICD–10. Insights gleaned from the proposed research will be valid for education and outreach purposes only, and will not be used for policy purposes. *Form Number:* CMS–10381 (OMB#: 0938–1149); *Frequency:* Annual; *Affected Public:* Private Sector—Business or other for-profits, Not-for-profits; *Number of Respondents:* 1,200; *Total Annual Responses:* 1,200; *Total Annual Hours:* 204. (For policy questions regarding this collection contact Rosali Topper at 410–786–7260. For all other issues call 410–786–1326.)

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access CMS Web Site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995,* or Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on January 7, 2013.

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: December 4, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–29626 Filed 12–6–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Neurological Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Neurological Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 22, 2013, from 8 a.m. to 6 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: Natasha Facey, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 1544, Silver Spring, MD 20993–0002, *Natasha.Facey@fda.hhs.gov,* 301–796–5290, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On February 22, 2013, the committee will discuss, make recommendations and vote on information regarding the premarket approval application (PMA) for the NeuroPace Responsive Neurostimulation (RNS) System sponsored by NeuroPace, Inc.

The RNS System is indicated for use as an adjunctive therapy in reducing the frequency of seizures in individuals 18 years of age or older with partial onset seizures from no more than two foci that are refractory to two or more antiepileptic medications.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 13, 2013. Oral presentations from the public will be scheduled between approximately 1 p.m. and 2 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before February 4, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 6, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams at *Annmarie.Williams@fda.hhs.gov* or 301–796–5966, 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: December 3, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–29538 Filed 12–6–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Request for Notification From Industry Organizations Interested in Participating in the Selection Process for Nonvoting Industry Representatives and Request for Nominations for Nonvoting Industry Representatives on Public Advisory Panels

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is requesting that any industry organization interested in participating in the selection of nonvoting industry representatives to serve on the Medical Devices Advisory Committee (MDAC) in the Center for Devices and Radiological Health (CDRH) notify FDA in writing. FDA is also requesting nominations for nonvoting industry representatives to serve on certain device panels of the MDAC in the CDRH. A nominee may either be self-nominated or nominated by an organization to serve as a nonvoting industry representative. Nominations will be accepted for current vacancies effective with this notice.

DATES: Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests must send a letter stating that interest to the FDA by January 7, 2013, for the vacancies listed in this notice. Concurrently, nomination materials for prospective candidates should be sent to FDA by January 7, 2013.

ADDRESSES: All letters of interest and nominations should be submitted in writing to Margaret Ames (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Margaret Ames, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5234, Silver Spring, MD 20993. 301–796–5960, FAX: 301–847–8505, email: *margaret.ames@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Section 520(f)(3)of the Federal Food, Drug and Cosmetic Act (the FD&C Act) (21 U.S.C. 360j(f)(3)), as amended by the Medical Device Amendments of 1976, provides that each medical device panel include one nonvoting member to represent the interests of the medical device manufacturing industry. The Agency is requesting nominations for nonvoting industry representatives to certain panels identified in the following paragraphs.

I. Functions of MDAC

(1) Review and evaluate data on the safety and effectiveness of marketed and investigational devices and make recommendations for their regulation; (2) advise the Commissioner of Food and Drugs (the Commissioner) regarding recommended classification or reclassification of these devices into one of three regulatory categories; (3) advise on any possible risks to health associated with the use of devices; (4) advise on formulation of product development protocols; (5) review premarket approval applications for medical devices; (6) review guidelines and guidance documents; (7) recommend exemption to certain devices from the application of portions of the Act; (8) advise on the necessity to ban a device; (9) respond to requests from the agency to review and make recommendations on specific issues or problems concerning the safety and effectiveness of devices; and (10) make recommendations on the quality in the design of clinical studies regarding the safety and effectiveness of marketed and investigational devices.

A. Circulatory System Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in the circulatory and vascular systems and makes appropriate recommendations to the Commissioner of Food and Drugs.

B. Ear, Nose and Throat Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of market and investigational ear, nose and throat devices and make appropriate recommendations to the Commissioner of Food and Drugs.

C. Gastroenterology and Urology Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational gastroenterology, urology and nephrology devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

D. General Hospital and Personal Use Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational general hospital, infection control and personal use devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

E. Neurological Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in the neurological system and makes appropriate recommendations to the Commissioner of Food and Drugs.

F. Obstetrics and Gynecology Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational obstetrics and gynecology devices and makes appropriate recommendations to the Commissioner of Food and Drugs.

G. Ophthalmic Devices Panel

Reviews and evaluates data concerning the safety and effectiveness of marketed and investigational devices for use in the eye and makes appropriate recommendations to the Commissioner of Food and Drugs.

II. Qualifications

Persons nominated for the device panels should be full-time employees of firms that manufacture products that would come before the panel, or consulting firms that represent manufacturers, or have similar appropriate ties to industry.

III. Selection Procedure

Any industry organization interested in participating in the selection of an appropriate nonvoting member to represent industry interests should send a letter stating that interest to the FDA contact (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). Within the subsequent 30 days, FDA will send a letter to each organization that has expressed an interest, attaching a complete list of all such organizations; and a list of all nominees along with their current resumes. The letter will also state that it is the responsibility of the interested organizations to confer with one another and to select a candidate, within 60 days after the receipt of the FDA letter, to serve as the nonvoting member to represent industry interests for a particular device panel. The interested organizations are not bound by the list of nominees in selecting a candidate. However, if no individual is selected within the 60 days, the Commissioner will select the nonvoting member to represent industry interests.

IV. Application Procedure

Individuals may self nominate and/or an organization may nominate one or more individuals to serve as a nonvoting industry representative. Contact information, a current curriculum vitae, and the name of the committee of interest should be sent to the FDA contact person (see **FOR FURTHER INFORMATION CONTACT**) within 30 days of publication of this document (see **DATES**). FDA will forward all nominations to the organizations expressing interest in participating in the selection process for the panel. (Persons who nominate themselves as nonvoting industry representatives will not participate in the selection process).

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees, and therefore encourages nominations of appropriately qualified candidates from these groups. Specifically, in this document, nominations for nonvoting representatives of industry interests are encouraged from the device manufacturing industry.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: December 3, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–29574 Filed 12–6–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel. NICHD T32 Teleconference Review.

Date: December 18, 2012.

Time: 1:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Sherry L. Dupere, Ph.D., Director, Division of Scientific Review, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, 301–451–3415, *duperes@mail.nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: December 3, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29557 Filed 12–6–12; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel, Novel Imaging Agents to Expand the Clinical Toolkit for Cancer Diagnosis, Staging and Treatment.

Date: March 7, 2013.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6116 Executive Boulevard, Room 611, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Kenneth L. Bielat, Ph.D., Scientific Review Officer, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Boulevard, Room 7147, Bethesda, MD 20892–8329, 301–496–7576, *bielatk@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: December 3, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29559 Filed 12–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Alternative Medicine; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Complementary and Alternative Medicine.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public 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 Advisory Council for Complementary and Alternative Medicine.

Date: February 1, 2013.

Closed: 8:30 a.m. to 10:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, Conference Room 10, 31 Center Drive, Bethesda, MD 20892.

Open: 10:45 a.m. to 4:00 p.m.

Agenda: Report from the Institute Director and other business of the Council.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892.

Contact Person: Martin H. Goldrosen, Ph.D., Director, Division of Extramural Activities, National Center for Complementary and Alternative Medicine, NIH, 6707 Democracy Blvd., Ste. 401, Bethesda, MD 20892–5475, (301) 594–2014, *goldrosm@mail.nih.gov*.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *nccam.nih.gov/about/naccam/*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: December 3, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29561 Filed 12–6–12; 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—Transition to Independence.

Date: February 12–13, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Sergei Radaev, Ph.D., Scientific Review Officer, Resources And Training Review Branch, Division of Extramural Activities, National Cancer Institute, NIH, 6116 Executive Blvd., 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: December 3, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29558 Filed 12–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; Notice of Closed Meeting

Pursuant to Section 10(d) of the Federal Advisory Committee Act, as Amended (5 U.S.C. App.), Notice is Hereby Given of the National Advisory Eye Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public 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/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Eye Council.

Date: January 10, 2013.

Open: 8:30 a.m. to 2:00 p.m.

Agenda: Following opening remarks by the Director, NEI, there will be presentations by the staff of the Institute and discussions concerning Institute programs.

Place: National Institutes of Health, 5635 Fishers Lane, Terrace Level Conference Center, Bethesda, MD 20892.

Closed: 2:00 p.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Terrace Level Conference Center, Bethesda, MD 20892.

Contact Person: Lore Anne McNicol, Ph.D., Director, Division of Extramural Research, National Eye Institute, National Institutes of Health, 301–451–2020, *lam@nei.nih.gov.*

Any person interested may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.nei.nih.gov,* where an agenda and any additional information will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: December 3, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29560 Filed 12–6–12; 8:45 am]

BILLING CODE 4140–01–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 Short-term Heart, Lung and Blood Training.

Date: January 8, 2013.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892.

Contact Person: Stephanie L. Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@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: December 3, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–29562 Filed 12–6–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Foreign Assembler's Declaration

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: Foreign Assembler's Declaration (with Endorsement by Importer). This is a proposed extension of an information collection that was previously approved. CBP is proposing that this information collection be extended with a change to the burden hours. This document is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** (77 FR 59206) on September 26, 2012, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10.

DATES: Written comments should be received on or before January 7, 2013.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Foreign Assembler's Declaration (with Endorsement by Importer).

OMB Number: 1651–0031.

Form Number: None.

Abstract: In accordance with 19 CFR 10.24, a Foreign Assembler's Declaration must be made in connection with the entry of assembled articles under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS). This declaration includes information such as the quantity, value and description of the imported merchandise. The declaration is made by the person who performed the assembly operations abroad and it includes an endorsement by the importer. The Foreign Assembler's Declaration is used by CBP to determine whether the operations performed are within the purview of subheading 9802.00.80, HTSUS and therefore eligible for preferential tariff treatment.

19 CFR 10.24(c) and (d) require that the importer/assembler maintain records for 5 years from the date of the related entry and that they make these records readily available to CBP for audit, inspection, copying, and reproduction.

Current Actions: CBP proposes to extend the expiration date of this information collection with a change to the estimated burden hours based the number of Foreign Assembly Declarations completed in 2011. There is no change to the information collected.

Type of Review: Extension (with change).

Affected Public: Businesses.

Estimated Number of Respondents/Recordkeepers: 2,730.

Estimated Time per Response/Recordkeeping: 55 minutes.

Estimated Number of Responses/Recordkeeping per Respondent: 128.

Estimated Total Annual Burden Hours: 320,087.

Dated: December 3, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–29554 Filed 12–6–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Application for Allowance in Duties

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-day notice and request for comments; Extension of an existing collection of information.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Allowance in Duties (CBP Form 4315). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

DATES: Written comments should be received on or before February 5, 2013, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 799 9th Street NW., 5th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L.104–13). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual cost burden to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Application for Allowance in Duties.

OMB Number: 1651–0007.

Form Number: CBP Form 4315.

Abstract: CBP Form 4315, *''Application for Allowance in Duties,''* is submitted to CBP in instances of claims of damaged or defective imported merchandise on which an allowance in duty is made in the liquidation of the entry. The information on this form is used to substantiate an importer's claim for such duty allowances. CBP Form 4315 is authorized by 19 U.S.C. 1506 and provided for by 19 CFR part 158, and authorized by 19 U.S.C. 1506, Tariff Act of 1930. This form is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_4315.pdf.*

Action: CBP proposes to extend the expiration date of this information collection with no change to the estimated burden hours or to CBP Form 4315.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 12,000.

Estimated Number of Total Annual Responses: 12,000.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 1,600.

Dated: December 3, 2012.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2012–29555 Filed 12–6–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Vantage Electric Vehicles

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (''CBP'') has issued a final determination concerning the country of origin of Vantage Vehicle electric trucks and vans. Based upon the facts presented, CBP has concluded in the final determination that the United States is the country of origin of the Vantage Vehicle EVX1000 and EVR1000 models of electric trucks and the EVC1000 and EVP1000 models of electric vans for purposes of U.S. Government procurement.

DATES: The final determination was issued on November 16, 2012. A copy of the final determination is attached. Any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of this final determination on or before January 7, 2013.

FOR FURTHER INFORMATION CONTACT: Heather K. Pinnock, Valuation and Special Programs Branch: (202) 325–0034.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on, November 16, 2012, pursuant to subpart B of part 177, Customs and Border Protection Regulations (19 CFR part 177, subpart B), CBP issued a final determination concerning the country of origin of the Vantage Vehicle EVX1000 and EVR1000 models of electric trucks and the EVC1000 and EVP1000 models of electric vans, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, in HQ H229157, was issued at the request of Vantage Vehicle International, Inc., under procedures set forth at 19 CFR part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511–18). In the final determination, CBP concluded that, based upon the facts presented, the Vantage Vehicle EVX1000 and EVR1000 models of electric trucks and the EVC1000 and EVP1000 models of electric vans, assembled to completion in the United States from parts made in a non-TAA country, a TAA country and the United States, are substantially transformed in the United States, such that the United States is the country of origin of the finished electric vehicles for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 CFR 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 CFR 177.30), provides that any party-at-interest, as defined in 19 CFR 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: November 16, 2012.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

Attachment

HQ H229157

November 16, 2012

MAR–2 OT:RR:CTF:VS H229157 HkP

CATEGORY: Marking

Mr. Michael Pak
CEO/President
Vantage Vehicle International, Inc.
1740 N. Delilah Street

Corona, CA 92879

RE: Government Procurement; Country of Origin of Vantage Vehicle Electric Trucks and Vans; Substantial Transformation

Dear Mr. Pak:

This is in response to your letter dated May 23, 2012, requesting a final determination on behalf of Vantage Vehicle International, Inc. (''VVI''), pursuant to subpart B of part 177 of the U.S. Customs and Border Protection (''CBP'') Regulations (19 C.F.R. Part 177).

Under these regulations, which implement Title III of the Trade Agreements Act of 1979 (TAA), as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of VVI low speed electric trucks (models EVX1000 and EVR1000) and electric vans (models EVC1000 and EVP1000). We note that as a U.S. importer and manufacturer, VVI is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

FACTS:

According to the information submitted, VVI imports gliders (or ''rolling chassis'') (bare chassis with bodies, axles, and wheels only) from China into the United States and converts them into low speed electric trucks and vans. VVI assembles the gliders with other components including motors, controllers, chargers, batteries, instrument clusters, converters, wire harnesses, battery boxes, heater cores, and miscellaneous items such as fasteners and wires, and modifies components of the gliders as necessary. Each vehicle assembled in the United States has approximately 67 components and assemblies and 146 miscellaneous items such as bolts, nuts, screws, fasteners and wires. All of the components and miscellaneous items are of U.S.-origin, except for the charger which is from Canada. Over 71 percent of the manufacturing cost of the vehicles is attributed to U.S. components and labor, approximately 26 percent to the Chinese glider, and approximately two percent to the Canadian charger. Information regarding the components, their cost and countries of origin as well as a detailed description of the manufacturing process was submitted.

The U.S. manufacturing operations are described as follows:

Stage 1—Prepping Stage

The truck bed is removed from the glider (this initial step is not applicable to gliders used to make vans). Tires and braking components are removed from the rear axle, which is then removed from the chassis and unnecessary brackets and clutch pedals are cut. The vehicle is painted. The battery housings are removed, holes are drilled into the vehicle frame, battery housings are fastened to the frame with bolts and washers, the batteries are installed, and cables are attached to the batteries. A relay box is bolted to the frame. Necessary adjustments are made to the rear axle, which is then reinstalled into the vehicle. The parking brakes are rerouted and vacuum lines are cut in the front of the vehicle.

The prepping stage takes approximately five hours.

Stage 2—Building

The transducer is installed along the brake line. The main wire harness is installed inside the cab and fastened below the vehicle. The heater box with new heater core and a new cluster wire harness are installed and the heater box is connected to the main wire harness. Forward and reverse switches are cut and installed into the dashboard, connected and covered. The accelerator pedal is installed. The grill with logo is attached to the back of the vehicle. The main aluminum electronics plate and all electronic components are attached to the vehicle frame and fuses and the auxiliary battery are installed. The main drive motor is attached to the rear axle and the vehicle's main electronics are installed. After the cab is cleaned of metal chips and dust, the middle console and back seats are installed. Air is removed from the brake lines. Backup alarms are installed and the electronic components are tested.

The building stage takes approximately 16 hours.

Stage 3—Finishing

Rust-proof undercoating and spray bed liner coating are applied to the vehicle, as appropriate, by a California company.

Stage 4—Pre-Delivery Inspection

The vehicle is washed and dried, the vehicle identification number (VIN) is recorded, stickers are added to the vehicle and paper tags, plastic and tape are removed, the windows and interior are cleaned, the seat covers installed, and the steering boot is greased. The vehicle is inspected in accordance with a quality control checklist and deficiencies addressed as required.

The inspection stage takes approximately 3 hours.

ISSUE:

What is the country of origin of the Vantage Vehicle low speed electric trucks (models EVX1000 and EVR1000) and electric vans (models EVC1000 and EVP1000) for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

Pursuant to Subpart B of Part 177, 19 CFR § 177.21 et seq., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 et seq.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain ''Buy American'' restrictions in U.S. law or practice for products offered for sale to the U.S. Government.

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Procurement Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Procurement Regulations define ''U.S.-made end product'' as:

> [A]n article that is mined, produces, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

In determining whether the combining of parts or materials constitutes a substantial transformation, the determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States,* 573 F. Supp.

1149 (Ct. Int'l Trade 1983), *aff'd,* 741 F.2d 1368 (Fed. Cir. 1984). Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See* C.S.D. 80–111, C.S.D. 85–25, C.S.D. 89–110, C.S.D. 89–118, C.S.D. 90–51, and C.S.D. 90–97. If the manufacturing or combining process is a minor one which leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc. v. United States,* 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (1982), aff'd 702 F. 2d 1022 (Fed. Cir. 1983).

In order to determine whether a substantial transformation occurs when components of various origins are assembled into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

In Headquarters Ruling Letter (''HQ'') H118435 (Oct. 13, 2010), CBP found that Chinese-origin chassis, plastic body parts and plastic pieces of trim were substantially transformed by assembly operations performed in the United States to produce electric vehicles. Under the described assembly process, the imported parts lost their individual identities and became integral parts of a new article possessing a new name, character and use. Further, components crucial to the making of an electric vehicle (the battery pack, motor, electronics, wiring assemblies, and charger) were of U.S. origin. Based upon these facts, we found that the country of origin of the electric vehicles was the United States.

In HQ H022169 (May 2, 2008), CBP found that an imported mini-truck glider was substantially transformed as a result of assembly operations performed in the United States to produce an electric mini-truck. Our decision was based on the fact that, under the described assembly process, the imported glider lost its individual identity and became an integral part of a new article possessing a new name, character and use. In addition, a substantial number of the components added to the imported glider were of U.S. origin.

In HQ 558919 (Mar. 20, 1995), a country of origin marking case relied upon in HQ H022169, U.S. Customs (now CBP) held that an extruder assembly manufactured in England was substantially transformed in the United States when it was wired and combined with U.S. components (motor, electric controls and extruder screw) to create a vertical extruder. In reaching that decision, Customs emphasized that the imported extruder subassembly and the U.S. components each had important attributes that were necessary to the operation of the extruder. Consequently, we found that the imported subassemblies should be excepted from individual marking, provided that the cartons in which the U.S. manufacturer received them were properly marked with their country of origin.

In the rulings cited above, CBP found that assembly of the imported parts together with the U.S.-made components was necessary to the operation of the finished product. The same is true in this situation. None of the imported parts, on their own, can operate as an electric vehicle but must be assembled with other necessary components, such as batteries, motors, instrument clusters, and wiring assemblies, which are all of U.S. origin. Moreover, given the complexity and duration of the U.S. manufacturing process, we consider those operations to be more than mere assembly.

Based on the information before us, and consistent with the CBP rulings cited above, we find that the Chinese-origin glider and Canadian charger are substantially transformed by the assembly operations performed in the United States to produce electric vehicles. Under the described assembly process, the imported articles lose their individual identities and become integral parts of new articles possessing new names, characters and uses. Further, components crucial to the making of an electric vehicle (the batteries, motor, instrument cluster, wiring assemblies, and heater core) are of U.S. origin. We conclude, based upon these specific facts, that the country of origin of the VVI electric trucks and vans for purposes of U.S. Government procurement is the United States.

HOLDING:

The Chinese glider and Canadian charger are substantially transformed when they are assembled in the United States with domestic components. As a result, the country of origin of VVI's line of electric vehicles, specifically the EVX1000 and EVR1000 Green Trucks and the EVC1000 and EVP1000 Green Vans, for purposes of U.S. Government procurement is the United States.

Notice of this final determination will be given in the **Federal Register**, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the **Federal Register** Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Sandra L. Bell,

Executive Director Regulations and Rulings Office of International Trade.

[FR Doc. 2012–29633 Filed 12–6–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5604 -N–13]

Notice of Proposed Information Collection: Comment Request; Border Community Capital Initiative

AGENCY: Office of Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be 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.

The purpose of this submission is for the application for the Border community Capital Initiative grant process. Information is required to rate and rank competitive applications and to ensure eligibility of applicants for funding. Semi-annual reporting is required to monitor grant management.

DATES: *Comments Due Date:* February 5, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Program Contact: Jackie L. Williams, Ph.D., Director, Office of Rural Housing and Economic Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2290 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection 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 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: Border Community Capital Initiative.

OMB Control Number, if applicable: Pending.

Description of the need for the information and proposed use: The purpose of this submission is for the application for the Boarder community Capital Initiative grant process. Information is required to rate and rank competitive applications and to ensure eligibility of applicants for funding. Semi-annual reporting is required to monitor grant management.

Agency form numbers, if applicable: SF 424; SF424 Supplement; HUD 424CB; HUD 424–CBW; SF–LLL; HUD 2880; HUD 2990; HUD 2991; HUD 2993; HUD 2994A; HUD 96010; HUD 27061; HUD 27300; and HUD 96011 SF 269a.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 2,801. The number of respondents is 50, the number of responses is 50, the frequency of response is on occasion, and the burden hour per response is 100.

Status of the proposed information collection: This is a new collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: December 3, 2012.

Clifford Taffet,

Deputy Assistant Secretary for Community Planning and Development.

[FR Doc. 2012–29609 Filed 12–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5601–N–48]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: ARMY: Ms. Veronica Rines, Department of Army, Office of the Chief of Staff for Installation Management, 600 Army Pentagon, Room 5A128, Washington, DC 20310, 571–256–8145; GSA: Mr. Flavio Peres, General Services Administration, Office of Real Property Utilization and Disposal, 1800 F Street NW., Room 7040 Washington, DC 20405, (202) 501–0084; NAVY: Mr. Steve Matteo, Department of the Navy, Asset Management Division, Naval Facilities Engineering Command, Washington Navy Yard, 1330 Patterson Ave. SW., Suite 1000, Washington, DC 20374; (This is not toll-free numbers).

Dated: November 29, 2012.

Ann Marie Oliva,

Deputy Assistant Secretary for Special Needs (Acting).

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 12/07/2012

Suitable/Available Properties

Building

Georgia

Building 8603
Red Arrow Rd.
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201240004
Status: Unutilized
Comments: off-site removal only; 192 sf.; Sep Toil/Shower; poor conditions; secured area; contact Army for info. on accessibility/removal

Building 8585
9734 Eighth Division
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201240005
Status: Unutilized
Comments: off-site removal only; 192 sf.; Sep Toil/Shower; poor conditions; secured area; contact Army for info. on accessibility/removal

Building 8018
7964 First Division Rd.
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201240006
Status: Unutilized
Comments: off-site removal only; 264 sf.; Sep Toil/Shower; poor conditions; secured area; contact Army for info. on accessibility/removal

Building 4156
6923 Rosell St.
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201240007
Status: Unutilized
Comments: off-site removal only; 8,460 sf.; TRANS UPH AST; poor conditions

Building 2835
6498 Way Ave.
Ft. Benning GA 31905
Landholding Agency: Army
Property Number: 21201240008
Status: Unutilized
Comments: off-site removal only; 2,578 sf.; BN HQ BLDG. TT; poor conditions

Hawaii

6 Properties
Schofield Barracks
Wahiawa HI 96786
Landholding Agency: Army
Property Number: 21201240027
Status: Unutilized
Directions: 24, 1005, 2276, B0886, M3010, QBAMP
Comments: Off-site removal only, sf. varies; poor conditions, contact Army for information on accessibility removal and specific details on a particular property

Ft. Shafter
136 Takata Road
Honolulu HI 96858
Landholding Agency: Army
Property Number: 21201240029
Status: Unutilized
Directions: 1536
Comments: Off-site removal only; 2,117 Sf., auto shop; need repairs.

Illinois

Building 103
2510 Luce Blvd.
Great Lakes IL 60088
Landholding Agency: Navy
Property Number: 77201240005
Status: Unutilized
Comments: Off-site removal only 5,531 sf., public shop, vacant since Jan. 2011, poor condition, lead/asbestos identified, secure area, contact Navy information on accessibility/removal.

Maryland

4 Buildings
Aberdeen Proving Ground
Aberdeen MD 21005
Landholding Agency: Army
Property Number: 21201240001
Status: Unutilized
Directions: 3409, 3410, E3615, RAILR
Comments: Off-site removal only; sf. varies; moderate conditions; located w/in secured area; contact Army on accessibility/ removal and specific details on a property.

New Jersey

4 Buildings
Route 15 North
Picatinny Arsenal NJ 07806
Landholding Agency: Army
Property Number: 21201240026
Status: Unutilized
Directions: 3701, 3702, 3706, 3709
Comments: Off-site removal only, sq. varies, moderate conditions, restricted area; contact Army for information on accessibility removal and specific details on a particular property.

New York

Building 1560
Rte. 293
West Point NY 10996
Landholding Agency: Army
Property Number: 21201240024
Status: Unutilized
Comments: Off-site removal only, 4544 sf., storage severely damage from Hurricane Irene, restricted area, contact Army on information on accessibility/removal.

Building 2104
West Point
West Point NY 10996
Landholding Agency: Army
Property Number: 21201240030
Status: Unutilized
Comments: Off-site removal only, 2,000 sf., office for red cross, good condition, restricted area, contacts army on info. on accessibility/removal.

4 Buildings
Ft. Drum
Ft. Drum NY 13602
Landholding Agency: Army
Property Number: 21201240037
Status: Unutilized
Directions: BRG28, 22374, 22354, 22254
Comments: Off-site removal only, poor conditions, restricted area, contact Army for accessibility/removal & specific details on a property.

3 Buildings
Ft. Drum
Ft. Drum NY 13602
Landholding Agency: Army
Property Number: 21201240045
Status: Unutilized
Directions: 2069, 2080, 21354
Comments: Off-site removal only, sf. varies, moderate deterioration, restricted area, contact Navy for information on accessibility/removal & specific details on a particular property.

North Carolina

Building 42843

Ft. Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201240034
Status: Underutilized
Directions: 42843
Comments: Located in a secured area, public access is denied and no alternative method to gain access without compromising national security.

Oklahoma

20 Buildings
Ft. Sill
Ft. Sill OK 73503
Landholding Agency: Army
Property Number: 21201240021
Status: Unutilized
Directions: 3456, 3457, 3460, 3462, 3463, 3466, 3467, 3468, 3470, 3472, 3473, 3476, 3477, 3479, 6009, 6010, 6012, 6014, 6015, 6018
Comments: Off-site removal only, sf varies, fair conditions, contact Army for info on specific details on a particular property.

29 Buildings
Ft. Sill
Ft. Sill OK 73503
Landholding Agency: Army
Property Number: 21201240028
Status: Unutilized

Directions: 1, 344, 2522, 2525, 2597, 2598, 2599, 2772, 2774, 2775, 2777, 3355, 3357, 3358, 3360, 3361, 3362, 3363, 3364, 3368, 3401, 3402, 3403, 3404, 3405, 3451, 3452, 3453, 3454
Comments: Off-site removal only, sf. varies, fair conditions, contact Army for specific details for a particular property.

Puerto Rico

3 Buildings
Ft. Buchanan
Guaynabo PR 00934
Landholding Agency: Army
Property Number: 21201240041
Status: Excess
Directions: 19, 234, 294
Comments: Off-site removal only, sf. varies, deteriorated, restricted area, contact Army for information on accessibility/removal, specific on a particular property.

Building 293
Crane Loop
Ft. Buchanan PR 00934
Landholding Agency: Army
Property Number: 21201240049
Status: Excess
Comments: Off-site removal only; 54 sf.; ready magazine; 24 mons. vacant; restricted area; deteriorated; contact Army for accessibility/removal requirements.

Texas

Building 11142
SSG Sims Rd.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240009
Status: Excess
Comments: Off-site removal only; 12,644 sf.; mess hall; poor conditions; limited public access; contact Army for info. on accessibility/removal.

Building 6951
11331 Montana Ave.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240010
Status: Excess
Comments: Off-site removal only; 288 sf.; utility bldg.; poor conditions; limited public access; contact Army for info. on accessibility/removal

Building 6942
11331 Montana Ave.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240011
Status: Excess
Comments: Off-site removal only; 1,059 sf.; storage; poor conditions; limited public access; contact Army for info. on accessibility/removal

Building 6924
11331 Montana Ave.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240012
Status: Excess
Comments: Off-site removal only; 10,340 sf.; aircraft hangar; poor conditions; limited public access; contact Army for info. on accessibility/removal

Bldg. 2432
Carrington Rd.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240013
Status: Excess
Comments: Off-site removal only; 180 sf.; dispatch bldg.; poor conditions; limited public access; asbestos/lead identified; contact Army for info. on accessibility/removal

Building 50
50 Slater Rd.
Ft. Bliss TX 79916
Landholding Agency: Army
Property Number: 21201240014
Status: Excess
Comments: Off-site removal only; 9,900 sf.; office; poor conditions; limited public access; asbestos/lead identified; contact Army for info. on accessibility/removal

2 Buildings
Ft. Hood
Ft. Hood TX 76544
Landholding Agency: Army
Property Number: 21201240044
Status: Excess
Directions: 706, 4286
Comments: Off-site removal only, sf. varies, fair conditions, asbestos, restricted area, contact Army for accessibility/removal & specific details on a property.

Virginia

9 Buildings
Ft. Belvoir
Ft. Belvoir VA 22060
Landholding Agency: Army
Property Number: 21201240003
Status: Unutilized
Directions: 358, 361, 1140, 1141, 1142, 1143, 1498, 1499, 2302
Comments: Off-site removal only; sf. varies; Admin.; fair conditions; located in restricted area; contact Army for info. on accessibility/removal & specific info. on a property

Building 3074
Epperson Avenue
Quantico VA 22134
Landholding Agency: Navy
Property Number: 77201240003
Status: Excess
Comments: Off-site removal only 7,705 sf. office, very poor conditions, secured area, contact Navy for information on accessibility/removal.

Building 3074
Epperson Avenue
Quantico VA 22134
Landholding Agency: Navy
Property Number: 77201240004
Status: Excess
Comments: Off-site removal only 7,705 sf. office, very poor conditions, secured area, contact Navy for information on accessibility/removal.

Wisconsin

11 Buildings
Ft. McCoy
Ft. McCoy WI 54656
Landholding Agency: Army
Property Number: 21201240019
Status: Excess
Directions: 2120, 2122, 2124, 2140, 2142, 2144, 2146, 2148, 2197, 2677, 9056
Comments: Off-site removal only, sf. varies, fair conditions, lead-based paint, restricted area, contact Army for accessibility/removal & specific details on a property.

13 Buildings
Ft. McCoy
Ft. McCoy WI 54656
Landholding Agency: Army
Property Number: 21201240020
Status: Unutilized
Directions: 716, 717, 738, 753, 54, 1248, 1249. 1250, 1251, 1616, 1617, 1738, 1739
Comments: Off-site removal only, sf. varies, fair conditions, asbestos, restricted area, contact Army for information on accessibility removal and details on a particular property.

Buildings 237 and 2118
Ft, McCoy
Ft. McCoy WI 54656
Landholding Agency: Army
Property Number: 21201240023
Status: Excess
Directions: 237, 2118
Comments: Off-site removal only 6,138 sf., vehicle maintained bldg., fair conditions; lead-based paint, restricted area, contacts Army for information on removal requirements.

Suitable/Available Properties

Land

California

Hydro Electric Power Plant
1402 San Rogue Rd.
Santa Barbara CA 93105
Landholding Agency: GSA
Property Number: 54201240009
Status: Excess
GSA Number: 9–I–CA–1693
Comments: .0997 acres; behind secured gate for Lauro Dame & Reservoir; will impact conveyance; contact GSA for more details

Unsuitable Properties

Building

Alabama

6 Buildings
Anniston Army Depot
Anniston AL 36201
Landholding Agency: Army
Property Number: 21201240002
Status: Unutilized
Directions: 42, 148, 171, 415, 601, 651
Comments: Located on military installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

California

13 Buildings
Sierra Army Depot
Herlong CA 96113
Landholding Agency: Army
Property Number: 21201240032
Status: Unutilized
Directions: 10, 20, 54, 141, 202, 227, 633, 634, 639, 640, 641, 642, 643
Comments: Located in a secured area, public access is denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Kentucky

8 Buildings

Ft. Knox
Ft. Knox KY 40121
Landholding Agency: Army
Property Number: 21201240043
Status: Unutilized
Directions: 5260, 5261, 6589, 7718, 7726, 7727, 7728, 9247
Comments: Located on secured military installation, where public access is denied & no alternative method to gain access without compromising national security.
Reasons: Secured Area

8 Buildings
Ft. Knox
Ft. Knox KY 40121
Landholding Agency: Army
Property Number: 21201240047
Status: Unutilized
Directions: 93, 430, 445, 1414, 2768, 2798, 4016
Comments: Located in secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Maryland

2 Buildings
Aberdeen Proving Ground
Aberdeen MD 21005
Landholding Agency: Army
Property Number: 21201240048
Status: Unutilized
Directions: 306 and 5043
Comments: Located in secured area; public access denied and no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Missouri

4 Buildings
Ft. Leonard Wood
Ft. Leonard Wood MO 65473
Landholding Agency: Army
Property Number: 21201240017
Status: Unutilized
Directions: 691, 692, 693, 694
Comments: Located in secured area, public access denied & no alternative method to gain access without compromising national security.
Reasons: Secured Area

North Carolina

2 Buildings
Ft. Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201240015
Status: Underutilized
Directions: W2976, W2979
Comments: Located on secured military installation; authorized personnel only; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

4 Buildings
Ft. Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201240016
Status: Unutilized
Directions: M6135, M6151, O3305, O4305
Comments: Located on secured military installation; authorized personnel only; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

6 Buildings
Ft. Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201240031
Status: Unutilized
Directions: J1951, A5786, A5785, A5679, A4290, A3275
Comments: Located in secured military installation, public access denied & no alternative method to gain access without compromising national security.
Reasons: Secured Area

5 Buildings
Ft. Bragg
Ft. Bragg NC 28310
Landholding Agency: Army
Property Number: 21201240033
Status: Unutilized
Directions: 85306, A5624, D1910, H4401, H4802
Comments: Located in restricted area, public access denied & no alternative method to gain access without compromising national security
Reasons: Secured Area

4 Buildings
Ft. Bragg
Cumberland NC 28308
Landholding Agency: Army
Property Number: 21201240036
Status: Unutilized
Directions: 15, 115, 32033, 41442
Comments: Located in a secured military installation, public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Ohio

Site #39225
Defense Supply Center
Columbus OH 43218
Landholding Agency: Army
Property Number: 21201240042
Status: Underutilized
Directions: 00016, 01017
Comments: Located in a secured military installation, public access denied and no alternative method to gain access without compromising national security.
Reasons: Secured Area

Vermont

6 Buildings
Ethan Allen Range
Jericho VT 05465
Landholding Agency: Army
Property Number: 21201240035
Status: Unutilized
Directions: 004–2,004–3, 03020, 04009, 04010, 04011
Comments: Located on secured military installation where public access is denied & no alternative method to gain access without compromising national security
Reasons: Secured Area

Virginia

Building 238
Joint Base Mayer-Henderson Hall
Ft. Myer VA 22211
Landholding Agency: Army
Property Number: 21201240025
Status: Unutilized
Directions: 238
Comments: Located in secured area, public access denied and no alternative meted to gain access without compromising national security.
Reasons: Secured Area

Washington

5 Buildings
Joint Base Lewis McChord
Joint Base Lewis McChord WA 98433
Landholding Agency: Army
Property Number: 21201240046
Status: Unutilized
Directions: 2205, 2206, 2260, 2265, 6182
Comments: Located on secured military cantonment area where public access is denied & no alternative method to gain access without compromising national security
Reasons: Secured Area

[FR Doc. 2012–29355 Filed 12–6–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2012–N025; FXES11120200000F2–134–FF02ENEH00]

Draft Environmental Impact Statement and Draft Pima County Multi-Species Habitat Conservation Plan; Pima County, AZ

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; notice of public meetings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have received an application from Pima County and the Pima County Regional Flood Control District (applicants) for an incidental take permit (ITP) under the Endangered Species Act of 1973, as amended (Act). The application has been assigned permit number TE84356A. If approved, the permit would be in effect for a period of 30 years, and would authorize incidental take of 5 animal species and impacts to 2 plant species currently listed under the Act, as well as impacts to 4 candidate species and 33 species that may become listed under the Act in the future (collectively, ''covered species''). The proposed incidental take or impacts would occur in Pima County and adjacent counties in Arizona, as a result of specific actions conducted under the authority of the applicants. We are making the application and associated documents available for public review, and we invite public comments.

DATES: To ensure consideration, we must receive any comments on or before

March 15, 2013. We will also accept written comments at a public meeting to be held on February 21, 2013, from 4:00 p.m. to 6:00 p.m. (see address below). We must receive any requests for additional public meetings, in writing, at the address shown in the **ADDRESSES** section by January 7, 2013.

ADDRESSES: The public informational meeting will be held at the Pima County Natural Resources Parks and Recreation Conference Room at 3500 W. River Road, Tucson, AZ 85741. Send requests for additional public meetings to the Field Supervisor, Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021. To obtain documents for review and submit comments, see ''Reviewing Documents and Submitting Comments'' in **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: *Permit Application, Draft Pima County Multi-Species Conservation Plan, draft Environmental Impact Statement, and draft Implementing Agreement:* Contact Jeff Servoss, by U.S. mail at the Arizona Ecological Services Office—Tucson Suboffice, 201 N. Bonita Avenue, Suite 141, Tucson, AZ 85745; by telephone at 520–670–6150 extension 231; or by email at *jeff_servoss@fws.gov.* Download copies for review at: *http://www.fws.gov/southwest/es/arizona.*

SUPPLEMENTARY INFORMATION: Under the National Environmental Policy Act (NEPA), we advise the public that:

1. We have gathered the information necessary to determine the impacts and formulate the alternatives for the draft Environmental Impact Statement (EIS), related to the potential issuance of an Incidental Take Permit (ITP) to the Applicants; and

2. Pima County has developed a draft habitat conservation plan—the Pima County Multi-Species Conservation Plan (MSCP), which describes the measures Pima County has agreed to implement to minimize and mitigate the effects of the proposed incidental take of federally listed species, and unlisted covered species, to the maximum extent practicable, pursuant to section 10(a)(1)(B) of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (Act).

If approved, the 30-year ITP would authorize incidental take of 40 animal species. Among the 40 species are 5 species currently listed under the Act:

- Southwestern willow flycatcher (*Empidonax traillii extimus*)
- Lesser long-nosed bat (*Leptonycteris curasoae yerbabuenae*)
- Gila topminnow (*Poeciliopsis occidentalis*)
- Gila chub (*Gila intermedia*)
- Chiricahua leopard frog (*Lithobates chiricahuensis*)

Also among the 40 species are 4 candidate species:

- Northern Mexican gartersnake (*Thamnophis eques megalops*)
- Western yellow-billed cuckoo (*Coccyzus americanus*)
- Tucson shovel-nosed snake (*Chionactis occipitalis klauberi*)
- Desert tortoise, Sonoran population (*Gopherus agassizii*)

The 40 species also include 31 species that would be covered should they become listed under the Act within the term of the permit:

- Mexican long-tongued bat (*Choeronycteris mexicana*)
- Western red bat (*Lasiurus blossevillii*)
- Southern yellow bat (*Lasiurus xanthinus*)
- California leaf-nosed bat (*Macrotus californicus*)
- Pale Townsend's big-eared bat (*Plecotus townsendii pallescens*)
- Merriam's mouse (*Peromyscus merriami*)
- Burrowing owl (*Athene cunicularia hypugaea*)
- Cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*)
- Rufous-winged sparrow (*Aimophila carpalis*)
- Swainson's hawk (*Buteo swainsoni*)
- Abert's towhee (*Pipilo aberti*)
- Bell's vireo (*Vireo bellii*)
- Desert box turtle (*Terrapene ornata luteola*)
- Ground-snake (*Sonora semiannulata*)
- Giant spotted whiptail (*Aspidoscelis burti stictogramma*)
- Lowland leopard frog (*Lithobates yavapaiensis*)
- Longfin dace (*Agosia chrysogaster*)
- Desert sucker (*Catostomus clarki*)
- Sonora sucker (*Catostomus insignis*)
- San Xavier talus snail (*Sonorella eremite*)
- Talus snail species (*Sonorella ambigua ambigua* syn. *papagorum*)
- Talus snail species (*Sonorella imperatrix*)
- Talus snail species (*Sonorella imperialis*)
- Talus snail species (*Sonorella magdalenensis* syn. *tumamocensis*)
- Talus snail species (*Sonorella odorata odorata* syn. *Marmoris*)
- Talus snail species (*Sonorella insignis*)
- Talus snail species (*Sonorella rinconensis*)
- Talus snail species (*Sonorella sabinoenis buehmanensis*)
- Talus snail species (*Sonorella sabinoensis tucsonica*)
- Talus snail species (*Sonorella sitiens sitiens*)
- Talus snail species (*Sonorella tortillita*)

Although take of listed plant species is not prohibited under the Act, plant species may be included in a habitat conservation plan to formally document the conservation benefits provided to them through that process. The applicants propose four plant species for coverage under their MSCP, including two listed species (Huachuca water umbel (*Lilaeopsis schaffneriana recurva*) and Pima pineapple cactus (*Coryphantha scheeri* var. *robustispina*)) and two unlisted species (needle-spined pineapple cactus (*Echinomastus erectocentrus* var. *erectocentrus*) and Tumamoc globeberry (*Tumamoca macdougalii*)).

The proposed incidental take would occur within Pima County, Arizona, as a result of impacts from actions occurring under the authority of the applicants. The applicants have completed a draft habitat conservation plan as part of the application package, as required by the Act. The application and associated documents describe measures the applicants have agreed to implement to minimize and mitigate—to the maximum extent practicable—the effects of the proposed incidental take of covered species and impacts to habitats on which they depend. The draft EIS considers the direct, indirect, and cumulative effects of the proposed action of permit issuance, including the measures that will be implemented to minimize and mitigate such impacts to the maximum extent practicable.

Background

In the past 50 years, Pima County, Arizona, has had one of the fastest growing human populations of any county in the United States (an increase of just under 500 percent), as a result of a sunny climate, natural beauty, and economic opportunities. Urban growth has resulted in significant development, which is expected to continue in the foreseeable future. A significant proportion of the predicted future development is anticipated to occur in the undeveloped or underdeveloped areas, particularly in the eastern portion of the county.

The presence of threatened and endangered species in the areas of potential land development creates regulatory concerns in Pima County. Interest in conservation and its potential related costs (e.g., land acquisition or set-asides) is found across many segments of the community, ranging from environmental advocates promoting strengthened protections, to members of the business community, the development industry, and real estate profession, all of whom may be concerned about potential economic

impacts. Landowners and private property interests are concerned about how their land-use decisions can potentially be affected by the presence of federally listed threatened and endangered species.

A long-term solution to ensure compliance with the Act, particularly in areas such as Pima County, where there are multiple listed and unlisted species of concern, is to develop a multi-species habitat conservation plan (MSCP). The Pima County MSCP proposes a combination of long-term and short-term actions and long-range planning to protect and enhance the natural environment. The Pima County MSCP would help guide public investments in both infrastructure and conservation, as well as establish the applicants' preferences for the expenditure of funds to preserve and reduce the threats posed by urbanization to habitat through ranch conservation and open space programs. If the Service approves the ITP, the applicants would commit to a series of measures that would avoid, minimize, and mitigate impacts of covered activities on the covered species. The commitments vary according to the alternatives described below and would have differing impacts on socioeconomics, habitat, and other aspects of the environment.

The objective of the Pima County MSCP is to achieve a balance between:

- Long-term conservation of the diversity of natural vegetation communities and native species of plants and animals that make up an important part of the natural heritage and allure of Pima County; and
- The orderly use of land to promote a sustainable economy, health, well-being, customs, and culture of the growing population of Pima County.

In addition, the Pima County MSCP has been designed to:

- Meet the requirements for the applicants to receive an ITP—pursuant to section 10 of the Act—that would allow for the incidental take of threatened and endangered species while engaging in otherwise lawful activities.
- Provide conservation benefits to species and ecosystems in Pima County that would not otherwise occur without the MSCP.
- Maximize flexibility and available options in developing mitigation and conservation programs.
- Minimize uncoordinated decision making, which can result in incremental habitat loss and inefficient project review.
- Provide a decision-making framework that minimizes habitat loss and maximizes the efficiency of public-sector projects.
- Provide the applicants and their community stakeholders (participants) with long-term planning assurances.
- Cover an appropriate range of activities under the permit.
- Reduce the regulatory burden of compliance with the Act for the applicants and all affected participants.
- Avoid, minimize, and mitigate for the impacts of activities that would result in take of threatened and endangered species and provide long-term management and monitoring programs to help ensure program effectiveness.
- Designate the funding that would be available to implement the Pima County MSCP over the entirety of its proposed term.

Purpose and Need for Action

We prepared the draft EIS to respond to the applicants' request for an ITP for the proposed covered species related to activities that have the potential to result in incidental take. The need for this action is based on the potential that activities proposed by the applicants on lands under their jurisdiction could result in incidental take of covered species, thus requiring an ITP. Section 9 of the Act prohibits the ''taking'' of threatened and endangered species. We are authorized, however, under limited circumstances, to issue permits to take federally listed species, when such a taking is incidental to, and not the purpose of, otherwise lawful activities. Regulations governing permits for endangered and threatened species are in the Code of Federal Regulations (CFR) at 50 CFR 17.22 and 17.32, respectively. The term ''take'' under the Act means to harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect endangered and threatened species, or to attempt to engage in any such conduct. Our regulations define ''harm'' as significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). The proposed ITP would authorize incidental take that is consistent with the conservation guidelines in the applicants' MSCP. The development and implementation of the MSCP will ensure that the Applicants meet the criteria for issuance of the ITP found in section 10(a)(1)(B) of the Act:

1. The taking will be incidental;
2. The applicants will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
3. The applicants will develop a proposed conservation plan and ensure that adequate funding for the plan will be provided;
4. The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and
5. The applicants will carry out any other measures that the Service may require as being necessary or appropriate.

Proposed Action

The proposed action is the issuance of an ITP for covered species within the permit area, principally located in Pima County, Arizona, under section 10(a)(1)(B) of the Act. Incidental take anticipated under this ITP application is species- and location-specific, and may include lethal take of individuals, as well as take in the form of harm through habitat loss or modification. The applicants would develop and implement the MSCP, as required by section 10(a)(2)(A) of the Act. The MSCP will describe the measures the applicants have agreed to implement to minimize and mitigate the effects of the proposed incidental take on covered species and their habitats. The goal of the MSCP is to provide long-term protection for multiple species of concern by avoiding, minimizing, and mitigating covered impacts; improving habitat conditions and ecosystem functions necessary for their survival; and to ensure that any incidental take of listed species will not reduce the likelihood of their survival and recovery in the wild.

The requested duration of the ITP is 30 years. The areas covered by the proposed ITP include: (1) Lands owned by the applicants, including those within the cities and towns of Tucson, Marana, Oro Valley, and Sahuarita, and adjacent counties; (2) lands where the applicants construct or maintain infrastructure, including lands within the cities and towns of Tucson, Marana, Oro Valley, and Sahuarita, and adjacent counties; (3) State lands that are or would be leased by the applicants or used as road easements; (4) private lands in unincorporated Pima County under the regulatory authority of the applicants; and (5) certain State Trust and Federal lands for which the title has been acquired by private entities or the applicants and thus have become subject to regulatory control of the applicants. Activities proposed for coverage under the ITP include, but are not limited to, undertakings by the applicants such as construction and maintenance activities and certain permits and approvals issued that allow

for ground disturbance on privately owned properties. The proposed MSCP includes an opt-in program whereby certain private entities, on a voluntary basis, could gain coverage for their lands under the applicants' ITP. The total acreage of impact for all covered activities would be capped at 36,000 acres.

Alternatives

The following is a brief summary of the four alternatives evaluated in the draft EIS and draft MSCP (for details, refer to those documents):

1. No Action Alternative. The applicants would not request and the Service would not issue a Section 10(a)(1)(B) permit. This alternative would require the applicants and developers of certain privately owned lands to evaluate each project or action on a case-by-case basis to address issues under the Act and avoid take of federally listed species. This alternative is the baseline against which the effects of the other alternatives are compared.

2. Permit for Applicants' Activities Only. The Service would issue a section 10(a)(1)(B) permit for coverage of 44 species that would apply only to activities that the applicants undertake.

3. Permit for Applicants' Activities and Automatic Coverage of Private Development Activities for which the County issues permits and approvals. Under this alternative, the Service would issue a section 10(a)(1)(B) permit for coverage of 44 species that would apply to activities that the applicants undertake, and would also cover most ground-disturbing private development within unincorporated Pima County, at no additional cost to the developer, for which the county issues a permit or approves a plan.

4. Preferred Alternative: Permit for Applicants' Activities and Certain Private Development Activities, some of which gain permit coverage with an opt-in provision. The Service would issue a section 10(a)(1)(B) permit for coverage of 44 species that would apply to activities that the applicants undertake, that would confer automatic coverage to a specified set of private development activities, and would confer coverage to certain private development activities where the developer voluntarily exercises the opt-in provision.

Public Comments

We request data, comments, new information, or suggestions from the public, other concerned governmental agencies, the scientific community, Tribes, industry, or any other interested party regarding this notice. We will consider these comments in developing a final EIS, final MSCP, and the incidental take permit (ITP). We particularly seek comments on the following:

1. Additional biological information relevant to the species, including information concerning the range, distribution, population size, and population trends of the species;

2. Current or planned activities in the subject area and their possible impacts on the species;

3. The presence of archeological sites, buildings and structures, historic events, sacred and traditional areas, and other historic preservation concerns, which are required to be considered in project planning by the National Historic Preservation Act; and

4. Identification of any other environmental issues that should be considered with regard to the proposed MSCP and permit decision.

Reviewing Documents

Please refer to TE84356A when requesting documents or submitting comments.

Downloadable copies of the draft MSCP and draft Implementing Agreement (IA) may be found on the Internet at *http://www.pima.gov/cmo/sdcp/MSCP/MSCP.html* and the draft EIS is available at *http://www.fws.gov/southwest/es/arizona.* For those without access to the Internet, a printed or CD–ROM copy of these documents is available upon request to Ms. Julia Fonseca, Pima County Office of Sustainability and Conservation, 201 N. Stone, 6th floor, Tucson, AZ 85701, phone (520) 740–6460, or email *mscp@pima.gov.* Additionally, persons wishing to review the draft MSCP, draft IA, and draft EIS may obtain copies by calling or faxing the U.S. Fish and Wildlife Service (520–670–6144, phone; 520–670–6155 fax).

The application, draft MSCP, draft IA, and draft EIS will also be available for public inspection, by appointment, during normal business hours (8 a.m. to 4:30 p.m.) at the Arizona Ecological Services Office, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.

Submitting Comments

During the public comment period (see **DATES**), submit your written comments or data to the Field Supervisor at the Phoenix address above. Comments will also be accepted by fax at the number above, as well as by email to *PimaMSCP@fws.gov* with the subject line ''Pima County Draft MSCP and Draft EIS.''

Comments submitted are available for public review at the Tucson address listed under **FOR FURTHER INFORMATION CONTACT**. This generally means that any personal information you provide to us will be available to anyone reviewing the public comments (see the Public Availability of Comments section below for more information).

Copies of the draft MSCP, draft IA, and draft EIS are also available for public inspection and review at the locations listed below:

- Pima County Public Library, Miller–Golf Links Branch Library 9640 E. Golf Links Road, Tucson, AZ 85730
- Pima County Public Library, Joel D. Valdez Main Library 101 North Stone Avenue, Tucson, AZ 85701
- Pima County Public Library, Caviglia-Arivaca Branch Library 17050 W. Arivaca Rd., Arivaca, AZ 85601
- Pima County Public Library, Sahuarita Branch Library 725 W. Via Rancho Sahuarita, Sahuarita, AZ 85629
- Pima County Public Library, Salazar-Ajo Branch Library 33 Plaza, Ajo, AZ 85321
- Pima County Public Library, Geasa-Marana Branch Library 13370 N. Lon Adams Rd., Marana, AZ 85653
- Pima County Office of Sustainability and Conservation (by appointment only) 201 N. Stone, 6th floor, Tucson, AZ 85701

Public Availability of Comments

Written comments we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that the entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10(c) of the Act (16 U.S.C. 1531 et seq.) and its implementing regulations (50 CFR 17.22 and 17.32), and NEPA (42 U.S.C. 4371 et seq.) and its implementing regulations (40 CFR 1506.6).

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region, Albuquerque, New Mexico.

[FR Doc. 2012–29391 Filed 12–6–12; 8:45 am]

BILLING CODE 4510–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWYD03000L131100000.DM0000]

Notice of Availability of the Draft Environmental Impact Statement for the Continental Divide-Creston Natural Gas Development Project, Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 (NEPA), as amended, the Bureau of Land Management (BLM) has prepared a Draft Environmental Impact Statement (EIS) for the proposed Continental Divide-Creston Natural Gas Development Project, and by this notice is announcing the opening of the comment period.

DATES: To ensure that comments will be considered, the BLM must receive written comments on the Continental Divide-Creston Natural Gas Development Project Draft EIS within 45 days following the date the Environmental Protection Agency publishes its Notice of Availability in the **Federal Register**. The BLM will announce future meetings or hearings and any other public involvement activities at least 15 days in advance through public notices, media releases, and/or mailings.

ADDRESSES: Comments related to the Continental Divide-Creston Natural Gas Development Project may be submitted by any of the following methods:

- *Email: Continental_Divide_Creston_WYMail@blm.gov.* Please reference ''CD–C Project'' in the subject line.
- *Fax:* 307–328–4224.
- *Mail:* Bureau of Land Management, Continental Divide-Creston Natural Gas Development Project Draft EIS, Attention: Dave Simons, Project Manager, P.O. Box 2407, 1300 N. Third Street, Rawlins, Wyoming 82301.

Copies of the Continental Divide-Creston Natural Gas Development Project Draft EIS are available in the BLM Rawlins Field Office, at the address indicated above, the BLM High Desert District Office, 280 Highway 191 North, Rock Springs, Wyoming 82901; the BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009; and the Carbon County Public Library, 215 West Buffalo Street, #117, Rawlins, Wyoming 82301; and at the following Web site: *http://www.blm.gov/wy/st/en/info/NEPA/documents/rfo/cd_creston.html.*

FOR FURTHER INFORMATION CONTACT: Dave Simons, Project Manager, at the BLM Rawlins Field Office, telephone: 307–328–4200; address: 1300 N. Third Street, P.O. Box 2407, Rawlins, Wyoming 82301, email: *Continental_Divide_Creston_WYMail@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, seven days a week, to leave a message or question with the above named individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The applicant is BP America Production Company (BP), representing itself and more than 20 other companies. BP has filed a plan of operations pursuant to 43 CFR subpart 3809 to expand development of natural gas resources within the existing Continental Divide/Wamsutter II and Creston/Blue Gap natural gas fields. The BLM has named the project the Continental Divide-Creston (CD–C) Natural Gas Development Project. The project proposal is to drill and develop 8,950 additional natural gas wells, including 100 to 500 coal bed natural gas wells, using a combination of both vertical and directional drilling techniques, during the next 15 years with a 30–40 year project life. Planned facilities would include well pads, gas and water collection pipelines, compressor stations, water disposal systems, an access road network and an electrical distribution system. All surface facilities would be removed when the project is completed and the land re-contoured to near predisturbance condition and re-vegetated. More than 4,000 wells have been drilled in the project area, which has been undergoing natural gas development since the 1950s.

Existing surface disturbance in the project area as of September 2012, is roughly 49,218 acres, including nearly 8,500 acres of long-term disturbance. Under the proposed plan, the BLM would be approving an additional 47,200 acres of surface disturbance. The combined total surface disturbance would represent approximately 10 percent of the project area.

The project is located in the following area:

Sixth Principal Meridian

T. 14 N., R. 91 W.,
  Secs. 6, 7, secs. 17 to 20, inclusive, and secs. 29 to 32, inclusive.
T. 18 N., R. 91 W.,
  Secs. 3 to 10, inclusive, secs. 15 to 21, inclusive, and secs. 28 to 32, inclusive.
T. 19 N., R. 91 W.,
  Secs. 1 to 23, inclusive, and secs. 26 to 34, inclusive.
T. 20 N., R. 91 W.,
  Secs. 6, 7, 18, 19, 30, and 31.
T. 21 N., R. 91 W.,
  Secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.
T. 22 N., R. 91 W.,
  Secs. 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.
T. 23 N., R. 91 W.,
  Secs 4 to 9, inclusive, secs. 16 to 21, inclusive, and secs. 28 to 33, inclusive.
T. 14 N., R. 92 W.
T. 15 N., R. 92 W.,
  Secs. 3 to 10, inclusive, secs. 14 to 23, inclusive, and secs. 25 to 36, inclusive.
T. 16 N., R. 92 W.,
  Secs. 4 to 8, inclusive, secs. 18, 19, and secs. 29 to 33, inclusive.
T. 17 N., R. 92 W.,
  Secs. 1 to 23, inclusive, and secs. 27 to 34, inclusive.
Tps. 18 to 23 N., R. 92 W.
T. 14 N., R. 93 W.,
  Secs. 1, 2, secs. 11 to 14, inclusive, secs. 23 to 26, inclusive, secs. 35 and 36.
T. 15 N., R. 93 W.,
  Secs. 1, 2, 3, secs. 10 to 15, inclusive, secs. 22 to 27, inclusive, secs. 34, 35, and 36.
Tps. 16 to 23 N., R. 93 W.
T. 16 N., R. 94 W.,
  Secs. 1 to 14, inclusive, secs. 23 to 26, inclusive, secs. 35 and 36.
Tps. 17 to 23 N., R. 94 W.
T. 16 N., R. 95 W.,
  Secs. 1, 2, and 3.
  Sec. 4, E½.
  Secs. 10, 11, and 12.
T. 17 N., R. 95 W.,
  Secs. 1 to 15, inclusive, secs. 22 to 27, inclusive, secs. 34, 35, and 36.
Tps. 18 to 24 N., R. 95 W.
Tps. 18 to 24 N., R. 96 W.
T. 19 N., R. 97 W.,
  Secs. 1 to 4, inclusive, and secs. 9 to 16, inclusive; those portions of secs. 17, 19 and 20 lying south of the right-of-way granted to the Union Pacific Railroad Company by the United States, serial number WYE–05871;
  Secs. 21 to 36, inclusive.
T. 20 N., R. 97 W.,
  Secs. 1 to 4, inclusive, secs. 9 to 16, inclusive, secs. 21 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 22 N., R. 97 W.,
  Secs. 1, 2, 3, and secs. 10 to 15, inclusive.
T. 23 N., R. 97 W.,
  Secs. 1 to 4, inclusive, secs. 9 to 16, inclusive, secs. 21 to 28, inclusive, and secs. 33 to 36, inclusive.
T. 24 N., R. 97 W.,
  Sec. 8, SE¼;
  Sec. 9, S½;
  Sec. 10, S½;
  Sec. 11, S½;
  Sec. 12, S½;
  Secs. 13 to 16, inclusive;
  Sec. 17, E½;
  Sec. 20, E½;
  Secs. 21 to 28, inclusive;
  Sec. 29, E½;

Secs. 33 to 36, inclusive.
T. 19 N., R. 98 W.,
Those portions of secs. 23 and 24 lying south of the right-of-way granted to the Union Pacific Railroad Company by the United States, serial number WYE–05871;
Sec. 25;
Those portions of secs. 26 to 31, inclusive, lying south of the right-of-way granted to the Union Pacific Railroad Company by the United States, serial number WYE–05871;
Secs. 32 to 36, inclusive.

The CD–C project area, including both public and nonpublic lands, aggregate approximately 1.1 million acres (1,672 square miles) in Carbon and Sweetwater Counties, Wyoming.

The eastern boundary of the CD–C project area is about 25 miles west of the city of Rawlins, Wyoming. The western boundary is roughly 50 miles east of the city of Rock Springs, Wyoming. Interstate 80 bisects the project area. The land surface and mineral estate in the area are administered by the BLM, the State of Wyoming, and private owners. The BLM manages approximately 626,932 surface acres (58.6 percent), the State of Wyoming owns approximately 48,684 acres (4.5 percent), and private landowners own approximately 394,470 acres (36.9 percent). The Rawlins Field Office (RFO) manages the BLM surface lands and the Federal mineral estate in the project area.

Cooperating agencies in this EIS include the State of Wyoming, with active participation from many state agencies including the State Planning Office, Wyoming Game and Fish Department (WGFD), State Historic Preservation Office (SHPO), Wyoming Department of Environmental Quality (WDEQ), and Wyoming Department of Agriculture. Regional cooperating agencies include Sweetwater County, the Little Snake River Conservation District, and the Sweetwater County Conservation District.

The Notice of Intent to prepare the EIS was published in the **Federal Register** twice, on September 8, 2005 (70 FR 53381), and again on March 3, 2006 (71 FR 10989). Two public scoping meetings were held in Rawlins, Wyoming, on October 13, 2005, and on April 6, 2006. Fifty comment letters, faxes, and emails were received during the extended scoping period.

Key issues identified during scoping include:

• Air quality: Potential project and cumulative impacts on air quality, including air quality-related values (AQRV).

• Cultural resources: The impact on the historic trails and transportation corridors in the project area.

• Hydrology: Potential degradation of surface and or ground water quality by project construction and drilling activities.

• Land ownership: The majority of the project area is in the ''checkerboard'' pattern of mixed public and private land ownership, complicating landscape scale impact reduction through mitigation on public lands where adjacent sections are non-public lands not subject to BLM regulations and requirements.

• Non-native, invasive plant species: The effect of current and projected infestations of non-native, invasive species.

• Rangeland management: Loss of livestock forage and the impact of project-associated hazardous conditions to area livestock operations.

• Special-status species: The impact from project activities upon threatened and endangered and sensitive wildlife species.

• Socioeconomics: The impact of the project on traditional socioeconomic indicators.

• Surface disturbance/reclamation: The extent of existing and proposed surface disturbance and its effects on all resources in the project area; and

• Wildlife habitat: The project's potential to further fragment wildlife habitat and further diminish the value of that habitat for many species.

In response to these issues, the BLM has developed five alternatives addressing the direct, indirect, and cumulative impacts of the Proposed Action which are analyzed in the Draft EIS:

• Alternative A, 100-Percent Vertical Drilling—This alternative assumes that all natural gas wells would be drilled from single-well pads, and that no directional drilling would occur;

• Alternative B, Enhanced Resource Protection—This alternative identifies those resources that may be most at risk from natural gas development, defines areas within the CD–C project area where those resource risks are likely to occur, and describes the enhanced protection and mitigations that could diminish those risks;

• Alternative C, Surface Disturbance Cap, Core and Non-Core Areas—This alternative places a cap on unreclaimed surface disturbance caused by natural gas development, a 60-acre cap in areas that have seen the greatest natural gas development to date and a 30-acre cap in the rest of the project area. The cap is acres per 640 acre section;

• Alternative D, Directional Drilling—This alternative requires that all future natural gas wells on Federal mineral estate be drilled from multi-well pads, one new multi-well pad per section; and

• Alternative E, No Action—NEPA regulations require that the EIS alternatives analysis ''include the alternative of no action'' (40 CFR 1502.14(d)). For this analysis, no action means that the development activities proposed by the CD–C operators would not be approved or authorized as proposed. Lease rights on Federal lands or mineral estate granted by the BLM would remain in effect and other, additional or supplemental proposals to develop leased resources, such as natural gas, could be received and would be considered by the BLM as appropriate.

Please note that public comments and information submitted including names, street addresses, and email addresses of persons who submit comments will be available for public review and disclosure at the above address during regular business hours (7:45 a.m. to 4:30 p.m.), Monday through Friday, except holidays.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask the BLM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Donald A. Simpson,

State Director.

[FR Doc. 2012–29614 Filed 12–6–12; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0006]

Agency Information Collection Activities: Proposed Collection, Comments Requested, Extension of a Currently Approved Collection: Law Enforcement Officers Killed and Assaulted

ACTION: 60-day notice.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for

review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until February 5, 2013.

This process is conducted in accordance with 5 CFR 1320.10.

All comments, suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Mrs. Amy C. Blasher, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, or facsimile to (304) 625–3566.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Extension of a currently approved collection.

(2) *The title of the form/collection:* Law Enforcement Officers Killed and Assaulted Program

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Forms 1–705; Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, tribal, and federal law enforcement agencies. Under Title 28, U.S. Code, Section 534, Acquisition, Preservation, and Exchange of Identification Records; Appointment of Officials, 1930, this collection requests Law Enforcement Officers Killed and Assaulted data from city, county, state, tribal and federal law enforcement agencies in order for the FBI UCR Program to serve as the national clearinghouse for the collection and dissemination of crime data and to publish these statistics in the Law Enforcement Officers Killed and Assaulted annual publication.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are approximately 18,233 law enforcement agency respondents; calculated estimates indicate 7 minutes per report.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 16,228 hours, annual burden, associated with this information collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitutional Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: December 3, 2012.

Jerri Murray,

Department Clearance Officer for PRA, United States Department of Justice.

[FR Doc. 2012–29601 Filed 12–6–12; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1105–NEW]

Agency Information Collection Activities; Proposed Collection; Comments Requested: Claims of U.S. Nationals for Compensation for Serious Personal Injuries Against the Government of Iraq and Referred to the Foreign Claims Settlement Commission by the Department of State Legal Adviser

ACTION: 60-Day notice.

The Department of Justice, Foreign Claims Settlement Commission (Commission), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the procedures of the Paperwork Reduction Act of 1995. OMB approval has been requested by January 15, 2013. The proposed information collection is published to obtain comments from the public and affected agencies. Comments should be directed to OMB, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20503. Comments are encouraged and will be accepted for 60 days until February 5, 2013.

All comments and suggestions, or questions regarding additional information, including obtaining a copy of the proposed information collection instrument with instructions, should be directed to Judith Lock, Foreign Claims Settlement Commission, Department of Justice, 600 E Street NW., Suite 6002, Washington DC 20579, or by facsimile (202) 616–6993.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

—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.

Overview of This Information Collection

(1) *Type of information collection:* New Collection.

(2) *The title of the form/collection:* Claims of U.S. Nationals Against Iraq.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: FCSC 1–12. Foreign Claims Settlement Commission, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals. Other: None. Information will be used as a basis for the Commission to receive, examine, adjudicate and render final decisions with respect to claims for

compensation of U.S. nationals, under the U.S.-Iraq Claims Settlement Agreement and the November 14, 2012 referral to the Commission by the Department of State Legal Adviser, for serious personal injuries, which may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault. Certified awards will be payable by the Department of Treasury out of funds provided.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 20 individual respondents will complete the application, and that the amount of time estimated for an average respondent to reply is approximately two hours each.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total annual public burden associated with this application is 40 hours.

If additional information is required contact: Jerri Murray, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: December 3, 2012.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2012–29602 Filed 12–6–12; 8:45 am]

BILLING CODE 4410–BA–P

DEPARTMENT OF JUSTICE

[OMB Number 1110–0001]

Agency Information Collection Activities, Proposed Collection, Comments Requested, Revision of a Currently Approved Collection: Return A—Monthly Return of Offenses Known to Police and Supplement to Return A—Monthly Return of Offenses Known to Police

ACTION: 60-day notice.

The Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with established review procedures of the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until February 5, 2013.

This process is conducted in accordance with 5 CFR 1320.10.

All comments, suggestions, or questions regarding additional information, to include obtaining a copy of the proposed information collection instrument with instructions, should be directed to Mrs. Amy C. Blasher, Unit Chief, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division, Module E–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306, or facsimile to (304) 625–3566.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of information collection:* Revision of a currently approved collection.

(2) *The title of the form/collection:* Return A—Monthly Return of Offenses Known to Police and Supplement to Return A—Monthly Return of Offenses Known to Police.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Forms 1–720, 1–720a, 1–720b, 1–720c, 1–720d, 1–720e, and 1–706; Criminal Justice Information Services Division, Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: City, county, state, tribal, and federal law enforcement agencies. Under Title 28, U.S. Code, Section 534, Acquisition, Preservation, and Exchange of Identification Records; Appointment of Officials, 1930, this collection requests Part I offense and clearance data as well as stolen and recovered monetary values of stolen property throughout the United States from city, county, state, tribal, and federal law enforcement agencies in order for the FBI UCR Program to serve as the national clearinghouse for the collection and dissemination of crime data and to publish these statistics in the Semiannual and Preliminary Annual Reports and Crime in the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* There are a potential of 18,233 law enforcement agency respondents; calculated estimates indicate 10 minutes for the Return A and 11 minutes for the Supplement to Return A.

(6) *An estimate of the total public burden (in hours) associated with this collection:* There are approximately 48,686 hours, annual burden, associated with this information collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, United States Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: December 3, 2012.

Jerri Murray,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 2012–29600 Filed 12–6–12; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF JUSTICE

[OMB Number 1117–0033]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Report of Mail Order Transaction

ACTION: 60-Day notice.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until February 5, 2013. This process is conducted in accordance with 5 CFR 1320.10.

If you have comments, especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Cathy A. Gallagher, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, Telephone (202) 307–7297.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- 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 agencies 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.

Overview of Information Collection 1117–0033

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Report of Mail Order Transaction.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:*

Form Number: none; Office of Diversion Control, Drug Enforcement Administration, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:*

Primary: Business or other for-profit.

Other: Not-for-Profit Institutions; State, Local or Tribal Government.

Abstract: The Comprehensive Methamphetamine Control Act of 1996 (Pub. L. 104–237) (MCA) amended the Controlled Substances Act to require that each regulated person who engages in a transaction with a non-regulated person which involves ephedrine, pseudoephedrine, or phenylpropanolamine (including drug products containing these chemicals) and uses or attempts to use the Postal Service or any private or commercial carrier shall, on a monthly basis, submit a report of each such transaction conducted during the previous month to the Attorney General.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that there are 11 total respondents at 12 responses annually for this information collection; 3 for paper form at 1 hour for each response (3 respondents × 12 annual responses × 1 hour = 36 hours total); and 8 via electronic mail at 15 minutes per form (8 respondents × 12 annual responses × 15 minutes = 24 hours total). The total annual burden is 60 hours (36 hours for paper forms and 24 hours for electronic forms).

(6) *An estimate of the total public burden (in hours) associated with the collection:* It is estimated that there are 60 annual burden hours associated with this collection.

If additional information is required contact: Jerri Murray, Department Clearance Officer, Policy and Planning Staff, Justice Management Division, Department of Justice, Two Constitution Square, 145 N Street NE., Room 3W–1407B, Washington, DC 20530.

Dated: December 3, 2012.

Jerri Murray,

Department Clearance Officer for PRA, U.S. Department of Justice.

[FR Doc. 2012–29599 Filed 12–6–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection on Administrative Procedures Including Form MA 8–7, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the 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 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data consistent with 20 CFR 601, including Form MA 8–7, which expires June 30, 2013.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before February 5, 2013.

ADDRESSES: Submit written comments to Scott Gibbons, Office of Unemployment Insurance, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3008 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Email: *gibbons.scott@dol.gov.* A copy of the proposed information collection request (ICR) can be obtained by contacting Mr. Gibbons.

SUPPLEMENTARY INFORMATION:

I. Background

Department of Labor, Employment and Training Administration regulations, 20 CFR 601, Administrative Procedures, contains collection of information requirements at Sections 601.2 and 601.3. Section 601.2 requires states to submit copies of their unemployment compensation laws for approval by the Secretary of Labor (Secretary) so that the Secretary may determine the status of state laws and plans of operation. Section 601.3 requires states to ''submit all relevant state materials such as statutes, executive and administrative orders, legal opinions, rules, regulations, interpretations, court decisions, etc.'' These materials are used by the Secretary to determine whether the state law contains provisions required by Section 3304(a) of the Internal Revenue Code of 1986. Grants of funds are made to states for the administration of their employment security laws if their unemployment compensation laws and their plans of operation for public employment offices meet required conditions of Federal laws. The information transmitted by Form MA 8–7 is used by the Secretary to make findings (as specified in the above cited Federal laws) required for certification

to the Secretary of the Treasury for payment to states or for certification of the state law for purposes of additional tax credit. If this information is not available, the Secretary cannot make such certifications. To facilitate transmittal of required material, the Department prescribes the use of Form MA 8–7, Transmittal for Unemployment Insurance Materials. This simple check off form is used by the states to identify material being transmitted to the National Office and allows the material to be routed to appropriate staff for prompt action.

II. Review Focus

The Department 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 without changes.

Title: Transmittal for Unemployment Insurance Materials.

Number: 1205–0222.

Affected Public: State Workforce Agencies.

Total Annual Burden Cost for Respondents: There is no burden cost for respondents.

Instruments	Respondents	Hours per response	Annualized responses	Annualized hours
Review of State Legislation	53	0.25h	5	66.25h
Review of State STC policies	26	0.25h	1	6.50h
Review of State SEA Policies	10	0.25h	1	2.50h
Unduplicated Totals	53		7	75.25h

Signed in Washington, DC, this 1st day of November, 2012.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2012–29592 Filed 12–6–12; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petition for Modification

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice; correction.

SUMMARY: This notice amends a petition for modification published in the **Federal Register** on May 23, 2012, for the Mountain Coal Company, LLC, P.O. Box 591, 5174 Highway 133, Somerset, Colorado 81434.

FOR FURTHER INFORMATION CONTACT: George F. Triebsch, 202–693–9440.

Correction

This notice corrects the mandatory safety standard cited in the notice. The safety standard referenced in the May 23, 2012 **Federal Register** notice on page 30556 in the 2nd column, Docket Number M–2012–075–C, was listed as 30 CFR 75.500(d) (Permissible electric equipment). The correct mandatory safety standard is 30 CFR 75.503 (Permissible electric face equipment; maintenance).

Dated: December 4, 2012.

George F. Triebsch,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2012–29585 Filed 12–6–12; 8:45 am]

BILLING CODE 4510–43–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export Radioactive Waste

Pursuant to 10 CFR 110.70(b) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 Fed. Reg 49139 (Aug. 28, 2007). Information about filing electronically is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* To ensure timely electronic filing, at least 5 (five) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by email at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this application for an export license follows.

NRC EXPORT LICENSE APPLICATION

[Description of material]

Name of applicant, date of application, date received, application No., docket No.	Material type	Total quantity	End use	Destination
EnergySolutions, October 24, 2012, October 25, 2012, XW020, 11006061.	Class A radioactive waste in the form of contaminated dry active materials generated during refurbishment of a heat transport impeller and associated equipment from Ontario Power Generation's Pickering Station in Canada.	Approximately 1178 pounds (approximately 68 cubic feet) of dry active materials, contaminated with various radionuclides in varying combinations. Activity levels will not exceed licensee possession limits, and materials will be handled in accordance with all U.S. federal and state regulations.	Storage or disposal by the original generator, as required or authorized by their regulator.	Canada.

Dated this 3rd day of December 2012, at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Mark R. Shaffer,

Deputy Director, Office of International Programs.

[FR Doc. 2012–29673 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export High-Enriched Uranium

Pursuant to 10 CFR 110.70 (b) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 Fed. Reg 49139 (Aug. 28, 2007). Information about filing electronically is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. To ensure timely electronic filing, at least 5 (five) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by email at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications

The information concerning this application for an export license follows.

NRC EXPORT LICENSE APPLICATION

[Description of material]

Name of applicant, date of application, date received, application No., docket No.	Material type	Total quantity	End use	Destination
DOE/NNSA—Y–12 National Security Complex. October 10, 2012 October 12, 2012 XSNM3730 11006054	High-Enriched Uranium (93.35%).	9.4 kilograms uranium-235 contained in 10.1 kilograms uranium.	To fabricate targets at CERCA AREVA Romans in France and to irradiate targets at the HFR Research Reactor in the Netherlands, the BR–2 Reactor in Belgium, and the Maria Research Reactor in Poland for ultimate use for production of medical isotopes at the Covidien Molybdenum Production Facility in the Netherlands.	The Netherlands.

Dated this 19th day of November 2012 at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Mark R. Shaffer,

Deputy Director, Office of International Programs.

[FR Doc. 2012–29641 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export High-Enriched Uranium

Pursuant to 10 CFR 110.70 (b) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). Information about filing electronically is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. To ensure timely electronic filing, at least 5 (five) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by email at *HEARINGDOCKET@NRC.GOV*, or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications

The information concerning this application for an export license follows.

NRC EXPORT LICENSE APPLICATION

[Description of material]

Name of applicant, date of application, date received, application No., docket No.	Material type	Total quantity	End use	Destination
DOE/NNSA–Y–12 National Security Complex. October 10, 2012 ..... October 12, 2012 ..... XSNM3729 ..... 11006053	High-Enriched Uranium (93.2%).	5.8 kilograms uranium-235 contained in 6.2 kilograms uranium.	To fabricate targets at CERCA AREVA Romans in France and to irradiate targets at the BR-2 Research Reactor in Belgium, the HFR Research Reactor in the Netherlands, the OSIRIS Research Reactor in France, and the LVR-15 Research Reactor in the Czech Republic for ultimate use for production of medical isotopes at the Institute for Radioelements in Belgium.	Belgium.

Dated this 19th day of November 2012 at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Mark R. Shaffer,

Deputy Director, Office of International Programs.

[FR Doc. 2012–29613 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0293]

Initial Test Programs for Water-Cooled Nuclear Power Plants

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft regulatory guide; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing for public comment draft regulatory guide (DG), DG–1259, ''Initial Test Programs for Water-Cooled Nuclear Power Plants.'' This guide describes the general scope and depth that the staff of the NRC considers acceptable for Initial Test Programs (ITPs) for light water cooled nuclear power plants.

DATES: Submit comments by January 31, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure consideration only for comments received on or before this date. Although a time limit is given, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0293. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0293. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Frank Talbot, Office of New Reactors, U.S. Nuclear Regulatory Commission,

Washington, DC 20555–0001; telephone: 301–415–3146 or email: *Frank.Talbot@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0293 when contacting the NRC about the availability of information regarding this document. You may access information related to this document by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0293.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Document*s'' and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The draft regulatory guide is available electronically under ADAMS Accession No. ML12298A071. The regulatory analysis may be found under ADAMS Accession No. ML12298A073.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0293 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Further Information

The NRC is issuing for public comment a draft guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The draft regulatory guide, entitled, ''Initial Test Programs for Water-Cooled Nuclear Power Plants,'' is temporarily identified by its task number, DG–1259. The DG–1259 is proposed revision 4 of Regulatory Guide (RG) 1.68, dated March 2007.

This guide describes the general scope and depth that the NRC staff considers acceptable for ITPs for light water cooled nuclear power plants. This RG is being revised to address design qualification tests for new design certifications (DCs) and combined licenses (COLs) using the requirements in part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' This RG is also being revised to add some preoperational, low-power and power ascension tests for new light water reactors (LWRs) licensed under 10 CFR Part 52. In addition, this RG is being revised to add new and updated references.

The DG has 3 appendices. Appendix A addresses the specific tests recommended or required for the ITPs. Appendix B provides information about ITP-related inspections that the NRC staff will perform, including the appropriate regional office staff. Finally, Appendix C contains guidance on the preparation and content of procedures for preoperational, fuel loading, initial criticality, low power, and power ascension tests.

III. Backfitting and Issue Finality

As discussed in the ''Implementation'' section of this regulatory guide, the NRC has no current intention to impose this regulatory guide on holders of current operating licenses or combined licenses. Accordingly, the issuance of this regulatory guide would not constitute ''backfitting'' as defined in 10 CFR 50.109(a)(1) of the Backfit Rule or be otherwise inconsistent with the applicable issue finality provisions in 10 CFR part 52.

This regulatory guide may be applied to applications for operating licenses and combined licenses docketed by the NRC as of the date of issuance of the final regulatory guide, as well as future applications for operating licenses and combined licenses submitted after the issuance of the regulatory guide. Such action would not constitute backfitting as defined in 10 CRF 50.109(a)(1) or be otherwise inconsistent with the applicable issue finality provision in 10 CFR part 52, inasmuch as such applicants or potential applicants are not within the scope of entities protected by the Backfit Rule or the relevant issue finality provisions in part 52.

Dated at Rockville, Maryland, this 30th day of November 2012.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guide Development Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2012–29618 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0222]

Japan Lessons-Learned Project Directorate Interim Staff Guidance JLD–ISG–2012–05; Performance of an Integrated Assessment for External Flooding

AGENCY: Nuclear Regulatory Commission.

ACTION: Japan Lessons-Learned Project Directorate Interim Staff Guidance; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing the Final Japan Lessons-Learned Project Directorate Interim Staff Guidance (JLD–ISG), JLD–ISG–2012–05, ''Performance of an Integrated Assessment'' (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12311A214). This JLD–ISG provides guidance and clarification to assist nuclear power reactors applicants and licensees with performing an integrated assessment for external flooding in response to Enclosure 2 of a March 12, 2012, information request (ADAMS Accession No. ML12053A340).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publically available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0222.

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0222. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The JLD–ISG–2012–05 is available under ADAMS Accession No. ML12311A214.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852
- *NRC's Interim Staff Guidance Web Site:* Go to *http://www.nrc.gov/reading-rm/doc-collections/isg/japan-lessons-learned.html* and refer to JLD–ISG–2012–05.

FOR FURTHER INFORMATION CONTACT: Mr. G. Edward Miller, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2481; email: *ed.miller@nrc.gov.*

SUPPLEMENTARY INFORMATION:

Background Information

On March 11, 2011, a magnitude 9.0 earthquake struck off the coast of the Japanese island of Honshu. The earthquake resulted in a large tsunami, estimated to have exceeded 14 meters (45 feet) in height that inundated the Fukushima Dai-ichi nuclear power plant site. The earthquake and tsunami produced widespread devastation across northeastern Japan and significantly affected the infrastructure and industry in the northeastern coastal areas of Japan. When the earthquake occurred, Fukushima Dai-ichi Units 1, 2, and 3 were in operation and Units 4, 5, and 6 were shut down for routine refueling and maintenance activities. The Unit 4 reactor fuel was offloaded to the Unit 4 spent fuel pool. Following the earthquake, the three operating units automatically shut down and offsite power was lost to the entire facility. The emergency diesel generators (EDGs) started at all six units providing alternating current (ac) electrical power to critical systems at each unit. The facility response to the earthquake appears to have been normal. Approximately 40 minutes following the earthquake and shutdown of the operating units, however, the first large tsunami wave inundated the site, followed by additional waves. The tsunami caused extensive damage to site facilities and resulted in a complete loss of all ac electrical power at Units 1 through 5, a condition known as station blackout. In addition, all direct current electrical power was lost early in the event on Units 1 and 2 and after some period of time at the other units. Unit 6 retained the function of one air-cooled EDG. Despite their actions, the operators lost the ability to cool the fuel in the Unit 1 reactor after several hours, in the Unit 2 reactor after about 70 hours, and in the Unit 3 reactor after about 36 hours, resulting in damage to the nuclear fuel shortly after the loss of cooling capabilities.

Following the events at the Fukushima Dai-ichi nuclear power plant, the NRC established a senior-level agency task force referred to as the Near-Term Task Force (NTTF). The NTTF was tasked with conducting a systematic and methodical review of the NRC's regulations and processes, and determining if the agency should make additional improvements to these programs in light of the events at Fukushima Dai-ichi. As a result of this review, the NTTF developed a comprehensive set of recommendations, documented in SECY–11–0093, ''Near-Term Report and Recommendations for Agency Actions Following the Events in Japan,'' dated July 12, 2011 (ADAMS Accession No. ML11186A950). These recommendations were enhanced by the NRC staff following interactions with stakeholders. Documentation of the staff's efforts is contained in SECY–11–0124, ''Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report,'' dated September 9, 2011 (ADAMS Accession No. ML11245A158) and SECY–11–0137, ''Prioritization of Recommended Actions to be Taken in Response to Fukushima Lessons Learned,'' dated October 3, 2011 (ADAMS Accession No. ML11272A111).

As directed by the Commission's staff requirement memorandum (SRM) for SECY–11–0093, dated August 19, 2011 (ADAMS Accession No. ML112310021), the NRC staff reviewed the NTTF recommendations within the context of the NRC's existing regulatory framework and considered the various regulatory vehicles available to the NRC to implement the recommendations. SECY–11–0124 and SECY–11–0137 established the staff's prioritization of the recommendations based upon the potential for each recommendation to enhance safety.

As part of the SRM for SECY–11–0124, dated October 18, 2011, the Commission approved the staff's proposed actions, including the development of three information requests under section 50.54(f) of Title 10 of the *Code of Federal Regulations* (10 CFR). The information collected would be used to support the NRC staff's evaluation of whether further regulatory action was needed in the areas of seismic and flooding design, and emergency preparedness.

In addition to Commission direction, the Consolidated Appropriations Act, Public Law 112–074, was signed into law on December 23, 2011, which contains the Energy and Water Development Appropriations Act, 2012 (Act). Section 402 of the Act directs the NRC to require licensees to reevaluate their design basis for seismic, tsunami, flooding, and other external hazards against current applicable Commission requirements and guidance.

In response to the aforementioned Commission and Congressional direction, the NRC issued a request for information to all power reactor licensees and holders of construction permits under 10 CFR part 50 on March 12, 2012. The March 12, 2012, letter includes a request that licensees reevaluate flooding hazards at nuclear power plant sites using updated flooding hazard information and present day regulatory guidance and methodologies. The letter also requests the comparison of the reevaluated hazard to the current design basis at the site for each potential flood mechanism. If the reevaluated flood hazard at a site is not bounded by the current design basis, licensees are requested to perform an integrated assessment. The integrated assessment will evaluate the total plant response to the flood hazard, considering multiple and diverse capabilities such as physical barriers, temporary protective measures, and operational procedures. The NRC staff will review the licensees' responses to this request for information and determine whether regulatory actions are necessary to provide additional protection against flooding.

The NRC staff developed draft JLD–ISG–2012–05 to provide guidance and clarification to assist nuclear power

reactor applicants and licensees and holders of construction permits in active or deferred status with the performance of an integrated assessment for external flooding.

Numerous public meetings were held to receive stakeholder input on the proposed guidance prior to its issuance formally for public comment. On September 28, 2012 (77 FR 65417), the NRC requested public comments on draft JLD–ISG–2012–05. The staff received sixty-one (61) comments from four (4) stakeholders. Comments were received related to the following topical areas: (1) Evaluation of mitigation capability, particularly the perceived limitations associated with use of the scenario-based evaluation method; (2) expectations and attributes of the peer review; (3) the availability of illustrative examples; (4) equipment redundancy and quantification of reliability; (5) the evaluation of manual actions associated with protective and mitgative actions; (6) the evaluation of flood protection and demonstration of reliability and margin using available performance criteria; and (7) general and miscellaneous other topics. In public meetings on October 24–25, 2012, and November 7, 2012, the NRC staff interacted extensively with external stakeholders to discuss and resolve public comments (including discussion of proposed modifications to the text of the ISG) related to the evaluation of mitigation capability, the expectations and attributes of peer review, and other topics. Significant modifications were made to text of the ISG in response to the public comments and the outcomes of the public meetings. In addition, to provide more detailed guidance, staff has augmented the ISG by providing additional references related to the evaluation of flood protection and significantly enhancing portions of the ISG related to the evaluation of manual actions. The comments were considered, evaluated, and resulted in modifications to the final JLD–ISG–2012–05. The comments, staff responses, and the staff's bases for changes to the ISG are contained in ''NRC Responses to Public Comments,'' for JLD–ISG–2012–05, which can be found under ADAMS at Accession No. ML12311A216.

Backfitting and Issue Finality

This ISG does not constitute backfitting as defined in 10 CFR 50.109 (the Backfit Rule) and is not otherwise inconsistent with the issue finality provision in 10 CFR part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' This ISG provides guidance on an acceptable method for responding to a portion of an information request issued pursuant to 10 CFR 50.54(f). Neither the information request nor the ISG require the modification or addition to systems, structures, or components, or design of a facility. Applicants and licensees may voluntarily use the guidance in JLD–ISG–2012–06 to comply with the request for information. The information received by this request may, at a later date, be used in the basis for a backfit at a later date. In this case, the appropriate backfit review process would be followed at that time.

Congressional Review Act

This interim staff guidance is a rule as designated in the Congressional Review Act (5 U.S.C. 801–808). OMB has found that this is not a major rule in accordance with the Congressional Review Act.

Dated at Rockville, Maryland, this 30th day of November 2012.

For the Nuclear Regulatory Commission.

Robert M. Taylor,

Deputy Director, Japan Lessons-Learned Project Directorate, Office of Nuclear Reactor Regulation.

[FR Doc. 2012–29619 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Reliability & PRA

Notice of Meeting

The ACRS Subcommittee on Reliability & PRA will hold a meeting on January 16, 2013, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, January 16, 2013—8:30 a.m. Until 5:00 p.m.

The Subcommittee will review the progress of the Human Reliability Analysis (HRA) methods. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), John Lai (Telephone 301–415–5197 or Email: *John.Lai@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 18, 2012, (77 FR 64146–64147).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: November 28, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–29675 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0220]

Standard Review Plan for Review of Fuel Cycle Facility License Applications

AGENCY: Nuclear Regulatory Commission.

ACTION: NUREG revision; request for comments.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is planning to revise NUREG–1520, Revision 1, ''Standard Review Plan (SRP) for the Review of a License Application for a Fuel Cycle Facility.'' The staff proposes to revise NUREG–1520 to provide guidance and further clarify several technical areas. In addition to revising NUREG–1520, the staff is also planning to issue Interim Staff Guidance (ISG) to provide guidance on Integrated Safety Analysis (ISA) implementation issues consistent with the direction in Staff Requirements Memorandum (SRM) SECY–12–0091, ''Completeness and Quality of Integrated Safety Analysis,'' dated October 9, 2012, which is also available in Agencywide Documents Access and Management System (ADAMS) under Accession No. ML12284A033. The NRC staff is seeking to engage stakeholders during the early stages of the SRP revision process by soliciting comments on which SRP areas should be revised and which topics should be addressed in ISGs.

DATES: Submit comments by January 7, 2013. Comments received after the comment period deadline will be considered if it is practical to do so, but the Commission is only able to ensure consideration of comments received on or before the end of the public comment period.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0220. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0220. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Soly I. Soto, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–492–3147; email: *Soly.Soto@nrc.gov* and Damaris Marcano; telephone: 301–492–3233; email: *Damaris.Marcano@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0220 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0220.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select *''ADAMS Public Documents''* and then select *''Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0220 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Background

The SRP for the review of a license application for a fuel cycle facility (NUREG–1520) provides NRC staff guidance for reviewing and evaluating the safety, health, and environmental protection aspects of applications for licenses to possess and use special nuclear material to produce nuclear reactor fuel. In May 2010, the NRC announced the availability of Revision 01 to NUREG–1520 (75 FR 30864), which is also available under ADAMS Accession No. ML101390110. The 2010 SRP revisions improved and enhanced the guidance in specific areas of the licensing program, and added guidance in areas where information was lacking or not suitably addressed. However, the NRC staff recognizes that guidance provided in several technical areas throughout the SRP needs to be further improved. Therefore, the NRC staff is planning to revise NUREG–1520, Revision 01, to provide additional information and clarify guidance on acceptable methods for achieving regulatory compliance with current regulations.

In an SRM dated October 9, 2012 (SRM–SECY–12–0091), the Commission directed the staff to request that the American Nuclear Society (ANS) develop an ISA standard that would improve the quality and completeness of ISAs. The Commission also directed the staff to refrain from revising NUREG–1520 on ISA topics related to the ANS standard until the standard is complete. Rather, the staff should issue ISGs on certain narrow topics needing clarification such as the use of passive design features, bounding assumptions, initial conditions and the completeness of ISA summaries.

III. Initial Plan To Revise NUREG–1520

A. Proposed Changes

The NRC staff proposes to revise the SRP to provide guidance and clarify the discussion in several technical areas,[1] including criticality hazards and management measures. Further, the staff proposes to add two chapters to address the requirements for material control and accounting (MC&A) and physical protection, which are referenced in section 70.22 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Contents of Application.'' Additionally, the staff also proposes to revise the SRP to add guidance on the characterization and treatment of natural phenomena events and their impacts to fuel cycle facilities. Furthermore, the NRC staff is expecting to incorporate administrative changes throughout the SRP to ensure consistency among the chapters.

The NRC staff is planning to revise Chapter 5, ''Nuclear Criticality Safety,'' to expand its discussion of the double contingency principle and double contingency protection. The discussion will include a description of what constitutes a loss of double contingency. Furthermore, the staff proposes to revise Chapter 11, ''Management Measures,'' to provide guidance on graded management measures. This guidance will address the selection of IROFS for application of graded management measures.

The NRC staff proposes the addition of two new chapters to the SRP: Chapter 12, ''Material Control and Accounting;'' and Chapter 13, ''Physical Protection.'' The purpose of adding these chapters is to more fully address the 10 CFR part 74 requirements for material control and accounting, and the 10 CFR part 73 physical protection requirements that are specifically addressed in § 70.22 for fuel cycle facilities. In Chapters 12 and 13, the staff is planning to reference applicable fuel cycle facility review guidance for 10 CFR part 73 and part 74 including those currently being evaluated under the rulemaking process.

The staff also proposes to revise the SRP to add guidance on the characterization and treatment of natural phenomena events, and their potential impacts on fuel cycle facilities. In addition, the NRC staff expects to incorporate administrative changes throughout the chapters of the SRP. Such administrative changes may include rearrangement of some sections and general streamlining to further improve clarity, reduce redundancy, and to assure that statutory, regulatory, and guidance document references are accurate and up to date.

For the ISG addressing ISA implementation issues, the staff plans to engage stakeholders to ensure common understanding on ISA implementation issues such as the use of passive engineered controls, bounding assumptions, and initial conditions to meet the 10 CFR part 70 requirements. In addition, the staff plans to provide clarification on the completeness of the ISA summaries to ensure that facilities appropriately consider all credible events when developing an ISA.

After consideration of the comments now being solicited, the NRC plans to develop and publish a project plan that establishes timelines and milestones for the SRP revisions and ISG development. The project plan will include additional opportunities for public comment.

B. Receiving Alerts

The NRC may post additional information related to revising NUREG–1520, including meeting notices, to the Federal rulemaking Web site at *http://www.regulations.gov*, under Docket ID NRC–2012–0220. The Federal rulemaking Web site allows you to receive alerts when changes or additions occur in a docket folder. To subscribe: 1) navigate to the docket folder (NRC–2012–0220); 2) click the ''Email Alert'' link; and 3) enter your email address and select how frequently you would like to receive emails (daily, weekly, or monthly). In addition, public meeting notices will be posted on the NRC's Public Meeting Schedule Web site, *http://www.nrc.gov/public-involve/public-meetings/index.cfm*, at least 10 days prior to the meeting.

Dated at Rockville, Maryland, this 28th day of October 2012.

For the Nuclear Regulatory Commission.

Marissa Bailey,

Deputy Director, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2012–29678 Filed 12–6–12; 8:45 am]

BILLING CODE 7590–01–P

[1] Guidance on ISA implementation issues will be addressed in an ISG.

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Application To Make Deposit or Redeposit (CSRS), SF 2803, and Application To Make Service Credit Payment for Civilian Service (FERS), SF 3108

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day notice and request for comments.

SUMMARY: The Retirement Services, Office of Personnel Management (OPM) offers the general public and other federal agencies the opportunity to comment on a revised information collection request (ICR) 3206–0134, Application to Make Deposit or Redeposit (CSRS) and Application to Make Service Credit Payment for Civilian Service (FERS). As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35) as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of 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, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until February 5, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to U.S. Office of Personnel Management, Retirement Services, Union Square 370, 1900 E Street NW., Washington, DC 20415–3500, Attention: Alberta Butler or sent via electronic mail to *Alberta.Butler@opm.gov*.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW., Room 4332, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910.

SUPPLEMENTARY INFORMATION: SF 2803, Application to Make Deposit or Redeposit (CSRS) and SF 3108, Application to Make Service Credit

Payment for Civilian Service (FERS), are applications to make payment used by persons who are eligible to pay for Federal service which was not subject to retirement deductions and/or for Federal service which was not subject to retirement deductions which were subsequently refunded to the applicant.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Application to Make Deposit or Redeposit (CSRS), and Application to Make Service Credit Payment for Civilian Service (FERS).

OMB Number: 3206–0134.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 150.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 75.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2012–29620 Filed 12–6–12; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–23; Order No. 1562]

International Mail Contract

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional inbound competitive Multi-Service Agreements with Foreign Postal Operators 1 negotiated service agreement with China Post. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 12, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Contents of Filing
III. Commission Action
IV. Ordering Paragraphs

I. Introduction

On November 30, 2012, the Postal Service filed a notice, pursuant to 39 CFR 3015.5, stating that it has entered into an additional negotiated service agreement with foreign postal operator China Post (Agreement).[1] The Agreement is a successor to the existing China Post 2011 Agreement, which will expire December 31, 2012.[2]

The Postal Service seeks to have the inbound portion of the Agreement, which concerns delivery of inbound Air CP,[3] Surface CP, and Express Mail Service, included within the Inbound Competitive Multi-Service Agreements with Foreign Postal Operators 1 (MC2010–34) product on the competitive product list. Notice at 1.

II. Contents of Filing

The Postal Service's filing consists of the Notice, an Excel file containing redacted financial workpapers, and four attachments. Attachment 1 is a redacted copy of the Agreement. Attachment 2 is the certified statement required by 39 CFR 3015.5(c)(2). Attachment 3 is a redacted copy of the Governors' Decision No. 10–3. Attachment 4 is an application for non-public treatment of unredacted material. *Id.* at 3. The Agreement's intended effective date is January 1, 2013. *Id.* at 4. The term is for one year after the effective date, unless terminated earlier. *Id.*

The Postal Service reviews the regulatory history of the Inbound Competitive Multi-Service Agreements with Foreign Operators 1 product and identifies the TNT Agreement (approved in Docket No. CP2010–95) as the baseline agreement for purposes of determining the functional equivalence of the instant Agreement.[4] *Id.* at 1–3. It asserts that the Agreement fits within applicable Mail Classification Schedule language and addresses functional equivalency with the baseline agreement, including similarity of cost characteristics. *Id.* at 5. The Postal Service also identifies differences between the two contracts, such as revisions to existing articles and the addition of new annexes, but asserts that these differences do not detract from a finding of functional equivalency. *Id.* at 5–8.

The Agreement also includes rates for a yet-to-be-launched inbound product. *Id.* Annex 1 n.3. Prior to launching the product, the parties to the Agreement must enter into a written modification to the Agreement, subject to approval from various entities, including the Commission. *Id.* at 4 n.8.

Rates under the instant Agreement are intended to become effective on January 1, 2013. *Id.* at 2–3. They are to remain in effect for 1 year after the effective date of the agreement, unless terminated earlier. *Id.* at 4.

III. Commission Action

Notice of establishment of docket. The Commission establishes Docket No. CP2013–23 for consideration of matters raised by the Notice. The Commission appoints Allison J. Levy to serve as Public Representative in this docket.

Interested persons may submit comments on whether the Postal Service's filing in the captioned docket is consistent with the policies of 39 U.S.C. 3632 and 3633 and the requirements of 39 CFR part 3015. Comments are due no later than December 12, 2012. The public portions of this filing can be accessed via the Commission's Web site (*http://www.prc.gov*). Information on obtaining access to sealed material appears in 39 CFR part 3007.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–23 for consideration of matters raised by the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, Allison J. Levy is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments by interested persons in this proceeding are due no later than December 12, 2012.

4. The Secretary shall arrange for publication of this order in the **Federal Register.**

By the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2012–29547 Filed 12–6–12; 8:45 am]

BILLING CODE 7710–FW–P

[1] Notice of United States Postal Service of Filing Functionally Equivalent Inbound Competitive Multi-Service Agreement with a Foreign Postal Operator, November 30, 2012 (Notice).

[2] *See* Docket No. CP2011–68, Order No. 859, Order Concerning an Additional Inbound Competitive Multi-Service Agreements with Foreign Postal Operator, November 30, 2012 (Notice).

[3] ''CP'' is an abbreviation used to identify or reference international parcel post (from the French phrase *colis postaux,* ''postal package'').

[4] The Postal Service identifies Governors' Decision No. 10–3 as the enabling Governors' Decision. *Id.* at 1–2. The TNT Agreement's status as the baseline agreement was confirmed in Order No. 840, September 7, 2011.

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 2a–7, OMB Control No. 3235–0268, SEC File No. 270–258.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Rule 2a–7 (17 CFR 270.2a–7) under the Investment Company Act of 1940 (15 U.S.C. 80a) (the ''Act'') governs money market funds. Money market funds are open-end management investment companies that differ from other open-end management investment companies in that they seek to maintain a stable price per share, usually $1.00. The rule exempts money market funds from the valuation requirements of the Act, and, subject to certain risk-limiting conditions, permits money market funds to use the ''amortized cost method'' of asset valuation or the ''penny-rounding method'' of share pricing.

Rule 2a–7 also imposes certain recordkeeping and reporting obligations on money market funds. The board of directors of a money market fund, in supervising the fund's operations, must establish written procedures designed to stabilize the fund's net asset value (''NAV''). The board must also adopt guidelines and procedures relating to certain responsibilities it delegates to the fund's investment adviser. These procedures and guidelines typically address various aspects of the fund's operations. The fund must maintain and preserve for six years a written copy of both these procedures and guidelines. The fund also must maintain and preserve for six years a written record of the board's considerations and actions taken in connection with the discharge of its responsibilities, to be included in the board's minutes. In addition, the fund must maintain and preserve for three years written records of certain credit risk analyses, evaluations with respect to securities subject to demand features or guarantees, and determinations with respect to adjustable rate securities and asset backed securities. If the board takes action with respect to defaulted securities, events of insolvency, or deviations in share price, the fund must file with the Commission an exhibit to Form N–SAR describing the nature and circumstances of the action. If any portfolio security fails to meet certain eligibility standards under the rule, the fund also must identify those securities in an exhibit to Form N–SAR. After certain events of default or insolvency relating to a portfolio security, the fund must notify the Commission of the event and the actions the fund intends to take in response to the situation.

The 2010 amendments to rule 2a–7 also added new collection of information requirements. First, money market fund boards must adopt written procedures that provide for periodic testing (and reporting to the board) of the fund's ability to maintain a stable NAV per share based on certain hypothetical events. Second, funds must post monthly portfolio information on their Web sites. Third, funds must maintain records of creditworthiness evaluations on counterparties to repurchase agreements that the fund intends to ''look through'' for purposes of rule 2a–7's diversification limitations. Finally, money market funds must promptly notify the Commission of the purchase of any money market fund's portfolio security by an affiliated person in reliance on rule 17a-9 under the Act and explain the reasons for such purchase.

The recordkeeping requirements in rule 2a–7 are designed to enable Commission staff in its examinations of money market funds to determine compliance with the rule, as well as to ensure that money market funds have established procedures for collecting the information necessary to make adequate credit reviews of securities in their portfolios. The reporting requirements of rule 2a–7 are intended to assist Commission staff in overseeing money market funds and reduce the likelihood that a fund is unable to maintain a stable NAV.

Commission staff estimates that there are 664 money market funds (136 fund complexes), all of which are subject to rule 2a–7. Commission staff further estimates that there will be approximately 10 new money market funds established each year. Commission staff estimates that rule 2a–7 contains the following collection of information requirements:

- Record of credit risk analyses, and determinations regarding adjustable rate securities, asset backed securities, securities subject to a demand feature or guarantee, and counterparties to repurchase agreements. Commission staff estimates a total annual hour burden for 664 funds to be 451,520 hours.
- Establishment of written procedures designed to stabilize NAV and guidelines and procedures for board delegation of authority. Commission staff estimates a total annual hour burden for 10 new money market funds to be 155 hours.
- Board review of procedures and guidelines of any investment adviser or officers to whom the fund's board has delegated responsibility under rule 2a–7 and amendment of such procedures and guidelines. Commission staff estimates a total annual hour burden for 166 funds to be 830 hours.
- Written record of board determinations and actions related to failure of a security to meet certain eligibility standards or an event of default or insolvency and notice to the Commission of an event of default or insolvency. Commission staff estimates a total annual hour burden for 20 funds to be 30 hours.
- Establishment of written procedures to test periodically the ability of the fund to maintain a stable NAV per share based on certain hypothetical events (''stress testing''). Commission staff estimates a total annual hour burden for 10 new money market funds to be 220 hours.
- Review, revise, and approve written procedures to stress test a fund's portfolio. Commission staff estimates a total annual hour burden for 136 fund complexes to be 1,632 hours.
- Reports to fund boards on the results of stress testing. Commission staff estimates a total annual hour burden for 136 fund complexes to be 6,800 hours.
- Monthly posting of money market fund portfolio information on a fund's Web site. Commission staff estimates a total annual hour burden for 664 funds and 10 new money market funds to be 56,016 hours.
- Notice to the Commission of the purchase of a money market fund's portfolio security by certain affiliated persons in reliance on rule 17a–9. Commission staff estimates a total annual hour burden for 25 fund complexes to be 25 hours.

Thus, the Commission estimates the total annual burden of the rule's information collection requirements is 517,228 hours.[1]

[1] This estimate is based on the following calculation: 451,520 hours + 155 hours + 830 hours + 30 hours + 220 hours + 1,632 hours + 6,800 hours + 56,016 hours + 25 hours = 517,228 hours.

The estimated total annual burden is being increased from 395,779 hours to 517,228 hours. This net increase is attributable to a combination of factors, including a decrease in the number of money market funds and fund complexes, and updated information from money market funds regarding hourly burdens, including revised staff estimates of the burden hours required to comply with rule 2a–7 as a result of new information received from surveyed fund representatives.

These estimates of burden hours are made solely for the purposes of the Paperwork Reduction Act. The estimates are not derived from a comprehensive or even a representative survey or study of Commission rules.

Commission staff estimates that in addition to the costs described above, money market funds will incur costs to preserve records, as required under rule 2a–7. These costs will vary significantly for individual funds, depending on the amount of assets under fund management and whether the fund preserves its records in a storage facility in hard copy or has developed and maintains a computer system to create and preserve compliance records. Commission staff estimates that the amount an individual fund may spend ranges from $100 per year to $300,000. Based on a cost of $0.0051295 per dollar of assets under management for small funds, $0.0005041 per dollar assets under management for medium funds, and $0.0000009 per dollar of assets under management for large funds, the staff estimates compliance with the record storage requirements of rule 2a–7 costs the fund industry approximately $57.3 million per year. Based on responses from individuals in the money market fund industry, the staff estimates that some of the largest fund complexes have created computer programs for maintaining and preserving compliance records for rule 2a–7. Based on a cost of $0.0000132 per dollar of assets under management for large funds, the staff estimates that total annualized capital/startup costs range from $0 for small funds to $35.6 million for all large funds. Commission staff further estimates that, even absent the requirements of rule 2a–7, money market funds would spend at least half of the amount for capital costs ($17.8 million) and for record preservation ($28.65 million) to establish and maintain these records and the systems for preserving them as a part of sound business practices to ensure diversification and minimal credit risk in a portfolio for a fund that seeks to maintain a stable price per share.

The collections of information required by rule 2a–7 are necessary to obtain the benefits described above. Notices to the Commission will not be kept confidential. 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.

Written 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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information 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. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Thomas Bayer, Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.*

Dated: December 3, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29571 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30287]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

November 30, 2012.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of November 2012. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 26, 2012, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street NE., Washington, DC 20549–8010.

Triangle Fund LLC [File No. 811–22637]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On August 31, 2012, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $101,533 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on September 18, 2012 and amended on October 19, 2012, November 7, 2012 and November 27, 2012.

Applicant's Address: 745 Seventh Ave., New York, NY 10019.

del Ray Global Investors Funds [File No. 811–22434]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 7, 2012 and September 10, 2012, applicant made liquidating distributions to its shareholders, based on net asset value. Expenses of $23,100 incurred in connection with the liquidation were paid by applicant and del Ray Global Investors, LLC, applicant's investment adviser. Applicant has retained approximately $46,441 in cash to cover expenses accrued but not yet invoiced.

Filing Date: The application was filed on October 31, 2012.

Applicant's Address: 6701 Center Drive West, Suite 655, Los Angeles, CA 90045.

Kayne Anderson Energy/Infrastructure Fund, Inc. [File No. 811–22065]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On December 31, 2007, applicant made a liquidating

distribution to its shareholders, based on net asset value. Expenses of $3,500 incurred in connection with the liquidation were paid by KA Fund Advisors, LLC, applicant's investment adviser.

Filing Dates: The application was filed on September 18, 2012, and amended on October 9, 2012 and November 20, 2012.

Applicant's Address: 717 Texas Ave., Suite 3100, Houston, TX 77002.

Defined Asset Funds Corporate Income Fund 10th Insured Series [File No. 811–2295]; Uncommon Values Unit Trust 1985 Series & Subsequent & Similar Series [File No. 811–4281]; Penn State Tax Exempt Investment Trust Series 1 [File No. 811–2787]; Shearson Lehman Brothers Unit Trusts High Yield Municipal Series 1 [File No. 811–5208]; Equity Opportunity Trust Growth Stock Series 1 [File No. 811–3722]

Summary: Each applicant, a unit investment trust, seeks an order declaring that it has ceased to be an investment company. On January 26, 2010, June 6, 2009, July 8, 2010, June 13, 2011 and August 30, 2011, respectively, each applicant made a liquidating distribution to its unit holders, based on net asset value. Applicants' incurred no expenses in connection with the liquidations.

Filing Dates: The applications were filed on September 5, 2012 and amended on November 20, 2012.

Applicants' Address: 18925 Base Camp Rd., Suite 203, Monument, CO 80132.

Hatteras Sector Select Fund [File No. 811–22614]; Hatteras Sector Select Institutional Fund [File No. 811–22615]

Summary: Each applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to engage in business of any kind.

Filing Dates: The applications were filed on August 21, 2012 and amended on November 15, 2012.

Applicant's Address: 8540 Colonnade Center Dr., Suite 401, Raleigh, NC 27615.

Genworth Variable Insurance Trust [File No. 811–22205]

Summary: Applicant, an open-end management company, seeks an order declaring that it has ceased to be an investment company. As of January 27, 2012, pursuant to a plan of substitution, applicant's shareholders tendered their shares for redemption, based on net asset value. Expenses of $217,001 incurred in connection with the liquidation were paid by Genworth Financial Wealth Management, Inc., and later reimbursed by the sponsor of the substituting portfolios.

Filing Dates: The application was filed on September 25, 2012, and amended on October 23, 2012.

Applicant's Address: 2300 Contra Costa Boulevard, Suite 600, Pleasant Hill, CA 94523.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29570 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30290]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

December 4, 2012.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940. A copy of each application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 26, 2012, and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 551–6810, SEC, Division of Investment Management, Office of Investment Company Regulation, 100 F Street NE., Washington, DC 20549–8010.

EM Capital Management, LLC [File No. 811–22687]; Global Investor Trust [File No. 811–22694]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. Applicants have never made a public offering of their securities and do not propose to make a public offering. EM Capital Management, LLC represents that it filed to register as an investment company in error and that it is not, and does not intend to operate as, an investment company. EM Capital Management, LLC will continue to operate as an investment adviser. Global Investor Trust will continue to operate as a private investment fund in reliance on section 3(c)(1) or 3(c)(7) of the Act.

Filing Dates: The applications were filed on October 31, 2012. Global Investor Trust filed an amended application on November 30, 2012. EM Capital Management, LLC filed amended applications on December 3, 2012 and December 4, 2012.

Applicants' Address: 920 Country Club Dr., Suite 1E, Moraga, CA 94556.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2012–29624 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68341; File No.10–207]

In the Matter of the Application of Miami International Securities Exchange, LLC for Registration as a National Securities Exchange: Findings, Opinion, and Order of the Commission

December 3, 2012.

I. Introduction

On April 26, 2012, Miami International Securities Exchange, LLC (''MIAX Exchange'' or ''MIAX'') submitted to the Securities and Exchange Commission (''Commission'') an Application for Registration as a National Securities Exchange (''Form 1 Application'') under Section 6 of the Securities Exchange Act of 1934 (''Act'').[1] Notice of MIAX's Form 1 Application was published for comment in the **Federal Register** on August 20, 2012.[2] The Commission received two

[1] 15 U.S.C. 78f.

[2] *See* Securities Exchange Act Release No. 67660 (August 15, 2012), 77 FR 50814 (''Notice'').

comment letters concerning MIAX's Form 1 Application.[3] MIAX submitted a detailed response to comments on November 30, 2012.[4] On November 30, 2012, MIAX submitted Amendment No. 1 to its Form 1 Application.[5]

II. Statutory Standards

Under Sections 6(b) and 19(a) of the Act,[6] the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and can comply, and can enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that MIAX's application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MIAX are consistent with Section 6 of the Act in that, among other things, they are designed to: (1) Assure fair representation of the exchange's members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer; [7] (2) prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system; [8] (3) not permit unfair discrimination between customers, issuers, or dealers; [9] and (4) protect investors and the public interest.[10] Finally, the Commission finds that MIAX's proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[11]

III. Discussion

A. Governance of MIAX Exchange

1. MIAX Exchange Board of Directors

The board of directors of MIAX Exchange (''Exchange Board'') will be its governing body and will possess all of the powers necessary for the management of its business and affairs, including governance of MIAX Exchange as a self-regulatory organization (''SRO'').[12]

Under the By-Laws of MIAX Exchange (''MIAX Exchange By-Laws''): [13]

- The Exchange Board will be composed of not less than ten directors; [14]
- One director will be the Chief Executive Officer of MIAX Exchange; [15]
- The number of Non-Industry Directors,[16] including at least one Independent Director,[17] will equal or exceed the sum of the number of Industry Directors [18] and Member Representative Directors; [19] and
- At least twenty percent of the directors on the Exchange Board will be Member Representative Directors.[20]

For the interim board (discussed below), and subsequently at the first annual meeting and each annual meeting thereafter, Miami Holdings, as the sole LLC Member of MIAX Exchange, will elect the MIAX Exchange Board pursuant to the MIAX By-Laws.[21] In addition, Miami Holdings will appoint the initial Nominating Committee [22] and Member Nominating Committee,[23] consistent with each

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[3] *See* Letter from Michael J. Simon, Secretary, International Securities Exchange, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated October 4, 2012 (''ISE Letter''); and Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated October 4, 2012 (''NASDAQ Letter''). In its letter, the International Securities Exchange (''ISE''), requested that MIAX clarify what it considered to be potential ''unique aspects'' of the proposed MIAX rules and asked the Commission to discuss how such provisions are consistent with the Act. Similarly, the letter from NASDAQ OMX (''NASDAQ'') requested that MIAX clarify certain of its proposed rules and provide greater explanation or detail as to how they would work. In Section IV, below, the Commission considers the issues raised by the comment letters, along with MIAX's response thereto, and considers whether MIAX sufficiently addressed those concerns. In summary, the Commission believes that MIAX has sufficiently addressed each of the commenters' concerns and has proposed reasonable changes to its rules to address those concerns. The changes also clarify the potential sources of ambiguity that commenters identified. The changes proposed in Amendment No. 1 are either not material, consistent with the existing rules of other registered national securities exchanges, or responsive to the concerns of the Commission and do not raise any new or novel regulatory issues.

[4] *See* Letter from Barbara Comly, Executive Vice President, General Counsel & Corporate Secretary, MIAX, to Elizabeth M. Murphy, Secretary, Commission, dated November 30, 2012 (''MIAX Response Letter'').

[5] In Amendment No. 1, MIAX proposed changes to the Limited Liability Company Agreement and the By-Laws of Miami International Securities Exchange, LLC concerning the election of an interim board of directors, which is discussed below in Section IV. *See* Amendment No. 1. MIAX also proposed changes to its proposed rules in response to concerns raised by the two comment letters. *See* Amendment No. 1. The rule text changes are discussed below in Section III.

[6] 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

[7] *See* 15 U.S.C. 78f(b)(3).

[8] *See* 15 U.S.C. 78f(b)(5).

[9] *See id.*

[10] *See id.*

[11] *See* 15 U.S.C. 78f(b)(8).

[12] *See* MIAX Exchange By-Laws Section 2.1. *See also* MIAX Exchange LLC Agreement Sections 7 and 8.

[13] The MIAX Exchange By-Laws are included in the Second Amended and Restated Limited Liability Company Agreement of MIAX Exchange (''MIAX Exchange LLC Agreement'').

[14] *See* MIAX Exchange By-Laws Article II, Section 2.2(a).

[15] *See* MIAX Exchange By-Laws Article II, Section 2.2(b).

[16] ''Non-Industry Director'' means a Director who is an Independent Director or any other individual who would not be an Industry Director. *See* MIAX Exchange By-Laws Article I(y).

[17] ''Independent Director'' means a ''Director who has no material relationship with the [MIAX Exchange] or any affiliate of the [MIAX Exchange], or any [MIAX member] or any affiliate of any such [MIAX member]; *provided,* however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of the [MIAX Exchange] or [Miami International Holdings, Inc.].'' *See* MIAX Exchange By-Laws Article I(n).

[18] An ''Industry Director'' is, among other things, a Director that is or has served within the prior three years as an officer, director, employee, or owner of a broker or dealer, as well as any Director who has, or has had, a consulting or employment relationship with MIAX Exchange or any affiliate of MIAX Exchange within the prior three years. *See* MIAX Exchange By-Laws Article I(p). This definition is consistent with what the Commission has approved for other exchanges. *See* Securities Exchange Act Release No. 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (''BATS Order''). *See also* Securities Exchange Act Release Nos. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (''BOX Order''); and 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (''DirectEdge Exchanges Order'').

[19] *See* MIAX Exchange By-Laws Article II, Section 2.2 (b)(i). ''Member Representative Director'' means a Director who has been appointed by Miami International Holdings, Inc. as an initial Director pursuant to Section 2.5 of the MIAX Exchange By-Laws to serve until the first annual meeting or who ''has been elected by the LLC Member after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to [the] By-Laws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member.'' *See* MIAX Exchange By-Laws Article I(v). *See also* MIAX Exchange By-Laws Article II, Section 2.5.

[20] *See* MIAX Exchange By-Laws Article II, Section 2.2(b)(ii).

[21] *See* MIAX Exchange By-Laws Article II, Section 2.4. *See also* MIAX Exchange LLC Agreement Section 9(a).

[22] The Nominating Committee will be comprised of at least three directors, and the number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members. *See* MIAX Exchange By-Laws Article V, Section 5.2. *See also* MIAX Exchange By-Laws Article IV, Section 4.2(a).

[23] The Member Nominating Committee will be comprised of at least three directors, and each member of the Member Nominating Committee

committee's compositional requirements,[24] to nominate candidates for election to the Exchange Board. Each of the Nominating Committee and Member Nominating Committee, after completion of its respective duties for nominating directors for election to the Board for that year, shall nominate candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX Exchange members pursuant to a petition process.[25]

The Nominating Committee will nominate candidates for each director position, and Miami Holdings, as the sole LLC Member, will elect those directors. For Member Representative Director positions, the Nominating Committee will nominate those candidates submitted to it, and approved, by the Member Nominating Committee.[26] Additional candidates, however, may be nominated for the Member Representative Director positions by MIAX Exchange members pursuant to a petition process.[27] If no candidates are nominated pursuant to a petition process, then the initial nominees submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee. If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MIAX Exchange members for a run-off election to determine the final slate of candidates for the vacant Member Representative Director positions.[28] In the event of a contested run-off election, the candidates who receive the most votes will be nominated as the final slate of Member Representative Director candidates by the Nominating Committee.[29] Miami Holdings, as the sole LLC Member, is obligated to elect the final slate of the Member Representative Director candidates that are nominated by the Nominating Committee.[30]

The Commission believes that the requirement in the MIAX Exchange By-Laws that 20% of the directors be Member Representative Directors and the means by which they will be chosen by MIAX Exchange members provide for the fair representation of members in the selection of directors and the administration of MIAX Exchange and therefore is consistent with Section 6(b)(3) of the Act.[31] As the Commission has previously noted, this requirement helps to ensure that members have a voice in the use of self-regulatory authority, and that an exchange is administered in a way that is equitable to all those who trade on its market or through its facilities.[32]

In addition, with respect to the requirement that the number of Non-Industry Directors, including at least one Independent Director, will equal or exceed the sum of the number of Industry Directors and Member Representative Directors, the Commission believes that the proposed composition of the MIAX Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,[33] which requires in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission previously has stated that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.[34] Further, the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public, non-industry directors can provide unique, unbiased perspectives, which are designed to enhance the ability of the MIAX Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of MIAX Exchange.[35]

Interim Exchange Board. Prior to commencing operations, Miami Holdings will appoint an interim Exchange board of directors (''Interim Exchange Board''), which will include interim Member Representative Directors. With respect to the selection of the interim Member Representative Directors for the Interim Exchange Board, prior to the commencement of operations as an exchange, MIAX will submit the names of its nominees for the interim Member Representative Directors positions to persons that have begun the process of becoming members in the new MIAX Exchange.[36] MIAX represents that the persons and firms that have applied to become the initial members of MIAX Exchange have already begun the process of completing the necessary applications, obtaining electronic connectivity, and testing their systems with MIAX.[37] MIAX additionally represents that the initial members of MIAX will consist substantially of the current group of persons and firms that have begun the membership application process with MIAX.[38]

Such persons will be allowed 14 days to submit the name of an alternative candidate and 5 days to vote for the final slate of candidates.[39] All other interim directors, except for the interim Member Representative Directors, will

shall be a Member Representative member. *See* MIAX Exchange By-Laws Article V, Section 5.3. *See also* MIAX Exchange By-Laws Article IV, Section 4.2(a). Pursuant to MIAX Exchange By-Laws Article I(w), a ''Member Representative member'' is a member of any committee or hearing panel appointed by the Exchange Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to the by-laws and who is an officer, director, employee, or agent of an Exchange Member.

[24] *See* MIAX Exchange By-Laws Article V, Section 5.1.

[25] *See id.*

[26] The Member Nominating Committee will solicit comments from MIAX Exchange members for the purpose of approving and submitting names of candidates for election to the position of Member Representative Director. *See* MIAX Exchange By-Laws Article II, Section 2.4(b).

[27] *See* MIAX Exchange By-Laws Article II, Section 2.4(c). The petition must be signed by executive representatives of 10% or more of the MIAX Exchange members. No MIAX Exchange member, together with its affiliates, may account for more than 50% of the signatures endorsing a particular candidate. *See id.*

[28] *See* MIAX Exchange By-Laws Article II, Section 2.4(e) and (f). Each MIAX Exchange Member shall have the right to cast one vote for each available Member Representative Director nomination, provided that any such vote must be cast for a person on the List of Candidates and that no MIAX Exchange member, together with its affiliates, may account for more than 20% of the votes cast for a candidate. *See* MIAX Exchange By-Laws Article II, Section 2.4(f).

[29] *See* MIAX Exchange By-Laws Article II, Section 2.4(f).

[30] *See id.*

[31] 15 U.S.C. 78f(b)(3).

[32] *See, e.g.,* Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (granting the exchange registration of Nasdaq Stock Market, Inc.) (''Nasdaq Order''); and BATS Order, *supra* note 18. *See also* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (''NYSE/Archipelago Merger Approval Order'').

[33] 15 U.S.C. 78f(b)(3).

[34] *See, e.g.,* Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (''Regulation ATS Release'').

[35] *See* Nasdaq Order and NYSE/Archipelago Merger Approval Order, *supra* note 32, and BATS Order, *supra* note 18.

[36] *See* Amendment No. 1; *see also* MIAX Exchange By-Laws Section 2.5(b). Specifically, MIAX will submit the names of its nominees for the interim Member Representative Director positions to persons who have submitted initial documents for membership in the Exchange who would meet the qualifications for membership. *See* MIAX Exchange By-Laws Section 2.5(b).

[37] *See* Amendment No. 1.

[38] *See* Amendment No. 1.

[39] *See* MIAX Exchange By-Laws Sections 2.5(b) and (d).

be appointed and elected by Miami Holdings, and must meet the MIAX Exchange board composition requirements as set forth in the MIAX Exchange By-Laws. Once these interim Member Representative Directors are seated on the Interim Exchange Board, then the Interim Exchange Board will meet the board composition requirements set forth in the governing documents of MIAX Exchange.

The Interim Exchange Board will serve until the first initial Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the MIAX By-Laws.[40] MIAX Exchange will complete such process within 90 days after its application for registration as a national securities exchange is granted by the Commission.[41]

The Commission believes that the process for electing the Interim Exchange Board, as proposed, is consistent with the requirements of the Act, including that the rules of the exchange assure fair representation of the exchange's members in the selection of its directors and administration of its affairs.[42] As noted above, MIAX represents that the initial members of MIAX will consist substantially of the current group of persons and firms that have begun the membership application process with MIAX. MIAX will engage these persons and firms in the interim board election process by, prior to the commencement of operations as an exchange, providing each of them with the opportunity to participate in the selection of interim Member Representative Directors consistent with the MIAX Exchange By-Laws. Further, MIAX Exchange represents that it will complete the full nomination, petition, and voting process as set forth in the MIAX Exchange By-Laws, which will provide persons that are approved as members after the effective date of this Order with the opportunity to participate in the selection of the Member Representative Directors, within 90 days of when MIAX Exchange's application for registration as a national securities exchange is granted.[43] The Commission therefore believes that MIAX Exchange's initial interim board process is consistent with the Act, including Section 6(b)(3), in that it is designed to provide representation among the persons and firms likely to become members when MIAX commences operations and is sufficient to allow MIAX to commence operations for an interim period prior to going through the process to elect a new Exchange Board pursuant to the full nomination, petition, and voting process set forth in the MIAX Exchange By-Laws.

2. Exchange Committees

In the MIAX Exchange By-Laws, MIAX Exchange has proposed to establish several standing committees, which will be divided into two categories: Committees of the Board (composed of MIAX Exchange directors) and Committees of the MIAX Exchange (composed of a mixture of MIAX Exchange directors and persons that are not MIAX Exchange directors).[44] The standing Committees of the Board will be the Audit, Compensation, Appeals, and Regulatory Oversight Committees.[45] In addition, the MIAX Chairman, with approval of the Exchange Board, may appoint an Executive Committee and a Finance Committee, which also would be Committees of the Board.[46]

The Audit Committee will consist of three or more directors, a majority of which will be Non-Industry Directors.[47] Each of the Compensation and Regulatory Oversight Committees will consist of three or more directors, all of which will be required to be Non-Industry Directors.[48] The Appeals Committee will consist of one Independent Director, one Industry Director, and one Member Representative Director.[49] If established, the Finance Committee will consist of at least three persons (who may, but are not required to, be directors) a majority of whom will be Non-Industry Directors.[50] The Executive Committee, if established, will consist of at least three directors. Because the Executive Committee will have the powers and authority of the Exchange Board in the management of the business and affairs of the MIAX Exchange between meetings of the Exchange Board, its composition must reflect that of the Exchange Board. Accordingly, the number of Non-Industry Directors on the Executive Committee must equal or exceed the number of Industry Directors and the percentages of Independent Directors and Member Representative Directors must be at least as great as the corresponding percentages on the Exchange Board as a whole.[51]

With respect to Committees of MIAX Exchange, MIAX Exchange has proposed to establish a Nominating Committee [52] and a Member Nominating Committee.[53] As discussed above, these committees will have responsibility for, among other things, nominating candidates for election to the Exchange Board. On an annual basis, the members of these committees will nominate candidates for the succeeding year's respective committees to be elected by Miami Holdings, as the sole LLC Member.[54] In addition, MIAX also has proposed to establish a Quality of Markets Committee,[55] which will provide advice and guidance to the Exchange Board on issues related to the fairness, integrity, efficiency and competiveness of the information, order handling and execution mechanisms of the exchange from the perspective of individual and institutional investors, retail and market making firms, exchange listed companies, and other market participants. The Quality of Markets Committee will include a broad representation of participants in MIAX Exchange. Additionally, at least 20% of the members of the committee will be Member Representative members, and the number of Non-Industry members must equal or exceed the total number of Industry and Member Representative members. MIAX also has proposed to

[40] *See* Amendment No. 1; and MIAX Exchange By-Laws Sections 2.2(e) and 2.5(a).

[41] *See* Amendment No. 1. The 90-day period is consistent with what the Commission recently approved for the BOX Exchange. *See* Securities Exchange Act Release No. 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (allowing BOX Exchange to appoint an initial interim board to enable it to commence operations as a registered exchange). *See also* Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699 (December 16, 2009) (''C2 Order'') (allowing CBOE to appoint the initial board members and to issue a circular to trading permit holders identifying a slate of representative directors within 45 days from the date on which trading commenced on C2).

[42] *See* 15 U.S.C. 78f(b)(3).

[43] MIAX's proposed timeline for the interim board process follows a process identical to what the Commission recently approved for the BOX Exchange.

[44] *See* MIAX Exchange By-Laws Section 4.1.

[45] *See* MIAX Exchange By-Laws Section 4.1(a).

[46] *See* MIAX Exchange By-Laws Section 4.5(e) and (f), respectively.

[47] *See* MIAX Exchange By-Laws Section 4.5(b). A Non-Industry Director shall serve as Chairman of the Committee. *See id. See also* MIAX Exchange By-Laws Section 4.2(a) (requiring that each committee be comprised of at least three people).

[48] *See* MIAX Exchange By-Laws Section 4.5(a) and 4.5(c).

[49] *See* MIAX Exchange By-Laws Section 4.5(d).

[50] *See* MIAX Exchange By-Laws Section 4.5(f). *See also* MIAX Exchange By-Laws Section 4.2(a) (providing that except as otherwise provided in the MIAX Exchange By-Laws, committees may include persons who are not members of the Board).

[51] *See* MIAX Exchange By-Laws Section 4.5(e).

[52] *See* MIAX Exchange By-Laws Article V, Section 5.2, and *supra* note 22.

[53] *See* MIAX Exchange By-Laws Article V, Section 5.3, and *supra* note 23.

[54] *See* MIAX Exchange By-Laws Article V, Section 5.1, and *supra* note 25. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX Exchange members pursuant to a petition process. *See supra* note 27 and accompanying text.

[55] *See* MIAX Exchange By-Laws Article IV, Section 4.6.

establish a Business Conduct Committee as discussed further below.[56]

The Commission believes that MIAX Exchange's proposed committees, which are similar to the committees maintained by other exchanges,[57] are designed to help enable MIAX Exchange to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[58]

B. Regulation of MIAX Exchange

When MIAX Exchange commences operations as a national securities exchange, MIAX Exchange will have all the attendant regulatory obligations under the Act. In particular, MIAX Exchange will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the MIAX Exchange and Miami Holdings governance documents are designed to facilitate the ability of MIAX Exchange and the Commission to fulfill their regulatory obligations. The discussion below summarizes some of these key provisions.

1. Ownership Structure; Ownership and Voting Limitations

MIAX Exchange will be structured as a Delaware limited liability company (''LLC''), which will be wholly-owned by the sole member of the LLC, Miami International Holdings, Inc. (''Miami Holdings''). The Miami Holdings' proposed Amended and Restated Certificate of Incorporation (''Miami Holdings Certificate'') includes restrictions on the ability to own and vote shares of capital stock of Miami Holdings.[59] These limitations are designed to prevent any Miami Holdings shareholder from exercising undue control over the operation of MIAX Exchange and to assure that the MIAX Exchange and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as Miami Holdings (directly or indirectly) controls MIAX Exchange, no person, either alone or together with its related persons,[60] may beneficially own more than 40% of any class of capital stock of Miami Holdings.[61] MIAX proposed a more conservative restriction for MIAX Exchange members, wherein MIAX Exchange *members,* either alone or together with their related persons, are prohibited from beneficially owning more than 20% of shares of any class of capital stock of Miami Holdings.[62] If any stockholder violates these ownership limits, Miami Holdings would redeem the shares in excess of the applicable ownership limit at their par value.[63] In addition, no person, alone or together with its related persons, may vote or cause the voting of more than 20% of the voting power of the then issued and outstanding capital stock of Miami Holdings.[64] If any stockholder purports to vote, or cause the voting of, shares that would violate this voting limit, Miami Holdings would not honor such vote in excess of the voting limit.[65]

Any person that proposes to own shares of capital stock in excess of the 40% ownership limitation, or vote or grant proxies or consents with respect to shares of capital stock in excess of the 20% voting limitation, must deliver written notice to the Miami Holdings board to notify the Board of its intention.[66] The notice must be delivered to the Board not less than 45 days before the proposed ownership of such shares or proposed exercise of such voting rights or the granting of such proxies or consents.[67] The Miami Holdings board may waive the 40% ownership limitation and the 20% voting limitation, pursuant to a resolution duly adopted by the Board of Directors, if it makes certain findings,[68] except that the Miami Holdings board cannot waive the voting and ownership limits above 20% for MIAX Exchange members and their related persons.[69] Any such waiver would not be effective unless and until approved by the Commission pursuant to Section 19 of the Act.[70]

The Miami Holdings Certificate also contains provisions that are designed to further safeguard the ownership and voting limitation described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons owns, directly or indirectly, of record or beneficially, 5% or more of the capital stock of Miami Holdings will be required to immediately notify Miami Holdings in writing upon acquiring knowledge of such ownership.[71] Thereafter, such persons will be required to update Miami Holdings of any increase or decrease of 1% or more in their previously reported ownership percentage.[72]

[56] *See infra* note 381 and accompanying text.

[57] *See, e.g.,* BATS Order, *supra* note 18, and Nasdaq Order, *supra* note 32.

[58] 15 U.S.C. 78f(b)(1).

[59] These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. *See e.g.,* Securities Exchange Act Release Nos. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE–2008–88) (CBOE Demutualization Approval Order); 58375 (August 18, 2008) 73 FR 49498 (August 21, 2008) (File No. 10–182) (''BATS Exchange Registration Order''); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR–NSX–2006–03) (''NSX Demutualization Order''); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR–CHX–2004–26) (''CHX Demutualization Order''); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR–Phlx–2003–73) (''Phlx Demutualization Order'').

[60] *See* Miami Holdings Certificate NINTH (a)(ii) (defining ''related persons'').

[61] *See* Miami Holdings Certificate NINTH (b)(i)(A).

[62] *See* Miami Holdings Certificate NINTH (b)(i)(B).

[63] *See* Miami Holdings Certificate NINTH (e). Any shares which have been called for redemption shall not be deemed outstanding shares for the purpose of voting or determining the total number of shares entitled to vote. Once redeemed by Miami Holdings, such shares shall become treasury shares and shall no longer be deemed to be outstanding. *See id.* Furthermore, if any redemption results in another stockholder owning shares in violation of the ownership limits described above, Miami Holdings shall redeem such shares. *See id.*

[64] *See* Miami Holdings Certificate NINTH (b)(i)(C).

[65] *See* Miami Holdings Certificate NINTH (d). The Miami Holdings Certificate also prohibits the payment of any stock dividends and conversions that would violate the ownership and voting limitations. *See* Miami Holdings Certificates FOURTH A.(b) and (e), and D.7.

[66] *See* Miami Holdings Certificate NINTH (b)(iv).

[67] *See id.*

[68] *See* Miami Holdings Certificate NINTH (b)(ii)(B). The required determinations are that (A) such waiver will not impair the ability of MIAX Exchange to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, (B) such waiver is otherwise in the best interests of MIAX Exchange and Miami Holdings, (C) such waiver will not impair the ability of the Commission to enforce the Act and (D) the transferee in such transfer and its related persons are not subject to any applicable ''statutory disqualification'' (within the meaning of Section 3(a)(39) of the Act). *See* Miami Holdings Certificate NINTH (b)(ii)(B) and (b)(iii). The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange to waive the ownership and voting limitations discussed above for non-members of the exchange. *See, e.g.,* DirectEdge Exchanges Order, *supra* note 18.

[69] *See id.* These provisions are generally consistent with waiver of ownership and voting limits approved by the Commission for other SROs. *See e.g.,* BATS Exchange Registration Order; NSX Demutualization Order, *supra* note 59; CHX Demutualization Order, *supra* note 59; and Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (SR–PCX–2004–08).

[70] *See* Miami Holdings Certificate NINTH (b)(ii)(B).

[71] *See* Miami Holdings Certificate NINTH(c)(i). The notice will require the person's full legal name; the person's title or status; the person's approximate ownership interest in Miami Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of Miami Holdings. *See id.*

[72] *See* Miami Holdings Certificate NINTH(c)(ii). Changes of less than 1% must also be reported to Miami Holdings if they result in such person crossing a 20% or 40% ownership threshold. *See id.* In addition, MIAX rules also impose limits on affiliation between the MIAX Exchange and a

Continued

The MIAX LLC Agreement does not include change of control provisions that are similar to those in the Miami Holdings Certificate; however the MIAX Exchange LLC Agreement explicitly provides that Miami Holdings is the sole LLC Member of MIAX Exchange.[73] Thus, if Miami Holdings ever proposes to no longer be the sole LLC Member of MIAX Exchange (and therefore no longer its sole owner), MIAX Exchange would be required to amend the MIAX Exchange LLC Agreement. Any changes to the MIAX Exchange LLC Agreement (which includes the MIAX Exchange By-Laws), including any change in the provisions that identify Miami Holdings as the sole owner of MIAX Exchange, must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act, as the case may be.[74] Further, pursuant to the MIAX Exchange By-Laws, Miami Holdings may not transfer or assign, in whole or in part, its ownership interest in MIAX Exchange, unless such transfer is filed with and approved by the Commission pursuant to Section 19 of the Act.[75]

Although Miami Holdings is not independently responsible for regulation, its activities with respect to the operation of MIAX Exchange must be consistent with, and must not interfere with, the self-regulatory obligations of MIAX Exchange. As described above, the provisions applicable to direct and indirect changes in control of Miami Holdings and MIAX Exchange, as well as the voting limitation imposed on owners of Miami Holdings who also are MIAX Exchange members, are designed to help prevent any owner of Miami Holdings from exercising undue influence or control over the operation of MIAX Exchange and to help assure that MIAX Exchange retains a sufficient degree of independence to effectively carry out its regulatory obligations under the Act. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. Members that trade on an exchange traditionally have had ownership interests in such exchange. As the Commission has noted in the past, however, a member's interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.[76] A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, the Commission believes that these requirements are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of MIAX Exchange to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that MIAX's and Miami Holding's proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[77] In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or MIAX Exchange to effectively carry out their regulatory oversight responsibilities under the Act.

2. Regulatory Independence and Oversight

Although Miami Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MIAX Exchange must be consistent with, and must not interfere with, MIAX Exchange's self-regulatory obligations. In this regard, MIAX Exchange and Miami Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MIAX Exchange. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.[78] Specifically:

- The directors, officers, employees, and agents of Miami Holdings must give due regard to the preservation of the independence of the self-regulatory function of MIAX Exchange and must not take actions that would interfere with the effectuation of decisions by the MIAX Exchange Board relating to its regulatory functions or that would interfere with MIAX Exchange's ability to carry out its responsibilities under the Act.[79]
- Miami Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and agrees to cooperate with the Commission and MIAX Exchange pursuant to, and to the extent of, their respective regulatory authority. In addition, Miami Holdings' officers, directors, employees, and agents must comply with federal securities laws and the rules and regulations promulgated thereunder and agree to cooperate with the Commission and MIAX Exchange in respect of the Commission's oversight responsibilities regarding MIAX Exchange and the self-regulatory functions and responsibilities of MIAX Exchange.[80]
- Miami Holdings, and its officers, directors, employees, and agents submit to the jurisdiction of the U.S. federal courts, the Commission, and MIAX Exchange, for purposes of any action, suit, or proceeding pursuant to U.S. federal securities laws, and the rules

member of the MIAX Exchange. *See* MIAX Rule 201(g) (''Without prior Commission approval, the Exchange or any entity with which it is affiliated shall not directly or indirectly through one or more intermediaries acquire or maintain an ownership interest in an Exchange Member. In addition, without prior Commission approval, no Member shall be or become affiliated with (1) the Exchange; or (2) any affiliate of the Exchange. Nothing herein shall prohibit a Member from acquiring or holding an equity interest in (i) Miami International Holdings, Inc. that is permitted by the Certificate of Incorporation of Miami International Holdings, Inc. or (ii) Miami International Securities Exchange, LLC that is permitted by the Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC.'').

[73] *See* MIAX Exchange LLC Agreement and MIAX Exchange By-Laws Article I(t) A (both of which define ''LLC Member'' to mean Miami Holdings, as the sole member of MIAX).

[74] *See* 15 U.S.C. 78s. *See also* MIAX Exchange LLC Agreement, Section 28(b).

[75] *See* MIAX Exchange By-Laws Article III, Section 3.4.

[76] *See, e.g.,* DirectEdge Exchanges Order and BATS Order, *supra* note 18.

[77] 15 U.S.C. 78f(b)(1).

[78] *See e.g.,* DirectEdge Exchanges Order and BATS Order, *supra* note 18, and C2 Order, *supra* note 41.

[79] *See* Amended and Restated By-Laws of Miami Holdings (''Miami Holdings By-Laws''), Article VII, Section 1.

Similarly, Article II, Section 2.1(d) of the MIAX Exchange By-Laws requires the MIAX Exchange Board to, when managing the business and affairs of MIAX Exchange and evaluating any proposal, consider the requirements of Section 6(b) of the Act. Section 2.1(e) also requires the MIAX Exchange Board, when evaluating any proposal to take into account (among other things and to the extent relevant), the potential impact on the integrity, continuity and stability of the national securities exchange operated by MIAX Exchange and the other operations of MIAX Exchange on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. *See, e.g.,* Amended and Restated By-Laws of BATS, Article III, Section 1.

[80] *See* Miami Holdings By-Laws, Article VII, Section 4.

and regulations thereunder, arising out of, or relating to, MIAX Exchange activities.[81]

• All books and records of MIAX Exchange reflecting confidential information pertaining to the self-regulatory function of MIAX Exchange (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by MIAX Exchange and its personnel and will not be used by MIAX Exchange for any non-regulatory purpose and shall not be made available to persons (including, without limitation, any MIAX Exchange member) other than to personnel of the Commission, and those personnel of MIAX Exchange, members of committees of MIAX Exchange, members of the MIAX Exchange Board, or hearing officers and other agents of MIAX, to the extent necessary or appropriate to properly discharge the self-regulatory function of MIAX Exchange.[82]

• The books and records of MIAX Exchange and Miami Holdings must be maintained in the United States [83] and, to the extent they are related to the operation or administration of MIAX Exchange, Miami Holdings books and records will be subject at all times to inspection and copying by the Commission.[84]

• Furthermore, to the extent they relate to the activities of MIAX Exchange, the books, records, premises, officers, directors, employees, and agents of Miami Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MIAX Exchange, for purposes of, and subject to oversight pursuant to, the Act.[85]

• Miami Holdings will take necessary steps to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) to consent in writing to the applicability of provisions regarding books and records, confidentiality, jurisdiction, and regulatory obligations, with respect to their activities related to MIAX Exchange.[86]

• Miami Holdings Certificate and By-Laws require that, so long as Miami Holdings controls MIAX Exchange, any changes to those documents be submitted to the MIAX Exchange Board, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations thereunder, such change shall not be effective until filed with, or filed with and approved by, the Commission.[87]

The Commission believes that the provisions discussed in this section, which are designed to help maintain the independence of MIAX Exchange's regulatory function and help facilitate the ability of MIAX Exchange to carry out its responsibility and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.[88] Whether MIAX Exchange operates in compliance with the Act, however, depends on how it and Miami Holdings in practice implement the governance and other provisions that are the subject of this Order.[89]

Further, Section 19(h)(1) of the Act [90] provides the Commission with the authority ''to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance'' with any such provision by its members (including associated persons thereof).[91] If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1), these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

The Commission also notes that, even in the absence of the governance provisions described above, under Section 20(a) of the Act any person with a controlling interest in MIAX Exchange would be jointly and severally liable with and to the same extent that MIAX Exchange is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.[92] In addition, Section 20(e) of the Act creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder.[93] Further, Section 21C of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been ''a cause of'' a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.[94] These provisions are applicable to all entities' dealings with MIAX Exchange, including Miami Holdings.

3. Regulation of MIAX

As a prerequisite for the Commission's granting of an exchange's application for registration, an exchange must be organized and have the capacity to carry out the purposes of the Act.[95] Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the federal securities laws and the rules of the exchange.[96] The discussion below summarizes how MIAX Exchange proposes to conduct and structure its regulatory operations.

[81] *See* Miami Holdings By-Laws, Article VII, Section 5.

[82] *See* MIAX Exchange By-Laws Article X, Section 10.4. The Commission notes that the Miami Holdings LLC Agreement also provides that all books and records of MIAX Exchange reflecting confidential information pertaining to the self-regulatory function of MIAX Exchange will be subject to confidentiality restrictions. *See* Miami Holdings By-Laws Article VII, Section 2. The requirement to keep such information confidential shall not limit the Commission's ability to access and examine such information or limit the ability of officers, directors, employees, or agent of Miami Holdings to disclose such information to the Commission. *See id.*

[83] *See* MIAX Exchange By-Laws Article X, Section 10.4; and Miami Holdings By-Laws Article VII, Section 3.

[84] *See* Miami Holdings By-Laws Article VII, Section 3.

[85] *See* Miami Holdings By-Laws Article VII, Section 3.

[86] *See* Miami Holdings By-Laws Article VII, Section 6.

[87] *See* Miami Holdings Certificate Article VII; and Miami Holdings By-Laws, Article XII, Section 1.

[88] 15 U.S.C. 78f(b)(1).

[89] The Commission notes that it is reviewing the various standards and processes it uses to facilitate the registration of national securities exchanges and other entities required to register with the Commission and plans to issue a concept release designed to collect information and evaluate different aspects of these registration standards and processes, including the policy objectives of registration, how best to achieve those policy objectives through registration and other means, and the relative benefits and costs of the various means available. *See* Securities Exchange Act Release No. 65543 (October 12, 2011), 76 FR 65784, 65786 fn. 13 (October 24, 2011).

[90] *See* 15 U.S.C. 78s(h)(1).

[91] *See id.*

[92] 15 U.S.C. 78t(a).

[93] 15 U.S.C. 78t(e).

[94] 15 U.S.C. 78u–3.

[95] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[96] *See id. See also* Section 19(g) of the Act, 15 U.S.C. 78s(g).

a. Regulatory Oversight Committee

The regulatory operations of MIAX Exchange will be monitored by the Regulatory Oversight Committee of the MIAX Exchange Board. The Regulatory Oversight Committee will consist of at least three directors, all of whom will be Non-Industry Directors. The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MIAX Exchange's regulatory and SRO responsibilities, assessing MIAX Exchange's regulatory performance, and assisting the MIAX Exchange Board (and committees of the MIAX Exchange Board) in reviewing MIAX Exchange's regulatory plan and the overall effectiveness of MIAX Exchange's regulatory functions.[97]

Further, a Chief Regulatory Officer (''CRO'') of MIAX Exchange will have general day-to-day supervision over MIAX Exchange's regulatory operations.[98] The Regulatory Oversight Committee also will be responsible for recommending compensation and personnel actions involving the CRO and senior regulatory personnel to the Compensation Committee of the MIAX Exchange for action.[99] The CRO will report to the Regulatory Oversight Committee.[100]

b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MIAX Exchange represented that, prior to commencing operations as a national securities exchange, Miami Holdings will provide sufficient funding to MIAX Exchange for the exchange to carry out its responsibilities under the Act.[101] Specifically, MIAX Exchange represents that prior to launching operations, Miami Holdings will allocate sufficient operational assets and make a capital contribution of not less than $2,000,000 into MIAX Exchange's capital account, in addition to either directly making payments of, or contributing adequate funds from Miami Holdings to MIAX Exchange for payments by MIAX Exchange of: (i) Personnel costs (including regulatory department personnel), (ii) technology support for regulatory oversight, (iii) infrastructure costs, and (iv) industry and regulatory memberships.[102]

MIAX Exchange also represents that such direct funding by Miami Holdings, as well as allocations and contributions by Miami Holdings to MIAX Exchange, will be adequate to operate MIAX Exchange, including the ongoing regulation of the exchange, and that Miami Holdings and MIAX Exchange have entered into a funding agreement that requires Miami Holdings to provide adequate funding for the exchange's initial and ongoing operations, including the regulation of MIAX Exchange.[103]

Further, any revenues received by MIAX Exchange from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes.[104] Any excess funds, as determined by MIAX Exchange, may be remitted to Miami Holdings, however ''Regulatory Funds'' will not be remitted to Miami Holdings.[105]

c. Rule 17d–2 Agreements; Regulatory Contract With CBOE

Section 19(g)(1) of the Act,[106] among other things, requires every SRO registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act.[107] Rule 17d–2 of the Act[108] permits SROs to propose joint plans to allocate regulatory responsibilities amongst themselves for their common rules with respect to their common members.[109] These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO. Such regulatory duplication would add unnecessary expenses for common members and their SROs.

A 17d–2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.[110] Many SROs have entered into Rule 17d–2 agreements.[111] MIAX Exchange has represented to the Commission that it intends to become a party to the existing multiparty options Rule 17d–2 plans concerning sales practice regulation and market surveillance.[112] Under these agreements, the examining SROs will examine firms that are common

[97] *See* MIAX Exchange By-Laws Article IV Section 4.5(c). The Regulatory Oversight Committee is responsible for reviewing MIAX Exchange's regulatory budget, and also will meet regularly with the Chief Regulatory Officer. *See id.*

[98] *See* MIAX Exchange By-Laws Article VI, Section 6.10.

[99] *See* MIAX Exchange By-Laws Article IV, Section 4.5(c).

[100] *See* MIAX Exchange By-Law Article VI, Section 6.10.

[101] *See* MIAX Form 1 Application, Exhibit I.

[102] *See id.*

[103] *See id.*

[104] *See* MIAX Exchange By-Laws Article IX, Section 9.4.

[105] *See* MIAX Form 1 Application, Exhibit I. *See also* MIAX Exchange LLC Agreement Section 16; and MIAX Exchange By-Laws Article IX, Section 9.4. MIAX Exchange By-Laws Article 1(ee) defines ''Regulatory Funds'' as ''fees, fines, or penalties derived from the regulatory operations of the [MIAX Exchange]'', but such term does not include ''revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the [MIAX Exchange], even if such revenues are used to pay costs associated with the regulatory operations of the [MIAX Exchange].'' This definition is consistent with the rules of other SROs. *See e.g.,* By-Laws of NASDAQ OMX PHLX LLC, Article I(ii); and By-Laws of NASDAQ OMX BX, Inc., Article I(ii).

[106] 15 U.S.C. 78s(g)(1).

[107] 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

[108] *See* Section 17(d)(1) of the Act and Rule 17d–2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d–2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

[109] 17 CFR 240.17d–2. Section 19(g)(1) of the Act requires every SRO to examine its members and persons associated with its members and to enforce compliance with the federal securities laws and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) of the Act. Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to Common Members. *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976) (''Rule 17d–2 Adopting Release'').

[110] *See id.*

[111] *See, e.g.,* Securities Exchange Act Release Nos. 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4–575) (FINRA/Boston Stock Exchange, Inc.); 58818 (October 20, 2008), 73 FR 63752 (October 27, 2008) (File No. 4–569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28057 (May 18, 2007) (File No. 4–536) (National Association of Securities Dealers, Inc. (''NASD'') (n/k/a FINRA) and CBOE concerning the CBOE Stock Exchange); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4–529) (NASD/ISE); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4–517) (NASD/Nasdaq).

[112] *See* MIAX Form 1 Application, Exhibit L. *See also* Securities Exchange Act Release Nos. 66974 (May 11, 2012), 77 FR 29705 (May 18, 2012) (File No. S7–966) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related sales practice matters); and 66975 (May 11, 2012), 77 FR 29712 (May 18, 2012) (File No. 4–551) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d–2 plan concerning options-related market surveillance).

members of MIAX Exchange and the particular examining SRO for compliance with certain provisions of the Act, certain rules and regulations adopted thereunder, and certain MIAX Exchange Rules.

In addition, MIAX Exchange has entered into a Regulatory Services Agreement (''RSA'') with the Chicago Board Options Exchange, Incorporated (''CBOE''), under which CBOE will perform certain regulatory functions on behalf of MIAX Exchange.[113] Pursuant to the RSA, CBOE, in its capacity as service provider to MIAX Exchange, will perform various services on MIAX's behalf, including conducting certain market surveillances; assisting MIAX Exchange in conducting investigations of potential violations of MIAX Exchange rules and/or federal securities laws related to activity on the Exchange; conducting examinations related to Exchange members' conduct on MIAX Exchange; assisting MIAX Exchange with disciplinary proceedings pursuant to MIAX Exchange rules, including issuing charges and conducting hearings; and providing dispute resolution services to Exchange members on behalf of MIAX Exchange, including operation of the MIAX Exchange's arbitration program.[114] Notwithstanding the RSA, MIAX Exchange will retain ultimate legal responsibility for the regulation of its members and its market.

The Commission believes that it is consistent with the Act for MIAX Exchange to contract with another SRO to perform certain examination, enforcement, and disciplinary functions.[115] These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that CBOE, as an SRO that operates two options exchanges, should have the capacity to perform these functions for MIAX Exchange.[116] However, MIAX Exchange, unless relieved by the Commission of its responsibility,[117] bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MIAX Exchange's behalf. In performing these regulatory functions, however, the SRO retained to perform regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of MIAX Exchange to perform its regulatory functions.[118] Accordingly, although CBOE will not act on its own behalf under its SRO responsibilities in carrying out these regulatory services for MIAX Exchange, as the SRO retained to perform regulatory functions, CBOE may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by MIAX Exchange.

C. Trading System

1. Access to MIAX

Access to MIAX will be granted to individuals or organizations who are approved to become members. Approved members will be issued Trading Permits that grant the member the ability to transact on MIAX Exchange through the exchange's electronic systems.[119] Trading Permits will not convey upon members any ownership interest in MIAX Exchange, and they will not be transferable except in cases where a member experiences a change in control or corporate reorganization.[120] Membership will be open to any broker-dealer that: (1) Is registered under Section 15 of the Act; [121] and (2) has and maintains membership in another registered options exchange or the Financial Industry Regulatory Authority (''FINRA'').[122] There will be no limit to the number of Trading Permits that MIAX Exchange can issue, although MIAX could determine in the future that a limit on or decrease to the number of Trading Permits issued is necessary.[123] Members of MIAX may be one of three classes of market maker,[124] or they may be non-market makers.

Those seeking to become members of MIAX will need to submit an application in accordance with procedures that MIAX will announce by Regulatory Circular.[125] Entities that become members, and their associated persons, will be required to meet and maintain certain qualification and registration criteria similar to what is required by other options exchanges.[126]

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[113] *See* MIAX Form 1 Application, Exhibit L.

[114] *See* MIAX Form 1 Application, Exhibit L.

[115] *See, e.g.,* Regulation ATS Release, *supra* note 34. *See also* Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR–Amex–2004–32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) (''Amex Regulatory Services Approval Order''); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004) (''NOM Approval Order''); Nasdaq Order, *supra* note 32; and BATS Order, *supra* note 18.

[116] *See, e.g.,* Amex Regulatory Services Approval Order, *supra* note 115; NOM Approval Order, *supra* note 115; and Nasdaq Order, *supra* note 32. The Commission notes that the RSA is not before the Commission and, therefore, the Commission is not acting on it.

[117] *See supra* note 108.

[118] For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an exchange in violation of any aspect of the exchange's self-regulatory obligations, the exchange will bear direct liability for the violation, while the SRO retained to perform regulatory functions may bear liability for causing or aiding and abetting the violation. *See, e.g.,* Nasdaq Order, *supra* note 32; BATS Order, *supra* note 18; and Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10–127) (approval of registration of ISE as a national securities exchange).

[119] *See* MIAX Exchange Rule 200(a). MIAX intends to allow each member to determine the best method for accessing MIAX, whether by using customized front-end software or through third-party vendors who route orders to MIAX through front-end or service bureau configurations. *See* MIAX Form 1 Application, Exhibit E.

[120] *See* MIAX Rule 200(d).

[121] *See* MIAX Rule 200(b).

[122] *See* MIAX Rule 200(c)(7).

[123] *See* MIAX Rule 200(a). MIAX would announce in advance any limitation or decrease it plans to impose pursuant to Rule 200(a). *See id.* In the event that MIAX imposes a limitation or decrease, MIAX, in doing so, may not eliminate the ability of an existing member to trade on MIAX Exchange unless MIAX Exchange is permitted to do so pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act. *See id.* In addition, MIAX's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(c)(4) of the Act. *See id. See also* 15 U.S.C. 78f(c)(4) (providing that an exchange may limit: (1) The number of members of the exchange and (2) the number of members and designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, provided, however, that no exchange shall have the authority to decrease the number of memberships in such exchange, or the number of members and designated representatives of members permitted to effect transactions on the floor of such exchange without the services of another person acting as broker, below such number in effect on May 1, 1975, or the date such exchange was registered with the Commission, whichever is later. In addition, the Commission, in accordance with the provisions of section 19(c) of the Act, may amend the rules of any exchange to increase (but not to decrease) or to remove any limitation on the number of memberships in such exchange or the number of members or designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, if the Commission finds that such limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.). *See also* CBOE Rule 3.1(a)(vi) (concerning limiting or reducing the number of types of trading permits). In addition, MIAX's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or any natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof. *See* 15 U.S.C. 78f(b)(2).

[124] *See* MIAX Rule 600. Market Maker registration is discussed in greater detail below, *infra* Section III(C)(3)(a).

[125] *See* MIAX Rule 200(c). Any proposed application fees contemplated by Rule 200(c) would need to be filed with the Commission pursuant to Section 19(b) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78s(b) and 17 CFR 240.19b–4, respectively.

[126] *See* MIAX Rule 200 Series. Such criteria include, but are not limited to, capital maintenance

Continued

In addition, MIAX proposes further requirements on members that seek to do business with the public.[127] Applicants who are denied membership may appeal MIAX Exchange's decision pursuant to MIAX's rules governing Hearings, Review, and Arbitration.[128] Every member will be subject to MIAX's regulatory jurisdiction, including MIAX's disciplinary jurisdiction.[129]

Further, MIAX Rule 608 requires market makers to have a letter of guarantee. In its comment letter, NASDAQ argues that MIAX should broaden this rule to require all members to provide a letter of guarantee, not just market makers.[130] In response, MIAX explains that MIAX Rule 209 already requires a letter of guarantee for all MIAX members.[131]

In addition, in its comment letter, NASDAQ notes that MIAX Rule 507 requires a member who changes clearing information to contact the clearing member on the other side of a trade.[132] NASDAQ argues this approach is potentially burdensome for MIAX members since some MIAX members might not maintain contact information for all other MIAX members.[133] NASDAQ believes that a better approach, given that the Options Clearing Corporation serves as the central clearing party for listed options trades, would be for the member to notify MIAX.[134] In response, MIAX revised Rule 507 to accommodate this suggestion, which MIAX believes should be less burdensome for members.[135]

The Commission finds that MIAX's proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof.[136] MIAX's proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.

The Commission notes that pursuant to Section 6(c) of the Act,[137] an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, MIAX must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.[138]

In addition, members may enter into arrangements with other parties, including non-members and other members, to provide ''Sponsored Access'' to trading on MIAX.[139] Members who provide such Sponsored Access will be responsible for all trading conducted pursuant to the access agreement, and to the same extent as if the member were trading directly.[140] Accordingly, members that provide Sponsored Access must maintain and implement policies and procedures to supervise and monitor sponsored trading activity.[141] Additionally, non-members who seek to trade on MIAX through Sponsored Access agreements will need to agree to comply with all applicable federal securities laws and rules and MIAX Exchange rules.[142] MIAX's rules governing Sponsored Access arrangements are similar to the rules of other exchanges [143] and are consistent with Rule 15c3–5 under the Act.[144]

2. Linkage

MIAX intends to become a participant in the Plan Relating to Options Order Protection and Locked/Crossed Markets or any successor plan (''Linkage Plan'').[145] If admitted as a participant to the Plan, other plan participants would be able to send orders to MIAX in accordance with the terms of the plan as applied to MIAX Exchange.

MIAX Exchange rules include relevant definitions, establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan, impose obligations on MIAX Exchange regarding how it must process incoming orders, establish a general standard that members and MIAX Exchange should avoid trade-throughs, establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges, and establish obligations with respect to locked and crossed markets.

The Commission believes that MIAX has proposed rules that are designed to comply with the requirements of the Linkage Plan.[146] Further, as provided below, before MIAX can commence operations as an exchange, it must become a participant in the Linkage Plan.

3. Market Makers

a. Registration and Appointment

Members of MIAX may apply to become one of three types of market maker: Primary Lead Market Maker, Lead Market Maker, or Registered Market Maker (collectively, ''Market Makers''). Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations.[147] Each class of Market Maker will receive a specific level of benefits and privileges in exchange for a specific level of obligation that such Market Maker assumes to the MIAX market.

To begin the process of registering as a Registered Market Maker or Lead Market Maker, a member will be required to file a written application with MIAX.[148] In reviewing a member's application for membership, MIAX will consider, among other things, the applicant's market making ability.[149] Only approved Lead Market Makers

requirements. *See, e.g.,* C2 Rules 3.1 and 3.2 (containing similar criteria).

[127] *See* MIAX Rule 1300 Series. These Rules also are similar to the rules of other exchanges. *See, e.g.,* ISE Rules Chapter 6.

[128] *See* MAX Rule 1100 Series.

[129] *See* MIAX Rule 200(f). For MIAX's rules concerning discipline, *see* MIAX Rule 1000 Series.

[130] *See* NASDAQ Letter, *supra* note 3, at 4.

[131] *See* MIAX Response Letter, *supra* note 4, at 15–16. MIAX noted that MIAX Rule 608, which NASDAQ referenced, is a rule that relates specifically to market makers, and as such, it simply reiterates that Rule 209's general requirement concerning letters of guarantee applies specifically to market makers. *See id.*

[132] *See* NASDAQ Letter, *supra* note 3, at 4.

[133] *See id.*

[134] *See id.*

[135] *See* MIAX Response Letter, *supra* note 4, at 13. MIAX notes that its revised rule is similar to the operation of ISE Rule 707. *See id.*

[136] 15 U.S.C. 78f(b)(2).

[137] 15 U.S.C. 78f(c).

[138] *See, e.g.,* BOX Order, *supra* note 18 at 26337; BATS Order, *supra* note 18, at 73 FR 49502; and Nasdaq Order, *supra* note 32, at 71 FR 3555.

[139] *See* MIAX Rule 210.

[140] *See* MIAX Rule 210(a).

[141] *See id.*

[142] *See* MIAX Rule 210(d)(1)(i). *See also, e.g.,* 17 CFR 240.15c3–5.

[143] *See, e.g.,* Nasdaq Rule 4611(d).

[144] 17 CFR 240.15c3–5.

[145] *See* MIAX Form 1 Application, Exhibit E. *See also* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546) (order approving the national market system Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, ISE, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

[146] *See* MIAX Rule 1400 Series.

[147] Market Makers' benefits and obligations are discussed in greater detail in the following section.

[148] *See* MIAX Rule 600(b).

[149] *See id.* The provision permitting MIAX to consider ''such other factors as [it] deems appropriate'' must be applied in a manner that is consistent with the Act, including provisions that prohibit an exchange from acting in an unfairly discriminatory manner. *See* 15 U.S.C. 78f(b)(5); *see also* C2 Order, *supra* note 41, at n. 80, 76 FR at 66704.

may apply to be considered for appointment as a Primary Lead Market Maker in one or more option classes traded on MIAX.[150] All members who are approved to become Market Makers will be designated as specialists on MIAX for all purposes under the Act and rules thereunder.[151]

Once approved, a Market Maker would seek appointment to make markets in options classes.[152] Either the Exchange Board or a committee thereof[153] would evaluate an application for Market Maker status based on: (1) The financial resources available to the Market Maker; (2) the Market Maker's experience and expertise in market making or options trading; (3) the preferences of the Market Maker to receive appointment(s) in specific option class(es); and (4) the maintenance and enhancement of competition among Market Makers in each option class.[154] MIAX will allow one Primary Lead Market Maker appointment per class, and will have a maximum class quoting limit of fifty Market Makers per class.[155] Once appointed, MIAX will surveil a Market Maker's activity for continued compliance with all applicable rules and requirements, which are discussed in more detail below.

The Commission finds that MIAX's rules for the registration and appointment of Market Makers are consistent with the Act. In particular, MIAX's rules provide an objective process by which a member could become a Market Maker on MIAX and provide for oversight by MIAX Exchange to monitor for continued compliance by Market Makers with the terms of their application for such status. The Commission notes that MIAX's proposed Market Maker registration and appointment requirements are similar to those of other options exchanges.[156]

b. Market Maker Obligations

Pursuant to MIAX rules, all Market Makers will be subject to a number of general obligations. In particular, the transactions of a Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market.[157] Among other things, a Market Maker must: (1) Engage in dealings for its own account when there is a lack of price continuity, a temporary disparity between the supply of and demand for a particular option contract, or a temporary distortion of the price relationships between options contracts of the same class; (2) compete with other market makers; (3) make markets that will be honored for the number of contracts entered; (4) update quotations in response to changed market conditions; and (5) price option contracts fairly by, among other things, meeting the bid/ask differential requirements prescribed.[158] In addition, Market Makers must maintain minimum net capital in accordance with MIAX rules and the federal securities laws.[159] Market Makers also must maintain information barriers between market making activities and any other business activities that are reasonably designed to prevent the misuse of material, non-public information.[160]

MIAX's rules governing Market Maker quoting obligations are tailored to the specific class of Market Maker.[161] Specifically, a Primary Lead Market Maker will be subject to the highest standard applicable on MIAX, as they will be required to provide continuous two-sided Standard quotes and/or Day eQuotes[162] throughout the trading day 99% of the time in the lesser of 99% of the series, or 100% of the series minus one put-call pair, in each appointed class.[163] Primary Lead Market Makers also are required to participate in the opening rotation.[164] Lead Market Makers must provide continuous two-sided quotes (consisting of Standard quotes and/or Day eQuotes) throughout the trading day 90% of the time in 90% of the series in each of their appointed classes.[165] Lead Market Makers also must participate in the opening rotation.[166] Lastly, Registered Market Makers must provide continuous two-sided quotes (consisting of Standard quotes and/or Day eQuotes) 90% of the time in 60% of the series in each of its appointed classes.[167] Further, Registered Market Makers may be called upon by a MIAX Exchange official to submit a single quote or maintain continuous quotes in one or more series of its appointed classes whenever, in the judgment of such official, it is necessary to do so in the interest of fair and orderly markets.[168] For purposes of meeting the continuous quoting obligations discussed herein, a Market Maker's quote must meet the bid/ask differential requirements of MIAX Rule 603(b)(4).[169]

In options classes other than to which they are appointed, a Market Maker is prohibited from engaging in transactions in an account in which it has an interest that are disproportionate to, or in derogation of, the performance of its market making obligations as set forth in the MIAX rules.[170] Further, the total number of contracts executed during a quarter by a Registered Market Maker in options classes to which it is not appointed may not exceed 25% of the total number of contracts traded by such Registered Market Maker in classes to which it is appointed.[171] Similarly, the total number of contracts executed during a quarter by a Lead Market Maker (including a Primary Lead Market Maker) in options classes to which it is not appointed may not exceed 10% of

[150] *See id.*

[151] *See* MIAX Rule 600(a).

[152] *See* MIAX Rule 602.

[153] *See* MIAX Rule 602(a). MIAX Rule 1100 Series provides the process for hearings, review, and arbitration of claims by persons economically aggrieved by MIAX Exchange action, which would include denial of registration as a Market Maker.

[154] *See id.*

[155] *See* Amendment No. 1 (in which MIAX revised its Rule 602(c) to increase the proposed class quoting limit from 10 to 50). *See also, e.g.,* C2 Rule 8.11(a) (imposing a class quoting limit of 50) and CBOE Rule 8.3A, Interpretations and Policies .01 (imposing a class quoting limit of 50).

[156] *See, e.g.,* ISE Rules 800 and 801, and C2 Rule 8.1 (registration); ISE Rule 802 and C2 Rule 8.11 (appointment).

[157] *See* MIAX Rule 603(a).

[158] *See* MIAX Rule 603(b)(4). Specifically, as set forth in note 285, *infra,* following the opening rotation, Market Makers must create differences of no more than $5 between the bid and offer. Prior to the opening rotation, bid/ask differentials shall be no more than $.25 between the bid and offer for each option contract for which the bid is less than $2, no more than $.40 where the bid is at least $2 but does not exceed $5, no more than $.50 where the bid is more than $5 but does not exceed $10, no more than $.80 where the bid is more than $10 but does not exceed $20, and no more than $1 where the bid is more than $20, provided that the Exchange may establish differences other than the above for one or more option.

[159] *See* MIAX Rule 609.

[160] *See* MIAX Rule 610.

[161] *See* MIAX Rule 604.

[162] *See infra* Section III(C)(5) (discussing the various types of quotes that may be submitted by Market Makers on MIAX).

[163] *See* MIAX Rule 604(e)(1). *See also* Amendment No. 1 (revising MIAX Rule 604(e)(1) to provide that these obligations will be applied on a class-by-class basis).

[164] *See* MIAX Rule 604(e)(1)(i).

[165] *See* MIAX Rule 604(e)(1). *See also* Amendment No. 1 (revising MIAX Rule 604(e)(2) to provide that these obligations will be applied on a class-by-class basis).

[166] *See* MIAX Rule 604(e)(2).

[167] *See* MIAX Rule 604(e)(3). *See also* Amendment No. 1 (revising MIAX Rule 604(e)(3) to provide that these obligations will be applied on a class-by-class basis).

[168] *See* MIAX Rule 604(e)(3)(iii).

[169] *See* MIAX Rule 604(e)(1)–(3) (for Primary Lead Market Makers, Lead Market Makers, and Registered Market Makers, respectively).

[170] *See* MIAX Rule 603(d). Among other things, a Market Maker should not effect purchases or sales except in an orderly manner. *See id. See also* ISE Rule 803(d) (containing an identical provision).

[171] *See* MIAX Rule 605(b)(2). *See also* ISE Rule 805(b)(2) (limiting the total number of contracts a Competitive Market Maker registered on that Exchange may execute per quarter in classes to which it is not appointed to 25% or less of the total contracts traded by that Market Maker in classes to which it is appointed).

the total number of contracts traded by such Lead Market Maker in classes to which it is appointed.[172] Executions resulting from orders in a Registered Market Maker's and Lead Market Maker's appointed classes are included in these 25% and 10% limitations, respectively.[173]

If MIAX finds any failure by a Market Maker to meet minimum performance standards or properly perform as a Market Maker, such Market Maker may be subject to suspension, termination, or restriction of registration in one or more of the securities in which the Market Maker is registered.[174]

Market Makers will receive certain benefits in return for satisfying their responsibilities.[175] For example, a broker-dealer or other lender may extend ''good faith'' credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or specialist.[176] In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.[177] The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.[178] The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.[179]

The Commission believes that MIAX's Market Maker participation requirements impose appropriate affirmative obligations on MIAX Exchange's Market Makers that are commensurate with the benefits afforded to such participants and, accordingly, are consistent with the Act.

Specifically, with regard to MIAX's proposed continuous quoting obligations, only those quotes that are liquidity providing—Standard quotes and Day eQuotes—will be counted towards a Market Maker's quoting obligations, rather than all types of eQuotes that a Market Maker will be permitted to utilize.[180] The Commission believes that this treatment is appropriate under the Act and consistent with a Market Maker's obligation to contribute to the maintenance of a fair and orderly market. Further, the Commission believes that the specific levels of benefits conferred on the different classes of Market Makers are appropriately balanced by the obligations imposed by MIAX's rules. For example, as discussed below, Primary Lead Market Makers and Lead Market Makers are entitled to certain participation entitlements,[181] and at the same time, are subject to heightened continuous quoting obligations to justify these special benefits.[182]

Finally, the Commission believes that the Act does not mandate a particular market model for exchanges, and while Market Makers may become an important source of liquidity on MIAX, they will likely not be the only source as MIAX is designed to match buying and selling interest of all MIAX participants.

4. Order Display, Execution, and Priority

MIAX will operate a fully automated electronic options marketplace. Liquidity will be derived from orders to buy and orders to sell, as well as market maker quotations, submitted to MIAX electronically by its members from remote locations. There will be no physical trading floor. Options traded on the Exchange will be subject to Minimum Price Variations that will begin at $0.05 for option contracts trading at less than $3.00 per option, and $.10 for option contracts trading at $3.00 per option or higher.[183] In addition, MIAX will participate in the penny pilot program pursuant to which it will permit certain options with premiums under $3 (as well as heavily traded options on certain indices) to be quoted and traded in increments as low as $.01.[184]

All orders and quotes submitted to MIAX will be displayed unless: (i) The order is a contingent order (such as immediate or cancel orders); or (ii) the quote is a certain type of eQuote [185] (such as an Auction or Cancel eQuote). Displayed orders and quotes will be displayed on an anonymous basis (except for attributable orders,[186] which will allow voluntary disclosure of firm identification information) at a specified price. Non-displayed orders will not be displayed to any participant.

In certain cases, orders and quotes may be displayed at a price different from the price specified by the submitting member.[187] One such case is

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[172] *See* MIAX Rule 605(b)(3); *see also* ISE Rule 805(b)(3) (limiting the total number of contracts a Primary Market Maker registered on that Exchange may execute per quarter in classes to which it is not appointed to 10% or less of the total contracts traded by that Market Maker in classes to which it is appointed.

[173] *See* MIAX Rule 605(b)(2)–(3). MIAX's inclusion of executions resulting from orders is more restrictive than similar rules of other exchanges, which do not include orders executed in appointed classes towards Market Makers' 25% and 10% limitations, respectively. *See, e.g.,* ISE Rule 805(b)(2)–(3).

See also Amendment No. 1 (where MIAX revised Rule 605 to remove consideration of non-priority quotes from the 25% and 10% limitations). MIAX's proposal not to count non-priority quotes in the 25% or 10% buckets does not raise any new or novel issue because even a non-priority quote still would be required to meet the maximum differential provision contained in MIAX Rule 603(b)(4). Accordingly, such a valid width quote, even if it may not comply with a potentially narrower ''priority quote width standard'' under MIAX Rule 517(b)(ii), would still represent a valid width quote that can be counted towards a Market Maker's quoting obligation, consistent with the practice on other exchanges.

[174] *See* MIAX Rules 600 and 602(f).

[175] *See, e.g.,* NOM Approval Order, *supra* note 115, at 73 FR 14526 (discussing the benefits and obligations of market makers).

[176] *See* 12 CFR 221.5 and 12 CFR 220.7; *see also* 17 CFR 240.15c3–1(a)(6) (capital requirements for market makers).

[177] 15 U.S.C. 78k(a).

[178] *See* NOM Approval Order, *supra* note 115, at 73 FR 14526.

[179] *See id.*

[180] *See infra* Section III(C)(5) (discussing the various quote types that Market Makers can utilize).

[181] *See infra* notes 225–240 and accompanying text (describing the Primary Lead Market Maker and Directed Lead Market Maker participation entitlements). *See also infra* Section III(C)(5) (discussing the benefit Market Makers receive from the MIAX priority quote rule).

[182] *See supra* Section III(C)(3)(b) (describing Primary Lead Market Maker and Lead Market Maker quoting obligations).

[183] *See* MIAX Rule 510(a).

[184] NASDAQ points out that MIAX's rule concerning the ''penny pilot'' did not contain a date for the end of the penny pilot. *See* NASDAQ Letter, *supra* note 3, at 3. In response, MIAX amended its Rule 510 to insert the industry-wide date for the schedule expiration the penny pilot (*i.e.,* December 31, 2012), and MIAX noted that at the time it filed its Form 1 application, the scheduled expiration of the penny pilot was June 30, 2012 (which the Commission notes preceded publication of the notice of MIAX's Form 1 application in the **Federal Register**). *See* MIAX Response Letter, *supra* note 4, at 13. MIAX notes that the December 31, 2012 expiration date conforms to other exchange rules, including CBOE Rule 6.42 and ISE Rule 710. *See id.*

[185] *See infra* Section III(C)(5) (discussing eQuotes). The Commission notes that MIAX has not proposed orders with reserve size at this time.

[186] An Attributable Order is a market or limit order which displays the user firm's ID for purposes of trading on MIAX. Use of Attributable Orders will be voluntary. This order type is consistent with similar order types on other exchanges. *See, e.g.,* CBOE Rule 6.53(o) (attributable order type).

[187] In its comment letter, ISE disagreed with the broad statement in Exhibit E of MIAX's Form 1 application that says that orders and quotes will be displayed at the price specified by the submitting member. ISE points out that there are two additional instances, beyond what MIAX described in its Exhibit E, where an order or quote will not be displayed at the submitted price: (1) Customer interest (either Professional or Priority customers) that is marked Do Not Route that would lock or cross the NBBO; and (2) market maker quotes and orders that would trade through the ABBO. *See* ISE Letter, *supra* note 3, at 1–2. In each case, the orders will be displayed one minimum price variation away from the opposite side NBBO, but will remain available for execution on MIAX at the price that locks the NBBO. *See* ISE Letter, *supra* note 3, at 1–2. In response, MIAX revised Exhibit E to note all

non-displayed penny orders. Specifically, MIAX proposes to allow a member to enter an order or quote (as applicable) priced in a penny increment for series that are subject to a minimum price variation other than a penny (*e.g.,* 5 cents or 10 cents). The order would be displayed at the applicable minimum increment (rounded as appropriate), not the narrower penny price, but would be available for execution at the non-displayed penny price (*i.e.,* a ''non-displayed penny order'').[188] With respect to MIAX's proposed use of non-displayed penny orders, the ISE Letter appears to assert that MIAX has proposed to permit non-displayed prices to be entered in regular trading increments in all classes, which (if true) ISE would oppose to the extent it could decrease transparency and further internalization of order flow.[189] ISE believes that MIAX's proposal on this point could be much broader than what has been previously approved by the Commission.[190] In response, MIAX notes that, pursuant to MIAX Rule 516(b)(3), non-displayed penny orders will only be accepted in designated classes, which must have a minimum price variation larger than one penny.[191] MIAX notes that such orders, which are limit orders priced in a one-cent increment, are executable at their stated penny limit price, but are displayed at the closest minimum price variation that does not violate the limit price.[192] MIAX reiterated that it does not propose to handle orders and quotes in a manner that will permit non-displayed prices in the regular trading increments in all options classes, and that its proposed rule is not intended to be broader than what has previously been approved by the Commission.[193] To clarify this point, MIAX revised Rule 516(b)(3) to state that non-displayed penny orders would only be accepted in designated classes and must have a minimum pricing variation larger than one penny.[194]

In its comment letter, NASDAQ notes that proposed MIAX Rule 516(b)(4) is silent on what would happen if a member attempted to submit a non-displayed penny order in an option that is not eligible for such orders.[195] In response, MIAX amended proposed MIAX Rule 516(b)(3) to state that such order would be rejected.[196]

Members may submit the following types of orders: Market; Limit (including Marketable Limit, Fill-or-Kill, Immediate-or-Cancel, Non-Displayed Penny,[197] and Auction or Cancel (''AOC'')); WAIT; [198] Attributable; Intermarket Sweep (''ISO''); Do Not Route; [199] Opening; Customer Cross; Qualified Contingent Cross; Day Limit; and Good 'Til Cancelled.[200] With the exception of the AOC Order, which is unique to MIAX, all of these order types are based on similar order types available on other options exchanges.[201] MIAX's AOC Order is a limit order which is used to provide liquidity during a specific MIAX Exchange mechanism (*e.g.,* the opening imbalance mechanism in MIAX Rule 503) with a time in force that corresponds to the duration of that event.[202] In other words, such an order would automatically expire at the end of the auction or event. AOC Orders are not displayed to any market participant, are not included in the MIAX best bid or offer, are not eligible for trading outside of the event, and may not be routed. The Commission believes that this order type, while not specifically based on an order type on another exchange, is substantially similar to order types approved by the Commission on other exchanges for use in various auction mechanisms, which are similarly not displayed to any participant and have a limited time in force related to the auction, and thus raises no new regulatory issues.[203]

Trades will execute on MIAX when orders or quotes on the MIAX order book match one another.[204] The MIAX system will continuously and automatically match orders pursuant to

instances of when orders and quotes will not be displayed or will be displayed at one price and executable at a different price. *See* MIAX Response Letter, *supra* note 4, at 3–4.

[188] *See* MIAX Rule 516(b)(4) (Non-displayed Penny Order). This functionality is based on similar rules of other exchanges. *See, e.g.,* CBOE Rule 6.13B (Penny Price Improvement).

[189] *See* ISE Letter, *supra* note 3, at 2.

[190] *See id.*

[191] *See* MIAX Response Letter, *supra* note 4, at 9.

[192] *See id.*

[193] *See id.*

[194] *See id.*

[195] *See* NASDAQ Letter, *supra* note 3, at 3.

[196] *See* MIAX Response Letter, *supra* note 4, at 9.

[197] *See supra* note 188.

[198] ''WAIT'' orders are orders that, upon entry into the MIAX system, are held for one second without processing for potential display and/or execution. After one second, the order is processed for potential display and/or execution in accordance with all order entry instructions as determined by the entering party. *See* MIAX Rule 516(c). *See also* NYSE Arca Rule 6.62(w) (containing an identical type of WAIT Order).

[199] In its comment letter, ISE notes that MIAX Rule 520 does not address how hidden prices that may result from the display of Do Not Route orders are treated for the requirement to expose orders before attempting to trade against them. *See* ISE Letter, *supra* note 3, at n. 6. MIAX clarified this point by revising Rule 520 (Limitation on Orders) to add new Interpretation .04 stating that Market Maker orders and quotes displayed at a price other than their limit price or quote price as described in Rule 515(d), and orders subject to the managed interest process—which includes all Do Not Route orders that could not be executed in full and are not cancelled—are not deemed to be ''exposed'' for purposes of Rule 520. *See* MIAX Response Letter, *supra* note 4, at 8–9.

In addition, NASDAQ requests clarification on MIAX Rule 516(f) regarding Do Not Route orders and how they operate when the NBBO locks contemporaneously. *See* NASDAQ Letter, *supra* note 3, at 4. In response, MIAX revised MIAX Rule 516(g) (previously 516(f)) to clarify that a Do Not Route order may execute at a price equal to or better than, but not inferior to, the best away market price, and if, after exhausting interest on MIAX, the best away market remains and the Do Not Route order has not been fully executed, the order will be handled in accordance with MIAX's managed interest process. *See* MIAX Response Letter, *supra* note 4, at 7–8. MIAX further notes that in case of contemporaneous locks, Do Not Route orders will be handled as set forth in MIAX Rules 515 and 516. *See* MIAX Response Letter, *supra* note 4, at 8. Further, ISE requests a technical clarification about the use of the term ''away best bid/offer'' in MIAX Rule 516(f), and whether it is intended to be different from the term ''ABBO.'' *See* ISE Letter, *supra* note 3, at n. 3. In response, MIAX eliminated this term in Rule 516 and instead notes that the specifics for handling a Do Not Route Order are set forth in Rule 515(c)(2), which explains such orders' handling without using the term ''away best bid/offer.'' *See* MIAX Response Letter, *supra* note 4, at 7.

[200] *See* MIAX Rule 516 for a description of each of the order types. MIAX notes that not all of these order types will be available upon initiation of operations. Rather, MIAX Exchange will update members through Regulatory Circulars as to the order types that will be available initially. *See also infra* Section III(C)(5) (discussing various quote types that market makers may submit). NASDAQ argues that MIAX should be compelled to define which order types will be available and file changes when new order types are introduced. *See* NASDAQ Letter, *supra* note 3, at 3. In response, MIAX represents that it plans to use each of the order types listed in Rule 516 in the foreseeable future and states that it believes that its rule provides adequate detail about each order type. *See* MIAX Response Letter, *supra* note 4, at 14. In addition, MIAX represents that it will file a proposed rule change whenever it seeks to introduce a new order type. *See* MIAX Response Letter, supra note 4, at 14–15. The Commission agrees that MIAX has appropriately set forth in its rules the order types that it plans to introduce, has represented that it intends to utilize all of the proposed order types contained in its current proposed rules, and has acknowledged that it will need to file a proposed rule change if it ever seeks to introduce additional new order types.

[201] *See, e.g.,* NOM Chapter VI, Section 1(g)(5) (WAIT Order); ISE rule 715(h) (Attributable Order); NOM Chapter VI, Section 1(e)(8) (Intermarket Sweep Order); Phlx Rule 1080(m)(iv)(A) (Do Not Route Order); ISE Rule 714(i) (Customer Cross Order); ISE Rule 715(j) (Qualified Contingent Cross Order); NYSE MKT Rule 131 (Day Order and Good 'Til Cancelled Order).

[202] *See* MIAX Rule 517(a)(2)(ii).

[203] *See, e.g.,* CBOE Rule 6.13A, Simple Auction Liaison (''SAL''). *See also* Securities Exchange Act Release No. 54229 (July 27, 2006), 71 FR 44058 (August 3, 2006) (CBOE–2005–90) (order approving a proposal to adopt a Simple Auction Liaison system to auction qualifying inbound orders for potential price improvement).

[204] NASDAQ points out that MIAX Rules 511 (Acceptance of Quotes and Orders) and 512 (Contract Made on Acceptance of Bid or Offer) appear to be duplicative. *See* NASDAQ Letter, *supra* note 3, at 4. In response, MIAX has deleted MIAX Rule 512 as duplicative. *See* MIAX Response Letter, *supra* note 4, at 13.

either price/time priority or pro-rata priority, as determined by MIAX on a class-by-class basis.[205]

MIAX also will offer additional priority overlays at its discretion on a class-by-class basis, which include ''Priority Customer'' and ''Market Turner'' overlays. Priority overlays would only be applicable for pro rata priority.[206] Under the ''Priority Customer'' overlay, the highest bid and lowest offer will have priority except that Priority Customer orders [207] will have priority over ''professional interest'' [208] and all Market Maker interest at the same price.[209] If there were two or more Priority Customer orders for the same options series at the same price, priority would be afforded based on the sequence in which such orders were received. This priority overlay is the same as public customer priority overlays that have been approved by the Commission on other exchanges.[210]

Under the ''Market Turner'' priority overlay, the ''Market Turner'' refers to the participant that was the first to enter an order or quote at a better price than the previous best disseminated MIAX price, where such order or quote is continuously in the market until the order or quote trades. When this priority overlay is in effect, the Market Turner would have priority at the highest bid or lowest offer that he or she established.[211] The Commission notes that an identical Market Turner priority overlay has been approved for use on another exchange.[212]

In its comment letter, ISE asks for clarification on the proposed execution priority provisions, including priority overlays. Specifically, ISE believes that it is difficult to understand how the different combinations or allocation methodologies, priority overlays, and entitlements will work.[213] ISE noted that the Form 1, by design, does not require a level of detail and discussion, as well as statutory analysis, which is required in SRO proposed rule changes filed on Form 19b–4.[214] For example, ISE presents an example of an allocation methodology that consists of pro rata with a Priority Customer and Market Turner overlays and asks how the overlays would interact with each other on MIAX.[215] NASDAQ also asks whether the priority provisions contained in MIAX Rule 514, when read in conjunction with the execution processes in MIAX Rule 515, might result in the ability for directing or internalizing orders in a new way.[216] In particular, NASDAQ asks about the interplay between the market turner overlay, non-displayed penny orders, and the liquidity refresh pause.[217]

In response, MIAX amended proposed MIAX Rules 514 and 515 to clarify the operation of two different trade allocation methodologies (*i.e.,* price-time and pro rata) with the possible priority overlays, which includes clarification of the different priority overlays that are applicable to a pro rata allocation methodology.[218] Specifically, MIAX revised proposed Rule 514 to clarify that the Market Turner overlay will never be in effect in conjunction with any other priority overlays, and that the priority overlays are only applicable to the pro rata allocation methodology (*i.e.,* the priority overlays cannot be used in conjunction with the price time methodology).[219] MIAX also clarified in Rule 514(d) that market maker priority quotes have precedence over other professional interest under the pro rata methodology only (*i.e.,* priority quotes would not have precedence under the price time methodology).[220]

In addition, MIAX expanded the discussion in Exhibit E to its Form 1 application to provide a detailed description of how the different trade allocation and priority overlays would operate.[221] MIAX also provided a series of examples to illustrate the proposed operation of its execution rule.[222] MIAX states that the clarifications to the rule text make clear that it has no intention to allow for the ability for directing or internalizing orders in a way not previously approved by the Commission.[223] Further, in response to NASDAQ, MIAX stated that it does not believe that there is any unique aspect to the operation of the market turner priority overlay, the liquidity refresh pause, or the rules related to non-displayed penny orders on MIAX or the overall functionality of these features when used in combination on the Exchange.[224]

In addition, proposed MIAX rules provide that it may grant Primary Lead Market Makers and Lead Market Makers certain participation entitlements. For example, Primary Lead Market Makers [225] may be entitled to a participation entitlement with respect to each incoming order if they have a priority quote [226] at the National Best Bid and Offer (''NBBO'').[227] The Primary Lead Market Maker participation entitlements will only be in effect if the Priority Customer overlay also is in effect and will apply only to any remaining balance after any Priority Customer orders have first been satisfied.[228] Further, neither a Primary Lead Market Maker nor a Lead Market Maker could be allocated a total quantity greater than the quantity they are quoting at the execution price, and they will not receive any further allocation of an order if they receive a participation entitlement.[229]

Another such entitlement provides that small size orders (*i.e.,* five or fewer contracts) will be allocated in full to the Primary Lead Market Maker if it has a priority quote at the NBBO.[230] In its comment letter, NASDAQ commented that MIAX Rule 514(g)(2), which provides this small order preference to Primary Lead Market Makers, states that small size is ''initially'' defined as 5 or fewer contracts.[231] NASDAQ argues that

[205] *See* MIAX Rule 514.

[206] See Amendment No. 1. *See also infra* notes 218 to 224 and accompanying text (describing more completely the revisions MIAX made to the priority rules in response to comments).

[207] MIAX rules define ''priority customer'' as a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* MIAX Rule 100. *See also* ISE Rule 100(a)(37A) (containing an identical definition of ''priority customer'').

[208] Pursuant to MIAX Rule 100, ''professional interest'' includes: (i) An order that is for the account of a person or entity that is not a Priority Customer, and (ii) an order or non-priority quote for the account of a Market Maker. *See also infra* notes 284–290 for a discussion of ''priority'' and ''non-priority'' quotes.

[209] *See* MIAX Rule 514(d)(1).

[210] *See, e.g.,* CBOE Rule 6.45A(a)(ii)(1).

[211] *See* MIAX Rule 514(d)(2).

[212] *See* CBOE Rule 6.45A(a)(iii)(2).

[213] *See* ISE Letter, *supra* note 3, at 3.

[214] *See id.*

[215] *See id.*

[216] *See* NASDAQ Letter, *supra* note 3, at 2.

[217] *See id.*

[218] *See* MIAX Response Letter, *supra* note 4, at 10–11.

[219] *See id.*

[220] *See id. See also infra* Section III(C)(5) for a more detailed discussion of priority quotes.

[221] *See* MIAX Response Letter, *supra* note 4, at 10.

[222] *See* Amendment No. 1.

[223] *See* MIAX Response Letter, *supra* note 4, at 2.

[224] *See id.*

[225] *See supra* Section III(C)(3) (discussing the various categories of Market Makers, including Primary Lead Market Makers).

[226] *See infra* Section III(C)(5) (discussing priority quotes).

[227] *See* MIAX Rule 514(g). Specifically, the Primary Lead Market Maker's participation entitlement will be equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote, or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO. *See* MIAX Rule 514(g)(1).

[228] *See* MIAX Rule 514(g).

[229] *See* MIAX Rule 514(i)(4).

[230] *See* MIAX Rule 514(g)(2). The rule provides that MIAX Exchange will review the functioning of this provision quarterly to make sure that small size orders do not account for more than 40% of the volume executed on MIAX.

[231] *See* NASDAQ Letter, *supra* note 3, at 3.

MIAX should not be allowed to have the discretion to change that number without filing a proposed rule change, and worries that MIAX might seek to unilaterally define such orders as ''10 or 50 contracts'' without first submitting a rule filing.[232] In response, MIAX amended Rule 514(g)(2) to avoid any doubt by stating that ''small size orders are defined as five (5) or fewer contracts.'' [233] MIAX further represents that any changes to the small size order rule would be made pursuant a subsequent proposed rule change filing with the Commission.[234]

MIAX also permits Electronic Exchange Members [235] to utilize Directed Orders.[236] A ''Directed Order'' refers to an order that an Electronic Exchange Member enters into the MIAX system and directs to a particular Lead Market Maker, including a Primary Lead Market Maker [237] (''Directed Lead Market Maker''). The Lead Market Maker must have an appointment in the relevant options class to receive a Directed Order in that class. A Directed Lead Market Maker may be granted a participation entitlement if he or she has a priority quote at the NBBO.[238] The Directed Lead Market Maker participation entitlement will only be in effect if the Priority Customer overlay also is in effect and will apply only to any remaining balance after Priority Customer orders have first been satisfied. The Commission believes that these participation entitlements for Primary Lead Market Makers and Directed Lead Market Makers are consistent with those that the Commission has approved for other exchanges.[239] Further, the Commission believes that these entitlements are appropriately balanced by the obligations imposed on these classes of market makers, as discussed in detail above.[240] In particular, the Commission notes that Primary Lead Market Makers and Lead Market Makers are subject to higher quoting obligations than other Registered Market Makers who are not eligible to receive the aforementioned participation entitlements.[241] Therefore, the Commission believes that the proposed rules regarding participation entitlements are consistent with the Act.

In its comment letter, ISE identifies several proposed MIAX rules that ISE believes would benefit from increased detail or description. For example, ISE opines that certain aspects of Rule 514 (regarding quote priority) and Rule 515 (regarding processing of orders and quotes) may be novel.[242] In response, MIAX states that it does not believe that any aspects of MIAX Rules 514 or 515 raise new issues not previously addressed by the Commission; nevertheless MIAX made revisions to those rules to clarify their operation.[243]

In its comment letter, NASDAQ expresses concern over a few MIAX rules that used terms such as ''from time to time'' or ''may.'' [244] For example, NASDAQ notes MIAX Rule 514(j) that says MIAX may, from time to time, make available to members the quantity of Priority Customer contracts included in its best bid and offer.[245] NASDAQ questions when MIAX might do this and asks whether this would be a market data feed.[246] NASDAQ asks for a more detailed description of this provision, and recommends that it not be adopted at this time if MIAX is not prepared to roll it out at its commencement of operations.[247] In response, MIAX revised several of its proposed rules to add further detail including changing the terms ''from time to time'' or ''may'' to a more definitive ''will'' or a more specific time frame.[248] For example, MIAX revised MIAX Rule 503(b) concerning openings to clarify that the procedure described in that rule ''will'' be used to reopen a class after a trading halt.[249] In addition, MIAX amended MIAX Rule 514(h) to provide that eligible order types for Directed Lead Market Makers will only be set forth in the MIAX Rules and not by regulatory circular.[250] Further, MIAX deleted MIAX Rule 514(j) and instead has included text in MIAX Rule 506 to clarify that it ''will'' make available to subscribers of its data feeds and to all market participants through the public data feed an indication when there is Public Customer interest included in the MBBO.[251]

In addition, NASDAQ recommends that MIAX Rule 503(h) and (i), which use the term ''may,'' should be clarified to specify how a closing procedure would be employed after the close of the market.[252] In response, as noted above, MIAX revised MIAX Rule 503 to replace the word ''may'' with the word ''will'' to clarify that the procedure described in that rule ''will'' be used to reopen a class after a trading halt.[253] Further, MIAX deleted MIAX Rule 503(i) concerning rotations in the event of a trading halt in a proprietary product because MIAX does not have any proprietary products at the time and that provision would be inapplicable currently.[254]

NASDAQ also requests clarification on MIAX Rule 503(e)(1) concerning the opening process, and in particular, whether MIAX would consider off-exchange trades or trades on markets other than the primary market when it decides whether to open an option class for trading.[255] In response, MIAX revised MIAX Rule 503(e)(1) to clarify that the opening process will begin following the dissemination of a quote or trade in the ''market for the underlying security,'' which MIAX previously defined in MIAX Rule 503(d) as either the primary listing market, the primary volume market, or the first market to open the underlying security, as determined on a class-by-class basis and announced to members in advance.[256]

Further, NASDAQ recommends that MIAX Rule 503(g) be clarified to be more specific about when the Help Desk may deviate from the standard manner of the opening procedure.[257] In response, MIAX revised Rule 503 to note that the Help Desk may delay (rather than ''deviate'') the opening procedure when necessary in the interests of maintaining a fair and

[232] *See id.*

[233] *See* MIAX Response Letter, *supra* note 4, at 13.

[234] *See id.*

[235] An Electronic Exchange Member is the holder of a trading permit who is not a Market Maker. *See* MIAX Rule 100.

[236] *See* MIAX Rule 514(h).

[237] *See supra* Section III(C)(3) (discussing the various categories of market makers, including Lead Market Makers).

[238] *See* MIAX Rule 514(h). Specifically, the Directed Lead Market Maker's participation entitlement will be equal to the greater of: (i) The proportion of the total size at the best price represented by the size of its quote; or (ii) 60% of the contracts to be allocated if there is only one other Market Maker quotation at the NBBO or 40% if there are two or more other Market Maker quotes at the NBBO.

[239] *See, e.g.,* ISE Rule 713, Supp. 01 and .03.

[240] *See supra* Section III(C)(3)(b) (discussing market maker obligations).

[241] As discussed above, *supra* Section III(C)(3)(b), Primary Lead Market Makers must provide continuous two-sided quotes 99% of the time in: (i) The lesser of 99% of the series, or 100% of the series minus one put-call pair, in each appointed class that is traded on at least one other exchange; and (ii) 100% of the series in each appointed class that is singly listed on MIAX. *See* MIAX Rule 604(e)(1). Lead Market Makers must provide continuous two-sided quotes 90% of the time in 90% of the series in each of its appointed classes. *See* MIAX Rule 604(e)(2).

[242] *See* ISE Letter, *supra* note 3, at 1.

[243] *See* MIAX Response Letter, *supra* note 4, at 2.

[244] *See* NASDAQ Letter, *supra* note 3, at 2.

[245] *See id.*

[246] *See id.*

[247] *See id.*

[248] *See* MIAX Response Letter, *supra* note 4, at 12–13.

[249] *See id.*

[250] *See id.* at 13.

[251] *See id.* at 12.

[252] *See* NASDAQ Letter, *supra* note 3, at 2.

[253] *See* MIAX Response Letter, *supra* note 4, at 13.

[254] *See id.* at 12.

[255] *See* NASDAQ Letter, *supra* note 3, at 2.

[256] *See* MIAX Response Letter, *supra* note 4, at 13.

[257] *See* NASDAQ Letter, *supra* note 3, at 2.

orderly market.[258] MIAX notes that Phlx Rule 1047(c) similarly allows an exchange official to delay the opening procedure, and that the Phlx rule provides the same level of detail as the revised MIAX rule.[259]

NASDAQ believes that MIAX's proposed rule text provides MIAX with too much discretion concerning the order types that initially will be available for use on MIAX, and argues that MIAX should be compelled to define which order types will be available when and file new rule changes when new order types are introduced or when order types are processed differently.[260]

For example, NASDAQ notes MIAX Rule 516 states that ''not all order types listed and described in this rule will be initially available for use on the Exchange.'' [261] NASDAQ argues that, if the functionality related to certain order and quote types is not available on MIAX, then MIAX should specify in its rules what is available and file proposed rule changes when it introduces additional order or quote types and related functionality.[262] In response, MIAX believes it is permissible and appropriate to list in its rules all order and quote types that it intends to use soon after it commences operations, provided that the applicable rules contain a sufficient level of detail about each order and quote type.[263] MIAX believes that MIAX Rules 516 and 517 provide adequate detail on each of the order and quote types listed therein.[264] MIAX further believes that it is appropriate to use a regulatory circular to specify which order and quote types have been activated from among those specified in its rules.[265] MIAX represents that it intends to activate in the foreseeable future each of the proposed order and quote types contained in its proposed rules.[266]

In addition, NASDAQ notes that MIAX Rule 514(g)(2) states that MIAX will advise membership through a Regulatory Circular when additional order types are eligible to be directed.[267] NASDAQ believes this flexibility may be problematic, and notes that directed orders can warrant additional regulatory scrutiny in light of the issues surrounding participation guarantees that usually accompany directed orders.[268] In response, MIAX amended MIAX Rule 514(h)(2) to remove its ability to specify this information in a regulatory circular and instead represents that it will submit a rule filing with the Commission when it proposes to extend directed order functionality to additional order types.[269] MIAX further represents that any order types eligible to be directed will be set forth in the MIAX rules.[270]

The Commission believes that MIAX Exchange's proposed display, execution, and priority rules discussed above in this section are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,[271] which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,[272] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of MIAX are substantially similar to the current trading rules of other exchanges, as noted above, which were filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act. Therefore, the Commission believes that these rules raise no new regulatory issues and are consistent with the Act. However, certain MIAX trading rules are, in fact, novel in some respect or unique to MIAX and may not be similarly based on the existing rules of other exchanges. The trading rules that are novel or unique to MIAX, including the use of eQuotes, priority quotes, and exposure mechanisms, are discussed separately in detail below.

5. eQuotes and Priority Quotes

The MIAX rules provide that Market Makers will be permitted to submit bids and offers to MIAX as orders, Standard quotes, or ''eQuotes.'' [273] Standard quotes refer to the traditional type of quotes that exist on other markets, and submission of a Standard quote by a Market Maker will cancel and replace any previously submitted Standard quote by the Market Maker.[274] In contrast, eQuotes will be quotes with a specific time in force, and Market Makers will be permitted to submit multiple eQuotes to MIAX Exchange (in addition to their single Standard quote).[275] In other words, the submission of an eQuote will not replace an existing Standard quote or eQuote. Thus, while Market Makers could only have one Standard quote active at any one time, they will be permitted to have multiple types of eQuotes active in a single series. The types of eQuotes available on MIAX will include Day eQuotes, Auction or Cancel (''AOC'') eQuotes, Opening Only (''OPG'') eQuotes, Immediate or Cancel (''IOC'') eQuotes, Fill or Kill eQuotes (''FOK''), and Intermarket Sweep eQuotes.[276] MIAX's proposed eQuote types are analogous to order types, often of the same name, that could be used by members and Market Makers on MIAX, as discussed above, except that the eQuotes would be submitted by Market Makers through their quote handling

[258] *See* MIAX Response Letter, *supra* note 4, at 12.

[259] *See id.* at 14.

[260] *See* NASDAQ Letter, *supra* note 3, at 2–3. NASDAQ notes that existing exchanges are required to file detailed rule changes that describe how a proposed rule would work. *See id.* NASDAQ notes that the details and specific functionality are important to users, who need to understand how their orders will be handled in various situations. *See id.* at 3.

[261] *See* NASDAQ Letter, *supra* note 3, at 2.

[262] *See id.* at 3. For example, NASDAQ notes that MIAX Rule 516(d) says that Attributable Orders may not be available for all MIAX systems and MIAX would issue a Regulatory Circular specifying which systems and class of securities will have Attributable Orders. *See id.* In response, MIAX has revised Rule 516(e) (previously Rule 516(d)) to clarify that Attributable Orders will be available in the MIAX system on initial launch. *See* MIAX Response Letter, *supra* note 4, at 8.

[263] *See* MIAX Response Letter, *supra* note 4, at 14–15.

[264] *See id.* MIAX notes that other exchanges have similar rules, for example C2 Options Exchange.

[265] *See id.*

[266] *See id.* at 14.

[267] *See* NASDAQ Letter, *supra* note 3, at 3.

[268] *See id.*

[269] *See* MIAX Response Letter, *supra* note 4, at 13.

[270] *See id.*

[271] 15 U.S.C. 78f(b)(5).

[272] 15 U.S.C. 78f(b)(8).

[273] *See* MIAX Rule 517.

[274] *See* MIAX 517(a)(1).

[275] While Market Makers would be permitted to layer the book with multiple types of quotes, MIAX Rule 517(a)(2)(i) provides that one type of eQuote, the Day eQuote, will have limitations as to the number of such quotes that a single Market Maker could place on the same side of an individual option. This limitation is no more than 10 Day eQuotes on the same side of an individual option (as that term is defined in MIAX Rule 100), and the specific limit within this range would be sent to members through a Regulatory Circular. The same limit will apply to all types of Market Makers. MIAX has stated in its Form 1 that it does not intend to allow to the use of Day eQuotes upon initiation of its operations. *See* Exhibit E of MIAX's Form 1 Application.

[276] *See* MIAX Rule 517(a)(2) for a description of each of the e-Quote types. MIAX notes that not all of these order types will be available upon initiation of operations. Rather, MIAX will update members through Regulatory Circulars as to the order types that initially will be available and as additional order types become available.

terminal and may receive priority over other orders and quotes, as discussed below.[277]

The Commission believes that the proposed eQuotes provisions are consistent with the Act. The Commission acknowledges that, while Market Maker ''quotes'' traditionally *provide* liquidity to the market, MIAX's proposed eQuotes will allow Market Makers to utilize various types of ''quotes'' that may instead *remove* liquidity from the market. However, under MIAX's proposed rules, only certain types of quotes that *provide* liquidity (*i.e.,* only Standard quotes and Day eQuotes) will be permitted to count toward a Market Maker's continuous quoting obligations.[278] In other words, Market Makers on MIAX will still be required to post traditional, continuous two-sided quotes that provide liquidity to the market.

Further, as noted above, the proposed eQuote types are largely analogous to orders, and other markets allow Market Makers to submit similar types of orders that also are not permitted to count towards a Market Maker's quoting obligations.[279]

The Commission notes that all quote types that may be submitted by Market Makers, whether Standard quotes or eQuotes, must be firm in accordance with the Market Maker's obligations under the MIAX rules [280] and Rule 602 of Regulation NMS.[281] However, the MIAX rules provide that bids and offers in certain of the eQuote types will not be disseminated to quotation vendors, including AOC eQuotes, OPG eQuotes, IOC eQuotes, FOK eQuotes, and Immediate or Cancel Intermarket Sweep Quotes. The Commission believes that this is consistent with the Act and Rule 602 of Regulation NMS due to the limited time in force or other contingencies associated with these particular eQuote types. Rule 602 of Regulation NMS generally requires exchanges to make their best bids and offers in U.S.-listed securities available in the consolidated quotation data that is widely disseminated to the public.[282] Paragraph (a)(1)(i)(A) of Rule 602, however, excludes bids and offers communicated on an exchange that either are executed immediately after communication or cancelled or withdrawn if not executed immediately after communication. The Commission believes that IOC eQuotes, FOK eQuotes, and Immediate or Cancel Intermarket Sweep Quotes fall within this exclusion under paragraph (a)(1)(i)(A) of Rule 602 and thus are consistent with the Act. Further, paragraph (a)(1)(i)(B) of Rule 602 excludes any bid or offer communicated prior to the commencement of trading in a security. Accordingly, the Commission notes that OPG eQuotes, which are quotes that can be submitted by a Market Maker only during the opening and will expire at the end of the opening process, are excluded from the dissemination requirements of Rule 602. Finally, as noted above with respect to AOC orders, the Commission has previously approved similar order types as consistent with the Act that are used in various auction mechanisms on other exchanges that are not displayed to any market participants.[283] The Commission believes that AOC eQuotes are analogous to these types of orders, and as such, the Commission believes that MIAX's proposal to not disseminate AOC eQuotes is consistent with the Act.

On MIAX, all Market Maker quotes will be designated as either ''priority quotes'' or ''non-priority quotes.'' [284] As clarified by MIAX in Amendment No. 1, to be considered a *priority quote,* the following standards must be met at the time of execution:

1. The Market Maker must have a two-sided quote pair that is valid width (*i.e.,* it must meet the bid/ask differential requirements in MIAX Rule 603(b)(4) [285] (*i.e.,* a ''valid width quote''));

2. The initial size of both of the Market Maker's bid and offer must meet the minimum quote size requirements of MIAX Rule 604(b)(2);

3. The bid/ask differential of the Market Maker's two-sided quote pair must meet the priority width requirements specified by MIAX for each option; [286] and

4. Either of the following are true: (i) At the time a locking or crossing quote or order enters the MIAX system, the Market Maker's two-sided quote pair is a valid width quote resting on the Book; or (ii) immediately prior to the time the Market Maker enters a new quote that locks or crosses the MBBO, the Market Maker must have had a valid width quote already existing (*i.e.,* exclusive of the Market Maker's new marketable quote or update) among his two-sided quotes.[287]

When determining whether a Market Maker has a valid width quote, MIAX will consider only Standard quotes and Day eQuotes.[288] In the event that a Market Maker has a priority quote on MIAX Exchange, all of that Market Maker's quotes (including all Standard quotes and eQuotes) would be entitled to have precedence over all other ''Professional Interest'' [289] (*i.e.,* non-Priority Customer orders, Market Maker orders, and non-priority quotes) at the same price in accordance with MIAX Rule 514(e).[290]

In its comment letter, ISE asks about MIAX Rule 514(e) and whether a Market Maker priority quote has precedence over other professional interest under both pro rata priority and price time priority, as well as when executing against an Intermarket Sweep Order.[291] In response, MIAX revised MIAX Rule 514(e) to clarify that Market Maker priority quotes will have precedence over other professional interest under the pro rata allocation methodology but not under the price time methodology.[292]

Further, ISE commented on MIAX Rule 603 and the priority quote provision. ISE believes that quote width

[277] NASDAQ pointed out an inconsistency between MIAX's proposed Rule 612(a) and MIAX's technical system specifications, as the technical specifications say that eQuotes are not considered for purposes of the MIAX Aggregate Risk Manager. *See* NASDAQ Letter, *supra* note 3, at 3. NASDAQ recommended that MIAX clarify this point in its rule text. *See id.* In response, MIAX states that it believes the rule and the technical specifications are both correct as written. *See* MIAX Response Letter, *supra* note 4, at 15. Specifically, MIAX notes that it does not plan to support Day eQuotes at its initial launch. *See id.* Accordingly, the technical specifications are accurate in that Day eQuotes would not be considered at this time for purposes of the Aggregate Risk Manager. *See id.* The subsequent introduction by MIAX of Day eQuotes would require corresponding amendments to the technical specifications. *See id.*

[278] *See* MIAX Rule 604(e); *see also supra* Section III(C)(3)(b) (discussing Market Maker obligations).

[279] *See, e.g.,* ISE Rule 805.

[280] *See* MIAX Rules 604(d) and 517.

[281] 17 CFR 242.602.

[282] *See id.*

[283] *See supra* note 203 and accompanying text.

[284] *See* MIAX Rule 517(b).

[285] MIAX Rule 603(b)(4) provides that, following the opening rotation, Market Makers must create differences of no more than $5 between the bid and offer. Prior to the opening rotation, bid/ask differentials shall be no more than $.25 between the bid and offer for each option contract for which the bid is less than $2, no more than $.40 where the bid is at least $2 but does not exceed $5, no more than $.50 where the bid is more than $5 but does not exceed $10, no more than $.80 where the bid is more than $10 but does not exceed $20, and no more than $1 where the bid is more than $20, provided that MIAX may establish differences other than the above for one or more option.

[286] MIAX added text to MIAX Rule 517(b)(1)(ii) to clarify that MIAX will establish priority quote widths through a proposed rule change filed with the Commission, and the width could be as narrow as one MVP or as wide as, but not wider than, the bid/ask differentials in MIAX Rule 603(b)(4). *See* Amendment No. 1.

[287] *See* MIAX Rule 517(b)(1)(i).

[288] *See* MIAX Rule 517(b)(2).

[289] *See* MIAX Rule 100 and *supra* note 208

[290] *See* MIAX Rules 517(b)(1) and 514(e).

[291] *See* ISE Letter, *supra* note 3, at 4.

[292] *See* Amendment No. 1 and MIAX Response Letter, *supra* note 4, at 10. MIAX also clarified that a Market Maker will have precedence over other professional interest when MIAX receives an Intermarket Sweep Order at a price inferior to the NBBO. *See id.*

violations would not be ''against the rules'' on MIAX, and also questions whether the priority quote provision is an appropriate ''heightened'' quotation requirement for a Market Maker to obtain a ''priority quote''.[293] While stating that it would not object to this approach, ISE requests that the Commission, if it approves MIAX's registration, to set forth the statutory basis for allowing a Market Maker to obtain a priority over other professional interests via a priority quote.[294] In response, MIAX added text to MIAX Rule 517(b) to clarify that MIAX would establish the priority quote width requirement through a proposed rule change filed with the Commission, and the requirement can have bid/ask differentials as narrow as one minimum price variation or as wide as, but never wider than, the minimum bid/ask differentials contained in MIAX Rule 603.[295] MIAX represented that the priority quote width standards ''will be in addition to and generally more stringent than the regulatory requirements applied to Market Makers,'' and that ''the categorization of Market Maker quotes as priority and non-priority allows the Exchange to provide incentives to its Market Makers to provide tighter markets.'' [296] Until MIAX establishes narrower priority quote width requirements, however, the priority quote width will be the standard bid/ask differentials contained in MIAX Rule 603.[297] In addition, MIAX clarified that the initial size of the bid and the offer for a priority quote must meet the minimum size requirement of MIAX Rule 604(b)(2).[298] Further, MIAX affirms that there is, despite ISE's assumption to the contrary, a maximum market quotation spread requirement during regular market hours.[299] Thus, a violation of the quote width requirements contained in MIAX Rule 603, which is a free-standing rule, would constitute a rule violation separate and apart from the priority quote provisions and would subject a market maker to disciplinary action.[300]

The Commission believes that it is appropriate and consistent with the Act for MIAX to provide its Market Makers that are meeting their priority quote width obligations with precedence over other Professional interest in the manner that MIAX has proposed. MIAX's proposed priority quote rule and the precedence afforded to Market Makers that maintain a priority quote provides Market Makers with a benefit in return for the obligations to the market that they have assumed (*e.g.,* the obligation to supply a continuous quote), while Market Makers will have precedence at the same price over other Professional participants that either do not have any obligations (*i.e.,* non-Market Maker Professional interest) or participants that are not quoting valid width markets (*i.e.,* other Market Makers).[301] As discussed in further detail above, the Commission previously has recognized that, due to the obligations imposed on market makers, it is appropriate and consistent with the Act to confer certain corresponding benefits on them.[302] In the event a professional participant wanted to receive the benefits of becoming a market maker, it could apply to register as a market maker, subject to the Exchange's registration requirements and the participant's willingness to undertake the applicable obligations.[303] Further, at least one other exchange affords market makers precedence over other professional interest in a manner similar to the MIAX rules.[304]

6. Section 11(a) of the Act

Section 11(a)(1) of the Act [305] prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises discretion (collectively, ''covered accounts''), unless an exception applies.

Rule 11a2–2(T) under the Act,[306] known as the ''effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2–2(T)'s conditions, a member: (1) Must transmit the order from off the exchange floor; (2) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; [307] (3) may not be affiliated with the executing member; and (4) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

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[293] *See* ISE Letter, *supra* note 3, at 4. MIAX responded that ISE's assumption was incorrect, and MIAX affirmed that market makers may be subject to disciplinary action if their quotation spread exceeds $5. *See* MIAX Response Letter, *supra* note 4, at 11.

[294] *See* ISE Letter, *supra* note 3, at 5.

[295] *See* Amendment No. 1 and MIAX Response Letter, *supra* note 4, at 11–12.

[296] *See* MIAX Response Letter, *supra* note 4, at 11.

[297] *See* Amendment 1 (revising MIAX Rule 517(b)(ii)).

[298] *See* MIAX Response Letter, *supra* note 4, at 11.

[299] *See id.*

[300] *See id.*

[301] *See* Phlx Rule 1000(b)(14) (defining a ''professional'' to mean any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), and providing that, subject to limited exceptions, ''[a] professional will be treated in the same manner as an off-floor broker-dealer for purposes of Rules 1014(g) * * *'').

[302] *See infra* Section III(C)(3)(b) (discussing Market Maker obligations and benefits).

[303] In Amendment No. 1, MIAX revised the maximum number of Market Makers allowed to quote per class up to 50 from 10. *See* Amendment 1 (revising rule 602(c)(2) to increase the Class Quoting Limit to 50 from 10). MIAX notes that a class quoting limit of 50 Market Makers is consistent with the practice at other exchanges (*see, e.g.,* CBOE Rule 8.3A and C2 Rule 8.11). *See* MIAX Response Letter, supra note 4, at 12. In addition, the higher limit will provide additional opportunity for interested participants to become Market Makers on MIAX and avail themselves of the benefits afforded to Market Makers on MIAX in return for undertaking the applicable obligations to the MIAX market. *See id.*

[304] *See* Phlx Rule 1014(g)(vii). Unlike MIAX's proposed rule, the Phlx rule provides that, for automatically executed trades, all market makers have precedence over other market participants, irrespective of whether such market makers are meeting their bid-ask differential requirements. In addition, NASDAQ BX has filed a proposed rule change to provide similar precedence for its market makers. See Securities Exchange Act Release No. 68041 (October 11, 2012), 77 FR 63903 (October 17, 2012) (BX–2012–065).

In addition, MIAX's priority quote proposal establishes a framework that could readily take into account future efforts by MIAX, which would be submitted pursuant to a proposed rule change submitted in accordance with Section 19 of the Act, to reduce and further narrow the maximum permitted width from the standard maximum $5 width, which is the current standard among U.S. options exchanges. If it does so, MIAX's system would provide an additional incentive for Market Makers to provide these narrower valid width quotes at all times through affording them precedence in return for their increased obligations.

At the same time, the Commission acknowledges that MIAX's current proposed bid/ask differential requirement (*i.e.,* $5 following the opening) is in line with the current industry standard among the options exchanges. Thus, MIAX will provide precedence to Market Makers based on a proposed quote width standard that is, at present, no more strict than other markets. However, as noted above, even if MIAX does not ultimately impose a narrower valid priority quote width, MIAX's proposal is consistent with the rules of two other exchanges, which provide such precedence to market makers without regard to whether they are meeting their bid-ask differential requirements.

[305] 15 U.S.C. 78k(a)(1).

[306] 17 CFR 240.11a2–2(T).

[307] The member may, however, participate in clearing and settling the transaction. *See* Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System (''1978 Release'')).

In a letter to the Commission,[308] MIAX requested that the Commission concur with its conclusion that MIAX members that enter orders into the MIAX trading system satisfy the requirements of Rule 11a2–2(T). For the reasons set forth below, the Commission believes that MIAX members entering orders into the MIAX trading system will satisfy the conditions of Rule 11a2–2(T).

First, Rule 11a2–2(T) requires that orders for covered accounts be transmitted from off the exchange floor. MIAX will not have a physical trading floor, and the MIAX trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.[309] Since the MIAX trading system receives all orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the trading system satisfies the off-floor transmission requirement.

Second, Rule 11a2–2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution. MIAX has represented that the MIAX trading system will at no time following the submission of an order allow a member or an associated person of such member to acquire control or influence over the result or timing of an order's execution.[310] According to MIAX, the execution of a member's order is determined solely by what orders, bids, or offers are present in the MIAX trading system at the time the member submits the order and the order priority based on MIAX rules.[311] Accordingly, the Commission believes that a MIAX member will not participate in the execution of its order submitted into the trading system.

Rule 11a2–2(T)'s third condition is that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the MIAX trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to MIAX Exchange.[312] MIAX has represented that the design of its trading system ensures that no member has any special or unique trading advantage over non-members in the handling of its orders after transmitting its orders to MIAX.[313] Based on MIAX's representation, the Commission believes that the MIAX trading system satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T).[314] MIAX members trading for covered accounts over which they exercise investment discretion must comply with this condition in order to rely on the rule's exemption.[315]

7. Exposure Mechanisms and Routing

MIAX's system is designed to automatically execute incoming orders or quotes against orders and quotes in its system, provided that such incoming orders and quotes will not be executed at prices inferior to the NBBO.[316] In the event that an incoming order could not be fully executed on MIAX because it would trade through the NBBO (see ''Route Timer,'' below) or, in certain cases, because there is insufficient size on MIAX to execute an incoming order in full when that order exhausts a Market Maker quote (see ''Liquidity Refresh Pause,'' below), its proposed execution rules provide for the use of exposure mechanisms in certain instances.

Liquidity Refresh Pause. First, MIAX proposes to implement a ''Liquidity Refresh Pause'' to allow additional orders or quotes to be received where an incoming order (''initiating order'') exhausts a Market Maker's quote that was all or part of the MIAX BBO (''MBBO'') and there are unexecuted contracts remaining from the initiating order.[317] Specifically, the Liquidity Refresh Pause would be utilized in instances where MIAX is the only market at the NBBO, and an incoming initiating order is a limit order that crosses the NBBO upon receipt or is a market order and, in either case, could only be partially executed on MIAX where it exhausted a Market Maker quote at the MBBO. In such cases, rather than immediately executing at the next available price, the MIAX system would

[308] *See* Letter from Barbara J. Comly, General Counsel and Corporate Secretary, Miami Holdings, to Richard R. Holley, III, Assistant Director, Division of Trading and Markets, Commission, dated November 30, 2012 (''MIAX 11(a) Request Letter'').

[309] *See, e.g.,* Securities Exchange Act Release Nos. 59154 (December 23, 2008) 73 FR 80468 (December 31, 2008) (SR–BSE–2008–48) (order approving proposed rules of BX); 49068, (January 13, 2004), 69 FR 2775 (January 20, 2004) (establishing, among other things, BOX as an options trading facility of BSE); 44983, (October 25, 2001), 66 FR 55225 (November 1, 2001) (approving the PCX's use of the Archipelago Exchange as its equity trading facility); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility). *See* 1978 Release, *supra* note 307. *See also* Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange (''Amex'') Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange (''Phlx'') Automated Communications and Execution System) (''1979 Release'').

[310] *See* MIAX 11(a) Request Letter, *supra* note 308. Members may change or cancel an order or quote at any time before the order is executed on the Exchange. *See* MIAX Form 1 Application, Exhibit E. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. *See* 1978 Release, *supra* note 307 (stating that the ''non-participation requirement does not prevent initiating members from canceling of modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor'').

[311] *See* MIAX11(a) Request Letter, *supra* note 308.

[312] In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release.

[313] *See* MIAX 11(a) Request Letter, *supra* note 308.

[314] 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. *See* 17 CFR 240.11a2–2(T)(d). *See also* 1978 Release, *supra* note 307 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[315] *See* MIAX 11(a) Request Letter, *supra* note 308.

[316] *See* MIAX Rule 515.

[317] *See* MIAX Rule 515(c)(1)(iii).

pause the market for a period of time not to exceed one second to allow additional Marker Maker orders and quotes and other market participant orders to be submitted.

At the start of the Liquidity Refresh Pause, the MIAX system will broadcast a message to subscribers of MIAX's data feeds, providing a description of the option and the size and side of the order or quote.[318] During the pause, the system will display the remainder of the initiating order at the original NBBO price and, on the opposite side of the market, it will display MIAX's next bid or offer as non-firm.[319]

All market participants may respond to the broadcast message during the Liquidity Refresh Pause.[320] During the Liquidity Refresh Pause, if MIAX receives a new order or quote on the opposite of the market from the initiating order's remaining contracts that locks or crosses the original NBBO, MIAX will immediately execute the remaining contracts at the original NBBO price, provided it would not trade through the current NBBO.[321] If MIAX receives a new order or quote on the same side of the market as the initiating order's remaining contracts that locks or crosses the original NBBO, MIAX will add the new order or quote to the MBBO size and disseminate the updated MBBO.[322] The initiating order and any new orders or quotes on the same side of the market received during the Liquidity Refresh Pause will be processed in the order in which they were received.[323]

At the end of the Liquidity Refresh Pause, if there are still unexecuted contracts remaining in the initiating order or any new interest on the same side of the market, the MIAX system will execute the remaining contracts in accordance with MIAX's ''price protection'' process, which ensures that the execution of remaining contracts is limited to only one minimum price variation (''MPV'') inferior to the original NBBO price, provided it does not trade through the current NBBO.[324] Specifically, if the next MIAX bid or offer is only one MPV inferior to the original NBBO, the initiating order's remaining contracts will be immediately executed at the next MIAX bid or offer up to the remaining contracts or the size of the MIAX bid or offer, whichever is less, provided the execution does not trade at a price inferior to the current NBBO.[325] If the next MIAX bid or offer is more than one MPV inferior to the original NBBO, then the initiating order will be handled depending on whether the limit price of the initiating order crosses the original NBBO by one or more MPVs. In particular, if the initiating order is a limit order whose limit price crosses the original NBBO by more than one MPV or if it is a market order, the remaining unexecuted portion of the initiating order will be cancelled.[326] If the initiating order is a limit order whose limit price crosses the original NBBO by one MPV, the MIAX system will display and book the initiating order at its limit price. If the limit price would lock or cross the NBBO, then the MIAX system will handle the order in accordance with MIAX's ''managed interest process.'' [327]

Under the ''managed interest process,'' the initiating order will be displayed one MPV away from the current opposite-side NBBO if displaying the order at its limit price would lock or cross the NBBO.[328] Should the NBBO price change to an inferior price level, the initiating order's displayed price will continue to re-price so that it is displayed one MPV away from the new NBBO until the order reaches its original limit price, is fully executed, or is cancelled.[329] However, while displaying the initiating order one MPV away from the opposite-side NBBO, the initiating order will be placed on the MIAX book at a price that locks the current opposite-side NBBO.[330] If MIAX receives a new order or quote on the opposite side of the market from the initiating order that could be executed, the MIAX system will immediately execute the remaining contracts to the extent possible at the initiating order's current booked bid or offer price, provided that it does not trade through the current NBBO.[331]

In its comment letter, ISE requests that MIAX clarify the operation of MIAX Rule 515, with reference to the execution price of a resting order that has a non-displayed execution price, including confirmation that the order would not be executed at a price that would trade through the NBBO.[332] ISE further requests clarification as to how certain orders are re-priced, including pursuant to MIAX Rule 515(c)(2) and (d) and whether those rules contemplate that an order will be continuously re-priced, or only re-priced once.[333] NASDAQ asked a question similar to ISE concerning whether the managed interest process would result in a resting order being re-priced only once or

[318] *See* MIAX Rule 515(c)(1)(iii)(A).

[319] *See id. See also* Phlx Rule 1082a(ii)(B)(3) (dissemination of non-firm quotes on opposite side of initiating order during Quote Exhaust timer); Securities Exchange Act Release No. 66315 (February 3, 2012), 77 FR 6828 (February 9, 2012) (Phlx–2012–12) (immediately effective filing to display non-firm quotes in conjunction with Quote Exhaust process).

[320] *See* MIAX Rule 515(c)(1)(iii)(A)(1)(a).

[321] *See* MIAX Rule 515(c)(1)(iii)(A)(1)(b).

[322] *See* MIAX Rule 515(c)(1)(iii)(A)(1)(c). If MIAX receives an IOC or a FOK order on the same side of the market as the initiating order's remaining contracts, the MIAX system will immediately cancel the IOC and FOK orders. If MIAX receives an AOC order on the same side of the market as the initiating order's remaining contracts, the MIAX system will immediately reject the AOC order. If MIAX receives an ISO on the same side of the market as the initiating order's remaining contracts, the Liquidity Refresh Pause will be terminated early and the initiating order and any new orders received during the pause will be processed in the order in which they were received. *See* MIAX Rule 515(c)(1)(iii)(A)(1)(e)–(g).

[323] *See* MIAX Rule 515(c)(1)(iii)(A)(1)(c). If all of the remaining contracts in the initiating order and any new orders or quotes on the same side of the market received during the Liquidity Refresh Pause are traded or cancelled during the Liquidity Refresh Pause, the Liquidity Refresh Pause will be terminated early and normal trading will resume. *See* MIAX Rule 515(c)(1)(iii)(A)(1)(d).

[324] *See* MIAX Rule 515(c)(1)(iii)(A)(2) and MIAX Form 1 Application, Exhibit E.

[325] If there are still contracts remaining from the initiating order, then the order will be handled pursuant to subparagraphs (1) or (2) of MIAX Rule 515(c)(1)(iii)(A)(2)(a), depending on whether the limit price of the initiating order crosses the original NBBO by one MPV or more.

[326] *See* MIAX Rule 515(c)(1)(iii)(A)(2)(b)(2).

[327] *See* MIAX Rule 515(c)(1)(iii)(A)(2)(b)(1). The ''managed interest process'' is set forth in MIAX Rule 515(c)(2). In addition to its potential use at the end of the Liquidity Refresh Pause, the ''managed interest process'' would be used more broadly for orders, such as Do Not Route orders, that could not be executed or could not be executed in full and could not be displayed at their limit price because that limit price would lock or cross the NBBO. *See* MIAX Rule 515(c)(2) (noting specifically that the ''managed interest process'' could apply pursuant to Rule 515 subparagraphs (c)(1)(i)A), (c)(1)(ii)(A), (c)(1)(ii)(B)1.a, (c)(1)(ii)(B)2.a, c(1)(iii)(A)2.a.1), (c)(1)(iii)(A)2.b.1), (c)(1)(iii)(B)1.a., and (c)(1)(iii)(B)2.a.).

[328] *See* MIAX Rule 515(c)(2).

[329] *See id. See also* Phlx Rule 1080(m)(iv)(A) (providing a functionally similar process of handling Do Not Route orders, displaying the order one MPV away from the current NBBO, booking the order internally on the Phlx book at a price that would lock the current NBBO, and re-pricing the order until it reaches its limit price in the event the NBBO moves to an inferior level).

[330] *See id.*

[331] See Phlx Rule 1080(m)(iv)(A) (providing that Do Not Route orders that are re-priced to one MPV away from the current NBBO will interact with incoming contra-side orders at the best away market price); see *also, e.g.* Phlx Rule 1082(a)(ii)(B)(3)(d) (providing that if Phlx receives an order or quote on the opposite side of the market from the initiating quote or order during the Quote Exhaust Timer that locks or crosses the reference price at any time during the Quote Exhaust Timer, it will execute immediately against the initiating quote or order at the reference price, which is price at which the initiating order was initially partially executed).

[332] *See* ISE Letter, *supra* note 3, at n. 3. MIAX added the phrase ''provided that the execution price does not violate the current NBBO'' to the place in MIAX Rule 516(f) (which was renumbered to 516(g)) where ISE noted it was missing. *See* MIAX Response Letter, *supra* note 4, at 6.

[333] *See* ISE Letter, *supra* note 3, at n. 3. ISE also asks for clarification as to whether Do Not Route orders will be continuously re-priced, or only re-priced once. *See id.* at n. 2.

dynamically as the away markets move.[334]

In response, MIAX revised several provisions in MIAX Rule 515 to clarify the execution price for a resting non-displayed order and to clarify the circumstances under which such orders are re-priced and the circumstances in which the booked price would differ from the NBBO.[335] For example, MIAX amended MIAX Rule 515(c)(2) to clarify that orders in the managed interest process are continuously re-priced.[336] MIAX also clarified in additional spots in MIAX Rules 515, 516, and 529 that such orders will not be executed at a price that would trade through the NBBO.[337]

In addition, NASDAQ notes that MIAX Rule 515 contains a number of situations where the rule provides that a posted order will immediately execute any remaining contracts when an inbound order comes into the MIAX system; however, MIAX's rule does not address what happens if the inbound order does not contain sufficient size to fully execute against the resting order.[338] In response, MIAX revised Rules 515(c) and 515(d) as well as 529(b)(2) to clarify what happens in such situations if an inbound order comes into the MIAX system where such inbound order contains less than the size of the posted order.[339] Specifically, MIAX will disseminate a revised MBBO that reflects the incoming order's remaining size and price.[340] For example, when MIAX is alone at the NBBO and utilizes the Liquidity Refresh Pause, if unexecuted contracts remain from an initiating order, MIAX would revise its MBBO to reflect the balance of the unexecuted order.[341]

Route Timer. MIAX also has proposed to subject Public Customer [342] orders to a ''Route Timer'' when it receives a route-eligible Public Customer order that cannot be filled on MIAX.[343] Specifically, if MIAX receives a Public Customer order (''initiating order'') that is marketable against the NBBO on an away market (''ABBO'') and MIAX is not at the NBBO, or MIAX's disseminated market is equal to the ABBO but MIAX has insufficient size to satisfy the initiating order,[344] the order may be subject to a Route Timer not to exceed one second.[345] During the Route Timer, Market Makers and other market participants may interact with the initiating order before MIAX routes the order to an away market or otherwise handles the order in accordance with MIAX Rule 515 or 529, as discussed below.

Like the Liquidity Refresh Pause discussed above, when the Route Timer is activated, MIAX will broadcast a notification (''Route Notification'') to subscribers of MIAX's data feeds, providing the size and side of the option.[346] During the timer, the MIAX system will display and book the initiating order at its limit price. However, if the limit price locks or crosses the current opposite side NBBO, the system will display the initiating order one MPV away from the current opposite side NBBO and book the initiating order at price that will internally lock the current opposite side NBBO.[347] The initiating order will remain available for execution up to its original bid or down to its original offer.[348] MIAX will display its next bid or offer on the opposite side of the market from the initiating order as non-firm.[349]

During the Route Timer, if MIAX receives a new order or quote on the opposite side of the market from the initiating order that can be executed, the MIAX system will immediately execute the remaining contracts at the initiating order's current booked bid or offer price,[350] provided that the execution price does not trade through the current NBBO.[351] If MIAX receives orders or quotes on the same side of the market as the initiating order, such new orders or quotes will join the initiating order in the Route Timer, and the MIAX system will disseminate an updated MBBO that includes the new order or quote's size.[352] If there is a change in the ABBO during the Route Timer that would allow the initiating order to trade on MIAX at the revised NBBO, the Route Timer will be cancelled and regular trading will resume.[353]

At the end of the Route Timer, if necessary, the MIAX system will route ISO orders to away markets disseminating the NBBO.[354] If, after routing to away markets, additional contracts remain to be executed from the initiating order, the MIAX system will handle the remaining interest in accordance with MIAX Rule 515.[355]

Immediate Routing. In addition, in limited circumstances where a number of criteria are met, certain Public Customer orders that are eligible for routing could be routed immediately without being subject to the Route Timer (''Immediate Routing'').[356] These criteria generally require that a Public Customer order be significantly greater in size than the size of the NBBO posted at away markets and must be received by MIAX at a time when MIAX has significant interest posted at one MPV inferior to the NBBO at away markets. Specifically, an incoming Public Customer order (''initiating order'') will be eligible for Immediate Routing if: (i) The initiating order's limit price crosses the opposite side NBBO; (ii) the MBBO is inferior to the NBBO on the opposite

[334] *See* NASDAQ Letter, *supra* note 3, at 2.

[335] *See* MIAX Response Letter, *supra* note 4, at 5–6.

[336] *See id.*

[337] *See id.*

[338] *See* NASDAQ Letter, *supra* note 3, at 4.

[339] *See* MIAX Response Letter, *supra* note 4, at 6–7.

[340] *See* MIAX Rules 515(d), 515(c)(1)(iii)(A)(1)(b), and 529(b)(2)(i).

[341] *See* MIAX Rule 515(c)(1)(iii)(A)(1)(b).

[342] *See supra* note 207.

[343] Orders with certain contingencies, such as IOC orders, and orders marked with a ''do not route'' qualifier are not eligible for routing. *See also infra* notes 359—363 and accompanying text (concerning ISE's comment regarding the proposed rule's limited applicability to Priority Customers) and Amendment No. 1 (in which MIAX revised the rule to apply to the broader category of Public Customers).

[344] The Route Timer will be utilized when MIAX is not at the NBBO, or is at the NBBO along with other markets but does not have sufficient size to execute a routable Public Customer initiating order in full. In contrast, the Liquidity Refresh Pause, discussed above, will be used when MIAX is the only market at the NBBO. *See* MIAX Rule 515(c)(1)(iii). The Route Timer is applicable only for Public Customer orders that are routable but do not meet the criteria for immediate routing discussed below. *See* MIAX Rule 529(b)(2)(i).

[345] *See* MIAX Rule 529(b)(2). Orders that meet certain criteria may be eligible for immediate routing rather than the one second Route Timer, as discussed further below. *See infra* notes 356—357 and accompanying text.

[346] *See* MIAX Rule 529(b)(2)(i). *See also* Amendment No. 1 (in which MIAX removed rule text from Rule 529(b)(2)(i) that also would have provided the NBBO price on the opposite side of the market from the order in the Route Notification).

[347] The internally locked price will not be visible to any participant.

[348] *See* MIAX Rule 529(b)(2)(i).

[349] *See id. See also supra* note 319.

[350] *See supra* note 331.

[351] *See id.*

[352] *See* MIAX Rule 529(b)(2)(ii).

[353] *See* MIAX Rule 529(b)(2)(ii). In addition, if, during the Route Timer, the initiating order and all interest on the same side of the market is traded in full or cancelled, the Route Timer will be terminated.

[354] *See* MIAX Rule 529(b)(2)(iii). At the end of the Route Timer, same side orders or quotes will be handled in the order in which they were received by MIAX. *See* MIAX Rule 529(b)(2)(ii).

[355] *See* MIAX Rule 529(b)(2)(iii). MIAX Rule 515 is the general rule governing execution of orders and quotes. It provides a number of different provisions describing how the MIAX system will handle orders that cannot be executed in part or in full. In accordance with Rule 515, depending on a variety of factors, orders may be cancelled, handled in accordance with the ''managed interest process,'' or subject to the Liquidity Refresh Pause, among others. *See generally* MIAX Rule 515.

[356] *See* MIAX Rule 529(b)(1). *See also infra* notes 359—363 and accompanying text (concerning ISE's comment regarding the proposed rule's limited applicability to Priority Customers) and Amendment No. 1 (in which MIAX revised the rule to apply to the broader category of Public Customers).

side of the market by one MPV; (iii) the displayed NBBO is not crossed; (iv) the initiating order size is equal to or greater than three times the total size of the away markets represented in the opposite side ABBO; (v) the size of the quotes and orders at the MBBO combined with the total size of the ABBO on the opposite side of the market are equal to or greater than one half the size of the initiating order; (vi) MIAX's disseminated market includes a bid of greater than zero with a size of greater than zero if the order is a sell order; and (vii) the size of MIAX's disseminated market is equal to or greater than three times the total size of the away markets represented in the opposite side ABBO.[357] If a Public Customer order meets the aforementioned criteria, the MIAX system will immediately route ISO orders priced at the ABBO to the away markets disseminating prices better than the MBBO.[358]

In its comment letter, ISE discusses MIAX Rules 515(c) and 529 and notes that MIAX would only route Priority Customer Orders but not other types of public customer orders, like Professional orders.[359] ISE questions whether this distinction is consistent with the Intermarket Linkage Plan and the Act.[360] In addition, ISE requests clarification on the use of the terms ''NBBO'' and ''ABBO'' in MIAX Rules 515 and 529, respectively.[361] In response, MIAX revised its Route Timer provisions in MIAX Rules 529 (Order Routing to Other Exchanges) and 503 (Openings on the Exchange) to change all references from ''Priority Customer Order'' to ''Public Customer Order.'' [362] The term ''Public Customer'' is defined in MIAX Rule 100 to mean a person that is not a broker or dealer in securities.[363] Accordingly, MIAX has addressed ISE's comment by broadening the types of interest that it will route, as ISE suggested, to include all Public Customer interest, which term includes Professional Customers, in a manner that is consistent with the Intermarket Linkage Plan and the Act.

The Commission believes that MIAX's proposed exposure and routing mechanisms, including the Liquidity Refresh Pause, Route Timer, and Immediate Routing criteria, are consistent with the Act. Several exchanges have adopted rules that provide for substantially similar exposure functionalities [364] that afford an opportunity for members to electronically ''step up'' and match a better-priced bid or offer available on another exchange, rather than immediately sending orders to other exchanges for execution.[365]

The Commission believes that MIAX's proposed Liquidity Refresh Pause is consistent with the Act. The rules governing MIAX's Liquidity Refresh Pause are substantially similar to those that the Commission approved for Phlx's ''Quote Exhaust'' process.[366] However, unlike MIAX, Phlx does not broadcast a message during its Quote Exhaust Timer. The Commission has, however, approved other similar broadcast messages for dissemination during order exposure or flash-type processes on other exchanges.[367] Further, MIAX's Liquidity Refresh Pause will limit the incoming order's execution price to one MPV inferior to the original NBBO price.[368] The Commission believes that this ''price protection'' functionality of MIAX's Liquidity Refresh Pause can benefit investors by ensuring that, should the NBBO price move to an inferior price during the one second (or less) pause, a limit will be imposed on how far away from the original NBBO price the initiating order may be executed; specifically, it may only be executed one MPV from the original NBBO price. In addition, an incoming order will not receive an execution pursuant to the Liquidity Refresh Pause process if such order would trade through the then-current NBBO. Further, market participants may utilize an IOC or FOK order to avoid having MIAX potentially subject their order to the Liquidity Refresh Pause process.[369]

Pursuant to MIAX's Immediate Routing process, orders will have to meet a number of criteria to be eligible for immediate routing, as described above. As such, many, if not most, orders likely will be subject to the one second Route Timer, rather than immediately routing to an away exchange displaying the NBBO. MIAX, however, is not required to route orders to away exchanges. Further, market participants may avoid the Route Timer by utilizing an IOC or FOK Order.

In addition, broker-dealers have a duty of best execution.[370] A broker-dealer must carry out a regular and rigorous review of the quality of the options markets to evaluate its best execution policies, including the determination as to which options market it routes customer order flow.[371]

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[357] *See* MIAX Rule 529(b)(1).

[358] *See id.* If there are still contracts remaining to be executed from the initiating order after routing, the remaining interest will be handled in accordance with MIAX Rule 515.

[359] *See* ISE Letter, *supra* note 3, at 3.

[360] *See id.*

[361] *See id.* at n. 7. MIAX notes that the NBBO is the combined best bid and best offer from both the ABBO (all markets excluding MIAX) and the MBBO (MIAX's best bid and best offer). *See* MIAX Response Letter, *supra* note 4, at 8–9. MIAX believes that the terms are used correctly in MIAX Rules 515 and 529. *See* MIAX Response Letter, *supra* note 4, at 7.

[362] *See* MIAX Response Letter, *supra* note 4, at n. 35.

[363] *See* MIAX Rule 100.

[364] *See, e.g.,* ISE Rule 803, Supplementary Material .02 and Securities Exchange Act Release Nos. 57812 (May 12, 2008), 73 FR 28846 (May 19, 2008) (SR–ISE–2008–28) and 58038 (June 26, 2008), 73 FR 38261 (July 3, 2008) (SR–ISE–2008–50); and CBOE Rule 6.14A(b), HAL.

[365] The Commission notes that it has proposed changes to Rule 602 of Regulation NMS that may affect these electronic ''flash'' mechanisms, if adopted. *See* Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632, 48633 (September 23, 2009) (File No. S7–21–09).

[366] *See* Phlx Rule 1082(a)(ii)(B)(3). *See also* Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR–Phlx–2009–32) (approving Quote Exhaust process) and *supra* note 319.

[367] *See, e.g.,* CBOE Rule 6.14A, Hybrid Agency Liaison (''HAL''). CBOE sends out an ''exposure message'' for orders received by its HAL system to electronically expose the order at the NBBO price.

[368] Phlx's rule does not include a similar provision. Phlx Rule 1082(a)(ii)(B)(3)(f) provides that the system will conduct an ''Acceptable Price Range'' test to determine whether there is a valid next available price at which the system may execute the remaining unexecuted contracts. *See* Phlx Rule 1082(a)(ii)(B)(3)(f).

[369] *See* MIAX Rules 515(c)(1), 515(e), and 515(f).

[370] A broker-dealer has a legal duty to seek to obtain best execution of customer orders. *See, e.g., Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 135 F.3d 266, 269–70, 274 (3d Cir.), cert. denied, 525 U.S. 811 (1998); *Certain Market Making Activities on Nasdaq,* Securities Exchange Act Release No. 40900 (Jan. 11, 1999) (settled case) (citing *Sinclair* v. *SEC,* 444 F.2d 399 (2d Cir. 1971); *Arleen Hughes,* 27 SEC 629, 636 (1948), aff'd sub nom. *Hughes* v. *SEC,* 174 F.2d 969 (DC Cir. 1949)). *See also Order Execution Obligations,* Securities Exchange Act Release No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) (''Order Handling Rules Release''). A broker-dealer's duty of best execution derives from common law agency principles and fiduciary obligations, and is incorporated in SRO rules and, through judicial and Commission decisions, the antifraud provisions of the federal securities laws. *See* Order Handling Rules Release, 61 FR at 48322. *See also Newton,* 135 F.3d at 270. The duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, *i.e.,* at the best reasonably available price. Newton, 135 F.3d at 270. *Newton* also noted certain factors relevant to best execution—order size, trading characteristics of the security, speed of execution, clearing costs, and the cost and difficulty of executing an order in a particular market. *See id.* at 270 n.2 (citing Payment for Order Flow, Exchange Act Release No. 33026 (Oct. 6, 1993), 58 FR 52934, 52937–38 (Oct. 13, 1993) (Proposed Rules)). *See In re E.F. Hutton & Co.,* Securities Exchange Act Release No. 25887 (July 6, 1988). *See also* Securities Exchange Act Release No. 34902 (October 27, 1994), 59 FR 55006, 55008–55009 (November 2, 1994) (''Approval of Payment for Order Flow Final Rules'). *See also* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''NMS Adopting Release''), at 37537 (discussing the duty of best execution).

[371] *See* NMS Adopting Release, *supra* note 370, at 37538. *See also* Securities Exchange Act Release

The protection against trade-throughs supports the broker-dealer's duty of best execution by helping ensure that customer orders are not executed at prices inferior to the best quotations, but it does not supplant or diminish the broker-dealer's responsibility for achieving best execution, including its duty to evaluate the execution quality of markets to which it routes customer orders.[372] Thus, to meet their best execution obligations, broker-dealers will need to consider and evaluate the functioning of the MIAX routing mechanisms and the quality of any resulting executions in making their determination of whether to route customer orders to MIAX.

D. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.[373] Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with federal securities laws and the rules of the exchange.[374]

MIAX rules codify MIAX's disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members' compliance with its rules and the federal securities laws.[375] MIAX's rules permit it to sanction members for violations of its rules and violations of the federal securities laws by, among other things, expelling or suspending members; limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with MIAX rules.[376]

MIAX's disciplinary and oversight functions will be administered in accordance with Chapter X of the MIAX rules, which governs disciplinary actions. Unless delegated to another SRO pursuant to the terms of an effective 17d–2 plan,[377] MIAX regulatory staff (including regulatory staff of another SRO that may be acting on MIAX Exchange's behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to MIAX rules.[378]

Upon a finding of probable cause of a violation within the disciplinary jurisdiction of MIAX Exchange and where further proceedings are warranted,[379] MIAX will conduct a hearing on disciplinary matters before a professional hearing officer[380] and two members of the Business Conduct Committee[381] (the ''Panel'').[382] The MIAX member (or their associated person) or the MIAX Exchange regulatory staff may petition for review of the decision of the Panel by the MIAX Exchange Board.[383] Any review would be conducted by the MIAX Exchange Board or a committee thereof composed of at least three Directors of the MIAX Exchange Board[384] (whose decision must be ratified by a majority of the MIAX Exchange Board) and such decision will be final.[385] In addition, the MIAX Exchange Board on its own motion may order review of a disciplinary decision.[386]

Appeals from any determination that impacts access to MIAX, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter XI of the MIAX Rules. MIAX's Chapter XI applies to persons economically aggrieved by any of the following actions of MIAX including, but not limited to: (a) Denial of an application to become a Member; (b) barring a person from becoming associated with a Member; (c) limiting or prohibiting services provided by the MIAX or services of any exchange member.[387]

Any person aggrieved by an action of MIAX within the scope of the Chapter XI may file a written application to be heard within thirty days[388] after such

No. 49175 (February 3, 2004), 69 FR 6124, 6128 (February 9, 2004) (''Options Concept Release'').

[372] *See* NMS Adopting Release, *supra* note 370, at 37538.

[373] *See* 15 U.S.C. 78f(b)(1).

[374] *See id.*

[375] *See* MIAX Rule 1000.

[376] *See id. See also* CBOE Rule 17.1(a) and ISE Rule 1600(a) (containing identical provisions).

[377] *See supra* note 112 (concerning the 17d–2 plans to which MIAX has committed to join).

[378] *See* MIAX Rules 1002 and 1004. As noted above, MIAX has entered into a RSA with CBOE under which CBOE will perform certain regulatory functions on behalf of MIAX. MIAX may perform some or all of the functions specified in the Chapter X of the MIAX Rules. *See also* MIAX Rule 1015. CBOE will: assist MIAX in conducting market surveillance and investigations of potential violations of MIAX rules and/or federal securities laws related to activity on MIAX ; conduct examinations related to MIAX members' conduct on MIAX; assist MIAX with disciplinary proceedings pursuant to MIAX rules, including issuing charges and conducting hearings; and provide dispute resolution services to MIAX members on behalf of MIAX, including operation of MIAX's arbitration program. *See supra* notes 113—114 and accompanying text.

[379] *See* MIAX Rule 1004. If there is probable cause for finding a violation, MIAX Exchange regulatory staff will prepare a statement of charges including the allegations and specifying the provisions of the Act and/or MIAX Exchange rules, regulations or policies thereunder alleged to have been violated by the MIAX member or associated person. The CRO must approve the statement of charges.

[380] *See* MIAX Rule 1015, Interpretation and Policy .01. As noted above, MIAX has entered into a RSA with CBOE to provide certain regulatory functions, including providing professional hearing officers. Under MIAX Rule 1006(a), the professional hearing officer is designated as the Chairman of the Panel. Under MIAX Rule 1006(e), the Panel Chairman has the sole responsibility to determine the time and place of all meetings of the Panel, and make all determinations with regard to procedural or evidentiary matters, as well as prescribe the time within which all documents, exhibits, briefs, stipulations, notices or other written materials must be filed where such is not specified in MIAX rules.

[381] In Amendment No. 1, MIAX proposed new By-Law 4.7 to include additional specifics of the Business Conduct Committee, which shall be appointed by the Chairman of the Exchange Board. Specifically, the Committee, which will not be a Board Committee, will have a minimum of three members and will be composed of a number of individuals as determined by the MIAX Chairman, none of whom shall be Directors of MIAX. In addition, at least one member of the Business Conduct Committee and any panel thereof must be an officer, director or employee of a MIAX member. *See* Amendment No. 1; *see also* MIAX Exchange By-Laws Sections 4.1 and 4.7. *See also* BOX Bylaw 6.08(a) (containing an identical composition for the BOX Hearing Committee).

[382] *See* MIAX Rule 1006. A Panel may make a determination without a hearing and may impose a penalty as to violations that the Member or associated person has admitted or has failed to answer or that otherwise do not appear to be in dispute. *See* MIAX Rule 1008. A Member or associated person alleged to have committed a disciplinary violation may submit a written offer of settlement to the Panel, or CRO if a Panel is not yet been appointed, which the Panel or CRO may accept or reject. If the second offer of settlement is rejected (such decision is not subject to review), a hearing will proceed in accordance with MIAX Rule 1006. *See* MIAX Rule 1009.

[383] *See* MIAX Rule 1010.

[384] Specifically, the Chairman of the MIAX Board, with the approval of the Board, shall appoint an Appeals Committee to preside over all appeals related to disciplinary and adverse action determinations. *See* note 49 and accompanying text (detailing the composition of the Appeals Committee). If the Independent Director serving on the Appeals Committee recuses himself or herself from an appeal, due to conflict of interest or otherwise, the Independent Director may be replaced by a Non-Industry Director for purposes of the applicable appeal if there is no other Independent Director able to serve as the replacement. *See* MIAX Exchange By-Laws Section 4.5(d). *See also* Amended and Restated By-Laws of BATS Exchange, Inc., Section V, Article 6 (specifying a similar Appeals Committee).

[385] *See* MIAX Rule 1010.

[386] *See id.*

[387] *See* MIAX Rule 1100. As noted above, MIAX has entered into a RSA with CBOE under which CBOE will perform certain regulatory functions on behalf of MIAX. CBOE may perform some or all of the functions specified in the Chapter XI of the MIAX Rules. *See supra* note 114. *See also* MIAX Rule 1106.

[388] An applicant may file for an extension of time as allowed by the Chairman of the Business Conduct Committee within thirty days of the MIAX Exchange's action. An application for an extension will be ruled upon by the Chairman of the Business Conduct Committee, and his ruling will be given in writing. Rulings on applications for extensions of time are not subject to appeal. *See* MIAX Rule 1101.

action has been taken.[389] Applications for hearing and review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee.[390] The decision of the hearing panel made pursuant to Chapter XI of the MIAX rules is subject to review by the MIAX Exchange Board, either on its own motion within 30 days after issuance of the decision, or upon written request submitted by the applicant or the President of MIAX Exchange within 15 days after issuance of the decision.[391] The review would be conducted by the MIAX Exchange Board or a committee of the MIAX Exchange Board composed of at least three directors.[392]

The Commission finds that MIAX's proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain MIAX actions, are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act [393] in that they provide fair procedures for the disciplining of members and persons associated with members. The Commission further finds that the proposed MIAX rules are designed to provide MIAX Exchange with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of MIAX.[394]

E. Listing

MIAX does not intend to offer original listings when it commences operations. Instead, MIAX will list and trade only equity options that are listed on other national securities exchanges and cleared by the Options Clearing Corporation. MIAX's listing rules, including the criteria for the underlying securities of the options to be traded, are substantially similar to the rules of other exchanges.[395] The Commission finds that MIAX's proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5), in that they are designed to protect investors and the public interest and to promote just and equitable principles of trade. Before beginning operation, MIAX will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Act (''OLPP''). In addition, before beginning operation, MIAX will need to become a participant in the Options Clearing Corporation.

IV. Exemption From Section 19(b) of the Act With Regard to CBOE and NYSE Rules Incorporated by Reference

MIAX proposes to incorporate by reference certain CBOE rules concerning arbitration. Thus, MIAX arbitration proceedings will be governed by the applicable CBOE arbitration rules. Specifically, as referenced in MIAX Rule 1107 (Arbitration), MIAX proposes to incorporate by reference Chapter XVIII of CBOE's rulebook (CBOE Arbitration Rules).[396] MIAX also proposes in Rule 1502 to incorporate by reference the CBOE or NYSE rules concerning initial and maintenance margin requirements.

In connection with the proposal to incorporate the CBOE and NYSE rules by reference, MIAX requested, pursuant to Rule 240.0–12 under the Act,[397] an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the MIAX rules that are effected solely by virtue of a change to a cross-referenced CBOE or NYSE rules.[398] MIAX proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, MIAX agrees to provide written notice to its members whenever CBOE or NYSE proposes a change to a rule within a cross-referenced category of rules [399] and whenever any such proposed changes are approved by the Commission or otherwise become effective.[400]

Using the authority under Section 36 of the Act,[401] the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.[402] The Commission is hereby granting MIAX's request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MIAX proposes to incorporate by reference. The exemption is conditioned upon MIAX providing written notice to MIAX members whenever CBOE or NYSE proposes to change an incorporated by reference rule. The Commission believes that the exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission and SROs resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.

V. Conclusion

It is ordered that the application of MIAX Exchange for registration as a national securities exchange be, and it hereby is, granted.

It is furthered ordered that operation of MIAX Exchange is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Options Trading.* MIAX Exchange must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; and (4) the Plan of the Options Regulatory Surveillance Authority.

B. *Participation in Multiparty Rule 17d–2 Plans.* MIAX Exchange must become a party to the multiparty Rule 17d–2 agreements concerning options sales practice regulation and market surveillance.

C. *Participation in the Options Clearing Corporation.* MIAX Exchange

[389] The application must include: (1) The action for which review is sought; (2) the specific reasons for the applicant's exception to such action; (3) the relief sought; and (4) whether the applicant intends to submit any documents, statements, arguments or other material in support of the application, with a description of any such materials. *See* MIAX Rule 1101(a).

[390] *See* MIAX Rule 1102. The decision of the hearing panel will be made in writing and sent to the parties to the proceedings. *See* MIAX Rule 1103.

[391] *See* MIAX Rule 1104. The MIAX Exchange Board, or a committee of the MIAX Exchange Board, will have sole discretion to grant or deny either request. *See id.*

[392] *See* MIAX Rule 1104(b). The MIAX Exchange Board or its designated committee may affirm, reverse, or modify in whole or in part, the decision of the hearing panel. The decision of the MIAX Exchange Board or its designated committee would be final, and must be in writing and would be sent to the parties to the proceeding. *See* MIAX Rule 1104(c).

[393] 15 U.S.C. 78f(b)(6) and (b)(7), respectively.

[394] *See* Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

[395] *See, e.g.,* ISE Rule 502 (Criteria for Underlying Securities).

[396] In addition, with respect to pre-dispute arbitration agreements, MIAX Rule 1107(c) provides that CBOE Rule 18.35 would apply to disputes between MIAX members and their customers.

[397] 17 CFR 240.0–12.

[398] *See* Letter from Barbara Comly, General Counsel, MIAX, to Elizabeth M. Murphy, Secretary, Commission, dated November 30, 2012 (''Section 19(b) Exemption Request'').

[399] *See id.*

[400] MIAX will provide such notice through a posting on the same Web site location where MIAX posts its own rule filings pursuant to Rule 19b–4 under the Act, within the required time frame. The Web site posting will include a link to the location on the FINRA or CBOE Web site where FINRA's or CBOE's proposed rule change is posted. *See id.*

[401] 15 U.S.C. 78mm.

[402] *See, e.g.,* DirectEdge Exchanges Order, BATS Order, and BOX Order, supra note 18, and C2 Order, supra note 41. In particular, the BOX Order granted relief for BOX's arbitration rule (which is substantively similar to MIAX's proposed rule), which also incorporates the same FINRA rules that MIAX proposes to incorporate.

must become an Options Clearing Corporation participant exchange.

D. *Participation in the Intermarket Surveillance Group.* MIAX Exchange must join the Intermarket Surveillance Group.

E. *Effective Regulation.* MIAX Exchange must have, and represent in a letter to the staff in the Commission's Office of Compliance Inspections and Examinations that it has, adequate procedures and programs in place to effectively regulate MIAX.

F. *Trade Processing and Exchange Systems.* MIAX Exchange must have, and represent in a letter to the staff in the Commission's Division of Trading and Markets that it has, adequate procedures and programs in place, as detailed in Commission Automation Policy Review guidelines, to effectively process trades and maintain the confidentiality, integrity, and availability of MIAX's systems.[403]

It is further ordered, pursuant to Section 36 of the Act,[404] that MIAX shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the FINRA and CBOE rules that MIAX proposes to incorporate by reference, subject to the conditions specified in this Order.

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29568 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30286; 812–13959]

Cambria Investment Management, L.P. and Cambria ETF Trust; Notice of Application

November 30, 2012.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: Cambria Investment Management, L.P. (''Cambria'') and Cambria ETF Trust (the ''Trust'').

SUMMARY: *Summary of Application:* Applicants request an order that permits: (a) Actively-managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days from the tender of Shares for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; and (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares.

DATES: *Filing Dates:* The application was filed on September 12, 2011, and amended on February 29, 2012, July 9, 2012, and November 13, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 26, 2012, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: 2321 Rosecrans Avenue, Suite 3225, El Segundo, CA 92045.

FOR FURTHER INFORMATION CONTACT: Barbara T. Heussler, Senior Counsel, at (202) 551–6990 or Jennifer L. Sawin, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is registered as an open-end management investment company under the Act and is a statutory trust organized under the laws of Delaware. The Trust will initially offer an actively-managed series, Cambria Shareholder Yield ETF (the ''Initial Fund''). The investment objective of the Initial Fund will be to seek to preserve and grow capital by investing in domestic equity securities and in particular in companies that will generate investment returns through the payment of dividends and through the appreciation of their share price.

2. Cambria, a California limited partnership, will be the investment adviser to the Initial Fund. Cambria is and any other Adviser (as defined below) is or will be registered as an ''investment adviser'' under section 203 of the Investment Advisers Act of 1940 (''Advisers Act''). The Adviser may enter into sub-advisory agreements with investment advisers to act as sub-advisers with respect to the Funds (each, a ''Subadviser''). Any Subadviser will be registered under the Advisers Act or not subject to such registration. A registered broker-dealer under the Securities Exchange Act of 1934 (''Exchange Act''), which may be an affiliate of the Adviser, will act as the distributor and principal underwriter of the Funds (''Distributor'').

3. Applicants request that the order apply to the Initial Fund and any future series of the Trust or of other existing or future open-end management companies that may utilize active management investment strategies (''Future Funds''). Any Future Fund will (a) be advised by Cambria or an entity controlling, controlled by, or under common control with Cambria (each such entity and any successor thereto included in the term ''Adviser''),[1] and (b) comply with the terms and conditions of the application.[2] The

[403] On November 16, 1989, the Commission published its first Automation Review Policy (''ARP I''), in which the Commission created a voluntary framework for SROs to establish comprehensive planning and assessment programs to determine systems capacity and vulnerability. On May 9, 1991, the Commission published its second Automation Review Policy (''ARP II'') to clarify the types of review and reports expected from SROs. *See* Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989) and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991).

[404] 15 U.S.C. 78mm.

[1] For purposes of the requested order, a ''successor'' is limited to an entity that results from a reorganization into another jurisdiction or a change in the type of business organization.

[2] All entities that currently intend to rely on the order are named as applicants. Any entity that

Continued

Initial Fund and Future Funds together are the ''Funds''. Each Fund will operate as an exchange-traded fund (''ETF''). In addition to the instruments described above, each Fund reserves the right to invest in other instruments, including short sales (''Short Positions''). Each Fund will consist of a portfolio of securities (including fixed income securities and/or equity securities) and/or currencies traded in the U.S. or in non-U.S. markets and other assets (''Portfolio Instruments'').[3] To the extent consistent with other investment limitations, the Funds may invest in ETFs as well as shares of certain exchange-traded products that are not registered investment companies,[4] cash and cash equivalents, mortgage- or asset-backed securities, including ''to-be-announced transactions'' (''TBA Transactions''),[5] and may engage in forward commitment transactions.[6] Funds may also invest in ''Depositary Receipts''.[7] A Fund will not invest in any Depositary Receipts that the Adviser, or Subadviser as applicable, deems to be illiquid or for which pricing information is not readily available. The Funds might include one or more ETFs which invest in other open-end and/or closed-end investment companies and/or ETFs.[8]

4. Applicants also request that any exemptions under section 12(d)(1)(J) of the Act from sections 12(d)(1)(A) and (B) apply to: (1) Any Fund that is currently or subsequently part of the same ''group of investment companies'' as the Initial Fund within the meaning of section 12(d)(1)(G)(ii) of the Act as well as any principal underwriter for the Fund and any Brokers selling Shares of a Fund to an Investing Fund, as defined below; and (2) each management investment company or unit investment trust registered under the Act that is not part of the same ''group of investment companies'' as the Funds, and that enters into a FOF Participation Agreement (as defined below) with a Fund (such management investment companies are referred to herein as ''Investing Management Companies,'' such unit investment trusts are referred to herein as, ''Investing Trusts,'' and Investing Management Companies and Investing Trusts together are referred to herein as ''Investing Funds'').[9] Investing Funds do not include the Funds.

5. Applicants anticipate that a Creation Unit will consist of at least 25,000 Shares and the price of a Share will range from $20 to $200. All orders to purchase Creation Units must be placed with the Distributor by or through a party (''Authorized Participant'') that has entered into a participant agreement with the Distributor and the transfer agent of the Trust with respect to the creation and redemption of Creation Units. An Authorized Participant is either: (a) A broker or dealer registered under the Exchange Act (''Broker'') or other participant in the Continuous Net Settlement System of the National Securities Clearing Corporation (''NSCC''), a clearing agency registered with the Commission and affiliated with the Depository Trust Company (''DTC''); or (b) a participant in the DTC (such participant, ''DTC Participant''). Shares of the Funds will be purchased and redeemed in Creation Units and generally on an ''in-kind'' basis. Except where the purchase or redemption will include cash under the limited circumstances specified below, purchasers will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and shareholders redeeming their Shares will receive an in-kind transfer of specified instruments (''Redemption Instruments'').[10] On any given Business Day,[11] the names and quantities of the instruments that constitute the Deposit Instruments and the names and quantities of the instruments that constitute the Redemption Instruments will be identical, and these instruments may be referred to, in the case of either a purchase or a redemption, as the ''In-kind Basket.'' In addition, the In-kind Basket will correspond *pro rata* to the positions in the Fund's portfolio (including cash positions),[12] except: (a) In the case of bonds, for minor differences when it is impossible to break up bonds beyond certain minimum sizes needed for transfer and settlement; (b) for minor differences when rounding is necessary to eliminate fractional shares or lots that are not tradeable round lots; [13] or (c) TBA Transactions, Short Positions [14] or other positions that cannot be transferred in kind [15] will be excluded from the In-kind Basket.[16] If there is a difference between the net asset value attributable to a Creation Unit and the aggregate market value of the In-kind Basket exchanged for the Creation Unit, the party conveying instruments with the lower value will pay to the other an amount in cash equal to that difference (the ''Balancing Amount'').

6. Purchases and redemptions of Creation Units may be made in whole or in part on a cash basis, rather than in kind, solely under the following circumstances: (a) To the extent there is a Balancing Amount, as described above; (b) if, on a given Business Day, the Fund announces before the open of trading that all purchases, all redemptions or all purchases and redemptions on that day will be made

relies on the order in the future will comply with the terms and conditions of the application. An Investing Fund (as defined below) may rely on the order only to invest in Funds and not in any other registered investment company.

[3] No Fund relying on the order requested by this application will invest in options contracts, futures contracts or swap agreements.

[4] The Funds may invest in exchange-traded products that invest primarily in commodities or currency but otherwise operate in a manner similar to ETFs. The Funds may also invest in exchange-traded notes.

[5] A TBA Transaction is a method of trading mortgage-backed securities. In a TBA Transaction, the buyer and seller agree upon general trade parameters such as agency, settlement date, par amount and price. The actual pools delivered generally are determined two days prior to the settlement date.

[6] In a forward commitment transaction, the buyer/seller enters into a contract to purchase/sell, for example, specific securities for a fixed price at a future date beyond normal settlement time.

[7] Depositary Receipts are typically issued by a financial institution, a ''depositary'', and evidence ownership in a security or pool of securities that have been deposited with the depositary. No affiliated persons of applicants, any Adviser, Subadviser or the Funds will serve as the depositary bank for any Depositary Receipts held by a Fund.

[8] In no case, however, will such a Fund rely on the exemption from Section 12(d)(1) being requested in the application.

[9] Applicants anticipate that there may be Investing Funds that are not part of the same group of investment companies as the Funds, but are subadvised by an Adviser.

[10] The Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the Securities Act. In accepting Deposit Instruments and satisfying redemptions with Redemption Instruments that are restricted securities eligible for resale pursuant to rule 144A under the Securities Act, the Funds will comply with the conditions of rule 144A.

[11] ''Business Day'' is defined to include any day that the Trust is open for business as required by Section 22(e) of the Act.

[12] The portfolio used for this purpose will be the same portfolio used to calculate the Fund's NAV for that Business Day.

[13] A tradeable round lot for a security will be the standard unit of trading in that particular type of security in its primary market.

[14] To the extent required by section 18(f) of the Act, Portfolio Instruments and/or cash held in a Fund's portfolio will be segregated to cover Short Positions in such portfolio. *See,* Securities Trading Practices of Registered Investment companies, Investment Company Act Rel. No. 10666 (Apr. 18, 1979).

[15] This includes instruments that can be transferred in kind only with the consent of the original counterparty to the extent the Fund does not intend to seek such consents.

[16] Because these instruments will be excluded from the In-kind Basket, their value will be reflected in the determination of the Balancing Amount (defined below).

entirely in cash; (c) if, upon receiving a purchase or redemption order from an Authorized Participant, the Fund determines to require the purchase or redemption, as applicable, to be made *entirely in cash;*[17] (d) if, on a given Business Day, the Fund requires all Authorized Participants purchasing or redeeming Shares on that day to deposit or receive (as applicable) cash *in lieu* of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are not eligible for transfer through either the NSCC Process or DTC Process; or (ii) in the case of Funds holding non-U.S. investments (''Global Funds''), such instruments are not eligible for trading due to local trading restrictions, local restrictions on securities transfers, or other similar circumstances; or (e) if the Fund permits an Authorized Participant to deposit or receive (as applicable) cash *in lieu* of some or all of the Deposit Instruments or Redemption Instruments, respectively, solely because: (i) Such instruments are, in the case of the purchase of a Creation Unit, not available in sufficient quantity; (ii) such instruments are not eligible for trading by an Authorized Participant or the investor on whose behalf the Authorized Participant is acting; or (iii) a holder of Shares of a Global Fund would be subject to unfavorable income tax treatment if the holder receives redemption proceeds in kind.[18]

7. Each Business Day, before the open of trading on the national securities exchange as defined in section 2(a)(26) of the Act (''Stock Exchange'') upon which its Shares are listed and traded, the Fund will cause to be published through the NSCC the names and quantities of the instruments comprising the In-kind Basket, as well as the estimated Balancing Amount (if any), for that day. The published In-kind Basket will apply until a new In-kind Basket is announced on the following Business Day, and there will be no intra-day changes to the In-kind Basket, except to correct errors in the published In-kind Basket. The Stock Exchange will disseminate every 15 seconds throughout the trading day through the facilities of the Consolidated Tape Association an amount representing, on a per Share basis, the sum of the current value of the Portfolio Instruments that were publicly disclosed prior to the commencement of trading in Shares on the Stock Exchange.

8. An investor purchasing or redeeming a Creation Unit from a Fund may be charged a fee (''Transaction Fee'') to protect existing shareholders of the Funds from the dilutive costs associated with the purchase and redemption of Creation Units.[19] All orders to purchase Creation Units will be placed with the Distributor by or through an Authorized Participant and the Distributor will transmit all purchase orders to the relevant Fund. The Distributor will be responsible for delivering a prospectus (''Prospectus'') to those persons purchasing Creation Units and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it.

9. Shares will be listed and traded at negotiated prices on the Stock Exchange and traded in the secondary market. Applicants expect that the Stock Exchange specialists (''Specialists'') or market makers (''Market Makers'') will be assigned to Shares. The price of Shares trading on the Stock Exchange will be based on a current bid/offer market. Transactions involving the purchases and sales of Shares on the Stock Exchange will be subject to customary brokerage commissions and charges.

10. Applicants expect that purchasers of Creation Units will include arbitrageurs. Specialists or Market Makers, acting in their unique role to provide a fair and orderly secondary market for Shares, also may purchase Creation Units for use in their own market making activities.[20] Applicants expect that secondary market purchasers of Shares will include both institutional and retail investors.[21] Applicants expect that arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their net asset value per common Share (''NAV'') should ensure that the Shares will not trade at a material discount or premium in relation to their NAV.

11. Shares may be redeemed only if tendered in Creation Units. Redemption requests must be placed by or through an Authorized Participant. As discussed above, redemptions of Creation Units will generally be made on an in-kind basis, subject to certain specified exceptions under which redemptions may be made in whole or in part on a cash basis, and will be subject to a Transaction Fee.

12. Neither the Trust nor any Fund will be marketed or otherwise held out as a ''mutual fund.'' Instead, each Fund will be marketed as an ''actively-managed exchange-traded fund.'' Any advertising material where features of obtaining, buying or selling Creation Units are described or where there is reference to redeemability will prominently disclose that Shares are not individually redeemable and that owners of Shares may acquire Shares from a Fund and tender those Shares for redemption to a Fund in Creation Units only.

13. The Funds' Web site, which will be publicly available prior to the public offering of Shares, will include the Prospectus and additional quantitative information updated on a daily basis, including, on a per Share basis for each Fund, the prior Business Day's NAV and the market closing price or mid-point of the bid/ask spread at the time of the calculation of such NAV (''Bid/Ask Price''), and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Instruments held by the Fund (including Short Positions) that will form the basis for the Fund's calculation of NAV at the end of the Business Day.[22]

[17] In determining whether a particular Fund will sell or redeem Creation Units entirely on a cash or in-kind basis (whether for a given day or a given order), the key consideration will be the benefit that would accrue to the Fund and its investors. Purchases of Creation Units either on an all cash basis or in-kind are expected to be neutral to the Funds from a tax perspective. In contrast, cash redemptions typically require selling portfolio holdings, which may result in adverse tax consequences for the remaining Fund shareholders that would not occur with an in-kind redemption. As a result, tax considerations may warrant in-kind redemptions.

[18] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis in reliance on clause (e)(i) or (e)(ii).

[19] Where a Fund, as described in section I.E.1.a, permits an in-kind purchaser or redeemer to deposit or receive cash in lieu of one or more Deposit or Redemption Instruments, the purchaser or redeemer may be assessed a higher Transaction Fee to offset the transaction cost to the Fund of buying or selling those particular Deposit or Redemption Instruments.

[20] Applicants state that unlike other Stock Exchanges where a Specialist may oversee trading in Shares, on NASDAQ, numerous Market Makers buy and sell Shares for their own accounts. If Shares are listed on NASDAQ, no Specialist will be contractually obligated to make a market in Shares. Rather, under NASDAQ's listing requirements, two or more Market Makers will be registered in Shares and required to make a continuous, two-sided market or face regulatory sanctions. No Market Maker or Specialist will be an affiliated person, or an affiliated person of an affiliated person, of the Funds, except within Section 2(a)(3)(A) or (C) of the Act due to ownership of Shares, as described below.

[21] Shares will be registered in book-entry form only. DTC or its nominee will be the record or registered owner of all outstanding Shares. Beneficial ownership of Shares will be shown on the records of DTC or DTC Participants.

[22] Applicants note that under accounting procedures followed by the Funds, trades made on

Continued

Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities or transactions from any provisions of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an ''open-end company'' as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the holder, upon its presentation to the issuer, is entitled to receive approximately a proportionate share of the issuer's current net assets, or the cash equivalent. Because Shares will not be individually redeemable, applicants request an order that would permit the Trust and any Fund to register as an open-end management investment company and redeem Shares in Creation Units only. Applicants state that investors may purchase Shares in Creation Units from each Fund and redeem Creation Units from each Fund. Applicants further state that because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell Shares in the secondary market at prices that do not vary materially from their NAV.

Section 22(d) of the Act and Rule 22c–1 Under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c–1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Shares will take place at negotiated prices, not at a current offering price described in the Prospectus, and not at a price based on NAV. Thus, purchases and sales of Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c–1 under the Act. Applicants request an exemption under section 6(c) from these provisions, to permit Shares to trade at negotiated prices.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c–1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c–1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices, and (c) assure an orderly distribution system of investment company shares by eliminating price competition from Brokers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Shares to trade in the secondary market at negotiated prices. Applicants state that (a) secondary market trading in Shares does not involve the Funds as parties and cannot result in dilution of an investment in Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity should ensure that the differences between the market price of Shares and their NAV remain immaterial.

Section 22(e) of the Act

7. Section 22(e) of the Act generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. Applicants observe that settlement of redemptions of Creation Units of Global Funds is contingent not only on the settlement cycle of the U.S. securities markets but also on the delivery cycles present in foreign markets in which those Funds invest. Applicants have been advised that, under certain circumstances, the delivery cycles for transferring Portfolio Instruments to redeeming investors, coupled with local market holiday schedules, will require a delivery process of up to 14 calendar days. Applicants therefore request relief from section 22(e) in order to provide payment or satisfaction of redemptions within the maximum number of calendar days required for such payment or satisfaction in the principal local markets where transactions in the Portfolio Instruments of each Global Fund customarily clear and settle, but in all cases no later than 14 calendar days following the tender of a Creation Unit. With respect to Future Funds that are Global Funds, applicants seek the same relief from section 22(e) only to the extent that circumstances exist similar to those described in the application.[23]

8. Applicants submit that Congress adopted section 22(e) to prevent unreasonable, undisclosed or unforeseen delays in the actual payment of redemption proceeds. Applicants state that allowing redemption payments for Creation Units of a Fund to be made within a maximum of 14 calendar days will not lead to unreasonable, undisclosed or unforeseen delays in the redemption

the prior Business Day will be booked and reflected in NAV on the current Business Day. Accordingly, the Funds will be able to disclose at the beginning of the Business Day the portfolio that will form the basis for the NAV calculation at the end of the Business Day.

[23] Applicants acknowledge that no relief obtained from the requirements of section 22(e) will affect any obligations that they have under rule 15c6–1 under the Exchange Act. Rule 15c6–1 requires that most securities transactions be settled within three business days of the trade date.

process and would not be inconsistent with the spirit and intent of section 22(e). Applicants state the statement of additional information (''SAI'') will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days and the maximum number of days, up to 14 calendar days, needed to deliver the proceeds for each affected Global Fund. Except as disclosed in the SAI for a Fund, deliveries of redemption proceeds for Global Funds are expected to be made within seven days. Applicants are not seeking relief from section 22(e) with respect to Global Funds that do not effect creations or redemptions in-kind.

Section 12(d)(1) of the Act

9. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if the securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter, or any other broker or dealer from selling its shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies generally.

10. Applicants request relief to permit Investing Funds (as defined below) to acquire Shares in excess of the limits in section 12(d)(l)(A) of the Act and to permit the Funds, their principal underwriters and any Brokers to sell Shares to Investing Funds in excess of the limits in section 12(d)(l)(B) of the Act. Applicants submit that the proposed conditions to the requested relief are designed to address the concerns underlying the limits in section 12(d)(1), which include concerns about undue influence, excessive layering of fees and overly complex structures.

11. Applicants submit that their proposed conditions address the concerns regarding the potential for undue influence. To limit the control that an Investing Fund may have over a Fund, applicants propose a condition prohibiting the adviser of an Investing Management Company (''Investing Fund Advisor''), sponsor of an Investing Trust (''Sponsor''), any person controlling, controlled by, or under common control with the Investing Fund Advisor or Sponsor, and any investment company or issuer that would be an investment company but for sections 3(c)(l) or 3(c)(7) of the Act that is advised or sponsored by the Investing Fund Advisor, the Sponsor, or any person controlling, controlled by, or under common control with the Investing Fund Advisor or Sponsor (''Investing Fund's Advisory Group'') from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any sub-adviser to an Investing Management Company (''Investing Fund Subadviser''), any person controlling, controlled by, or under common control with the Investing Fund Subadviser, and any investment company or issuer that would be an investment company but for sections 3(c)(l) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Investing Fund Subadviser or any person controlling, controlled by or under common control with the Investing Fund Subadviser (''Investing Fund's Subadvisory Group'').

12. Applicants propose a condition to ensure that no Investing Fund or Investing Fund Affiliate [24] (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an offering of securities during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (''Affiliated Underwriting''). An ''Underwriting Affiliate'' is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Investing Fund Advisor, Investing Fund Subadviser, employee or Sponsor of the Investing Fund, or a person of which any such officer, director, member of an advisory board, Investing Fund Advisor or Investing Fund Subadviser, employee or Sponsor is an affiliated person. An Underwriting Affiliate does not include any person whose relationship to the Fund is covered by section 10(f) of the Act.

13. Applicants propose several conditions to address the concerns regarding layering of fees and expenses. Applicants note that the board of directors or trustees of any Investing Management Company, including a majority of the directors or trustees who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act (''disinterested directors or trustees''), will be required to find that the advisory fees charged under the contract are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract of any Fund in which the Investing Management Company may invest. In addition, an Investing Fund Advisor, trustee of an Investing Trust (''Trustee'') or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Investing Fund Advisor, Trustee or Sponsor or an affiliated person of the Investing Fund Advisor, Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Advisor, Trustee or Sponsor or its affiliated person by a Fund, in connection with the investment by the Investing Fund in the Fund. Applicants also propose a condition to prevent any sales charges or service fees on shares of an Investing Fund from exceeding the limits applicable to a fund of funds set forth in NASD Conduct Rule 2830.[25]

14. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund will be prohibited from acquiring securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

15. To ensure that the Investing Funds understand and comply with the terms and conditions of the requested order, any Investing Fund that intends to invest in a Fund in reliance on the requested order will be required to enter into a participation agreement (''FOF Participation Agreement'') with the Fund. The FOF Participation Agreement

[24] An ''Investing Fund Affiliate'' is defined as the Investing Fund Advisor, Investing Fund Subadviser, Sponsor, promoter and principal underwriter of an Investing Fund, and any person controlling, controlled by or under common control with any of these entities. A ''Fund Affiliate'' is defined as an investment adviser, promoter or principal underwriter of a Fund and any person controlling, controlled by or under common control with any of these entities.

[25] Any references to NASD Conduct Rule 2830 include any successor or replacement rule to NASD Conduct Rule 2830 that may be adopted by FINRA.

will include an acknowledgment from the Investing Fund that it may rely on the order only to invest in the Funds and not in any other investment company.

Sections 17(a)(1) and (2) of the Act

16. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person (''second tier affiliate''), from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines ''affiliated person'' to include any person directly or indirectly owning, controlling, or holding with power to vote, 5% or more of the outstanding voting securities of the other person and any person directly or indirectly controlling, controlled by, or under common control with, the other person. Section 2(a)(9) of the Act defines ''control'' as the power to exercise a controlling influence over the management or policies of a company and provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities. Each Fund may be deemed to be controlled by an Adviser and hence affiliated persons of each other. In addition, the Funds may be deemed to be under common control with any other registered investment company (or series thereof) advised by an Adviser (an ''Affiliated Fund'').

17. Applicants request an exemption under sections 6(c) and 17(b) of the Act from sections 17(a)(1) and 17(a)(2) of the Act to permit in-kind purchases and redemptions of Creation Units by persons that are affiliated persons or second tier affiliates of the Funds solely by virtue of one or more of the following: (a) Holding 5% or more, or in excess of 25% of the outstanding Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest described in (a); or (c) holding 5% or more, or more than 25% of the Shares of one or more Affiliated Funds.[26] Applicants also request an exemption in order to permit a Fund to sell its Shares to, and purchase its Shares from, an Investing Fund and to engage in any accompanying in-kind transactions with certain Investing Funds of which the Funds are affiliated persons or a second-tier affiliates.[27]

18. Applicants assert that no useful purpose would be served by prohibiting such affiliated persons from making in-kind purchases or in-kind redemptions of Shares of a Fund in Creation Units. Both the deposit procedures for in-kind purchases of Creation Units and the redemption procedures for in-kind redemptions will be effected in exactly the same manner for all purchases and redemptions, regardless of size or number. Absent the circumstances discussed in section I.E.1.a of the application, on each Business Day the Deposit Instruments and Redemption Instruments available for a Fund will be the same for all purchasers and redeemers, respectively, and will correspond *pro rata* to the Fund's Portfolio Instruments. Applicants state that the method of valuing Portfolio Instruments held by a Fund is the same as that used for calculating the value of in-kind purchases or redemptions and therefore, creates no opportunity for affiliated persons or the Applicants to effect a transaction detrimental to other holders of Shares of that Fund. Applicants note that any consideration paid for the purchase or redemption of Shares directly from a Fund (including for any affiliated person and including any Investing Fund) will be based on the NAV of the Fund in accordance with policies and procedures set forth in the Fund's registration statement.[28] Applicants do not believe that in-kind purchases and redemptions will result in abusive self-dealing or overreaching of the Fund.

19. Applicants also submit that the sale of Shares to and redemption of Shares from an Investing Fund meets the standards for relief under sections 17(b) and 6(c) of the Act. Applicants also state that the proposed transactions are consistent with the general purposes of the Act and appropriate in the public interest.

Applicants' Conditions

Applicants agree that any order of the Commission granting the requested relief will be subject to the following conditions:

A. Actively-Managed Exchange-Traded Fund Relief

1. As long as a Fund operates in reliance on the requested order, the Shares of the Fund will be listed on a Stock Exchange.

2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Any advertising material that describes the purchase or sale of Creation Units or refers to redeemability will prominently disclose that the Shares are not individually redeemable and that owners of the Shares may acquire those Shares from the Fund and tender those Shares for redemption to the Fund in Creation Units only.

3. The Web site for the Funds, which is and will be publicly accessible at no charge, will contain, on a per Share basis, for each Fund the prior Business Day's NAV and the market closing price or Bid/Ask Price, and a calculation of the premium or discount of the market closing price or Bid/Ask Price against such NAV.

4. On each Business Day, before commencement of trading in Shares on the Stock Exchange, the Fund will disclose on its Web site the identities and quantities of the Portfolio Instruments held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the Business Day.

5. The Adviser or any Subadviser, directly or indirectly, will not cause any Authorized Participant (or any investor on whose behalf an Authorized Participant may transact with the Fund) to acquire any Deposit Instrument for the Fund through a transaction in which the Fund could not engage directly.

6. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of actively managed exchange-traded funds.

B. Section 12(d)(1) Relief

1. The members of the Investing Fund's Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of the Investing Fund's Subadvisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a

[26] Applicants are not seeking relief from section 17(a) for, and the requested relief will not apply to, transactions where a Fund could be deemed an affiliated person, or an affiliated person of an affiliated person, of an Investing Fund because an investment adviser to the Funds is also an investment adviser to an Investing Fund.

[27] Applicants expect most Investing Funds will purchase Shares in the secondary market and will not purchase Creation Units directly from a Fund. To the extent that purchases and sales of Shares occur in the secondary market and not through principal transactions directly between an Investing Fund and a Fund, relief from section 17(a) would not be necessary. However, the requested relief would apply to direct sales of Shares in Creation Units by a Fund to an Investing Fund and redemptions of those Shares. The requested relief is also intended to cover any in-kind transactions that may accompany such sales and redemptions.

[28] Applicants acknowledge that the receipt of compensation by (a) an affiliated person of an Investing Fund, or an affiliated person of such person, for the purchase by the Investing Fund of Shares of the Fund or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Shares to an Investing Fund, may be prohibited by section 17(e)(1) of the Act. The FOF Participation Agreement also will include this acknowledgment.

decrease in the outstanding voting securities of a Fund, the Investing Fund's Advisory Group or the Investing Fund's Subadvisory Group, each in the aggregate, becomes a holder of more than 25 percent of the outstanding voting securities of a Fund, it will vote its Shares of the Fund in the same proportion as the vote of all other holders of the Fund's Shares. This condition does not apply to the Investing Fund's Subadvisory Group with respect to a Fund for which the Investing Fund Subadviser or a person controlling, controlled by or under common control with the Investing Fund Subadviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

2. No Investing Fund or Investing Fund Affiliate will cause any existing or potential investment by the Investing Fund in a Fund to influence the terms of any services or transactions between the Investing Fund or an Investing Fund Affiliate and the Fund or a Fund Affiliate.

3. The board of directors or trustees of an Investing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to assure that the Investing Fund Advisor and any Investing Fund Subadviser are conducting the investment program of the Investing Management Company without taking into account any consideration received by the Investing Management Company or an Investing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

4. Once an investment by an Investing Fund in Shares of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of the Fund (''Board''), including a majority of the disinterested Board members, will determine that any consideration paid by the Fund to the Investing Fund or an Investing Fund Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (ii) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by or under common control with such investment adviser(s).

5. The Investing Fund Advisor, or Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Investing Fund in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under rule 12b–1 under the Act) received from a Fund by the Investing Fund Advisor, or Trustee or Sponsor, or an affiliated person of the Investing Fund Advisor, or Trustee or Sponsor, other than any advisory fees paid to the Investing Fund Advisor, or Trustee, or Sponsor, or its affiliated person by the Fund, in connection with the investment by the Investing Fund in the Fund. Any Investing Fund Subadviser will waive fees otherwise payable to the Investing Fund Subadviser, directly or indirectly, by the Investing Management Company in an amount at least equal to any compensation received from a Fund by the Investing Fund Subadviser, or an affiliated person of the Investing Fund Subadviser, other than any advisory fees paid to the Investing Fund Subadviser or its affiliated person by the Fund, in connection with the investment by the Investing Management Company in the Fund made at the direction of the Investing Fund Subadviser. In the event that the Investing Fund Subadviser waives fees, the benefit of the waiver will be passed through to the Investing Management Company.

6. No Investing Fund or Investing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in an Affiliated Underwriting.

7. The Board of a Fund, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by the Fund in an Affiliated Underwriting, once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Investing Fund in the Fund. The Board will consider, among other things: (i) Whether the purchases were consistent with the investment objectives and policies of the Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interest of shareholders.

8. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings once an investment by an Investing Fund in the securities of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

9. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), an Investing Fund will execute a FOF Participation Agreement with the Fund stating that their respective boards of directors or trustees and their investment advisers, or Trustee and Sponsor, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in shares of a Fund in excess of the limit in section 12(d)(1)(A)(i), an Investing Fund will notify the Fund of the investment. At such time, the Investing Fund will also transmit to the Fund a list of the names of each Investing Fund Affiliate and Underwriting Affiliate. The Investing Fund will notify the Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Fund and the Investing Fund will maintain and preserve a copy of the order, the FOF Participation Agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

10. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Investing Management Company,

including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than duplicative of, the services provided under the advisory contract(s) of any Fund in which the Investing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Investing Management Company.

11. Any sales charges and/or service fees charged with respect to shares of an Investing Fund will not exceed the limits applicable to a fund of funds as set forth in NASD Conduct Rule 2830.

12. No Fund relying on this section 12(d)(1) relief will acquire securities of any investment company or company relying on section 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act, except to the extent permitted by exemptive relief from the Commission permitting the Fund to purchase shares of other investment companies for short-term cash management purposes.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68342; File No. SR–CBOE–2012–114]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

December 3, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 21, 2012, 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. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), 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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Network Access Port fees. Currently, the Exchange only offers 1 Gigabit Ethernet (''1 Gbps'') network access connectivity. However, as of December 1, 2012, the Exchange is moving its trading systems over to the Equinix NY4 facility (''NY4''). In addition to 1 Gbps network access, NY4 has capacity to accommodate 10 Gigabit Ethernet (''10 Gbps'') network access. The Exchange would like to make such a connection available to CBOE market participants. However, the equipment and infrastructure necessary to provide the 10 Gbps connection is more expensive than that necessary to provide a 1 Gbps connection. As such, the Exchange proposes to adopt a $3,000 per month fee for access to a 10 Gbps Network Access Port ($6,000 for Sponsored Users). CBOE market participants will be able to elect to connect to CBOE's trading system via either a 1 Gbps or 10 Gbps Network Access port. Regardless of which is chosen, the Network Access Port fee will be assessed for each port that provides direct access to CBOE's trading system. The Exchange currently charges a different rate for regular access and Sponsored User access, and merely proposes to increase the rates in equal proportion.

Following the move to NY4, CBOE will be retaining some trading systems in Chicago (the ''Disaster Recovery Systems'') in case of the occurrence of some kind of disaster which prevents NY4 from operating. These Disaster Recovery Systems can be accessed via Network Access Ports in Chicago (the ''Disaster Recovery Network Access Ports''). CBOE market participants may maintain Disaster Recovery Network Access Ports in order to be able to connect to the Disaster Recovery Systems in case of such disaster. The fee for a Disaster Recovery Network Access Port will be $250 per month ($500 for Sponsored Users; for connectivity fees, CBOE charges twice the rate for Sponsored Users as for regular access, and therefore merely proposes to apply the same concept to the new Disaster Recovery Network Access Port fees). This amount will allow CBOE to maintain the Disaster Recovery Network Access Ports in case they become necessary.

The Exchange also proposes to amend the reference in its Fees Schedule to its 1-Gbps Network Access Port. Currently, that port fee is listed as for ''1 Gigabyte''. However, ''Gigabyte'' is not the correct term (''Gigabit'' is the correct term) to refer to that manner of access. The Exchange proposes to replace the word ''Gigabyte'' with ''Gbps'', which is the abbreviation of the term ''Gigabit'', in order to use the correct terminology.

The proposed change is to take effect on December 1, 2012.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[3] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[4] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest, and with Section 6(b)(4) of the Act[5], which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78f(b)(4).

among its Trading Permit Holders and other persons using its facilities.

Assessing a higher fee for 10 Gbps connectivity than for 1 Gbps connectivity is reasonable because 10 Gbps connectivity is more robust than 1 Gbps connectivity, and is equitable and not unfairly discriminatory because 10 Gbps connectivity requires more costly equipment and maintenance, and the Exchange must recoup the costs related to providing 10 Gbps connectivity. Further, CBOE market participants may still elect for the less-expensive 1 Gbps connectivity. Finally, the amount of the fee for 10 Gbps connectivity is less than the amount of the fees for 10 Gbps connectivity assessed by other exchanges.[6]

The fee for Disaster Recovery Network Access Ports is reasonable because it will allow CBOE to maintain those ports in case of necessity. The fee for Disaster Recovery Network Access Ports is equitable and not unfairly discriminatory because it will be applied equally to all CBOE market participants wishing to maintain a connection to the Disaster Recovery Systems via a Disaster Recovery Network Access Port (except Sponsored Users).

Assessing higher fees for Sponsored Users is equitable and not unfairly discriminatory because Sponsored Users are able to access the Exchange and use the equipment provided without possessing a trading permit. As such, CBOE Trading Permit Holders who have a trading permit will have a higher level of commitment to transacting business on CBOE and using Exchange facilities than Sponsored Users. Finally, these differences in the amounts for Sponsored Users and regular users maintain the same proportional difference as that for other connectivity fees.

Amending the references in the Fees Schedule to its 1-Gbps Network Access Port from ''1 Gigabyte'' to ''1 Gbps'' removes impediments to and to perfects the mechanism for a free and open market and a national market system, and, in general, protects investors and the public interest by eliminating any confusion that could be caused due to the use of inaccurate terminology.

[6] *See* New York Stock Exchange Price List, page 13 [sic], which lists monthly prices of $12,000–61,500 for different types of 10 Gbps connectivity (along with initial charges of $10,000–50,000) *and* International Securities Exchange Schedule of Fees, page 9 [sic], which lists a low-latency Ethernet network access fee of $7,000 per month.

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 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

The Exchange neither solicited nor received comments on the proposed rule change.

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)[7] of the Act and paragraph (f) of Rule 19b–4[8] 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. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–114 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–CBOE–2012–114. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at CBOE's principal office and on its Internet Web site. 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–CBOE–2012–114, and should be submitted on or before December 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29623 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 C.F.R. 240.19b–4(f).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 68336; File No. SR–NASDAQ–2012–129]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Establish the Retail Price Improvement Program on a Pilot Basis Until 12 Months From the Date of Implementation

December 3, 2012

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is filing with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposed rule change that would adopt new Nasdaq Rule 4780 to establish a Retail Price Improvement (''RPI'') Program (the ''Program'' or ''proposed rule change'') to attract additional retail order flow to the Exchange while also providing the potential for price improvement to such order flow.

The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com/Filings/,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ 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

Background

The Exchange is proposing a one-year pilot program that would add new Nasdaq Rule 4780 to establish an RPI Program to attract additional retail order flow to the Exchange while also providing the potential for price improvement to such order flow. Under the proposed rule change, the Exchange would create a new class of market participant called a Retail Member Organization (''RMO''), which would be eligible to submit certain retail order flow (''Retail Orders'') to the Exchange. As proposed, Nasdaq members (''Members'') will be permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is priced more aggressively than the Protected National Best Bid or Offer (''Protected NBBO'').[3]

Definitions

The Exchange proposes to adopt the following definitions under proposed Nasdaq Rule 4780. First, the term ''Retail Member Organization'' (or ''RMO'') would be defined as a Member (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

Second, the term ''Retail Order'' would be defined as an agency or riskless principal order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price (except in the case of a market order being changed to a marketable limit order) or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

Finally, the term ''Retail Price Improvement Order'' or ''RPI Order'' or collectively ''RPI interest'' would be defined as non-displayed liquidity on the Exchange that is priced more aggressively than the Protected NBBO by at least $0.001 and that is identified as an RPI Order in a manner prescribed by the Exchange.[4] RPI orders can be priced either as an explicitly priced limit order or implicitly priced as relative to the NBBO with an offset of at least $0.001. The price of an RPI Order with an offset would be determined by a Member's entry of the following into the Exchange: (1) RPI buy or sell interest; (2) an offset from the Protected NBBO, if any; and (3) a ceiling or floor price. RPI Orders submitted with an offset would be similar to other peg orders available to Members in that the order is tied or ''pegged'' to a certain price, and would have its price automatically set and adjusted upon changes in the Protected NBBO, both upon entry and any time thereafter. The Exchange expects that RPI sell or buy interest typically would be entered to track the Protected NBBO, that is, RPI Orders typically would be submitted with an offset. The offset would be a predetermined amount by which the Member is willing to improve the Protected NBBO, subject to a ceiling or floor price. The ceiling or floor price would be the amount above or below which the Member does not wish to trade. RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed. The Exchange will also allow Members to enter RPI Orders which establish the exact limit price, which is similar to a non-displayed limit order currently accepted by the Exchange today except the Exchange will accept sub-penny limit prices on RPI Orders in increments of $0.001. The Exchange will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

Members and RMOs may enter odd lots, round lots or mixed lots as RPI Orders and as Retail Orders respectively. As discussed below, RPI Orders will be ranked and allocated according to price and time of entry into the System consistent with Nasdaq Rule 4757 and therefore without regard to whether the size entered is an odd lot, round lot or mixed lot amount. Similarly, Retail Orders will interact with RPI Orders and other price-improving orders available on the Exchange (*e.g.,* non-displayed liquidity priced more aggressively than the NBBO) [5] according to the Priority and Allocation rules of the Program and without regard to whether they are odd

[3] The term Protected Quotation is defined in Chapter XII, Sec. 1(19) and has the same meaning as is set forth in Regulation NMS Rule 600(b)(58). The Protected NBBO is the best-priced protected bid and offer. Generally, the Protected NBBO and the national best bid and offer (''NBBO'') will be the same. However, a market center is not required to route to the NBBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBBO is otherwise not available for an automatic execution. In such case, the Protected NBBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[4] Exchange systems would prevent Retail Orders from interacting with RPI Orders if the RPI Order is not priced at least $0.001 better than the Protected NBBO. The Exchange notes, however, that price improvement of $0.001 would be a minimum requirement and Members could enter RPI Orders that better the Protected NBBO by more than $0.001. Exchange systems will accept RPI Orders without a minimum price improvement value; however, such interest will execute at its floor or ceiling price only if such floor or ceiling price is better than the Protected NBBO by $0.001 or more. Concurrently with this filing, the Exchange has submitted a request for an exemption under Regulation NMS Rule 612 that would permit it to accept and rank the non-displayed RPI Orders. As outlined in the request, the Exchange believes that the minimum price improvement available under the Program, which would amount to $0.50 on a 500 share order, would be meaningful to the small retail investor. *See* Letter from Jeffrey S. Davis, Deputy General Counsel, The NASDAQ Stock Market LLC to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated November 19, 2012 (''Sub-Penny Rule Exemption Request'').

[5] Other price improving liquidity may include, but is not limited to: booked non-displayed orders with a limit price that is more aggressive than the then-current NBBO; midpoint-pegged orders (which are by definition non-displayed and priced more aggressively than the NBBO); non-displayed orders pegged to the NBBO with an aggressive offset. Orders that do not constitute other price improving liquidity include, but are not limited to: orders with a time-in-force instruction of IOC; displayed orders; limit orders priced less aggressively than the NBBO.

lots, round lots or mixed lots. Finally, Retail Orders may be designated as Type 1 or Type 2 without regard to the size of the order.

RPI Orders would interact with Retail Orders as follows. Assume a Member enters RPI sell interest with an offset of $0.001 and a floor of $10.10 while the Protected NBO is $10.11. The RPI Order could interact with an incoming buy Retail Order at $10.109. If, however, the Protected NBO was $10.10, the RPI Order could not interact with the Retail Order because the price required to deliver the minimum $0.001 price improvement ($10.099) would violate the Member's floor of $10.10. If a Member otherwise enters an offset greater than the minimum required price improvement and the offset would produce a price that would violate the Member's floor, the offset would be applied only to the extent that it respects the Member's floor. By way of illustration, assume RPI buy interest is entered with an offset of $0.005 and a ceiling of $10.112 while the Protected NBBO is at $10.11. The RPI Order could interact with an incoming sell Retail Order at $10.112, because it would produce the required price improvement without violating the Member's ceiling, but it could not interact above the $10.112 ceiling. Finally, if a Member enters an RPI Order without an offset (*i.e.,* an explicitly priced limit order), the RPI Order will interact with Retail Orders at the level of the Member's limit price as long as the minimum required price improvement is produced. Accordingly, if RPI sell interest is entered with a limit price of $10.098 and no offset while the Protected NBBO is $10.11, the RPI Order could interact with the Retail Order at $10.098, producing $0.012 of price improvement. The System will not cancel RPI interest when it is not eligible to interact with incoming Retail Orders; such RPI interest will remain in the System and may become eligible again to interact with Retail Orders depending on the Protected NBBO. RPI Orders will not be accepted during halts.

RMO Qualifications and Approval Process

Under proposed Nasdaq Rule 4780(b), any Member could qualify as an RMO if it conducts a retail business or handles retail orders on behalf of another broker-dealer. Any Member that wishes to obtain RMO status would be required to submit: (1) An application form; (2) an attestation, in a form prescribed by the Exchange, that any order submitted by the Member as a Retail Order would meet the qualifications for such orders under proposed Nasdaq Rule 4780(b); and (3) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow.[6]

An RMO would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the Member to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of this rule, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[7]

If the Exchange disapproves the application, the Exchange would provide a written notice to the Member. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Nasdaq Rule 4780(d), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO also could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

Failure of RMO To Abide by Retail Order Requirements

Proposed Nasdaq Rule 4780(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a Member from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the Member. A disqualified RMO could appeal the disqualification as provided in proposed Nasdaq Rule 4780(d) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange.

Appeal of Disapproval or Disqualification

Proposed Nasdaq Rule 4780(d) provides appeal rights to Members. If a Member disputes the Exchange's decision to disapprove it as an RMO under Nasdaq Rule 4780(b) or disqualify it under Nasdaq Rule 4780(c), such Member (''appellant'') may request, within five business days after notice of the decision is issued by the Exchange, that the Retail Price Improvement Program Panel (''RPI Panel'') review the decision to determine if it was correct.

The RPI Panel would consist of the Exchange's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the Chief Executive Officer of Nasdaq. The RPI Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RPI Panel could overturn or modify an action taken by the Exchange and all determinations by the RPI Panel would constitute final action by the Exchange on the matter at issue.

Retail Liquidity Identifier

Under proposed Nasdaq Rule 4780(e), the Exchange proposes to disseminate an identifier when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System (''Retail Liquidity Identifier''). The Retail Liquidity Identifier will be disseminated through consolidated data streams (*i.e.,* pursuant to the Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS, for Tape A and Tape B securities, and the Nasdaq UTP Plan for Tape C securities) as well as through proprietary Exchange data feeds.[8] The

[6] For example, a prospective RMO could be required to provide sample marketing literature, Web site screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[7] The Exchange or another self-regulatory organization on behalf of the Exchange will review an RMO's compliance with these requirements through an exam based review of the RMO's internal controls.

[8] The Exchange notes that the Retail Liquidity Identifier for Tape A and Tape B securities will be disseminated pursuant to the CTA/CQS Plan as soon as the Program, if approved, becomes operational. The identifier will also be available through the consolidated public market data stream

Continued

Retail Liquidity Identifier will reflect the symbol and the side (buy or sell) of the RPI interest, but will not include the price or size of the RPI interest. In particular, CQS and UTP quoting outputs will include a field for codes related to the Retail Liquidity Identifier. The codes will indicate RPI interest that is priced better than the Exchange's Protected Bid or Protected Offer by at least the minimum level of price improvement as required by the Program.

Retail Order Designations

Under proposed Nasdaq Rule 4780(f), an RMO can designate how a Retail Order would interact with available contra-side interest as follows.

As proposed, a Type 1-designated Retail Order would interact with available contra-side RPI Orders and other price improving liquidity but would not interact with other available contra-side interest in the System or route to other markets. The shares remaining from a Type 1-designated Retail Order that do not fully execute against contra-side RPI Orders or other price improving liquidity, if any, would be immediately and automatically cancelled.

A Type 2-designated Retail Order would also interact first with available contra-side RPI Orders and other price improving liquidity, but would also be eligible to interact with other available contra-side interest in the System or optionally route to other market centers pursuant to Rule 4758. Accordingly, the shares remaining from a Type 2-designated Retail Order that do not fully execute against contra-side RPI Orders or other price improving liquidity, if any, would execute against other liquidity available on the Exchange or be routed to other market centers for execution. The remaining unexecuted portion would then be cancelled.

Priority and Order Allocation

Under proposed Nasdaq Rule 4780(g), the Exchange proposes that competing RPI Orders in the same security would be ranked and allocated according to price then time of entry into the System. The Exchange further proposes that executions will occur in price/time priority in accordance with Nasdaq Rule 4757. Any remaining unexecuted RPI interest will remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with proposed Nasdaq Rule 4780(f). The following example illustrates this proposed method:

Protected NBBO for security ABC is $10.00–$10.05
Member 1 enters an RPI Order to buy ABC at $10.015 for 500
Member 2 then enters an RPI Order to buy ABC at $10.02 for 500
Member 3 then enters an RPI Order to buy ABC at $10.035 for 500

An incoming Retail Order to sell 1,000 shares of ABC for $10.00 executes first against Member 3's bid for 500 at $10.035, because it is the best priced bid, then against Member 2's bid for 500 at $10.02, because it is the next best priced bid. Member 1 is not filled because the entire size of the Retail Order to sell 1,000 is depleted. The Retail Order executes against RPI Orders in price/time priority.

However, assume the same facts above, except that Member 2's RPI Order to buy ABC at $10.02 is for 100. The incoming Retail Order to sell 1,000 executes first against Member 3's bid for 500 at $10.035, because it is the best priced bid, then against Member 2's bid for 100 at $10.02, because it is the next best priced bid. Member 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

As a final example, assume the same facts as above, except that Member 3's order was not an RPI Order to buy ABC at $10.035, but rather, a non-displayed order to buy ABC at $10.03. The result would be similar to the result immediately above, in that the incoming Retail Order to sell 1,000 executes first against Member 3's bid for 500 at $10.03, because it is the best priced bid, then against Member 2's bid for 100 at $10.02, because it is the next best priced bid. Member 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

Implementation

The Exchange proposes that all Regulation NMS securities traded on the Exchange would be eligible for inclusion in the RPI Program. The Exchange proposes to limit the Program during the pilot period to trades occurring at prices equal to or greater than $1.00 per share. Toward that end, Exchange trade validation systems would prevent the interaction of RPI buy or sell interest (adjusted by any offset) and Retail Orders at a price below $1.00 per share.[9] For example, if there was RPI buy interest tracking the Protected NBB at $0.99 with an offset of $0.001 and a ceiling of $1.02, Exchange trade validation systems would prevent the execution of the RPI Order at $0.991 with a sell Retail Order with a limit of $0.99. However, if the Retail Order was Type 2 as defined the Program,[10] it would be able to interact at $0.99 with liquidity outside the Program in the Exchange's order book. In addition to facilitating an orderly [11] and operationally intuitive pilot, the Exchange believes that limiting the Program to trades equal to or greater than $1.00 per share during the pilot will enable it better to focus its efforts to monitor price competition and to assess any indications that data disseminated under the Program is potentially disadvantaging retail orders. As part of that review, the Exchange will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.

Comparison to Existing Programs

Proposed Nasdaq Rule 4780 is based on NYSE Rule 107C, governing NYSE's ''Retail Liquidity Program,'' which was recently approved by the Commission and commenced operations on August 1, 2012 [12] and on recently proposed BATS Y-Exchange, Inc. (''BATS'') Rule 11.24.[13] Proposed Nasdaq Rule 4780 is

for Tape C securities. The processor for the Nasdaq UTP quotation stream will disseminate the Retail Liquidity Identifier and analogous identifiers from other market centers that operate programs similar to the RPI Program.

[9] As discussed above, the price of an RPI would be determined by a Member's entry of buy or sell interest, an offset (if any) and a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would track the Protected NBBO.

[10] Type 2 Retail Orders are treated as IOC orders that execute against displayed and non-displayed liquidity in the Exchange's order book where there is no available liquidity in the Program. Type 2 Retail Orders can either be designated as eligible for routing or as non-routable, as described above.

[11] Given the proposed limitation, the pilot Program would have no impact on the minimum pricing increment for orders priced less than $1.00 and therefore no effect on the potential of markets executing those orders to lock or cross. In addition, the non-displayed nature of the liquidity in the Program simply has no potential to disrupt displayed, protected quotes. In any event, the Program would do nothing to change the obligation of exchanges to avoid and reconcile locked and crossed markets under NMS Rule 610(d).

[12] Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) (the ''RLP Approval Order''). In conjunction with the approval of the NYSE Retail Liquidity Program, a nearly identical program was proposed and approved to operate on NYSE MKT LLC (formerly, the American Stock Exchange). For ease of reference, the comparisons made in this section only refer to NYSE Rule 107C, but apply equally to NYSE MKT Rule 107C.

[13] Securities Exchange Act Release No. 67734 (August 27, 2012) 77 FR 53242 (August 31, 2012) (SR–BYX–2012–019).

similar to both BATS Rule 11.24 and NYSE Rule 107C with three key distinctions to the latter.[14] The first distinction is that NYSE Rule 107C includes a class of participant that is registered as a provider of liquidity and provides specific procedures and rules related to such participants and their role in the NYSE RLP. NYSE Rule 107C does permit all participants to submit RPI Orders to NYSE, but provides the specific class of registered retail liquidity providers with execution fees that are lower than fees charged to other participants in exchange for a requirement to maintain RPI Orders on NYSE at least 5% of the trading day.[15] The Exchange believes that equal treatment for all Exchange Members that enter RPI Orders will result in a higher level of competition and maximize price improvement to incoming Retail Orders. Accordingly, the Exchange has not proposed to adopt a special category of retail liquidity provider.

The second distinction between proposed Nasdaq Rule 4780 and NYSE Rule 107C is that the Exchange proposes to in all cases execute incoming Retail Orders against resting RPI Orders *and* other resting non-displayed liquidity to maximize the price improvement available to the incoming Retail Order. As proposed, the Exchange will maintain its strict price/time priority model and will provide all available price improvement to incoming Retail Orders, whether such price improvement is submitted pursuant to the Program or as an order type currently accepted by the Exchange, such as non-displayed orders. In contrast, pursuant to NYSE Rule 107C(k)(1), a Type 1-designated Retail Order, ''will interact only with available contra-side Retail Price Improvement Orders and will not interact with other available contra-side interest in Exchange systems.'' [16] The Exchange is proposing in all cases to provide the maximum price improvement available to incoming Retail Orders. Accordingly, Retail Orders under the Exchange's Program will always interact with available contra-side RPI Orders and any other price improving contra-side interest, in price/time priority consistent with Nasdaq Rule 4780(b). Such ''other'' price improving contra-side interest will of course remain available to all participants, as it is today, while RPI Orders will only be available to RMOs, as described above.

Finally, as proposed the Exchange will provide applicable price improvement to incoming Retail Orders at potentially multiple price levels. In contrast, pursuant to NYSE Rule 107C an incoming Retail Order to NYSE will execute at the single clearing price level at which the incoming order will be fully executed. To illustrate, assume the same facts set forth in the second example above, where Member 2's RPI Order to buy ABC at $10.02 was for 100 shares. Pursuant to NYSE Rule 107C, an incoming Retail Order to sell 1,000 shares at $10.00 would execute first against Member 3's bid for 500 shares, because it is the best priced bid, then against Member 2's bid for 100 shares, because it is the next best priced bid, then against 400 of the 500 shares bid by Member 1. However, rather than executing at each of these price levels for the number of shares available (*i.e.,* 500 shares at $10.035, 100 shares at $10.02 and 400 shares at $10.015), as it would under proposed Nasdaq Rule 4780(b), the Retail Order submitted to NYSE pursuant to NYSE Rule 107C executes at the single clearing price that completes the order's execution, which is $10.015 to complete the entire order to sell 1,000 shares. The Exchange intends to provide all of the price improvement in these examples to the incoming Retail Order, and thus has proposed to execute orders under the Program consistent with its existing price/time market model.

Fee Structure of Program

The Exchange will submit a separate proposal to amend its fee schedule in connection with the proposed RPI Program. Under that proposal, the Exchange expects to charge Members a fee for executions of their RPI Orders against Retail Orders and in turn would provide a credit or free executions to RMOs for executions of their Retail Orders against RPI Orders. The fees and credits for liquidity providers and RMOs will be determined based on experience with the Program in the first several months.

As explained above, the Exchange proposes to execute incoming Retail Orders against all available contra-side interest that will provide price improvement to the Retail Order, including non-displayed orders other than RPI Orders. In the event non-displayed interest priced better than the NBBO other than an RPI Order interacts with a Retail Order, the Exchange anticipates proposing to rebate the Member that entered such non-displayed interest a credit rather than the charge which is imposed for an RPI Order execution. In such cases, the rebate credited to the Member that entered the non-displayed interest may be less than the rebate credited that same Member for an execution against a non-Retail Order.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[17] In particular, the Exchange believes the proposed change furthers the objectives of Section 6(b)(5) of the Act,[18] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and offer the potential for price improvement to retail investors. The Exchange notes that a significant percentage of the orders of individual investors is executed over-the-counter.[19] The Exchange believes that it is appropriate to create a financial incentive to bring more retail order flow to a public market. The Exchange also notes that the Commission recently approved a similar proposal by NYSE

[14] The Exchange has proposed to accept RPIs in a manner similar to the explicitly accepted method at NYSE and NYSE MKT, specifically, with an offset as well as a ceiling or a floor (*i.e.,* the entry of an RPI bid with an offset of $0.015 and a ceiling of $10.04; when the NBBO is $10.02 by $10.04, an incoming sell order would execute against such RPI at $10.035). The Exchange notes that like NYSE and NYSE MKT, Members will be able to submit retail price improving orders with an explicit sub-penny floor or ceiling and no offset, effectively creating a static sub-penny limit order, and the Exchange has proposed rule text to make this ability clear.

[15] NYSE Rule 107C(f).

[16] Moreover, although pursuant to NYSE Rules 107C(k)(2) and 107C(k)(3), a Type 2-designated Retail Order and a Type 3-designated Retail Order can interact with other non-RPI interest in the NYSE systems, such interaction only occurs after a Retail Order first executes against RPI Orders.

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(5).

[19] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

and NYSE MKT.[20] Accordingly, the proposal generally encourages competition between exchange venues. In this connection, the Exchange believes that the proposed distinctions between the Exchange's proposal and the approved programs for NYSE and NYSE MKT, as well as the similar program proposed by BATS, will both enhance competition amongst market participants and encourage competition amongst exchange venues.

The Exchange understands that Section 6(b)(5) of the Act[21] prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business.

While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the RPI Program on an exchange market would result in better prices for retail investors. The Exchange recognizes that sub-penny trading and pricing could potentially result in undesirable market behavior. The Exchange will monitor the Program in an effort to identify and address any such behavior.

The Exchange will separately propose fees applicable to the Program, including fees or rebates for non-displayed orders offering price improvement other than RPI Orders that interact with Retail Orders. The Exchange believes any such proposal to treat such non-displayed orders differently depending on the parties with whom they interact is consistent with Section 6(b)(5) of the Act,[22] which requires that the rules of an exchange are not designed to permit unfair discrimination. The Exchange believes that such a differential pricing structure for non-displayed orders is not unfairly discriminatory. As stated in the NYSE RLP Approval Order, the ''Commission has previously recognized that the markets generally distinguish between individual retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.'' [23] The Exchange's proposed differential pricing structure for non-displayed orders raises substantively identical policy considerations as the rules approved by the Commission in the NYSE RLP Approval Order, which account for the difference of assumed information and sophistication level between different trading participants by providing Retail Orders access to better execution prices as well as more favorable access fees.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which shall occur no later than 90 days after Commission approval of Nasdaq Rule 4780. The Program shall expire on [Date to be determined upon adoption of Nasdaq Rule 4780]. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–129 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–NASDAQ–2012–129. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the

[20] *See* RLP Approval Order, supra note 12.

[21] 15 U.S.C. 78f(b)(5).

[22] 15 U.S.C. 78f(b)(5).

[23] *See* RLP Approval Order, supra note 12, at 40679–40680 (citing Concept Release on Equity Market Structure and approval of an options exchange program related to price improvement for retail orders). Certain options exchanges deploy this same rationale today through pricing structures that vary for a trading participant based on the capacity of the contra-side trading participant. *See, e.g.,* Securities Exchange Act Release No. 67171 (June 8, 2012), 77 FR 35732 (June 14, 2012) (SR–NASDAQ–2012–068) (notice of filing and immediate effectiveness of proposal to modify fees for the NASDAQ Options Market, including certain fees and rebates that are variable depending on the capacity of the contra-party to the transaction); *see also* Securities Exchange Act Release No. 63632 (January 3, 2011), 76 FR 1205 (January 7, 2011) (SR–BATS–2010–038) (notice of filing and immediate effectiveness of proposal to modify fees for BATS Options, including liquidity rebates that are variable depending on the capacity of the contra-party to the transaction).

provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. 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 publicly available. All submissions should refer to File Number SR–NASDAQ–2012–129 and should be submitted on or before December 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[24]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29563 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68338; File No. SR–ICC–2012–22]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Schedule 502 of the ICC Rules To Update the Contract Reference Obligation ISIN Associated With One Single Name Contract

December 3, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 19, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by ICC. ICC filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3)[4] thereunder, 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 the Terms of Substance of the Proposed Rule Change

The purpose of the proposed rule change is to update the Contract Reference Obligation International Securities Identification Number (''Contract Reference Obligation ISIN'') in Schedule 502 of the ICE Clear Credit Rules in order to be consistent with the industry standard reference obligation for one single name contract that ICC currently clears (Kimco Realty Corporation).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC 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. ICC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of these statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

ICC is updating the Contract Reference Obligation ISIN for Kimco Realty Corporation in order to remain consistent with the industry standard reference obligation. Also, the Contract Reference Obligation ISIN update does not require any changes to the ICC risk management framework. The only change being submitted is the update to the Contract Reference Obligation ISIN for Kimco Realty Corporation in Schedule 502 of the ICC Rules.

Section 17A(b)(3)(F) of the Act[5] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions. ICC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to ICC, in particular, with Section 17A(b)(3)(F),[6] because the update to the Contract Reference Obligation ISIN for Kimco Realty Corporation will facilitate the prompt and accurate settlement of securities transactions and contribute to the safeguarding of securities and funds associated with swap transactions which are in the custody or control of ICC or for which it is responsible. ICC is updating the Contract Reference Obligation ISIN for Kimco Realty Corporation in order to ensure that Clearing Participants are informed of the Contract Reference Obligation ISIN update.

B. Self-Regulatory Organization's Statement on Burden on Competition

ICC does not believe the proposed rule change would 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

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(iii)[7] of the Act and Rule 19b–4(f)(3)[8] thereunder because it is concerned solely with the administration of the self-regulatory organization. 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.[9]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ICC–2012–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

[24] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78s(b)(3)(A)(iii).

[8] 17 CFR 240.19b–4(f)(3).

[9] 15 U.S.C. 78s(b)(3)(C).

Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICC–2012–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of ICE Clear Credit and on ICE Clear Credit's Web site at *https://www.theice.com/publicdocs/regulatory_filings/ICEClearCredit_111912.pdf*.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2012–22 and should be submitted on or before December 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29565 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68343; File No. SR–NASDAQ–2012–118]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change To Modify Certain Disclosure Requirements To Require Issuers To Publicly Describe the Specific Basis and Concern Identified by Nasdaq When a Listed Issuer Does Not Meet a Listing Standard and Give Nasdaq the Authority To Make a Public Announcement When a Listed Issuer Fails To Make a Public Announcement

December 3, 2012.

I. Introduction

On October 3, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to modify certain disclosure requirements surrounding a listed issuer's non-compliance with the Exchange's listing rules and give the Exchange the authority to issue a public announcement when a listed issuer fails to do so. The proposed rule change was published in the **Federal Register** on October 19, 2012.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

Before an issuer lists its securities on the Exchange for trading, the issuer and the securities must meet the Exchange's initial listing standards.[4] These standards include, among other things, minimum financial standards such as total market value, stock price, the number of publicly traded shares, and corporate governance standards to ensure transparency and accountability to the issuer's stakeholders. Once the securities are listed for trading, the issuer and the securities would need to meet the Exchange's continued listing standards to remain listed on the Exchange.[5]

In addition to the quantitative and corporate governance listing standards, Nasdaq Rule 5101 also gives the Exchange discretion to deny listing or continued listing based on any event or condition that makes such listing or continued listing inadvisable or unwarranted, even though the securities meet all enumerated standards.[6] Nasdaq rules discuss in more detail the use of such discretion and state that the Exchange may deny initial or continued listing because it has concluded that ''* * * a public interest concern is so serious that no remedial measure would be sufficient to alleviate it.'' [7]

Nasdaq rules provide that when a listed issuer does not meet the Exchange's continued listing standards, Nasdaq would immediately notify the issuer of the deficiency.[8] The Exchange notification consists of: (1) Staff delisting determination which subjects the issuer and its securities to immediate suspension and delisting, unless appealed; (2) notification of deficiency for which the issuer may submit a plan of compliance; (3) notification of deficiency for which the issuer is entitled to automatic cure or compliance period; or (4) public reprimand letters (collectively ''Nasdaq Staff Determinations''). After a listed issuer receives a Nasdaq Staff Determination, Nasdaq rules require the issuer to make a public announcement disclosing receipt of the notification and the Exchange rules upon which the Nasdaq Staff Determination is based.[9]

Currently, the Exchange's rules require the listed issuer, after receiving a Nasdaq Staff Determination, to make a public announcement by filing a Form 8–K when required by Commission rules or by issuing a press release disclosing receipt of the Nasdaq Staff Determination and the Exchange rules upon which the deficiency is based.[10]

In its proposal, the Exchange stated that some issuers comply with this

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–68053 (October 15, 2012), 77 FR 64369.

[4] *See* Nasdaq Rule 5000 series.

[5] *See id.*

[6] *See* Nasdaq Rule 5101.

[7] *See* Nasdaq Rule IM–5101–1.

[8] *See* Nasdaq Rule 5810.

[9] *See* Nasdaq Rule 5815(b). Nasdaq rules also provide for review and/or appeals. *See* Nasdaq Rule 5800 series. The Exchange's listing qualification department would notify the issuer of the deficiency. *See* Nasdaq Rule 5810. Thereafter, the Exchange's hearing panel, if requested by the issuer on a timely basis, would review the delisting determination at a hearing. *See* Nasdaq Rule 5815. The Exchange's listing and hearings review council could review the decision of the Exchange's hearing panel, either on its own or through the appeal of the issuer. *See* Nasdaq Rule 5820. Lastly, the Exchange's board of directors could review the decision of the Exchange's review council. *See* Nasdaq Rule 5825.

[10] *See* Nasdaq Rules 5250(b)(2), 5810(b) and IM–5810. The Commission notes that under Nasdaq Rule 5810, an issuer that is late in filing a periodic report must issue a press announcement by issuing a press release disclosing receipt of the Nasdaq Staff Determination and the Nasdaq rules upon which the deficiency is based, in addition to filing any Form 8–K as required by Commission rules.

requirement by merely disclosing the Exchange rule number and a description of such rule, but do not provide additional disclosure to allow the public to understand the deficiency or the underlying basis for it. The Exchange stated, for example, that in situations where the deficiency is not related to the quantitative continued listing standards, such as when the Exchange initiates delisting proceedings due to public interest concerns under Nasdaq Rule 5101, such issuer disclosure would not be adequate for the public if the listed issuer's public announcement only cites to Exchange Rule 5101 and does not provide any details on the nature of the deficiency.

The Exchange proposes to change its rules in several ways to address this issue. First, the Exchange would require issuers to disclose each specific basis and concern cited by Nasdaq in the Nasdaq Staff Determination.[11] The Exchange proposal would also indicate that issuers can provide their own analysis of the issues raised in the Exchange's delisting determination.[12] Finally, the Exchange proposes to allow it to issue a public announcement if a listed issuer does not make the required announcement or at any level of a proceeding after an issuer receives a Nasdaq Staff Determination involving an issuer's listing or trading.[13] For example, if the issuer does not make the public announcement within the allotted time, if the issuer's public announcement does not contain all of the required information, or if the issuer's public announcement contains inaccurate or misleading information, the Exchange stated that it may issue a public announcement with the required information.[14]

III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[15] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The development and enforcement of meaningful listing standards for an exchange is of substantial importance to financial markets and the investing public. Among other things, listing standards provide the means for an exchange to screen issuers that seek to become listed and to provide listed status only to those that are bona fide issuers with sufficient public float, investor base, and trading interest likely to generate depth and liquidity sufficient to promote fair and orderly markets. Meaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing, and the role of an exchange in overseeing its market, assuring compliance with its listing standards and detecting and deterring manipulative trading activity.

The Commission finds that the proposed rule change is consistent with the requirements of the Act. The proposal would require an issuer, after receipt of a notification of deficiency of the Exchange's continued listing standards, to issue more detailed public announcements on the concerns identified in the Exchange's determination. Currently, issuers are required to disclose receipt of the notification and the Exchange rule(s) upon which the deficiency is based. As the Exchange noted, in certain instances such disclosure is inadequate. For example, some delisting notifications are based on the Exchange exercising its public interest authority pursuant to Exchange Rule 5101. Mere disclosure of the Exchange rule number would not provide investors with the necessary information as to the reasons behind the Exchange's deficiency determination. The Commission believes that this proposal should provide investors with additional important information on the listed issuer in order to help investors make informed trading decisions.

As noted above, the Exchange's rules give listed issuers the right to appeal a delisting determination or public reprimand letter.[17] This process at the first appeal level involving a hearing panel review can take up to six months. Without adequate disclosure of the specific basis and concerns identified by the Exchange during this appeal process, investors may not have full disclosure of the issues involving the listed issuer that gave rise to the deficiency and that may affect an investment decision. The Commission also notes that the proposal furthers the intent behind the original requirement that a listed issuer publicly announce in either its 8–K, if applicable, or a press release that it has received a Nasdaq Staff Determination for a deficiency and the rule on which it is based, which is to ensure adequate disclosure to the public and investors on the deficiency. The proposal will help to ensure that this purpose cannot be avoided by minimal disclosure. The Commission believes that the benefits of full disclosure on the specific basis for a Nasdaq Staff Determination should help to prevent fraudulent and manipulative acts and practices and further investor protection and the public interest, consistent with Section 6(b)(5) under the Act.

In addition, as described above, Nasdaq's proposal also specifically states that in its public announcement, a listed issuer can provide its own analysis of the issues raised in a staff delisting determination. While the Commission notes that the appropriate forum for appealing a delisting determination is within the adjudicatory process provided in the Exchange's rules and this provision should not be used as a way to litigate the issues through the public announcement, the proposed rule simply reflects that issuers may currently make public announcements for a variety of reasons. In the event that an issuer discloses inaccurate or misleading analysis, the Exchange represented that the Exchange could use the new authority in proposed Nasdaq Rule 5840(l), as discussed below, to issue an Exchange clarifying public announcement.[18] The

[11] *See* proposed Nasdaq Rules 5250(b)(2), 5810(b) and IM–5810–1. This new requirement would be in addition to the current requirement for a listed issuer to disclose receipt of a Nasdaq Staff Determination and the rules upon which it is based.

[12] *See* proposed Nasdaq Rule IM–5810–1.

[13] *See* proposed Nasdaq Rules IM–5810–1 and 5840(l).

[14] *See* proposed Nasdaq Rules IM–5810–1. Currently, if the public announcement is not made by the listed issuer within the time allotted, the Exchange would halt trading of the securities. The Exchange proposes to halt trading if the issuer's public announcement does not include all of the required information and to allow the Exchange to make a public announcement with the required information. *See* proposed Nasdaq Rule IM–5810–1. The Exchange also proposes to resume trading if the Exchange makes the public announcement if the issuer's failure to make the announcement is the only basis for the trading halt. *Id.*

[15] In approving the proposed rule change, the Commission has considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78f(b)(5).

[17] *See supra* note 9.

[18] The Commission notes that this order only addresses issues raised by the Exchange's proposal

Continued

Commission believes that the proposal is reasonably balanced to allow issuers to express their analysis, while the proposed rules help to ensure that there will not be inaccurate, misleading or confusing public information through the Exchange's authority to issue its own public announcement in response to such issuer's announcement. The Commission expects the Exchange to actively monitor issuers' analysis and for the Exchange to promptly issue a public announcement if the Exchange detects misleading or inaccurate information.[19] Based on the above, the Commission believes that, consistent with Section 6(b)(5) of the Act, that the proposal should prevent fraudulent and manipulative acts and practices and further investor protection.

The Commission also finds that the proposed changes that would allow the Exchange to make an issuer's required public announcement about a Nasdaq Staff Determination should the issuer fail to do so within the time allotted or if the announcement does not contain all the required information are consistent with the requirements of the Act. The Commission notes that, for the same reasons noted above, it is important that there is adequate notification of a Nasdaq Staff Determination to investors and the public. Therefore, if the issuer fails to make the required disclosure the Exchange will have the authority to do so. The Commission notes that the proposal is similar to the rules of another national securities exchange.[20] As described above, the Exchange's proposal will also clarify some of the rule language concerning a trading halt that is imposed for an issuer's failure to make the public announcement, and update these requirements to reflect the other changes being adopted herein. The Commission believes these changes are appropriate and will ensure that a trading halt can be imposed for failure to adequately disclose information in the public announcement, and clarify that such trading halt would be lifted after the Exchange makes the public announcement assuming that is the only basis for the trading halt. Based on the above, the Commission believes that these aspects of the proposal are consistent with furthering investor protection and the public interest.

Finally, the Commission believes that the proposed new provision that gives the Exchange the authority to make a public announcement involving an issuer's listing or trading on Nasdaq at any level of a proceeding under its Rule 5800 Series in order to maintain the quality of and public confidence in its markets and to protect investors and the public interest is consistent with the Act. For example, the Exchange could use this authority to counter any inaccurate or misleading statements in an issuer's own public announcement with respect to the issuer's delisting. The Commission also believes that this authority could be useful in those situations, as noted by Nasdaq in its filing, where an issuer is trading in the over-the-counter market pending its delisting appeal and does not make its own announcement when the appeal is finally denied. In such a situation, Nasdaq could use its authority to make such an announcement. In both situations noted above, allowing the Exchange to make a public announcement if there is a lack of accurate public information concerning a Nasdaq Staff Determination would be important for investors and the public interest consistent with Section 6(b)(5) of the Act.[21]

IV. Conclusion

It is therefore ordered that, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–NASDAQ–2012–118) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin O'Neill,

Deputy Secretary.

[FR Doc. 2012–29605 Filed 12–6–12; 8:45 am]

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and does not address any issues or liabilities that may arise under the Act.

[19] The Commission expects Nasdaq to monitor the new requirements and propose to make changes if necessary.

[20] *See* New York Stock Exchange Listed Company Manual Section 802.02.

[21] The Commission does not believe giving the Exchange the authority to make such public announcements replaces any due process or rights to appeal a delisting notification or public reprimand letter under the Exchange's adjudicatory process, but rather is meant simply to provide a way for the public to get accurate information about an issuer that is subject to a Staff Determination. The Commission expects the Exchange to monitor its use of this authority consistent with this purpose.

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68337; File No. SR–ICC–2012–18]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Withdrawal of Proposed Rule Change To Add Rules Related to the Clearing of iTraxx Europe Index CDS and European Corporate Single-Name CDS

December 3, 2012.

On September 28, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,[1] and Rule 19b-4 thereunder,[2] to add rules related to the clearing of iTraxx Europe Index credit default swaps and European Corporate Single-Name credit default swaps. Notice of the proposed rule change was published in the **Federal Register** on October 17, 2012.[3] The Commission received no comments on the proposed change. On November 30, 2012, ICC withdrew the proposed rule change (SR–ICC–2012–18).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29564 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68340; File No. SR–NYSEMKT–2012–65]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123C(9)(a)(1)(ii)—Equities To Delete the Requirement That the Order Acceptance Cut-Off Time Cannot Be Past 4:30 p.m.

December 3, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 20, 2012, NYSE MKT LLC (''NYSE MKT'' or ''Exchange'') filed with the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 34–68035 (October 11, 2012), 77 FR 63905 (October 17, 2012).

[4] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii)—Equities to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii)—Equities to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).[3]

Background

Pursuant to Rule 123C(9)(a)(1)—Equities, the Exchange may suspend Rule 52—Equities (Hours of Operation) to resolve an extreme order imbalance that may result in a price dislocation at the close as a result of an order entered into Exchange systems, or represented to a Designated Market Maker (''DMM'') orally at or near the close. Rule 123C(9)(a)(1)—Equities was intended to be and has been invoked to attract offsetting interest in rare circumstances where there exists an extreme imbalance at the close such that a DMM is unable to close the security without significantly dislocating the price.

Pursuant to Rule 123C(9)(a)(1)(ii)—Equities, once it has been determined to suspend Rule 52 and solicit offsetting interest, the Exchange is responsible for soliciting such offsetting interest from both on-Floor and off-Floor participants. Such solicitation requests include, at a minimum, the security symbol, the imbalance amount and side, the last sale price, and an order acceptance cut-off time. The Exchange designates the order acceptance cut-off time, but the Rule currently provides that in no event shall the order acceptance cut-off time be later than 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).

Currently, the Exchange uses Trader Updates to solicit interest from off-Floor participants. The Exchange's Trader Updates are posted on the Exchange's Web site and are distributed both by RSS feed and by email to anyone who subscribes to receive such free updates.

Since January 3, 2011, when the Rule, which was previously operated on a pilot bases, became a permanent rule, the Exchange and NYSE, which has an identical rule, have invoked the relief available pursuant to the Rule only once, on September 21, 2012. In 2010, Rule 123C(9)(a)(1)—Equities was invoked only three times on both markets.

Proposed Amendment

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii)—Equities to delete the requirement that the order acceptance cut-off time shall be no later than 4:30 p.m., or in the case of an early scheduled close, 30 minutes after the closing time. The Exchange believes it is appropriate to delete the bright-line cut off time because it hinders the ability of the Exchange to ensure a fair and orderly close if adhering to the 4:30 p.m. order acceptance cut-off time is not possible under the particular circumstances.

In particular, the Exchange notes that for two of the four times that the rule has been invoked since 2010 on both the Exchange and the NYSE, the NYSE has extended the order acceptance cut-off time past 4:30 p.m. The reasons for the extensions differed, but the Exchange believes that given the rarity of the need to invoke the provisions of Rule 123C(9)(a)(1)—Equities in the first instance, together with what the NYSE has experienced in those few events with its parallel rule, it is appropriate to delete the bright-line 4:30 p.m. cut-off time.

For example, on February 12, 2010, due to corporate actions in Berkshire Hathaway (BRK) Class A and B securities, an NYSE-listed security, there was significant trading volume in those securities, including at the close. In the circumstances, it was determined that the most efficient manner to effect the close of trading in those securities was to effect the closing transaction in BRK–B before closing the BRK–A shares. After closing the BRK–B security at 4:19 p.m., the DMM assessed the shares eligible to be executed for the BRK–A close and determined that the imbalance was significant enough to invoke the procedures of NYSE Rule 123C(9)(a)(1). Due to the complexity of the situation, the NYSE was not able to issue its solicitation of offsetting interest until 4:27 p.m. Because three minutes was not sufficient time to receive incoming offsetting interest and close the security, the NYSE accepted order flow past the 4:30 p.m. order acceptance cut-off time. The NYSE filed with the Commission a rule proposal that permitted the temporary suspension of NYSE Rule 123C(9)(a)(1)(ii) 4:30 p.m. order acceptance cut-off time.[4]

More recently, on Friday, September 21, 2012, there was a buy imbalance in Weatherford International LTD (WFT), an NYSE-listed security, that could not be satisfied by sell orders on the Book. Accordingly, the NYSE invoked procedures pursuant to NYSE Rule 123C(9) to solicit interest from both off-Floor and on-Floor participants to offset that imbalance. While the Exchange initiated publication of solicitation for such offsetting interest immediately following 4:00 p.m., due to delays in the Exchange's web and email systems, the Exchange's two solicitations of interest, which were sent at 4:22 p.m. and 4:28 p.m., did not leave Exchange systems until 4:29 p.m. and 4:35 p.m., respectively, and were time-stamped accordingly. Because of these delays, the Exchange extended the order acceptance cut-off time to 4:35 p.m., which is past the time prescribed in NYSE Rule 123C(9)(a)(1)(ii). By extending the order acceptance cut-off time to 4:35 p.m., the Exchange was able to attract sufficient sell-side interest to offset the buy imbalance and the stock was closed shortly thereafter on a transaction of 7.822 million shares,

[3] The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC (''NYSE''). *See* Securities Exchange Act Release No. 68282 (Nov. 21, 2012), 77 FR 71023 (Nov. 28, 2012) (SR–NYSE–2012–63).

[4] *See* Securities Exchange Act Release No. 61549 (Feb. 19, 2010), 75 FR 9009 (Feb. 26, 2010) (SR–NYSE–2010–09).

unchanged from the last sale price of $13.54.[5]

Although the NYSE did not have rule authority to extend the order acceptance cut-off time in the WFT closing situation to 4:35 p.m., the NYSE believes that it acted appropriately under the circumstances to ensure that WFT could close in a fair and orderly manner at a price that was not significantly dislocated from the last sale price. In particular, the issue that the NYSE experienced with respect to its web and email system was unanticipated and the NYSE sought to respond in a manner that protected investors and the public interest by ensuring a fair and orderly close.

The Exchange believes it is appropriate to provide the Exchange with authority to designate an order acceptance cut-off time that is tailored to the particular situation, rather than have to adhere to the 4:30 p.m. time frame. The Exchange's ultimate goal is to ensure a fair and orderly close in a manner that is as close to the official 4:00 p.m. closing time as possible. However, depending on the circumstances, whether because of the complexity of the closing process for a particular security or because of a system or technology issue, requiring a bright-line order acceptance time may not be appropriate.

Moreover, the Exchange believes that adhering to such a bright-line cut-off time could harm investors and the public. For example, in both the BRK–A and WFT closes, if the NYSE had adhered to the 4:30 p.m. cut-off time, the NYSE would not have been able to complete its solicitation of offsetting interest. Without such offsetting interest, the Exchange had two alternatives, either close the stock at a price significantly dislocated from the last sale price, or invoke an order imbalance halt and not hold a closing transaction. The Exchange does not believe that either alternative is in the best interest of investors or the public. Rather, the Exchange believes that ensuring that the closing price is not significantly dislocated from the last sale, even if that means a delayed closing time, would benefit investors and the public.[6]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[7] of the Securities Exchange Act of 1934 (the ''Act''), in general, and furthers the objectives of Section 6(b)(5),[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

In particular, the Exchange believes that providing the Exchange with the authority to designate the order cut-off time as appropriately tailored to the particular situation removes impediments to and perfects the mechanism of a free and open market because it enables the Exchange to complete the process to solicit interest to offset an imbalance at the close that would otherwise result in a significant price dislocation. Without the relief requested herein, the Exchange may not be able to complete the process to solicit offsetting interest, which would result in either the stock closing at a dislocated price, or require the Exchange to invoke an order imbalance halt in the security. The Exchange believes such solutions could harm investors and the public because of either an unnecessarily dislocated closing price, or in the case of an imbalance halt, orders intended for the closing transaction would not be executed. The Exchange further believes that the proposed rule change would protect investors and the public interest because it would enable the Exchange to complete the process to ensure that the closing price that may be closer to the last sale price, rather than a closing price that is significantly dislocated from the last sale price.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

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 email to *rule-comments@sec.gov*. Please include File Number SR–NYSEMKT–2012–65 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–NYSEMKT–2012–65. This file number should be included on the

[5] On September 27, 2012, the NYSE published a Trader Update that provided the public with notice of this issue: *http://traderupdates.nyse.com/2012/09/weatherford_international_ltd.html.*

[6] The Exchange proposes to make clarifying changes to paragraphs (a)(1), (a)(1)(v), (a)(2), and (b) of Rule 123C(9)—Equities and Supplementary Material .20 and .30 to Rule 123C—Equities to either add the phrase ''Equities'' or delete the term ''NYSE'' in connection with references to other equity rules in the rule text.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A)(iii).

[10] 17 CFR 240.19b–4(f)(6).

subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2012–65 and should be submitted on or before December 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29567 Filed 12–6–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68339; File No. SR–NYSEArca–2012–130]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Rule 6.62(cc) Making Available the Post No Preference Light Only Quotation to Options Classes Not Participating in the Penny Pilot

December 3, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that, on November 20, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Arca Rule 6.62(cc) to make available the Post No Preference Light Only Quotation (''PNPLO Quotation'') to options classes not participating in the penny pilot (''non-Penny Pilot Issues''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 6.62(cc) to make available the Post No Preference Light Only Quotation (''PNPLO Quotation'') to non-Penny Pilot Issues.

A PNPLO Quotation is an electronic Market Maker quotation that, upon initial entry into the NYSE Arca System, is only eligible to execute against displayed liquidity on the Consolidated Book.[3] A PNPLO Quotation is similar to the Post No Preference Light Order (''PNP-Light Order'') under NYSE Arca Options Rule 6.62(v), which is a non-routable order type that is only eligible to execute against displayed liquidity. The PNPLO Quotation was recently approved by the Commission in June of 2012[4] and provides a useful tool for Market Markers to provide quotations in the market. Upon entry of a PNPLO Quotation, the NYSE Arca System automatically removes the pre-existing quotation(s) of a Market Maker, as it does upon the entry of any other quotation, regardless of the acceptance or rejection of the PNPLO Quotation by the NYSE Arca System.[5] The PNPLO Quotation also provides Market Makers with greater control over the circumstances in which their quotations interact with contra-side trading interest on the Exchange by preventing interaction with non-displayed liquidity. The increase in control afforded by the PNPLO Quotation is desirable from the perspective of Market Makers because it is difficult for them to account for non-displayed liquidity in their quoting models.

Currently, the PNPLO Quotation is only available for options classes participating in the Penny Pilot Program. Market Makers may only submit PNPLO Quotation orders for options classes in the Penny Pilot Program. The Exchange now proposes to allow the use of the PNPLO Quotation by Market Makers for quoting in non-Penny classes as well.

In the initial Notice, the Exchange stated that Market Makers on NYSE Arca in penny pilot issues receive post liquidity credits for electronic

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Exchange Rule 6.62(cc). In this regard, a PNPLO Quotation is similar to the Post No Preference Light Order (''PNP-Light Order'') under NYSE Arca Options Rule 6.62(v), which is a non-routable order type that is only eligible to execute against displayed liquidity. A PNPLO Quotation that, upon entry, would execute exclusively against non-displayed liquidity on the Consolidated Book is immediately rejected by the NYSE Arca System. Additionally, a PNPLO Quotation that, upon entry, would execute against both displayed and non-displayed liquidity on the Consolidated Book immediately executes only against the displayed liquidity, but not against the non-displayed liquidity, and any remaining size of the PNPLO Quotation will be immediately rejected by the NYSE Arca System. Furthermore, a PNPLO Quotation that, upon entry, would execute exclusively against displayed liquidity on the Consolidated Book immediately executes against the displayed liquidity and any remaining size of the PNPLO Quotation is placed on the Consolidated Book and treated like a standard Market Maker quotation. Lastly, a PNPLO Quotation that would not execute against either displayed or non-displayed liquidity is placed in the Consolidated Book and treated as a standard Market Maker quotation.

[4] *See* Securities Exchange Act Release No. 67252 (June 25, 2012), 77 FR 38879 (June 29, 2012) (Order approving PNPLO Quotation) (''Order''). *See also* Securities Exchange Act Release No. 66937 (May 7, 2012), 77 FR 27820 (May 11, 2012) (''Notice'').

[5] Accordingly, in the event that a PNPLO Quotation is rejected by the NYSE Arca System, the Market Maker is required to re-enter a quotation for purposes of satisfying any applicable quoting obligations under NYSE Arca Options Rule 6.37B. *See* Notice, 77 FR at 27821.

executions against their quotes that are resting in the Consolidated Book, and are charged take liquidity fees when their quotes execute against resting liquidity in the Consolidated Book.[6] The Exchange also stated that Market Makers consider these fees when calculating their quotes, and they may provide a wider quote than they otherwise would if they believe there is a chance that they would be charged a take liquidity fee for submitting a quote that executes against non-displayed liquidity (instead of receiving a post liquidity credit for executions against a resting quote).[7] The Exchange further stated that by eliminating the risk of incurring additional fees, the PNPLO Quotation may lead Markets Makers to provide narrower quotes on the Exchange, which in turn would benefit investors.[8]

On October 25, 2012, the Exchange filed for immediate effectiveness a proposed rule change to provide Post-Take pricing for electronic transactions in all non-Penny issues.[9] The Exchange believes that the same reasons in support of the PNPLO Quotation for Penny classes are now valid for non-Penny classes. The Exchange believes that with the new Post-Take pricing for electronic transactions in non-Penny classes, Market Makers in non-Penny classes would also benefit from the PNPLO Quotation functionality. Market Makers on the Exchange, whether they quote in Penny classes or non-Penny classes, will benefit from the functionality that the PNPLO Quotation provides. Market Markers in non-Penny classes would benefit from the ability upon entry of a PNPLO Quotation, the NYSE Arca System automatically removing the pre-existing quotation(s) of a Market Maker, as it does upon the entry of any other quotation, regardless of the acceptance or rejection of the PNPLO Quotation by the NYSE Arca System. Market Markers in non-Penny classes would also benefit from the greater control that the PNPLO Quotation provides over the circumstances in which their quotations interact with contra-side trading interest on the Exchange by preventing interaction with non-displayed liquidity. Market Markers in non-Penny classes would also benefit from the greater control afforded by the PNPLO Quotation because it is difficult for them to account for non-displayed liquidity in their quoting models.

The Exchange sees no reason to continue to treat equally positioned Market Makers differently by making the PNPLO Quotation functionality available based on whether they are quoting in Penny classes versus non-Penny classes. The Exchange notes that all market participants, including Market Makers, already have the ability to avoid trading with non-displayed liquidity by entering PNP-Light Orders, which have existed on the Exchange since 2009.[10] PNP-Light Order is available equally to all participants whether they chose to trade in Penny or non-Penny classes. The Exchange also notes that market participants that enter non-displayed liquidity (*i.e.,* orders with reserve size) are choosing not to have the full size of their trading interest displayed, which is in contrast to the Commission's encouragement of a market structure in which trading interest is displayed,[11] and accordingly do not receive all of the benefits with respect to that non-displayed liquidity that are afforded to displayed liquidity.[12]

The Exchange notes that the Commission also has found that the current Rule was not unfairly discriminatory.[13] The Exchange believes that the proposal only makes the functionality even less discriminatory by allowing equally positioned Market Makers to be offered the same functionality.

The Exchange will announce the implementation date of the proposed rule change in a Trader Update to be published no later than 90 days following the date of filing. The implementation date will be no later than 90 days following publication of the Trader Update announcing the date of filing.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[14] of the Act, in general, and furthers the objectives of Section 6(b)(5),[15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Like the existing Price Improving Quote and the existing PNPLO Quotation for Penny classes, the proposed PNPLO Quotation would provide a Market Maker with the ability to control its interactions with contra-side liquidity.[16] Specifically, upon initial entry, a PNPLO Quotation would not be eligible to interact with non-displayed liquidity. In this regard, the Exchange understands that a Market Maker's quoting algorithm can take into account existing liquidity in the marketplace, but may not be able to accurately account for the risk of interacting with non-displayed liquidity. As noted, Market Makers on NYSE Arca in Penny Pilot issues receive post liquidity credits for electronic executions against their quotes that are resting in the Consolidated Book, and are charged take liquidity fees when their quotes execute against resting liquidity in the Consolidated Book. Market Makers consider these fees when calculating their quotes, and they may provide a wider quote than they otherwise would if they believe there is a chance that they would be charged a take liquidity fee for submitting a quote that executes against non-displayed liquidity (instead of receiving a post liquidity credit for executions against a resting quote). As noted, the PNP-Light Order is available equally to all participants whether they chose to trade

[6] *See* Notice, 77 FR at 27821.

[7] *See id.*

[8] *See id.*

[9] *See* Securities Exchange Act Release No. 68179 (November 8, 2012), 77 FR 68163 (November 15, 2012) (SR–NYSEArca–2012–121).

[10] The Exchange notes that it adopted the PNP-Light Order type pursuant to Section 19(b)(3)(A) of the Exchange Act, and that the rule filing adopting that order type was not abrogated. *See* Securities Exchange Act Release 59603 (March 19, 2009), 74 FR 13279 (March 26, 2009) (SR–NYSEArca–2009–21) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc.) Amending Rule 6.62 to Provide Additional Order Types).

[11] *See, e.g.,* Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632, 48636 (September 23, 2011) [sic] (File No. S7–21–09) (Proposed Elimination of Flash Order Exception from Rule 602 of Regulation NMS) (''The Commission long has emphasized the need to encourage displayed liquidity in the form of publicly displayed limit orders.'').

[12] In this regard, the Exchange notes that non-displayed liquidity is not afforded trade-through protection under Section 5 of the Options Order Protection and Locked/Crossed Market Plan. *See, e.g.,* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546).

[13] *See* Order, 77 FR at 38880. Specifically, the Commission stated that the ''Commission also believes that the proposed rule change is not unfairly discriminatory. Currently, market participants including Market Makers can achieve functionality similar to the PNPLO Quotation through use of the PNP-Light Order, which is a non-routable order type that is only eligible to execute against displayed liquidity. The Exchange is proposing a similar functionality for use by Market Makers when quoting. The PNPLO Quotation would be available for use by all Market Makers quoting in the penny pilot classes on the Exchange.''

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

[16] *See supra* note 4.

in Penny or non-Penny classes. Accordingly, the proposal would permit Market Makers to eliminate from their quoting decisions the risk of incurring interaction with non-displayed liquidity, and therefore may result in narrower quote widths, which would increase the quality of the Exchange's market and thereby benefit investors.

The Exchange believes that allowing Market Makers to use the PNPLO Quotation for non-Penny classes is just, equitable and not unfairly discriminatory. For example, the PNPLO Quotation treats all similarly situated market participants the same in that it would be available for use by all Market Makers on the Exchange. Moreover, the Exchange notes that all market participants, including Market Makers, already have the ability to avoid trading with non-displayed liquidity by entering PNP-Light Orders, which have existed on the Exchange since 2009.[17] The Exchange also notes that market participants that enter non-displayed liquidity (*i.e.,* orders with reserve size) are choosing not to have the full size of their trading interest displayed, which is in contrast to the Commission's encouragement of a market structure in which trading interest is displayed,[18] and accordingly do not receive all of the benefits with respect to that non-displayed liquidity that are afforded to displayed liquidity.[19] The Exchange notes that the Commission also has found that the current Rule was not unfairly discriminatory.[20] The Exchange believes that the proposal only makes the functionality even less discriminatory by allowing equally positioned Market Makers to be offered the same functionality. For the forgoing reasons, the Exchange believes that the proposal is not unfairly discriminatory. Overall, the Exchange believes that the proposal protects investors and the public interest because it may contribute to more aggressive quoting by Market Makers and may lead to more displayed liquidity on the Exchange, which, in turn, should increase the quality of the Exchange's market and benefit investors.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[21] and Rule 19b–4(f)(6)(iii) thereunder.[22] 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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–130 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–2012–130. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–130 and should be submitted on or before December 28, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–29566 Filed 12–6–12; 8:45 am]

BILLING CODE 8011–01–P

[17] The Exchange notes that it adopted the PNP-Light Order type pursuant to Section 19(b)(3)(A) of the Exchange Act, and that the rule filing adopting that order type was not abrogated. *See* Securities Exchange Act Release 59603 (March 19, 2009), 74 FR 13279 (March 26, 2009) (SR–NYSEArca–2009–21) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Amending Rule 6.62 to Provide Additional Order Types).

[18] *See, e.g.,* Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632, 48636 (September 23, 2011) [sic] (File No. S7–21–09) (Proposed Elimination of Flash Order Exception from Rule 602 of Regulation NMS) (''The Commission long has emphasized the need to encourage displayed liquidity in the form of publicly displayed limit orders.'').

[19] In this regard, the Exchange notes that non-displayed liquidity is not afforded trade-through protection under Section 5 of the Options Order Protection and Locked/Crossed Market Plan. *See, e.g.,* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4–546).

[20] *See* Order, 77 FR at 38880.

[21] 15 U.S.C. 78s(b)(3)(A).

[22] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[23] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to and one extension of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA), Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collection below is pending at SSA. SSA will submit it to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than February 5, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

Statement for Determining Continuing Eligibility, Supplemental Security Income Payment(s)—416.204–0960–0416. SSA conducts disability redeterminations to determine if Supplemental Security Income (SSI) recipients (1) met and continue to meet all statutory and regulatory requirements for SSI eligibility and (2) are receiving the correct SSI payment amount. SSA makes these redeterminations through periodic use of Form SSA–8203–BK. SSA conducts this legally mandated information collection in field offices via personal contact (face-to-face or telephone interview) using the automated Modernized SSI Claim System (MSSICS). The respondents are SSI recipients or their representative payees.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
MSSICS	810,824	1	20	270,275
MSSICS/Signature Proxy	777,085	1	19	246,077
Paper	27,824	1	20	9,275
Totals	1,615,733			525,627

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 7, 2013. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Claimant Statement about Loan of Food or Shelter; Statement about Food or Shelter Provided to Another—20 CFR 416.1130–416.1148–0960–0529. SSA bases an SSI claimant or recipient's eligibility on need, as measured by the amount of income an individual receives. Per our calculations, income includes other people providing in-kind support and maintenance in the form of food and shelter to SSI applicants or recipients. SSA uses Forms SSA–5062 and SSA–L5063 to obtain statements about food or shelter provided to SSI claimants or recipients. SSA uses this information to determine whether food or shelters are bona fide loans or income for SSI purposes. This determination may affect the claimants' or recipients' eligibility for SSI as well as the amounts of their SSI payments. The respondents are claimants and recipients for SSI payments, and individuals who provide loans of food or shelter to them.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–5062 Paper form	34,900	1	10	5,817
SSA–L5063 Paper form	34,900	1	10	5,817
SSA–5062 MSSICS	34,900	1	10	5,817
SSA–L5063 MSSICS	34,900	1	10	5,817
Total	139,600			23,268

2. Site Review Questionnaire for Volume and Fee-for-Service Payees and Beneficiary Interview Form—20 CFR 404.2035, 404.2065, 416.665, 416.701, and 416.708—0960–0633. SSA asks organizational representative payees to complete Form SSA–637, the Site Review Questionnaire for Volume and Fee-for-Service Payees, to provide information on how they carry out their responsibilities, including how they manage beneficiary funds. SSA then obtains information from the beneficiaries these organizations represent via Form SSA–639, Beneficiary Interview Form, to corroborate the payees' statements. Due to the sensitivity of the information,

SSA employees always complete the forms based on the answers respondents give during a personal interview. The respondents are individuals, State and local governments, non-profit and for-profit organizations serving as representative payees, and the beneficiaries they serve.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–637	1,999	1	120	3,998
SSA–639	8,293	1	10	1,382
Totals	10,292			5,380

3. Certification of Prisoner Identity Information—20 CFR 422.107—0960–0688. Inmates of Federal, State, or local prisons may need a Social Security card as verification of their Social Security number for school or work programs, or as proof of employment eligibility upon release from incarceration. Before SSA can issue a replacement Social Security card, applicants must show SSA proof of their identity. People who are in prison for an extended period typically do not have current identity documents. Therefore, under formal written agreement with the correctional institution, SSA allows prison officials to verify the identity of certain incarcerated U.S. citizens who need replacement Social Security cards. Information prison officials provide comes from the official prison files, sent on correctional facility letterhead. SSA uses this information to establish the applicant's identity in the replacement Social Security card process. The respondents are prison officials who certify the identity of prisoners applying for replacement Social Security cards.

Type of Request: Extension of an OMB-approved Information Collection.

Modality of completion	Number of responses	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Verification of Prisoner Identity Statements	1,100	200	3	11,000

Dated: December 4, 2012.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2012–29577 Filed 12–6–12; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Certificated Training Centers—Simulator Rule

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. To determine regulatory compliance, there is a need for airmen to maintain records of certain training and recency of experience; a training center has to maintain records of student's training, employee qualification and training, and training program approvals.

DATES: Written comments should be submitted by February 5, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0570.

Title: Certificated Training Centers—Simulator Rule.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: 14 CFR 142.73 requires that training centers maintain records for a period of one year to show trainee qualifications for training, testing, or checking, training attempts, training checking, and testing results, and for one year following termination of employment the qualification of instructors and evaluators providing those services. The information is maintained by the certificate holder and subject to review by aviation safety inspectors (operations), designated to provide surveillance to training centers to ensure compliance with airman training, testing, and certification requirements specified in other parts of the 14 CFR.

Respondents: Approximately 113 training centers and associated satellite facilities.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1,177.6 hours.

Estimated Total Annual Burden: 126,092 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

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 FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on November 29, 2012.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2012–29589 Filed 12–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection: Report of Inspections Required by Airworthiness Directives

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. Airworthiness Directives are regulations issued to require correct corrective action to correct unsafe conditions in aircraft, engines, propellers, and appliances. Reports of inspections are often needed when emergency corrective action is taken to determine if the action was adequate to correct the unsafe condition. The respondents are aircraft owners and operators.

DATES: Written comments should be submitted by February 5, 2013.

FOR FURTHER INFORMATION CONTACT: Kathy DePaepe at (405) 954–9362, or by email at: *Kathy.A.DePaepe@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0056.

Title: Report of Inspections Required by Airworthiness Directives.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: Title 14 CFR part 39, Airworthiness Directives (AD), authorized by §§ 40113(a), 44701, and 44702 of Title 49 United States Code, prescribes how the FAA issues ADs. The FAA issues ADs when an unsafe condition is discovered on a specific aircraft type. If the condition is serious enough and more information is needed to develop corrective action, specific information may be required from aircraft owners/operators. If it is necessary for the aircraft manufacturer or airworthiness authority to evaluate the information, owners/operators will be instructed to send the information to them.

Respondents: Approximately 1,120 aircraft owners/operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 5 minutes.

Estimated Total Annual Burden: 3,080 hours.

ADDRESSES: Send comments to the FAA at the following address: Ms. Kathy DePaepe, Room 126B, Federal Aviation Administration, AES–200, 6500 S. MacArthur Blvd., Oklahoma City, OK 73169.

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 FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on November 29, 2012.

Albert R. Spence,

FAA Assistant Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2012–29590 Filed 12–6–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Draft Written Re-Evaluation for Environmental Impact Statement: T.F. Green Airport, Warwick, RI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability and notice of comment period.

SUMMARY: The FAA is issuing this notice to advise the public that a Draft Written Re-Evaluation for an Environmental Impact Statement (EIS) has been prepared for Theodore Francis Green Airport in Warwick, Rhode Island.

DATES: Comments must be received by January 7, 2013.

ADDRESSES: Send comments by any of the following methods: Email: *Richard.doucette@faa.gov* Include ''Comment to T.F. Green Draft Written Re-Evaluation'' in the subject line Mail: Richard Doucette, Environmental Program Manager, Federal Aviation Administration New England, 12 New England Executive Park, Burlington, MA 01803.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Environmental Program Manager, Federal Aviation Administration New England, 12 New England Executive Park, Burlington, MA 01803, (781) 238–7613, or at *Richard.doucette@faa.gov*.

SUPPLEMENTARY INFORMATION: The FAA is making available a Draft Written Re-Evaluation document, which evaluates the impacts of Runway Safety Areas and other airfield improvements at Theodore Francis Green Airport in Warwick, Rhode Island. The document will assist the FAA in determining the suitability of the July 2011 EIS and September 2011 Record of Decision (ROD). The Re-Evaluation document is available for review during normal business hours at the following locations:

FAA New England, 16 New England Executive Park, Burlington, MA, 781–238–7613;

Warwick Central Library, 600 Sandy Lane, Warwick, RI, 401–739–5440;

Warwick Library, Apponaug Branch, 3267 Post Road, Warwick, RI, 401–739–6411;

Warwick Library, Norwood Branch, 328 Pawtuxet Ave., Warwick, RI, 401–941–7545.

Copies of the document can be obtained by contacting Richard Doucette at *Richard.doucette@faa.gov* or 781–238–7613. It is also available at *http://www.faa.gov/airports/new_england/*

Public comments will be accepted through January 7, 2013.

Issued on: November 26, 2012.

Richard Doucette,

Environmental Program Manager, Airports Division, FAA New England Region.

[FR Doc. 2012–29744 Filed 12–5–12; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35676 (Sub-No. 1)]

BNSF Railway Company—Temporary Trackage Rights Exemption—Union Pacific Railroad Company

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice, correction.

SUMMARY: This document corrects a notice appearing in the **Federal Register** on December 3, 2012 (77 FR 71,680).

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245–0386.

[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: On December 3, 2012, the **Federal Register** published a notice at 77 FR 71,680 regarding Docket No. FD 35676 (Sub-No. 1). The notice contained incorrect dates under the **DATES** caption. The **DATES** caption should read:

DATES: This decision is effective on December 30, 2012. Petitions to stay must be filed by December 10, 2012. Petitions for reconsideration must be filed by December 20, 2012.

Dated: December 3, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–29587 Filed 12–6–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

[Docket ID OCC–2012–0018]

Mutual Savings Association Advisory Committee

AGENCY: Office of the Comptroller of the Currency (OCC), Department of the Treasury.

ACTION: Notice.

SUMMARY: The OCC has determined that the renewal of the charter of the OCC Mutual Savings Association Advisory Committee (MSAAC) is necessary and in the public interest. The OCC hereby gives notice of the renewal of the charter.

DATES: The charter of the OCC MSAAC is renewed for a two-year period that began on November 19, 2012.

FOR FURTHER INFORMATION CONTACT: Donna Deale, Designated Federal Official, (202) 874–5020, Office of the Comptroller of the Currency, 250 E Street SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Notice of the renewal of the MSAAC charter is hereby given, with the approval of the Secretary of the Treasury, pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. 2 (1988). The Comptroller of the Currency has determined that the renewal of the MSAAC charter is necessary and in the public interest in order to provide advice and information concerning the current condition of mutual savings associations, the regulatory changes or other steps the OCC may be able to take to ensure the health and viability of mutual savings associations, and other issues of concern to the existing mutual savings associations, all in accordance with the goals of Section 5(a) of the Home Owners' Loan Act (HOLA), 12 U.S.C. 1464.

Dated: November 30, 2012.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2012–29553 Filed 12–6–12; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Information Collection Tools

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

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 take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning existing final regulation, FI–43–94 (TD 8649), Regulations Under Section 1258 of the Internal Revenue Code of 1986; Netting Rule for Certain Conversion Transactions (§ 1.1258–1); final regulation, REG–252936–96 (TD 8780), Rewards for Information Relating to Violations of Internal Revenue Laws (section 301.7623–1); Revenue Procedure 98–46 and Revenue Procedure 97–44, LIFO Conformity Requirement; final regulation, REG–209322–82 (TD 8841), Return of Partnership Income (§ 1.6031(a)–1); Revenue Procedure 2000–42, Section 1503(d) Closing Agreement Requests; and Notice 2008–33, Credit for New Qualified Alternative Motor Vehicles (Qualified Fuel Cell Motor Vehicles).

DATES: Written comments should be received on or before February 5, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224. Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form number, reporting or record-keeping requirement number, and OMB number (if any) in your comment.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the collection tools should be directed to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3634, or through the Internet at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Currently, the IRS is seeking comments concerning the following information collection tools, reporting, and record-keeping requirements:

(1) *Title:* Regulations Under Section 1258 of the Internal Revenue Code of 1986; Netting Rule for Certain Conversion Transactions (§ 1.1258–1).

OMB Number: 1545–1452. *Form Number:* FI–43–94 (TD 8649—final).

Abstract: Internal Revenue Code section 1258 recharacterizes capital gains from conversion transactions as ordinary income to the extent of the time value element. This regulation provides that certain gains and losses may be netted for purposes of determining the amount of gain recharacterized. To be eligible for netting relief, the taxpayer must identify on its books and records all the positions that are part of the conversion transaction. This must be done before the close of the day on which the positions become part of the conversion transaction.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 50,000.

Estimated Time per Respondent: 6 minutes.

Estimated Total Annual Burden Hours: 5,000.

(2) *Title:* Rewards for Information Relating to Violations of Internal Revenue Laws.

OMB Number: 1545–1534.

Form Number: REG–252936–96 (TD 8780—final).

Abstract: The regulations explain the procedure for submitting information that relates to violations of the internal revenue laws. The regulations also require a person claiming a reward for information to provide, in certain circumstances, identification of evidence that the person is the proper claimant.

Current Actions: There are no changes being made to the revenue procedure at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, businesses or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 10,000.

Estimated Time per Respondent: 3 hrs.

Estimated Total Annual Reporting Burden Hours: 30,000.

(3) *Title:* LIFO Conformity Requirement.

OMB Number: 1545–1559.

Form Number: Revenue Procedure 98–46 and Revenue Procedure 97–44.

Abstract: Revenue Procedure 97–44 permits automobile dealers that comply with the terms of the revenue procedure to continue using the LIFO inventory method despite previous violations of the LIFO conformity requirements of Internal Revenue Code section 472(c) or (e)(2). Revenue Procedure 98–46 modified Revenue Procedure 97–44 by allowing medium-and heavy-duty truck dealers to take advantage of the favorable relief provided in Revenue Procedure 97–44.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 5,000.

Estimated Time per Respondent: 20 hrs.

Estimated Total Annual Burden Hours: 100,000.

(4) Title: Return of Partnership Income.

OMB Number: 1545–1583.

Form Number: REG–209322–82 (TD 8841 (final)).

Abstract: Section 1.6031(a)–1 requires partnerships to file a partnership return. The information in this section is required to enable the IRS to verify that a taxpayer is reporting the correct amount of income or gain or claiming the correct amount of losses, deductions, or credits from that taxpayer's interest I the partnership. The partnership return is filed on Form 1065.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and farms.

The burden is reflected in the burden estimate of Form 1065.

(5) Title: Section 1503(d) Closing Agreement Requests.

OMB Number: 1545–1706.

Form Number: Revenue Procedure 2000–42.

Abstract: Revenue Procedure 2000–42 informs taxpayers of the information they must submit to request a closing agreement under regulation section 1.1503–2(g)(2)(iv)(B)(i) to prevent the recapture of dual consolidated losses upon the occurrence of certain triggering events.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 20.

Estimated Time per Respondent: 100 hours.

Estimated Total Annual Burden Hours: 2,000.

(6) Title: Credit for New Qualified Alternative Motor Vehicles (Qualified Fuel Cell Motor Vehicles).

OMB Number: 1545–2028.

Form Number: Notice 2008–33.

Abstract: This Notice will be used to determine whether the vehicle for which the credit is claimed under § 30B by a taxpayer is property that qualifies for the credit. The collection of information is required to obtain a benefit. The likely respondents are corporations and partnerships.

Current Actions: There is no change in the paperwork burden previously approved by OMB.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals and Households, Businesses and other for-profit organizations.

Estimated Number of Respondents: 5.

Estimated Time per Respondent: 40 hours.

Estimated Total Annual Burden Hours: 200.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: December 3, 2012.

R. Joseph Durbala,

IRS Reports Clearance Officer.

[FR Doc. 2012–29552 Filed 12–6–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 77 Friday,
No. 236 December 7, 2012

Part II

Department of Health and Human Services

45 CFR Part 153, 155, 156, *et al.*
Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 153, 155, 156, 157 and 158

[CMS–9964–P]

RIN 0938–AR51

Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule provides further detail and parameters related to: the risk adjustment, reinsurance, and risk corridors programs; cost-sharing reductions; user fees for a Federally-facilitated Exchange; advance payments of the premium tax credit; a Federally-facilitated Small Business Health Option Program; and the medical loss ratio program. The cost-sharing reductions and advanced payments of the premium tax credit, combined with new insurance market reforms, will significantly increase the number of individuals with health insurance coverage, particularly in the individual market. The premium stabilization programs—risk adjustment, reinsurance, and risk corridors—will protect against adverse selection in the newly enrolled population. These programs, in combination with the medical loss ratio program and market reforms extending guaranteed availability (also known as guaranteed issue) protections and prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates, will help to ensure that every American has access to high-quality, affordable health insurance.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on December 31, 2012.

ADDRESSES: In commenting, please refer to file code CMS–9964–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 ''Submit a comment'' instructions.

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–9964–P, P.O. Box 8016, Baltimore, MD 21244–8016.

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–9964–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

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, call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Sharon Arnold at (301) 492–4286, Laurie McWright at (301) 492–4311, or Jeff Wu at (301) 492–4305 for general information.

Adrianne Glasgow at (410) 786–0686 for matters related to reinsurance.

Michael Cohen at (301) 492–4277 for matters related to the methodology for determining the reinsurance contribution rate and payment parameters.

Grace Arnold at (301) 492–4272 for matters related to risk adjustment, the HHS risk adjustment methodology, or the distributed data collection approach for the HHS-operated risk adjustment and reinsurance programs.

Adam Shaw at (410) 786–1091 for matters related to risk corridors.

Johanna Lauer at (301) 492–4397 for matters related to cost-sharing reductions, advance payments of the premium tax credits, or user fees.

Rex Cowdry at (301) 492–4387 for matters related to the Small Business Health Options Program.

Carol Jimenez at (301) 492–4457 for matters related to the medical loss ratio program.

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 following Web site as soon as possible after they have been received: *http://www.regulations.gov.* 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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Acronyms

Affordable Care Act The Affordable Care Act of 2010 (which is the collective term for the Patient Protection and Affordable Care Act (Pub. L. 111–148) and the Health Care and Education Reconciliation Act (Pub. L. 111–152))
APTC Advance payment of the premium tax credit
AV Actuarial Value
CFR Code of Federal Regulations
CHIP Children's Health Insurance Program
CMS Centers for Medicare & Medicaid Services
EHB Essential Health Benefits
ERISA Employee Retirement Income Security Act
ESI Employer sponsored insurance
FFE Federally-facilitated Exchange
FPL Federal Poverty Level
GAAP Generally accepted accounting principles
HCC Hierarchical condition category
HHS United States Department of Health and Human Services
HIPAA Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191)
IHS Indian Health Service
IRS Internal Revenue Service
MLR Medical Loss Ratio
NAIC National Association of Insurance Commissioners
OMB Office of Management and Budget
OPM United States Office of Personnel Management
PHS Act Public Health Service Act
PRA Paperwork Reduction Act of 1985
QHP Qualified Health Plan
SHOP Small Business Health Options Program
The Code Internal Revenue Code of 1986

I. Executive Summary

A. Purpose

Beginning in 2014, individuals and small businesses will be able to purchase private health insurance through competitive marketplaces, called Affordable Insurance Exchanges, or ''Exchanges.'' Individuals who enroll in health plans through Exchanges may receive premium tax credits to make health insurance more affordable, and financial assistance to cover cost sharing for health care services. The premium tax credits, combined with the new insurance reforms, will significantly increase the number of individuals with health insurance coverage, particularly in the individual market. Premium stabilization programs—risk adjustment, reinsurance, and risk corridors—protect against adverse selection in the newly enrolled population. These programs, in combination with the medical loss ratio program and market reforms extending guaranteed availability (also known as guaranteed issue) protections, prohibiting the use of factors such as health status, medical history, gender, and industry of employment to set premium rates, will help to ensure that every American has access to high-quality, affordable health insurance.

Premium stabilization programs: The Affordable Care Act establishes transitional reinsurance and temporary risk corridors programs, and a permanent risk adjustment program to provide payments to health insurance issuers that cover higher-risk populations and to more evenly spread the financial risk borne by issuers.

The transitional reinsurance program and the temporary risk corridors program, which begin in 2014, are designed to provide issuers with greater payment stability as insurance market reforms are implemented. The reinsurance program will reduce the uncertainty of insurance risk in the individual market by partially offsetting risk of high-cost enrollees. The risk corridors program, which is a Federally administered program, will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains. On an ongoing basis, the risk adjustment program is intended to provide increased payments to health insurance issuers that attract higher-risk populations, such as those with chronic conditions, and reduce the incentives for issuers to avoid higher-risk enrollees. Under this program, funds are transferred from issuers with lower-risk enrollees to issuers with higher-risk enrollees.

In the Premium Stabilization Rule (77 FR 17220), we laid out a regulatory framework for these three programs. In that rule, we stated that the specific payment parameters for those programs would be published in this proposed rule. In this proposed rule, we expand upon these standards, and propose payment parameters for these programs.

Advanced payments of the premium tax credit and cost-sharing reductions: This proposed rule proposes standards for advanced payments of the premium tax credit and for cost-sharing reductions. These programs assist low- and moderate-income Americans in affording health insurance on an Exchange. Section 1401 of the Affordable Care Act amended the Internal Revenue Code (26 U.S.C.) to add section 36B, allowing an advance, refundable premium tax credit to help individuals and families afford health insurance coverage. Section 36B of the Code was subsequently amended by the Medicare and Medicaid Extenders Act of 2010 (Pub. L. 111–309) (124 Stat. 3285 (2010)); the Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 (Pub. L. 112–9) (125 Stat. 36 (2011)); and the Department of Defense and Full-Year Continuing Appropriations Act, 2011 (Pub. L. 112–10) (125 Stat. 38 (2011)). The section

36B credit is designed to make a qualified health plan affordable by reducing a taxpayer's out-of-pocket premium cost.

Under section 1411 of the Affordable Care Act, an Exchange makes an advance determination of tax credit eligibility for individuals enrolling in coverage through the Exchange and seeking financial assistance. Using information available at the time of enrollment, the Exchange determines: (1) whether the individual meets the income and other requirements for advance payments, and (2) the amount of the advance payments. Advance payments are made monthly under section 1412 of the Affordable Care Act to the issuer of the qualified health plan (QHP) in which the individual enrolls.

Section 1402 of the Affordable Care Act provides for the reduction of cost sharing for certain individuals enrolled in QHPs offered through the Exchanges and section 1412 of the Affordable Care Act provides for the advance payment of these reductions to issuers. This assistance will help low- and moderate-income qualified individuals and families afford the out-of-pocket spending associated with health care services provided through QHP coverage. The law directs issuers to reduce cost sharing for essential health benefits for individuals with household incomes between 100 and 400 percent of the Federal Poverty Level (FPL) who are enrolled in a silver level QHP through an individual market Exchange and are eligible for advance payment of premium tax credits. The statute also directs issuers to eliminate cost sharing for Indians (as defined in section 4(d) of the Indian Self-Determination and Education Assistance Act) with a household income at or below 300 percent of the FPL who are enrolled in a QHP of any ''metal'' level (that is, bronze, silver, gold, or platinum) through the individual market in the Exchange, and prohibits issuers of QHPs from requiring cost sharing for Indians, regardless of household income, for items or services furnished directly by the Indian Health Service, an Indian Tribe, a Tribal Organization, or an Urban Indian Organization, or through referral under contracted health services.

HHS published a bulletin [1] outlining an intended regulatory approach to calculations of actuarial value and implementation of cost-sharing reductions on February 24, 2012 (the ''AV/CSR Bulletin''). Specifically, HHS outlined an intended regulatory approach for the calculation of AV, de minimis variation standards, silver plan variations for individuals eligible for cost-sharing reductions, and advance payments of cost-sharing reductions to issuers, among other topics. In the Exchange Establishment Rule, we established eligibility standards for these cost-sharing reductions. In this proposed rule, we establish standards governing the administration of cost-sharing reductions and provide specific payment parameters for the program.

Federally-facilitated Exchange user fees: Section 1311(d)(5)(A) of the Affordable Care Act contemplates an Exchange charging assessments or user fees to participating issuers to generate funding to support its operations. As the operator of a Federally-facilitated Exchange, HHS has the authority, under this section of the statute, to collect and spend such user fees. In addition, 31 U.S.C. 9701 provides for an agency to establish a charge for a service provided by the agency. Office of Management and Budget Circular A–25 Revised (''Circular A–25R'') establishes Federal policy regarding user fees and specifies that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. In this proposed rule, we establish a user fee for issuers participating in a Federally-facilitated Exchange.

Small Business Health Options Program: Section 1311(b)(1)(B) of the Affordable Care Act directs each State that chooses to operate an Exchange to establish a Small Business Health Options Program (SHOP) that provides health insurance options for small businesses. The Exchange Establishment Rule sets forth standards for the administration of SHOP Exchanges. In this proposed rule, we clarify and expand upon the standards established in that final rule.

Medical loss ratio program: Public Health Service (PHS) Act section 2718 generally requires health insurance issuers to submit an annual MLR report to HHS and provide rebates to consumers if they do not achieve specified MLRs. On December 1, 2010, we published an interim final rule, entitled ''Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements under the Patient Protection and Affordable Care Act,'' (75 FR 74864) that established standards for the MLR program. Since then, we have made several revisions and technical corrections to those rules. We propose in this proposed rule to amend the regulations to specify how issuers are to account for payments or receipts for risk adjustment, reinsurance, and risk corridors, and to change the timing of the annual MLR report and distribution of rebates required of issuers to allow for accounting of the premium stabilization programs. This proposed rule also proposes to amend the regulations to revise the treatment of community benefit expenditures in the MLR calculation for issuers exempt from Federal income tax.

B. Summary of the Major Provisions

This proposed rule fills in the framework established by the Premium Stabilization Rule by proposing provisions and parameters for the three premium stabilization programs—the permanent risk adjustment program, the transitional reinsurance program, and the temporary risk corridors program. It also proposes key provisions governing advance payments of the premium tax credit, cost-sharing reductions, and user fees for Federally-facilitated Exchanges. Finally, it proposes a number of amendments relating to the SHOP and the medical loss ratio program.

Risk Adjustment: The goal of the Affordable Care Act risk adjustment program is to mitigate the impacts of possible adverse selection and stabilize the premiums in the individual and small group markets as and after insurance market reforms are implemented. In this proposed rule, we propose a number of standards and parameters for implementing the risk adjustment program, including:

- Provisions governing a State operating a risk adjustment program;
- The risk adjustment methodology HHS will use when operating risk adjustment on behalf of a State, including the risk adjustment model, the payments and charges methodology, and the data collection approach; and
- An outline of the data validation process we propose to use when operating risk adjustment on behalf of a State.

Reinsurance: The Affordable Care Act directs that a transitional reinsurance program be established in each State to help stabilize premiums for coverage in the individual market from 2014 through 2016. In this proposed rule, we propose a number of standards and parameters for implementing the reinsurance program, including:

- Provisions excluding certain types of health coverage from reinsurance contributions;
- The national per capita contribution rate to be paid by health insurance issuers and self-insured group health plans along with the methodology to be used for calculating the contributions

[1] Available at: *http://cciio.cms.gov/resources/files/Files2/02242012/Av-csr-bulletin.pdf.*

due from a health insurance issuer or self-insured group health plan;

- Provisions establishing eligibility for reinsurance payments;
- The national reinsurance payment parameters and the approach we propose to use to calculate and administer the reinsurance program; and
- The distributed data collection approach we propose to use to implement the reinsurance program.

Risk Corridors: The temporary risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016. In this proposed rule, we propose to permit a QHP to include profits and taxes within its risk corridors calculations. We also propose an annual schedule for the program and standards for data submissions.

Advance Payments of the Premium Tax Credit: Sections 1401 and 1411 of the Affordable Care Act provide for advance payments of the premium tax credit for low- and moderate-income enrollees in QHPs on Exchanges. In this proposed rule, we propose a number of standards governing the administration of this program, including:

- Provisions governing the reduction of premiums by the amount of any advance payments of the premium tax credit; and
- Provisions governing the allocation of premiums to essential health benefits.

Cost-Sharing Reductions: Sections 1402 and 1412 of the Affordable Care Act provide for reductions in cost sharing on essential health benefits for low- and moderate-income enrollees in qualified silver level health plans in individual market Exchanges. It also provides for reductions in cost sharing for Indians enrolled in QHPs at any metal level. In this proposed rule, we propose a number of standards governing the cost-sharing reduction program, including:

- Provisions governing the design of variations of QHPs with cost-sharing structures for enrollees of various income levels and for Indians;
- The maximum out-of-pocket limits applicable to the various plan variations;
- Provisions governing the assignment and reassignment of enrollees to plan variations;
- Provisions governing issuer submissions of estimates of cost-sharing reductions, which are paid in advance to issuers by the Federal government; and
- Provisions governing reconciliation of these advance estimates against actual cost-sharing reductions provided.

User Fees: This proposed rule proposes a per billable member user fee applicable to issuers participating in a Federally-facilitated Exchange. This proposed rule also outlines HHS's approach to calculating the fee.

SHOP: Beginning in 2014, SHOP Exchanges will allow small employers to offer employees a variety of QHPs. In this proposed rule, we propose several standards and processes for implementing SHOP Exchanges, including:

- Standards governing the definitions and counting methods used to determine whether an employer is a small or large employer;
- A safe harbor method of employer contribution in a Federally-facilitated SHOP (FF–SHOP);
- The default minimum participation rate;
- QHP standards linking Exchange and FF–SHOP participation and ensuring broker commissions in FF–SHOP that are the same as those in the outside market; and
- Allowing Exchanges and SHOPs to selectively list only brokers registered with the Exchange or SHOP (and adopting that policy for FFEs and FF–SHOPs).

MLR: The MLR program requires issuers to rebate a portion of premiums if their MLRs fall short of the applicable MLR standard for the reporting year. MLR is calculated as a ratio of claims plus quality improvement activities to premium revenue, with adjustments for taxes, regulatory fees, and the premium stabilization programs. In this proposed rule, we propose a number of standards governing the MLR program, including:

- Provisions accounting for risk adjustment, reinsurance, and risk corridors in the MLR calculation;
- A revised timeline for MLR reporting and rebates; and
- Provisions modifying the treatment of community benefit expenditures.

C. Costs and Benefits

The provisions of this proposed rule, combined with other provisions in the Affordable Care Act, will improve the individual insurance market by making insurance more affordable and accessible to millions of Americans who currently do not have affordable options available to them. The shortcomings of the individual market today have been widely documented.[2]

These limitations of the individual market are made evident by how few people actually purchase coverage in the individual market. In 2011, approximately 48.6 million people were uninsured in the United States,[3] while only around 10.8 million were enrolled in the individual market.[4] The relatively small fraction of the target market that actually purchases coverage in the individual market in part reflects people's resources, how expensive the product is relative to its value, and how difficult it is for many people to access coverage.

The provisions of this proposed rule, combined with other provisions in the Affordable Care Act, will improve the functioning of both the individual and the small group markets while stabilizing premiums. The transitional reinsurance program will serve to stabilize premiums in the individual market. Reinsurance will attenuate individual market rate increases that might otherwise occur because of the immediate enrollment of higher risk individuals, potentially including those currently in State high-risk pools. In 2014, it is anticipated that reinsurance payments will result in premium decreases in the individual market of between 10 and 15 percent relative to expected premiums without reinsurance.

The risk corridors program will protect QHP issuers in the individual and small group market against inaccurate rate setting and will permit issuers to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets.

The risk adjustment program protects against adverse selection by allowing issuers to set premiums according to the average actuarial risk in the individual and small group market without respect to the type of risk selection the issuer would otherwise expect to experience with a specific product offering in the market. This should lower the risk premium issuers would otherwise price into premiums in the expectation of enrolling individuals with unknown health status. In addition, it mitigates the incentive for health plans to avoid

[2] Michelle M. Doty et al., Failure to Protect: Why the Individual Insurance Market Is Not a Viable Option for Most U.S. Families: Findings from the Commonwealth Fund Biennial Health Insurance Survey, 2007, The Commonwealth Fund, July 2009; Sara R. Collins, Invited Testimony: Premium Tax Credits Under The Affordable Care Act: How They Will Help Millions Of Uninsured And Underinsured Americans Gain Affordable, Comprehensive Health Insurance, The Commonwealth Fund, October 27, 2011.

[3] Source: U.S. Census Bureau, Current Population Survey, 2012 Annual Social and Economic Supplement, Table HI01. Health Insurance Coverage Status and Type of Coverage by Selected Characteristics: 2011.

[4] Source: CMS analysis of June 2012 Medical Loss Ratio Annual Reporting data for 2011 MLR reporting year, available at *http://cciio.cms.gov/resources/data/mlr.html.*

unhealthy members. The risk adjustment program also serves to level the playing field inside and outside of the Exchange, as payments and charges are applied to all non-grandfathered individual and small group plans.

Provisions addressing the advance payments of the premium tax credit and cost-sharing reductions will help provide for premium tax credits and the reduction or elimination of cost sharing for certain individuals enrolled in QHPs offered through the Exchanges. This assistance will help many low-and moderate-income individuals and families obtain health insurance. For many people, cost sharing is a barrier to obtaining needed health care.[5] The availability of premium tax credits through Exchanges starting in 2014 will result in lower net premium rates for many people currently purchasing coverage in the individual market, and will encourage younger and healthier enrollees to enter the market, improving the risk pool and leading to reductions in premium rates for current policyholders.[6]

The provisions addressing SHOP Exchanges will reduce the burden and costs of enrolling employees in small group plans, and give small businesses many of the cost advantages and choices that large businesses already have. Additionally, SHOP Exchanges will allow for employers to preserve control over health plan choices while saving employers money by spreading insurers' administrative costs across more employers.

The provisions addressing the MLR program will result in a more accurate calculation of MLR and rebate amounts, since it will reflect issuers' claims-related expenditures, after adjusting for the premium stabilization programs.

We solicit comments on additional strategies consistent with the Affordable Care Act that HHS or States might deploy to help make rates affordable in the current market and encourage timely enrollment in coverage in 2014. Ensuring that premiums are affordable is a priority for HHS as well as States, consumers, and insurers, so we welcome suggestions for the proposed rule on ways to achieve this goal while implementing these essential consumer protections.

Issuers may incur some one-time fixed costs to comply with the provisions of the final rule, including administrative and hardware costs. However, issuer revenues and expenditures are also expected to increase substantially as a result of the expected increase in the number of people purchasing individual market coverage. That enrollment is projected to exceed current enrollment by 50 percent.[7] We are soliciting comments on the nature and magnitude of these costs and benefits to issuers, and the potential effect of the provisions of this rule on premium rates and financial performance.

In addition, States may incur administrative and operating costs if they choose to establish their own programs. We are also requesting information on such costs. In accordance with Executive Orders 12866 and 13563, we believe that the benefits of this regulatory action would justify the costs.

II. Background

Starting in 2014, individuals and small businesses will be able to purchase private health insurance through State-based competitive marketplaces called Affordable Insurance Exchanges (Exchanges). The Department of Health and Human Services (HHS), the Department of Labor, and the Department of the Treasury are working in close coordination to release guidance related to Exchanges in several phases. The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act (Pub. L. 111–152) was enacted on March 30, 2010. We refer to the two statutes collectively as the Affordable Care Act in this proposed rule.

A. Premium Stabilization

A proposed regulation was published in the **Federal Register** on July 15, 2011 (76 FR 41930) to implement health insurance premium stabilization policies in the Affordable Care Act. A final rule implementing the health insurance premium stabilization programs (that is, risk adjustment, reinsurance, and risk corridors) (Premium Stabilization Rule) (77 FR 17220) was published in the **Federal Register** on March 23, 2012. We published a white paper on risk adjustment concepts on September 12, 2011 (Risk Adjustment White Paper). We published a bulletin on May 1, 2012, outlining our intended approach to implementing risk adjustment when we are operating risk adjustment on behalf of a State (Risk Adjustment Bulletin). On May 7–8, 2012, we hosted a public meeting in which we discussed that approach (Risk Adjustment Spring Meeting).

We published a bulletin on May 31, 2012, outlining our intended approach to making reinsurance payments to issuers when we are operating the reinsurance program on behalf of a State (Reinsurance Bulletin). The Department solicited comment on proposed operations for both reinsurance and risk adjustment when we are operating the program on behalf of a State.

B. Cost-Sharing Reductions

We published a bulletin outlining an intended regulatory approach to calculating actuarial value and implementing cost-sharing reductions on February 24, 2012 (AV/CSR Bulletin). In that bulletin, we outlined an intended regulatory approach for the design of plan variations for individuals eligible for cost-sharing reductions, and advance payments and reimbursement of cost-sharing reductions to issuers, among other topics. We reviewed and considered comments to the AV/CSR Bulletin in developing section III.E. of this proposed rule.

C. Advance Payments of the Premium Tax Credit

A proposed regulation relating to the health insurance premium tax credit was published by the Department of the Treasury in the **Federal Register** on August 17, 2011 (76 FR 50931). A final rule relating to the health insurance premium tax credit was published by the Department of the Treasury in the **Federal Register** on May 23, 2012 (26 CFR parts 1 and 602).

D. Exchanges

A Request for Comment relating to Exchanges was published in the **Federal Register** on August 3, 2010 (75 FR 45584). An Initial Guidance to States on Exchanges was issued on November 18, 2010. A proposed regulation was published in the **Federal Register** on July 15, 2011 (76 FR 41866) to implement components of the

[5] Brook, Robert H., John E. Ware, William H. Rogers, Emmett B. Keeler, Allyson Ross Davies, Cathy D. Sherbourne, George A. Goldberg, Kathleen N. Lohr, Patricia Camp and Joseph P. Newhouse. *The Effect of Coinsurance on the Health of Adults: Results from the RAND Health Insurance Experiment.* Santa Monica, CA: RAND Corporation, 1984. Available at: *http://www.rand.org/pubs/reports/R3055.*

[6] Congressional Budget Office, Letter to Honorable Evan Bayh, providing an Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act, November 30, 2009; Sara R. Collins, Invited Testimony: Premium Tax Credits Under The Affordable Care Act: How They Will Help Millions Of Uninsured And Underinsured Americans Gain Affordable, Comprehensive Health Insurance, The Commonwealth Fund, October 27, 2011; Fredric Blavin et al., The Coverage and Cost Effects of Implementation of the Affordable Care Act in New York State, Urban Institute, March 2012.

[7] Congressional Budget Office, *http://www.cbo.gov/sites/default/files/cbofiles/attachments/03–13-Coverage%20Estimates.pdf* (Table 3).

Exchange. A proposed regulation regarding Exchange functions in the individual market, eligibility determinations, and Exchange standards for employers was published in the **Federal Register** on August 17, 2011 (76 FR 51202). A final rule implementing components of the Exchanges and setting forth standards for eligibility for Exchanges (Exchange Establishment Rule) was published in the **Federal Register** on March 27, 2012 (77 FR 18310).

E. Market Reform Rules

A notice of proposed rulemaking relating to market reforms and effective rate review was published in the **Federal Register** on November 26, 2012 (77 FR 70584) (proposed Market Reform Rule).

F. Essential Health Benefits and Actuarial Value

A notice of proposed rulemaking relating to essential health benefits and actuarial value was published in the **Federal Register** on November 26, 2012 (77 FR 70644) (proposed EHB/AV Rule).

G. Medical Loss Ratio

HHS published a request for comment on PHS Act section 2718 in the **Federal Register** on April 14, 2010 (75 FR 19297), and published an interim final rule with 60 day comment period relating to the medical loss ratio (MLR) program on December 1, 2010 (75 FR 74864). A final rule with 30 day comment period (MLR Final Rule) was published in the **Federal Register** on December 7, 2011 (76 FR 76574).

H. Tribal Consultations

This proposed rule may be of interest to, and affect, American Indians/Alaska Natives. Therefore, we plan to consult with Tribes during the comment period and prior to publishing a final rule.

III. Provisions of the Proposed HHS Notice of Benefit and Payment Parameters for 2014

A. Provisions for the State Notice of Benefit and Payment Parameters

In § 153.100(c), we established a deadline of March 1 of the calendar year prior to the applicable benefit year for States to publish a State notice of benefit and payment parameters if the State wishes to modify the parameters for the reinsurance program or the risk adjustment methodology set forth in the applicable HHS notice of benefit and payment parameters. We recognize that, for this initial benefit year (that is, for benefit year 2014), it may be difficult for States to publish such a notice by the required deadline. We therefore propose to modify § 153.100(c) to require that, for benefit year 2014 only, a State must publish a State notice by March 1, 2013, or by the 30th day following publication of the final HHS notice of benefit and payment parameters, whichever is later. If a State that chooses to operate reinsurance or risk adjustment does not publish the State notice within that timeframe, the State would: (1) Adhere to the data requirements for health insurance issuers to receive reinsurance payments that are specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year; (2) forgo the collection of additional reinsurance contributions under § 153.220(d) and the use of additional funds for reinsurance payments under § 153.220(d)(3); (3) forgo the use of more than one applicable reinsurance entity; and (4) adhere to the risk adjustment methodology and data validation standards published in the annual HHS notice of benefit and payment parameters.

B. Provisions and Parameters for the Permanent Risk Adjustment Program

The risk adjustment program is a permanent program created by the Affordable Care Act that transfers funds from lower risk, non-grandfathered plans to higher risk, non-grandfathered plans in the individual and small group markets, inside and outside the Exchanges. In subparts D and G of the Premium Stabilization Rule, we established standards for the administration of the risk adjustment program. A State approved or conditionally approved by the Secretary to operate an Exchange may establish a risk adjustment program, or have HHS do so on its behalf.

In the Premium Stabilization Rule, we established that a risk adjustment program is operated using a risk adjustment methodology. States operating their own risk adjustment program may use a risk adjustment methodology developed by HHS, or may elect to submit an alternate methodology to HHS for approval. In the Premium Stabilization Rule, we also laid out standards for States and issuers with respect to the collection and validation of risk adjustment data.

In section III.B.1. of this proposed rule, we propose standards for HHS approval of a State-operated risk adjustment program (regardless of whether a State elects to use the HHS-developed methodology or an alternate, Federally certified risk adjustment methodology). This approval process would be distinct from the approval process for State-based Exchanges. In section III.B.2. of this proposed rule, we propose a fee to support HHS operation of the risk adjustment program. This fee is a per-capita fee applied to issuers of risk adjustment covered plans in States where HHS is operating the risk adjustment program.

In section III.B.3. of this proposed rule, we describe the methodology that HHS would use when operating a risk adjustment program on behalf of a State. This methodology would be used to assign a plan average risk score based upon the relative average risk of a plan's enrollees, and to apply a payment transfer formula to determine risk adjustment payments and charges. We also describe the HHS-operated data collection approach, and the schedule for operating the HHS-operated risk adjustment program. States operating a risk adjustment program can use this methodology, or submit an alternate methodology, as described in section III.B.4. of this proposed rule.

Finally, in section III.B.5. of this proposed rule, we describe the data validation process we propose to use when operating a risk adjustment program on behalf of a State. We propose that issuers contract with independent auditors to conduct an initial validation audit of risk adjustment data, and that we conduct a second validation audit of a sample of risk adjustment data validated in the initial validation audit to verify the findings of the initial validation audit. We propose that this process be implemented over time, such that payment adjustments based on data validation findings would not be made in the initial years. We also describe a proposed framework for appeals of data validation findings.

1. Approval of State-Operated Risk Adjustment

a. Risk Adjustment Approval Process

In the Premium Stabilization Rule, we laid out minimum standards for States that choose to operate risk adjustment. In § 153.310(a), we specified that a State that elects to operate an Exchange is eligible to establish a risk adjustment program. In § 153.310(a)(2) and (a)(3), we specified that HHS would carry out risk adjustment functions on behalf of the State if the State was not eligible to operate risk adjustment, or if the State deferred operation of risk adjustment to HHS. Under our authority in section 1321(a) of the Affordable Care Act on standards for operation of risk adjustment programs and section 1343(b) of the Affordable Care act on criteria and methods to be used in carrying out risk adjustment activities,

we now propose to add § 153.310(a)(4) such that, beginning in 2015, HHS would carry out the risk adjustment functions on behalf of a State if the State is not approved by HHS (that is, does not meet the standards proposed in § 153.310(c)) to operate a risk adjustment program prior to State publication of its notice of benefit and payment parameters. We believe an approval process for State-operated risk adjustment programs will promote confidence in these programs so that they can effectively protect against the effects of adverse selection.

We propose that a new paragraph (c), entitled ''State responsibilities for risk adjustment,'' set forth a State's responsibilities with regard to risk adjustment program operations. With this change, we also propose to redesignate paragraphs (c) and (d) to paragraphs (e) and (f) of § 153.310. We note that the State must ensure that the entity it selects to operate risk adjustment complies with the standards established in § 153.310(b).

In paragraph § 153.310(c)(1), we propose that if a State is operating a risk adjustment program for a benefit year, the State administer the program through an entity that meets certain standards. These standards would ensure the entity has the capacity to operate the risk adjustment program throughout the benefit year, and is able to administer the risk adjustment methodology. We will work with States to ensure that entities are ready to operate a risk adjustment program by the beginning of the applicable benefit year.

As proposed in § 153.310(c)(1)(i), the entity must be operationally ready to administer the applicable Federally certified risk adjustment methodology and process the resulting payments and charges. We believe that it is important for a State to demonstrate that its risk adjustment entity has the capacity to implement the applicable Federally certified risk adjustment methodology so that issuers may have confidence in the program, and so that the program can effectively mitigate the effects of potential adverse selection. To meet this standard, a State would demonstrate that the risk adjustment entity: (1) Has systems in place to implement the data collection approach, to calculate individual risk scores, and calculate issuers' payments and charges in accordance with the applicable Federally certified risk adjustment methodology; and (2) has tested, or has plans to test, the functionality of the system that would be used for risk adjustment operations prior to the start of the applicable benefit year. States would also demonstrate that the entity has legal authority to carry out risk adjustment program operations, and has the resources to administer the applicable risk adjustment methodology in its entirety, including the ability to make risk adjustment payments and collect risk adjustment charges.

We propose in paragraph § 153.310(c)(1)(ii) that the entity have relevant experience to operate a risk adjustment program. To meet this standard, a State would demonstrate that the entity has on staff, or has contracted with, individuals or firms with experience relevant to the implementation of a risk adjustment methodology. This standard is intended to ensure that the entity has the resources and staffing necessary to successfully operate the risk adjustment program.

We propose in paragraph § 153.310(c)(2) that a State seeking to operate its own risk adjustment program ensure that the risk adjustment entity complies with all applicable provisions of subpart D of 45 CFR part 153 in the administration of the applicable Federally certified risk adjustment methodology. In particular, the State would ensure that the entity complies with the privacy and security standards set forth in § 153.340.

We propose in § 153.310(c)(3) that the State conduct oversight and monitoring of risk adjustment activities in order for HHS to approve the State's risk adjustment program. Because the integrity of the risk adjustment program has important implications for issuers and enrollees, we propose to consider the State's plan to monitor the conduct of the entity. HHS would examine the State's requirements for data integrity and the maintenance of records, and the State's standards for issuers' use of risk adjustment payments. We will provide more detail about oversight in future rulemaking.

Finally, we propose in § 153.310(d) that a State submit to HHS information that establishes that it and its risk adjustment entity meet the criteria set forth in § 153.310(c). Under the proposed § 153.310(a)(4), HHS would operate risk adjustment in the State, under the HHS-developed methodology, if the State does not receive approval prior to the March deadline for publication of the State notice of benefit and payment parameters. Thus, if a State wishes to operate risk adjustment for benefit year 2015, it would have to be approved prior to publication of the State notice of benefit and payment parameters for benefit year 2015 (publication of which must occur by March 1, 2014). We will issue future guidance on application dates, procedures, and standards.

We welcome comments on these proposed provisions.

b. Risk Adjustment Approval Process for Benefit Year 2014

For benefit year 2014, we recognize there are unique timing issues for approving a State-operated risk adjustment program. States would not know whether they are eligible to operate a risk adjustment program until they are approved or conditionally approved to operate an Exchange for the 2014 benefit year. In addition, the set of Federally certified risk adjustment methodologies and the State-operated risk adjustment program approval process will not be finalized until the final Payment Notice is effective.

Given these timing constraints, we are proposing a transitional policy for benefit year 2014. We would not require that a State-operated risk adjustment program receive approval for benefit year 2014. Instead, we propose a transitional process shortly after the provisions of § 153.310(a)(4), (c), and (d) become effective. We are requesting that States planning to operate risk adjustment in benefit year 2014 consult with HHS to determine the capacity of the State to operate risk adjustment. In these consultations, HHS would ask States to identify the entity they select to operate risk adjustment, and to describe its plans for risk adjustment operations in the State. This consultative process would apply for benefit year 2014; however, we intend that States obtain formal approval under the proposed process for benefit year 2015 and subsequent years.

For benefit year 2015 and subsequent benefit years, the proposed approval process would continue to involve ongoing consultations with States and their selected risk adjustment entities. In the course of these consultations, we would provide States and proposed entities with our ongoing views on whether they are adequately demonstrating the capacity of the entity to operate all risk adjustment functions. If the State does not produce the requested evidence or make the requested changes in the specified timeframe, HHS may determine that the relevant criteria were not met, and may decline to approve that State's risk adjustment program. We welcome comments on this proposal.

2. Risk Adjustment User Fees

If a State is not approved to operate or chooses to forgo operating its own risk adjustment program, HHS would operate risk adjustment on the State's

behalf. We intend to collect a user fee to support the administration of HHS-operated risk adjustment. This fee would apply to issuers of risk adjustment covered plans in States in which HHS is operating the risk adjustment program.

Circular No. A–25R establishes Federal policy regarding user fees, and specifies that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. The risk adjustment program will provide special benefits as defined in section 6(a)(1)(b) of Circular No. A–25R to an issuer of a risk adjustment covered plan because it will mitigate the financial instability associated with risk selection as other market reforms go into effect. The risk adjustment program will also contribute to consumer confidence in the insurance industry by helping to stabilize premiums across the individual and small group health insurance markets.

We propose to determine HHS' total costs for administering risk adjustment programs on behalf of States by examining HHS's contract costs of operating the risk adjustment program. These contracts cover development of the model and methodology, collections, payments, account management, data collection, program integrity and audit functions, operational and fraud analytics, stakeholder training, and operational support. We do not propose to set the user fee to cover Federal personnel.

We would set the user fee rate as a national per capita rate, which would spread the cost of the program across issuers of risk adjustment covered plans based on enrollment. We would divide HHS's projected total costs for administering the risk adjustment programs on behalf of States by the expected number of enrollees in risk adjustment covered plans in HHS-operated risk adjustment programs.

An issuer of a risk adjustment covered plan in a State where HHS is operating risk adjustment would pay a risk adjustment user fee equal to the product of its annual enrollment in the risk adjustment covered plan multiplied by the annual per capita risk adjustment user fee rate specified in the annual notice of benefit and payment parameters for the applicable benefit year. We would calculate the total user fee that would be charged to each issuer based on the issuer's monthly enrollment, as provided to HHS using the data collection approach for the risk adjustment program. This approach would ensure that user fees are appropriately tied to enrollment and spread across issuers. We expect that the use of existing data collection and submission methods would minimize burden on issuers, while promoting accuracy.

We anticipate that the total cost for HHS to operate the risk adjustment program on behalf of States for 2014 would be less than $20 million, and that the per capita risk adjustment user fee would be no more than $1.00 per enrollee per year.

HHS would collect risk adjustment user fees from issuers of risk adjustment covered plans in June of the year after the applicable benefit year to align with payments and charges processing, to provide issuers the time to fully comply with the data collection and submission standards, and to permit HHS to perform the user fee calculations based on actual monthly enrollment counts from the benefit year.

We seek comment on this proposed assessment of user fees to support HHS-operated risk adjustment programs.

3. Overview of the risk adjustment methodology HHS would implement when operating risk adjustment on behalf of a State

The goal of the risk adjustment program is to stabilize the premiums in the individual and small group markets as and after insurance market reforms are implemented. The risk adjustment methodology proposed here, which HHS would use when operating risk adjustment on behalf of a State, is based on the premise that premiums should reflect the differences in plan benefits and plan efficiency, not the health status of the enrolled population.

Under § 153.20, a risk adjustment methodology is made up of five elements:

- The *risk adjustment model* uses an individual's recorded diagnoses, demographic characteristics, and other variables to determine a risk score, which is a relative measure of how costly that individual is anticipated to be.
- The *calculation of plan average actuarial risk* and the *calculation of payments and charges* average all individual risk scores in a risk adjustment covered plan, make certain adjustments, and calculate the funds transferred between plans. In this proposed rule, these two elements of the methodology are presented together as the payment transfer formula.
- The *data collection approach* describes HHS' approach to obtaining data, using the distributed model described in section III.G. of this proposed rule that is required for the risk adjustment model and the payment transfer formula.
- The *schedule for the risk adjustment program* describes the timeframe for risk adjustment operations.

States approved to operate risk adjustment may utilize this risk adjustment methodology, or they may submit an alternate methodology as described in section III.B.4. of this proposed rule.

The risk adjustment methodology addresses three considerations: (1) The newly insured population; (2) plan metal levels and permissible rating variation; and (3) the need for inter-plan transfers that net to zero. Risk adjustment payments or charges would be calculated from the payment transfer formula described in section III.B.3.c. of this proposed rule. The key feature of the HHS risk adjustment methodology is that the risk score alone does not determine whether a plan is assessed charges or receives payments. Transfers depend not only on a plan's average risk score, but also on its plan-specific cost factors relative to the average of these factors within a risk pool within a State.

As discussed in greater detail below, the risk adjustment methodology developed by HHS:

- Is developed on commercial claims data for a population similar to the expected population to be risk adjusted;
- Uses the hierarchical condition categories (''HCC'') grouping logic used in the Medicare population, with HCCs refined and selected to reflect the expected risk adjustment population;
- Calculates risk scores with a concurrent model (current year diagnoses predict current year costs);
- Establishes 15 risk adjustment models, one for each combination of metal level (platinum, gold, silver, bronze, catastrophic) and age group (adults, children, infants);
- Results in ''balanced'' payment transfers within a risk pool within a market within a State;
- Adjusts payment transfers for plan metal level, geographic rating area, induced demand, and age rating, so that transfers reflect health risk and not other cost differences; and
- Transfers funds between plans within a market within a State.

a. Risk Adjustment Applied to Plans in the Individual and Small Group Markets

Section 1343(c) of the Affordable Care Act stipulates that risk adjustment is to apply to non-grandfathered health insurance coverage offered in the individual and small group markets. We previously defined a ''risk adjustment covered plan'' in § 153.20 as health

insurance coverage offered in the individual or small group markets, excluding plans offering excepted benefits and certain other plans, including ''any other plan determined not to be a risk adjustment covered plan in the annual HHS notice of benefit and payment parameters.'' We propose to amend this definition by replacing ''and any plan determined not to be a risk adjustment covered plan in the annual HHS notice of benefit and payment parameters'' with ''and any plan determined not to be a risk adjustment covered plan in the applicable Federally certified risk adjustment methodology.'' We note that, under this revised definition, we would describe any plans not determined to be risk adjustment covered plans under the HHS risk adjustment methodology in the annual notice of benefit and payment parameters, which is subject to notice and comment.

We describe below our proposed treatment of certain types of plans (specifically, plans not subject to market reforms, student health plans, and catastrophic plans), and our proposed approach to risk pooling for risk adjustment purposes when a State merges markets for the purposes of the single risk pool provision described in section 1312(c) of the Affordable Care Act. States may propose different approaches to these plans and to risk pooling in State alternate methodologies, subject to the requirements established at § 153.330(b) in this proposed rule.

Plans not subject to market reforms: Certain types of plans offering non-grandfathered health insurance coverage in the individual and small group markets would not be subject to the insurance market reforms proposed in the Market Reform Rule and the EHB/AV proposed rule. In addition, plans providing benefits through policies that begin in 2013, with renewal dates in 2014, would not be subject to these requirements until renewal in 2014. The law specifies that the risk adjustment program is to assess charges on non-grandfathered health insurance coverage in the individual and small group markets with less than average actuarial risk and to make payments to non-grandfathered health insurance coverage in these markets with higher than average actuarial risk. We interpret actuarial risk to mean predictable risk that the issuer has not been able to compensate for through exclusion or pricing. In the current market, plans are generally not subject to the insurance market reforms that begin in 2014 described at § 147.102 (fair health insurance premiums), § 147.104 (guaranteed availability of coverage, subject to the student health insurance provisions at § 147.145), § 147.106 (guaranteed renewability of coverage, subject to the student health insurance provisions at § 147.145), § 156.80 (single risk pool), and Subpart B 156 (essential health benefits package), and so are generally able to minimize actuarial risk by excluding certain conditions (for example, maternity coverage for women of child-bearing age), denying coverage to those with certain high-risk conditions, and by pricing individual premiums to cover the costs of providing coverage to an individual with those conditions.

We propose to use the authority in section 1343(b) of the Affordable Care Act to ''establish criteria and methods to be used in carrying out * * * risk adjustment activities'' to treat plans not subject to insurance market reforms at § 147.102 (fair health insurance premiums), § 147.104 (guaranteed availability of coverage, subject to the student health insurance provisions at § 147.145), § 147.106 (guaranteed renewability of coverage, subject to the student health insurance provisions at § 147.145), § 156.80 (single risk pool), and Subpart B 156 (essential health benefits package), as follows. Because we believe that plans not subject to these market reform rules are able to effectively minimize actuarial risk, we believe these plans would have uniform and virtually zero actuarial risk. We therefore propose to treat these plans separately, such that these plans would not be subject to risk adjustment charges and would not receive risk adjustment payments. Also, these plans would not be subject to the issuer requirements described in subparts G and H of part 153. We note that plans issued in 2013 and subject to these requirements upon renewal would become subject to risk adjustment upon renewal, and would comply with the requirements established in subparts G and H of part 153 at that time.

Student health plans: Only individuals attending a particular college or university are eligible to enroll in a student health plan (as described in § 147.145) offered by that college or university. We believe that student health plans, because of their unique characteristics, will have relatively uniform actuarial risk. We therefore propose to use the authority in section 1343(b) of the Affordable Care Act to ''establish criteria and methods to be used in carrying out * * * risk adjustment activities'' to treat these plans as a separate group that would not be subject to risk adjustment charges and would not receive risk adjustment payments. Therefore, these plans would not be subject to the issuer requirements described in subparts G and H of part 153.

Catastrophic plans: Unlike metal level coverage, only individuals age 30 and under, or individuals for whom insurance is deemed to be unaffordable as specified in section 1302(e) of the Affordable Care Act, are eligible to enroll in catastrophic plans. Because of the unique characteristics of this population, we propose to use our authority to establish ''criteria and methods'' to risk adjust catastrophic plans in a separate risk pool from the general (metal level) risk pool. Catastrophic plans with less than average actuarial risk compared with other catastrophic plans would be assessed charges, while catastrophic plans with higher than average actuarial risk compared with other catastrophic plans would receive payments. The specific mechanisms for assessing risk, and calculating payments and charges, are described below. We are not, however, proposing to exempt these plans from the requirements in subparts G and H of part 153.

Merger of markets: Section 1312(c) of the Affordable Care Act directs issuers to use a single risk pool for a market—the individual or small group market—when developing rates and premiums. Section 1312(c)(3) gives States the option to merge the individual and small group market into a single risk pool. To align risk pools for the risk adjustment program and rate development, we would merge markets when operating risk adjustment on behalf of a State if the State elects to do the same for single risk pool purposes. In such a case, rather than transferring funds between individual market plans only and between small group market plans only, we would transfer funds between all individual and small group market plans, considered as one market. When the individual and small group markets are merged, the State average premium, described in section III.B.3.c. below, would be the average premium of all applicable individual and small group market plans in the applicable risk pool, and normalization described in section III.B.3.c. below would occur across all plans in the applicable risk pool in the individual and small group market.

Risk adjustment in State of licensure: Risk adjustment is a State-based program in which funds are transferred within a State within a market, as described above. In general, a risk adjustment methodology will be linked to the rate and benefit requirements applicable under State and Federal law

in a particular State. Such requirements may differ from State to State, and apply to policies filed and approved by the department of insurance in a State.[8] However, a plan licensed in a State (and therefore subject to that State's rate and benefit requirements) may enroll individuals in multiple States. To help ensure that policies in the small group market are subject to risk adjustment programs linked to the State rate and benefit requirements applicable to that policy, we propose in § 153.360 that a risk adjustment covered plan be subject to risk adjustment in the State in which the policy is filed and approved. We welcome comments on these proposals.

b. Overview of the HHS Risk Adjustment Model

We developed the HHS risk adjustment model in consultation with States, providers, issuers, and consumers on methodological choices by soliciting comment on the choices in preamble to the proposed Premium Stabilization Rule and in the Risk Adjustment White Paper.[9] We also engaged in discussions with these stakeholders at the Risk Adjustment Spring Meeting and in user group calls with States.

Each HHS risk adjustment model predicts plan liability for an enrollee based on that person's age, sex, and diagnoses (risk factors), producing a risk score. We propose separate models for adults, children, and infants to account for cost differences in each of these age groups. The adult and child models are additive; that is, the relative costs assigned to an individual's age, sex, and diagnoses are added together to produce a risk score. Infant risk scores are determined by inclusion in one of 25 mutually exclusive groups based on the infant's maturity and the severity of its diagnoses. If applicable, the risk score is multiplied by a cost-sharing reduction adjustment.

The enrollment-weighted average risk score of all enrollees in a particular risk adjustment covered plan within a geographic rating area are then input into the payment transfer formula, as described in section III.B.3.c. of this proposed rule, to determine an issuer's payment or charge for a particular plan.

Each HHS risk adjustment model predicts individual-level risk scores, but is designed to predict average group costs to account for risk across plans.[10] This method accords with the Actuarial Standard Board's Actuarial Standard of Practice for risk classification.[11]

(1) Data Used To Develop the HHS Risk Adjustment Model

Each HHS risk adjustment model was calibrated using de-identified data from the Truven Health Analytics 2010 MarketScan® Commercial Claims and Encounters database (MarketScan) for individuals living in all States, aged 0–64, enrolled in commercial health insurance plans. The database contains enrollee-specific clinical utilization, expenditures, and enrollment across inpatient, outpatient, and prescription drug services from a selection of large employers and health plans. The database includes de-identified data from approximately 100 payers, and has more than 500 million claims from insured employees, their spouses, and dependents. Active employees, early retirees, individuals on COBRA continuation coverage, and their dependents are included in the database. The enrollment data files contain information for any person enrolled in one of the employer or individual health plans at any point during a year. Enrollees were classified as enrolled in fee-for-service (''FFS'') plans or encounter-type plans, with most FFS plans being preferred provider organization (''PPO'') plans, and the majority of encounter-type plans being health maintenance organization (''HMO'') plans. An individual could have been enrolled for as few as one and as many as 365 days in a year, and could have been enrolled in one or more years. In operation, the same rules will be applied with respect to enrollment.

Diagnoses for model calibration were extracted from facility and professional claims. Facility claims were extracted only from bill types that were hospital inpatient, hospital outpatient, rural health clinic, federally qualified health center, or community mental health center. For professional and outpatient facility claims, diagnoses were generally extracted from claims where the procedure (CPT code) indicated a face-to-face visit with a qualified clinician. Diagnoses from procedures that did not meet these criteria (for example, durable medical equipment, pathology/laboratory, and diagnostic radiology) were not included. The concurrent modeling sample (approximately 20 million individuals) was generated using the following criteria: (1) The enrollee had to be enrolled in a FFS plan; [12] (2) the enrollee must not have incurred any claims paid on a capitated basis;[13] and (3) the enrollee must have been enrolled in a plan with drug benefits and mental health and substance abuse coverage. The final database reflects our best approximation of the essential health benefits package under the Affordable Care Act, which also includes prescription drug and mental health and substance abuse coverage.

MarketScan expenditure data includes gross covered charges, which were defined as:

Gross covered charges = submitted charges − non-covered charges − pricing reductions

Inpatient, outpatient, and prescription drug expenditures for each enrollee were calculated by summing gross covered charges in, respectively, the inpatient, outpatient, and prescription drug services files. Total expenditures were defined as the sum of inpatient, outpatient, and prescription drug expenditures. Plan liability expenditures for a given plan type (platinum, gold, silver, bronze, catastrophic) were defined by applying the applicable standardized benefit design, as discussed in section III.B.3.b.10., to total expenditures. To more accurately reflect expected expenditures for 2014, the 2010 total expenditures were increased for projected cost growth.[14] Average monthly expenditures were defined as the enrollee's expenditures for the enrollment period divided by the number of enrollment months. Annualized expenditures (total or plan liability) were defined as average monthly expenditures multiplied by 12. Data for each individual was weighted by months of enrollment divided by 12.

(2) Concurrent Model

The HHS risk adjustment model is a concurrent model. A concurrent model takes diagnoses from a given period to predict cost in that same period. This is in contrast to a prospective model, which would use data from a prior period to predict costs in a future period. We are proposing to use a

[8] *State Jurisdictional and Extraterritorial Issues White Paper: States' Treatment of Regulatory Jurisdiction Over Single Employer Group Health Insurance* (unpublished white paper—available from NAIC Research Library or in NAIC Proceedings I, 2009) NAIC,3/17/09.

[9] *http://cciio.cms.gov/resources/files/riskadjustment_whitepaper_web.pdf.*

[10] American Academy of Actuaries: Risk Assessment and Risk Adjustment, Issue Brief. May 2010.

[11] Actuarial Standard of Practice No. 12: Risk Classification (for All Practice Areas). Actuarial Standards Board, Doc. No. 101. December 2005.

[12] We limited the modeling sample to enrollees in FFS plans because costs on non-FFS claims may not represent the full cost of care associated with a disease.

[13] In 2010 the MarketScan database, even FFS plan types can have carve-out services paid on a capitated basis, which are less reliable for predicted expenditure calculations.

[14] We used the same projected cost growth as was used in the development of the AV calculator.

concurrent model because 2013 diagnostic data will not be available for use in the model in 2014. In addition, we anticipate that enrollees may move between plans, or between programs. A concurrent model would be better able to handle changes in enrollment than a prospective model because individuals newly enrolling in health plans may not have prior data available that can be used in risk adjustment.

(3) Prescription Drugs

At this time, we have elected not to include prescription drug use as a predictor in each HHS risk adjustment model. While use of particular prescription drugs may be useful for predicting expenditures, we believe that inclusion of prescription drug information could create adverse incentives to modify discretionary prescribing. We seek comments on possible approaches for future versions of the model to include prescription drug information while avoiding adverse incentives.

(4) Principles of Risk Adjustment and the Hierarchical Condition Category (HCC) Classification System

A diagnostic classification system determines which diagnosis codes should be included, how the diagnosis codes should be grouped, and how the diagnostic groupings should interact for risk adjustment purposes. The ten principles that were used to develop the hierarchical condition category (HCC) classification system for the Medicare risk adjustment model guided the creation of the HHS risk adjustment model we propose to use when HHS operates risk adjustment on behalf of a State. Those principles are:

Principle 1—Diagnostic categories should be clinically meaningful. Each diagnostic category is a set of International Classification of Diseases, Ninth Revision, Clinical Modification (''ICD–9–CM'') codes.[15] These codes should all relate to a reasonably well-specified disease or medical condition that defines the category.

Principle 2—Diagnostic categories should predict medical (including drug) expenditures. Diagnoses in the same HCC should be reasonably homogeneous with respect to their effect on both current (this year's) costs (concurrent risk adjustment) or future (next year's) costs (prospective risk adjustment).

Principle 3—Diagnostic categories that will affect payments should have adequate sample sizes to permit accurate and stable estimates of expenditures. Diagnostic categories used in establishing payments should have adequate sample sizes in available data sets.

Principle 4—In creating an individual's clinical profile, hierarchies should be used to characterize the person's illness level within each disease process, while the effects of unrelated disease processes accumulate. Related conditions should be treated hierarchically, with more severe manifestations of a condition dominating (and zeroing out the effect of) less serious ones.

Principle 5—The diagnostic classification should encourage specific coding. Vague diagnostic codes should be grouped with less severe and lower-paying diagnostic categories to provide incentives for more specific diagnostic coding.

Principle 6—The diagnostic classification should not reward coding proliferation. The classification should not measure greater disease burden simply because more ICD–9–CM codes are present.

Principle 7—Providers should not be penalized for recording additional diagnoses (monotonicity). This principle has two consequences for modeling: (1) no HCC should carry a negative payment weight; and (2) a condition that is higher-ranked in a disease hierarchy (causing lower-rank diagnoses to be ignored) should have at least as large a payment weight as lower-ranked conditions in the same hierarchy. (There may be exceptions, as when a coded condition represents a radical change of treatment of a disease process.)

Principle 8—The classification system should be internally consistent (transitive). If diagnostic category A is higher-ranked than category B in a disease hierarchy, and category B is higher-ranked than category C, then category A should be higher-ranked than category C. Transitivity improves the internal consistency of the classification system and ensures that the assignment of diagnostic categories is independent of the order in which hierarchical exclusion rules are applied.

Principle 9—The diagnostic classification should assign all ICD–9–CM codes (exhaustive classification). Because each diagnostic code potentially contains relevant clinical information, the classification should categorize all ICD–9–CM codes.

Principle 10—Discretionary diagnostic categories should be excluded from payment models. Diagnoses that are particularly subject to intentional or unintentional discretionary coding variation or inappropriate coding by health plans/providers, or that are not clinically or empirically credible as cost predictors, should not increase cost predictions. Excluding these diagnoses reduces the sensitivity of the model to coding variation, coding proliferation, gaming, and upcoding.

(5) CMS HCC Diagnostic Classification System

The HCCs in the Medicare risk adjustment model are referred to as CMS HCCs. The HCCs in the HHS risk adjustment model are referred to as HHS HCCs. The CMS HCC diagnostic classification provides the diagnostic framework for the classification and selection of HCCs for the HHS risk adjustment model. The CMS HCC risk adjustment model uses patient diagnoses and demographic information to prospectively predict medical spending for beneficiaries in Medicare Part C managed care plans. The CMS HCC classification system was reviewed and adapted to account for the different population to create the HHS HCC classification.

The CMS HCC diagnostic classification system begins by classifying over 14,000 ICD–9–CM diagnosis codes into diagnostic groups, or DXGs. Each ICD–9–CM code maps to exactly one DXG, which represents a well-specified medical condition or set of conditions. DXGs are further aggregated into Condition Categories, or CCs. CCs describe a broader set of similar diseases. Although they are not as homogeneous as DXGs, diseases within a CC are related clinically and with respect to cost. Hierarchies are imposed among related CCs, so that a person is coded for only the most severe manifestation among related diseases.

After imposing hierarchies, CCs become Hierarchical Condition Categories, or HCCs. Although HCCs reflect hierarchies among related disease categories, for unrelated diseases, HCCs accumulate. For example, a female with rheumatoid arthritis and breast cancer has (at least) two separate HCCs coded, and her predicted cost would reflect increments for both conditions. The model's structure thus provides, and predicts from, a detailed comprehensive clinical profile for each individual.

Three major characteristics of the CMS HCC classification system required modification for use with the HHS risk adjustment model: (1) Population; (2) type of spending; and (3) prediction year. The CMS HCCs were developed using data from the aged and/or disabled Medicare population. Although every ICD–9–CM diagnosis code is

[15] Please note that in future years we will update the calibration of the HHS risk adjustment model to account for the transition from ICD–9–CM codes to ICD–10–CM codes.

mapped and categorized into a diagnostic grouping, for some conditions (such as pregnancy) the sample size in the Medicare population is quite low. With larger sample sizes in the commercial population, HCCs were re-examined for infant, child, and adult subpopulations. Additionally, the CMS HCCs are configured to predict medical spending, while HHS HCCs predict both medical and drug spending. Finally, the CMS HCC classification is primarily designed for use with a prospective risk adjustment model, using base year diagnoses and demographic information to predict the next year's spending. Each HHS risk adjustment model is concurrent, using current year diagnoses and demographics to predict the current year's spending. Medical conditions may predict current year costs that differ from future costs; HCC and DXG groupings should reflect those differences.

As such, HCCs and DXGs may not be the same between the Medicare and HHS risk adjustment models. For example, the newborn hierarchy was reconfigured in the HHS risk adjustment model to include new HCCs and DXGs to account for major cost differences in the youngest premature newborns and in neonatal disorders. Adjustments such as these resulted in 264 classification HCCs in the HHS risk adjustment model.

In designing the diagnostic classification for the HHS risk adjustment model, principles 7 (monotonicity), 8 (transitivity), and 9 (exhaustive classification) were prioritized. For example, if the expenditure weights for the models did not originally satisfy monotonicity, constraints were imposed to create models that did. However, tradeoffs were often required among other principles. For example, clinical meaningfulness is often best served by creating a very large number of detailed clinical groupings. However, a large number of groupings may not allow for adequate sample sizes for each category.

(6) Principles for HCC Selection

We selected 127 of the full classification of 264 HHS HCCs for inclusion in the HHS risk adjustment model. In determining which HCCs to include in the HHS risk adjustment model, HCCs that were more appropriate for a concurrent model or for the expected risk adjustment population (for example, low birth weight babies were included in the HHS risk adjustment model). We considered the basic criteria below to determine which HCCs should be included in the HHS risk adjustment model:

- Whether the HCC represents clinically significant medical conditions with significant costs for the target population;
- Whether there will be a sufficient sample size to ensure stable results for the HCC;
- Whether excluding the HCC would exclude (or limit the impact of) diagnoses particularly subject to discretionary coding;
- Whether the HCC identifies chronic or systematic conditions that represent insurance risk selection or risk segmentation, rather than random acute events;
- Do not represent poor quality of care; and
- Whether the HCC is applicable to the model age group.

Consistent with the risk adjustment principles described previously, each HHS risk adjustment model excludes HHS HCCs containing diagnoses that are vague or nonspecific (for example, symptoms), discretionary in medical treatment or coding (for example, osteoarthritis), or not medically significant (for example, muscle strain). Each HHS risk adjustment model also excludes HHS HCCs that do not add to costs.

(7) Grouping of HCCs

To balance the competing goals of improving predictive power and limiting coding variability to create a relatively simple risk adjustment model, a number of HHS HCCs were grouped into sets equivalent to a single HCC. HHS HCCs were grouped (1) To reduce model complexity; (2) to avoid including HHS HCCs with small sample size; (3) to limit upcoding by severity within an HCC hierarchy; and (4) to reduce additivity within disease groups (but not across disease groups) to decrease the sensitivity of the model to coding proliferation. After grouping, the number of HHS HCCs included in the proposed HHS risk adjustment model was effectively reduced from 127 to 100.[16]

(8) Demographics

In addition to the HHS HCCs included in the HHS risk adjustment model, enrollee risk scores are calculated from demographic factors. There are 18 age/sex categories for adults, and 8 age/sex categories for children. As described below, age/sex categories for infants are not used. Adults are defined as ages 21+, children are ages 2–20, and infants are ages 0–1. The age categories for adult male and female are ages 21–24, 25–29, 30–34, 35–39, 40–44, 45–49, 50–54, 55–59, and 60+. The age categories for children male and female are ages 2–4, 5–9, 10–14, and 15–20. This is consistent with the CMS HCC model, which also uses five year increments for age groups. In operation, age will be defined as age as of the enrollee's last day of enrollment in risk adjustment covered plans within an issuer in the applicable benefit year. For individuals who do not have any of the HHS HCCs included in the proposed HHS risk adjustment model, predicted expenditures are based solely on their demographic risk factors. In the calibration data set, 19 percent of adults, nine percent of children, and 45 percent of infants have HCCs included in the risk adjustment models.

(9) Separate Adult, Child and Infant Models

Due to the inherent clinical and cost differences in the adult (age 21+), child (age 2–20), and infant (age 0–1) populations, HHS developed separate risk adjustment models for each age group. The models for adults and children generally have similar specifications, including demographic age/sex categories and HHS HCCs, but differ slightly due to clinical and cost differences. However, infants have certain costs related to hospitalization at birth and can have severe and expensive conditions that do not apply to adults or children, while having relatively low frequencies for most HHS HCCs included in the model compared to adults and children. Therefore, HHS proposes to use a separate infant model.

The infant model utilizes a mutually exclusive groups approach in which infants are assigned a maturity category (by gestation and birth weight) and a severity category. There are 5 maturity categories: Extremely Immature; Immature; Premature/Multiples; Term; and Age 1. For the maturity category, age 0 infants would be assigned to one of the first four categories and age 1 infants would be assigned to the Age 1 category. There are 5 severity categories based on the clinical severity and associated costs of the non-maturity HCCs: Severity Level 1 (Lowest Severity) to Severity Level 5 (Highest Severity). All infants (age 0 or 1) are assigned to a severity category based on the highest severity of their non-maturity HCCs. The 5 maturity categories and 5 severity categories would be used to create 25 mutually-exclusive interaction terms to which

[16] In addition, we imposed several additional constraints –HCC coefficient values were made equal if a lower-ranked HCC in a disease hierarchy had a higher coefficient than a higher-ranked HCC; the 10 principles of risk adjustment models described in section III.B.3.b.4. were generally followed.

each infant is assigned. An infant who has HCCs in more than one severity category would be assigned to the highest of those severity categories. An infant who has no HCCs or only a newborn maturity HCC would be assigned to Severity Level 1 (Lowest). Finally, evidence suggests that male infants have higher costs than female infants due to increased morbidity and neonatal mortality.[17] To account for these differences by sex, there are 2 male-age indicator variables: Age 0 Male and Age 1 Male. The male-age variable would be added to the interaction term to which the infant is assigned.

We understand that there may be cases in which there is no separate infant birth claim from which to gather diagnoses. For example, at an operational level mother and infant claims may be bundled such that infant diagnoses appear on the mother's record. Where newborn diagnoses appear on the mother's claims, HHS is exploring the feasibility of associating those codes with the appropriate infant. This assumes that the mother and infant enrollment records exist and can be matched, which may also pose operational problems in some cases. Alternatively, we are considering requiring issuers to provide separate mother and infant claims when they have received a combined claim. We seek comment on the operational feasibility of both of these approaches.

Tables 5 and 6 contain descriptions of how the severity and maturity are defined.

(10) Selection of Plan Liability Model

We propose separate risk adjustment models for each metal level because plans at different metal levels would have different liability for enrollees with the same expenditure patterns.

We considered using a total expenditure approach to estimating the HHS risk adjustment model. A total expenditure risk adjustment model would use the demographic age/sex categories, HHS HCCs included in the model, and any other independent variables to predict all of the costs associated with an enrollee, whether those costs are incurred by the enrollee or the issuer. In a total expenditure model, two individuals of the same age with the same set of HCCs would have the same risk score regardless of the metal level plan type in which the individuals were enrolled. However, we do not believe that this approach would accurately capture plan liability levels due to the non-linear nature of liability for plans at different metal levels. In particular, deductibles are anticipated to be highest in bronze plans and lowest in platinum plans. Plan liabilities for plan types (platinum, gold, silver, bronze, and catastrophic) were defined by applying standardized benefit design parameters for each given metal level to total expenditures. We estimated average plan liability for each of the plan types, and created an adult, child, and infant model for each plan type.

(11) Disease Interactions

We propose that the HHS risk adjustment models for adults include interaction factors. Including interactions improves model performance for low- and high-cost individuals and better reflects plan liability across metal levels.

Disease interactions were created using the silver model by first creating a single severity illness indicator. We elected to use the silver model to create interaction terms because we expect enrollment to be highest in silver plans due to the availability of premium tax credits and cost-sharing reductions in those plans. The severity illness indicator variable was interacted with individual HCCs or HCC groups, and the predicted costs of the interaction variables were then grouped into three cost categories: low, medium and high. Interaction groups in the medium and high cost categories were included in the HHS risk adjustment model as shown at the bottom of Table 1 below. An individual is determined to have the severity indicator if they have one or more of the HCCs listed in Table 2.

An individual with at least one of the HCCs that comprises the severity illness indicator variable and at least one of the HCCs interacted with the severity illness indicator variable would be assigned a single interaction factor. A hierarchy is imposed on these interaction groups such that an individual with a high cost interaction is excluded from having a medium cost interaction. The high or the medium interaction factor would be added to demographic and diagnosis factors of the individual.

(12) List of Factors To Be Employed in the Model

The proposed HHS risk adjustment models predict annualized plan liability expenditures using age and sex categories and the HHS HCCs included in the HHS risk adjustment model. Dollar coefficients were estimated for these categories and HCCs using weighted least squares regression, where the weight was the fraction of the year enrolled.

For each model, the factors were the statistical regression dollar values for each category or HCC in the model divided by a weighted average plan liability for the full modeling sample. The factors represent the predicted relative incremental expenditures for each category or HCC. For a given enrollee, the sums of the factors for the enrollee's category and HCCs are the total relative predicted expenditures for that enrollee. Table 1 contains factors for each adult model, including the interactions. Table 3 contains the factors for each child model. Table 5 contains the factors for each infant model.

TABLE 1—ADULT RISK ADJUSTMENT MODEL FACTORS

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Demographic Factors					
Age 21–24, Male	0.258	0.208	0.141	0.078	0.062
Age 25–29, Male	0.278	0.223	0.150	0.081	0.064
Age 30–34, Male	0.338	0.274	0.187	0.101	0.079
Age 35–39, Male	0.413	0.339	0.240	0.140	0.113
Age 40–44, Male	0.487	0.404	0.293	0.176	0.145
Age 45–49, Male	0.581	0.487	0.365	0.231	0.195
Age 50–54, Male	0.737	0.626	0.484	0.316	0.269
Age 55–59, Male	0.863	0.736	0.580	0.393	0.339
Age 60–64, Male	1.028	0.880	0.704	0.487	0.424

[17] Mathews, T.J., M.S. & Marian F. MacDormon, Ph.D., Division of Vital Statistics. *Infant Mortality Statistics From the 2007 Period Linked Birth/Infant Death Data Set.* National Vital Statistic Reports. Vol. 59. No. 6. (June 29, 2011). Available at: *www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_06.pdf.*

TABLE 1—ADULT RISK ADJUSTMENT MODEL FACTORS—Continued

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Age 21–24, Female	0.433	0.350	0.221	0.101	0.072
Age 25–29, Female	0.548	0.448	0.301	0.156	0.120
Age 30–34, Female	0.656	0.546	0.396	0.243	0.203
Age 35–39, Female	0.760	0.641	0.490	0.334	0.293
Age 40–44, Female	0.839	0.713	0.554	0.384	0.338
Age 45–49, Female	0.878	0.747	0.583	0.402	0.352
Age 50–54, Female	1.013	0.869	0.695	0.486	0.427
Age 55–59, Female	1.054	0.905	0.726	0.507	0.443
Age 60–64, Female	1.156	0.990	0.798	0.559	0.489
Diagnosis Factors					
HIV/AIDS	5.485	4.972	4.740	4.740	4.749
Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/ Shock	13.696	13.506	13.429	13.503	13.529
Central Nervous System Infections, Except Viral Meningitis	7.277	7.140	7.083	7.117	7.129
Viral or Unspecified Meningitis	4.996	4.730	4.621	4.562	4.550
Opportunistic Infections	9.672	9.549	9.501	9.508	9.511
Metastatic Cancer	25.175	24.627	24.376	24.491	24.526
Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia	11.791	11.377	11.191	11.224	11.235
Non-Hodgkin's Lymphomas and Other Cancers and Tumors	6.432	6.150	6.018	5.983	5.970
Colorectal, Breast (Age < 50), Kidney, and Other Cancers	5.961	5.679	5.544	5.500	5.483
Breast (Age 50+) and Prostate Cancer, Benign/Uncertain Brain Tumors, and Other Cancers and Tumors	3.509	3.294	3.194	3.141	3.121
Thyroid Cancer, Melanoma, Neurofibromatosis, and Other Cancers and Tumors	1.727	1.559	1.466	1.353	1.315
Pancreas Transplant Status/Complications	9.593	9.477	9.411	9.434	9.439
Diabetes with Acute Complications	1.331	1.199	1.120	1.000	0.957
Diabetes with Chronic Complications	1.331	1.199	1.120	1.000	0.957
Diabetes without Complication	1.331	1.199	1.120	1.000	0.957
Protein-Calorie Malnutrition	14.790	14.790	14.786	14.862	14.883
Mucopoly-saccharidosis	2.335	2.198	2.130	2.071	2.052
Lipidoses and Glycogenosis	2.335	2.198	2.130	2.071	2.052
Amyloidosis, Porphyria, and Other Metabolic Disorders	2.335	2.198	2.130	2.071	2.052
Adrenal, Pituitary, and Other Significant Endocrine Disorders	2.335	2.198	2.130	2.071	2.052
Liver Transplant Status/Complications	18.445	18.197	18.105	18.165	18.188
End-Stage Liver Disease	6.412	6.102	5.974	6.001	6.012
Cirrhosis of Liver	2.443	2.255	2.177	2.137	2.125
Chronic Hepatitis	1.372	1.228	1.152	1.071	1.046
Acute Liver Failure/Disease, Including Neonatal Hepatitis	4.824	4.634	4.548	4.547	4.550
Intestine Transplant Status/Complications	77.945	78.110	78.175	78.189	78.195
Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis	13.144	12.823	12.681	12.743	12.764
Intestinal Obstruction	7.257	6.922	6.789	6.842	6.864
Chronic Pancreatitis	6.682	6.385	6.269	6.309	6.329
Acute Pancreatitis/Other Pancreatic Disorders and Intestinal Malabsorption	3.614	3.380	3.281	3.245	3.234
Inflammatory Bowel Disease	2.894	2.640	2.517	2.398	2.355
Necrotizing Fasciitis	7.878	7.622	7.508	7.545	7.559
Bone/Joint/Muscle Infections/Necrosis	7.878	7.622	7.508	7.545	7.559
Rheumatoid Arthritis and Specified Autoimmune Disorders	3.414	3.135	3.009	2.987	2.982
Systemic Lupus Erythematosus and Other Autoimmune Disorders	1.263	1.124	1.051	0.954	0.921
Osteogenesis Imperfecta and Other Osteodystrophies	3.524	3.300	3.184	3.126	3.107
Congenital/Developmental Skeletal and Connective Tissue Disorders	3.524	3.300	3.184	3.126	3.107
Cleft Lip/Cleft Palate	2.168	1.978	1.891	1.815	1.793
Hemophilia	49.823	49.496	49.321	49.330	49.329
Myelodysplastic Syndromes and Myelofibrosis	15.404	15.253	15.182	15.214	15.224
Aplastic Anemia	15.404	15.253	15.182	15.214	15.224
Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn	7.405	7.198	7.099	7.090	7.089
Sickle Cell Anemia (Hb-SS)	7.405	7.198	7.099	7.090	7.089
Thalassemia Major	7.405	7.198	7.099	7.090	7.089
Combined and Other Severe Immunodeficiencies	5.688	5.489	5.402	5.419	5.423
Disorders of the Immune Mechanism	5.688	5.489	5.402	5.419	5.423
Coagulation Defects and Other Specified Hematological Disorders	3.080	2.959	2.899	2.880	2.872
Drug Psychosis	3.776	3.517	3.389	3.302	3.274
Drug Dependence	3.776	3.517	3.389	3.302	3.274
Schizophrenia	3.122	2.854	2.732	2.647	2.624
Major Depressive and Bipolar Disorders	1.870	1.698	1.601	1.476	1.436
Reactive and Unspecified Psychosis, Delusional Disorders	1.870	1.698	1.601	1.476	1.436
Personality Disorders	1.187	1.065	0.974	0.836	0.790

TABLE 1—ADULT RISK ADJUSTMENT MODEL FACTORS—Continued

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Anorexia/Bulimia Nervosa	3.010	2.829	2.732	2.657	2.631
Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes	5.387	5.219	5.141	5.101	5.091
Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes	1.264	1.171	1.099	1.015	0.985
Autistic Disorder	1.187	1.065	0.974	0.836	0.790
Pervasive Developmental Disorders, Except Autistic Disorder	1.187	1.065	0.974	0.836	0.790
Traumatic Complete Lesion Cervical Spinal Cord	11.728	11.537	11.444	11.448	11.449
Quadriplegia	11.728	11.537	11.444	11.448	11.449
Traumatic Complete Lesion Dorsal Spinal Cord	10.412	10.205	10.108	10.111	10.111
Paraplegia	10.412	10.205	10.108	10.111	10.111
Spinal Cord Disorders/Injuries	6.213	5.969	5.861	5.843	5.836
Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease	3.379	3.094	2.967	2.927	2.919
Quadriplegic Cerebral Palsy	2.057	1.810	1.681	1.610	1.589
Cerebral Palsy, Except Quadriplegic	0.729	0.596	0.521	0.437	0.408
Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies	0.727	0.590	0.522	0.467	0.449
Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy	5.174	4.999	4.921	4.900	4.891
Muscular Dystrophy	2.118	1.928	1.848	1.771	1.745
Multiple Sclerosis	7.441	6.971	6.764	6.830	6.850
Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders	2.118	1.928	1.848	1.771	1.745
Seizure Disorders and Convulsions	1.578	1.411	1.321	1.229	1.199
Hydrocephalus	7.688	7.552	7.486	7.492	7.493
Non-Traumatic Coma, and Brain Compression/Anoxic Damage	9.265	9.102	9.022	9.026	9.025
Respirator Dependence/Tracheostomy Status	40.054	40.035	40.022	40.105	40.131
Respiratory Arrest	12.913	12.707	12.612	12.699	12.728
Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes	12.913	12.707	12.612	12.699	12.728
Heart Assistive Device/Artificial Heart	33.372	33.025	32.877	32.978	33.014
Heart Transplant	33.372	33.025	32.877	32.978	33.014
Congestive Heart Failure	3.790	3.648	3.587	3.591	3.594
Acute Myocardial Infarction	11.904	11.451	11.258	11.423	11.478
Unstable Angina and Other Acute Ischemic Heart Disease	6.369	6.001	5.861	5.912	5.935
Heart Infection/Inflammation, Except Rheumatic	6.770	6.611	6.537	6.530	6.528
Specified Heart Arrhythmias	3.363	3.193	3.112	3.063	3.046
Intracranial Hemorrhage	10.420	10.062	9.907	9.943	9.959
Ischemic or Unspecified Stroke	4.548	4.304	4.215	4.242	4.256
Cerebral Aneurysm and Arteriovenous Malformation	5.263	5.000	4.890	4.867	4.859
Hemiplegia/Hemiparesis	5.979	5.846	5.794	5.858	5.881
Monoplegia, Other Paralytic Syndromes	4.176	4.024	3.959	3.938	3.931
Atherosclerosis of the Extremities with Ulceration or Gangrene	11.941	11.801	11.745	11.844	11.876
Vascular Disease with Complications	8.228	7.996	7.896	7.922	7.932
Pulmonary Embolism and Deep Vein Thrombosis	4.853	4.642	4.549	4.539	4.537
Lung Transplant Status/Complications	31.457	31.161	31.030	31.131	31.161
Cystic Fibrosis	10.510	10.142	9.957	9.960	9.962
Chronic Obstructive Pulmonary Disease, Including Bronchiectasis	1.098	0.978	0.904	0.810	0.780
Asthma	1.098	0.978	0.904	0.810	0.780
Fibrosis of Lung and Other Lung Disorders	2.799	2.657	2.596	2.565	2.556
Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	9.052	8.934	8.883	8.913	8.924
Kidney Transplant Status	10.944	10.576	10.432	10.463	10.482
End Stage Renal Disease	37.714	37.356	37.193	37.352	37.403
Chronic Kidney Disease, Stage 5	2.189	2.048	1.995	1.990	1.992
Chronic Kidney Disease, Severe (Stage 4)	2.189	2.048	1.995	1.990	1.992
Ectopic and Molar Pregnancy, Except with Renal Failure, Shock, or Embolism	1.377	1.219	1.120	0.912	0.828
Miscarriage with Complications	1.377	1.219	1.120	0.912	0.828
Miscarriage with No or Minor Complications	1.377	1.219	1.120	0.912	0.828
Completed Pregnancy With Major Complications	3.778	3.285	3.134	2.931	2.906
Completed Pregnancy With Complications	3.778	3.285	3.134	2.931	2.906
Completed Pregnancy with No or Minor Complications	3.778	3.285	3.134	2.931	2.906
Chronic Ulcer of Skin, Except Pressure	2.515	2.371	2.313	2.304	2.304
Hip Fractures and Pathological Vertebral or Humerus Fractures	9.788	9.570	9.480	9.521	9.536
Pathological Fractures, Except of Vertebrae, Hip, or Humerus	1.927	1.805	1.735	1.648	1.620
Stem Cell, Including Bone Marrow, Transplant Status/Complications	30.944	30.908	30.893	30.917	30.928
Artificial Openings for Feeding or Elimination	11.093	10.939	10.872	10.943	10.965
Amputation Status, Lower Limb/Amputation Complications	7.277	7.087	7.009	7.056	7.073
Interaction Factors					
Severe illness × Opportunistic Infections	12.094	12.327	12.427	12.527	12.555

TABLE 1—ADULT RISK ADJUSTMENT MODEL FACTORS—Continued

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Severe illness × Metastatic Cancer	12.094	12.327	12.427	12.527	12.555
Severe illness × Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia	12.094	12.327	12.427	12.527	12.555
Severe illness × Non-Hodgkin's Lymphomas and Other Cancers and Tumors	12.094	12.327	12.427	12.527	12.555
Severe illness × Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy	12.094	12.327	12.427	12.527	12.555
Severe illness × Heart Infection/Inflammation, Except Rheumatic	12.094	12.327	12.427	12.527	12.555
Severe illness × Intracranial Hemorrhage	12.094	12.327	12.427	12.527	12.555
Severe illness × HCC group G06 (HCC Group 6 includes Myelodysplastic Syndromes and Myelofibrosis, and Aplastic Anemia)	12.094	12.327	12.427	12.527	12.555
Severe illness × HCC group G08 (HCC Group 8 includes Combined and Other Severe Immunodeficiencies, and Disorders of the Immune Mechanism)	12.094	12.327	12.427	12.527	12.555
Severe illness × End-Stage Liver Disease	2.498	2.648	2.714	2.813	2.841
Severe illness × Acute Liver Failure/Disease, Including Neonatal Hepatitis	2.498	2.648	2.714	2.813	2.841
Severe illness × Atherosclerosis of the Extremities with Ulceration or Gangrene	2.498	2.648	2.714	2.813	2.841
Severe illness × Vascular Disease with Complications	2.498	2.648	2.714	2.813	2.841
Severe illness × Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	2.498	2.648	2.714	2.813	2.841
Severe illness × Artificial Openings for Feeding or Elimination	2.498	2.648	2.714	2.813	2.841
Severe illness × HCC group G03 (HCC Group 3 includes Necrotizing Fasciitis and Bone/Joint/Muscle Infections/Necrosis)	2.498	2.648	2.714	2.813	2.841

TABLE 2—HHS HCCS IN THE SEVERITY ILLNESS INDICATOR VARIABLE

Description
Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock.
Peritonitis/Gastrointestinal Perforation/Necrotizing Enter colitis.
Seizure Disorders and Convulsions.
Non-Traumatic Coma, Brain Compression/Anoxic Damage.
Respirator Dependence/Tracheostomy Status.
Respiratory Arrest.
Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes.
Pulmonary Embolism and Deep Vein Thrombosis.

TABLE 3—CHILD RISK ADJUSTMENT MODEL FACTORS

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Demographic Factors					
Age 2–4, Male	0.283	0.209	0.106	0.019	0.000
Age 5–9, Male	0.196	0.140	0.064	0.005	0.000
Age 10–14, Male	0.246	0.189	0.110	0.047	0.033
Age 15–20, Male	0.336	0.273	0.191	0.114	0.095
Age 2–4, Female	0.233	0.165	0.071	0.019	0.000
Age 5–9, Female	0.165	0.113	0.048	0.005	0.000
Age 10–14, Female	0.223	0.168	0.095	0.042	0.031
Age 15–20, Female	0.379	0.304	0.198	0.101	0.077
Diagnosis Factors					
HIV/AIDS	2.956	2.613	2.421	2.228	2.166
Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock	17.309	17.142	17.061	17.081	17.088
Central Nervous System Infections, Except Viral Meningitis	12.636	12.409	12.296	12.313	12.319
Viral or Unspecified Meningitis	3.202	3.004	2.896	2.750	2.702
Opportunistic Infections	20.358	20.262	20.222	20.201	20.189
Metastatic Cancer	34.791	34.477	34.307	34.306	34.300
Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia	11.939	11.618	11.436	11.358	11.334
Non-Hodgkin's Lymphomas and Other Cancers and Tumors	9.354	9.071	8.908	8.806	8.774
Colorectal, Breast (Age <50), Kidney, and Other Cancers	3.689	3.480	3.337	3.188	3.143
Benign/Uncertain Brain Tumors, and Other Cancers and Tumors [18]	3.308	3.084	2.954	2.814	2.769

TABLE 3—CHILD RISK ADJUSTMENT MODEL FACTORS—Continued

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Thyroid Cancer, Melanoma, Neurofibromatosis, and Other Cancers and Tumors	1.530	1.368	1.254	1.114	1.066
Pancreas Transplant Status/Complications	18.933	18.476	18.264	18.279	18.289
Diabetes with Acute Complications	2.629	2.354	2.198	1.904	1.799
Diabetes with Chronic Complications	2.629	2.354	2.198	1.904	1.799
Diabetes without Complication	2.629	2.354	2.198	1.904	1.799
Protein-Calorie Malnutrition	13.930	13.794	13.726	13.751	13.759
Mucopolysaccharidosis	6.177	5.867	5.696	5.642	5.625
Lipidoses and Glycogenosis	6.177	5.867	5.696	5.642	5.625
Congenital Metabolic Disorders, Not Elsewhere Classified	6.177	5.867	5.696	5.642	5.625
Amyloidosis, Porphyria, and Other Metabolic Disorders	6.177	5.867	5.696	5.642	5.625
Adrenal, Pituitary, and Other Significant Endocrine Disorders	6.177	5.867	5.696	5.642	5.625
Liver Transplant Status/Complications	18.322	18.048	17.922	17.898	17.888
End-Stage Liver Disease	12.960	12.754	12.650	12.622	12.614
Cirrhosis of Liver	1.177	1.027	0.920	0.871	0.833
Chronic Hepatitis	1.177	1.027	0.920	0.807	0.775
Acute Liver Failure/Disease, Including Neonatal Hepatitis	6.255	6.092	6.003	5.972	5.966
Intestine Transplant Status/Complications	106.169	106.704	106.991	107.180	107.222
Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis	16.784	16.360	16.156	16.171	16.179
Intestinal Obstruction	5.715	5.451	5.307	5.210	5.178
Chronic Pancreatitis	16.692	16.315	16.148	16.163	16.166
Acute Pancreatitis/Other Pancreatic Disorders and Intestinal Malabsorption	3.843	3.685	3.584	3.471	3.434
Inflammatory Bowel Disease	5.049	4.673	4.471	4.320	4.271
Necrotizing Fasciitis	5.829	5.551	5.398	5.318	5.292
Bone/Joint/Muscle Infections/Necrosis	5.829	5.551	5.398	5.318	5.292
Rheumatoid Arthritis and Specified Autoimmune Disorders	2.689	2.473	2.327	2.171	2.122
Systemic Lupus Erythematosus and Other Autoimmune Disorders	1.397	1.249	1.139	0.996	0.951
Osteogenesis Imperfecta and Other Osteodystrophies	1.536	1.410	1.311	1.211	1.183
Congenital/Developmental Skeletal and Connective Tissue Disorders	1.536	1.410	1.311	1.211	1.183
Cleft Lip/Cleft Palate	1.785	1.573	1.441	1.281	1.228
Hemophilia	46.388	45.839	45.551	45.541	45.535
Myelodysplastic Syndromes and Myelofibrosis	29.387	29.168	29.063	29.075	29.078
Aplastic Anemia	29.387	29.168	29.063	29.075	29.078
Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn	7.791	7.476	7.308	7.229	7.203
Sickle Cell Anemia (Hb-SS)	7.791	7.476	7.308	7.229	7.203
Thalassemia Major	7.791	7.476	7.308	7.229	7.203
Combined and Other Severe Immunodeficiencies	5.690	5.455	5.339	5.270	5.247
Disorders of the Immune Mechanism	5.690	5.455	5.339	5.270	5.247
Coagulation Defects and Other Specified Hematological Disorders	4.909	4.754	4.650	4.543	4.511
Drug Psychosis	4.067	3.816	3.693	3.596	3.566
Drug Dependence	4.067	3.816	3.693	3.596	3.566
Schizophrenia	5.536	5.127	4.916	4.775	4.730
Major Depressive and Bipolar Disorders	1.779	1.591	1.453	1.252	1.188
Reactive and Unspecified Psychosis, Delusional Disorders	1.779	1.591	1.453	1.252	1.188
Personality Disorders	0.935	0.832	0.723	0.511	0.441
Anorexia/Bulimia Nervosa	2.565	2.372	2.252	2.146	2.111
Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes	3.606	3.347	3.239	3.201	3.189
Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes	2.403	2.203	2.093	1.982	1.943
Autistic Disorder	1.673	1.500	1.372	1.177	1.112
Pervasive Developmental Disorders, Except Autistic Disorder	0.963	0.850	0.723	0.511	0.441
Traumatic Complete Lesion Cervical Spinal Cord	18.394	18.224	18.156	18.210	18.228
Quadriplegia	18.394	18.224	18.156	18.210	18.228
Traumatic Complete Lesion Dorsal Spinal Cord	18.394	18.224	18.156	18.210	18.228
Paraplegia	18.394	18.224	18.156	18.210	18.228
Spinal Cord Disorders/Injuries	4.668	4.416	4.287	4.181	4.150
Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease	14.484	14.155	13.995	13.958	13.954
Quadriplegic Cerebral Palsy	5.717	5.367	5.223	5.251	5.262
Cerebral Palsy, Except Quadriplegic	1.899	1.672	1.557	1.447	1.412
Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies	0.943	0.785	0.686	0.592	0.562
Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy	5.301	5.071	4.950	4.861	4.832
Muscular Dystrophy	3.122	2.915	2.800	2.698	2.669
Multiple Sclerosis	5.370	4.996	4.806	4.769	4.752
Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders	3.122	2.915	2.800	2.698	2.669
Seizure Disorders and Convulsions	2.188	2.012	1.882	1.702	1.644
Hydrocephalus	6.791	6.630	6.550	6.521	6.513

TABLE 3—CHILD RISK ADJUSTMENT MODEL FACTORS—Continued

Factor	Platinum	Gold	Silver	Bronze	Catastrophic
Non-Traumatic Coma, and Brain Compression/Anoxic Damage	9.073	8.882	8.788	8.753	8.735
Respirator Dependence/Tracheostomy Status	34.717	34.532	34.471	34.623	34.668
Respiratory Arrest	14.998	14.772	14.669	14.691	14.696
Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes	14.998	14.772	14.669	14.691	14.696
Heart Assistive Device/Artificial Heart	25.734	25.262	25.057	25.189	25.225
Heart Transplant	25.734	25.262	25.057	25.189	25.225
Congestive Heart Failure	6.292	6.159	6.073	6.013	5.992
Acute Myocardial Infarction	4.568	4.453	4.410	4.433	4.448
Unstable Angina and Other Acute Ischemic Heart Disease	4.568	4.453	4.410	4.433	4.448
Heart Infection/Inflammation, Except Rheumatic	12.842	12.655	12.573	12.590	12.597
Hypoplastic Left Heart Syndrome and Other Severe Congenital Heart Disorders	7.019	6.823	6.668	6.528	6.480
Major Congenital Heart/Circulatory Disorders	2.257	2.143	2.018	1.870	1.828
Atrial and Ventricular Septal Defects, Patent Ductus Arteriosus, and Other Congenital Heart/Circulatory Disorders	1.411	1.319	1.206	1.078	1.047
Specified Heart Arrhythmias	4.483	4.276	4.141	4.052	4.026
Intracranial Hemorrhage	21.057	20.757	20.616	20.617	20.618
Ischemic or Unspecified Stroke	8.498	8.373	8.324	8.360	8.363
Cerebral Aneurysm and Arteriovenous Malformation	4.704	4.464	4.344	4.280	4.250
Hemiplegia/Hemiparesis	5.561	5.404	5.334	5.315	5.310
Monoplegia, Other Paralytic Syndromes	5.561	5.404	5.334	5.315	5.310
Atherosclerosis of the Extremities with Ulceration or Gangrene	10.174	9.937	9.799	9.688	9.641
Vascular Disease with Complications	11.571	11.355	11.257	11.260	11.272
Pulmonary Embolism and Deep Vein Thrombosis	13.894	13.661	13.557	13.591	13.604
Lung Transplant Status/Complications	100.413	100.393	100.412	100.660	100.749
Cystic Fibrosis	13.530	13.006	12.743	12.739	12.742
Chronic Obstructive Pulmonary Disease, Including Bronchiectasis	0.521	0.458	0.354	0.215	0.175
Asthma	0.521	0.458	0.354	0.215	0.175
Fibrosis of Lung and Other Lung Disorders	5.812	5.657	5.555	5.472	5.450
Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections	10.730	10.615	10.549	10.566	10.571
Kidney Transplant Status	18.933	18.476	18.264	18.279	18.289
End Stage Renal Disease	43.158	42.816	42.659	42.775	42.808
Chronic Kidney Disease, Stage 5	11.754	11.581	11.472	11.374	11.340
Chronic Kidney Disease, Severe (Stage 4)	11.754	11.581	11.472	11.374	11.340
Ectopic and Molar Pregnancy, Except with Renal Failure, Shock, or Embolism	1.191	1.042	0.917	0.674	0.590
Miscarriage with Complications	1.191	1.042	0.917	0.674	0.590
Miscarriage with No or Minor Complications	1.191	1.042	0.917	0.674	0.590
Completed Pregnancy With Major Complications	3.419	2.956	2.778	2.498	2.437
Completed Pregnancy With Complications	3.419	2.956	2.778	2.498	2.437
Completed Pregnancy with No or Minor Complications	3.419	2.956	2.778	2.498	2.437
Chronic Ulcer of Skin, Except Pressure	1.570	1.479	1.394	1.314	1.289
Hip Fractures and Pathological Vertebral or Humerus Fractures	7.389	7.174	7.022	6.882	6.842
Pathological Fractures, Except of Vertebrae, Hip, or Humerus	2.353	2.244	2.128	1.965	1.912
Stem Cell, Including Bone Marrow, Transplant Status/Complications	30.558	30.485	30.466	30.522	30.538
Artificial Openings for Feeding or Elimination	14.410	14.247	14.197	14.340	14.383
Amputation Status, Lower Limb/Amputation Complications	10.174	9.937	9.799	9.688	9.641

TABLE 4—INFANT RISK ADJUSTMENT MODELS FACTORS

Group	Platinum	Gold	Silver	Bronze	Catastrophic
Extremely Immature × Severity Level 5 (Highest)	393.816	392.281	391.387	391.399	391.407
Extremely Immature × Severity Level 4	225.037	223.380	222.424	222.371	222.365
Extremely Immature × Severity Level 3	60.363	59.232	58.532	58.247	58.181
Extremely Immature × Severity Level 2	60.363	59.232	58.532	58.247	58.181
Extremely Immature × Severity Level 1 (Lowest)	60.363	59.232	58.532	58.247	58.181
Immature × Severity Level 5 (Highest)	207.274	205.589	204.615	204.629	204.644
Immature × Severity Level 4	89.694	88.105	87.188	87.169	87.178
Immature × Severity Level 3	45.715	44.305	43.503	43.394	43.379
Immature × Severity Level 2	33.585	32.247	31.449	31.221	31.163
Immature × Severity Level 1 (Lowest)	33.585	32.247	31.449	31.221	31.163
Premature/Multiples × Severity Level 5 (Highest)	173.696	172.095	171.169	171.111	171.108

[18] This HCC also includes Breast (Age 50+) and Prostate Cancer.

TABLE 4—INFANT RISK ADJUSTMENT MODELS FACTORS—Continued

Group	Platinum	Gold	Silver	Bronze	Catastrophic
Premature/Multiples × Severity Level 4	34.417	32.981	32.155	31.960	31.925
Premature/Multiples × Severity Level 3	18.502	17.382	16.694	16.311	16.200
Premature/Multiples × Severity Level 2	9.362	8.533	7.967	7.411	7.241
Premature/Multiples × Severity Level 1 (Lowest)	6.763	6.144	5.599	4.961	4.771
Term × Severity Level 5 (Highest)	132.588	131.294	130.511	130.346	130.292
Term × Severity Level 4	20.283	19.222	18.560	18.082	17.951
Term × Severity Level 3	6.915	6.286	5.765	5.092	4.866
Term × Severity Level 2	3.825	3.393	2.925	2.189	1.951
Term × Severity Level 1 (Lowest)	1.661	1.449	0.998	0.339	0.188
Age1 × Severity Level 5 (Highest)	62.385	61.657	61.217	61.130	61.108
Age1 × Severity Level 4	10.855	10.334	9.988	9.747	9.686
Age1 × Severity Level 3	3.633	3.299	3.007	2.692	2.608
Age1 × Severity Level 2	2.177	1.930	1.665	1.320	1.223
Age1 × Severity Level 1 (Lowest)	0.631	0.531	0.333	0.171	0.137
Age 0 Male	0.629	0.587	0.574	0.533	0.504
Age 1 Male	0.117	0.102	0.094	0.065	0.054

TABLE 5—HHS HCCS INCLUDED IN INFANT MODEL MATURITY CATEGORIES

Maturity category	HCC/Description
Extremely Immature	Extremely Immature Newborns, Birthweight < 500 Grams.
Extremely Immature	Extremely Immature Newborns, Including Birthweight 500–749 Grams.
Extremely Immature	Extremely Immature Newborns, Including Birthweight 750–999 Grams.
Immature	Premature Newborns, Including Birthweight 1000–1499 Grams.
Immature	Premature Newborns, Including Birthweight 1500–1999 Grams.
Premature/Multiples	Premature Newborns, Including Birthweight 2000–2499 Grams.
Premature/Multiples	Other Premature, Low Birthweight, Malnourished, or Multiple Birth Newborns.
Term	Term or Post-Term Singleton Newborn, Normal or High Birthweight.
Age 1	All age 1 infants.

TABLE 6—HHS HCCS INCLUDED IN INFANT MODEL SEVERITY CATEGORIES

Severity category	HCC
Severity Level 5 (Highest)	Metastatic Cancer.
Severity Level 5	Pancreas Transplant Status/Complications.
Severity Level 5	Liver Transplant Status/Complications.
Severity Level 5	End-Stage Liver Disease.
Severity Level 5	Intestine Transplant Status/Complications.
Severity Level 5	Peritonitis/Gastrointestinal Perforation/Necrotizing Enterocolitis.
Severity Level 5	Respirator Dependence/Tracheostomy Status.
Severity Level 5	Heart Assistive Device/Artificial Heart.
Severity Level 5	Heart Transplant.
Severity Level 5	Congestive Heart Failure.
Severity Level 5	Hypoplastic Left Heart Syndrome and Other Severe Congenital Heart Disorders.
Severity Level 5	Lung Transplant Status/Complications.
Severity Level 5	Kidney Transplant Status.
Severity Level 5	End Stage Renal Disease.
Severity Level 5	Stem Cell, Including Bone Marrow, Transplant Status/Complications.
Severity Level 4	Septicemia, Sepsis, Systemic Inflammatory Response Syndrome/Shock.
Severity Level 4	Lung, Brain, and Other Severe Cancers, Including Pediatric Acute Lymphoid Leukemia.
Severity Level 4	Mucopolysaccharidosis.
Severity Level 4	Major Congenital Anomalies of Diaphragm, Abdominal Wall, and Esophagus, Age < 2.
Severity Level 4	Myelodysplastic Syndromes and Myelofibrosis.
Severity Level 4	Aplastic Anemia.
Severity Level 4	Combined and Other Severe Immunodeficiencies.
Severity Level 4	Traumatic Complete Lesion Cervical Spinal Cord.
Severity Level 4	Quadriplegia.
Severity Level 4	Amyotrophic Lateral Sclerosis and Other Anterior Horn Cell Disease.
Severity Level 4	Quadriplegic Cerebral Palsy.
Severity Level 4	Myasthenia Gravis/Myoneural Disorders and Guillain-Barre Syndrome/Inflammatory and Toxic Neuropathy.
Severity Level 4	Non-Traumatic Coma, Brain Compression/Anoxic Damage.
Severity Level 4	Respiratory Arrest.
Severity Level 4	Cardio-Respiratory Failure and Shock, Including Respiratory Distress Syndromes.
Severity Level 4	Acute Myocardial Infarction.
Severity Level 4	Heart Infection/Inflammation, Except Rheumatic.
Severity Level 4	Major Congenital Heart/Circulatory Disorders.
Severity Level 4	Intracranial Hemorrhage.

TABLE 6—HHS HCCS INCLUDED IN INFANT MODEL SEVERITY CATEGORIES—Continued

Severity category	HCC
Severity Level 4	Ischemic or Unspecified Stroke.
Severity Level 4	Vascular Disease with Complications.
Severity Level 4	Pulmonary Embolism and Deep Vein Thrombosis.
Severity Level 4	Aspiration and Specified Bacterial Pneumonias and Other Severe Lung Infections.
Severity Level 4	Chronic Kidney Disease, Stage 5.
Severity Level 4	Hip Fractures and Pathological Vertebral or Humerus Fractures.
Severity Level 4	Artificial Openings for Feeding or Elimination.
Severity Level 3	HIV/AIDS.
Severity Level 3	Central Nervous System Infections, Except Viral Meningitis.
Severity Level 3	Opportunistic Infections.
Severity Level 3	Non-Hodgkin's Lymphomas and Other Cancers and Tumors.
Severity Level 3	Colorectal, Breast (Age < 50), Kidney and Other Cancers.
Severity Level 3	Benign/Uncertain Brain Tumors, and Other Cancers and Tumors.[19]
Severity Level 3	Lipidoses and Glycogenosis.
Severity Level 3	Adrenal, Pituitary, and Other Significant Endocrine Disorders.
Severity Level 3	Acute Liver Failure/Disease, Including Neonatal Hepatitis.
Severity Level 3	Intestinal Obstruction.
Severity Level 3	Necrotizing Fasciitis.
Severity Level 3	Bone/Joint/Muscle Infections/Necrosis.
Severity Level 3	Osteogenesis Imperfecta and Other Osteodystrophies.
Severity Level 3	Cleft Lip/Cleft Palate.
Severity Level 3	Hemophilia.
Severity Level 3	Disorders of the Immune Mechanism.
Severity Level 3	Coagulation Defects and Other Specified Hematological Disorders.
Severity Level 3	Prader-Willi, Patau, Edwards, and Autosomal Deletion Syndromes.
Severity Level 3	Traumatic Complete Lesion Dorsal Spinal Cord.
Severity Level 3	Paraplegia.
Severity Level 3	Spinal Cord Disorders/Injuries.
Severity Level 3	Cerebral Palsy, Except Quadriplegic.
Severity Level 3	Muscular Dystrophy.
Severity Level 3	Parkinson's, Huntington's, and Spinocerebellar Disease, and Other Neurodegenerative Disorders.
Severity Level 3	Hydrocephalus.
Severity Level 3	Unstable Angina and Other Acute Ischemic Heart Disease.
Severity Level 3	Atrial and Ventricular Septal Defects, Patent Ductus Arteriosus, and Other Congenital Heart/Circulatory Disorders.
Severity Level 3	Specified Heart Arrhythmias.
Severity Level 3	Cerebral Aneurysm and Arteriovenous Malformation.
Severity Level 3	Hemiplegia/Hemiparesis.
Severity Level 3	Cystic Fibrosis.
Severity Level 3	Fibrosis of Lung and Other Lung Disorders.
Severity Level 3	Pathological Fractures, Except of Vertebrae, Hip, or Humerus.
Severity Level 2	Viral or Unspecified Meningitis.
Severity Level 2	Thyroid, Melanoma, Neurofibromatosis, and Other Cancers and Tumors.
Severity Level 2	Diabetes with Acute Complications.
Severity Level 2	Diabetes with Chronic Complications.
Severity Level 2	Diabetes without Complication.
Severity Level 2	Protein-Calorie Malnutrition.
Severity Level 2	Congenital Metabolic Disorders, Not Elsewhere Classified.
Severity Level 2	Amyloidosis, Porphyria, and Other Metabolic Disorders.
Severity Level 2	Cirrhosis of Liver.
Severity Level 2	Chronic Pancreatitis.
Severity Level 2	Inflammatory Bowel Disease.
Severity Level 2	Rheumatoid Arthritis and Specified Autoimmune Disorders.
Severity Level 2	Systemic Lupus Erythematosus and Other Autoimmune Disorders.
Severity Level 2	Congenital/Developmental Skeletal and Connective Tissue Disorders.
Severity Level 2	Acquired Hemolytic Anemia, Including Hemolytic Disease of Newborn.
Severity Level 2	Sickle Cell Anemia (Hb-SS).
Severity Level 2	Drug Psychosis.
Severity Level 2	Drug Dependence.
Severity Level 2	Down Syndrome, Fragile X, Other Chromosomal Anomalies, and Congenital Malformation Syndromes.
Severity Level 2	Spina Bifida and Other Brain/Spinal/Nervous System Congenital Anomalies.
Severity Level 2	Seizure Disorders and Convulsions.
Severity Level 2	Monoplegia, Other Paralytic Syndromes.
Severity Level 2	Atherosclerosis of the Extremities with Ulceration or Gangrene.
Severity Level 2	Chronic Obstructive Pulmonary Disease, Including Bronchiectasis.
Severity Level 2	Chronic Ulcer of Skin, Except Pressure.
Severity Level 1 (Lowest)	Chronic Hepatitis.
Severity Level 1	Acute Pancreatitis/Other Pancreatic Disorders and Intestinal Malabsorption.
Severity Level 1	Thalassemia Major.
Severity Level 1	Autistic Disorder.

TABLE 6—HHS HCCS INCLUDED IN INFANT MODEL SEVERITY CATEGORIES—Continued

Severity category	HCC
Severity Level 1	Pervasive Developmental Disorders, Except Autistic Disorder.
Severity Level 1	Multiple Sclerosis.
Severity Level 1	Asthma.
Severity Level 1	Chronic Kidney Disease, Severe (Stage 4).
Severity Level 1	Amputation Status, Lower Limb/Amputation Complications.
Severity Level 1	No Severity HCCs.

(13) Adjustments to Model Discussed in the Risk Adjustment White Paper

We discussed the possibility of including adjustments to the HHS risk adjustment model to account for cost-sharing reductions and reinsurance payments in the Risk Adjustment White Paper, and sought comment. We propose to include an adjustment for the receipt of cost-sharing reductions in the model, but not to adjust for receipt of reinsurance payments in the model.

(i) Cost-sharing Reductions Adjustments

We propose an adjustment to the HHS risk adjustment models for individuals who receive cost-sharing reductions. The Affordable Care Act establishes cost-sharing reductions for enrollees in individual market plans in Exchanges based on their income and/or Indian status. Individuals who qualify for cost-sharing reductions may utilize health care services at a higher rate than would be the case in the absence of cost-sharing reductions. This higher utilization (to the extent not covered by required cost sharing by the enrollees or cost-sharing reductions reimbursed by the Federal government) would neither be paid by cost sharing reductions nor built into premiums. This adjustment to the HHS risk adjustment models would be based on the adjustment for induced demand for advanced payment of cost-sharing reductions described in section III.E. of this proposed rule. The proposed adjustment factors are set forth in Table 7. These adjustments would be multiplicative, and applied after demographic, diagnosis, and interaction factors are summed.

We plan to evaluate this adjustment in the future, once data from the first few years of risk adjustment are available. We seek comment on this approach.

TABLE 7—COST-SHARING REDUCTION ADJUSTMENT

Household income	Plan AV	Induced utilization factor
Non-Indian CSR Recipients		
100–150% of FPL	Plan Variation 94%	1.12
150–200% of FPL	Plan Variation 87%	1.12
200–250% of FPL	Plan Variation 73%	1.00
>250% of FPL	Standard Plan 70%	1.00
Indian CSR Recipients		
<300% of FPL	Platinum (90%)	1.15
<300% of FPL	Gold (80%)	1.12
<300% of FPL	Silver (70%)	1.07
<300% of FPL	Bronze (60%)	1.00
>300% of FPL		1.00

(ii) Reinsurance Adjustments

Section 1341 of the Affordable Care Act establishes a three-year transitional reinsurance program in the individual market, raising the question of whether to account for these reinsurance payments when developing the HHS risk adjustment models. Some reinsurance payments would be made for low-risk individuals with unexpected high-cost expenditures (for example, due to an accident) that may not be accounted for in the risk adjustment models. However, plans that receive risk adjustment payments for their higher-than-average risk enrollees may also be eligible to receive reinsurance payments for the same high-risk enrollees. Adjusting for reinsurance payments in the HHS risk adjustment model would address the concerns that reinsurance and risk adjustment could compensate twice for the same high-risk individuals.

Despite this potential, we propose not to adjust for reinsurance in the HHS risk adjustment model for a number for reasons. First, removing reinsurance payments from risk adjustment would reduce protections for issuers of reinsurance-eligible plans that enroll high-cost individuals. Second, it would be difficult to determine what portion of reinsurance payments were made for conditions included in each HHS risk adjustment model, and the appropriate model adjustment for these payments. Finally, because the size of the reinsurance pool declines over its three-year duration, the methodology to account for reinsurance payments would need to be modified each year for the HHS risk adjustment model.

(14) Model Performance Statistics

To evaluate model performance, we examined their R-squared and predictive ratios. The R-squared statistic, which calculates the percentage of individual variation

[19] This HCC also includes Breast (Age 50+) and Prostate Cancer.

explained by a model, measures the predictive accuracy of the model overall. The predictive ratios measure the predictive accuracy of a model for different validation groups or subpopulations. The predictive ratio for each of the HHS risk adjustment models is the ratio of the weighted mean predicted plan liability for the model sample population to the weighted mean actual plan liability for the model sample population. The predictive ratio represents how well the model does on average at predicting plan liability for that subpopulation. A subpopulation that is predicted perfectly would have a predictive ratio of 1.0. For each of the HHS risk adjustment models, the R-squared statistic and the predictive ratio are in the range of published estimates for concurrent risk adjustment models.[20] The R-squared statistic for each model is shown in Table 8.

We welcome comment on these proposed risk adjustment models.

TABLE 8—R-SQUARED STATISTIC FOR HHS RISK ADJUSTMENT MODELS

Risk adjustment model	R-squared statistic
Platinum Adult	0.360
Platinum Child	0.307
Platinum Infant	0.292
Gold Adult	0.355
Gold Child	0.302
Gold Infant	0.289
Silver Adult	0.352
Silver Child	0.299
Silver Infant	0.288
Bronze Adult	0.351
Bronze Child	0.296
Bronze Infant	0.289
Catastrophic Adult	0.350
Catastrophic Child	0.295
Catastrophic Infant	0.289

c. Overview of the Payment Transfer Formula

Plan average risk scores are calculated as the member month-weighted average of individual enrollee risk scores, as shown in section III.B.3.b. of this proposed rule. We defined the calculation of plan average actuarial risk and the calculation of payments and charges in the Premium Stabilization Rule. Here, we combine these concepts into a risk adjustment payment transfer formula. In this section, we refer to payments and charges generically as transfers. Under § 153.310(e), as proposed to renumbered, HHS would invoice issuers of risk adjustment covered plans for transfers by June 30 of the year following the applicable benefit year.

We propose to calculate risk adjustment transfers after the close of the applicable benefit year, following the completion of issuer risk adjustment data reporting. As discussed in detail below, the payment transfer formula includes a set of cost adjustment terms that require transfers to be calculated at the geographic rating area level for each plan (thus, HHS would calculate two separate transfer amounts for a plan that operates in two rating areas). Payment transfer amounts would be aggregated at the issuer level (that is, at the level of the entity licensed by the State) such that each issuer would receive an invoice and a report detailing the basis for the net payment that would be made or the charge that would be owed. The invoice would also include plan-level risk adjustment information that may be used in the issuer's risk corridors calculations.

The proposed payment transfer formula is designed to provide a per member per month (PMPM) transfer amount. The PMPM transfer amount derived from the payment transfer formula would be multiplied by each plan's total member months for the benefit year to determine the total payment due or charge owed by the issuer for that plan in a rating area.

(1) Rationales for a Transfer Methodology Based on State Average Premiums

Risk adjustment transfers are intended to reduce the impact of risk selection on premiums while preserving premium differences related to other cost factors, such as the actuarial value, local patterns of utilization and care delivery, local differences in the cost of doing business, and, within limits established by the Affordable Care Act, the age of the enrollee. Risk adjustment payments would be fully funded by the charges that are collected from plans with lower risk enrollees (that is, transfers within a State would net to zero).

In the Risk Adjustment White Paper, we presented several approaches for calculating risk adjustment transfers using the State average premium and plans' own premiums. The approaches that used plans' own premiums resulted in unbalanced payment transfers, requiring a balancing adjustment to yield transfers that net to zero. These examples also demonstrated that the balancing adjustments could introduce differences in premiums across plans that were not consistent with features of the plan (for example, AV or differences in costs and utilization patterns across rating areas). A balancing adjustment would likely vary from year to year, and could add uncertainty to the rate development process (that is, plan actuaries would need to factor the uncertainty of the balancing adjustment into their transfer estimates).

Therefore, we propose a payment transfer formula that is based on the State average premium for the applicable market, as described in section III.B.3.a. of this proposed rule. The State average premium provides a straightforward and predictable benchmark for estimating transfers. As shown in the examples in the Risk Adjustment White Paper, transfers net to zero when the State average premium is used as the basis for calculating transfers.

Plan premiums differ from the State average premium due to a variety of factors, such as differences in cost-sharing structure or regional differences in utilization and unit costs. The proposed payment transfer formula applies a set of cost factor adjustments to the State average premium so that it will better reflect plan liability. These adjustments to the State average premium result in transfers that compensate plans for liability differences associated with risk selection, while preserving premium differences related to the other cost factors described above.

(2) Conceptual Overview of the Payment Transfer Formula

In this section, we provide a broad overview of the payment transfer formula that we propose to use when operating risk adjustment on behalf of a State. We discuss at a conceptual level our proposal to use the State average premium as the basis of the formula and the components of the formula.

(i) Calculating Transfers Using the State Average Premium

The payment transfer formula proposed for 2014 is based on the difference between two plan premium estimates: (1) A premium based on plan-specific risk selection; and (2) a premium without risk selection. Transfers are intended to bridge the gap between these two premium estimates:

[20] Winkleman, Ross and Syed Mehmud. ''A Comparative Analysis of Claims-Based Tools for Health Risk Assessment.'' Society of Actuaries. April 2007.

Conceptually, the goal of payment transfers is to provide plans with payments to help cover their actual risk exposure beyond the premiums the plans would charge reflecting allowable rating and their applicable cost factors. In other words, payments would help cover excess actuarial risk due to risk selection.

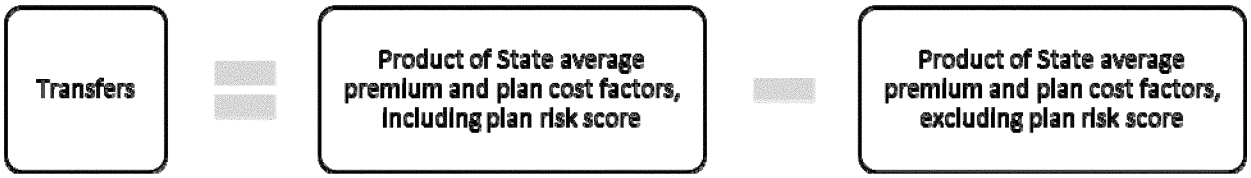
Both of these premium estimates would be based on the State average premium. The State average premium is the average premium requirement for providing insurance to the applicable market population. The proposed payment transfer formula develops plan premium estimates by adjusting the State average premium to account for plan-specific characteristics such as benefit differences. This approach also assumes that all plans have premiums that can be decomposed into the State average premium and a set of adjustment factors, and that all plans would have the same premium if the adjustment factors were held constant across plans. Finally, the derivation of the payment transfers also assumes that plans ''price to cost,'' that is, that competition among plans for enrollees drives plans' premiums to their premium requirements. Therefore, we may consider ''premiums'' to be ''costs'' or ''premium requirements.'' The payment transfer formula includes the following premium adjustment terms:

- Plan average risk score: multiplying the plan average risk score by the State average premium shows how a plan's premium would differ from the State average premium based on the risk selection experienced by the plan.
- Actuarial value: a particular plan's premium may differ from the State average premium based on the plan's cost sharing structure, or actuarial value. An AV adjustment is applied to the State average premium to account for relative differences between a plan's AV and the market average AV.
- Permissible rating variation: plan rates may differ based on allowable age rating factors. The rating adjustment accounts for the impact of allowable rating factors on the premium that would be realized by the plan.
- Geographic cost differences: differences in unit costs and utilization may lead to differences in the average premium between intra-State rating areas, holding other cost factors (for example, benefit design) constant. The geographic cost adjustment accounts for cost differences across rating areas.
- Induced demand: enrollee spending patterns may vary based on the generosity of cost-sharing. The induced demand adjustment accounts for greater utilization of health care services induced by lower enrollee cost sharing in higher metal level plans.

The State average premium is multiplied by these factors to develop the plan premium estimates used in the payment transfer formula. The factors are relative measures that compare how plans differ from the market average with respect to the cost factors (that is to say, the product of the adjustments is normalized to the market average product of the cost factors).

In the absence of these adjustments, transfers would reflect liability differences attributed to cost factors other than risk selection. For example, in the absence of the AV adjustment, a low AV plan with lower-risk enrollees would be overcharged because the State average premium would not be scaled down to reflect the fact that the plan's AV is lower than the average AV of plans operating in the market in the State.

The figure below shows how the State average premium, the plan average risk score, and other plan-specific cost factors are used to develop the two plan premium estimates that are used to calculate payment transfers:



(ii) Estimating the Plan Premium With Risk Selection

The first premium term in the proposed payment transfer formula, the plan premium estimate reflecting risk selection, is calculated as the product of the State average premium and the normalized product of the plan average risk score, the plan geographic cost factor, and the plan induced demand factor.

The formula below shows how the plan premium estimate reflecting risk selection would be calculated:

$$\left[\frac{PLRS_i \cdot IDF_i \cdot GCF_i}{\sum_i (s_i \cdot PLRS_i \cdot IDF_i \cdot GCF_i)}\right] \bar{P}_s$$

Where,

$\bar{P}_s$ = State average premium,
$PLRS_i$ = plan i's plan liability risk score,
IDF_i = plan i's induced demand factor,
GCF_i = plan i's geographic cost factor,
s_i = plan i's share of State enrollment;
and the denominator is summed across all plans in the risk pool in the market in the State.

The key factor in the premium reflecting risk selection is the plan average risk score, which would be calculated from the HHS risk adjustment models. The plan average risk score is a relative measure of plan liability based on the health status of a plan's enrollees. The State average premium is multiplied by the plan average risk score to estimate plan liability based on the risk selection present in its enrollee population. However, because the HHS risk adjustment models do not account for plan liability differences attributable to induced demand or geographic cost differences, those cost factors must be included in the estimate of the premium with risk selection.

The denominator of the adjustment term normalizes the product of the plan cost factors to the State average product of the cost factors. The normalized product of the plan cost factors provides an estimate of how a plan's liability differs from the market average due to underlying differences in its cost factors, including risk selection, induced demand and geographic cost differences.

The premium reflecting risk selection does not include an AV adjustment because the risk score reflects the plan's AV. Additionally, the premium estimate reflecting risk selection does not include the allowable rating factor adjustment. Thus, the difference between the premium estimates (that is, the premium with and the premium without risk selection) provides an estimate of plan liability attributed to risk selection that is not compensated for through allowable premium rating—our measure of actuarial risk.

(iii) Estimating the Plan Premium Without Risk Selection

The second premium term in the proposed payment transfer formula, the plan premium estimate not reflecting risk selection, would be calculated as the product of the State average premium and the normalized product of the plan AV, plan allowable rating factor, the induced demand factor, and a geographic cost factor. The formula below shows how this term would be calculated:

$$\left[\frac{AV_i \cdot ARF_i \cdot IDF_i \cdot GCF_i}{\sum_i (s_i \cdot AV_i \cdot ARF_i \cdot IDF_i \cdot GCF_i)}\right]\bar{P}_s$$

Where,

$\bar{P}_s$ = State average premium,
AV_i = plan i's metal level AV,
ARF_i = allowable rating factor
IDF_i = plan i's induced demand factor,
GCF_i = plan i's geographic cost factor,
s_i = plan i's share of State enrollment;
and the denominator is summed across all plans in the risk pool in the market in the State.

The normalized adjustment terms would account for how a plan's AV, allowed rating variation, induced demand, and geographic cost factors jointly vary from the State average product of these terms. The normalized product of the adjustment terms would be multiplied by the State average premium to estimate the extent to which the plan's premium requirement would differ from the premium requirement for the State average plan due to cost factors unrelated to risk selection.

(iv) Risk Adjustment Payment Transfer Formula

Transfers would be calculated as the difference between the plan premium estimate reflecting risk selection and the plan premium estimate not reflecting risk selection—the two premium estimates described above. Therefore, the proposed 2014 HHS risk adjustment payment transfer formula is:

$$T_i = \left[\frac{PLRS_i \cdot IDF_i \cdot GCF_i}{\sum_i (s_i \cdot PLRS_i \cdot IDF_i \cdot GCF_i)} - \frac{AV_i \cdot ARF_i \cdot IDF_i \cdot GCF_i}{\sum_i (s_i \cdot AV_i \cdot ARF_i \cdot IDF_i \cdot GCF_i)}\right]\bar{P}_s$$

Where,

$\bar{P}_s$ = State average premium,
$PLRS_i$ = plan i's plan liability risk score,
AV_i = plan i's metal level AV,
ARF_i = allowable rating factor
IDF_i = plan i's allowable rating factor,
GCF_i = plan i's geographic cost factor,
s_i = plan i's share of State enrollment;
and the denominator is summed across all plans in the risk pool in the market in the State.

The difference between the two premium estimates in the payment transfer formula would determine whether a plan would pay a risk transfer charge or receive a risk transfer payment. Note that the value of the plan average risk score by itself does not determine whether a plan would be assessed a charge or receive a payment—even if the risk score is greater than 1.0, it is possible that the plan would be assessed a charge if the premium compensation that the plan may receive through its rating practices (as measured through the allowable rating factor) exceeds the plan's predicted liability associated with risk selection.

Plans with higher AV would, other things being equal, also have higher risk scores. This is due to the fact that the metal level-specific risk adjustment models that are used to predict plan liability assume different cost sharing and levels of plan liability. Thus, the risk score for two identical sets of enrollees would differ depending on the metal level model used. Thus, a bronze plan with an average risk score of 1.1 would likely have more adverse selection than a gold plan with an average risk score of 1.1 (because the bronze plan risk adjustment model assumes a lower level of plan liability than the gold plan model).

Risk adjustment transfers are calculated at the risk pool level. Each State will have a risk pool for all of its metal-level plans. Catastrophic plans will be treated as a separate risk pool for purposes of risk adjustment. Individual and small group market plans will either be pooled together or treated as separate risk pools, as described in section III.B.3.a. of this proposed rule.

(v) Normalization and Budget Neutral Transfers

As discussed above, each of the two premium terms in the payment transfer formula would be divided by its average. This means that each ''normalized'' term would average to 1.0. Thus, the average of the difference between these terms would be zero. This is the fundamental property of the payment transfer formula that ensures that transfers across a risk pool would net to zero.

Note that the individual factors in the proposed payment transfer formula do not need to independently average to 1.0. For example, the average risk score for a State may not equal 1.0 due to the underlying differences in the health status of the State's population and the national sample used to calibrate the model. It is not necessary to separately renormalize plan average risk scores to the State average risk score because the payment transfer formula normalizes the product of the risk score, the induced demand factor and the geographic cost factor. The individual scales for *PLRS, IDF, GCF,* and *ARF* are not specified because the payment transfer formula applies to the plan-specific value relative to the State average.

(vi) Calculation of Transfer Formula Inputs

In this section, we describe each component of the proposed payment transfer formula, and explain how it is computed and how it affects transfers.

(A) Plan Average Risk Score

The plan average risk score represents the plan's overall risk exposure. The proposed plan average risk score calculation includes an adjustment to account for the family rating rules proposed in the Market Reform Rule, which caps the number of children that can count toward the build-up of family rates at three. If risk scores were calculated as the member month-weighted average of all enrollee risk scores, plan average risk scores would tend to misrepresent the risk issuers take on for family policies that include children that do not count toward family rates. In general, children tend to have lower risk scores than adults, and without an adjustment the average risk score for family policies including more than three children would tend to be lower than the average risk score of

family policies with three or fewer children, despite the fact that family policies with more than three children face more uncompensated risk.

The formula below shows the proposed plan average risk score calculation including the risk of all members on the policy, including those children not included in the premium.

$$PLRS_i = \frac{\sum_e M_e \cdot PLRS_e}{\sum_b M_b}$$

Where,

$PLRS_i$ is plan i's average plan liability risk score, the subscript e denotes each enrollee within the plan,

$PLRS_e$ is each enrollee's individual plan liability risk score,

M_e is the number of months during the risk adjustment period the enrollee e is enrolled in the plan, and

M_b is the number of months during the risk adjust period the billable member b is enrolled in the plan (billable members exclude children who do not count towards family rates).

The proposed payment transfer formula uses the plan average risk score to calculate transfers. The plan average risk scores would be calculated using the applicable risk adjustment model described in section III.B.3.b. of this proposed rule. The plan liability models would produce risk scores that reflect the health status of the plan's enrollees and the AV of the plan. The AV adjustment in the proposed payment transfer formula would help ensure that transfers do not compensate plans for differences in AV (for which the plans may charge an appropriate premium).

(B) Billable Members

With the exception of the plan average risk score calculation discussed above, all of the other calculations used in the proposed payment transfer formula are based on billable members (that is, children who do not count toward family policy premiums are excluded). Member months, the State average premium, the allowable rating factor, and the geographic cost factor are all calculated based on billable members.

(C) State Average Premium

As noted above, we propose to use the State average premium as the basis of calculating payment transfers. The average premium calculation would be based on the total premiums assessed to enrollees, including the portion of premiums that are attributable to administrative costs. The State average premium would be calculated as the enrollment-weighted mean of all plan average premiums of risk adjustment covered plans in the applicable risk pool in the applicable market in the State. The State average premium calculation is based on billable member months and excludes member months for children that do not count toward family policy rates. Plan average premiums would be calculated from the actual premiums charged to their enrollees, weighted by the number of months enrolled.

The proposed equations for these average premiums are:

$$\bar{P}_s = \sum_i S_i^s \bar{P}_i$$

and

$$\bar{P}_i = \frac{\sum_s (M_s \cdot P_s)}{\sum_s M_s}$$

The first equation calculates the State average premium $\bar{P}_s$ as the average of individual plan averages, $\bar{P}_i$ weighted by each plan's share of statewide enrollment in the risk pool in the market, S_i^s (based on billable member months). The second equation shows how the plan averages are calculated. This is the weighted mean over all subscribers s of subscriber premiums $\bar{P}_s$, with M_s representing the number of billable member months of enrollment under the policy of each subscriber s.

(D) Actuarial Value

The proposed AV adjustment in the payment transfer formula would account for relative differences in plan liability due to differences in actuarial value. The AV adjustment helps to achieve the goal of compensating plans for risk selection while allowing other determinants of premiums—including the generosity of plan benefits—to be reflected in premiums. If the payment transfer formula were to ignore actuarial value, it would effectively force low-AV plans to subsidize high-AV plans. This is because the State average premium is calculated from all plans at all metal levels in the risk pool in the market. As a result, in the absence of an actuarial value adjustment, a bronze plan with a low risk score would see its transfer charge increased based on a State average premium that includes plans with more generous benefits.

The AV adjustment would be based on the metal level actuarial value associated with each plan type (for example, all bronze health plans would be assigned an AV factor of .6 in the proposed payment transfer formula). Using the metal level actuarial value as the basis for this adjustment provides a simple and straightforward approach for estimating the impact of benefit design on plan liability. The standard metal level actuarial values approximate plan liability for the standard population (that is, plan liability in the absence of risk selection). Additionally, the adjustment should not be based on a plan's actuarial value, including the de minimis range as computed by the AV calculator. The cost sharing assumptions in the HHS risk adjustment models correspond to the standard metal level actuarial values (for example, 0.6 a bronze plan), so the actuarial value adjustment in the payment transfer formula must also correspond to the standard metal level actuarial values.

Table 9 shows the AV adjustment that would be used for each category of metal level plans.

TABLE 9—ACTUARIAL VALUE ADJUSTMENT USED FOR EACH METAL LEVEL IN THE PAYMENT TRANSFER FORMULA

Metal level	AV adjustment
Catastrophic	0.57
Bronze	0.60
Silver	0.70
Gold	0.80
Platinum	0.90

(E) Allowable Rating Variation

PHS Act section 2701, as added by the Affordable Care Act, establishes standards for plan premium rating. Rates can vary based on three enrollee characteristics—age, family size, and tobacco use—and geographic area within each State. Furthermore, the law limits the amount by which premiums may vary by age; the most expensive age group's rating cannot be more than three times as high as the lowest (for adults age 21 or above), and rating based on tobacco use cannot exceed a 50 percent increment. Plans cannot base premiums on enrollee health status. In the proposed Market Reform Rule, we have issued proposed standards related to the rating rules under the Affordable Care Act. The proposed payment transfer formula discussed above assumes the rating standards of the proposed Market Reform Rule. The final payment transfer formula may require updating in the final Payment Notice to reflect any changes to the rating standards in the final Market Reform Rule.

The proposed Allowable Rating Factor (ARF) adjustment in the payment transfer formula would account only for age rating. Tobacco use, wellness discounts, and family rating

requirements would not be included in the payment transfer formula for the reasons specified below. Geographic cost variation is treated as a separate adjustment in the payment transfer formula.

Age rating is permitted within limits to enable plans to be partially compensated for risk based on enrollee age. Under the proposed Market Reform Rule, each State would have a standard age curve that all issuers would be required to use. The 3:1 age rating restriction applies to the adults aged 21 and older. Age bands for individuals under 21 would not be subject to the 3:1 restriction, but their corresponding rating factors would still be specified in the standard age curves. Each plan's allowable rating factor would be calculated as the enrollment-weighted average of the age factor, based on the applicable standard age curve, across all of a plan's enrollees. In operation, for the age rating factor included in the payment transfer formula, age would be calculated as the enrollee's age at the time of enrollment, as outlined in the proposed Market Reform Rule.

Under the proposed Market Reform Rule, premiums for families with three or fewer children would be calculated as the sum of individual rates for each individual within the family. These individual rates would be based on each person's age, tobacco use, and geographic rating area. For families with more than three children, the family premium would be built up from the individual premiums of the parents plus the three oldest children. Additional children would not be reflected in the family premium. The proposed payment transfer formula does not include an explicit adjustment related to the family rating requirements, as rate setting would not include a family rating factor.

Tobacco rating and wellness discounts are also not included in the proposed allowable rating factor adjustment. These rating factors are discretionary. HHS proposes not to include adjustments for these rating factors in the payment transfer formula to maintain issuer flexibility with respect to tobacco and wellness discount rating that is allowed by the Affordable Care Act.

Table 10 shows a simplified example of how the ARF values would be calculated for three plans.

TABLE 10—EXAMPLE ALLOWABLE RATING FACTOR CALCULATION

Age band	State age-rating curve	Plan A	Plan B	Plan C	State
		Enrollment percentages (Share of member-months)			
21	1.000	33.30%	40.00%	10.00%	31.70%
(Age bands from 22–39 omitted)					
40	1.278	33.30%	40.00%	20.00%	33.30%
(Age bands from 41–63 omitted)					
64 and older	3.000	33.30%	20.00%	70.00%	35.00%
Total member-months		300,000	200,000	100,000	600,000
ARF		1.758	1.511	2.456	1.793

In Table 10, three plans constitute the entire risk pool in the market in the State. In practice, each State age rating curve would have 44 adult bands: One for each year from 21 to 63, plus a 64-and-older band. In this example, we simplify by considering only three bands: 21, 40, and 64 and older. The second column shows the relative premiums for each age band; note that these values conform to the 3:1 rating restriction.

Three plans are presented in the next three columns, followed by statewide totals. We assume Plan A's enrollment of 300,000 member-months is equally distributed among the three age bands. Enrollment in Plan B is weighted toward younger ages, while Plan C captures a disproportionately older population. Statewide, these enrollments add up to a 31.7 percent share in the age 21 band, 33.3 percent in 40 and older age band, and 35.0 percent in 64 and older age band.

Plan-specific ARF values are calculated similarly. For example, Plan C's ARF is the sum of three products: 1.000*0.10 + 1.278*0.20 + 3.000*0.70 = 2.456. This value indicates that within the 3:1 rating restriction, Plan C would be expected to collect premiums that are higher than the State average due to Plan C's enrollments skewing older. Plan A's enrollees are slightly younger than the State average, which is also reflected in its 1.758 ARF, and Plan B's enrollment is younger than Plan A.

(F) Induced Demand

Induced demand reflects differences in enrollee spending patterns attributable to differences in the generosity of plan benefits (as opposed to risk selection). Induced demand is a function of plan benefit design. We believe risk adjustment should not compensate a plan for differences in plan liability that are not attributed to the underlying health and demographic characteristics of the plan's enrollees. In the absence of an induced demand adjustment, relative differences in induced demand may not be reflected in a plan's post-transfer premiums. In other words, plans with relatively high AV and induced demand could receive larger transfers, allowing them to reduce the premium impact of induced demand. For example, a plan that experiences 10 percent higher utilization due to induced demand would have a post-transfer premium that is less than 10 percent above an otherwise identical plan without induced demand.

The expenditure data underlying the AV calculator includes an induced demand factor for each metal level. We propose to use the same induced demand factors in the payment transfer formula, shown in Table 11.

TABLE 11—INDUCED DEMAND ADJUSTMENT USED FOR EACH METAL LEVEL IN THE PAYMENT TRANSFER FORMULA

Metal level	Induced demand adjustment
Catastrophic	1.00

TABLE 11—INDUCED DEMAND ADJUSTMENT USED FOR EACH METAL LEVEL IN THE PAYMENT TRANSFER FORMULA—Continued

Metal level	Induced demand adjustment
Bronze	1.00
Silver	1.03
Gold	1.08
Platinum	1.15

(G) Geographic Area Cost Variation

The proposed geographic cost factor (GCF) would be an adjustment in the payment transfer formula because there are some plan costs—such as input prices or utilization rates—that vary geographically and are likely to affect plan premiums. By including the adjustment, these costs would be reflected in premiums, rather than being offset by transfers.

Excluding this adjustment would cause transfers to subsidize high-risk plans in high-cost areas at the expense of low-risk plans in low-cost areas. In a low-cost area, for example, a plan with lower-than-average risk enrollees would face a charge scaled to State average costs, which would be larger than would be appropriate in an area where costs are low. At the same time, the payment received by higher-than-average risk plans would be larger than necessary to compensate for the plan's excess risk. This would disadvantage low-risk plans relative to high-risk plans in the low-cost area. The opposite would be true in high-cost areas.

GCFs would be calculated for each rating area. These factors would be calculated based on the observed average silver plan premiums in a geographic area relative to the Statewide average silver plan premium. Using only silver plans as the basis of the adjustment would help control for differences in premiums across rating areas due to differential enrollment patterns in the available plan types. Additionally, the silver plan premiums used to calculate the adjustment must be standardized for age to isolate geographic cost differences in premiums.

Calculation of the GCF would involve three steps. First, the average premium would be computed for each silver plan in each rating area (using the same formula that is used to compute plan premiums in the State average premium calculation discussed above). The calculation would be:

$$\bar{P}_i = \frac{\sum_s (M_s \cdot P_s)}{\sum_s M_s}$$

Where,

$\bar{P}_i$, is the average premium for plan i

s indexes all subscribers enrolled in the plan

M_s is the number of billable member months for billable members under the policy of subscriber s

P_s is the premium for subscriber s.

The second step would be to generate a set of plan average premiums that standardizes the premiums for age rating. Plan premiums are standardized for age by dividing the average plan premium by the plan rating factor, the enrollment-weighted rating factor applied to all billable members (discussed above). This formula would be:

$$\bar{P}_i^{AS} = \bar{P}_i / (ARF_i)$$

Where,

$\bar{P}_i^{AS}$ is plan i's age standardized average premium,

$\bar{P}_i$, is the average premium for plan i, and

ARF_i is the allowable rating factor.

The third and final step would compute a GCF for each area and assign it to all plans in that area. This would be accomplished with the following calculation:

$$GCF_i = \left(\sum_{area} s_i^a \cdot \bar{P}_i^{AS} \right) \Big/ \left(\sum_{state} s_i^s \cdot \bar{P}_i^{AS} \right)$$

This equation divides the enrollment-weighted average of standardized silver-level plan premiums in a geographic area by the average of those premiums Statewide. The numerator's summation is over all silver-level plans within plan *i*'s geographic area,

$$\text{so } \sum_{area} s_i^a = 1. \text{ Similarly, the summation in the denominator is over all silver-level plans in the State, so } \sum_{state} s_i^s = 1.$$

Using these formulas, the enrollment-weighted statewide average of plan GCF values would equal 1.0, so deviations from 1.0 can be interpreted as the percentage by which any geographic area's costs deviate from the State average. In other words, a GCF equal to 1.15 indicates that the plan operates in a geographic area where costs are, on average, 15 percent higher than the Statewide average.

(H) Calculation of the Plan Transfer Payments

The PMPM transfer payment calculated from the proposed payment transfer formula would be multiplied by the total number of plan member months for billable members to calculate the total plan level payment. As discussed above, transfers would be calculated at the plan level within rating areas (that is, a plan operating in two rating areas would be treated as two separate plans for the purposes of calculating transfers).

We welcome comment on this proposed payment transfer formula.

d. Overview of the Data Collection Approach

In § 153.20, we propose a technical correction to the definition of risk adjustment data collection approach. We propose to delete ''and audited'' so that the definition of risk adjustment data collection approach means ''the specific procedures by which risk adjustment data is to be stored, collected, accessed, transmitted, validated and the applicable timeframes, data formats, and privacy and security standards.'' This technical correction clarifies that auditing of risk adjustment data is not part of the risk adjustment data collection approach. Risk adjustment data should be audited during the data validation process, which is not a part of the risk adjustment methodology or data collection approach.

We also propose to modify § 153.340(b)(3) by adding the additional restriction that ''Use and disclosure of personally identifiable information is limited to those purposes for which the personally identifiable information was collected (including for purposes of data validation).'' This addition will further ensure the privacy and security of potentially sensitive data by limiting the use or disclosure of any personally identifiable information collected as a part of this program.

The data collection approach HHS proposes to use when operating risk adjustment on behalf of the State is described in the applicable sections of section III.G. of this proposed rule and in the new proposed § 153.700 through § 153.730.

We welcome comment on this proposed data collection approach.

e. Schedule for Risk Adjustment

Under § 153.610(a), issuers of risk adjustment covered plans will provide HHS with risk adjustment data in the form and manner specified by HHS. Under the HHS-operated risk adjustment program, issuers will not send, but must make available to HHS, anonymized claims and enrollment data, as specified in section III.G. of this proposed rule, for benefit year 2014 beginning January 1, 2014. Enrollee risk scores will be calculated based on enrollee enrollment periods and claims dates of service that occur between January 1, 2014 and December 31, 2014. Enrollee risk scores for subsequent benefit years will be calculated based on claims and enrollment periods for that same benefit year.

As set forth in the proposed § 153.730, claims to be used in the risk score calculation must be made available to HHS by April 30 of the year following the benefit year. We believe this date provides for ample claims runout to ensure that diagnoses for the benefit year are captured, while providing HHS sufficient time to run enrollee risk score, plan average risk, and payments and charges calculations and meet the June 30 deadline described at the redesignated § 153.310(e).

We welcome comment on this proposed schedule for risk adjustment.

4. State Alternate Methodology

a. Technical Correction

The Premium Stabilization Rule established standards for States that establish their own risk adjustment programs. Under the proposed revision to § 153.310, a State may establish a risk adjustment program if it elects to operate an Exchange and is approved to operate risk adjustment in the State. If a State does not meet the requirements to operate risk adjustment, HHS will carry out all functions of risk adjustment on behalf of the State. In § 153.320(a), we established that Federally certified methodologies must be used in the operation of the risk adjustment program, and defined the process by which a methodology may become Federally certified. In this proposed rule, we modify § 153.320(a)(1) and (a)(2) to clarify that these methodologies must be published in ''the applicable annual'' notice of benefit and payment parameters as opposed to ''an annual'' HHS notice of benefit and payment parameters. This proposed change makes clear that methodologies must be certified for use each year.

b. State Alternate Risk Adjustment Methodology Evaluation Criteria

The Premium Stabilization Rule specified the information that a State will need to provide to support its request for HHS to certify an alternate risk adjustment methodology. In § 153.330(a), we specified the elements required to be included with the request to HHS for certification of an alternate risk adjustment methodology. Section 153.330(a)(1)(i) states that a request for certification for an alternate methodology must include the elements specified in § 153.320(b), which includes a complete description of: (1) The risk adjustment model; (2) the calculation of plan average actuarial risk; (3) the calculation of payments and charges; (4) the risk adjustment data collection approach; and (5) the schedule for the risk adjustment program. Section 153.330(a)(1)(ii) states that the alternate methodology request must also include the calibration methodology and frequency of calibration, and § 153.330(a)(1)(iii) provides that the request must include statistical performance metrics specified by HHS. Section 153.330(a)(2) requires

that the request also include certain descriptive and explanatory information relating to the alternate methodology.

Under our existing regulations, States wishing to submit an alternate risk adjustment methodology should do so by submitting the information described in this proposed rule to HHS at *AlternateRAMethodology@cms.hhs.gov.* As described in preamble to the Premium Stabilization Rule, at the Risk Adjustment Spring Meeting, and in technical assistance calls with States, requests for State alternate methodologies will be accepted up to 30 days after publication of this proposed rule. We will review a State's request for certification of its alternate methodology only if it has submitted an Exchange Blueprint application and has indicated on that application its intent to operate a risk adjustment program in the State (or, in later years, if it is operating or has been approved to operate an Exchange). We expect to work with States as they develop their alternate methodologies.

We noted in the Premium Stabilization Rule that we would provide greater detail about the process for receiving Federal certification of alternate risk adjustment methodologies in this proposed rule. We propose the following evaluation criteria to certify alternate risk adjustment methodologies. We propose to redesignate paragraph (b) of § 153.330 to paragraph (c), and are proposing a new paragraph (b) that sets forth the evaluation criteria for alternate risk adjustment methodologies. In the new § 153.330(b)(1), we propose to consider whether the alternate risk adjustment methodology meets criteria that correspond to the elements of the alternate methodology request described in paragraph § 153.330(a)(1) and (2). Specifically, we will be evaluating the extent to which an alternate risk adjustment methodology:

(i) Explains the variation in health care costs of a given population;

(ii) Links risk factors to daily clinical practices and is clinically meaningful to providers;

(iii) Encourages favorable behavior among providers and health plans and discourages unfavorable behavior;

(iv) Uses data that is complete, high in quality, and available in a timely fashion;

(v) Is easy for stakeholders to understand and implement;

(vi) Provides stable risk scores over time and across plans; and

(vii) Minimizes administrative costs.

For example, to determine the extent that an alternate methodology explains the variation in health care costs of a given populations, we would consider whether the risk adjustment model was calibrated from data reflecting the applicable market benefits, was calibrated on a sample that is reasonably representative of the anticipated risk adjustment population, and was calibrated using a sufficient sample to ensure stable weights across time and plans. In addition, in evaluating this criterion, we would consider whether the methodology has suitably categorized the types of plans subject or not subject to risk adjustment, given the overall approach taken by the methodology and the goal of the program to account for plan average actuarial risk. States must provide a rationale for the methodology's approach to the plans subject to risk adjustment. Under this proposed criteria, we would also evaluate the State's method for calculating payments and charges, as described in section III.B.4.c., below.

We also note that we would consider whether the alternate methodology discriminates against vulnerable populations or creates inappropriate incentives. Alternate methodologies must not discriminate against individuals because of age, disability, or expected length of life, and should take into account the health care needs of diverse segments of the risk adjustment population, including women, children, persons with disabilities, and other vulnerable groups.

In the proposed § 153.330(b)(2), we would consider whether the alternate methodology complies with the requirements of subpart D, especially § 153.310(e) (as proposed to be renumbered) and § 153.340. Section 153.310(e) requires alternate methodologies to have a schedule that provides annual notification to issuers of risk adjustment covered plans of payments and charges by June 30 of the year following the benefit year. Section 153.340(b)(1) sets forth a number of minimum requirements for data collection under risk adjustment, including standards relating to data privacy and security. While the Federal approach will not directly collect data from insurers, but instead will use a distributed approach that will not include personally identifiable information, the Premium Stabilization Rule gave States the flexibility to design their own data collection approach, provided privacy and security standards are met. The privacy and security of enrollees' data is of paramount importance to HHS, and the data collection approach in an alternate methodology must protect personally identifiable information, if any, that is stored, transmitted, or analyzed, to be certified. The application for certification of the alternate methodology should identify which data elements contain personally identifiable information, and should specify how the State would meet these data and privacy security requirements.

In § 153.330(b)(3), we propose to consider whether the alternate risk adjustment methodology accounts for payment transfers across metal levels. We believe that sharing risk across metal levels is a critical part of a risk adjustment methodology as new market reforms are implemented because of the need to mitigate adverse selection across metal levels, as well as within metal levels. The proposed HHS risk adjustment methodology transfers funds between plans across metal levels, and under this proposal, State alternate methodologies must do so as well.

For reasons described previously, under the proposed HHS risk adjustment methodology, we propose to apply risk adjustment to catastrophic plans in their own risk pool—that is, we would transfer funds between catastrophic plans, but not between catastrophic plans and metal level plans. For a number of plans, such as student health plans and plans not subject to the market reform rules, we have proposed not to transfer payments under the HHS risk adjustment methodology. However, as discussed above, we believe that States should have the flexibility to submit a methodology that transfers funds between these types of plans (either in their own risk pool or with the other metal levels).

In § 153.330(b)(4), we propose to consider whether the elements of the alternate methodology align with each other. For example, the data collected through the data collection approach should align with the data required by the risk adjustment model to calculate individual risk scores.

Alternate methodologies submitted by States that are approved as Federally certified risk adjustment methodologies for 2014 will be published in the final 2014 HHS notice of benefit and payment parameters. We envision working closely with States during the development of their alternate methodologies to ensure that they meet the criteria described above. We expect to have a number of meetings with any State proposing an alternate methodology during the certification process. During these meetings, we intend to provide input to States on whether their proposed alternate methodologies meet the given criteria. States will then have the opportunity to modify their alternate methodologies and request further review. We are

committed to working with States in a collaborative fashion on these matters.

c. Payment and Charges

In the preamble to the Premium Stabilization Rule, we noted that we plan to establish a national method for calculation of payments and charges. The goal of the proposed payment transfer formula is to reduce the impact of risk selection on premiums while ensuring that payments and charges net to zero. A national method for the calculation of payments and charges would ensure a degree of consistency in the risk adjustment program from State to State, while allowing States to vary other elements of the program. However, we recognize that a uniform national method could limit States' flexibility in developing their alternate risk adjustment methodologies.

The proposed payment transfer formula (regardless of whether for a plan liability or total expenditure approach, as described in section III.B.3.10. utilizes the plan average risk score and the State average premium. The proposed HHS payment transfer formula is based on a plan liability model. States can adapt this formula to a total expenditure model by replacing the plan liability risk score in the formula with the total expenditure risk score of a plan, and multiplying the total expenditure risk score by an adjustment for AV. We propose to provide States the flexibility to select the adjustments used for the calculation of payments and charges in their alternate methodologies. The proposed HHS payment transfer formula will make adjustments for AV, age rating factor, geographic cost differences, and induced demand. States have the option of including or excluding any of these adjustments. States may also include other adjustments in the calculation of payments and charges under their alternate methodologies. Adjustments can be added to or removed from the basic payment transfer formula as long as these factors are normalized, so that transfers net to zero. We will work with States on a one-on-one basis in developing their payment transfer formulae for their alternate methodologies.

States may construct particular adjustment factors in different ways. For example, HHS would determine an adjustment for geographic cost differences by comparing the area premium to the State average premium. A State may elect to develop a different factor to adjust for geographic cost differences. As described above, we ask States to provide the adjustments, the associated factors or curves, and the rationale for the adjustments they plan to use for their alternate methodologies as part of their response to the criterion proposed in § 153.330(b)(1). We believe this approach ensures a degree of consistency while allowing States flexibility for calculating payments and charges.

5. Risk Adjustment Data Validation

In § 153.350, we specified standards applicable to States, or HHS on behalf of States, in validating risk adjustment data. Specifically, we required States operating risk adjustment programs and HHS to establish a process to appeal findings from data validation and allow the State, or HHS on behalf of the State, to adjust risk adjustment payments and charges based on data validation findings. The credibility of risk adjustment data, which results from a reliable data validation process, is important to establishing issuer confidence in the risk adjustment program. Moreover, as error rates derived from the results of data validation may be used to make adjustments to the plan average actuarial risk calculated for a risk adjustment covered plan, the data validation process will ensure that such transfers accurately reflect each plan's average enrollee risk. In this proposed rule, we build upon guidance released in the Risk Adjustment Bulletin and in discussions held with stakeholders at the Risk Adjustment Spring Meeting to define data validation standards applicable to issuers of risk adjustment covered plans when HHS operates risk adjustment on behalf of a State.

We propose that, beginning in 2014, HHS conduct a six-stage data validation program when operating risk adjustment on behalf of a State: (1) Sample selection; (2) initial validation audit; (3) second validation audit; (4) error estimation; (5) appeals; and (6) payment adjustments. We discuss these concepts in greater detail below. We note States are not required to adopt this HHS data validation methodology.

a. Data Validation Standards When HHS Operates Risk Adjustment

We propose to add a new subsection, § 153.630, which sets forth risk adjustment data validation standards applicable to all issuers of risk adjustment covered plans when HHS is operating risk adjustment. In § 153.630(a), we propose a general standard that issuers of risk adjustment covered plans have an initial and second validation audit of risk adjustment data. These are the second and third stages of the six-stage data validation program described below.

b. Data Validation Process When HHS Operates Risk Adjustment

(1) Sample Selection

Under the Premium Stabilization Rule, HHS will validate a statistically valid sample from each issuer that submits data for risk adjustment every year. As described above, sample selection is the first stage of HHS' six-stage risk adjustment data validation process. HHS would select the sample for each issuer of a risk adjustment covered plan in accordance with standards discussed in this section. HHS would ensure that the data validation process reviews an adequate sample size of enrollees such that the estimated payment errors will be statistically sound and so that enrollee-level risk score distributions reflect enrollee characteristics for each issuer. The sample would cover applicable subpopulations for each issuer. For example, enrollees with and without risk adjustment diagnoses would be included in the sample. In determining the appropriate sample size for data validation, we recognize the need to strike a balance between ensuring statistical soundness of the sample and minimizing the operational burden on issuers, providers, and HHS.

We expect that each issuer's initial validation audit sample within a State will consist of approximately 300 enrollees, with up to two-thirds of the sample consisting of enrollees with HCCs.

Note that any assumptions used by HHS that underlie the sample size determinations in the initial years of the program may be updated as we gain experience performing data validation for risk adjustment. Additionally, we will continue to evaluate population distributions to determine the sample subpopulations. We seek comment on this approach to sample selection, particularly on use of existing data validation program results that could be used to derive comparable estimates under this program.

(2) Initial Validation Audit

Once the audit samples are selected by HHS, issuers would conduct independent audits of the risk adjustment data for their initial validation audit sample enrollees, as set forth in § 153.630(b). In § 153.630(b)(1), we propose that issuers of risk adjustment covered plans engage one or more auditors to conduct these independent initial validation audits. We propose in § 153.630(b)(2) through (4) that issuers ensure that initial validation auditors are reasonably capable of performing the audit, that the

audit is completed, that the auditor is free from conflicts of interest, and that the auditor submits information regarding the initial validation audit to HHS in the manner and timeframe specified by HHS. These proposed requirements would ensure that the initial validation audit is conducted according to minimum audit standards, and that issuers or auditors transmit necessary information to HHS for use in the second validation audit.

For the enrollees included in the HHS-specified audit sample, issuers of risk adjustment covered plans would provide enrollment and medical record documentation to the initial validation auditor to validate the demographic and health status data of each enrollee, as described above.[21] We anticipate that issuers would have considerable autonomy in selecting their initial validation auditors. However, initial validation auditors must conduct data validation audits in accordance with audit standards established by HHS. We have identified three methods for establishing these standards:

- HHS or an HHS-designated entity could prospectively certify auditors for these audits;
- HHS could develop standards that issuers and initial validation auditors would follow, without any requirement of prior HHS certification or approval of auditors; or
- HHS could issue non-binding, ''best practice'' guidelines for issuers and auditors.

We request comment on these approaches and on any standards or best practices that should be applicable. Upon conclusion of the initial validation audit process, issuers of risk adjustment covered plans would be required to submit audit findings to HHS in accordance with the standards established by HHS.

(3) Second Validation Audit

We propose to retain an independent second validation auditor to verify the accuracy of the findings of the initial validation audit. We would select a sub-sample of initial validation audit sample enrollees for review by the second validation auditor. We would provide additional information pertaining to its approach for selecting the second validation audit sub-sample in future guidance. The second validation auditor would only review enrollee information that was or was to be originally presented during the initial validation audit.

In § 153.630(c), we establish standards for issuers of risk adjustment covered plans related to HHS' second validation audit of risk adjustment data. These requirements establish minimum standards for issuer compliance with the second validation audit. We propose that an issuer of a risk adjustment covered plan comply with, and ensure the initial validation auditor complies with, HHS and the second validation auditor in connection with the second validation audit. Specifically, issuers would submit (or ensure their initial validation auditor submits) data validation information, as specified by HHS, from their initial validation audit for each enrollee included in the second validation audit sub-sample. Issuers would also transmit all information to HHS or its second validation auditor in an electronic format to be determined by HHS. The second validation auditor would inform the issuers of error findings based on their review of enrollees in the second validation audit subsample.

(4) Error Estimation

We would estimate risk score error rates based on the findings from the data validation process. Risk adjustment errors may include any findings that result in a change to the demographic or health status components of an enrollee's risk score. This may include errors due to incorrect diagnosis coding, invalid documentation, missing or insufficient medical record documentation, or incorrect determination of enrollee demographic information. We are considering estimating changes in plan average actuarial risk for the issuer error rates calculated from data validation activities, with a suitable confidence interval. We plan to conduct analyses to determine the most effective methodology for adjusting plan risk scores for calculating risk adjustment payment transfers.

Upon completion of the second validation audit and error estimation stages of HHS's data validation process, we would provide each issuer with enrollee-level audit results and error estimates at the issuer level, based on the methodology described above.

We are requesting comments on the described error estimation concepts.

c. Appeals

In accordance with § 153.350(d), we provide an administrative process to appeal findings with respect to data validation. We propose in § 153.630(d) that issuers may appeal the findings of a second validation audit or the application of a risk score error rate to its risk adjustment payments and charge. We anticipate that appeals would be limited to instances in which the audit was not conducted in accordance with second validation audit standards established by HHS. We will provide further detail on this process in future guidance or regulation, as appropriate.

d. Payment Adjustments

In accordance with 153.350(b), HHS may adjust charges and payments to a risk adjustment covered plan based on the recalculation of plan average actuarial risk following the data validation process. We anticipate that HHS would use a prospective approach when making such payment adjustments. We believe a prospective approach is appropriate because we anticipate issuers' error estimates to be relatively stable from year to year. Further, we believe it is necessary to use a prospective approach to allow issuers and HHS sufficient time to complete the validation and appeals processes. Transfers for a given benefit year would likely be invoiced before the data validation process for that benefit year is completed. The prospective approach would ensure that issuers would not be subject to a second transfer for the benefit year. We would use an issuer's data validation error estimates from the prior year to adjust the issuer's average risk score in the current year for transfers. We request comments on this approach.

As described previously, because the risk adjustment program transfers funds between issuers in a zero sum manner, trust in the system is important for the success of the program. We have proposed the data validation process described here to ensure that issuers comply with risk adjustment standards and to promote confidence in the risk adjustment program. As such, we propose in paragraph § 153.630(e) that HHS may adjust payments and charges for issuers that do not comply with the initial or second validation audit standards set forth in § 153.630(b) and (c). We seek comment on the types of adjustments that may be assessed on issuers that do not comply with parameters set forth in this proposed rule.

e. Proposed HHS-Operated Data Validation Process for Benefit Years 2014 and 2015

We propose that issuers of risk adjustment covered plans adhere to the data validation process outlined above beginning with data for the 2014 benefit year. However, we recognize the complexity of the risk adjustment

[21] We note that issuers will need to link information on the dedicated distributed data environments with the information specified this proposed rule for data validation purposes.

program and the data validation process, and the uncertainty in the market that will exist in 2014. In particular, we are concerned that adjusting payments and charges without first gathering information on the prevalence of error could lead to a costly and potentially ineffective audit program. Therefore, we are proposing that issuers conduct an initial validation audit and that we conduct a second validation audit for benefit year 2014 and 2015, but that we would not adjust payments and charges based on validation findings during these first two years of the program (that is, we would not adjust payments and charges based on validation results on data from the 2014 and 2015 benefit years). However, we would conduct all aspects of the data validation program other than adjusting payments and charges (though we would make adjustments under the proposed § 153.630(e)) during the first two years of the program, including requiring the initial validation and second validation audits, and calculating error rates for each issuer. We believe that the data validation conducted during the first two years of the program will serve an important educational purpose for issuers and providers. Although we are proposing not to adjust payments and charges as a correction based on error estimates discovered, we note that other remedies, such as prosecution under the False Claims Act, may be applicable to issuers not in compliance with the risk adjustment program requirements. We have tried to balance the need to provide assurance to issuers that all risk adjustment data is adequate and that calculations are appropriate with the desire to limit burden and uncertainty in the initial years of program operation.

This approach was taken with the Medicare Part C risk adjustment program—the data validation audit process was observed for several years before payment adjustments were made. We plan to work with issuers during the first two years of the data validation program, and will seek additional input on how to improve the process. We are requesting comments on this approach, particularly with respect to improvements to the data validation process generally, whether there are alternatives to forgoing changes to payments and charges that we should adopt, and what methods we should adopt to ensure data integrity in the first two years of the program.

As part of our effort to refine the data validation program during the first two years, we are considering publishing a report on the error rates discovered during these first two years, and propose to use these results to inform our audit program. For this report, we may conduct special studies of the second validation audits aimed at comparing the error rate results of the initial validation auditors and second validation audits. For example, the second validation audits may be used to assess the extent to which auditor error contributed to the initial validation audit risk score error rate findings, and to determine whether discrepancies between the results of the two audits may result in adjustments to the estimated error rates calculated for the initial validation audit process.

The second validation audits could also be used to assess the accuracy of the initial audit error rates at either the auditor or issuer level. Conducting the second validation audits at the auditor level in future years would allow us to examine the accuracy of the initial validation audit without having to draw large initial validation audit record samples from each issuer that participates in risk adjustment. We anticipate that a small number of audit firms will perform the majority of initial audits. We seek comment on the approaches outlined here, as well as additional approaches to data validation for risk adjustment.

f. Data Security and Transmission

In § 153.630(f), we establish data security and transmission requirements for issuers related to the HHS data validation process. These requirements establish the manner in which issuers and auditors must transmit audit information, and ensure that any enrollee information that is transmitted is protected. In § 153.630(f)(1), we propose that issuers submit any risk adjustment data and source documentation specified by HHS for the initial and second validation audits to HHS in the manner and timeframe established by HHS. We propose in § 153.630(f)(2) that, in connection with the initial validation audit, the second validation audit, and any appeals, an issuer must ensure that it and its initial validation auditor complies with the security standards described at § 164.308, § 164.310, and § 164.312.

C. Provisions and Parameters for the Transitional Reinsurance Program

The Affordable Care Act directs that a transitional reinsurance program be established in each State to help stabilize premiums for coverage in the individual market from 2014 through 2016. The reinsurance program is designed to alleviate the need to build into premiums the risk of enrolling individuals with significant unmet medical needs. By stabilizing premiums in the individual market equitably throughout the United States, the reinsurance program is intended to help millions of Americans purchase affordable health insurance, reduce unreimbursed usage of hospital and other medical facilities by the uninsured, and thereby lower medical expenses and premiums for all people with private health insurance.

We aim to administer the reinsurance program to provide reinsurance payments in an efficient, fair, and accurate manner, where they are needed most, to effectively stabilize premiums nationally. In addition, we intend to implement the reinsurance program in a manner that minimizes the administrative burden of collecting contributions and making reinsurance payments. For example, HHS intends to collect contributions from health insurance issuers and self-insured group health plans [22] in all States, including States that elect to operate their reinsurance programs. This would allow for a centralized and streamlined process for the collection of contributions, and would avoid inefficiencies related to using different processes in different States. This would also eliminate the need for States to send to HHS the contributions collected for the U.S. Treasury. Federal collections will also leverage economies of scale, reducing the overall administrative costs of the reinsurance program.

We also intend to simplify collections by using a national per capita uniform contribution rate. Collection based on a per capita rate is simpler and easier to implement than other methods. In addition, in the HHS-operated reinsurance program, we propose to calculate reinsurance payments using the same distributed approach for data collection that we propose for operating risk adjustment on behalf of States.[23] This will permit issuers to receive reinsurance payments using the same systems established for the risk adjustment program, resulting in less administrative burden and lower costs,

[22] As discussed in more detail below, Section 1341 of the Affordable Care Act provides that health insurance issuers and ''third party administrators on behalf of group health plans'' must make contributions to an applicable reinsurance entity. Although self-insured group health plans are ultimately liable for reinsurance contributions, a third-party administrator or administrative-services-only contractor may be utilized for transfer of the reinsurance contributions. For consistency, throughout this proposed rule, we will refer to these contributing entities as self-insured group health plans.

[23] See our discussion of this distributed approach in section III.G. of this proposed rule.

while maintaining the security of identifiable health information.

In this proposed rule, we propose modifications and refinements to the reinsurance program standards for States and issuers. These modifications further reduce the administrative burden of collecting contributions and making reinsurance payments, and will more effectively stabilize premiums in the individual markets in all States across the country. In particular, we propose uniform reinsurance payment parameters to be used across all States. These payment parameters would be used to calculate reinsurance payments in all States, regardless of whether the State or HHS on behalf of the State operates the reinsurance program. We also propose that HHS will collect contributions from health insurance issuers and self-insured group health plans in all States, including States that elect to operate their own reinsurance programs. In addition, we propose a national, uniform calendar under which reinsurance contributions will be collected from all contributing entities, and reinsurance payments will be disbursed to issuers of non-grandfathered individual market plans. Furthermore, we propose to distribute reinsurance payments based on the need for reinsurance payments in each State. Because reinsurance contributions and reinsurance needs will vary significantly between States, we believe a policy of disbursing reinsurance payments solely in a State in which the contributions are collected would not meet the States' individual reinsurance needs, would not fulfill HHS's obligation to provide equitable allocation of these funds under section 1341(b)(2)(B) of the Affordable Care Act as well as would disbursing reinsurance payments in the manner proposed in this proposed rule.

We note that these proposals reflect changes from policies set forth in the Premium Stabilization Rule. The principal proposed changes from the policies in the Premium Stabilization Rule include:

- Uniform reinsurance payment parameters to be used by all States;
- A uniform reinsurance contribution collection and payment calendar;
- A one-time annual reinsurance contribution collection, instead of quarterly collections in a benefit year;
- Collection of reinsurance contributions by HHS under the national contribution rate from both health insurance issuers and self-insured group health plans;
- A limitation on States' ability to change reinsurance payment parameters from those that HHS establishes in the annual HHS notice of benefit and payment parameters—a State may only propose supplemental reinsurance payment parameters if the State elects to collect additional funds for reinsurance payments or use additional State funds for reinsurance payments; and
- A limitation on States that seek additional reinsurance funds for administrative expenses, such that the State must have its applicable reinsurance entity collect those additional funds.

These modifications are proposed in addition to other regulatory changes outlined below to ensure effective administration of the transitional reinsurance program.

1. State Standards Related to the Reinsurance Program

a. State Notice of Benefit and Payment Parameters

HHS intends to establish a reinsurance contribution and payment process and reinsurance payment parameters that will be applicable in all States, and proposes to amend the requirements set forth in the Premium Stabilization Rule accordingly. First, instead of allowing a State establishing its own reinsurance program to modify, via a State notice of benefit and payment parameters, the data collection frequency for issuers to receive reinsurance payments from those specified in this proposed rule, we propose that all States be required to use the annual payment schedule set forth in this proposed rule. As such, we propose to amend § 153.100(a)(1) to remove the reference to State modification of data collection frequency. Under this proposal, the frequency with which data must be submitted for reinsurance payments would follow a national schedule. Under § 153.100(a)(1), HHS would continue to allow a State establishing a reinsurance program to modify the data requirements for health insurance issuers to receive reinsurance payments, provided that the State publishes a State notice of benefit and payment parameters and specifies these modifications in that notice.

We propose to also amend § 153.100 by deleting subparagraph (a)(5), and to add § 153.232 to direct a State that elects to collect additional reinsurance contributions for purposes of making additional reinsurance payments or to use additional funds for reinsurance payments under § 153.220(d) to publish supplemental State reinsurance payment parameters in its State notice of benefit and payment parameters under proposed § 153.100(a)(2).

The Premium Stabilization Rule stated that a State establishing a reinsurance program may either directly collect additional reinsurance contributions for administrative expenses and reinsurance payments when a State elects to collect from health insurance issuers, or may elect to have HHS collect contributions from health insurance issuers for administrative expenses. However, we now propose to change this policy such that a State operating its own reinsurance program will no longer be permitted to have HHS collect additional funds for administrative expenses. To create the most effective reinsurance program, we are proposing to collect reinsurance contributions on behalf of all States from both health insurance issuers and self-insured group health plans in the aggregate, and we propose to disburse reinsurance payments based on a State's need for reinsurance payments, not based on where the contributions were collected. As a result, HHS will no longer be able to attribute additional funds for administrative expenses back to a State. We propose to amend § 153.100(a)(3) to clarify that these additional contributions may only be collected by a State operating its own reinsurance program in that State.

We also propose to delete § 153.110(d)(5) and § 153.210(a)(2)(iii), because we propose to disburse reinsurance contributions in proportion to the need for reinsurance payments. Thus, a State's allocation of reinsurance contributions among applicable reinsurance entities is no longer necessary. Accordingly, we also propose to delete § 153.110(d)(2), which requires that a State notice include an estimate of the number of enrollees in fully insured plans with the boundaries of each reinsurance entity.

We further propose that HHS collect all contributions under a national contribution rate from all health insurance issuers in all States. We therefore propose to delete all requirements regarding the State collection of reinsurance contributions from health insurance issuers under the national contribution rate, including § 153.100(a)(2) and § 153.110(b), removing the requirement that a State publish a State notice of benefit and payment parameters to announce its intention to collect reinsurance contributions from health insurance issuers. We also propose to delete § 153.110(d)(4) which requires States to publish in their State notices an estimate of the reinsurance contributions that will be collected by each applicable reinsurance entity.

b. Reporting to HHS

We propose to amend § 153.210 by adding paragraph (e), which directs a State that establishes a reinsurance program to provide information regarding all requests for reinsurance payments received from all reinsurance-eligible plans for each quarter during the benefit year. We propose to use this information to monitor requests for reinsurance payments and reinsurance contribution amounts throughout the benefit year, to ensure equitable reinsurance payments in all States.

To provide issuers in the individual market with information to assist in developing rates in subsequent benefit years, we propose in § 153.240(b)(2) that a State, or HHS on behalf of the State, provide issuers of reinsurance-eligible plans with quarterly estimates of the expected requests for reinsurance payments for the reinsurance-eligible plan under both the national payment parameters and any State supplemental payments parameters set forth under § 153.232, as determined by HHS or the State's reinsurance entity, as applicable. These quarterly estimates would provide issuers with the timely information that is needed to support the calculation of expected claims assumptions that are key to rate development and ultimately, premium stabilization. We expect that an issuer of a reinsurance-eligible plan will use this information to estimate total reinsurance payments to be received for future benefit years, and will use its best estimates of future payments to reduce premiums. It is our expectation that reinsurance payments will be used in the rate setting process to reduce premiums, fulfilling the goals of the reinsurance program.

The national reinsurance payment parameters are calculated to expend all reinsurance contributions collected under the national contribution rate. Similarly, the additional funds collected by the State for reinsurance payments or additional State funds are to be reasonably calculated, under proposed § 153.232(a)(2), to cover all additional reinsurance payments projected to be made under the State supplemental payment parameters. Because the national payment parameters and State supplemental payment parameters apply to two separate funds, we believe that it is important for a State to distinguish between reinsurance payments made under the two different sets of parameters so that reinsurance-eligible plans can understand how each reinsurance program will likely affect claims costs. HHS intends to collaborate with issuers and States to develop these early notifications. We therefore propose in § 153.240(b) that each State, or HHS on behalf of the State, ensure that each applicable reinsurance entity provides to issuers the expected requests for reinsurance payments made under § 153.410 and § 152.232 for all reinsurance-eligible plans in the State within 60 days of the end of each quarter, with a final report for a benefit year sent to issuers no later than June 30 of the year following the applicable benefit year.

For efficient administration of the reinsurance program, HHS must ensure that reinsurance contributions are appropriately spent on reinsurance payments. To this end, we intend to obtain reports regarding reinsurance payments and administrative expenses from States that establish a reinsurance program. We intend to provide details of these reports in future regulation and guidance, along with similar standards for Exchanges, the risk adjustment program, and other Affordable Care Act programs.

c. Additional State Collections

Under the current § 153.220(g) of the Premium Stabilization Rule (which we now propose to redesignate as paragraph (d)), a State operating its own reinsurance program may elect to collect more than the amounts based on the national contribution rate set forth in the annual HHS notice of benefit and payment parameters for administrative expenses of the applicable reinsurance entity or additional reinsurance payments. Under § 153.220(h)(1) of the Premium Stabilization Rule (now proposed to be designated as § 153.220(d)(2)), a State must notify HHS within 30 days after publication of the draft annual HHS notice of benefit and payment parameters for the applicable benefit year of the additional contribution rate that it elects to collect.

We note that although the proposed § 153.220(d) specifies that a State may elect to collect additional reinsurance contributions for administrative expenses or reinsurance payments, nothing in section 1341 of the Affordable Care Act or this proposed rule gives a State the authority to collect from self-insured group health plans covered by ERISA, and that Federal law generally preempts State law that relates to an ERISA-covered plan.

d. State Collections

We propose that HHS collect reinsurance contributions from all contributing entities regardless of whether a State elects to operate the reinsurance program or have HHS operate the reinsurance program on its behalf. As reinsurance payments will be calculated based on aggregate contributions collected and total requests for reinsurance payments nationally, we believe that a centralized collection process for all contributing entities will facilitate the allocation and disbursement of funds. This will also streamline the contribution submissions process for health insurance issuers who operate in multiple States.

We propose to amend § 153.220(a) to set forth that if a State establishes a reinsurance program, HHS will collect all reinsurance contributions from all contributing entities for that State under the national contribution rate. We, therefore, propose to delete § 153.220(a)(2), as we are no longer requiring a State to ensure that the applicable reinsurance entity accepts contributions for reinsurance contribution enrollees who reside in that State with respect to health insurance issuers from HHS. In accordance with the proposed change regarding State collections, we also propose to delete § 153.220(b) of the Premium Stabilization Rule, which directs a State operating its own reinsurance program to notify HHS of its intention to collect from its health insurance issuers for the 2014 benefit year by December 1, 2012. If finalized as proposed, we would consider any notification a State made to HHS pursuant to § 153.220(b) of the Premium Stabilization Rule prior to the finalization of this proposed rule to be withdrawn. We propose to delete § 153.220(f) of the Premium Stabilization Rule which includes requirements on the State collection of reinsurance contributions from health insurance issuers.

Section 153.220(e) of the Premium Stabilization Rule requires that reinsurance contributions are allocated as required in the annual HHS notice of benefit and payment parameters for the applicable benefit year such that contributions allocated for reinsurance payments within the State are only used for reinsurance payments, and contributions allocated for payments to the U.S. Treasury are paid in the timeframe and manner established by HHS. We also propose that any additional contributions collected under § 153.220(d)(1)(ii) and allocated for reinsurance payments under the State supplemental reinsurance payment parameters must be used to make reinsurance payments. We also propose under § 153.220(d)(3) that States may use additional funds, which were not collected as additional reinsurance contributions, to make reinsurance payments under the State supplemental

reinsurance payment parameters. This would allow States to use other revenue sources, including funds collected for State high-risk pools as discussed below, for supplemental reinsurance payments, as determined by a State. This proposal ensures that additional State collections for reinsurance payments and other State funds, as applicable, may be used to reduce premiums.

e. High-Risk Pools

We are not proposing further requirements for State high-risk pools beyond those currently provided at § 153.250. As stated in that section, a State must eliminate or modify its high-risk pool to the extent necessary to carry out the transitional reinsurance program. However, any changes made to a State high-risk pool must comply with the terms and conditions of Grants to States for Operation of Qualified High-Risk Pools (CFDA 93.780), as applicable. Under § 153.400(a)(2)(iii), State high-risk pools are excluded from making reinsurance contributions and cannot receive reinsurance payments. Because State high-risk pools and the transitional reinsurance program both target high-cost enrollees, high-risk pools can operate in parallel with the reinsurance program, serving a distinct subset of the target population. States have the flexibility to decide whether to maintain, phase out, or eliminate their high-risk pools.

The Affordable Care Act permits a State to coordinate its high-risk pool with the reinsurance program ''to the extent not inconsistent'' [24] with the statute. Thus, a State may coordinate the entry of the State's high-risk pool enrollees into the Exchange. HHS is examining ways in which a State could continue its program to complement Exchange coverage. We clarify that nothing in the Premium Stabilization Rule prevents a State that establishes its own reinsurance program from using State money designated for its own high-risk pool towards the reinsurance program. However, a State may not use funds collected for the reinsurance program for its high-risk pool. As indicated in the Premium Stabilization Rule, funds collected for the transitional reinsurance program can only be used for the purpose of making payments under the reinsurance program or for administering that program. Finally, a State could designate its high-risk pool as its applicable reinsurance entity, provided that the high-risk pool meets all applicable criteria for being an applicable reinsurance entity.

2. Contributing Entities and Excluded Entities

Section 1341 of the Affordable Care Act provides that health insurance issuers and third party administrators on behalf of group health plans must make payments to an applicable reinsurance entity. Thus, with respect to insured coverage, issuers are liable for making reinsurance contributions. With respect to self-insured group health plans, the plan is liable, although a third-party administrator or administrative-services-only contractor may be utilized to transfer reinsurance contributions on behalf of a self-insured group health plan, at that plan's discretion. A self-insured, self-administered group health plan without a third-party administrator or administrative-services-only contractor would make its reinsurance contributions directly.[25]

Under section 1341(b)(3)(B)(i) of the Affordable Care Act, contribution amounts for reinsurance are to reflect, in part, an issuer's ''fully insured commercial book of business for all major medical products.'' We interpret this statutory language to mean that an issuer will not be required to make reinsurance contributions for coverage that is non-commercial, or that is not ''major medical coverage.'' [26] We believe it is implicit in the statute that contributions are not required for health insurance coverage that is not regulated by a State department of insurance and written on a policy form filed with and approved by a State department of insurance (but contributions are generally required for self-insured plans even though they are not regulated by a State department of insurance). We discuss below our intent to exclude certain types of plans.

Major medical coverage: Section 1341(b)(3)(B)(i) of the Affordable Care Act refers to ''major medical products,'' but does not define the term. For the purpose of the reinsurance program, our view is that coverage provided under a major medical product (which we refer to in Part 153 as ''major medical coverage'') is health coverage, which may be subject to reasonable enrollee cost sharing, for a broad range of services and treatments including diagnostic and preventive services, as well as medical and surgical conditions provided in various settings, including inpatient, outpatient, and emergency room settings.[27] Thus, for purposes of the reinsurance program, we believe that coverage that is limited in scope (for example, dread disease coverage, hospital indemnity coverage, stand-alone vision coverage, or stand-alone dental coverage) or extent (for example, coverage that is not subject to the Public Health Service Act section 2711 and its implementing regulations) would not be major medical coverage.

In this proposed rule, we also propose to clarify that when an individual has both Medicare coverage and employer-provided group health coverage, Medicare Secondary Payer (MSP) rules under section 1862(b) of the Social Security Act would be applicable, and the group health coverage would be considered major medical coverage only if the group health coverage is the primary payer of medical expenses (and Medicare is the individual's secondary payer) under the MSP rules. For example, a working 68-year-old employee enrolled in a group health plan who, under the MSP rules, is a beneficiary for whom Medicare is the secondary payer would be counted for purposes of reinsurance contributions. However, a 68-year-old retiree enrolled in a group health plan who, under the MSP rules, is a beneficiary for whom Medicare is the primary payer would not be counted for purposes of reinsurance contributions. Similarly, an individual covered under a group health plan with only Medicare Part A (hospitalization) benefits (where Medicare is the primary payer), would not be counted for purposes of reinsurance contributions because the group health coverage would not be considered major medical coverage. We also intend that individuals entitled to Medicare because of disability or end-stage renal disease that have other primary coverage under the MSP rules be treated consistently with the working

[24] See section 1341(d) of the Affordable Care Act.

[25] In the Certain Preventive Services under the Affordable Care Act Advanced Notice of Proposed Rulemaking (77 FR 16501) published March 21, 2012, potential changes to the reinsurance contributions were contemplated with regard to a potential religious accommodation for contraception coverage for certain self-funded plans. If the rules regarding the religious accommodation include changes to the reinsurance contribution, this policy may be changed accordingly.

[26] We note that under the definition of reinsurance-eligible plan in § 153.20, if a plan is excluded from making reinsurance contributions, the plan is excluded from the reinsurance program altogether, (that is, a plan excluded from making reinsurance contributions cannot receive reinsurance payments).

[27] See Section 7F of the National Association of Insurance Commissioners (NAIC) Model Regulation to Implement the Accident and Sickness Insurance Minimum Standards Model Act, (MDL–171) for a definition of major medical expense coverage. Available at: *http://naic.org/committees_index_model_description_a_c.htm#accident_health.*

aged, as outlined above. We seek comment on this proposal.

Commercial book of business: Section 1341(b)(3)(B)(i) of the Affordable Care Act refers to a ''commercial book of business,'' which we interpret to refer to large and small employer group policies and individual market policies. For example, products offered by an issuer under Medicare Part C or D would be part of a ''governmental'' book of business, not a commercial book of business. Similarly, a plan or coverage offered by a Tribe to Tribal members and their spouses and dependents, and other persons of Indian descent closely affiliated with the Tribe in the capacity of the Tribal members as Tribal members (and not in their capacity as current or former employees of the Tribe or their dependents) would not be part of a commercial book of business, but a plan or coverage offered by the Federal government, a State government or a Tribe to employees (or retirees or dependents) because of a current or former employment relationship would be part of a commercial book of business. We seek comment on this interpretation.

Policy filed and approved in a State. We propose that a group or individual policy for health insurance coverage not filed and approved in a State be excluded from reinsurance contributions. To illustrate, if group coverage for employees substantially all of whom work outside the United States—''expatriate coverage''—is not written on a form filed with and approved by a State department of insurance, we propose to exclude it from reinsurance contributions because that coverage is not within the jurisdiction of a State department of insurance and the Affordable Care Act generally does not apply. On the other hand, insured group ''expatriate'' coverage written on a form filed with and approved by a State department of insurance would be subject to the Affordable Care Act and required to make reinsurance contributions. Individual coverage for overseas travel would be similarly treated.

Therefore, we propose to amend § 153.400(a)(1) to state that a contributing entity must make reinsurance contributions on behalf of its self-insured group health plans and health insurance coverage except to the extent that:

(1) The plan or coverage is not major medical coverage;

(2) In the case of health insurance coverage, the coverage is not considered to be part of an issuer's commercial book of business; or

(3) In the case of health insurance coverage, the coverage is not issued on a form filed and approved by a State insurance department.[28] We seek comment on this proposal.

Under the requirements proposed in § 153.400(a)(1), and for clarity, we propose in § 153.400(a)(2) to explicitly exclude the following types of plans and coverage from reinsurance contributions.

(a) *Excepted benefits:* We are not proposing a change in policy with respect to plans or health insurance coverage that consist solely of excepted benefits as defined by section 2791(c) of the PHS Act, as currently described in § 153.400(a)(2) of the Premium Stabilization Rule.

(b) *Private Medicare, Medicaid, CHIP, State high-risk pools, and basic health plans:* Both Medicare and Medicaid have fee-for-service or traditional components, as well as managed care components, in which private health insurance issuers, under contract with HHS, deliver the requisite benefits. As discussed in the preamble to the Premium Stabilization Rule, these private Medicare or Medicaid plans are excluded from reinsurance contributions because they are not part of a commercial book of business. We also clarify that for purposes of reinsurance contributions, programs under the CHIP, Federal and State high-risk pools (including the Pre-Existing Condition Insurance Plan Program under section 1101 of the Affordable Care Act), and basic health plans described in section 1331 of the Affordable Care Act are similarly excluded from reinsurance contributions because they are not part of a commercial book of business.

(c) *Health Reimbursement Arrangements (HRAs) integrated with a group health plan:* HRAs are group health plans that are governed by IRS Notice 2002–45 (2002–2 CB 93) and subsequent guidance. An employer credits an amount to each eligible employee's HRA which the employees may use for allowable medical expenses. An HRA that is integrated with a group health plan is excluded from reinsurance contributions because it is integrated with major medical coverage.[29] We note that reinsurance contributions generally would be required for that group health plan.

(d) *Health saving accounts (HSAs):* Eligible individuals covered by a high deductible health plan may have the option of contributing to an HSA. An HSA is an individual arrangement governed by section 223(d) of the Code and subsequent guidance that consists of a tax-favored account held in trust to accumulate funds that can be used to pay qualified medical expenses of the beneficiary. An HSA is offered along with a high deductible health plan. For purposes of reinsurance contributions, we believe that an HSA is not major medical coverage because it consists of a fixed amount of funds that are available for both medical and non-medical purposes, and would be excluded from reinsurance contributions. We note that reinsurance contributions generally would be required for the high deductible health plan because we believe that it would constitute major medical coverage.

(e) *Health flexible spending arrangements (FSAs):* Health FSAs are usually funded by an employee's voluntary salary reduction contributions under section 125 of the Code. Because section 9005 of the Affordable Care Act limits the annual amount that may be contributed by an employee to a health FSA to $2,500, we believe that a health FSA is not major medical coverage under this rule, and therefore would be excluded from reinsurance contributions.

(f) *Employee assistance plans, disease management programs, and wellness programs:* Employee assistance plans, disease management programs, and wellness programs typically provide ancillary benefits to employees that in many cases do not constitute major medical coverage. Employers, plan sponsors, and health insurance issuers have flexibility in designing these programs to provide services to provide additional benefits to employees, participants, and beneficiaries. If the program (whether self-insured or insured) does not provide major medical coverage, we propose to exclude it from reinsurance contributions. We also note that employers that provide one or more of these ancillary benefits often sponsor major medical plans, which will be subject to reinsurance contributions, absent other excluding circumstances.

(g) *Stop-loss and indemnity reinsurance policies:* For the purpose of reinsurance, we propose to exclude stop-loss insurance and indemnity reinsurance because they do not constitute major medical coverage for the applicable covered lives. Generally, a stop-loss policy is an insurance policy

[28] We note that contributions are generally required for self-insured plans even if not regulated by a State department of insurance because self-insured plans are not typically regulated by these entities.

[29] The preamble to interim final regulations under section 2711 of the PHS Act provides that an HRA satisfies the prohibition on annual and lifetime limits in section 2711 when it is integrated as part of a group health plan with other coverage that satisfies section 2711. See 75 FR 37190–37191.

that protects against health insurance claims that are catastrophic or unpredictable in nature and provides coverage to self-insured group health plans once a certain level of risk has been absorbed by the plan. Stop-loss insurance allows an employer to self-insure for a set amount of claims costs, with the stop-loss insurance covering most or all of the remainder of the claims costs that exceed the set amount. An indemnity reinsurance policy is an agreement between two or more insurance companies under which the reinsuring company agrees to accept and to indemnify the issuing company for all or part of the risk of loss under policies specified in the agreement and the issuing company retains its liability to, and its contractual relationship with, the applicable lives covered. We believe these types of policies were not intended to be subject to the reinsurance program. No inference is intended as to whether stop-loss or reinsurance policies constitute health insurance policies for purposes other than reinsurance contributions.

(h) *Military Health Benefits:* TRICARE is the component of the Military Health System that furnishes health care insurance to active duty and retired personnel of the uniformed services (and covered dependents) through private issuers under contract. Although TRICARE coverage is provided by private issuers, it is not part of a commercial book of business because the relationship between the uniformed services and service members differs from the traditional employer-employee relationship in certain important respects. For example, service members may not resign from duty during a period of obligated service, may not form unions, and may be subject to discipline for unexcused absences from duty. Consequently, our view is that such military health insurance is excluded from reinsurance contributions.

In addition to TRICARE, the Military Health System also includes health care services that doctors, dentists, and nurses provide to uniformed services members on military bases and ships. The Veterans Health Administration within the U.S. Department of Veterans Affairs provides health care to qualifying veterans of the uniformed services at its outpatient clinics, hospitals, medical centers, and nursing homes. Similarly, because we do not consider these programs to be part of a commercial book of business, our view is that such military health programs are excluded from reinsurance contributions.

(i) *Tribal coverage:* As discussed above, we propose to exclude plans or coverage (whether fully insured or self-insured) offered by a Tribe to Tribal members and their spouses and dependents (and other persons of Indian descent closely affiliated with the Tribe) in the capacity of the Tribal members as Tribal members (and not in their capacity as current or former employees of the Tribe or their dependents) as this would not be part of a commercial book of business. However, a plan or coverage offered by the Federal government, a State government or a Tribe to employees (or retirees or dependents) because of a current or former employment relationship would be part of a commercial book of business. Similarly, coverage provided to Indians through programs operated under the authority of the Indian Health Service (IHS), Tribes or Tribal organizations, or Urban Indian organizations, as defined in section 4 of the Indian Health Care Improvement Act would be excluded from reinsurance contributions because it is not part of a commercial book of business. We note, however, that a plan or coverage offered by a Tribe to its employees (or retirees or dependents) on account of a current or former employment relationship would not be excluded.

3. National Contribution Rate

a. 2014 Rate

As described in § 153.220(c) (previously designated as § 153.220(e)), we intend to publish in the annual HHS notice of benefit and payment parameters the national per capita reinsurance contribution rate for the upcoming benefit year. We read section 1341 of the Affordable Care Act to specify the total contribution amounts to be collected from contributing entities (reinsurance pool) as $10 billion in 2014, $6 billion in 2015, and $4 billion in 2016. Additionally, we read sections 1341(b)(3)(B)(iv) and 1341(b)(4) of the Affordable Care Act to direct the collection of funds for contribution to the U.S. Treasury each year as $2 billion in 2014, $2 billion in 2015, and $1 billion in 2016. These amounts, payable to the U.S. Treasury, total $5 billion, which we note is the same amount as that appropriated for the Early Retiree Reinsurance Program under section 1102 of the Affordable Care Act. It has been suggested that the collection of the $2 billion in funds payable to the U.S. Treasury for 2014 should be deferred until 2016, thereby lowering the contribution rate in 2014, while ensuring that the total amount specified by law is returned to the U.S. Treasury by the end of this temporary program. We seek comment on whether such a delayed collection would be consistent with the statutory requirements described above and whether there are other steps that could be taken to reduce the burden of these collections on contributing entities. Finally, section 1341(b)(3)(B)(ii) of the Affordable Care Act allows for the collection of additional amounts for administrative expenses. Taken together, these three components make up the total dollar amount to be collected from contributing entities for each of the three years of the reinsurance program under the national per capita contribution rate.

Each year, the national per capita contribution rate will be calculated by dividing the sum of the three amounts (the national reinsurance pool, the U.S. Treasury contribution, and administrative costs) by the estimated number of enrollees in plans that must make reinsurance contributions:

$$\textit{National Per Capita Reinsurance Contribution Rate} = \frac{\textit{National reinsurance pool} + \textit{Treasury contribution} + \textit{Administrative costs}}{\textit{Estimate of enrollees in plans required to make reinsurance contributions}}$$

As an illustration, under the Affordable Care Act, the 2014 national reinsurance pool is $10 billion, and the contribution to the U.S. Treasury is $2 billion. The amount to be collected for administrative expenses for benefit year 2014 would be $20.3 million (or 0.2 percent of the $10 billion dispersed), discussed in greater detail below. The HHS estimate of the number of enrollees in plans that must make reinsurance contributions that total the $12.02 billion described above yields a per capita contribution rate of $5.25 per

month in benefit year 2014. We seek comment on this calculation.

Section 153.220(c) (previously designated as § 153.220(e)) provides that HHS will set in the annual HHS notice of benefit and payment parameters for the applicable benefit year the national contribution rate and the proportion of contributions collected under the national contribution rate to be allocated to reinsurance payments, payments to the U.S. Treasury, and administrative expenses. In Table 12 below, we specify these proportions (or amounts, as applicable):

TABLE 12—PROPORTION OF CONTRIBUTIONS COLLECTED UNDER THE NATIONAL CONTRIBUTION RATE FOR REINSURANCE PAYMENTS, PAYMENTS TO U.S. TREASURY AND ADMINISTRATIVE EXPENSES

Proportion or amount for:	If total contribution collections under the national contribution rate are less than or equal to $12.02 billion	If total contribution collections under the national contribution rate are more than $12.02 billion
Reinsurance payments	83.2 percent ($10 billion/ $12.02 billion).	The difference between total national collections and those contributions allocated to the U.S. Treasury and administrative expenses.
Payments to the U.S. Treasury	16.6 percent ($2 billion/ $12.02 billion).	$2 billion.
Administrative expenses	0.2 percent ($20.3 million/ $12.02 billion).	$20.3 million.

As shown in Table 12, if the total amount of contributions collected is less than equal to $12.02 billion, we propose to allocate approximately 83.2 percent of the reinsurance contributions collected to reinsurance payments, 16.6 percent of the reinsurance contributions collected to the U.S. Treasury and 0.2 percent of the reinsurance contributions collected to administrative expenses.

Section III.C.6. of this proposed rule provides details on the methodology we used to develop enrollment estimates for the national per capita contribution rate.

b. Federal Administrative Fees

As described in the Premium Stabilization Rule, HHS would collect reinsurance contributions from self-insured group health plans, even if a State is operating its own reinsurance program. As noted above, we propose that HHS also collect reinsurance contributions from health insurance issuers, even if a State is operating its own reinsurance program. In this proposed rule, we estimate the Federal administrative expenses of operating the reinsurance program in 2014 to be approximately $20.3 million, or approximately 0.2 percent of the $10 billion in reinsurance funds to be distributed in 2014. We believe this figure reflects the Federal government's significant economies of scale in operating the program, and estimate a national per capita contribution rate of $0.11 annually for HHS administrative expenses.

As shown in Table 13, we expect to apportion the annual per capita amount of $0.11 of administrative expenses as follows: $0.055 of the total amount collected per capita for administrative fees for the collection of contributions from health insurance issuers and self-insured group health plans; and $0.055 of the total amount collected per capita for administrative fees for reinsurance payment activities, supporting the administration of payments to issuers of reinsurance-eligible plans.

TABLE 13—BREAKDOWN OF ADMINISTRATIVE EXPENSES

[Annual, per capita]

Item	Estimated cost
Collecting contributions from health insurance issuers and self-insured group health plans	$0.055
Payment activities	0.055
Total annual per capita fee for HHS to perform all reinsurance functions	0.11

If HHS operates the reinsurance program on behalf of a State, HHS would retain the annual per capita fee for HHS to perform all reinsurance functions, which would be $0.11. If a State operates its own reinsurance program, HHS would transfer $0.055 of the per capita administrative fee to the State for purposes of administrative expenses incurred in making reinsurance payments, and retain the remaining $0.055 to offset the costs of contribution collection. We note that the administrative expenses for reinsurance payments will be distributed in proportion to the State-by-State total requests for reinsurance payments made under the national payment parameters. We seek comment on this approach, and other reasonable, administratively simple approaches that may be used to calculate administrative costs.

4. Calculation and Collection of Reinsurance Contributions

a. Calculation of Reinsurance Contribution Amount and Timeframe for Collections

We intend to administer the reinsurance program in a manner that minimizes the administrative burden on health insurance issuers and self-insured group health plans, while ensuring that contributions are calculated accurately. Thus, we propose in § 153.400(a) and § 153.240(b)(1), respectively, to collect and pay out reinsurance funds annually to minimize the costs of administering the program and the burden on contributing entities. If we were to collect and make reinsurance payments throughout the benefit year, we would likely be required to hold the disbursement of a large portion of the reinsurance payments until the end of the benefit year to ensure an equitable allocation of payments. This would deprive contributing entities of the use of those funds during the benefit year, and we believe that the proposed § 153.400(a)

and § 153.240(b)(1) would address this issue. However, we note that this approach would delay the receipt of some reinsurance payments for individual market issuers, and solicit comment on the benefits and burdens for issuers, States, and other stakeholders of a more frequent collections and payment cycle.

Under the Premium Stabilization Rule, HHS would collect reinsurance contributions through a per capita assessment on contributing entities. To clarify how this assessment is made, we propose to add § 153.405, which provides that the reinsurance contribution of a contributing entity be calculated by multiplying the average number of covered lives of reinsurance contribution enrollees during the benefit year for all of the contributing entity's plans and coverage that must pay reinsurance contributions, by the national contribution rate for the applicable benefit year.

$$\textit{Required Reinsurance Contribution} = \textit{Number of Covered Lives During the Benefit Year for All Contributing Entity's Plans} \times \textit{National Contribution Rate for the Applicable Benefit Year}$$

We also propose to amend § 153.405(b) to require that, no later than November 15 of benefit year 2014, 2015, and 2016, as applicable, a contributing entity must submit to HHS an annual enrollment count of the average number of covered lives of reinsurance contribution enrollees for each benefit year. The count must be determined as specified in proposed § 153.405(d), (e), (f), or (g) as applicable. We propose to amend § 153.400(a) so that each contributing entity makes reinsurance contributions at the national contribution rate annually and in a manner specified by HHS. We also propose to amend § 153.400(a) so that each contributing entity makes reinsurance contributions under any additional applicable State supplemental contribution rate, if a State elects to collect additional contributions for administrative expenses or reinsurance payments under § 153.220(d), annually and in a manner specified by the State. We believe this annual collection schedule will ensure a more accurate count of a contributing entity's average covered lives, and would avoid the need for any initial estimates and subsequent reconciliation to account for fluctuations in enrollment during the course of the benefit year.

Under § 153.405(c)(1), within 15 days of submission of the annual enrollment count or by December 15, whichever is later, HHS will notify each contributing entity of the reinsurance contribution amounts to be paid based on that annual enrollment count. We specify in § 153.405(c)(2) that a contributing entity remit contributions to HHS within 30 days after the date of the notification of contributions due for the applicable benefit year. The amount to be paid by the contributing entity must be based upon the notification received under § 153.405(c)(1).

Counting Methods for Health Insurance Issuers: In § 153.405(d), we propose a number of methods that a health insurance issuer may use to determine the average number of covered lives of reinsurance contribution enrollees under a health insurance plan for a benefit year for purposes of the annual enrollment count. These methods promote administrative efficiencies by building on the methods permitted for purposes of the fee to fund the Patient-Centered Outcomes Research Trust Fund (the PCORTF Rule), modified so that a health insurance issuer may determine an annual enrollment count during the fourth quarter of the benefit year.[30] Thus, under each of these methods, the number of covered lives will be determined based on the first nine months of the benefit year.

(1) *Actual Count Method:* Under the PCORTF Rule, an issuer may use the ''actual count method'' to determine the number of lives covered under the plan for the plan year by calculating the sum of the lives covered for each day of the plan year and dividing that sum by the number of days in the plan year. We propose that, for reinsurance contributions purposes, a health insurance issuer would add the total number of lives covered for each day of the first nine months of the benefit year and divide that total by the number of days in those nine months.

(2) *Snapshot Count Method:* Under the PCORTF Rule, a health insurance issuer may use the ''snapshot count method'' generally by adding the total number of lives covered on a certain date during the same corresponding month in each quarter, or an equal number of dates for each quarter, and dividing the total by the number of dates on which a count was made. For reinsurance contributions purposes, an issuer would add the totals of lives covered on a date (or more dates if an equal number of dates are used for each quarter) during the same corresponding month in each of the first three quarters of the benefit year, (provided that the dates used for the second and third quarters must be within the same week of the quarter as the date used for the first quarter), and divide that total by the number of dates on which a count was made. For this purpose, the same months must be used for each quarter (for example, January, April and July).

(3) *Member Months Method or State Form Method:* Under the PCORTF Rule, a health insurance issuer may use the ''Member Months Method'' or ''State Form Method'' by using data from the NAIC Supplemental Health Exhibit or similar data from other State forms. However, data from these forms may be out of date at the time of the annual enrollment count submission, and we believe that it is important that health insurance issuers achieve an accurate count of covered lives, particularly for individual market plans. We expect that the individual market would be subject to large increases in enrollment between 2014 and 2016. Therefore, we propose a modified counting method based upon the ratio of covered lives per policy in the NAIC or State form. Specifically, we propose that health insurance issuers using this method multiply the average number of policies for the first nine months of the applicable benefit year by the ratio of covered lives per policy calculated from the NAIC Supplemental Health Care Exhibit (or from a form filed with the issuer's State of domicile for the most recent time period). Issuers would count the number of policies in the first nine months of the applicable benefit year by adding the total number of policies on one date in each quarter, or an equal number of dates for each

[30] See the proposed rule published on April 17, 2012 (77 FR 22691). Once the PCORTF Rule is finalized, we may modify the methods of reporting contained in this rulemaking.

quarter (or all dates for each quarter), and dividing the total by the number of dates on which a count was made.

For example, if a health insurance issuer indicated on the NAIC form for the most recent time period that it had 2,000 policies covering 4,500 covered lives, it would apply the ratio of 4,500 divided by 2,000, equaling 2.25 to the number of policies it had over the first three quarters of the applicable benefit year. If the issuer had an average of 2,300 policies in the three quarters of the applicable benefit year, it would report 2.25 multiplied by 2,300 as the number of covered lives for the purposes of reinsurance contributions.

Counting Methods for Self-Insured Group Health Plans: In § 153.405(e), we propose a number of methods that a self-insured group health plan may use to determine the average number of covered lives for purposes of the annual enrollment count. These methods mirror the methods permitted to sponsors of self-insured group health plans under the PCORTF Rule, modified slightly for timing, so that enrollment counts may be obtained on a more current basis.

(1) *Actual Count Method or Snapshot Count Method:* We propose that self-insured plans, like health insurance issuers, may use the actual count method or snapshot count method as described above.

(2) *Snapshot Factor Method:* Under the PCORTF Rule, a plan sponsor generally may use the ''snapshot factor method'' by adding the totals of lives covered on any date (or more dates if an equal number of dates are used for each quarter) during the same corresponding month in each quarter, and dividing that total by the number of dates on which a count was made, except that the number of lives covered on a date is calculated by adding the number of participants with self-only coverage on the date to the product of the number of participants with coverage other than self-only coverage on the date and a factor of 2.35.[31] For this purpose, the same months must be used for each quarter (for example, January, April, July, and October). For reinsurance contributions purposes, a self-insured group health plan would use this PCORTF counting method over the first three quarters of the benefit year, provided that for this purpose, the corresponding dates for the second and third quarters of the benefits year must be within the same week of the quarter as the date selected for the first quarter.

(3) *Form 5500 Method:* Under the PCORTF Rule, a plan sponsor may use the ''Annual Return/Report of Employee Benefit Plan'' filed with the Department of Labor (Form 5500) by using data from the Form 5500 for the last applicable plan year. We propose that, for purposes of reinsurance contributions, a self-insured group health plan may also rely upon such data, even though the data may reflect enrollment in a previous benefit year. Our modeling of the 2014 health insurance marketplace, discussed in section III.C.6. of this proposed rule, suggests that enrollment in self-insured group health plans is less likely to fluctuate than enrollment in the individual market. Thus, we propose that a self-insured group plan may calculate the number of lives covered for a plan that offers only self-only coverage by adding the total participants covered at the beginning and end of the benefit year, as reported on the Form 5500, and dividing by two. Additionally, a self-insured group plan that offers self-only coverage and coverage other than self-only coverage may calculate the number of lives covered by adding the total participants covered at the beginning and the end of the benefit year, as reported on the Form 5500.

Counting Methods for Plans With Self-insured and Insured Options: An employer may sponsor a group health plan that offers one or more coverage options that are self-insured and one or more other coverage options that are insured. In § 153.405(f), we propose that to determine the number of covered lives of reinsurance contribution enrollees under a group health plan with both self-insured and insured options for a benefit year must use one of the methods specified in either § 153.405(d)(1) or § 153.405(d)(2)—the ''actual count'' method or ''snapshot count'' for health insurance issuers.

Aggregation of self-insured group health plans and health insurance plans: We propose in § 153.405(g)(1) that if a plan sponsor maintains two or more group health plans or health insurance plans (or a group health plan with both insured and self-insured components) that collectively provide major medical coverage for the same covered lives, which we refer to as ''multiple plans'' for the purpose of the reinsurance program, then these multiple plans must be treated as a single self-insured group health plan for purposes of calculating any reinsurance contribution amount due under paragraph (c) of this section. This approach would prevent the double counting of a covered life for major medical coverage offered across multiple plans, and prohibit plan sponsors that provide such major medical coverage from splitting the coverage into separate arrangements to avoid reinsurance contributions on the grounds that it does not offer major medical coverage.

For purposes of § 153.405(g)(1), the plan sponsor is responsible for paying the applicable fee. We propose to define ''plan sponsor'' in proposed § 153.405(g)(2) based on the definition of the term in the PCORTF Rule.[32] We propose to define ''plan sponsor'' as:

(A) The employer, in the case of a plan established or maintained by a single employer;

(B) The employee organization, in the case of a plan established or maintained by an employee organization;

(C) The joint board of trustees, in the case of a multi-employer plan (as defined in section 414(f) of the Code);

(D) The committee, in the case of a multiple employer welfare arrangement;

(E) The cooperative or association that establishes or maintains a plan established or maintained by a rural electric cooperative or rural cooperative association (as such terms are defined in section 3(40)(B) of ERISA);

(F) The trustee, in the case of a plan established or maintained by a voluntary employees' beneficiary association (meaning that the association is not merely serving as a funding vehicle for a plan that is established or maintained by an employer or other person);

(G) In the case of a plan, the plan sponsor of which is not described in (A) through (F) above, the person identified or designated by the terms of the document under which the plan is operated as the plan sponsor, provided that designation is made and consented to, by no later than the date by which the count of covered lives for that benefit year is required to be provided. After that date, the designation for that benefit year may not be changed or revoked, and a person may be designated as the plan sponsor only if the person is one of the persons maintaining the plan (for example, one of the employers that is maintaining the plan with one or more other employers); or

(H) In the case of a plan the sponsor of which is not described in (A) through

[31] The preamble to the proposed PCORTF Rule explains that ''the 2.35 dependency factor reflects that all participants with coverage other than self-only have coverage for themselves and some number of dependents. The Treasury Department and the IRS developed the factor, and other similar factors used in the regulations, in consultation with Treasury Department economists and in consultation with plan sponsors regarding the procedures they currently use for estimating the number of covered individuals.''

[32] If the definition of ''plan sponsor'' is revised in the final PCORTF Rule, we intend to revise the definition proposed herein to maintain consistency.

(F) above, and for which no identification or designation of a plan sponsor has been made pursuant (G), each employer or employee organization that maintains the plan (with respect to employees of that employer or employee organization), and each board of trustees, cooperative or association that maintains the plan.

Exceptions: We propose two exceptions to this aggregation rule, in § 153.405(g)(3). First, if the benefits provided by any health insurance or self-insured group health plans are limited to excepted benefits within the meaning of section 2791(c) of the PHS Act (such as stand-alone dental or vision benefits), the excepted benefits coverage need not be aggregated with other plans for purposes of this section. Second, if benefits provided by any health insurance or self-insured group health plan are limited to prescription drug coverage, that prescription drug coverage need not be aggregated so as to reduce the burden on sponsors who have chosen to structure their coverage in that manner. As discussed in section III.C.2. of this proposed rule, coverage that consists solely of prescription drug or excepted benefits is not major medical coverage. If enrollees have major medical coverage and separate coverage consisting of prescription drug or excepted benefits, reinsurance contributions only would be required with respect to the major medical coverage. Reinsurance contributions would not be required with respect to the same enrollees' prescription drug or excepted benefits coverage, and consequently, double counting of covered lives will not occur.

Multiple Plans: In § 153.405(g)(4), we propose counting requirements for multiple plans in which at least one of the plans is an insured plan (covered in § 153.405(g)(4)(i)), and multiple self-insured group health plans not including an insured plan (covered in § 153.405(g)(4)(ii)). First, we anticipate that a plan sponsor will generate or obtain a list of the participants in each plan and then analyze the lists to identify those participants that have major medical coverage across all the plans collectively. To calculate the average number of covered lives of reinsurance contribution enrollees across multiple plans, we propose that a plan sponsor must use one of the methods applicable to health insurance plans or self-insured group health plans under § 153.405(d) and § 153.405(e), respectively, applied across the multiple plans as a whole. We also propose to require reporting to HHS or the applicable reinsurance entity concerning multiple plans, as discussed in § 153.405(g)(4). Additionally, it is important to note that the reinsurance program operates on a benefit year basis as discussed in section III.C.5. of this proposed rule, which is defined at § 153.20 of this part (by reference to § 155.20) as the calendar year, and the applicable counting methods all apply on that basis, no matter the plan year applicable to particular plans.

Multiple Group Health Plans Including an Insured Plan: When one or more of the multiple group health plans is an insured plan, we propose that the actual count method for health insurance issuers in § 153.405(d)(1) or the snapshot count method for health insurance issuers in § 153.405(d)(2) must be used. We propose to prohibit the use of the ''Member Months Method'' or ''State Form Method'' to count covered lives across multiple insured plans because those methods would not easily permit aggregate counting, since the identities of the covered lives are not available on the applicable forms. We propose that the plan sponsor must determine and report, in a timeframe and manner established by HHS, to HHS (or, the applicable reinsurance entity if the multiple plans all consist solely of health insurance plans and the applicable reinsurance entity of a State is collecting contributions from health insurance issuers in such State): (1) The average number of covered lives calculated; (2) the counting method used; and (3) the names of the multiple plans being treated as a single group health plan as determined by the plan sponsor and reported to HHS.

Multiple Self-Insured Group Health Plans Not Including an Insured Plan: We describe the counting provisions applicable to multiple self-insured group health plans (that is, when none of the plans is an insured plan) in proposed paragraph (g)(4)(ii) of this section. There are four counting methods available for self-insured plans which are set forth in proposed § 153.405(e)(1) through § 153.405(e)(4) of this section. Proposed § 153.405(e)(1) permits a plan sponsor to use the actual count method under § 153.405(d)(1) or the snapshot count method under § 153.405(d)(2) that are also available for insured plans. Proposed paragraph (e)(2) permits an additional method (the snapshot factor method) for self-insured plans. We propose not to permit a plan sponsor to use the fourth method, the ''Form 5500 Method'' as described in proposed § 153.405(e)(3) to count covered lives across multiple self-insured plans because that method would not easily permit aggregate counting, since the identities of the covered lives are not available on that form. Thus, we propose three possible methods for multiple self-insured plans under paragraph (g)(4)(ii). We further propose that the plan sponsor must report, in a timeframe and manner established by HHS, to HHS: (1) The average number of covered lives calculated; (2) the counting method used; and (3) the names of the multiple plans being treated as a single group health plan as determined by the plan sponsor.

Consistency with PCORTF Rule Not Required: We intend to allow a contributing entity to use a different counting method for the annual enrollment count of covered lives for purposes of reinsurance contributions from that used for purposes of the return required in connection with the PCORTF Rule. Because time periods and counting methods may differ, we would not require that a contributing entity submit consistent estimates of its covered lives in the return required in connection with the PCORTF Rule and the annual enrollment count required for reinsurance contributions (although these counts should be performed in accordance with the rules of the counting method chosen). However, when calculating the average number of covered lives across two or more plans under proposed paragraph (g), the same counting method must be used across all of the multiple plans, because they would be treated as a single plan for counting purposes.

We welcome comments on this approach to counting covered lives for reinsurance contributions.

b. State Use of Contributions Attributed to Administrative Expenses

To achieve the purposes of the reinsurance program, reinsurance contributions collected must be appropriately spent on reinsurance payments, payments to the U.S. Treasury, and on reasonable expenses to administer the reinsurance program. Therefore, we provide guidance on three restrictions that we intend to propose on the use of reinsurance contributions for administrative expenses, to permit States that participate in the reinsurance program to accurately estimate the cost of administrative expenses. While we will provide details of those standards in future regulation and guidance, along with similar standards for Exchanges, the risk adjustment program, and other Affordable Care Act programs, we provide below an overview of our intentions.

First, we intend to apply the prohibition described in section 1311(d)(5)(B) of the Affordable Care Act

to the reinsurance program so that reinsurance funds intended for administrative expenses cannot be used for staff retreats, promotional giveaways, excessive executive compensation, or promotion of Federal or State legislative or regulatory modifications. Second, we intend to propose that reinsurance funds intended for administrative expenses may not be used for any expense not necessary to the operation and administration of the reinsurance program. Third, we intend to propose that an applicable reinsurance entity must allocate any shared, indirect, or overhead costs between reinsurance-related and other State expenses based on generally accepted accounting principles, consistently applied. An applicable reinsurance entity would be required to provide HHS, in a timeframe and manner specified by HHS, a report setting forth and justifying its allocation of administrative costs. We welcome comments on these intended proposals.

5. Eligibility for Reinsurance Payments Under Health Insurance Market Rules

We are proposing to add § 153.234 to clarify that, under either the reinsurance national payment parameters or the State supplemental reinsurance payment parameters, if applicable, a reinsurance-eligible plan's covered claims costs for an enrollee incurred prior to the application of 2014 market reform rules—§ 147.102 (fair health insurance premiums), § 147.104 (guaranteed availability of coverage, subject to the student health insurance provisions at § 147.145), § 147.106 (guaranteed renewability of coverage, subject to the student health insurance provisions at § 147.145), § 156.80 (single risk pool), and Subpart B 156 (essential health benefits package)—do not count toward either the national or State supplemental attachment points, reinsurance caps, or coinsurance rates. Unlike plans subject to the market reform rules under the Affordable Care Act, plans not subject to these 2014 market reforms rules may use several mechanisms to avoid claims costs for newly insured, high-cost individuals by excluding certain conditions (for example, maternity coverage for women of child-bearing age), by denying coverage to those with certain high-risk conditions, and by pricing individual premiums to cover the costs of providing coverage to such individuals. (We note that student health plan eligibility would be subject to the modified guaranteed availability and guaranteed issue requirements only, to the extent that they apply, as set forth in § 147.145, and we would require that the student health plans only meet those modified requirements to be eligible for reinsurance payments.) The market reform rules will be effective for the individual market for policy years [33] beginning on or after January 1, 2014, and as a result, policies that are issued in 2013 will be subject to these rules at the time of renewal in 2014, and therefore, become eligible for reinsurance payments at the time of renewal in 2014.

We believe that providing reinsurance payments only to those reinsurance-eligible plans that are subject to the 2014 market reform rules better reflects the reinsurance program's purpose of mitigating premium adjustments to account for risk from newly insured, high-cost individuals. We also propose that State-operated reinsurance programs similarly limit eligibility for reinsurance payments. We recognize that this policy contrasts with the approach proposed for State-operated risk adjustment programs, under which HHS is proposing to permit States to choose to risk adjust plans not subject to the 2014 market reform rules. Because some States may have enacted State-specific rating and market reforms that they believe would justify the inclusion of these plans in risk adjustment before these plans' renewal dates, permitting State flexibility on the applicability of risk adjustment to plans not subject to the 2014 market reform rules furthers the goals of the risk adjustment program. However, we believe that State flexibility for eligibility for reinsurance payments does not further the goal of the reinsurance program.

Also, we intend to operate the reinsurance program on a calendar year basis, which we believe makes the most sense from policy and administrative perspectives. First, we believe that there is ambiguity in section 1341 of the Affordable Care Act as to whether the reinsurance program is to be administered on a plan year or calendar year basis. Some provisions of section 1341 concerning contributions from and payments to issuers use the term ''plan year.'' However, other provisions of section 1341—notably sections 1341(b)(4), 1341(b)(3)(B)(iv) and 1341(c)(1)(A)—contemplate that the transitional reinsurance program would run with the calendar year. Second, a calendar year based program would ensure adequate collections in the early part of the program and to preserve fairness in making reinsurance payments. Third, implementing the reinsurance program on a calendar year basis permits the reinsurance program schedule to coincide with the MLR and the temporary risk corridors program schedules, both of which operate on a calendar year basis. Finally, we believe that the purpose of the reinsurance program is to stabilize premiums beginning in 2014, when the Exchanges begin to operate. We believe that the statute reflects this intent in section 1341(c)(1)(A) of the Affordable Care Act, which states that the purpose of an applicable reinsurance entity is ''to help stabilize premiums for coverage in the individual market in a State during the first three years of operation of an Exchange for such markets within the State when the risk of adverse selection related to new rating rules and market changes is greatest.''

We welcome comments on this proposal.

6. Reinsurance Payment Parameters

As described in the Premium Stabilization Rule, reinsurance payments to eligible issuers will be made for a portion of an enrollee's claims costs paid by the issuer that exceeds an attachment point, subject to a reinsurance cap. The coinsurance rate, attachment point, and reinsurance cap are the reinsurance ''payment parameters.'' Section 1341(b)(2)(B) of the Affordable Care Act directs the Secretary, in establishing standards for the transitional reinsurance program to include a formula for determining the amount of reinsurance payments to be made to issuers for high-risk individuals that provides for the equitable allocation funds. Using the Secretary's authority under this provision, we propose to amend the policy described in the Premium Stabilization Rule by establishing uniform, ''national'' reinsurance payment parameters that will be applicable to the reinsurance program for each State, whether or not operated by a State. We believe that using uniform, national payment parameters would result in equitable access to the reinsurance funds across States, while furthering the goal of premium stabilization across all States by disbursing reinsurance contributions where they are most needed.

The primary purpose of the transitional reinsurance program is to stabilize premiums by setting the reinsurance payment parameters to achieve the greatest impact on rate

[33] As defined at 45 CFR 144.103, ''policy year means in the individual health insurance market the 12-month period that is designated as the policy year in the policy documents of the individual health insurance coverage. If there is no designation of a policy year in the policy document (or no such policy document is available), then the policy year is the deductible or limit year used under the coverage. If deductibles or other limits are not imposed on a yearly basis, the policy year is the calendar year.''

setting, and therefore, premiums, through reductions in plan risk, while complementing the current commercial reinsurance market. In contrast to commercial reinsurance, which is used to protect against risk, the primary purpose of the reinsurance program is to stabilize premiums in the individual market from 2014 through 2016. The reinsurance program is designed to protect against issuers' potential perceived need to raise premiums due to the implementation of the 2014 market reform rules, specifically guaranteed availability. Even though HHS expects that any potential new high-cost claims from newly insured individuals would be balanced out by low-cost claims from many newly insured individuals who enter the individual market as a result of the availability of premium tax credits, more affordable coverage, the minimum coverage provision, and greater transparency and competition in the market, the reinsurance program is designed to alleviate the concern of new high-cost claims from newly insured individuals.

Therefore, we propose that the 2014 national payment parameters be established at an attachment point of $60,000, when reinsurance payments would begin, a national reinsurance cap of $250,000, when the reinsurance program stops paying claims for a high-cost individual, and a uniform coinsurance rate of 80 percent, meant to reimburse a proportion of claims between the attachment point and reinsurance cap while giving issuers an incentive to contain costs. These three proposed payment parameters would help offset high-cost enrollees, without interfering with traditional commercial reinsurance, which typically has attachment points in the $250,000 range. We estimate that these national payment parameters will result in total requests for reinsurance payments of approximately $10 billion. With the coinsurance rate, reinsurance cap, and attachment point fixed uniformly across all States, we believe that the reinsurance program would have the greatest equitable impact on premiums across all States. We believe that these proposed national payment parameters best address the reinsurance program's goals to promote national premium stabilization and market stability while providing plans incentives to continue effective management of enrollee costs. We intend to continue to monitor individual market enrollment and claims patterns to appropriately disburse reinsurance payments throughout each of the benefit years.

To assist with the development of the payment parameters, HHS developed a model that estimates market enrollment incorporating the effects of State and Federal policy choices and accounting for the behavior of individuals and employers, the Affordable Care Act Health Insurance Model (ACAHIM). The outputs of the ACAHIM, especially the estimated enrollment and expenditure distributions, were used to analyze a number of policy choices relating to benefit and payment parameters, including the national reinsurance contribution rate and national reinsurance payment parameters.

The ACAHIM generates a range of national and State-level outputs for 2014, including the level and composition of enrollment across markets given the eligible population in a State. The ACAHIM is described below in two sections: (1) The approach for estimating 2014 enrollment and (2) the approach for estimating 2014 expenditures. Because enrollment projections are key to estimating the reinsurance payment parameters for the reinsurance program, HHS paid much attention to the underlying data sources and assumptions for the ACAHIM. The ACAHIM uses recent Current Population Survey (CPS) data adjusted for small populations at the State level, exclusion of undocumented immigrants, and population growth to 2014, to assign individuals to the various coverage markets.

More specifically, the ACAHIM assigns each individual to a single health insurance market as their baseline (pre-Affordable Care Act) insurance status. In addition to assuming that individuals currently in Medicare, TRICARE, or Medicaid will remain in such coverage, the ACAHIM takes into account the probability that a firm will offer employment-based coverage based on the CPS distribution of coverage offers for firms of a similar size and industry. Generally, to determine the predicted insurance enrollment status for an individual or family (the ''health insurance unit'' or ''HIU'') in 2014, the ACAHIM calculates the probability that the firm will offer insurance, then models Medicaid eligibility, and finally models eligibility for advance payments of the premium tax credit and cost-sharing reductions under the Exchange. Whenever a transition to another coverage market is possible, the ACAHIM takes into account the costs and benefits of the decision for the HIU and assigns a higher probability of transition to those with the greatest benefit. The ACAHIM also assumes that uninsured individuals will take up individual market coverage as informed by current take-up rates of insurance across States, varying by demographics and incomes and adjusting for post Affordable Care Act provisions, such as advance payments of the premium tax credit and cost-sharing reductions.

Estimated expenditure distributions from the ACAHIM are used to set the uniform, national reinsurance payment parameters so that estimated contributions align with estimated payments for eligible enrollees. The ACAHIM uses the Health Intelligence Company, LLC (HIC) database from calendar year 2010, with the claims data trended to 2014 to estimate total medical expenditures per enrollee by age, gender, and area of residence. The expenditure distributions are further adjusted to take into account plan benefit design, or, ''metal'' level (that is, ''level of coverage,'' as defined in 156.20) of individual insurance coverage in an Exchange. To describe a State's coverage market, the ACAHIM computes the pattern of enrollment using the model's predicted number and composition of participants in a coverage market. These estimated expenditure distributions were the basis for the national reinsurance payment parameters.

7. Uniform Adjustment to Reinsurance Payments

We propose to amend § 153.230 by specifying in subparagraph (d) that HHS will adjust reinsurance payments by a uniform, pro rata adjustment rate in the event that HHS determines that the amount of total requests for reinsurance payments under the national reinsurance payment parameters will exceed the amount of reinsurance contributions collected under the national contribution rate during a given benefit year. The total amount of contributions considered for this purpose would include any contributions collected but unused under the national contribution rate during any previous benefit year.

For example, in 2014, if total requests for reinsurance payments under the national reinsurance payment parameters are $10.1 billion and only $10 billion is collected for reinsurance payments under the national contribution rate, then all requests for reinsurance payments would be reduced by approximately 1 percent. However, if HHS determines that the total reinsurance contributions collected under the national contribution rate for the applicable benefit year are equal to or more than the total requests for reinsurance payments calculated using the national reinsurance payment

parameters, then no such adjustment will be applied, and all requests for reinsurance payments will be paid in full under the national payment parameters. Any unused reinsurance funds would be used for the next benefit year's reinsurance payments. This uniform pro rata adjustment would ensure that claims are paid at the same rate out of the national reinsurance fund, and promote equitable access to the national reinsurance fund across all States while furthering the goal of premium stabilization under the Affordable Care Act. We invite comment on this policy.

8. Supplemental State Reinsurance Parameters

While we propose uniform, national payment parameters applicable to all States as discussed above, we are also proposing to add § 153.232(a), which specifies the manner in which States may modify the national reinsurance payment parameters established in the HHS notice of benefit and payment parameters. Specifically, we propose that a State that establishes its own reinsurance program may only modify the national reinsurance payment parameters by establishing State supplemental payment parameters that cover an issuer's claims costs beyond the national reinsurance payments parameters. Furthermore, reinsurance payments under these State supplemental payments parameters may only be made with additional funds the State collects for reinsurance payments under § 153.220(d)(1)(ii) or State funds applied to the reinsurance program under § 153.220(d)(3). We believe that this approach would not prohibit States from collecting additional amounts for reinsurance payments, as provided for under section 1341(b)(3)(B) of the Affordable Care Act, while allowing nationwide access to the reinsurance payments from the contributions collected under the national reinsurance contribution rate.

We propose in § 153.232(a) that a State may set State supplemental reinsurance payments parameters by adjusting the national reinsurance payment parameters in one or more of the following ways: (1) Decreasing the national attachment point; (2) increasing the national reinsurance cap; or (3) increasing the national coinsurance rate. In other words, a State may not alter the national reinsurance payment parameters in a manner that could result in reduced reinsurance payments. We seek comment on this approach, including whether there should be any limitations as to how a State may supplement the national reinsurance payment parameters.

To provide issuers with greater certainty for premium rate setting purposes, we propose that a State ensure that any additional funds for reinsurance payments it collects under § 153.220(d)(1)(ii) or State funds under § 153.220(d)(3) as applicable are reasonably calculated to cover additional reinsurance payments that are projected to be made under the State's supplemental reinsurance payment parameters for a given benefit year. We believe that the State must also ensure that such parameters are applied to all reinsurance-eligible plans in that State in the same manner. We further propose in § 153.232(b) that contributions collected under § 153.220(d)(1)(ii) or additional funds collected under § 153.220(d)(3), as applicable, must be applied toward requests for reinsurance payments made under the State supplemental reinsurance payments parameters for each benefit year commencing in 2014 and ending in 2016.

We also propose in § 153.232(c) that, as applicable, a health insurance issuer of a non-grandfathered individual market plan becomes eligible for reinsurance payments under a State's supplemental reinsurance parameters, if its incurred claims costs for an individual enrollee's covered benefits during a benefit year: (1) Exceed the supplemental State attachment point; (2) exceed the national reinsurance cap; or (3) exceed the national attachment point, if the State has established a State supplemental coinsurance rate. This would allow reinsurance payments made under the State supplemental payment parameters to ''wrap around'' the national reinsurance payment parameters so that the State could apply any additional contributions it collects under proposed § 153.220(d) towards reinsurance payments beyond the national reinsurance payment parameters. In this way, HHS can distribute funds under the national payments formula to where they are needed most, while allowing States that elect to run their own program the flexibility to supplement nationally calculated reinsurance payments. As mentioned previously, States would be required to separate in its reporting to issuers the reinsurance payments paid under the national reinsurance payment parameters and State supplemental reinsurance payment parameters.

To ensure that reinsurance payments under State supplemental payment parameters do not overlap with the national reinsurance payment parameters, we propose the method for calculating State supplemental reinsurance payments. Specifically, we propose in § 153.232(d) that supplemental reinsurance payments with respect to a health insurance issuer's claims costs for an individual enrollee's covered benefits must be calculated by taking the sum of: (1) The product of such claims costs between the supplemental State attachment point and the national attachment point multiplied by the national coinsurance rate (or applicable State supplemental coinsurance rate); (2) the product of such claims costs between the national reinsurance cap and the supplemental State reinsurance cap multiplied by the national coinsurance rate (or applicable State supplemental coinsurance rate); and (3) the product of such claims costs between the national attachment point and the national reinsurance cap multiplied by the difference between the State supplemental coinsurance rate and the national coinsurance rate.

For example, in 2014 a State may elect to establish supplemental State reinsurance payment parameters that modify all three national reinsurance payment parameters, by establishing a State supplemental attachment point of $50,000, a State supplemental coinsurance rate of 100 percent, and a State supplemental reinsurance cap of $300,000. Under these supplemental State reinsurance payment parameters, the State must use its additional contributions to pay up to $98,000 of the issuer costs under $300,000 or the sum of: $10,000 (100 percent of an issuer's costs between the State's 2014 supplemental attachment point of $50,000 and the 2014 national attachment point $60,000); and $50,000 (100 percent of an issuer's costs between the 2014 national reinsurance cap of $250,000 and the 2014 State supplemental reinsurance cap $300,000); and $38,000 (the product of an issuer's costs between $60,000 and $250,000 multiplied by the difference between the State's supplemental coinsurance rate (100 percent) and the national coinsurance rate (80 percent). Contributions collected under the national contribution rate would be applied to an issuer's claims costs above the 2014 national attachment point, subject to the national coinsurance rate and national reinsurance cap.

Alternatively, a second State may elect to establish a State supplemental attachment point of $40,000 in 2014, but elect not to establish a supplemental State coinsurance rate or reinsurance cap. That State would then use any additional contributions it collects to cover up to $16,000 or 80 percent (the 2014 national coinsurance rate) of an

issuer's claims costs between $40,000 (the 2014 supplemental State attachment point) and $60,000 (the 2014 national attachment point). As in the first example, contributions collected under the national contribution rate would be applied to an issuer's claims costs above the 2014 national attachment point, subject to the national coinsurance rate and national reinsurance cap.

Similar to payment calculations under the national reinsurance payments parameters, we propose in § 153.232(e) that if all requested reinsurance payments under the State supplemental reinsurance parameters calculated in a State for a benefit year will exceed all the additional funds a State collects for reinsurance payments under § 153.220(d)(1)(ii) or State funds under § 153.220(d)(3) as applicable, the State must determine a uniform pro rata adjustment to be applied to all such requests for reinsurance payments in the State. Each applicable reinsurance entity in the State must reduce all such requests for reinsurance payments under the State supplemental reinsurance payment parameters for the applicable benefit year by that adjustment.

Finally, in § 153.232(f), we propose that a State must ensure that reinsurance payments made to issuers under the State supplemental reinsurance payment parameters do not exceed the issuer's total paid amount for the reinsurance-eligible claim(s) and any remaining additional funds collected under § 153.220(d)(1)(ii) must be used for reinsurance payments under the State supplemental parameters in subsequent benefit years. We seek comment on this proposal, including other areas of flexibility that could be provided to State-operated reinsurance programs.

9. Allocation and Distribution of Reinsurance Contributions

Section 153.220(d) of the Premium Stabilization Rule currently provides that HHS would distribute reinsurance contributions collected for reinsurance payments from a State to the applicable reinsurance entity for that State. We propose to replace this section with proposed § 153.235(a), which provides that HHS will allocate and distribute the reinsurance contributions collected under the national contribution rate based on the need for reinsurance payments, regardless of where the contribution was collected. As previously stated in this proposed rule, HHS will disburse all contributions collected under the national contribution rate from all States for the applicable benefit year, based on all available contributions and the aggregate requests for reinsurance payments, net of the pro rata adjustment, if any. We believe that this method of disbursing reinsurance contributions will allow the transitional reinsurance program to equitably stabilize premiums across the nation, and permit HHS to direct reinsurance funds based on the need for reinsurance payments. Consistent with this proposal, we propose to amend § 153.220(a) to clarify that even if a State establishes a reinsurance program, HHS would directly collect from health insurance issuers, as well as self-insured group health plans, the reinsurance contributions for enrollees who reside in that State.

10. Reinsurance Data Collection Standards

a. Data Collection Standards for Reinsurance Payments

Section 153.240(a) directs a State's applicable reinsurance entity to collect data needed to determine reinsurance payments as described in § 153.230. We propose to amend § 153.240(a) by adding subparagraph (1) to direct a State to ensure that its applicable reinsurance entity either collect or be provided access to the data necessary to determine reinsurance payments from an issuer of a reinsurance-eligible plan. We note that this data would include data related to cost-sharing reductions because reinsurance payments are not based on a plan's paid claims amounts that are reimbursed by cost-sharing reduction amounts. The applicable reinsurance entity, therefore, must reduce a plan's paid claims amount considered for reinsurance payments attributable to cost-sharing reductions. When HHS operates a reinsurance program on behalf of a State, HHS would utilize the same distributed data collection approach that we propose to use for risk adjustment, as described in section III.G. of this proposed rule. This proposed amendment would clarify that an applicable reinsurance entity may either use a distributed data collection approach for its reinsurance program or directly collect privacy-protected data from issuers to determine an issuer's reinsurance payments. The distributed data collection approach would not involve the direct collection of data; instead, HHS or the State would access data on plans' secure servers.

We also propose to amend § 153.240(a) by adding subparagraph (3), directing States to provide a process through which an issuer of a reinsurance-eligible plan that does not generate individual enrollee claims in the normal course of business (such as a capitated plan) may request reinsurance payments (or submit data to be considered for reinsurance payments) based on estimated costs of encounters for the plan in accordance with the requirements of § 153.410. We propose to direct States to ensure that such requests (or a subset of such requests) are subject to (to the extent required by the State) a data validation program. A State would have the flexibility to design a data validation program that meets its adopted methodology and State-specific circumstances. This proposed amendment would enable certain reinsurance-eligible plans, such as staff-model health maintenance organizations, that do not generate claims with associated costs in the normal course of business to provide data to request and receive reinsurance payments.

When HHS operates a reinsurance program on behalf of a State, issuers of capitated plans would generate claims for encounters, and derive costs for those claims when submitting requests for reinsurance payments (or submitting data to be considered for reinsurance payments). It is our understanding that many capitated plans currently use some form of encounter data pricing methodology to derive claims, often by imputing an amount based upon the Medicare fee-for-service equivalent price or the usual, customary, and reasonable equivalent that would have been paid for the service in the applicable market. A capitated plan should use its principal internal methodology for pricing encounters, such as the methodology in use for other State or Federal programs (for example, a methodology used for the Medicare Advantage market). If a plan has no such methodology, or has an incomplete methodology, it would be permitted to implement a methodology or supplement the methodology in a manner that yields derived claims that are reasonable in light of the specific market that the plan is serving. Capitated plans, like all plans that submit reinsurance payment requests (or data to be considered for reinsurance payments) in the HHS-operated program, will be subject to validation and audit. Because capitated plans already use pricing methodologies, we believe this proposed policy would permit capitated plans to participate in the reinsurance program with a minimal increase in administrative burden. We welcome comments on this approach.

b. Notification of Reinsurance Payments

We propose to add § 153.240(b)(1) which directs a State, or HHS on behalf of the State, to notify issuers of the total amount of reinsurance payments that will be made no later than June 30 of the year following the benefit year. This corresponds with the date on which a State or HHS must notify issuers of risk adjustment payments and charges. As such, by June 30 of the year following the applicable benefit year, issuers will be notified of reinsurance payments and risk adjustment payments and charges, allowing issuers to account for their total reinsurance payments and risk adjustment payments and charges when submitting data for the risk corridors and MLR programs. To provide issuers in the individual market with information to assist in development of premiums and rates in subsequent benefit years, we also propose in new § 153.240(b)(2) that a State provide quarterly notifications of estimates to each reinsurance-eligible plan of the expected requests for reinsurance payments for each quarter. HHS intends to collaborate with issuers and States to develop these early notifications. We welcome comments on this proposal.

c. Privacy and Security Standards

We propose to amend § 153.240 by adding paragraph (d)(1), to require a State operating its own reinsurance program to ensure that the applicable reinsurance entity's collection of personally identifiable information is limited to information reasonably necessary for use in the calculation of reinsurance payments and that use and disclosure of personally identifiable information is limited to those purposes for which the personally identifiable information was collected (including for purposes of data validation). This proposal aligns with corresponding language for the risk adjustment program. The term ''personally identifiable information'' is a broadly used term across Federal agencies, and has been defined in the Office of Management and Budget Memorandum M–07–16 (May 22, 2007).[34] To reduce duplicative guidance or potentially conflicting regulatory language, we are not defining personally identifiable information in this proposed rule, and incorporate the aforementioned definition in to this proposed rule.

We also propose to amend § 153.240 by adding paragraph (d)(2) to require that an applicable reinsurance entity implement specific privacy and security standards to ensure enrollee privacy, and to protect sensitive information. Specifically, this provision would require an applicable reinsurance entity to provide administrative, physical, and technical safeguards for personally identifiable information that may be used to request reinsurance payments. This provision is meant to ensure that an applicable reinsurance entity complies with the same privacy and security standards that apply to issuers and providers, specifically the security standards described at § 164.308, § 164.310, and § 164.312.

d. Data Collection

We propose to add new § 153.420(a) to address data collection issues, including the distributed data collection approach that HHS intends to use when operating the reinsurance program on behalf of a State. We propose that issuers of plans eligible for and seeking reinsurance payments submit or make accessible data (including data on cost-sharing reductions to permit the calculation of enrollees' claims costs incurred by the issuer), in accordance with the reinsurance data collection approach established by the State, or HHS on behalf of the State.

In § 153.420(b), we propose that an issuer of a reinsurance-eligible plan submit data to be considered for reinsurance payments for the applicable benefit year by April 30 of the year following the end of the applicable benefit year. The April 30 deadline would apply to all issuers of reinsurance-eligible plans, regardless of whether HHS or the State is operating reinsurance. We welcome comments on this proposal.

D. Provisions for the Temporary Risk Corridors Program

1. Definitions

In the Premium Stabilization Rule, we stated in response to comments that we intended to propose that taxes and profits be accounted for in the risk corridors calculation, in a manner consistent with the MLR program. We, therefore, propose the following amendments and additions to the definitions in this section.

We propose to amend § 153.500 by defining ''taxes'' with respect to a QHP as Federal and State licensing and regulatory fees paid with respect to the QHP as described in § 158.161(a), and Federal and State taxes and assessments paid for the QHP as described in § 158.162(a)(1) and § 158.162(b)(1). This definition aligns with the fees and taxes deductible from premiums in the MLR calculation. We use this definition to define ''after tax premiums earned'' which we propose to mean, with respect to a QHP, premiums earned minus taxes.

We propose to revise the definition of ''administrative costs'' in § 153.500 to mean, with respect to a QHP, the total non-claims costs incurred by the QHP issuer for the QHP, including taxes. We note that under this broader definition, administrative costs may also include fees and assessments other than ''taxes,'' as defined above.

Using the definitions above, we propose to amend § 153.500 by defining ''profits'' with respect to a QHP to mean the greater of: (1) 3 percent of after-tax premiums earned; and (2) premiums earned by the QHP minus the sum of allowable costs and administrative costs of the QHP. Thus, we propose to define profits for a QHP through the use of the risk corridors equation; however, we provide for a minimum 3 percent profit margin so that the risk corridors program will protect a reasonable profit margin (subject to the 20 percent cap on allowable administrative costs as described below). We believe that permitting issuers of QHPs to retain a reasonable profit margin will afford them greater assurance of achieving reasonable financial results given the expected changes in the market in 2014 through 2016, and will encourage the issuers to reduce the risk premium built into their rates. Long-term industry trends suggest an average industry underwriting margin of approximately 2 percent.[35] However, our understanding is that the 2 percent margin includes many plans with significant, unexpected underwriting losses, and includes lines of business that typically have lower underwriting margins than those customarily earned in the individual and small group markets. MLR data from 2011 on 30 large issuers suggest an average underwriting margin of approximately 3 percent, once individual issuer negative results are removed. We believe that a calculation with significant negative margins removed better reflects reasonable issuer projections of underwriting profit. We welcome comments on the estimates, data sources, and appropriate profit margin to use in the risk corridor calculation.

Finally, using the definition of profits discussed above, we propose to revise the definition of ''allowable administrative costs'' in § 153.500 so that it means, with respect to a QHP, the sum of administrative costs, other than

[34] Available at: *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf.*

[35] Borsch, Matthew, CFA, and Wass, Sam, Equity Research Report, *Americas: Managed Care, Decline in Blue Cross Margins Shows the Industry-Wide Downturn,* Goldman Sachs Group, Inc. (August 28, 2012).

taxes, and profits earned, which sum is limited to 20 percent of after-tax premiums earned (including any premium tax credit under any governmental program), plus taxes. This definition reflects the inclusion of profits and taxes discussed above, and clarifies that the 20 percent cap on allowable administrative costs applies to taxes, other than taxes deductible from premium revenue under the MLR rules, a result that is consistent with the way these taxes are accounted for by the MLR rules.

The following example illustrates the operation of the risk corridors calculation as proposed in this proposed rule:

- *Premiums earned:* Assume a QHP with premiums earned of $200.
- *Allowable costs:* Assume allowable costs of $140, including expenses for health care quality and health information technology, and other applicable adjustments. Risk adjustment and reinsurance payments are after-the-fact adjustments to allowable costs for purposes of determining risk corridors amounts, and allowable costs must be reduced by the amount of any cost-sharing reductions received from HHS.
- *Non-Claims Costs:* Assume that the QHP has non-claims costs of $50, of which $15 are properly allocable to licensing and regulatory fees and taxes and assessments described in § 158.161(a), § 158.162(a)(1), and § 158.162(b)(1) (that is, ''taxes'').

The following calculations result:

- *Taxes:* Under the proposed definition of taxes, the QHP's taxes will be $15.
- *Administrative costs* are proposed to be defined as non-claims costs. In this case, those costs would be $50. Administrative costs other than taxes would be $35.
- *After-tax premiums earned* are proposed to be defined as premiums earned minus taxes, or in this case $200 − $15 = $185.
- *Profits* are proposed to be defined as the greater of: 3 percent of premiums earned, or 3 percent * $200 = $6; and premiums earned by the QHP minus the sum of allowable costs and administrative costs, or $200—($140 + $50) = $200 − $190 = $10. Therefore, profits for the QHP would be $10, which is greater than $6.
- *Allowable administrative costs* are proposed to be defined as the sum of administrative costs, other than taxes, plus profits earned by the QHP, which sum is limited to 20 percent of after-tax premiums earned by the QHP (including any premium tax credit under any governmental program), plus taxes.

= ($35 + $10), limited to 20 percent of $185, plus $15
= $45, limited to $37, plus $15
= $37, plus $15
= $52.

- *The target amount* is defined as premiums earned reduced by allowable administrative costs, or $200 − $52 = $148.
- *The risk corridors ratio* is the ratio of allowable costs to target amount, or the ratio of $140 to $148, or approximately 94.6 percent (rounded to the nearest one-tenth of one percent), meaning that the QHP issuer would be required to remit to HHS 50 percent of approximately (97 percent − 94.6 percent) = 50 percent of 2.4 percent, or approximately 1.2 percent of the target amount, or approximately 0.012 * $148, or approximately $1.78.

We propose these amendments to account for taxes and profits in a manner broadly consistent with the MLR calculation. As described in the Premium Stabilization Rule, we seek alignment between the MLR and risk corridors program when practicable so that similar concepts in the two programs are handled in a similar manner, and similar policy goals are reflected. Otherwise, there would be the potential for the Federal government to subsidize MLR rebate payments, or for an issuer to make risk corridors payments even though no MLR rebates would have been required.

We welcome comments on these proposals.

2. Risk Corridors Establishment and Payment Methodology

We propose to add paragraph (d) to § 153.510, which would specify the due date for QHP issuers to remit risk corridors charges to HHS. Under this provision, an issuer would be required to remit charges within 30 days after notification of the charges.

We propose a schedule for the risk corridors program, as follows. By June 30 of the year following an applicable benefit year, under the redesignated § 153.310(e), issuers of QHPs will have been notified of risk adjustment payments and charges for the applicable benefit year. By that same date, under proposed § 153.240(b)(1), QHP issuers also would have been notified of all reinsurance payments to be made for the applicable benefit year. As such, we propose in § 153.530(d) that the due date for QHP issuers to submit all information required under § 153.530 of the Premium Stabilization Rule is July 31 of the year following the applicable benefit year. We note that in section III.I. of this proposed rule, we are proposing that the MLR reporting deadline be revised to align with this schedule.

We welcome comments on these proposals.

3. Risk Corridors Data Requirements

In § 153.530 of the Premium Stabilization Rule, we stated that to support the risk corridors program calculations, a QHP must submit data related to actual premium amounts collected, including premium amounts paid by parties other than the enrollee in a QHP, specifically advance premium tax credits. We further specified that risk adjustment and reinsurance payments be regarded as after-the-fact adjustments to allowable costs for purposes of determining risk corridors amounts, and allowable costs be reduced by the amount of any cost-sharing reductions received from HHS. For example, if a QHP incurred $200 in allowable costs for a benefit year, but received a risk adjustment payment of $25, made reinsurance contributions of $10, received reinsurance payments of $35, and received cost-sharing reduction payments of $15, its allowable costs would be $135 ($200 allowable costs − $25 risk adjustment payments received + $10 reinsurance contributions made − $35 reinsurance payments received − $15 cost-sharing reduction payments).

As noted in section III.E. of this proposed rule, we are proposing an approach to reimbursement of cost-sharing reductions that would add an additional reimbursement requirement for cost-sharing reductions by providers with whom the issuer has a fee-for-service compensation arrangement. As described in section III.E., we propose that issuers be reimbursed for, in the case of a benefit for which the issuer compensates the provider in whole or in part on a fee-for-service basis, the actual amount of cost-sharing reductions provided to the enrollee for the benefit and reimbursed to the provider by the issuer. However, cost-sharing reductions on benefits rendered by providers for which the issuer provides compensation other than on a fee-for-service arrangement (such as a capitated system) would not be held to this standard.

It is our understanding that, in most fee-for-service arrangements, cost-sharing reductions will be passed through to the fee-for-service provider, and as such a QHP's allowable costs should not include either enrollee cost sharing or cost-sharing reductions reimbursed by HHS. However, in contrast in capitated arrangements, cost-sharing reduction payments should be accounted for as a deduction from

allowable costs because we assume in a competitive market that capitation payments (which are reflected directly in an issuer's allowable costs) will be raised to account for the reductions in providers' cost-sharing income, and that the issuer will retain the cost-sharing reduction payments.

Therefore, we are proposing to amend § 153.530(b)(2)(iii) so that allowable costs are reduced by any cost-sharing reduction payments received by the issuer for the QHP to the extent not reimbursed to the provider furnishing the item or service.

4. Manner of Risk Corridor Data Collection

We also propose to amend § 153.530(a), (b), and (c) to specify that we will address the manner of submitting required risk corridors data in future guidance rather than in this HHS notice of benefit and payment parameters.

E. Provisions for the Advance Payments of the Premium Tax Credit and Cost-Sharing Reduction Programs

1. Exchange Responsibilities With Respect to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

a. Special Rule for Family Policies

We propose to amend § 155.305(g)(3), currently entitled ''special rule for multiple tax households.'' Currently, this provision sets forth a rule for determining the cost-sharing reductions applicable to individuals who are, or who are expected to be, in different tax households but who enroll in the same QHP policy. This provision includes a hierarchy of cost-sharing eligibility categories. Our proposed amendment would rename this paragraph ''special rule for family policies,'' add a category for qualified individuals who are not eligible for any cost-sharing reductions, and add text to explicitly address situations in which Indians (as defined in § 155.300(a)) and non-Indians enroll in a family policy. The proposed amendment would extend the current policy with respect to tax households such that individuals on a family policy would be eligible to be assigned to the most generous plan variation for which all members of the family are eligible. We note that nothing in this provision precludes qualified individuals with different levels of eligibility for cost-sharing reductions from purchasing separate policies to secure the highest cost-sharing reductions for which they are respectively eligible. We expect that Exchanges will assist consumers in understanding the relative costs and benefits of enrolling in a family policy versus several individual policies.

The following example demonstrates the applicability of this provision:

• Example: A and B are parent and child who live together, but are each in separate tax households. A and B purchase a silver level QHP family policy in the individual market on an Exchange. A has a household income of 245 percent of the FPL, while B has a household income of 180 percent of the FPL. Individually, A would be eligible for enrollment in the 73 percent AV silver plan variation (that is, with higher cost-sharing requirements), and B in the 87 percent AV silver plan variation (that is, with lower cost-sharing requirements). Under the proposed provision, A and B would collectively qualify for the 73 percent AV silver plan variation, but not the 87 percent AV silver plan variation.

HHS recognizes that this policy may limit the cost-sharing reductions that members of a family could receive if the family chooses to enroll in a family policy; however, section 1402 of the Affordable Care Act does not permit an individual to receive benefits under the Federal cost-sharing reductions program for which the individual is ineligible. In addition, because deductibles and out-of-pocket limits are calculated at the policy level, as opposed to the individual level, it would be operationally difficult to establish separate cost-sharing requirements for different enrollees within the same policy. We discuss this policy further with regard to Indians in section III.E.4.i. of this proposed rule. We welcome comments on this proposal and its effect on families.

b. Recalculation of Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

We propose to add paragraph (g) to § 155.330, related to eligibility redeterminations during a benefit year, to clarify how changes during a benefit year in a tax filer's situation that are reported or identified in accordance with § 155.330 affect eligibility for advance payments of the premium tax credit and cost-sharing reductions. As discussed in the Exchange Establishment Rule, an Exchange must redetermine a tax filer's eligibility for advance payments of the premium tax credit and cost-sharing reductions either as a result of a self-reported change by an individual under § 155.330(b) or as a result of periodic data matching as described in § 155.330(d).

As described in 26 CFR 1.36B–4(a)(1), a tax filer whose premium tax credit for the taxable year exceeds the tax filer's advance payments may receive the excess as an income tax refund, and a tax filer whose advance payments for the taxable year exceed the tax filer's premium tax credit would owe the excess as additional income tax liability, subject to the limits specified in 26 CFR 1.36B–4(a)(3). Consequently, it is important when calculating advance payments that the Exchange act to minimize any projected discrepancies between the advance payments and the final premium tax credit amount, which would be determined by the IRS after the close of the tax year. Thus, we propose in § 155.330(g)(1)(i) that when an Exchange is recalculating the amounts of advance payments of the premium tax credit available due to an eligibility redetermination made during the benefit year, an Exchange must account for any advance payments already made on behalf of the tax filer in the benefit year for which information is available to the Exchange, such that the recalculated advance payment amount is projected to result in total advance payments for the benefit year that correspond to the tax filer's projected premium tax credit for the benefit year, calculated in accordance with 26 CFR 1.36B–3. We propose in § 155.330(g)(1)(ii) to specify that the advance payment provided on the tax filer's behalf must be greater than or equal to zero, and must comply with 26 CFR 1.36B–3(d), which limits advance payments to the total premiums for the QHPs (and stand-alone dental plans, if applicable) selected.

The following example demonstrates the applicability of this provision:

• Tax filer A is determined eligible for enrollment in a QHP through the Exchange and for advance payments of the premium tax credit during open enrollment prior to 2014 based on an expected household income for the year 2014 of $33,510 (300 percent of the FPL). Tax filer A seeks to purchase coverage in a rating area where the premium for the second lowest cost silver plan is $300 per month. As such, the maximum amount of advance payments of the premium tax credit per month would be calculated as follows: 300 − ((1/12)*(9.5%*33,510)) = $35. During the month of June, the tax filer reports an expected decrease in annual household income such that tax filer A's projected household income for the year 2014 will now be $27,925 (250 percent of the FPL). Thus, the maximum amount of advance payments of the premium tax credit per month would be calculated as follows: 300 − ((1/12)*(8.05%*27,925)) = $113. However, the Exchange's recalculation of advance payments of the premium tax credit

must take into account the advance payments already made on behalf of tax filer A. The Exchange must first multiply $113 by 12 months to calculate the expected tax credit for the entire year ($1,356), subtract the amount already paid for the first six months ($210), and then divide the difference by the number of months remaining in the year (six), which results in a recalculated maximum advance payment for the remaining months of $191. In this example, we assume that the taxpayer has elected to have the maximum advance payment for which he or she is eligible to be paid to his or her selected QHP issuer.

If a tax filer is determined eligible for advance payments of the premium tax credit during the benefit year but did not previously receive advance payments of the premium tax credit, the Exchange would calculate the advance payments in accordance with the process described above, without subtracting any previous payments. We reiterate that the provision of all advance payments of the premium tax credit must be consistent with section 36B of the Code and its implementing regulations, including the requirement that premium tax credits (and advance payments) are available only for ''coverage months'' during which the individual is eligible and enrolled in a QHP through the Exchange. We also considered taking a different approach if an eligibility redetermination during the benefit year results in an increase in advance payments of the premium tax credit—we considered proposing that in such a situation, HHS would make retroactive payments to the QHP issuer for all prior months of the benefit year to reflect the increased advance payment amount, not to exceed the total premium for each month. This approach would permit us to pay out more of the full premium tax credit amount prior to the close of the tax year. Without retroactive payments, in the case of a redetermination late in the year, we would have a limited ability to pay out an increase because of the limitation that the premium tax credit—and thus the advance payments of the premium tax credit not exceed the total premium for the month. Following this alternative approach in the case of increases in advance payments of the premium tax credit during the benefit year could also help address any outstanding premium amounts owed by an enrollee to a QHP issuer. We solicit comments regarding whether we should adopt this approach, and how QHP issuers should be required to provide the retroactive payments to enrollees.

In § 155.330(g)(2), we propose that, when redetermining eligibility for cost-sharing reductions during the benefit year, an Exchange must determine an individual to be eligible for the category of cost-sharing reductions that corresponds to the individual's expected annual household income for the benefit year, as determined at redetermination. Section 1402(f)(3) of the Affordable Care Act provides that eligibility determinations for cost-sharing reductions are made on the basis of the expected annual household income for the same taxable year for which the advance payment determination is made under section 1412(b) of the Affordable Care Act. Therefore, if a mid-year change in income triggers use of a new annual household income figure for purposes of determining eligibility for advance payments of the premium tax credit, eligibility for cost-sharing reductions must also be redetermined using the new figure. However, unlike the premium tax credit, cost-sharing reductions are not reconciled at the end of the year by tax filers. As such, redeterminations of eligibility for cost-sharing reductions should not take into account the amount of cost-sharing reductions already provided on an individual's behalf.

The following example demonstrates the applicability of this provision:

• Tax filer B is determined eligible for enrollment in a QHP through the Exchange and for cost-sharing reductions during open enrollment prior to 2014 and enrolls in a silver plan QHP. Tax filer B is assigned to a plan variation in January 2014 based on an expected annual household income of 150 percent of the FPL. During the month of June, the tax filer self-reports an increase in expected household income such that tax filer B's expected annual household income will now be at 200 percent of the FPL. The Exchange must redetermine the tax filer's eligibility for cost-sharing reductions for the remainder of the benefit year following the effective date of redetermination at 200 percent of the FPL, which is the tax filer's expected annual household income, and the tax filer should then be assigned to the plan variation designed to provide cost-sharing reductions for individuals with that expected annual household income.

c. Administration of Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

We propose to add two paragraphs to § 155.340. First, we propose to add paragraph (e) to § 155.340, which would provide that if one or more individuals in a tax household who are eligible for advance payments of the premium tax credit(s) collectively enroll in more than one policy through the Exchange (whether by enrolling in more than one policy under a QHP, enrolling in more than one QHP, or enrolling in one or more QHPs and one or more stand-alone dental plans) for any month in a benefit year, the Exchange must allocate the advance payment of the premium tax credit(s) in accordance with the methodology proposed in § 155.340(e)(1) and (2). We note that an Exchange, under § 155.340(a), must submit to HHS the dollar amount of the advance payment that will be made to each QHP on behalf of the enrollee.

We propose the following allocation methodology: as described in § 155.340(e)(1), the Exchange must first allocate the portion of the advance payment of the premium tax credit(s) that is less than or equal to the aggregate adjusted monthly premiums for the QHP policies, as defined under 26 CFR 1.36B–3(e), properly allocated to EHB, among the QHP policies in proportion to the respective portions of the premiums for the policies properly allocated to EHB. As described in proposed § 155.340(e)(2), any remaining advance payment of the premium tax credit(s) must be allocated among the stand-alone dental policies in proportion to the respective portions of the adjusted monthly premiums for the stand-alone dental policies properly allocated to the pediatric dental EHB. The portion of the adjusted monthly premium for a QHP policy or a stand-alone dental policy that is allocated to EHB would be determined based on the information that the QHP issuer submits, under the proposed § 156.470, and described in section III.E.2. of this proposed rule. For example, if a family collectively eligible for advance payments of the premium tax credit purchases two QHPs and a stand-alone dental plan, with a $500 adjusted monthly premium allocated to EHB, a $400 adjusted monthly premium allocated to EHB, and a $100 adjusted monthly premium allocated to the pediatric dental essential health benefit, respectively, the Exchange must allocate five-ninths of the advance payment of the premium tax credit (up to $500) to the first QHP, and four-ninths (up to $400) to the second QHP. If there is any remaining advance payment of the premium tax credit, this will be allocated to the stand-alone dental plan. This rule ensures a pro rata allocation (by premium) of the advance payment of the premium tax credit to the QHPs, while ensuring that the advance

payment of premium tax credits are only for (and based on) the portion of premiums for EHB. We welcome comments on this proposal.

Second, we propose to add paragraph (f) to § 155.340, which sets forth standards for an Exchange when it is facilitating the collection and payment of premiums to QHP issuers and stand-alone dental plans on behalf of enrollees, as permitted under § 155.240(c). Consistent with our proposed provision in § 156.460(a), § 155.340(f)(1) would direct the Exchange to reduce the portion of the premium for the policy collected from the enrollee by the amount of the advance payment of the premium tax credit for the applicable month(s) when the Exchange elects to collect premiums on behalf of QHPs. Because the Exchange is responsible for premium collections in these circumstances, the Exchange must also take responsibility for lowering the premium costs charged to enrollees by the amount of the credit. Proposed § 155.340(f)(2) would direct Exchanges to display the amount of the advance payment of the premium tax credit for the applicable month(s) on an enrollee's billing statement. This is the Exchange equivalent of the requirement for QHP issuers proposed in § 156.460(b). Both rules are drafted for the same purpose: To ensure that an enrollee is aware of the total cost of the premium so that he or she may verify that the correct advance payment of the premium tax credit has been applied. We welcome comments on this proposal.

2. Exchange Functions: Certification of Qualified Health Plans

We propose to add § 155.1030. This section would set forth standards for Exchanges to ensure that QHPs in the individual market on the Exchange meet the requirements related to advance payments of the premium tax credit and cost-sharing reductions, as proposed in § 156.215 and described below. We propose these standards under section 1311(c) of the Affordable Care Act, which provides for the Secretary to establish criteria for the certification of health plans as QHPs, as well as section 1321(a)(1), which provides general rulemaking authority for title I of the Affordable Care, including the establishment of programs for the provision of advance payments of the premium tax credit and cost-sharing reductions. We believe that it is appropriate to incorporate these standards into the QHP certification criteria because Exchanges are the primary entities that interact with and oversee QHPs.

In § 155.1030(a)(1), we propose that the Exchange ensure that each issuer that offers or seeks to offer a QHP in the individual market on the Exchange submit the required plan variations, as proposed in § 156.420, for each of its health plans proposed to be offered in the individual market on the Exchange. Further we propose that the Exchange must certify that the plan variations meet the requirements detailed in § 156.420. We expect that an Exchange would collect prior to each benefit year the information necessary to validate that the issuer meets the requirements for silver plan variations, as detailed in § 156.420(a), and collect for certification the information necessary to validate that the issuer meets the requirements for zero and limited cost sharing plan variations, as detailed in § 156.420(b) . We expect that this data collection would include the cost-sharing requirements for the plan variations, such as the annual limitation on cost sharing, and any reductions in deductibles, copayments or coinsurance. In addition, the Exchange would collect or calculate the actuarial values of each QHP and silver plan variation, calculated under § 156.135 of the proposed EHB/AV Rule. We propose in § 155.1030(a)(2) that the Exchange provide the actuarial values of the QHPs and silver plan variations to HHS. As described in § 156.430, HHS would use this information to determine the payments to QHP issuers for the value of the cost-sharing reductions.

In § 155.1030(b)(1), we propose to require the Exchange to collect certain information that an issuer must submit under § 156.470 that would allow for the calculation of the advance payments of cost-sharing reductions and the premium tax credit. Specifically, in § 156.470(a), we propose that an issuer provide to the Exchange annually for approval, for each metal level health plan (that is, a health plan at any of the four levels of coverage, as defined in § 156.20) offered, or proposed to be offered, in the individual market on the Exchange, an allocation of the rate and the expected allowed claims costs for the plan, in each case, to: (1) EHB, other than services described in § 156.280(d)(1),[36] and (2) any other services or benefits offered by the health plan not described in clause (1). We propose this annual submission of the rate allocation information, under section 36B(b)(3)(D) of the Code, as added by section 1401 of the Affordable Care Act, to allow for the removal of the cost of ''additional benefits'' from the advance payments of the premium tax credit. The rate allocation information would allow the Exchange to calculate the percentage of the rate attributable to EHB; this percentage could then be multiplied by the adjusted monthly premium, as defined by 26 CFR 1.36B–3(e), and the monthly premium of the QHP in which the taxpayer enrolls, to calculate the premium assistance amount. The allocation of the expected allowed claims costs would be used to validate the rate allocation, and to calculate the advance payments for cost-sharing reductions as described in proposed § 156.430 of this proposed rule.

In § 156.470(e), we further propose that an issuer of a metal level health plan offered, or proposed to be offered, in the individual market on the Exchange also submit to the Exchange annually for approval, an actuarial memorandum with a detailed description of the methods and specific bases used to perform the allocations. The Exchange and HHS would use this memorandum to verify that the allocations meet the standard, proposed in § 156.470(c). First, the issuer must ensure that the allocation is performed by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies. Second, the rate allocation should reasonably reflect the allocation of the expected allowed claims costs attributable to EHB (excluding those services described in § 156.280(d)(1)). Third, the allocation should be consistent with the allocation of State-required benefits to be submitted by the issuer as proposed in § 155.170(c) of the proposed EHB/AV Rule, and the allocation requirements described in § 156.280(e)(4) for certain services. Fourth, the issuer should calculate the allocation as if it was a premium under the fair health insurance premium standards described at § 147.102, the single risk pool standards described at § 156.80, and the same premium rate standards described at § 156.255. We propose this requirement because we believe the allocation of rates should be performed consistent with the standards applicable to the setting of rates. Thus, for example, an issuer should calculate the allocation of premiums using costs for essential health benefits across all enrollees in all plans in the relevant risk pool, under § 156.80, and not across a standardized population or a plan-specific population. Although the last

[36] 45 CFR 156.280(e)(1)(i) provides that if a QHP provides coverage of services described in paragraph (d)(1) of that section, the QHP issuer must not use Federal funds, including advance payments of the premium tax credit or cost-sharing reductions, to pay for the services.

approach might yield a more accurate allocation, it would increase the analytical burden on issuers, and it would not align with other reporting requirements, such as for the Effective Rate Review program (established under section 2794 of the PHS Act), which requires projections based on the single risk pool standards. We welcome comment on this proposed standard and alternative approaches.

In § 156.470(b), we propose somewhat similar standards for the allocation of premiums for stand-alone dental plans. Specifically, we propose that an issuer provide to the Exchange annually for approval, for each stand-alone dental plan offered, or proposed to be offered, in the individual market on the Exchange, a dollar allocation of the expected premium for the plan, to: (1) the pediatric dental essential health benefit, and (2) any benefits offered by the stand-alone dental plan that are not the pediatric essential health benefit. As described in 26 CFR 1.36B–3(k), this allocation will be used to determine premium tax credit, and thus the advance payment of the premium tax credit, available if an individual enrolls in both a QHP and a stand-alone dental plan. We note that unlike issuers of metal level health plans offered or proposed to be offered as QHPs, issuers of stand-alone dental plans would be required to submit a dollar allocation of the expected premium for the plan (rather than a percentage of the rate, which would be multiplied by the premium to determine the allocation of the premium).

We propose this approach because issuers of stand-alone dental plans are exempt from certain standards in the proposed Market Reform Rule, including § 147.102 and 156.80 (related to fair health insurance premiums and the single risk pool), and as a result, are not required to develop rates under the same limitations that apply to issuers of QHPs in the individual and small group markets. Implicit in the allocation methodology required for issuers of QHPs proposed in § 156.470(a) is a requirement that the premium rating methodology be set prior to the allocation. We anticipate that issuers of stand-alone dental plans may take into account additional rating factors, up to and including medical underwriting, which would make the completion and submission of final premium rating methodologies to the Exchange problematic. Our proposal at § 156.470(b) does not require issuers of stand-alone dental plans to finalize the total premium prior to the benefit year, but does require issuers to finalize the dollar amount of the premium allocable to the pediatric dental essential health benefit to allow for the calculation of advance payments of the premium tax credit. This approach will ensure that Exchanges have sufficient information to calculate advance payments of the premium tax credit at the time an applicant selects coverage.

In proposed § 156.470(e), we also propose that issuers of stand-alone dental plans submit to the Exchange annually for approval an actuarial memorandum with a detailed description of the methods and specific bases used to perform the allocations, demonstrating that the allocations meet the standards proposed in § 156.470(d). These standards are similar to those proposed for issuers of metal level health plans offered or proposed to be offered as QHPs, with some adaptations specific to stand-alone dental plans. In § 156.470(d)(1) and (2) we propose that the allocation be performed by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies, and be consistent with the allocation applicable to State-required benefits to be submitted by the issuer under § 155.170(c). In addition, in § 156.470(d)(3), we propose that the allocation be calculated under the fair health insurance premium standards described at 45 CFR 147.102, except for the provision related to age set forth at § 147.102(a)(1)(ii); the single risk pool standards described at 45 CFR 156.80; and the same premium rate standards described at 45 CFR 156.255 (in each case subject to the standard proposed in subparagraph (4) described below). We propose these standards because we believe that Congress intended that premium tax credits be available based on the market reforms embodied in the Affordable Care Act. However, in the place of the fair health insurance premium standards related to age, we propose in subparagraph (4) that the allocation be calculated so that the amount of the premium allocated to the pediatric dental essential health benefit for an individual under the age of 19 years does not vary, and the amount of the premium allocated to the pediatric dental essential health benefit for an individual aged 19 years or more is equal to zero. Thus, for example, an issuer of a stand-alone dental plan should calculate the dollar allocation for individuals under 19 years of age across all such enrollees in all plans in the relevant risk pool, under § 156.80. This will ensure that advance payments of the premium tax credit are applied to policies that include individuals who may benefit from the pediatric dental essential health benefit as interpreted in the proposed EHB/AV Rule. We seek comment on this approach and the proposed allocation standards. We also note that issuers of stand-alone dental plans are not required to submit an allocation of their expected allowed claims costs because these plans are not eligible for cost-sharing reductions, as described in § 156.440(b).

In § 155.1030(b)(1), we propose that the Exchange collect and review annually the rate or premium allocation, the expected allowed claims cost allocation, and the actuarial memorandum that an issuer submits; and ensure that such allocations meet the standards set forth in § 156.470(c). To ensure that the allocations are completed appropriately, we expect that the Exchange will review the allocation information in conjunction with the rate and benefit information that the issuer submits under § 156.210. To facilitate this review, we proposed revisions to the reporting requirements for the Effective Rate Review program in the proposed Market Reform rule to include the rate allocation and expected allowed claims cost allocation information that issuers of metal level health plans would submit. Therefore, an Exchange that coordinates its review of QHP rates and benefits with the State's Effective Rate Review program would be able to also coordinate the allocation review, avoiding duplication. This approach should streamline the submission process for issuers. We note, however, that it is ultimately the responsibility of the Exchange to ensure that the issuer performs the allocations appropriately for each health plan or stand-alone dental plan that the issuer offers, or seeks to offer, on the individual market in the Exchange, including those that are not reported as part of the Effective Rate Review program. Therefore, we expect that Exchanges will collect the allocation information through the Effective Rate Review program or the QHP certification and annual submission process, as appropriate.

As discussed above, the rate and premium allocation information would then be used by the Exchange to calculate the dollar amounts of the advance payments of the premium tax credit, and the expected allowed claims cost allocation would be used by HHS to calculate the advance payments of the cost-sharing reductions, as described in § 156.430. To allow for these calculations, and to ensure that Federal funds are spent appropriately, we propose under § 155.1030(b)(2) that the Exchange be required to submit to HHS the approved allocation(s) and actuarial memorandum for each QHP and stand-

alone dental plan. We propose to provide further detail on the manner and timeframe of this submission to HHS in the future; however, we expect that the Exchange would be required to submit the information prior to the start of the benefit year. In paragraph (b)(4), we propose authority for the use of this data by HHS for the approval of the estimates that issuers submit for advance payments of cost-sharing reductions described in § 156.430, and for the oversight of the advance payments of cost-sharing reductions and premium tax credits programs.

In § 155.1030(b)(3), we propose that the Exchange collect annually any estimates and supporting documentation that a QHP issuer submits to receive advance payments for the value of the cost-sharing reductions under § 156.430(a). The Exchange must then submit the estimates and supporting documentation to HHS for review and approval. This collection from issuers should occur as part of the initial QHP certification process and any annual submission process. We propose to provide further detail on the manner and timeframe of the submission to HHS in the future; however, we expect that the Exchange would be required to submit the information prior to the start of the benefit year.

3. QHP Minimum Certification Standards Relating to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

Under HHS rulemaking authority under sections 1311(c)(1), 1321(a)(1), 1402 and 1412 of the Affordable Care Act, we propose to add § 156.215. This section would amend the QHP minimum certification standards and specify that an issuer seeking to offer a health plan on the individual market in the Exchange meet the requirements described in subpart E of part 156 related to the administration of advance payments of the premium tax credit and cost-sharing reductions. We propose to add this section to clarify that compliance with part 156 subpart E, including the standards and submission requirements proposed at § 156.420 and § 156.470, is a requirement of QHP certification, and therefore, is included in the standard described at § 155.1000(b), under which an Exchange must offer only health plans that meet the minimum certification requirements. Under our proposal, continuing compliance with subpart E requirements by QHPs and QHP issuers is a condition of certification; failure to comply with the requirements could result in decertification of the QHP as well as other enforcement actions. This corresponds to the proposed addition of § 155.1030, which sets forth the Exchange responsibilities on certification with respect to advance payments of the premium tax credit and cost-sharing reductions (described previously).

4. Health Insurance Issuer Responsibilities With Respect to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

a. Definitions

Under § 156.400, we propose definitions for terms that are used throughout subpart E of part 156. These terms apply only to subpart E. Some of these definitions cross-reference definitions elsewhere in parts 155 or 156, including definitions proposed in the proposed EHB/AV Rule: the terms ''advance payments of the premium tax credit'' and ''Affordable Care Act'' are defined by reference to § 155.20, and the term ''maximum annual limitation on cost sharing'' is defined as the highest annual dollar amount that health plans (other than QHPs with cost-sharing reductions) may require in cost sharing for a particular year, as established for that year under § 156.130 of the proposed EHB/AV Rule. The terms ''Federal poverty level or FPL'' and ''Indian'' are defined by reference to § 155.300(a). The term ''de minimis variation'' is defined as the allowable variation in the AV of a health plan that does not result in a material difference in the true dollar value of the health plan as established in § 156.140(c)(1) of the proposed EHB/AV Rule. We also propose to define ''stand-alone dental plan'' as a plan offered through an Exchange under § 155.1065. We seek comment on these definitions.

We propose to rely on the definitions of ''cost sharing'' and ''cost-sharing reductions'' from § 156.20. We note that the definitions of cost sharing and cost-sharing reductions apply only with respect to EHB, though without regard to whether the EHB is provided inside or outside of a QHP's network. We propose to define ''annual limitation on cost sharing'' to mean the annual dollar limitation on cost sharing required to be paid by an enrollee that is established by a particular health plan. However, as proposed in § 156.130(c) of the proposed EHB/AV Rule, we note again that the annual limitation on cost sharing would not include cost sharing for benefits provided outside of a QHP's network. If a State requires a QHP to cover benefits in addition to EHB, the provisions of this subpart E (except for § 156.420(c) and (d)) relating to cost-sharing reductions do not apply to those additional State-required benefits. For clarity, we note these provisions apply to State-required benefits included in EHB under § 156.110(f) of the proposed EHB/AV Rule. Finally, we note that cost-sharing reductions are subject to § 156.280(e)(1)(ii).

Other definitions are proposed here to effectuate the regulations proposed in subpart E. This Payment Notice includes five related definitions: standard plan, silver plan variation, zero cost sharing plan variation, limited cost sharing plan variation, and plan variation, as follows:

- We propose to define ''standard plan'' as a QHP offered at one of the four levels of coverage, defined at § 156.140, with an annual limitation on cost sharing that conforms to the requirements of § 156.130(a). A standard plan at the bronze, silver, gold, or platinum level of coverage is referred to as a standard bronze plan, a standard silver plan, a standard gold plan, and a standard platinum plan, respectively.
- We propose to define ''silver plan variation'' as, with respect to a standard silver plan, any of the variations of that standard silver plan described in § 156.420(a).
- We propose to define ''zero cost sharing variation'' as, with respect to a QHP at any level of coverage, the variation of such QHP described in § 156.420(b)(1), which provides for the elimination of cost sharing for Indians based on household income level.
- We propose to define ''limited cost sharing variation'' as, with respect to a QHP at any level of coverage, the variation of such QHP described in § 156.420(b)(2), which provides for the prohibition on cost sharing applicable to the receipt of benefits from IHS or certain other providers, irrespective of income level.
- We propose to define ''plan variation'' as a zero cost sharing plan variation, limited cost sharing plan variation, or silver plan variation. We emphasize that the plan variations of a QHP are not separate plans, but variations in how the cost sharing required under the QHP is to be shared between the enrollee(s) and the Federal government.

We propose these definitions to administer and implement the cost-sharing reductions established under section 1402 of the Affordable Care Act. As described in more detail below, although there will only be one actual QHP (for example, a standard silver plan) with one standard cost-sharing structure, we use the concept of plan variations to describe how certain eligible individuals will pay only a

portion of the total cost sharing required under that QHP, with the Federal government bearing the remaining cost-sharing obligations under section 1402 of the Affordable Care Act.

To reflect how the Affordable Care Act creates different eligibility categories with different associated cost-sharing reductions, we propose that each plan variation will reflect the enrollee's portion of the cost sharing requirements for the QHP. We refer to ''assigning'' enrollees to the applicable plan variation to describe how the enrollee will receive the benefits described in section 1402 of the Affordable Care Act. We reiterate that these variations are not different QHPs and that a change in eligibility for cost-sharing reductions simply changes the enrollee's responsibility for part of the total cost sharing under the same QHP. We seek comment on these definitions.

We propose to define ''de minimis variation for a silver plan variation'' as a single percentage point. That is, we propose that 1 percentage point variation in the AV of a silver plan variation would not result in a material difference in the true dollar value of the silver plan variation. We note that this proposal differs from the 2 percentage point de minimis variation standard for health plans, proposed in § 156.140(c)(1) of the proposed EHB/AV Rule. We believe that because cost-sharing reductions are reimbursed by the Federal government, the degree of flexibility afforded to issuers of silver plan variations in the cost-sharing design should be somewhat less. With this standard we seek to balance the need to ensure that individuals receive the full value of the cost-sharing reductions for which they are eligible, and issuers' ability to set reasonable cost-sharing requirements.

We propose to define ''most generous'' or ''more generous'' as, between a QHP (including a standard silver plan) or plan variation and one or more other plan variations of the same QHP, the QHP or plan variation designed for the category of individuals last listed in § 155.305(g)(3). That list, as proposed to be amended under this rule, first lists the QHP with no cost-sharing reductions, followed by the limited cost sharing plan variation, the 73 percent, 87 percent, and 94 percent silver plans, and finally, the zero cost sharing plan variation. We seek comment on this definition.

We propose to define the ''annual limitation on cost sharing'' as the annual dollar limit on cost sharing required to be paid by an enrollee that is established by a particular QHP. We note that this definition refers to the plan-specific cost-sharing parameter, while the defined term ''maximum annual limitation on cost sharing'' refers to the uniform maximum that would apply to all QHPs (other than QHPs with cost-sharing reductions) for a particular year.

Finally, we propose to define the ''reduced maximum annual limitation on cost sharing'' as the dollar value of the maximum annual limitation on cost sharing for a silver plan variation that remains after applying the reduction in the maximum annual limitation on cost sharing required by section 1402 of the Affordable Care Act, as announced in the annual HHS notice of benefit and payment parameters. The reduced maximum annual limitation on cost sharing for each silver plan variation for 2014 is proposed in the preamble for § 156.420 of this Payment Notice. The reduced maximum annual limitation applies, as does the maximum annual limitation, only with respect to cost sharing on EHB, and does not apply to cost sharing on services provided by out-of-network providers.

b. Cost-Sharing Reductions for Enrollees

In § 156.410(a), we propose that a QHP issuer must ensure that an individual eligible for cost-sharing reductions, as demonstrated by assignment to a particular plan variation, pay only the cost sharing required of an eligible individual for the applicable covered service under a plan variation. For example, if an individual is assigned to an 87 percent AV silver plan variation, and the copayment for a hospital emergency room visit is reduced from $100 to $50 under that silver plan variation, the individual must be charged only the reduced copayment of $50. We also specify in this paragraph that the enrollee receive this reduction in cost sharing when the cost sharing is collected, which in this instance might occur when the enrollee visits the emergency room for care. This means that a QHP issuer may not create a system in which an eligible enrollee is required to pay the full cost sharing requirement and apply for a reimbursement or refund. This proposal applies to all forms of cost sharing, including copayments, coinsurance, and deductibles. Similarly, the QHP issuer must ensure that the enrollee is not charged any type of cost sharing after the applicable annual limitation on cost sharing has been met. We note, however, that an individual eligible for cost-sharing reductions would not be eligible for a reduced copayment or coinsurance rate until any applicable (potentially reduced) deductible has been paid. For example, assume that a QHP issuer requires a $750 deductible for individuals eligible for a 73 percent AV silver plan variation, with reduced cost sharing occurring after the deductible is met. Further assume that an individual eligible for cost-sharing reductions has not previously incurred cost sharing during the benefit year under the QHP and has a two day hospital stay that costs $500 per day. Under this plan variation, the individual must pay $500 for the first day and $250 for the second day to meet the plan's deductible requirements before receiving the reduced coinsurance or copayment under the 73 percent AV plan variation. We seek comment on these provisions.

In § 156.410(b), we propose that after a qualified individual makes a plan selection, a QHP issuer would assign the individual to the applicable plan variation under the eligibility determination sent to the QHP issuer by the Exchange. For example, an individual determined by the Exchange to be eligible for a 94 percent AV silver plan variation would be provided the option to enroll in any silver health plan with the appropriate cost-sharing reductions applied (the statute specifies that cost-sharing reductions are available to non-Indians only in silver health plans). We note that the QHP issuer is entitled to rely upon the eligibility determination sent to the QHP issuer by the Exchange.

In § 156.410(b)(1), we propose that a QHP issuer assign a qualified individual who chooses to enroll in a silver plan in the individual market in the Exchange to the silver plan variation for which the qualified individual is eligible. This proposal is consistent with section 1312(a)(1) of the Affordable Care Act, which permits the individual to enroll in the silver health plan. However, section 1312(a)(1) does not address whether the individual could opt out of the most generous silver plan variation (that is, to refuse the most generous cost-sharing reductions for which the individual is eligible). We believe that allowing opting out of the most generous silver plan variation could cause significant consumer confusion, with no attendant policy benefit. Furthermore, we note that if a qualified individual does not want to take advantage of the cost-sharing reductions for which he or she is eligible, the individual may elect to decline to apply for cost-sharing reductions when seeking enrollment through the Exchange. In addition, we note that section 1402(a) states the requirement on QHP issuers to provide cost-sharing reductions to eligible individuals once the QHP issuer has

been notified of the individual's eligibility. We invite comment on this approach.

Section § 156.410(b)(2) and (3) are discussed below in the section of this proposed rule related to special cost-sharing reduction rules for Indians.

In § 156.410(b)(4), we propose that a QHP issuer must assign an individual determined ineligible by the Exchange for cost-sharing reductions to the selected QHP with no cost-sharing reductions.

c. Plan Variations

In § 156.420, we propose that issuers submit to the Exchange for certification and approval the variations of the health plans that they seek to offer, or continue to offer, in the individual market on the Exchange as QHPs that include required levels of cost-sharing reductions. We further clarify that under our proposal, multi-State plans, as defined in § 155.1000(a), and CO–OP QHPs, as defined in § 156.505, would be subject to the provisions of this subpart. OPM will certify the plan variations of the multi-State plans and determine the time and manner for submission.

Sections 1402(a) through (c) of the Affordable Care Act direct issuers to reduce cost sharing for EHB for eligible insured enrolled in a silver health plan with household incomes between 100 and 400 percent of the FPL, such that the plan's share (before any reimbursement from HHS for cost-sharing reductions) of the total allowed costs of the benefits are a certain percentage (that is, the health plan meets a certain AV level). To achieve these AV levels, the law directs issuers to first reduce the maximum annual limitation on cost sharing. The amount of the reduction in the maximum annual limitation on cost sharing is specified in the statute; however, under section 1402(c)(1)(B)(ii) of the Affordable Care Act, the Secretary may adjust the reduction to ensure that the resulting limits do not cause the AVs of the health plans to exceed the specified levels. After the issuer reduces the annual limitation on cost sharing to comply with the applicable reduced maximum annual limitation, section 1402(c)(2) of the Affordable Care Act directs the Secretary to establish procedures under which an issuer is to further reduce cost sharing if necessary to achieve the specified AV levels.

Table 14 sets forth the reductions in the maximum annual limitation on cost sharing (subject to revision by the Secretary) and AV levels applicable to silver plans for these individuals, under section 1402(c) of the Affordable Care Act:

TABLE 14—STATUTORY REDUCTIONS IN MAXIMUM ANNUAL LIMITATION ON COST SHARING

Household income	Reduction in maximum annual limitation on cost sharing (subject to revision by the Secretary)	AV level (calculated before any reimbursement from HHS) (percent)
100–150% of FPL	2/3	94
150–200% of FPL	2/3	87
200–250% of FPL	1/2	73
250–300% of FPL	1/2	70
300–400% of FPL	1/3	70

For individuals with household incomes of 250 to 400 percent of the FPL, we note that without any change in other forms of cost sharing, any reduction in the maximum annual limitation on cost sharing will cause an increase in AV. Therefore, a reduction in the maximum annual limitation on cost sharing for the standard silver plan could require corresponding increases in other forms of cost sharing to maintain the required 70 percent AV. For example, if a plan were directed to lower its annual limitation on cost sharing for individuals with household income between 250 and 400 percent of the FPL from $6,000 to $5,000, the issuer might be required to significantly increase plan deductibles, coinsurance, and co-payments to maintain the required 70 percent AV. We anticipate that most individuals would not expect to reach the annual limitation on cost sharing, and therefore, would be required to pay more in up-front costs under such a cost-sharing structure. Given the effect of the reductions in the maximum annual limitation on cost sharing outlined above and the additional administrative burden required in designing and operating additional silver plan variations, we propose not to reduce the maximum annual limitation on cost sharing for individuals with household incomes between 250 and 400 percent of the FPL. We believe that this approach is within the Secretary's authority under section 1402(c)(1)(B)(ii) of the Affordable Care Act, and would benefit those individuals who do not expect to reach the annual limitation on cost sharing, who are likely to represent the majority of eligible individuals. The majority of those who commented on this approach in response to the AV/CSR Bulletin were supportive of this proposed implementation of section 1402(c)(1) of the Affordable Care Act.

For individuals with a household income of 100 to 250 percent of the FPL, we propose, as outlined in the AV/CSR Bulletin, an annual three-step process for the design of cost-sharing structures in the silver plan variations, as follows:

Step 1. In the first step, we would identify in the annual HHS notice of benefit and payment parameters the maximum annual limitation on cost sharing applicable to all plans that will offer the EHB package. This limit would be used to set the reduced maximum annual limitation on cost sharing applicable to silver plan variations.

Section 156.130(a) of the proposed EHB/AV Rule relates to the maximum annual limitation on cost sharing for EHB packages. For benefit year 2014, cost sharing (except for cost sharing on services provided by out-of-network providers) under self-only coverage and non-self-only coverage may not exceed the annual dollar limit on cost sharing for high deductible health plans as described in sections 223(c)(2)(A)(ii)(I) and 223(c)(2)(A)(ii)(II) of the Code, respectively. For a benefit year beginning after 2014, the maximum annual limitation on cost sharing will equal the dollar limit for 2014 benefit year adjusted by a premium adjustment percentage determined by HHS, under section 1302(c)(4) of the Affordable Care Act. We plan to propose the premium adjustment percentage applicable to the 2015 benefit year in the next HHS notice of benefit and payment parameters.

Maximum Annual Limitation on Cost Sharing for Benefit Year 2014: As discussed above, the maximum annual limitation on cost sharing for 2014 will be the dollar limit on cost sharing for

high deductible health plans set by the IRS for 2014. The IRS will publish this dollar limit in the spring of 2013. However, to allow time for HHS to analyze the impact of the reductions in the maximum annual limitation on cost sharing on health plan AV levels, and to allow issuers adequate time to develop the cost-sharing structures of their silver plan variations for submission during the QHP certification process, we propose to estimate the dollar limit for 2014, using the methodology detailed in sections 223(c)(2)(A)(ii) and 223(g) of the Code. This methodology calls for a base dollar limit to be updated annually by a cost-of-living adjustment, which for 2014 is based on the average Consumer Price Index for all urban consumers, published by the Department of Labor, for a 12-month period ending March 31, 2013. Because that the Consumer Price Index for March 2013 is not yet available, we propose to use a projection of this number developed by the Office of Management Budget for the President's Budget for Fiscal Year 2013. Using this projection, and the methodology described in the Code, we estimate that the maximum annual limitation on cost sharing for self-only coverage for 2014 will be approximately $6,400 (the maximum annual limitation on cost sharing for other than self-only coverage for 2014 would be twice that amount, or $12,800). This is slightly more than a 2 percent increase from the limit set by IRS for 2013 ($6,250). We emphasize that this estimate was developed only for purposes of setting the reduced maximum annual limitation on cost sharing for silver plan variations. Under section 1302(c)(1)(A) of the Affordable Care Act, cost sharing incurred under plans offering EHB packages in 2014 cannot exceed the limit set by IRS under section 223(c)(2)(A)(ii)(I) and (II) of the Code for 2014 plan years. We welcome comment on this approach.

Step 2. In the second step under our proposal, we would analyze the effect on AV of the reductions in the maximum annual limitation on cost sharing described in section 1402(c)(1)(A) of the Affordable Care Act. Under section 1402(c)(1)(B)(ii), we would adjust the reduction in the maximum annual limitation on cost sharing, if necessary, to ensure that the actuarial value of the applicable silver plan variations would not exceed the actuarial value specified in section 1402(c)(1)(B)(i). A description of our analyses and the reduced annual limitations on cost sharing for the three income categories will be published in this annual HHS notice of benefit and payment parameters.

Reduced Maximum Annual Limitation on Cost Sharing for Benefit Year 2014. For the 2014 benefit year, we analyzed the impact on actuarial value of the reductions described in the Affordable Care Act to the estimated maximum annual limitation on cost sharing for self-only coverage for 2014 ($6,400). We began by developing three model silver level QHPs. These model plans were meant to represent the broad sets of plan designs that we expect issuers to offer at the silver level of coverage through an Exchange. To that end, the model plans include a PPO plan with a typical cost-sharing structure ($1,675 deductible and 20 percent in-network coinsurance rate), a PPO plan with a lower deductible and above-average coinsurance ($575 deductible and 40 percent in-network coinsurance rate), and an HMO-like plan ($2,100 deductible, 20 percent coinsurance rate, and the following services with copays that are not subject to the deductible or coinsurance: $500 inpatient stay, $350 emergency department visit, $25 primary care office visit, and $50 specialist office visit).[37] All three model plans meet the actuarial value requirements for silver health plans, and start with an annual limitation on cost sharing equal to the estimated maximum annual limitation on cost sharing ($6,400). The plan design features of the model QHPs were entered into the AV calculator developed by HHS and proposed at § 156.135(a) in the proposed EHB/AV Rule, implementing section 1302(d) of the Affordable Care Act. We then observed how the reduction in the maximum annual limitation on cost sharing specified in the Affordable Care Act (that is, ⅔ or ½ of the annual limitation on cost sharing, as applicable) affected the AV of the plans.

We found that the reduction in the maximum annual limitation on cost sharing specified in the Affordable Care Act for enrollees with a household income level between 100 and 150 percent of the FPL (⅔ reduction), and 150 and 200 percent of the FPL (⅔ reduction), did not cause the AV of any of the model QHPs to exceed the statutorily specified AV level (94 and 87, respectively). This suggests that it is unnecessary to adjust the reduction under section 1402(c)(1)(B)(ii) of the Affordable Care Act for benefit year 2014. In contrast, the reduction in the maximum annual limitation on cost sharing specified in the Affordable Care Act for enrollees with a household income level between 200 and 250 percent of FPL (½ reduction), did cause the AVs of the model QHPs to exceed the specified AV level of 73 percent. As a result, we propose that QHP issuers only be required to reduce their annual limitation on cost sharing for enrollees in the 2014 benefit year with a household income between 200 and 250 percent of FPL by approximately ⅕, rather than ½. We further propose to moderate the reductions in the maximum annual limitation on cost sharing for all three income categories, as shown in Table 15, to account for any potential inaccuracies in our estimate of the maximum annual limitation on cost sharing for 2014, and unique plan designs that may not be captured by our three model QHPs. We note that selecting a lesser reduction for the maximum annual limitation on cost sharing will not reduce the benefit afforded to enrollees in aggregate as QHP issuers are required to further reduce their limit on cost sharing, or reduce other types of cost sharing, if the required reduction does not cause the actuarial value of the QHP to meet the specified level, as detailed in step 3 of this proposal. Based on this analysis, in Table 15, we propose the following reduced maximum annual limitations on cost sharing for benefit year 2014:

[37] We note that these plan structures are broadly consistent with structures suggested by research from ''Small Group Health Insurance in 2010: A Comprehensive Survey of Premiums, Product Choices, and Benefits.'' *America's Health Insurance Plans Center for Policy and Research.* July 2011; ''Employer Health Benefits: 2011 Summary of Findings.'' *The Kaiser Family Foundation and Health Research & Educational Trust.* Accessed on June 7, 2012 from *http://ehbs.kff.org/pdf/8226.pdf;* and ''What the Actuarial Values in the Affordable Care Act Mean.'' *The Kaiser Family Foundation: Focus on Health Reform.* April 2011. Accessed on June 7, 2012 from *http://www.kff.org/healthreform/upload/8177.pdf.*

TABLE 15—REDUCTIONS IN MAXIMUM ANNUAL LIMITATION ON COST SHARING FOR 2014

Eligibility category	Reduced maximum annual limitation on cost sharing for self-only coverage for 2014	Reduced maximum annual limitation on cost sharing for other than self-only coverage for 2014
Individuals eligible for cost-sharing reductions under § 155.305(g)(2)(i) (that is, 100–150% of FPL)	$2,250	$4,500
Individuals eligible for cost-sharing reductions under § 155.305(g)(2)(ii) (that is, 150–200% of FPL)	$2,250	$4,500
Individuals eligible for cost-sharing reductions under § 155.305(g)(2)(iii) (that is, 200–250% of FPL)	$5,200	$10,400

We do not believe there will be a need to revise our analyses once the IRS dollar limit for 2014 is published, and propose that QHP issuers may rely on the reduced maximum annual limitations on cost sharing published in the final HHS notice of benefit and payment parameters to develop their silver plan variations for the 2014 benefit year. We welcome comment on this approach.

Step 3. In the third step under our proposal, a QHP issuer offering coverage in the individual market on the Exchange would develop three variations of its standard silver plan—one each for individuals with household incomes between 100 and 150 percent of the FPL, 150 and 200 percent of the FPL, and 200 and 250 percent of the FPL—with each variation having an annual limitation on cost sharing that does not exceed the applicable reduced maximum annual limitation on cost sharing published in the annual HHS notice of benefit and payment parameters. If the application of the reduced annual limitation on cost sharing results in an AV for a particular silver plan variation that differs from the required 73, 87, or 94 percent AV level by more than the permitted amount (that is, the 1 percent de minimis amount for silver plan variations, subject to proposed § 156.420(f), as described below), the QHP issuer would adjust the cost-sharing structure in that silver plan variation to achieve the applicable AV level.

For example, we propose to set the reduced maximum annual limitation on cost sharing for self-only coverage for 2014 at $2,250 for individuals with household incomes between 150 and 200 percent of the FPL. However, an issuer might find that even when the limitation on cost sharing for the proposed plan is reduced to $2,250, the actuarial value of the plan may only increase to 82 percent. The issuer would then amend its cost-sharing structure by decreasing copayments, deductibles or coinsurance (or further reducing the annual limitation on cost sharing) so that the silver plan variation achieves the required AV of 87 percent (plus or minus the de minimis variation for silver plan variations). The AV of the silver plan variation would be calculated using the AV calculator or other permitted methods, as described in § 156.135 of the proposed EHB/AV Rule.

We set forth in § 156.420(a)(1) through (3) proposed specifications for the three silver plan variations, and propose that they may deviate from the required AV levels by the de minimis variation for silver plan variations, established as 1 percentage point. We further propose that issuers submit these silver plan variations annually to the Exchange for certification, prior to the benefit year. Silver plan variations must be approved annually even if the standard silver plan does not change, since the reduced maximum annual limitation on cost sharing may change annually due to the premium adjustment percentage. We welcome comment on this proposed provision.

Sections 156.420(b) and (d) are discussed below in the section related to special cost-sharing reduction rules for Indians.

In § 156.420(c), we propose that silver plan variations cover the same benefits and include the same providers as the standard silver plan. We further propose that silver plan variations must require the same out-of-pocket spending for benefits other than EHB. Lastly, we propose that silver plan variations be subject to all requirements applicable to the standard silver plan (except for the requirement that the plan have an AV as set forth in § 156.140(b)(2) of the proposed EHB/AV Rule). This means, for example, that silver plan variations must meet standards relating to marketing and benefit design of QHPs, network adequacy standards, and essential community providers. Although these requirements are implicit because a plan variation is not a separate plan, we seek to make these requirements explicit to ensure that QHP issuers develop appropriate plan variations.

In § 156.420(e), we propose a standard to govern the design of cost sharing structures for silver plan variations. Under this approach, the cost sharing for enrollees under any silver plan variation for an EHB from a provider may not exceed the corresponding cost sharing in the standard silver plan or any other silver plan variation of the standard silver plan with a lower AV. For example, if the co-payment on an emergency room visit at a particular university hospital is $30 in the silver plan variation with a 73 percent AV, the co-payment in the silver plan variation with an 87 percent AV for that issuer would be $30 or less. This proposed standard would apply to all types of cost-sharing reductions, including reductions to deductibles, coinsurance, and co-payments. An issuer would have the flexibility to vary cost sharing on particular benefits or providers so long as that cost sharing did not increase for a particular benefit or provider for higher AV silver plan variations. This standard, along with the proposed requirements in § 156.420(c), would help ensure that silver plan variations with higher AVs would always provide the most cost savings to enrollees while providing the same benefits and provider network. Furthermore, consumers would be best served by enrolling in the highest AV variation of the standard silver plan selected for which they are eligible. We also believe that this proposed standard is appropriate as the plan variations are meant to be the same as the QHP, except as to the payer of the cost sharing and the reduction in out-of-pocket costs charged to the eligible individual.

We provided an overview of this proposed approach in the AV/CSR Bulletin. One commenter expressed concern about the differential effect of deductibles on low-income populations, and suggested that we also set limits on deductibles in silver plan variations. A number of other commenters also urged HHS to adopt more restrictive

requirements on issuers' designs of cost-sharing structures in silver plan variations. One commenter urged HHS to systematically monitor a number of aspects of how QHP issuers implement cost-sharing reductions.

We believe that, at this point, this proposal strikes the appropriate balance between protecting consumers and preserving QHP issuer flexibility. The standard in § 156.420(e) that cost sharing for a silver plan variation not exceed the corresponding cost sharing for a standard silver plan or silver plan variation with a lower AV, along with non-discrimination standards described in § 156.130(g) of the proposed EHB/AV Rule, protects low-income populations who are assigned to these QHP plan variations through the Exchange. We seek comment on this approach.

In § 156.420(f), we propose that, notwithstanding the permitted de minimis variation in AV for a health plan or the permitted de minimis variation for a silver plan variation, the AV of the standard silver plan (which must be 70 percent plus or minus 2 percentage points) and the AV of the silver plan variation applicable to individuals with household incomes between 200 and 250 percent of the FPL (which must be 73 percent plus or minus 1 percentage point) must differ by at least 2 percentage points. For example, under the de minimis standard proposed in § 156.140(c)(1) of the proposed EHB/AV rule, an issuer would be permitted to offer a standard silver plan with an AV of 72 percent. Under the proposed rule in § 156.420(f), that issuer would be permitted to offer a silver plan variation with an AV of 74 percent to individuals with household incomes between 200 and 250 percent of the FPL, but not a silver plan variation with an AV of 73 percent. This proposal helps ensure that eligible enrollees with household incomes between 200 and 250 percent of the FPL can purchase a plan with a cost-sharing structure that is more generous than that associated with the standard silver plan, consistent with Congressional intent for cost-sharing reductions under section 1402(c). We chose to propose a 2 percentage point differential to ensure that a difference in cost-sharing reductions provided to each income category is maintained, while still allowing issuers the flexibility to set the AV within the de minimis variation standards and to develop plan designs with easy-to-understand cost sharing arrangements. We welcome comments on this approach.

d. Changes in Eligibility for Cost-Sharing Reductions

In § 156.425(a), we propose that if the Exchange notifies a QHP issuer of a change in an enrollee's eligibility for cost-sharing reductions (including a change following which the enrollee will not be eligible for cost-sharing reductions), then the QHP issuer must change the individual's assignment so that the individual is assigned to the applicable standard plan or plan variation. We also propose that the QHP issuer effectuate the change in eligibility in accordance with the effective date of eligibility provided by the Exchange, as described in § 155.330(f). We clarify that if an enrollee changes QHPs after the effective date of the eligibility change as the result of a special enrollment period, once the Exchange notifies the issuer of the new QHP of the enrollment, that QHP issuer must assign the enrollee to the applicable standard plan or plan variation of the QHP selected by the enrollee, consistent with the proposed § 156.410(b).

In paragraph (b) of § 156.425, we propose that in the case of a change in assignment to a different plan variation (or standard plan without cost-sharing reductions) of the same QHP in the course of a benefit year (including in the case of a re-enrollment into the QHP following enrollment in a different plan), the QHP issuer must ensure that any cost sharing paid by the applicable individuals under the previous plan variations (or standard plan without cost-sharing reductions) is accounted for in the calculation of deductibles and annual limitations on cost sharing in the individual's new plan variation for the remainder of the benefit year. We note that a change from or to an individual or family policy of a QHP due to the addition or removal of family members does not constitute a change in plan for the family members who remain on the individual or family policy. Individuals would therefore not be penalized by changes in eligibility for cost-sharing reductions during the benefit year or the addition or removal of family members, although they would be ineligible for any refund on cost sharing to the extent the newly applicable deductible or annual limitation on cost sharing is exceeded by prior cost sharing. The QHP issuer would not be prohibited from or required to extend this policy to situations in which the individual changes QHPs, including by enrolling in a QHP at a different metal level, but would be permitted to so extend this policy, provided that this extension of the policy is applied across all enrollees in a uniform manner. We seek comment on this provision.

e. Payment for Cost-Sharing Reductions

Section 1402(c)(3) of the Affordable Care Act directs a QHP issuer to notify the Secretary of HHS of cost-sharing reductions made under the statute for individuals with household incomes under 400 percent of the FPL, and directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions. Section 1402(c)(3)(B) also permits the Secretary to establish a capitated payment system to carry out these payments. Further, section 1412(c)(3) of the Affordable Care Act permits advance payments of cost-sharing reduction amounts to QHP issuers based upon amounts specified by the Secretary. Under these authorities, we propose to implement a payment approach under which we would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts.[38] This approach fulfills the Secretary's obligation to make ''periodic and timely payments equal to the value of the reductions'' under section 1402(c)(3) of the Affordable Care Act. This proposal would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement (to the extent the issuers provide the required actuarial information), and ensures that payments are made only for actual cost-sharing reduction amounts realized by Exchange enrollees. This approach is similar to the one employed for the low-income subsidy under Medicare Part D. We welcome comments on this and alternative approaches, and whether this approach should change over time.

To implement our proposed payment approach, in § 156.430(a)(1)(i) through (iv), we propose that for each health plan that an issuer offers, or intends to offer, in the individual market on the Exchange as a QHP, the issuer must provide to the Exchange annually prior to the benefit year, for approval by HHS, an estimate of the dollar value of the cost-sharing reductions to be provided over the benefit year. If the QHP is a silver health plan, the submission must identify separately the per member per month dollar value of the cost-sharing reductions to be provided under each silver plan variation identified in

[38] We note that these payments (both advance and reconciled), and the estimated or actual cost-sharing reductions underlying them, are subject to 45 CFR 156.280(e)(1)(ii).

§ 156.420(a)(1), (2), and (3). And for each QHP, regardless of metal level, the submission must identify the per member per month dollar value of the cost-sharing reductions to be provided under the zero cost sharing plan variation. In addition, the estimate should be accompanied by supporting documentation validating the estimate. We expect that Exchanges will collect this information from issuers through the QHP certification process or an annual submission process, and then send the information to HHS for review and approval. Sections 156.430(a)(1)(ii) and 156.430(a)(2) are further described in section III.E.4.i. of this proposed rule.

We further propose that issuers develop the estimates using the methodology specified by HHS in the applicable annual HHS notice of benefit and payment parameters. In § 156.430(a)(3), we propose that HHS will approve estimates that follow this methodology. For the 2014 benefit year, we propose that issuers use a methodology that utilizes the data that issuers submit under § 156.420 and § 156.470. As a result, issuers would not be required to submit any additional data or supporting documentation to receive advance payments in benefit year 2014 for the value of the cost-sharing reductions that would be provided under silver plan variations. Below, we describe in detail how the data that issuers will submit under § 156.420 and § 156.470 will be used to develop the estimate of the value of the cost-sharing reductions for the 2014 benefit year.

Methodology for Developing Estimate of Value of Cost-Sharing Reductions for Silver Plan Variations for 2014 Benefit Year. We propose that for the 2014 benefit year, issuers use a simplified methodology for estimating the value of the cost-sharing reductions under silver plan variations and calculating the advance payments. We believe that the lack of data regarding the costs that will be associated with the QHPs and their plan variations will make it difficult to accurately predict the value of the cost-sharing reductions, even if a complex methodology is used. We intend to review the methodology for estimating the advance payments in future years, once more data is available. We also note that the payment reconciliation process described § 156.430(c) through paragraph (e) would ensure that the QHP issuer is made whole for the value of any cost-sharing reductions provided during the year, which may not be equal to the value of the advance payments.

For the 2014 benefit year, we propose that advance payments be estimated on a per enrollee per month basis using the following formula:

$$\text{Per Enrollee Per Month Advance Payment} = \text{Monthly Expected Allowed Claims Costs for Silver Plan Variation} \times (\text{Silver Plan Variation AV} - \text{Standard Plan AV})$$

In this formula, the monthly expected allowed claims cost for a silver plan variation would equal one-twelfth of the expected allowed claims costs allocated to EHB, other than services described in § 156.280(d)(1),[39] for the standard silver plan, multiplied by a factor to account for the increased utilization that may occur under the specific plan variation due to the reduced cost-sharing requirements. As described in § 156.470, the QHP issuer will submit the expected allowed claims cost information to the Exchange annually. The Exchange will then review this estimate, and submit the approved information to HHS, as described in proposed § 155.1030(b)(2) above, for use in the advance payment calculation. HHS will then multiply the monthly expected allowed claims cost by one of the following induced utilization factors, to arrive at the monthly expected allowed claims cost for the particular plan variation. We propose the following induced utilization factors based on our analysis of the expected difference in expenditures for enrollees in QHPs of different actuarial values. For this analysis, we used the Actuarial Value Calculator, developed by HHS using the Health Intelligence Company, LLC (HIC) database from calendar year 2010. This database includes detailed enrollment and claims information for individuals who are members of regional insurers and covers over 54 million individuals. The database includes current members of small group health plans, and a population relatively similar to the population of enrollees likely to participate in the health exchanges.[40]

TABLE 16—INDUCED UTILIZATION FACTORS FOR PURPOSES OF COST-SHARING REDUCTION ADVANCE PAYMENTS

Household income	Silver plan AV	Induced utilization factor
100–150% of FPL.	Plan Variation 94%.	1.12
150–200% of FPL.	Plan Variation 87%.	1.12

TABLE 16—INDUCED UTILIZATION FACTORS FOR PURPOSES OF COST-SHARING REDUCTION ADVANCE PAYMENTS—Continued

Household income	Silver plan AV	Induced utilization factor
200–250% of FPL.	Plan Variation 73%.	1.00

In the second half of the formula, we propose the multiplication of the monthly expected allowed claims cost for the particular plan variation by the difference in AV between the standard silver plan and the plan variation. This will allow us to estimate the difference in cost sharing between the standard plan and the plan variation. We propose to use the actuarial values of the QHPs and silver plan variations that the Exchange will submit to HHS under § 155.1030(a)(2).

This methodology should limit the burden of estimating cost-sharing reduction amounts on QHP issuers, and provide a standardized per enrollee per month estimate of the value of cost-sharing reductions. This estimate can then be multiplied by the number of enrollees assigned to a particular plan variation in a given month to arrive at the total advance payment that will be provided to the issuer for each plan variation of each QHP, for a given

[39] Under § 156.20, cost-sharing reductions are only provided on EHB. In addition, § 156.280(e)(1)(i) states that if a QHP provides coverage of services described in paragraph (d)(1) of that section, the QHP issuer must not use federal funds, including cost-sharing reductions, to pay for the service.

[40] We note that these induced utilization factors appear to be broadly consistent with results from the RAND Health Insurance Experiment, described in Robert H. Brook, John E. Ware, William H. Rogers, Emmett B. Keeler, Allyson Ross Davies, Cathy Donald Sherbourne, George A. Goldberg, Kathleen N. Lohr, Patti Camp, and Joseph P. Newhouse. *The Effect of Coinsurance on the Health of Adults: Results from the RAND Health Insurance Experiment.* Santa Monica, Calif.: RAND Corporation, R–3055–HHS, December 1984.

month. We welcome comment on this methodology and the proposed induced utilization factors, as well as the value of increasing the complexity of the methodology versus the value of operational efficiency.

In § 156.430(b), we propose making periodic advance payments to issuers based on the approved advance estimates provided under § 156.430(a) and the confirmed enrollment information. We propose to use the methodology described above to determine the amount of these advance payments.

In § 156.430(c), we propose that a QHP issuer report to HHS the actual amount of cost-sharing reductions provided. In general, for a particular benefit provided by the QHP, this amount would equal the difference between the cost sharing required of an enrollee in the corresponding standard silver plan with no cost-sharing reductions and the cost sharing that was actually required of the enrollee under the plan variation at the point where the service was provided. For example, if an individual enrolled in a silver plan variation receives a benefit that would be subject to a $20 copayment under the standard silver plan but is subject to only a $5 copayment under the silver plan variation in which the individual is enrolled, the cost-sharing reduction amount would be $15. Additional specifications regarding submission of actual cost-sharing reduction amounts will be provided in future guidance; however, we expect that QHP issuers will submit the actual amount of cost-sharing reductions provided after the close of the benefit year.

In § 156.430(c)(1) and (c)(2), we propose specific standards for the reporting of cost-sharing reduction amounts. In § 156.430(c)(1), we propose that in the case of a benefit for which the QHP issuer compensates the applicable provider in whole or in part on a fee-for-service basis, the QHP issuer submit the total allowed costs for essential health benefits charged for an enrollees' policy for the benefit year, broken down by what the issuer paid, what the enrollee paid, and the amount reimbursed to the provider for the amount that the enrollee would have paid under the standard QHP without cost-sharing reductions. In § 156.430(c)(2), we propose that in the case of a benefit for which the QHP issuer compensates the applicable provider in any other manner (such as on a capitated basis), the QHP issuer submit the total allowed costs for essential health benefits charged for an enrollees' policy for the benefit year, broken down by what the issuer paid, what the enrollee paid, and the amount that the enrollee would have paid under the standard QHP without cost-sharing reductions. When we refer to compensation made on a capitated basis in this context, we mean a compensation model under which issuers make payments to providers based on a contracted rate for each enrollee, commonly referred to as a ''per-member-per-month'' rate, regardless of the number or type of services provided. We note that a non-fee-for-service provider is not required to be reimbursed by the issuer. However, we expect that issuers and providers in non-fee-for-service arrangements will make available to providers compensation for cost-sharing reductions through their negotiated capitation payments. We seek comments on this assumption and other payment approaches for QHPs that use a capitated system to pay providers.

In § 156.430(d), we propose to periodically reconcile advance payments to issuers against the actual cost-sharing reduction amounts reported under § 156.430(c). Thus, where a QHP issuer compensates a provider in whole or in part on a fee-for-service basis, we would reconcile the advance payments provided to the issuer against the actual amount of cost-sharing reductions reimbursed to providers and provided to enrollees. Where the QHP issuer compensates a provider under another arrangement, such as a capitated arrangement, we would reconcile the advance payments made to issuers against the actual cost-sharing reduction amounts provided to enrollees. We propose this differentiated reimbursement approach because if issuers are paying providers on a basis other than a fee-for-service basis, the parties may not be exchanging data or making payments on a per-service basis. We do not wish to interfere with contractual payment arrangements between issuers and providers by imposing per-service accounting or payment streams if an issuer and provider have elected not to structure their relationship in that manner. However, in all cases we would condition reimbursement upon provision to the enrollee at the point-of-service of the cost-sharing reduction under the applicable plan variation. We welcome comment on this proposal.

We propose in § 156.430(e) that if the actual amounts of cost-sharing reductions exceed the advance payment amounts provided to the issuer (including if the QHP issuer elected not to submit an advance estimate of the cost-sharing reduction amounts provided under the limited cost sharing plan variation, and therefore received no advance payments), HHS would reimburse the issuer for the shortfall, assuming that the issuer has submitted its actual cost-sharing reduction amount report to HHS in a timely fashion. If the actual amounts of cost-sharing reductions are less than the advance payment amounts provided to the issuer, we propose that the QHP issuer must repay the difference to HHS. Detailed procedural requirements and interpretive guidance on cost-sharing reduction reconciliation will be provided in the future.

In § 156.430(f), we propose rules on advance payment and reimbursement of cost-sharing reductions during special transitional periods of coverage where eligibility and enrollment are uncertain, including requirements relating to cost-sharing reductions provided during grace periods following non-payment of premium. Under § 156.270, a QHP issuer must establish a standard policy for termination of coverage for non-payment of premiums by enrollees. Under that policy, a three-month grace period applies if an enrollee receiving advance payments of the premium tax credit has previously paid at least one full month's premium during the benefit year. In the first month of the grace period, the QHP issuer must pay all appropriate claims for services rendered and HHS would reimburse the QHP issuer for cost-sharing reductions for such claims (and the QHP issuer may retain any advance payments of cost-sharing reductions), but the issuer may pend claims for services rendered to the enrollee in the second and third months of the grace period. If an enrollee exhausts the grace period without making full payment of the premiums owed, the QHP issuer may terminate coverage and deny payment for the pending claims.

In § 156.430(f)(1), we propose standards related to the non-payment of premiums and exhausted grace periods. We propose that a QHP issuer will be eligible for reimbursement of cost-sharing reductions provided prior to a termination of coverage effective date. Furthermore, any advance payments of cost-sharing reductions would be paid to a QHP issuer for coverage prior to a determination of termination, including during any grace period as described in § 155.430(b)(2)(ii)(A) and (B). The determination of termination occurs on the date that the Exchange sends termination information to the QHP issuer and HHS under § 155.430(c)(2).

The QHP issuer would be required to repay any advance payments of cost-sharing reductions made with respect to any month after any termination of

coverage effective date during a grace period. A QHP issuer generally would not be eligible for reimbursement of cost-sharing reductions provided after the termination of coverage effective date with respect to a grace period. For example, if an individual receiving advance payments of the premium tax credit is eligible for cost-sharing reductions, and stops paying his or her premium, HHS would continue to provide advance payments of the cost-sharing reductions during the grace period. HHS would reimburse the QHP issuer for any reduction in cost sharing provided during the first month of the three-month grace period, but not after the termination of coverage effective date (that is, there will be no reimbursement for cost-sharing reductions provided during the second and third month of the grace period if retroactive termination occurs). The issuer may pend claims and payments for cost-sharing reductions for services rendered to the individual in the second and third month of the grace period, as described in § 156.270(d). The QHP issuer must return to HHS any advance payments of the cost-sharing reduction applicable to the second and third months. This proposed policy aligns with the approach for advance payments of the premium tax credit described in § 156.270(e).

We propose in § 156.430(f)(2) and (3) that in the case of any other retroactive termination, if the termination (or late determination thereof) is the fault of the QHP issuer, as reasonably determined by the Exchange, the QHP issuer would not be eligible for advance payments and reimbursement for cost-sharing reductions provided during the period following the termination of coverage effective date and prior to the determination of the termination; and if the termination (or the late determination thereof) is not the fault of the QHP issuer, as reasonably determined by the Exchange, the QHP issuer would be eligible for advance payments and reimbursement for cost-sharing reductions provided during such period. For example, if a QHP issuer fails to timely notify the Exchange that an enrollee requested a termination of coverage, the Exchange could reasonably determine that the QHP issuer is at fault and would not be eligible for advance payments and reimbursement for cost-sharing reductions provided during the period following the termination of coverage effective date and prior to the determination of the termination. Alternatively, if an individual was incorrectly enrolled in a QHP due to an error by the Exchange, the QHP issuer would not be at fault and would be eligible for advance payments and reimbursement for cost-sharing reductions provided during the period following the termination of coverage effective date and prior to the determination of the termination. We welcome comment on this proposal and other approaches, and seek comment on the relative equities of, incentives created by, and consequences of this proposal and other approaches, including the potential costs to HHS.

In § 156.430(f)(4), we propose that a QHP issuer would be eligible for advance payments and reimbursement of cost-sharing reductions provided during any period for resolution of inconsistencies in information required to determine eligibility for enrollment under § 155.315(f). Under § 155.315(f), if an Exchange cannot verify eligibility information for an individual, it must provide the individual at least 90 days to present satisfactory evidence of eligibility to resolve the inconsistency. In the interim, the Exchange must make an eligibility determination based upon the individual's attestation and other verified information in the application, including with respect to the cost-sharing reductions for which the individual is eligible. At the end of the inconsistency period, if the Exchange cannot confirm the attestation, the Exchange must make the eligibility determination based upon the data available, subject to certain exceptions. In the event the Exchange cannot confirm the attestation and determines the individual to be ineligible for cost-sharing reductions provided during the inconsistency period, we propose to reimburse those cost-sharing reductions because there is no clear mechanism under the Affordable Care Act for seeking reimbursement of those amounts from the individual. We welcome comment on this proposal and other approaches, and seek comment on the relative equities of, incentives created by, and consequences of this proposal and other approaches, including the potential costs to HHS.

f. Plans Eligible for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

In § 156.440, we clarify the applicability of advance payments of the premium tax credit and cost-sharing reductions to certain QHPs. We propose that the provisions of part 156 subpart E generally apply to qualified health plans offered in the individual market on the Exchange.

However, we propose in § 156.440(a) that the provisions not apply to catastrophic plans as described in § 156.155 of the proposed Market Reform Rule to be consistent with 26 CFR 1.36B–1(c). Section 36B(c)(3)(A) of the Code defines a QHP to exclude catastrophic plans—a definition that also applies to section 1402 of the Affordable Care Act, by means of section 1402(f)(1) of the Affordable Care Act. Further, eligibility for cost-sharing reductions is tied to a ''coverage month with respect to which a premium tax credit is paid,'' which would exclude months during which the individual is enrolled in a catastrophic health plan. Therefore, we propose that enrollment in a catastrophic plan precludes eligibility for cost-sharing reductions. Effectively, this proposal restricts the provision of cost-sharing reductions with respect to Indians only, because non-Indians can only receive cost-sharing reductions when enrolled in a silver plan variation.

We propose in § 156.440(b) that the provisions of this subpart E, including § 156.410, § 156.420, § 156.425, § 156.430, and § 156.470, to the extent each relate to cost-sharing reductions, not apply to stand-alone dental plans. Section 1311(d)(2)(B)(ii) of the Affordable Care Act provides that an Exchange must allow a stand-alone dental plan that provides pediatric dental benefits that are EHB to be offered separately from or in conjunction with a QHP. However, section 1402(c)(5) of the Affordable Care Act states if an individual enrolls in both a QHP and a stand-alone dental plan, the provisions on cost-sharing reductions under sections 1402(a) and (c) of the Affordable Care Act do not apply to that portion of the cost-sharing reductions properly allocable to pediatric dental EHB, meaning that if an individual enrolls in both a QHP and a stand-alone dental plan offered on an Exchange, cost-sharing reductions are not payable with respect to pediatric dental benefits offered by the stand-alone dental plan. However, cost-sharing reductions would be payable with respect to pediatric dental benefits provided by a QHP. Requiring payment of cost-sharing reductions on pediatric dental benefits within a stand-alone dental plan offered on an Exchange would create significant operational complexities. For example, stand-alone dental plans would be required to submit plan variations, and since the calculation of AV for stand-alone dental plans will not be standardized, the review and approval of the plan variations and advance estimates would be difficult to oversee.

We propose to clarify in § 156.440(c) that the provisions of this subpart E

apply to child-only plans. Section 1302(f) of the Affordable Care Act and § 156.200(c)(2) of this subchapter provides that an issuer that offers a QHP at any level of coverage in an Exchange also must offer the plan at the same level of coverage in the Exchange only to individuals that have not attained age 21. Under section 1302(f) of the Affordable Care Act, the child-only plan is to be treated as a QHP, and is therefore subject to the provisions of this subpart E.

g. Reduction of Enrollee's Share of Premium To Account for Advance Payments of the Premium Tax Credit

In § 156.460(a), we propose to codify QHP issuer requirements set forth in section 1412(c)(2)(B) of the Affordable Care Act. The law authorizes the payment of advance tax credits to QHP issuers on behalf of certain qualified enrollees. The advance payment must be used to reduce the portion of the premium charged to enrollees. In § 156.460(a)(1), we propose to codify clause (i) of that subparagraph, which requires that a QHP issuer reduce the portion of the premium charged to the enrollee by the amount of the advance payment of the premium tax credit for the applicable month(s).

In § 156.460(a)(2), we propose to codify section 1412(c)(2)(B)(ii) of the statute, which requires that the QHP issuer notify the Exchange of any reduction in the portion of the premium charged to the individual. This notification will be sent to the Exchange through the standard enrollment acknowledgment in accordance with § 156.265(g). That information will then be submitted to the Secretary via enrollment information sent from the Exchange to HHS under § 155.340(a)(1).

In § 156.460(a)(3), we propose to codify section 1412(c)(2)(B)(iii), which requires that a QHP issuer display the amount of the advance payment of the premium tax credit for the applicable month(s) on an enrollee's billing statement. This requirement would ensure that the enrollee is aware of the total cost of the premium and would allow the enrollee to verify that the correct amount for the advance payment of the premium tax credit has been applied to his or her account.

In § 156.460(b), we propose that a QHP issuer may not refuse to commence coverage under a policy or terminate a policy on account of any delay in payment from the Federal government of an advance payment of the premium tax credit on behalf of an enrollee if the QHP issuer has been notified by the Exchange that it would receive an advance payment. We expect that monthly advance payments of the premium tax credit would be paid in the middle of the month, and propose to require that issuers not decline to cover individuals nor terminate policies for which the enrollee's payments have been timely made on account of the timing of the advance payments of the premium tax credit.

We welcome comment on these proposals.

h. Allocation of Rates and Claims Costs for Advance Payments of Cost-Sharing Reductions and the Premium Tax Credit

As described in section III.E.2. of this proposed rule, we propose in § 156.470 to direct issuers to allocate the rate or expected premium for each metal level health plan and stand-alone dental plan offered, or proposed to be offered, in the individual market on the Exchange, and the expected allowed claims costs for the metal level health plans, among EHB and additional benefits. Issuers must submit these allocations annually to the Exchange, along with an actuarial memorandum with a detailed description of the methods and specific bases used to perform the allocations. The Exchange and HHS will use this memorandum to verify that these allocations meet the standards set forth in paragraphs (c) and (d) of § 156.470.

We propose that issuers submit the allocation information to the Exchange as part of the QHP certification process and an annual submission process for QHPs that are already certified, though an Exchange may specify alternative submission channels. For example, for issuers interested in participating in a Federally-facilitated Exchange, we propose to collect the metal level health plan allocation information through the Effective Rate Review program. We proposed revisions to the rate review reporting requirements in the proposed Market Reform Rule to include the allocation submission. This approach should streamline the submission process for issuers. We note that multi-State plans, as defined in § 155.1000(a), are subject to these provisions. OPM would determine the time and manner for multi-State plans to submit the allocation information. We welcome comment on this proposal.

i. Special Cost-Sharing Reduction Rules for Indians

We discuss in greater detail below a number of provisions throughout this proposed subpart E implementing section 1402(d) of the Affordable Care Act, which governs cost-sharing reductions for Indians.

Interpretation of section 1402(d)(2) of the Affordable Care Act: Section 1402(d)(1) of the Affordable Care Act directs a QHP issuer to treat an Indian with household income not more than 300 percent of the FPL as an ''eligible insured''—a defined term in the statute triggering cost-sharing reductions for non-Indians—and to eliminate all cost sharing for those Indians. Conversely, section 1402(d)(2) of the Affordable Care Act, which prohibits cost sharing under a plan for items or services to an Indian enrolled in a QHP provided directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization, or through referral under contract health services, does not direct the issuer to treat the Indian as an ''eligible insured.'' Section 1402(f)(2) of the Affordable Care Act permits cost-sharing reductions only for months in which the ''insured''—which we interpret to be synonymous with the term ''eligible insured''—is allowed a premium tax credit. The implications of this interpretation are that cost-sharing reductions under sections 1402(a) and 1402(d)(1) of the Affordable Care Act are only available to individuals eligible for premium tax credits. However, cost-sharing reductions under section 1402(d)(2) of the Affordable Care Act would be available to Indians regardless of their eligibility for premium tax credits. This approach aligns with the typical practice today, under which cost sharing is not required with respect to services provided to an Indian by the IHS, an Indian Tribe, Tribal Organization, or Urban Indian Organization. Furthermore, as described in § 155.350(b), an Exchange may determine an Indian eligible for cost-sharing reductions under section 1402(d)(2) of the Affordable Care Act without requiring the applicant to request an eligibility determination for insurance affordability programs. We welcome comment on our interpretation of sections 1402(d)(2) and 1402(f)(2) of the Affordable Care Act.

We note also that section 1402(d) of the Affordable Care Act specifies that reductions in cost sharing must be provided to Indians who purchase coverage on the Exchange. Although section 1402(d)(1) of the Affordable Care Act applies only to the individual market, section 1402(d)(2) of the Affordable Care Act does not contain this explicit restriction. We propose to interpret section 1402(d)(2) of the Affordable Care Act to apply only to the individual market because we believe section 1402(d)(2) flows from and builds upon the identification of ''any qualified health plans'' made in section 1402(d)(1). Further, we believe that Congress did not intend for reductions

in cost sharing to be available outside the individual market Exchanges. We welcome comment on this interpretation and any other interpretation of this language.

Finally, we note that section 1402(d)(2)(B) of the Affordable Care Act states that QHP issuers are not to reduce payments to the relevant facility or provider for an item or service by the amount of any cost sharing that would be due from an Indian but for the prohibition on cost sharing set forth in section 1402(d)(2) of the Affordable Care Act. We propose not to codify this provision in regulation because we believe it is clear and self-enforcing, and because we believe that it would also be impermissible for an issuer to reduce payments to a provider for any cost-sharing reductions required under sections 1402(a) or 1402(d)(1) of the Affordable Care Act—particularly because these cost-sharing reductions are to be reimbursed by HHS. We also note that nothing in this section exempts an issuer from section 206 of the Indian Health Care Improvement Act, which provides that the United States, an Indian Tribe, Tribal organization, or urban Indian organization has the right to recover from third party payers, including QHPs, up to the reasonable charges billed for providing health services, or, if higher, the highest amount an insurer would pay to other providers.

Proposed provisions of part 156 relating to Indians: Similar to cost-sharing reductions for non-Indians, we propose to use the concept of plan variations to describe how Indians would pay only a portion, or as appropriate, none of the total cost sharing required under that plan, with the Federal government bearing the remaining cost-sharing obligation. In § 156.410(b)(2), we propose that a QHP issuer assign an Indian determined by the Exchange to have an expected household income that does not exceed 300 percent of the FPL to a zero cost sharing plan variation of the selected QHP (no matter the level of coverage) with no cost sharing, based on the enrollment and eligibility information submitted to the QHP issuer by the Exchange. In § 156.410(b)(3), we propose that a QHP issuer assign an Indian determined eligible by the Exchange for cost-sharing reductions under section 1402(d)(2) of the Affordable Care Act to a limited cost sharing plan variation of the selected QHP (no matter the level of coverage) with no cost sharing required on benefits received from the IHS and certain other providers. The assignments to the plan variations would be subject to § 155.305(g)(3), which governs plan variation placement decisions when a single policy covers two or more individuals who are eligible for different levels of cost-sharing reductions. We also considered an alternative approach to the provision of cost-sharing reductions for Indians. Rather than requiring QHP issuers to assign Indians to zero and limited cost sharing plan variations, QHP issuers would simply assign Indians to the standard plan (or as appropriate, silver plan variation), and would waive the cost-sharing requirements, as appropriate. We note that this latter approach would permit an Indian and non-Indian to enroll in the same plan, and for each to receive the cost-sharing reductions to which they would be individually entitled. We are proposing the approach described above in part because we believe that the use of plan variations will permit issuers to efficiently and effectively provide to all enrollees eligible for cost-sharing reductions, especially Indians, their appropriate level of cost-sharing reductions. Because of technical constraints, we understand that complying with the alternative approach would be nearly impossible for many issuers for the 2014 benefit year. Due to these considerations, adopting the alternative approach could lead many issuers to implement cost-sharing waivers manually, which could lead to fewer cost-sharing reductions being available to Indians. In addition, we note that under the proposed Market Reform Rule at § 147.102(c)(1), the total premium for family coverage in a State that has not adopted community rating principles is to be determined by summing the premiums for each individual family member (but that premiums for no more than the three oldest family members who are under age 21 must be taken into account). Thus, in many instances, a family made up of Indians and non-Indians would lose no premium savings from enrolling in different policies to obtain the maximum cost-sharing reductions for which each family member is eligible. However, we seek comment on which approach HHS should adopt beginning January 1, 2016. We propose the approach first described above pending the adoption of any change in approach. We also seek comment on the burdens that may be imposed on individuals, providers and insurers under the proposed and alternative approaches. Finally, we will monitor whether providers are receiving less payment for Indians who choose to enroll in a family policy without the benefit of cost-sharing.

In § 156.420(b), we propose that QHP issuers submit to the Exchange the zero cost sharing plan variation and limited cost sharing plan variations for each of the QHPs (at any level of coverage) that it intends to offer on the Exchange. The zero cost sharing plan variation—addressing cost-sharing reductions under section 1402(d)(1) of the Affordable Care Act and available to Indians with expected household incomes that do not exceed 300 percent of the FPL, as determined under § 155.350(a)—must have all cost sharing eliminated. The limited cost sharing plan variation—addressing cost-sharing reductions under section 1402(d)(2) of the Affordable Care Act and available to all Indians as determined in § 155.350(b)—must have no cost sharing on any item or service furnished directly by the IHS, an Indian Tribe, Tribal Organization, Urban Indian Organization, or through referral under contract health services, as defined in 25 U.S.C. 1603. We note that unlike silver plan variations, zero cost sharing plan variation and limited cost sharing plan variations must only be submitted for certification when the standard plan is submitted for QHP certification. We welcome comment on this proposal.

In § 156.420(d), we propose language similar to that proposed in § 156.420(c) for silver plan variations—that the zero cost sharing plan variation and limited cost sharing plan variations cover the same benefits and include the same providers as the standard QHP, and require the same out-of-pocket spending for benefits other than EHB. We also propose that a limited cost sharing plan variation, which would have no cost sharing on any item or service furnished directly by the IHS, Indian Tribe, Tribal Organization, or Urban Indian Organization, or through referral under contract health services, must have the same cost sharing on items or services not described in § 156.420(b)(2) as the QHP with no cost-sharing reductions. Lastly, we propose that zero cost sharing plan variation and limited cost sharing plan variations be subject to all standards applicable to the standard QHP (except for the requirement that the plan have an AV as set forth in 156.140(b)). We believe that these standards are appropriate, as a plan variation and a standard plan are meant to be the same QHP, except for the reductions in cost sharing. We welcome comment on this proposal.

Section 1402(d)(3) of the Affordable Care Act directs the Secretary to pay a QHP issuer the amount necessary to reflect the increase in AV of a QHP

required by reason of the changes in cost sharing for Indians under section 1402(d) of the Affordable Care Act. We propose to use the same payment approach to reimburse cost-sharing reductions for Indians under sections 1402(d) as we propose to use for cost-sharing reductions provided to eligible individuals with household incomes between 100 and 250 percent of the FPL under section 1402(a) of the Affordable Care Act. That is, we propose that QHP issuers submit estimates for the dollar value of the cost-sharing reductions to be provided under the zero cost sharing plan variation and limited cost sharing plan variations, to receive advance payments, and then reconcile the advance payments to the actual cost-sharing reduction amounts. This unified approach satisfies both the requirement for ''periodic and timely payments equal to the value of the reductions'' under section 1402(c)(3) of the Affordable Care Act, and payment of ''the amount necessary to reflect the increase in AV of the plan'' under section 1402(d)(3) of the Affordable Care Act. Because AV is a mechanism for identifying how much the plan pays for benefits compared to the costs paid by an enrollee, we believe reimbursement of the dollar value of the reductions satisfies the requirement to pay QHP issuers an amount necessary to reflect the increase in actuarial value of the qualified health plan as a result of the reductions. Furthermore, at this time, it would be difficult for issuers and HHS to accurately estimate the ''increase in AV of the plan'' resulting from the cost-sharing reduction rules for Indians. Relevant data on Indian populations' cost sharing is not easily available, and issuers would not be able to use the AV calculator to estimate Indian-only cost-sharing features of a plan because the calculator is based on a standard population. Our proposed combined approach to reimbursing both cost-sharing reductions for eligible individuals with household incomes between 100 and 250 percent of the FPL and cost-sharing reductions for Indians should reduce the operational and financial burden on issuers and HHS, who would otherwise be required to operate under and implement two separate reimbursement programs.

In § 156.430(a)(1)(ii) we propose that for each metal level QHP that an issuer offers or intends to offer in the individual market on the Exchange, the issuer must provide to the Exchange annually prior to the benefit year, for approval by HHS, estimates, and supporting documentation validating the estimates, of the per member per month dollar value of cost-sharing reductions to be provided under the zero cost sharing plan variation. These estimates must be developed using the methodology specified by HHS in the applicable annual HHS notice of benefit and payment parameters. We propose that issuers use the same methodology described above for estimating advance payments for the cost-sharing reductions provided under silver plan variations for estimating advance payments for the cost-sharing reductions provided under the zero cost sharing plan variation. This methodology would utilize data that QHP issuers submit for other requirements, such as § 156.420 and § 156.470. As a result, QHP issuers would not be required to submit separate estimates or supporting documentation to receive advance payments in benefit year 2014 for the value of the cost-sharing reductions that would be provided under the zero cost sharing plan variation.

As in the case of silver plan variations, the following formula would be used:

$$\textit{Per Enrollee Per Month Advance Payment}$$
$$= \textit{Monthly Expected Allowed Claims Cost for Zero Cost Sharing Plan Variation}$$
$$\times (\textit{Zero Cost Sharing Plan Variation AV} - \textit{Standard Plan AV})$$

In this formula, the monthly expected allowed claims cost for the zero cost sharing plan variation would equal one-twelfth of the expected allowed claims costs allocated to EHB, other than services described in § 156.280(d)(1), for the standard plan, multiplied by a factor to account for the increased utilization that may occur under the zero cost sharing plan variation due to the elimination of the cost-sharing requirements. As described in § 156.470, the QHP issuer should submit the expected allowed claims cost information to the Exchange annually. The Exchange would then review this allocation, and submit the approved allocation to HHS, as described in § 155.1030(b)(2), for use in the advance payment calculation. HHS would then multiply the monthly expected allowed claims cost by the induced utilization factor, to arrive at the monthly expected allowed claims cost for the zero cost sharing plan variation. We propose the following induced utilization factors for the zero cost sharing plan variation, based on our analysis of the HIC database from calendar year 2010.

TABLE 17—INDUCED UTILIZATION FACTORS FOR ADVANCE PAYMENTS FOR COST-SHARING REDUCTIONS FOR INDIANS

Zero cost sharing plan variation	Induced utilization factor
Zero Cost Sharing Plan Variation of Bronze QHP	1.15
Zero Cost Sharing Plan Variation of Silver QHP	1.12
Zero Cost Sharing Plan Variation of Gold QHP	1.07
Zero Cost Sharing Plan Variation of Platinum QHP	1.00

In the second half of the formula, we propose to multiply the monthly expected allowed claims cost for the zero cost sharing plan variation by the difference in AV between the standard plan and the plan variation. The AV of the zero cost sharing plan variation would be 100, because all cost sharing is eliminated for this plan variation. Lastly, the per enrollee per month estimate will be multiplied by the number of individuals assigned to the zero cost sharing plan variation (based on the most recent confirmed enrollment data) in a given month to arrive at the total advance payment that will be provided to the issuer for each QHP. We welcome comment on this methodology and the proposed induced utilization factor, as well as the value of increasing the complexity of the methodology versus the value of operational efficiency.

In § 156.430(a)(2), we discuss the process for estimating the value of cost-sharing reductions to be provided under the limited cost sharing plan variation open to Indians regardless of household income. We propose that QHP issuers have the option to forgo submitting an estimate of the value of these cost-sharing reductions if they believe the operational cost of developing the estimate is not worth the value of the

advance payment. If a QHP issuer chooses to not submit an estimate, the issuer would provide the cost-sharing reductions as required, and would be reimbursed by HHS after the close of the benefit year, as proposed in § 156.430(c). If a QHP issuer does seek advance payments for the these cost-sharing reductions, the issuer must provide to the Exchange annually prior to the benefit year, for approval by HHS, an estimate, and supporting documentation validating the estimate, of the per member per month dollar value of the cost-sharing reductions to be provided under the limited cost sharing plan variation of the QHP. The estimate must be developed using the methodology specified by HHS in the applicable annual HHS notice of benefit and payment parameters. For the 2014 benefit year, we simply propose that issuers submit a reasonable estimate of the value of the reductions, developed by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies, and that the estimate should be no higher than the corresponding estimate for the zero cost sharing plan variation. We do not propose a standardized methodology because, unlike other plan variations, these cost-sharing reductions are to be provided for only a specific subset of providers, and the Affordable Care Act does not prescribe an AV for these reductions. As noted above, because the actuarial value calculator is based on a standard population, it will not have the functionality to generate an accurate AV for these plan variations. However, as in the case of the other plan variations, we plan to review the methodology for calculating the advance payments once more data is available. We also note that the payment reconciliation process described in § 156.430(c) through (e) would ensure that the QHP issuer is made whole for the value of any cost-sharing reductions provided during the benefit year that may not be adequately covered by the advance payments.

The Exchange will collect the estimate and supporting documentation, as described in § 155.1030(b)(3), and submit the estimate and supporting documentation to HHS for review. Assuming the estimate is reasonable, HHS would make advance payments to the QHP issuer following the same procedure as for the other plan variations, and as discussed in § 156.430(b).

We welcome comment on this approach.

F. Provisions on User Fees for a Federally-Facilitated Exchange (FFE)

Section 1311(d)(5)(A) of the Affordable Care Act contemplates an Exchange charging assessments or user fees to participating health insurance issuers to generate funding to support its operations. If a State is not an electing State or does not have an approved Exchange, section 1321(c)(1) directs HHS to operate an Exchange within the State. In addition, 31 U.S.C. 9701 permits an agency to establish a charge for a service provided by the agency. Circular No. A–25R establishes Federal policy regarding user fees, and specifies that a user charge will be assessed against each identifiable recipient for special benefits derived from Federal activities beyond those received by the general public. Based on section 1311(d)(5)(A) of the Affordable Care Act and Circular No. A–25, we are proposing that HHS collect a user fee from participating issuers (as defined in § 156.50(a)) to support the operation of Federally-facilitated Exchanges. Participating issuers will receive two special benefits not available to the general public when they offer plans through a Federally-facilitated Exchange: (1) The certification of their plans as QHPs, and (2) the ability to sell health insurance coverage through a Federally-facilitated Exchange to individuals determined eligible for enrollment in a QHP. These special benefits are provided to participating issuers based on the following Federal operations in connection with the operation of Federally-facilitated Exchanges:

- Provision of consumer assistance tools;
- Consumer outreach and education;
- Management of a Navigator program;
- Regulation of agents and brokers;
- Eligibility determinations;
- Administration of advance payments of the premium tax credit and cost-sharing reductions;
- Enrollment processes;
- Certification processes for QHPs (including ongoing compliance verification, recertification and decertification); and
- Administration of a SHOP Exchange.

Activities performed by the Federal government that do not provide issuers participating in a Federally-facilitated Exchange with a special benefit will not be covered by this user fee.

Circular No. A–25R states that user charges should generally be set at a level so that they are sufficient to recover the full cost to the Federal government of providing the service when the government is acting in its capacity as sovereign (as is the case when HHS operates a Federally-facilitated Exchange). However, Circular No. A–25R also allows for exceptions to this policy, if approved by OMB. To maintain a competitive balance between plans inside and outside the Exchanges, to align with the administrative cost structure of State-based Exchanges, and because we believe that growing enrollment is likely to increase user fee receipts in future years, we have requested an exception to the policy for 2014. As a result, in § 156.50(c), we propose that a participating issuer offering a plan through a Federally-facilitated Exchange remit a user fee to HHS each month, in the time and manner established by HHS, equal to the product of the billable members enrolled through the Exchange in the plan offered by the issuer, and the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year. For purposes of this paragraph, billable members are defined under the proposed § 147.102(c)(1) as the number of members on a policy, with a limitation of three family members under age 21. This approach will ensure that the user fee generally aligns with the number of enrollees for each issuer.

For the 2014 benefit year, we propose a monthly user fee rate equal to 3.5 percent of the monthly premium charged by the issuer for a particular policy under the plan. We seek to align this rate with rates charged by State-based Exchanges, and may adjust this rate to take into account comparable State-based Exchange rates in the final Payment Notice. We note that this policy does not affect the ability of a State to use grants described in section 1311 of the Affordable Care Act to develop functions that a State elects to operate under a Partnership Exchange, and to support State activities to build interfaces with a Federally-facilitated Exchange, as described in the ''State Exchange Implementation Questions and Answers,'' published November 29, 2011.

Circular No. A–25R provides for a user fee to be collected simultaneously with the rendering of services, and thus we further propose to assess user fees throughout the benefit year in which coverage is offered. Additional guidance on user fee collection processes will be provided in the future; however, we anticipate that user fees will be calculated based on the number of billable members enrolled in a plan each month. We anticipate collecting

user fees by deducting the user fee from Exchange-related program payments. If an issuer does not receive any Exchange-related program payments, the issuer would be invoiced for the user fee on a monthly basis. We welcome comment on these proposals and the operational processes related to user fee assessment and collections.

In addition, we welcome comments on a policy that we are considering that would provide for the pooling of Exchange user fees or all administrative costs across a particular market (however, the user fee would be collected only from issuers participating in the Federally-facilitated Exchange). The Market Reform proposed rule proposes an implementation of section 1312(c) of the Affordable Care Act under which the claims experience of all enrollees in health plans offered by an issuer in a State in the individual, small group, or combined market, as applicable, are to be pooled. We are considering further developing this policy, which we would codify in regulation at § 156.80,[41] by requiring that Exchange user fees also be subject to risk pooling. Specifically, we are considering proposing that issuers be allowed an adjustment to the index rate for the pooled, expected Exchange user fees for the set of health plans offered in a particular market. We are considering this additional specification to provide further protection against adverse selection for QHP coverage, and to ensure that the costs of Exchange user fees are spread evenly across the market. We seek comment on this policy, including whether it should apply to a broader set of administrative costs. For example, under this alternative, it could apply to both Exchange user fees and distribution costs, or all administrative costs. In addition, we seek comment on an alternative approach, under which the proposed risk pooling would apply across all health plans within a product (defined as a specific set of benefits), rather than across a market.

G. Distributed Data Collection for the HHS-Operated Risk Adjustment and Reinsurance Programs

1. Background

The Premium Stabilization Rule specifies at § 153.20 that a risk adjustment methodology must include a risk adjustment data collection approach. Therefore, the Federally certified risk adjustment methodology described in this proposed rule must include such a data collection approach. As already discussed, we propose to add new § 153.420(a) to establish that an issuer of a reinsurance-eligible plan must submit or make accessible all required reinsurance data in accordance with the reinsurance data collection approach established by the State, or by HHS on behalf of the State. In addition, we propose to amend Part 153 by adding Subpart H, entitled ''Distributed Data Collection for HHS-Operated Programs.'' We intend to clarify in Subpart H the data collection process that HHS would use when operating a risk adjustment or reinsurance program on behalf of a State.

In the preamble to the proposed Premium Stabilization Rule, we described a distributed approach as one in which each issuer formats its own data in a manner consistent with the risk assessment database, and then passes risk scores to the entity responsible for assessing risk adjustment charges and payments. In the preamble to the Premium Stabilization Rule, we indicated that we intend to use a distributed approach to collect data for the HHS-operated risk adjustment program. In the Reinsurance Bulletin, we stated that we will also use such an approach when we operate the reinsurance program. We believe that this approach minimizes issuer burden while protecting enrollees' privacy.

2. Issuer Data Collection and Submission Requirements

Under the HHS-operated risk adjustment and reinsurance programs, HHS will use a distributed data collection approach to run software on enrollee-level and claims-level data that reside on an issuer's dedicated data environment. This approach will require close technological coordination between issuers and HHS.

Distributed data environment: In § 153.700(a), we propose that an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State where HHS is operating the risk adjustment or reinsurance program on behalf of the State, must establish a dedicated data environment and provide data access to HHS, in a manner and timeframe specified by HHS, for risk adjustment and reinsurance operations. To accomplish the distributed data collection approach for both the reinsurance and risk adjustment programs, issuers would be required to establish secure, dedicated, electronic server environments to house medical and pharmacy claims, encounter data, and enrollment information. Issuers would be directed to make this data accessible to HHS in HHS-specified electronic formats, and to provide HHS with access to the data environment to install, update, and operate common software and specific reference tables for the purpose of executing risk adjustment and reinsurance program operations. Issuers would also be directed to correct submitted files to resolve problems detected by HHS during file processing. We will provide further technical details on these standards in the future.

We note that HHS will store, in a private and secure HHS computing environment, aggregate plan summary data and reports based on activities performed on each issuer's dedicated server environment. Except for purposes of data validation and audit, HHS will not store any personally identifiable enrollee information or individual claim-level information.

We propose in § 153.700(b) that issuers must establish the dedicated data environment (and confirm proper establishment through successfully testing the environment to conform with HHS standards for such testing) three months prior to the first date of full operation. For example, for benefit year 2014, implementation, including testing, will begin in March 2013, and continue through October 2013, in preparation for the commencement of risk adjustment and reinsurance program operations on January 1, 2014. HHS also plans to schedule technical assistance trainings for issuers in 2013.

Data Requirements: In § 153.710(a), we propose that an issuer of a risk adjustment covered plan or reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must provide to HHS, through the dedicated data environment, access to the enrollee-level plan enrollment data, enrollee claims data, and enrollee encounter data specified by HHS.

We propose in § 153.710(b) that all claims data submitted by an issuer of a risk adjustment covered plan or reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must have resulted in payment by the issuer. The enrollee-level data must include information from claims and encounter data (including data related to cost-sharing reductions, to permit HHS to calculate enrollee paid claims net of cost-sharing reductions) as sourced from all medical and pharmacy providers, suppliers, physicians, or other practitioners who furnished items or services to the issuer's health plan members for all permitted paid medical and pharmacy services during the benefit period. All

[41] We issued a proposed regulation on risk pooling at § 156.80 of the proposed Market Reform Rule.

data must be provided at the level of aggregation specified by HHS.

A listing of required data, proposed data formats, and data definitions for the HHS-operated distributed data approaches for the risk adjustment and reinsurance programs will be provided in the PRA approved under OMB Control Number (OCN) 0938–1155 with an October 31, 2015 expiration date.

In § 153.710(c), we propose that an issuer that does not generate claims in the normal course of business [42] must derive costs on all applicable provider encounters using their principal internal methodology for pricing those encounters (for example, a pricing methodology used for the Medicare Advantage encounter data collection). If a plan has no such methodology, or has an incomplete methodology, it would be permitted to implement a methodology or supplement the methodology in a manner that yields derived claims that are reasonable in light of the specific market that the plan is serving.

Establishment and usage of masked enrollee identification numbers: We propose in § 153.720(a) that an issuer of a risk adjustment covered plan or reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must establish an unique masked enrollee identification number for each enrollee, in accordance with HHS-defined requirements as described in this section, and maintain the same masked enrollee identification number for an enrollee across enrollments or plans within the issuer, within the State, during a benefit year. In § 153.720(b), we propose that an issuer of a risk adjustment covered plan or reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, may not include an enrollee's personally identifiable information in the masked enrollee identification number or use the same masked enrollee identification number for different enrollees enrolled with the issuer. The requirements here align the specific requirements for data collection with the requirements in § 153.340(b) of the Premium Stabilization Rule and the proposed § 153.240(d). As discussed above, the term ''personally identifiable information'' is a broadly used term across Federal agencies, and has been defined in the Office of Management and Budget Memorandum M–07–16 (May 22, 2007).[43] To reduce duplicative guidance or potentially conflicting regulatory language, we are not defining personally identifiable information in this proposed rule, and incorporate the aforementioned definition in to this proposed rule.

Deadline for submission of data: We propose in § 153.730 that an issuer of a risk adjustment covered plan or reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, submit data to be considered for risk adjustment payments and charges and reinsurance payments for the applicable benefit year by April 30 of the year following the end of the applicable benefit year. This timeline will permit sufficient time for HHS to calculate and notify issuers of those payments and charges in time to meet the June 30 deadline set forth in § 153.310(e), as proposed to be renumbered, and proposed in § 153.240(b)(1).

Proposed § 153.240(b)(2) provides that States administering their own reinsurance program must notify issuers of reinsurance-eligible plans of their expected requests for reinsurance payments on a quarterly basis. We believe that these interim reports will provide issuers in the individual market with information to assist in the development of premiums and rates in subsequent benefit years. Acceptable enrollment and claims/encounter data not submitted in a timely manner will be considered in the next quarter or during the annual processing period. The annual reinsurance payments will not be determined until after April 30 of the year following the applicable benefit year, once all requests for reinsurance payments have been submitted, and any adjustments have been made under proposed § 153.230(d). Therefore, for claims to be eligible for reinsurance payments, acceptable enrollment and paid claims or encounter data must be available on the issuer's environment prior to the April 30 deadline, as specified in future guidance.

3. Risk Adjustment Data Requirements

HHS's data collection approach is aligned with the HHS risk adjustment model and its calculation of payments and charges. This section describes the types of data that will be acceptable for risk adjustment.

a. *Data collection period:* The data collection period will encompass enrollment and services for the applicable benefit year.

(1) Claim-level service dates. Institutional and medical claims and encounter data where the discharge date or through date of service occurs in the applicable benefit year will be allowed for risk adjustment, provided that all other criteria defined under this section are met.

(2) Enrollment periods. Issuers must provide data for all individuals enrolled in risk adjustment covered plans in the applicable benefit year with enrollment effective dates beginning on or after January 1 of that benefit year.

b. *Acceptable Risk Adjustment Data.* Acceptable risk adjustment data for enrollee risk score calculation will be determined using the criteria listed below.

(1) Acceptable claim types. Data to calculate enrollee risk scores will include diagnoses reported on institutional and medical claims that result in final payment action or encounters that result in final accepted status. The specific criteria for capturing a complete inpatient stay (across multiple bills) for single hospital admission will be provided in future guidance.

(2) Acceptable provider types. Diagnoses reported on certain hospital inpatient facility, hospital outpatient and physician provider claims will be acceptable for risk adjustment. The risk adjustment model discussion provides HHS' description for identifying and excluding claims from providers based on these criteria.

(3) Acceptable diagnoses. Diagnoses will be acceptable for enrollee risk score calculation if they are present on medical claims and encounters that meet criteria that are acceptable for HHS-operated risk adjustment data collection.

c. *Risk Adjustment Processing and Reporting.* Issuers are responsible for correcting errors and problems identified by HHS in the distributed data environment.

4. Reinsurance Data Requirements

This section describes the types of data that would be necessary for the evaluation of claims eligible for reinsurance payments to reinsurance-eligible plans as defined under § 153.20. HHS would use the same distributed data collection approach used for risk adjustment; however, only data elements necessary for reinsurance claim selection will be considered for the purpose of determining a reinsurance payment. Data considered acceptable for reinsurance payment calculations are described below.

a. *Data collection period.* Medical and pharmacy claims, where a claim was

[42] Examples of such plans include staff-model health maintenance organizations and plans that pay providers on a capitated basis.

[43] Available at: *http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-16.pdf.*

incurred in the benefit year beginning on or after January 1 of the applicable benefit year and paid before the applicable data submission deadline (provided all other criteria are met) would be accepted for consideration.

b. *Acceptable Reinsurance Data.* Acceptable reinsurance data leading to eligible claim selection for the reinsurance program will be determined using the criteria listed below.

(1) Claim types. Data to identify eligible reinsurance paid claims would include medical and pharmacy claims. Claims that resulted in payment by the issuer as the final action and encounters priced in accordance with issuer pricing methodologies would be considered for payment. Replacement claims for the purposes of adjusting data elements submitted on prior claim submissions, including, but not limited to changes in payment amounts, services rendered, diagnosis, would be accepted, but interim bills and late charges would not be accepted. The specific criteria for submitting complete data for inpatient stays will be provided in future guidance.

(2) Capitated plans: Encounter data submitted by issuers that do not generate claims in the normal course of business would be accepted for consideration when services were performed in the benefit year beginning on or after January 1, 2014 and submitted prior to the applicable data-submission deadline. Specific information related to the assessment and application of encounter claims for reinsurance calculations will be provided in future guidance.

c. *Reinsurance Processing and Reporting.* HHS plans to provide each issuer with a periodic report on data functions performed in each issuer's distributed data environment, including the identification of reinsurance eligible claims by State. The reports would indicate whether HHS accepted or rejected submitted files and data, and errors detected by HHS. Issuers would need to provide corrected files and data to address errors identified in HHS-provided reports for those files and data to be eligible for identification during reinsurance processing. Timeframes for the processing and reporting of these reports, including receipt of corrected files or discrepancy resolution, will be provided in future guidance.

H. Small Business Health Options Program

1. Employee Choice in the Federally-Facilitated SHOP (FF–SHOP)

Employee choice is a central SHOP concept, and facilitating employee choice at a single level of coverage selected by the employer—bronze, silver, gold, or platinum—is a required SHOP function.[44] In addition, the SHOP may also allow a qualified employer to make QHPs available to employees by other methods.[45] For the FF–SHOP, we continue to consider whether to allow a qualified employer to offer its employees only a single QHP. We note that, once an employer has selected a single QHP and decided on a contribution toward that QHP, the employer can then offer employees a choice of all the other plans at the same metal level at no additional cost to the employer. Since adding employee choice would have no adverse financial impact on the employer, we propose that Federally-facilitated SHOPs will not offer a single QHP option to employers but will focus instead on the innovative features of a SHOP: A simpler employer experience and enhanced employee choice. In FF–SHOPs, we propose that employers will choose a level of coverage (bronze, silver, gold, or platinum) and a contribution, and employees can then choose any QHP at that level.

In addition to this choice within single level of coverage, many employers expressed support for employer and employee choice across metal levels both in comments to the Exchange Establishment NPRM and in stakeholder discussions. Issuers, however, have expressed concern about the potential risk segmentation that may result. In comments submitted to HHS in connection with the Exchange Final Rule,[46] issuers urged that employee choice be limited to a single level of coverage selected by the employer based on the potential for risk segmentation with a greater degree of employee choice. There was general agreement among these commenters that the degree of risk segmentation is small if employee choice is limited to a single metal level of coverage, particularly given the presence of risk adjustment, and increases as employee choice is extended across metal levels of coverage. Many commenters suggested that the risk segmentation associated with broad choice across all metal levels may adversely affect premiums.

Some issuers expressed openness to allowing the employee to ''buy up'' to certain plans at the next higher level of coverage, thereby offering employees a broader range of health plans. Therefore, we seek comment on adding an additional employer option in the FF–SHOP that would allow a qualified employer to make available to employees all QHPs at the level of coverage selected by the employer plus any QHPs at the next higher level of coverage that a QHP issuer agrees to make available under this option. QHP issuers could decide whether or not to make available QHPs at the next higher level of coverage above the level of coverage selected by the employer.

We note that concerns about risk selection will be mitigated both by the risk adjustment program which addresses risk selection directly and by consumer tools showing expected ''total costs'' of coverage (premium, deductibles, copayments and coinsurance) that help consumers compare the cost of a high premium/low cost sharing plan with a low premium/high cost sharing plan. Nonetheless, particularly in the early years of implementation, the FF–SHOP in each State will need to balance the fundamental goal of enhancing employer and employee choice against concerns about potential risk selection to achieve the broadest issuer participation, the best range of plan design choices, and the most effective competition in the small group market. Therefore, we seek comment on a transitional policy in which a Federally-facilitated SHOP would allow or direct employers to choose a single QHP from those offered through the SHOP.

2. Methods for Employer Contributions in the FF–SHOP

Employers may elect a variety of ways to contribute toward health coverage that are consistent with Federal law. Because employees in the FF–SHOP will be choosing their own coverage and will need to know the net cost to them after the employer's contribution, the employer will need to choose a contribution method before employees select their qualified health plans. To facilitate this, each SHOP would offer ''safe harbor'' methods of contributing toward the employee coverage—methods that reflect a meaningful employer choice and that conform to existing Federal law. The safe harbor methods described below are not the only allowable methods of contribution, but are those that will be available initially to qualified employers participating in FF–SHOPs.

Under this proposed rule at § 155.705(b)(11), FF–SHOPs would base the employer contribution methods on the cost of a reference plan chosen by the qualified employer. This reference plan approach is one of the methods

[44] § 155.705(b)(2).

[45] § 155.705(b)(3).

[46] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers (CMS–9989), 77 FR 18310 (Mar. 27, 2012).

described in section III.G. of IRS Notice 2010–82 regarding allowable ways an employer may contribute to the employees' premiums and qualify for the small business premium tax credit prior to 2014.[47] We note that the IRS plans to issue additional guidance applicable to plan years beginning after 2013.

The IRS Notice describes two types of reference plan premiums—one in which the premium for the reference plan is a composite premium that is the same for each member and a second in which the premium for the reference plan varies with the age of the covered individual (or other permissible rating factor). In both cases, the small business can define its contribution toward a member's coverage as a percentage of the premium for the reference plan.

Except in States that prohibit employee contributions that vary by age or require issuers to quote only composite premiums, the qualified employer would be asked the following question: ''Do you want each employee to contribute the same amount toward the reference plan premium, or do you want the employee's contribution to vary with age within the allowed limits?'' [48] [49] This option to charge younger employees lower premiums for a given coverage may help attract younger individuals into the risk pool and may help employer groups meet any minimum participation rates. On the other hand, this option also results in higher premium contributions by older employees who are also more likely to incur higher out-of-pocket costs.[50]

If the qualified employer decides that the employee's contribution should vary by age, then the employer contribution would be based on the reference plan, and the remaining employee contribution for the employee's plan would not be affected by other employees' decisions about participation. Once the employees have chosen their plans, the qualified employer would approve the final application and the FF–SHOP would enroll the employees in their chosen health plans.

If the qualified employer decides that each employee pays the same amount for the reference plan coverage, regardless of age, the composite premium for the reference plan, and the employer contribution based on that plan, may change based on which employees choose to participate, just as composite premiums may need to be re-quoted by the issuer today. Operationally, once the employee choices have been made, the composite premium for the reference plan would be recalculated, and the employer and employees notified of any changes.

We welcome comments on this approach.

3. Linking Issuer Participation in an FFE to Participation in an FF–SHOP

Consistent with the goal of ensuring choice of affordable insurance plans, in this proposed rule, we propose standards that we believe will help ensure that qualified employers and qualified employees enrolling through a FF–SHOP are offered a robust set of QHP choices in a competitive small group marketplace. We believe that a competitive marketplace offering qualified individuals, qualified employers, and qualified employees a choice of issuers and QHPs is a central goal of the Affordable Care Act, and that the SHOP can provide an effective way for small employers to offer their employees a choice of issuers and QHPs. We propose in § 156.200(g) to leverage issuers' participation in an FFE to ensure participation in the FF–SHOP, provided that no issuer would be required to begin offering small group market products as a result of this provision.

While a State-operated SHOP has a variety of options available to ensure a robust choice of QHPs and issuers, an FFE is limited to the QHP certification process. We propose in § 156.200(g) that an FFE may certify a QHP in the individual market of an FFE only if the QHP issuer meets one of the following conditions: (1) The issuer offers through the FF–SHOP serving that State at least one small group market QHP at the silver level of coverage and one at the gold level of coverage; (2) the QHP issuer does not offer small group market plans in that State, but another issuer in the same issuer group (as defined below) offers through the FF–SHOP serving that State at least one small group market QHP at the silver level of coverage and one at the gold level of coverage; or (3) neither the issuer nor any issuer in the same issuer group offers a small group market product in the State. Thus, no issuer would be required to begin offering small group market plans to meet this requirement.

We note that § 156.515(c)(2) has already implemented similar provisions for the Consumer Operated and Oriented Plans (CO–OPs). A CO–OP is not required to offer plans in the small group market, but if the CO–OP does offer a small group market plan, it must offer a silver and a gold QHP in each SHOP that serves the geographic regions in which the CO–OP offers coverage in the small group market.

We propose to add to § 156.20 a definition of ''issuer group'' that will be specific to this section of the regulations. The proposed definition includes both issuers affiliated by common ownership and control and issuers affiliated by the common use of a nationally licensed service mark. We believe that either of these elements—common control or common use of a licensed mark—would appropriately identify an issuer group. We define ''issuer group'' to help assure that the certification standard linking Exchange participation with SHOP participation has similar effects on small issuers and large issuer groups. We seek comment on this issue and whether or not the policy meets its three intended goals: Enhancing employer and employee choice, assuring similar effects on single issuers and issuer groups, and not requiring any issuer not already offering coverage, to begin offering coverage in the small group market.

4. Broker Compensation for Coverage Sold Through an FFE or FF–SHOP

While a State also has a variety of policies it might adopt with regard to broker compensation that would help create a level playing field for enrollment inside and outside the SHOP due to the State's broad authority to regulate insurance markets, FFE and FF–SHOP options for creating a level playing field are again limited to QHP certification standards. In a new paragraph § 156.200(f), we propose that QHP certification by an FFE and an FF–

[47] IRS Notice 2010–82, section III.G. describes employer contribution methods using a reference plan with a variety of different rating methods: Per member rating (referred to in the Notice as ''list billing''), composite rating (referred to as ''composite billing''), and the hybrid method (referred to as an ''employer-computed composite rate''). Although prepared as guidance regarding employer contributions eligible for the small business premium tax credit and applicable only through 2013, it provides a clear description of ''safe harbor'' methods that will be used in the FF–SHOP.

[48] Thus, the ratio of the employee contribution made by the oldest adult and the youngest adult toward the reference plan cannot exceed 3:1 before any tobacco use factor is applied.

[49] Because tobacco use information from employees will not be available when estimating total premiums for the group and average premiums per employee, tobacco use will always be a surcharge applied to an employee's or dependent's premium. See the proposed Health Insurance Market Rules (77 FR at 70595–70597) and the Incentives for Nondiscriminatory Wellness Programs in Group Health Plans Proposed Rule (77 FR 70620) for further discussion of the tobacco use surcharge and wellness programs.

[50] See 29 CFR 1625.10 for a description of the ways in which employee contributions toward premiums may vary according to employee age without constituting impermissible age discrimination.

SHOP be conditioned on the QHP issuer paying similar broker compensation for QHPs offered through a FFE or FF–SHOP that it would pay for similar health plans offered outside an FFE and an FF–SHOP. We request comment on whether ''similar health plans'' is a sufficient standard and if not, which factors should be considered in identifying ''similar health plans.'' We also request comment on how this standard might apply when small group market product commissions are calculated on a basis other than an amount per employee or covered life or a percentage of premium.

5. Minimum Participation Rate in the FF–SHOP

Section 155.705(b)(10) specifies that a SHOP may establish a uniform minimum participation rate for its QHPs. Further rulemaking is needed to establish a minimum participation rate in the FF–SHOP. We recognized in the proposed Exchange Establishment Rule, 76 FR at 41886, that minimum participation rates calculated at the level of the issuer are currently in wide use by issuers as one method to reduce the potential for adverse selection. We note here that the ability of a SHOP, including an FF–SHOP, to adopt a minimum participation rate as an exception to the guaranteed issue requirements of the Affordable Care Act is dependent on the final adoption of § 147.104(b)(1) of the proposed Health Insurance Market Rule, (77 FR 70612), which conditions employer eligibility for the year-around open enrollment period in the SHOP (or FF–SHOP) on meeting any minimum participation rate that the SHOP (or FF–SHOP) might establish.

Because we believe risk selection based on employee decisions to participate is likely without a minimum participation rate, we propose a minimum participation rate for the FF–SHOP of 70 percent, calculated at the level of the FF–SHOP. This rate is based on consultations with issuer organizations and regulators about customary minimum participation rates and would apply to all qualified employers in the FF–SHOP serving a given State. Because State law, regulation, and market practices vary from State to State, we also propose an option for the FF–SHOP to adopt a different uniform minimum participation rate in a State with a FF–SHOP if there is evidence that:

(1) A State law sets the rate; or

(2) A higher or lower rate is customarily used by the majority of QHP issuers in that State for products in the State's small group market outside the SHOP.

In addition, in accordance with State laws, we propose that certain types of alternative coverage will exclude an employee entirely from the calculation of the minimum participation rate:

(1) A group health plan offered by another employer; or

(2) A governmental program such as Medicare, Medicaid, or TRICARE.

We seek comment on the default minimum participation rate and the exceptions that will help ensure alignment with current State practice and standards inside and outside the SHOP.

6. Determining Employer Size for Purposes of SHOP Participation

While the Exchange Establishment Rule did not finalize a method for determining employer size, we note that part-time employees must be taken into account in some reasonable way to be consistent with the Affordable Care Act standards for determining employer size. We propose to amend the definitions of ''small employer'' and ''large employer'' in § 155.20 to specify the method for determining employer size and to add the definition of large employer to § 157.20. In determining whether an employer is a small employer for purposes related to the SHOP, we propose that the full-time equivalent method used in section 4980H(c)(2)(e) of the Code, as added by section 1513 of the Affordable Care Act, be used. We seek comment on the proposed definition. We believe that having a single method will provide greater clarity and simplicity both for employers and for States seeking to reconcile State methods of determining group size with Federal methods in the operation of Exchanges and for determining employer eligibility to participate in the SHOP. We discuss the timing of this action in the ''Transitional Policies'' section below.

7. Definition of a Full-Time Employee for Purposes of Exchanges and SHOPs

Section 1312(f)(2)(A) of the Affordable Care Act defines a qualified employer as one ''that elects to make all full-time employees of such employer eligible for one or more qualified health plans offered in the small group market through an Exchange that offers qualified health plans.'' The Affordable Care Act does not define a full-time employee for purposes of this provision. We propose to add to § 155.20 a definition of full-time employee that cross-references section 4980H(c)(4) of the Code, which provides that a full-time employee with respect to any month is generally an employee who is employed an average at least 30 hours of service per week, subject to the transitional policies discussed in the next paragraph. Under our proposal, this definition would control for purposes of the section 1312(f)(2)(A) requirement that qualified employers offer coverage to all full-time employees.

8. Transitional Policies

Most States currently use definitions of a full-time employee and methods of counting employees to determine employer size that differ from Federal definitions and methods. We believe that certain provisions of the Affordable Care Act that distinguish between the small group market and large group market and between large employers and small employers require that a Federal definition be used. We also note that section 1304(b)(3) of the Affordable Care Act provides States with some discretion in how they define their small group market in 2014 and 2015. Because States will generally take legislative action before January 1, 2016, to redefine the upper limit of the small group market as 100 employees, we believe that States can also act at that time to adopt a counting method that is consistent with Federal law.

Therefore, we propose that the definitions of small employer and full-time employee proposed above be effective January 1, 2016, for purposes of Exchange and SHOP administration. With respect to State-operated SHOPs for 2014 and 2015 only, HHS will not take any enforcement actions against a State-operated SHOP for including a group in the small group market based on a State definition that does not include part-time employees when the group should have been classified as part of the large group market based on the Federal definition. Similarly, during 2014 and 2015, an employer and a State-operated SHOP may adopt a reasonable basis for their determination of whether they have met the SHOP requirement to offer coverage to all full-time employees, such as the definition of full-time employee from the State's small group market definition or the Federal definition from section 4980H of Chapter 43 of the Code.

The FF–SHOP, however, must use a counting method that takes part-time employees into account. We propose that these definitions will be effective October 1, 2013 for the FF–SHOP. To make an employer eligibility determination, the FF–SHOP will ask employers about the number of employees based on the full-time equivalent method used in section

4980H of Chapter 43 of the Code, as added by section 1513 of the Affordable Care Act. Thus, in FF–SHOP States, there may be a few employers who can purchase a small group market plan outside of the FF–SHOP (because they have fewer than 50 full time employees) but will not be eligible to purchase through the FF–SHOP (because they have more than 50 full time equivalent employees).

We request comment on the proposed definitions and on the proposed transition policies.

9. Web Site Disclosures Relating to Agents and Brokers

We propose modifications to the Web site disclosure standards relating to brokers in § 155.220(b). Specifically, we propose a new paragraph (b)(1) that would allow an Exchange or SHOP to limit the display of agent and broker information to include only those licensed agents and brokers who are registered with the Exchange or SHOP and a new paragraph (b)(2) that would specifically adopt this provision for an FFE and an FF–SHOP. We believe that listing only brokers who have registered with the Exchange is in the best interest of the consumer, both because the registration and training helps assure that the agent or broker is familiar with the Exchange policies and application process and because the proposed listing will not contain large numbers of licensed brokers who are not active in the market. We welcome comments on these proposals.

10. QHP Issuer Standards Specific to Shop

We propose modifications to the QHP issuer standards specific to SHOP for enrollment in § 156.285. Specifically, we propose a technical correction in paragraph (c)(7) such QHP issuers participating in the SHOP must enroll qualified employees if they are eligible for coverage. This correction aligns SHOP enrollment standards to Exchange enrollment standards.

I. Medical Loss Ratio Requirements Under the Patient Protection and Affordable Care Act

1. Treatment of Premium Stabilization Payments, and Timing of Annual MLR Reports and Distribution of Rebates

Our previous rulemakings concerning PHS Act section 2718 did not address how issuers are to account for the premium stabilization programs in their MLR reports and in calculating their MLR and any rebates owing, given that the premium stabilization programs are effective beginning in 2014. This proposed rule would modify the definition of premium revenue in § 158.130, the formula in § 158.221(c) for calculating an issuer's MLR, and the formula in § 158.240(c) for calculating an issuer's rebate if the MLR standard is not met, in the current MLR regulation to account for payments and receipts related to the premium stabilization programs. When the MLR annual reporting form is updated for the reporting year 2014 and later, premium stabilization amounts would be considered a part of total premium revenue reported to the Secretary, similar to other elements involved in the derivation of earned premium. The MLR annual reporting form would then account for premium stabilization amounts by removing them from adjusted earned premium, so that these amounts do not have a net impact on the adjusted earned premium used in calculating the MLR denominator and rebates. Additionally, this proposed rule would amend § 158.140(b) to include premium stabilization amounts as an adjustment to incurred claims in calculating the MLR numerator as provided in § 158.221. This approach would address stakeholder concerns that netting premium stabilization amounts directly against adjusted earned premium in MLR and rebate calculations would result in an issuer paying either a higher total amount or a lower total amount for rebates and the premium stabilization programs combined, depending on whether the issuer's net premium stabilization obligations resulted in payment or receipt of funds by the issuer. The approach in this proposed rule would also preserve consistency between the MLR and risk corridors programs by treating premium stabilization amounts in MLR and rebate calculations the same way section 1342(c) of the Affordable Care Act treats reinsurance and risk adjustment amounts in risk corridors calculations, by applying them as adjustments to cost, not revenue. Although PHS Act section 2718 provides that premium revenue should ''account for'' collections or receipts for the premium stabilization programs, we believe the statutory language provides flexibility as to whether to account for the effects of such collections or receipts in determining revenue (the denominator) or costs (the numerator) of the MLR formula. We considered netting premium stabilization payments or receipts against revenue, but for the reasons discussed above, have not proposed that approach. We invite comment on this decision.

In sum, the formula for calculating the MLR would be amended as follows to take into account payments for and receipts related to the premium stabilization programs:

$$\text{Adjusted MLR} = [(i + q + n - r)/\{(p + n - r) - t - f - n + r\}] + c$$

Where,

i = incurred claims
q = expenditures on quality improving activities
p = earned premiums
t = Federal and State taxes
f = licensing and regulatory fees
n = reinsurance, risk corridors, and risk adjustment payments made by issuer
r = issuer's reinsurance, risk corridors, and risk adjustment related receipts
c = credibility adjustment, if any.

Issuers must provide rebates to enrollees if their MLRs fall short of the applicable MLR standard for the reporting year. Rebates for a company whose adjusted MLR value in a State falls below the minimum MLR standard in a given market would be calculated using the following amended formula:

$$\text{Rebates} = (m - a) * [(p + n - r) - t - f - n + r]$$

Where,

m = the applicable minimum MLR standard for a particular State and market
a = issuer's adjusted MLR for a particular State and market.

The amendments made by this proposed rule would be effective for MLR reporting years beginning in 2014.

In addition, this proposed rule would change the MLR reporting and rebate deadlines, beginning with the 2014 MLR reporting year, to coordinate them with the reporting cycles of the premium stabilization programs. Currently, an issuer must file its annual MLR report by June 1 and pay any rebates it owes to consumers by August 1 of the year that follows the MLR reporting year. However, looking ahead, the amounts associated with the premium stabilization programs that issuers must take into account in their MLR calculations will not be known until after June 1 each year. For example, a state, or HHS on behalf of a state, has until June 30 of the year following a benefit year to notify issuers of the risk adjustment and reinsurance payments due or charges owed for that benefit year (§ 153.310(e); § 153.240(b)(1) as proposed in this proposed rule). As further specified above in section III.C. of this proposed rule issuers must submit risk corridors data and calculations by July 31 of the year following a benefit year (§ 153.530(d) as proposed in this proposed rule). Accordingly, we propose to amend § 158.110(b) to change the date of MLR

reporting to the Secretary from June 1 to July 31 beginning with the 2014 MLR reporting year, and we propose to amend § 158.240(d) to change the rebate due date from August 1 to September 30 to accommodate the schedule for the premium stabilization programs beginning with the 2014 MLR reporting year. Similarly, we propose to amend § 158.241(a)(2) to change the due date for rebates provided by premium credit from August 1 to September 30, to apply to the first month's premium that is due on or after September 30 following the MLR reporting year, beginning with the 2014 MLR reporting year. In choosing these dates, we tried to balance consumers' and policyholders' interests in maintaining the dates for MLR reporting and rebates as close to the June 1 and August 1 dates as possible with issuers' interests in having the necessary data to submit their annual MLR report and sufficient time to disburse any rebates. Although we must provide issuers any reconciliation of their risk corridors calculations by August 31, as described above in Section C of this proposed rule, we believe that there will be few changes to the risk corridors calculations submitted by issuers to the Secretary by July 31. This would give issuers one additional month from any reconciliation to disburse any rebates owed, which we believe is sufficient time. Comments on the proposed timeline are welcome.

2. Deduction of Community Benefit Expenditures

While we did not specifically solicit comments on the deduction from premium for community benefit expenditures in the MLR December 7, 2011 final rule with comment period, we received a few comments that recommend that a tax exempt not-for-profit issuer should be able to deduct both community benefit expenditures and State premium tax. These commenters suggest that prior to publication of the final rule, the MLR interim final rule published on December 1, 2010 gave a tax exempt not-for-profit issuer this flexibility. Two commenters assert that a Federal income tax exempt issuer is required to make community benefit expenditures to maintain its Federal income tax exempt status, and that allowing a deduction for community benefit expenditures takes the place of a Federal income tax deduction in the MLR calculation. Commenters have made clear that deducting both State premium taxes and community benefit expenditures would help level the playing field because it would allow a Federal income tax exempt issuer to deduct its community benefit expenditures in the same manner that a for-profit issuer is allowed to deduct its Federal income taxes. We agree, and this proposed rule would amend § 158.162(b)(1)(vii) to allow a Federal income tax exempt issuer to deduct both State premium taxes and community benefit expenditures from earned premium in the MLR calculation. This proposed rule would not change the treatment of State premium taxes and community benefit expenditures for those issuers that are not exempt from paying Federal income tax. Comments are welcome on the merits of allowing a tax exempt issuer to deduct both State premium taxes and community benefit expenditures from earned premium.

In its model MLR recommendation,[51] the NAIC determined that the deduction from premium for community benefit expenditures should be limited to a reasonable amount to discourage fraud and abuse and that this limit should be the State premium tax rate. We applied this principle in allowing issuers exempt from State premium tax to deduct community benefit expenditure, up to the State premium tax rate, in their MLR calculation. However, the MLR final rule published on December 7, 2011 allowed issuers exempt from Federal income tax to deduct community benefit expenditures in lieu of State premium taxes, not Federal income taxes.

Commenters have suggested that a 3 percent limit on the deduction from premium for community benefit expenditures would be sufficient to allow a tax exempt issuer to maintain its current community benefit expenditure. The 2011 MLR data indicate that, of the not-for-profit issuers that reported non-zero community benefit expenditures, the average spent on community benefit expenditures (deductible and non-deductible) was about 1.6 percent of premium. This suggests that a 3 percent community benefit expenditure deduction limit would not discourage a tax exempt issuer from making community benefit expenditures. In light of the NAIC model rule and the comments received, we propose to limit the deduction from premium for community benefit expenditures for issuers that are exempt from Federal income tax to the higher of either 3 percent of premium or the highest premium tax rate charged in a State. Comments are solicited on the proposed community benefit expenditures deduction limit.

3. Summary of Errors in the MLR Regulation

a. Errors in the December 1, 2010 Interim Final Rule

We are making two changes to the December 1, 2010 interim final rule (75 FR 74864) to make the language of the rule consistent with the NAIC's recommendations, which in the preamble we stated that we were adopting.

On page 74924, in § 158.140 (b)(5)(i), we mistakenly specified the date by which issuers must define the formula they use for the blended rate adjustment as ''January 1, 2011'' instead of ''January 1 of the MLR reporting year.'' We are updating this date to ensure that all issuers are able to choose to make the blended rate adjustment going forward. We mistakenly omitted the words ''by the issuer'' following the words ''will be defined'' and mistakenly used the word ''will'' instead of ''must'' in describing the objective formula to be used in reporting group coverage at a blended rate.

On page 74928, in § 158.232(d), we inadvertently used the word ''For'' instead of ''Beginning with'' when describing the date after which partially-credible issuers that consistently fail to meet the MLR standard will not be allowed to use a credibility adjustment.

b. Error in the May 16, 2012 Correcting Amendment

Section 158.232(c)(1)(i) of the MLR regulation was amended by the May 16, 2012 correcting amendment (77 FR 28788), which currently reads: ''[t]he per person deductible for a policy that covers a subscriber and the subscriber's dependents shall be the lesser of: The sum of the deductible applicable to each of the individual family members; or the overall family deductible for the subscriber and subscriber's family, divided by two (regardless of the total number of individuals covered through the subscriber).'' In this correcting amendment, we further amend § 158.232(c)(1)(i) by deleting the words ''The sum of'' after the words ''the lesser of:'' and the comma after the words ''subscriber's family,'' which we inadvertently did not delete in the May 16, 2012 correcting amendment.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a

[51] Regulation for Uniform Definitions and Standardized Methodologies for Calculation of the Medical Loss Ratio for Plan Years 2011, 2012 and 2013 per Section 2718(b) of the Public Health Service Act, available at *http://www.naic.org/documents/committees_ex_mlr_reg_asadopted.pdf.*

collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. 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 following sections of this document contain paperwork burden but not all of them are subject to the information collection requirements (ICRs) under the PRA for reasons noted.

A. Collections Related to State Operation of Reinsurance & Risk Adjustment Programs (§ 153.210 Through § 153.240, § 153.310)

Although the number of States that will elect to operate their own reinsurance or risk adjustment programs is unknown, we anticipate that fewer than nine States will choose to do so. Collections from fewer than 10 persons are exempt from the PRA under 44 U.S.C. 3502(3)(A)(i). Therefore, we do not plan to seek OMB approval for the following collections. However, in the event that, by the time of the final Payment Notice, we believe that the number of States will be greater than 9, we will seek PRA approval based on the burden estimates outlined below.

1. Reporting to HHS (§ 153.210)

We are proposing under § 153.210(e) that a State operating its own reinsurance program must ensure that its applicable reinsurance entity provide information regarding the requests for reinsurance payments under the national contribution rate made under § 153.410 of this part for all reinsurance-eligible plans for each quarter during the applicable benefit year. We estimate that it will take an operations analyst 2 hours (at $55 an hour) to gather information from applicable reinsurance entities and to submit this information to HHS, for a total burden of $110 per State selecting to run reinsurance.

2. Collection of Reinsurance Contribution Funds (§ 153.220)

Under proposed § 153.220(d), a State that operates its own reinsurance program and elects to collect additional reinsurance contributions for additional administrative expenses or supplemental reinsurance payments or use additional State funds for supplemental reinsurance payments must notify HHS of its intent to do so within 30 days after publication of the draft annual HHS notice of benefit and payment parameters for the applicable benefit year. We believe that the burden associated with this requirement is the time and effort necessary for the State to provide this notification, and estimate it will take each State approximately 1 hour by an operations analyst (at $55 an hour) to submit this notification requirement. Consequently, we estimate a total burden of $55 for each State as a result of this requirement.

3. Collections Related to Reinsurance Payments Made Under a State Additional Contribution Rate (§ 153.232)

Under § 153.232(a), we propose to require a State running its own reinsurance program that chooses to collect additional contributions under § 153.220(d) to set supplemental State reinsurance payment parameters and to ensure that reinsurance contributions collected and funds used are reasonably calculated to cover additional reinsurance payments that are projected to be made only under the supplemental reinsurance payment parameters. We estimate that it will take an operations analyst 8 hours (at $55 an hour) and a senior manager 2 hours (at $77 an hour) to determine appropriate supplemental payment parameters. Therefore, we estimate that it will cost each State choosing to collect additional contributions approximately $594 to comply with this requirement.

Under § 153.232(d), we propose that States that run their own reinsurance program and that choose to collect additional contributions under § 153.220(d) calculate the supplemental reinsurance payments from their additional funds collected under the State additional contribution rate using supplemental payment parameters in conjunction with the national payment parameters to reimburse a particular portion of claims. Additionally, under § 153.232(e), we propose that, if all requested reinsurance payments under the State supplemental reinsurance parameters calculated will exceed all reinsurance contributions collected under the additional State contribution rate for the benefit year, the State must determine a uniform pro rata adjustment to be applied to all requests for reinsurance payments. The State or the applicable reinsurance entity must reduce all such requests for reinsurance payments for the applicable benefit year by that adjustment. We estimate it will take an operations analyst 40 hours (at $55 an hour) and a senior manager 12 hours (at $77 an hour) to determine appropriate payment calculations and, if necessary, a pro rata adjustment. Therefore, we estimate that it will cost each State choosing to collect additional contributions approximately $3,124 to comply with this requirement.

4. Collections Related to Disbursement of Reinsurance Payments (§ 153.240)

We propose to amend § 153.240(a) to direct a State operating its own reinsurance program to ensure that the applicable reinsurance entity either collects data or is provided access to the data required to determine reinsurance payments as described in §§ 153.230 and 153.232. In § 153.240(b) we propose that a State or HHS on behalf of the State notify issuers of the total amount of reinsurance payments that will be made no later than June 30 of the year following the benefit year, as well as an estimate to each reinsurance-eligible plan of expected requests for reinsurance payments from the plan on a quarterly basis during the applicable benefit year. We estimate it will take an operations analyst 40 hours (at $55 an hour), 10 hours per quarter, and a senior manager 12 hours (at $77 an hour), 3 hours per quarter, to determine appropriate quarterly estimates of expected reinsurance payments and to notify plans. Additionally, we expect it will take an operations analyst 40 hours (at $55 an hour) and a senior manager 12 hours (at $77 an hour) to determine the total amount of reinsurance payments for each reinsurance-eligible plan. Therefore, we estimate that it will cost each State choosing to run reinsurance approximately $6,248 to comply with this requirement. We will also revise the supporting statement of 0938–1155 to reflect the additional burden for States choosing to run reinsurance of providing quarterly estimates of expected reinsurance payments and notice of total reinsurance payments to reinsurance-eligible plans. At the final Payment Notice stage, we will revise the supporting statement of 0938–1155 to clarify that a State has the option to ensure that the applicable reinsurance entity provides access to data required to determine reinsurance payments, and that the State is not required to verify that the reinsurance entity is collecting this data directly.

In § 153.240(a)(3), we propose that a State must provide a process through which an issuer of a reinsurance-eligible plan that does not generate individual

enrollee claims in the normal course of business, such as a capitated plan, may use estimated claims costs to make a request for payment (or to submit data to be considered for reinsurance payments) for such plan in accordance with the requirements of § 153.410. In addition, the State must ensure that such requests for reinsurance payment are subject to validation. We estimate that our proposal will result in a small administrative cost to States associated with determining a format for submission of reinsurance payment data and notifying capitated plans of the acceptable method and format of data collection. We anticipate that a State will only need to establish this process once. On average, we estimate that it will take each State approximately 50 hours to comply with this requirement. We estimate it will take an operations analyst 40 hours (at $55 an hour) and a senior manager 10 hours (at $77 an hour) to determine an appropriate format for submission of reinsurance payment data for capitated plans and to notify plans of the acceptable method and format for data collection. Therefore, we estimate that it will cost each State choosing to run reinsurance approximately $2,970 to comply with this proposal.

In § 153.240(d)(1), we propose that, if a State establishes a reinsurance program, the State must ensure that the applicable reinsurance entity's collection of personally identifiable information is limited to information reasonably necessary for use in the calculation of reinsurance contributions or payments. Furthermore, in § 153.240(d)(2), we propose that, if a State establishes a reinsurance program, it must ensure that the applicable reinsurance entity implements security standards that provide administrative, physical, and technical safeguards for the individually identifiable information consistent with the security standards. To comply with this requirement, we believe that most States will require the applicable reinsurance entity to comply with privacy and security standards that are similar to the Federal standards already established under the HIPAA and The Health Information Technology for Economic and Clinical Health Act (HITECH) (Pub. L. 104–191, 110 Stat. 1936, enacted August 21, 1996) or with privacy and security standards that are already established under State law, rather than developing entirely new standards to apply to reinsurance entities. We further anticipate that most States will incorporate this requirement into their contracting process with reinsurance entities. We estimate it will take a contract administrator 2 hours (at $40 an hour) and a lawyer 2 hours (at $77 an hour) to establish privacy and security standards for reinsurance entities and to notify reinsurance entities of these standards. Therefore, we estimate a total burden of 4 hours and $234 for each State choosing to operate reinsurance to comply with this proposal.

5. HHS Approval of Risk Adjustment States (§ 153.310)

Under § 153.310(a)(4), we are proposing that a State that operates risk adjustment must be approved by HHS to do so. The burden associated with this process is the time and effort required by a State to submit evidence that it meets the approval standards set forth in § 153.310(c). Note that these processes will start in benefit year 2015—prior to that, HHS will engage in informal consultations with States. In any given benefit year after 2015, different States may apply for approval.

We estimate it will take each State approximately 180 hours to complete the initial risk adjustment entity approval process. We estimate it will take an operations analyst 72 hours (at $55 an hour), a contract administrator 72 hours (at $40 per hour), a senior manager 24 hours (at $77 an hour), and an attorney 12 hours (at $77 an hour) to meet the initial approval requirements. Therefore, we estimate a total burden of $9,612 for each entity, as a result of these approval requirements.

B. ICRs Regarding Calculation of Reinsurance Contributions (§ 153.405)

In § 153.405, we propose an annual enrollment count of covered lives by contributing entities using counting methods derived from the PCORTF Rule. We propose requiring contributing entities to provide annual counts of their enrollment and reinsurance contributions to HHS based on their last reported PCORTF number as modified for reinsurance purposes. The burden associated with this requirement is the time and effort required by an issuer to derive an annual, enrollment count. Because issuers will already be under an obligation to determine a count of covered lives using a PCORTF method, the burden associated with this requirement is the additional burden of conducting these counts using the slightly modified counting methods specified in this proposed rule. On average, we estimate it will take each issuer 1 hour to reconcile and submit final enrollment counts to HHS. Assuming an hourly wage rate of $55 for an operations analyst, we estimate an aggregate burden of $110,000 for 2,000 reinsurance contributing entities subject to this requirement. We are revising supporting statement of OMB Control Number 0938–1155 to include the required data elements that issuers will need to submit their enrollment counts and to specify that issuers must follow the methodology when they derive enrollee counts for reinsurance contributions.

C. Requests for Reinsurance Payment (§ 153.410)

As described in § 153.410, we propose that issuers of reinsurance-eligible plans seeking reinsurance payment must request payment in accordance with the requirements of this proposed rule or the State notice of benefit and payment parameters, as applicable. To be eligible for reinsurance payments, issuers of reinsurance-eligible plans must submit or make accessible all necessary data to be considered for reinsurance payments for the applicable benefit year.

Issuers operating reinsurance-eligible plans in the individual market that are subject to the reinsurance data collection requirements are eligible to make reinsurance payment requests. To minimize burden on issuers, HHS intends to collect data in an identical manner for the HHS-operated reinsurance program and HHS-operated risk adjustment programs. In addition, when HHS operates reinsurance on behalf of a State, the maximum out-of-pocket differential between a cost-sharing reduction plan variation and the national maximum out-of-pocket limit established by the Federal government would be factored into an issuer's reinsurance payment. Although we are clarifying the data elements issuers would be required to submit as part of the reinsurance payment request process, the burden associated with this requirement is already accounted for under OMB Control Number 0938–1155 with an October 31, 2015 expiration date. We are updating the supporting statement approved under 0938–1155 with an October 31, 2015 expiration date to reflect these clarified data elements.

D. Upload of Risk Adjustment and Reinsurance Data (§ 153.420)

Under the HHS-operated risk adjustment and reinsurance programs, HHS proposes to use a distributed data collection approach to run software on enrollee-level plan enrollment, claims and encounter data that reside on an issuer's dedicated data environment. We propose in § 153.700(a) to require that an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a

State where HHS is operating the risk adjustment or reinsurance program on behalf of the State, as applicable, must provide HHS, through the dedicated data environment, access to enrollee-level plan enrollment data, enrollee claims data, and enrollee encounter data as specified by HHS. Under § 153.710(b), all claims data submitted by an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating risk adjustment or reinsurance, as applicable, must have resulted in payment by the issuer. Under § 153.710(c), an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating risk adjustment or reinsurance, as applicable, that does not generate individual enrollee claims in the normal course of business must derive costs on all applicable provider encounters using its principal internal methodology for pricing those encounters. Issuers will be directed to make risk adjustment and reinsurance data accessible to HHS in a way that conforms to HHS-established guidelines and applicable standards for electronic data collection and submission, storage, privacy and security, and processing. In addition, in § 153.720(a), we propose requiring these issuers to establish a unique masked enrollee identification number for each enrollee, in accordance with HHS-defined requirements and maintain the same masked enrollee identification number for enrollees that enroll in different plans within the issuer, within the State, during a benefit year. Issuers must provide all data to HHS in the specified formats, and must correct submitted files to resolve problems detected by HHS during file processing. The burden associated with this requirement is the time and effort to ensure that information in the dedicated data environment complies with HHS requirements.

We estimate that this data submission requirement will affect 1,800 issuers, and will cost each issuer approximately $327,600 in total labor and capital costs (including the average cost of $15,000 for a data processing server) during the start-up year. This cost will be lower in future years when fixed costs decrease. This cost reflects an estimate of 3 full-time equivalent employees (5,460 hours per year) at an average hourly rate of $59.39 per hour. We anticipate that approximately 400 data processing servers will be established across the market in 2014, and these servers will process approximately 9 billion claims and enrollment files. Therefore, we estimate an aggregate burden, including labor and capital costs, of $589,680,000 for all issuers as a result of these requirements. We are revising the supporting statements associated with the submission of risk adjustment data and reinsurance enrollment data approved under OMB Control Number 0938–1155 with an October 31, 2015 expiration date to account for this burden.

E. ICRs Regarding Data Validation Requirements When HHS Operates Risk Adjustment (§ 153.630)

Under § 153.630, an issuer that offers at least one risk adjustment covered plan in a State where HHS is operating risk adjustment on behalf of the State for the applicable benefit year must have an initial validation audit performed on its risk adjustment data. The burden associated with this requirement is the issuer's time and effort to provide HHS with source claims, records, and enrollment information to validate enrollee demographic information for initial and second validation audits, and the issuer's cost to employ an independent auditor to perform the initial validation audit on a statistically valid sample of enrollees.

The statistically valid sample of enrollees provided to each issuer will consist of enrollees both with and without HCCs. We estimate that each issuer sample will consist of approximately 300 enrollees, with a disproportionate share of approximately two-thirds of the sample consisting of enrollees with HCCs. We also anticipate that this audit burden will affect about 1,800 issuers.

Based on Truven Health Analytics 2010 MarketScan® data, we have determined that for enrollees with HCCs, the average number of HCCs to be reviewed by an auditor per enrollee is approximately two. Additionally, based on HHS audit experience, we estimate that it may cost approximately $180 ($90 per hour for 2 hours) for an auditor to review the medical record documentation for one enrollee with roughly two HCCs. We expect that it may cost approximately $30 per enrollee ($90 per hour for 20 minutes) to validate demographic information for all enrollees in the audit sample, totaling approximately $210 per enrollee with HCCs and $30 per enrollee with no HCCs. We assume that an initial validation audit will be performed on 180,000 enrollees without HCCs, and 360,000 enrollees with HCCs. We have developed this estimate assuming that medical records will not be reviewed for enrollees without HCCs, and that validation for these enrollees will be conducted using demographic data only. Based on the information above, we estimate that the total burden per issuer to retain initial validation auditors to perform the initial validation would cost approximately $45,000. Therefore, for 1,800 issuers, we anticipate that the total burden of conducting initial validation audits will be $81 million. We are revising the PRA currently approved OMB Control Number 0938–1155 with an October 31, 2015 expiration date to account for this additional burden.

Under § 153.630(d), issuers will have the opportunity to appeal errors identified through the second validation audit process. Because we intend to provide further detail on this process in later guidance and rulemaking, we currently cannot estimate the number of issuers that will appeal HCC findings, or the cost per issuer for doing so. Therefore, we will seek OMB approval and solicit public comment on the appeal information collection requirements established under § 153.630(d) at a future date.

F. ICRs Regarding QHP Certification Standards Related to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions (§ 155.1030)

In § 155.1030(a)(1), we propose that the Exchange ensure that each issuer that offers or seeks to offer a QHP in the individual market on the Exchange submit the required plan variations, as proposed in § 156.420, for each of its health plans proposed to be offered as a QHP in the individual market on the Exchange. Further we propose that the Exchange must certify that the plan variations meet the requirements detailed in § 156.420. We expect that an Exchange would collect prior to each benefit year the information necessary to validate that the issuer meets the requirements for silver plan variations, as detailed in § 156.420(a), and collect for certification the information necessary to validate that the issuer meets the requirements for zero and limited cost sharing plan variations, as detailed in § 156.420(b). We expect that this data collection would include the cost-sharing requirements for the plan variations, such as the annual limitation on cost sharing, and any reductions in deductibles, copayments or coinsurance. In addition, the Exchange would collect or calculate the actuarial values of each QHP and silver plan variation, calculated under § 156.135 of the proposed EHB/AV Rule. We propose in § 155.1030(a)(2) that the Exchange provide the actuarial values of the QHPs and silver plan variations to HHS. As proposed in § 155.1030(b)(4), HHS may

use this information in connection with approving estimates for advance payment of cost-sharing reductions submitted by issuers under proposed § 156.430. Because HHS will already have this information for Federally-facilitated Exchanges, the burden associated with this requirement is the time and effort for each Partnership or State-based Exchange to submit this information. We estimate that it will take each Partnership or State-based Exchange approximately 3.5 hours to collect, validate, and submit the data to HHS (3 hours by a database administrator at $47.70 per hour, and 0.5 hours by a manager at $75.15 per hour). We estimate that this will cost each Exchange approximately $181 per year. We plan to revise the supporting statement published under CMS form number 10433, which is pending OMB approval, to account for this additional burden.

In paragraph (b)(1) and (2), we propose that the Exchange collect, review, and submit the rate or expected premium allocation, the expected allowed claims cost allocation, and the actuarial memorandum that a metal level health plan or stand-alone dental plan issuer submits under § 156.470. This collection will allow for the calculation of the advance payments of cost-sharing reductions and the premium tax credit. The Exchange must ensure that such allocations meet the standards set forth in § 156.470(c) and (d). This allocation information must be collected and approved before a health plan or stand-alone dental plan can be certified for participation in the Exchange. We expect that the Exchange will collect the allocation information in conjunction with the rate and benefit information that the issuer submits under § 156.210 and/or the rate information that the QHP issuers submits through the Effective Rate Review program. Therefore, we believe that the burden for Partnership Exchanges or State-based Exchanges to submit to HHS this information collected from QHPs is generally part of the burden that is accounted for in the PRA approved under OMB Control Number 0938–1141. We estimate that Partnership and State-based Exchanges will incur additional burden to submit allocation information to HHS for stand-alone dental plans. We estimate that it will take each Exchange 30 minutes to submit this information for each stand-alone dental plan, and assume that this submission will be performed at the hourly wage rate of $38.49 for an insurance analyst. Assuming 20 stand-alone dental plans across the market, we estimate an aggregate burden of approximately $385 for all Partnership or State-based Exchanges to submit this information to HHS. We plan to revise the supporting statement published under CMS form number 10433, which is pending OMB approval, to account for this additional burden.

In subparagraph (b)(3), we propose that the Exchange must collect any estimates and supporting documentation that a QHP issuer submits to receive advance payments of certain cost-sharing reductions, as described in § 156.430(a), and submit, in the manner and timeframe established by HHS, the estimates and supporting documentation to HHS for review. Because HHS will already have this information for Federally-facilitated Exchanges, the burden associated with this requirement is the time and effort for each Partnership or State-based Exchange to submit this information. We believe that this requirement will impose minimal burden, and that it will take an insurance analyst 5 minutes (at an hourly wage rate of $38.49), to collect and submit this information to HHS for each Partnership or State-based Exchange. Therefore, we estimate a burden of $3.08 for each Partnership or State-based Exchange as a result of this requirement.

G. ICRs Regarding QHP Participation Standards in SHOP (§ 156.200)

In § 156.200(g)(1), we propose that if the issuer of a QHP in an FFE also participates in the State's small group market, the QHP certification standard would be met if the issuer offers at least one small group market QHP at the silver level of coverage and one QHP at the gold level of coverage in an FF–SHOP serving that State. We also propose that, if neither the issuer nor any issuer in the same issuer group participates in the small group market of the State, the standard would be met. Therefore, no issuer would be required to begin offering small group market plans to meet this requirement. The burden associated with this requirement is the time and effort for an issuer to prepare a QHP certification application for a SHOP for at least one silver level and one gold level plan design. This burden would be incurred by issuers who, absent this requirement, would otherwise not have participated in a SHOP. We describe the burden associated with this requirement in the 30-day **Federal Register** Notice for the Initial Plan Data Collection published on November 21, 2012 (77 FR 69846).

H. ICRs Regarding Plan Variations (§ 156.420)

In § 156.420, we propose that issuers submit to the Exchange for certification the variations of the health plans that they offer or propose to offer in the individual market on the Exchange that include required levels of cost-sharing reductions. We provide an overview of the submission process associated with this requirement in this proposed rule. In paragraph (a), we propose that, for each silver health plan that an issuer offers or proposes to offer in the individual market on the Exchange, the QHP issuer must submit to the Exchange for certification the standard silver plan and three variations of the standard silver plan. In paragraph (b), we further propose that a QHP issuer must, for each of its health plans at any metal level of coverage, submit a zero cost sharing plan variation and a limited cost sharing plan variation of each health plan offered or proposed to be offered in the individual market on the Exchange.

We estimate that 1,200 issuers will participate in an Exchange nationally, and that each issuer will offer one QHP per metal level with four zero cost sharing plan variations and four limited cost sharing plan variations (one per metal level QHP) and three plan variations for low-income populations, for a total of four standard plans and eleven plan variations. Our burden estimate assumes that each issuer will submit these plan variations as part of their electronic QHP application, which is described in further detail in the ''Supporting Statement for Initial Plan Data Collection to Support QHP Certification and other Financial Management and Exchange Operations,'' which was provided for public comment on November 21, 2012 (77 FR 69846). We estimate that it will take approximately 1.5 hours to submit the requisite information for a plan variation (0.75 hours by an actuary at a wage rate of $56.89, 0.5 hours by an insurance analyst at a wage rate of $38.49, and 0.25 hours by an insurance manager at a wage rate of $67.44). We estimate that each submission for a plan variation will cost an issuer $78.77, for a total estimated annual cost of $866.47 per issuer for the 11 plan variations. We estimate an aggregate burden of $1,039,764 for all issuers participating in the Exchange. We plan to revise the supporting statement published under CMS form number 10433, which is pending final OMB approval, to account for this additional burden.

I. ICRs Regarding Payment of Cost-Sharing Reductions (§ 156.430)

In § 156.430(a)(1), we propose that for each silver plan variation and zero cost sharing plan variation that an issuer offers or proposes to offer in the individual market on the Exchange, the QHP issuer must provide to the Exchange, for approval by HHS, estimates, and supporting documentation validating the estimates, of the dollar value of cost-sharing reductions to be provided. However, we propose a simplified methodology for calculating the advance payments for the initial years of the cost-sharing reduction program. This methodology will utilize data that QHP issuers submit for other requirements, such as § 156.420 and § 156.470. As a result, there will be no additional burden associated with this requirement.

In § 156.430(a)(2), we discuss the process for estimating the value of cost-sharing reductions to be provided under the plan variation open to Indians with a household income above 300 percent of the FPL, described in § 156.420(b)(2). If a QHP issuer seeks advance payments for the these cost-sharing reductions, the issuer must provide to the Exchange, for approval by HHS, an estimate, and supporting documentation validating the estimate, of the dollar value of the cost-sharing reductions to be provided under the limited cost sharing plan variation of the QHP. We estimate that 1,200 issuers will participate in Exchanges nationally, and that each issuer will offer one QHP per metal level, with one limited cost sharing plan variation for each metal level. For each plan variation, the issuer may submit an estimate and supporting documentation of the dollar value of the cost-sharing reductions. We expect estimates and supporting documentation will be submitted as part of the electronic QHP application, which is described in further detail in the ''Supporting Statement for Initial Plan Data Collection to Support QHP Certification and other Financial Management and Exchange Operations,'' which was provided for public comment on November 21, 2012 (77 FR 69846). We estimate that it will take approximately 1.0 hours to submit each response for a plan variation (0.5 hours by an actuary at a wage rate of $56.89 and 0.5 hours by an insurance analyst at a wage rate of $38.49. We estimate that each response for a plan variation will cost an issuer $47.69, for an estimated total issuer burden to submit responses for 4 plan variations of $228,912 for the year. We plan to revise the supporting statement published under CMS form number 10433, which is pending final OMB approval, to account for this additional burden.

In § 156.430(c), we propose that a QHP issuer submit to HHS, in the manner and timeframes established by HHS the actual amount of cost-sharing reductions provided to each enrollee. This information is necessary so that HHS can reconcile advance payments made throughout the year to actual cost-sharing amounts. While these information collection requirements are subject to the Paperwork Reduction Act, the information collection process and instruments associated with this requirement are currently under development. We will seek OMB approval and solicit public comments upon their completion.

J. ICRs Regarding Reduction of an Enrollee's Share of Premium to Account for Advance Payment of the Premium Tax Credit (§ 156.460)

In § 156.460(a)(2), we propose that if a QHP issuer receives an advance payment of the premium tax credit on behalf of an individual, the QHP issuer must notify the Exchange of any reduction in premium through the standard enrollment acknowledgment in accordance with § 156.265(g). Because this notification will occur through the enrollment acknowledgement process that already exists under the final Exchange Establishment rule (77 FR 18310), we believe that this requirement will impose minimal burden on QHP issuers, and that it will take an insurance analyst 5 minutes (at an hourly wage of $38.49), to collect and submit this information to each Exchange Therefore, we estimate a burden of $3.20 for each QHP issuer, and an aggregate burden of $3,849 for all 1,200 QHP issuers, as a result of this requirement.

K. ICRs Regarding Allocation of Rates and Claims Costs for Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions (§ 156.470)

In § 156.470(a), we propose that an issuer provide to the Exchange annually for approval, for each metal level health plan offered or proposed to be offered in the individual market on the Exchange, an allocation of the rate and the expected allowed claims costs for the plan, for EHB, other than services described in § 156.280(d)(1), and any other services or benefits offered by a health plan that do not meet the definition of EHB. In § 156.470(b) we propose that an issuer of a stand-alone dental plan provide to the Exchange for approval a dollar allocation of the expected premium for the plan to the pediatric dental essential health benefit. In § 156.470(c) and (d), we propose that issuers ensure that the allocation described in paragraphs (a) and (b), respectively, are calculated following specific standards. Lastly, in § 156.470(e), we propose that an issuer of a metal level health plan or stand-alone dental plan offered, or proposed to be offered, in the individual market on the Exchange, submit an actuarial memorandum with a detailed description of the methods and specific bases used to perform the allocations that would be required under paragraphs (a) and (b) of that section, demonstrating that the allocations meet the standards set forth in paragraphs (c) and (d).

QHP issuers will submit these allocations and justifications through the Effective Rate Review program (Rate Increase Disclosure and Review Rule, 76 FR 29964). The Rate Increase Disclosure and Review Rule develops a process to ensure the public disclosure of all information and justifications relating to unreasonable rate increases. To that end, the regulation establishes various reporting requirements for health insurance issuers, including a Preliminary Justification for a proposed rate increase, a Final Justification for any rate increase determined by a State or HHS to be unreasonable, and a notification requirement for unreasonable rate increases that will not be implemented. The Preliminary Justification includes data supporting the potential rate increase as well as a written explanation of the rate increase. For those rates HHS will be reviewing, issuers' submissions also will include data and information that HHS will need to make a valid actuarial determination regarding whether a rate increase is unreasonable. Therefore, there will be no additional burden on QHP issuers that submit their rates through the Effective Rate Review program. The burden for the Effective Rate Review submission is already accounted for in OMB Control Number 0938–1141. We are additionally revising the supporting statement of the PRA approved under OMB Control Number 0938–1141 to clarify that we will be collecting this allocation information from metal plans to be offered on an Exchange, whether they are new or existing.

This requirement will result in additional burden for stand-alone dental plans. We estimate that it will take each stand-alone dental plan 5 hours to prepare and submit this information to the Exchange. We assume that this requirement will require 3 hours of labor by an insurance analyst (at an

hourly wage rate of $38.49) and 2 hours of labor by an actuary (at an hourly wage rate of $56.89). Assuming 20 stand-alone dental plans across the market, we estimate an aggregate burden of approximately $4,585 for all stand-alone dental plans to submit these allocations and justifications to the Exchange. We plan to revise the supporting statement published under HHS form number 10433, which is pending final OMB approval, to account for this additional burden.

L. ICRs Regarding Medical Loss Ratio Reporting (§ 158.130, § 158.140, § 158.162, § 158.221, § 158.240)

This proposed rule would direct issuers to include all payments and receipt amounts related to the reinsurance, risk corridors and risk adjustment programs in the annual MLR report.

The existing information collection requirement is approved under OMB Control Number 0938–1164. This includes the annual reporting form that is currently used by issuers to submit MLR information to HHS. Prior to the deadline for the submission of the annual MLR report for the 2014 MLR reporting year, and in accordance with the PRA, HHS plans to solicit public comment and seek OMB approval for an updated annual form that will include reporting of the premium stabilization payments and will reflect the changes in deduction for community benefit expenditures for federal income tax exempt not-for-profit issuers.

TABLE 18—ESTIMATED FISCAL YEAR REPORTING RECORDKEEPING AND COST BURDENS

Regulation sections	OMB Control No./CMS Form No.	Respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting [52] ($)	Total labor cost ($)	Total capital/ maintenance costs ($)	Total cost ($)
§ 153.405	0938–NEW	2,000	2,000	1.00	2,000	55.00	110,000	0	110,000
§ 153.420	0938–1155	1,800	9,000,000,000	0.001	9,828,000	59.39	583,680,000	6,000,000	589,680,000
§ 153.630(b)	0938–1155	1,800	540,000	1.67	900,000	90.00	81,000,000	0	81,000,000
§ 155.1030(a)	0938–NEW/CMS–10433.	51	51	3.50	179	51.62	9,240	0	9,240
§ 155.1030(b)(2)	0938–NEW/CMS–10433.	20	20	0.50	10	38.49	385	0	385
§ 155.1030(b)(3)	0938–NEW/CMS–10433.	51	51	0.08	4.1	38.49	158	0	158
§ 156.420	0938–NEW/CMS–10433.	1,200	13,200	1.50	19,800	52.51	1,039,698	0	1,039,698
§ 156.430(a)(2)	0938–NEW/CMS–10433.	1,200	4,800	1.00	4,800	47.69	228,912	0	228,912
§ 156.460(a)(2)	0938–NEW	1,200	1,200	0.08	96	38.49	3,695	0	3,695
§ 156.470	0938–NEW/CMS–10433.	20	20	5	100	45.85	4,585	0	4,585
Total		3,271					666,076,673	6,000,000	672,076,673

V. 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.

VI. Regulatory Impact Analysis

A. Statement of Need

This proposed rule implements standards related to premium stabilization programs (reinsurance, risk adjustment, and risk corridors), consistent with the Affordable Care Act. The purpose of these three programs is to protect issuers from the negative effects of adverse selection and to protect consumers from increases in premiums due to issuer uncertainty. The Premium Stabilization Rule provided that further details on the implementation of these programs, including the specific parameters applicable to these programs, would be forthcoming in this proposed rule. This proposed rule also includes provisions governing the cost-sharing reductions program, the advance payment of the premium tax credit program, the medical loss ratio program, the SHOP Exchange, and user fees for Federally-facilitated Exchanges.

B. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 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. A regulatory impact analysis (RIA) must be prepared for rules with economically significant effects ($100 million or more in any 1 year).

OMB has determined that this Payment Notice is ''economically significant'' within the meaning of section 3(f)(1) of Executive Order 12866, because it is likely to have an annual effect of $100 million in any one year. Accordingly, we have prepared an RIA that presents the costs and benefits of this proposed rule.

It is difficult to discuss the wide-ranging effects of these provisions in isolation, though the overarching goal of the premium stabilization and Exchange-related provisions and policies in the Affordable Care Act is to

[52] Bureau of Labor Statistics, U.S. Department of Labor, *National Compensation Survey: Occupational Earnings in the United States, 2011.* United States Government Printing Office. May 2011. Retrieved from *http://www.bls.gov/ncs/ncswage2010.htm.*

make affordable health insurance available to individuals who do not have access to affordable employer-sponsored coverage. The provisions within this proposed rule are integral to the goal of expanding coverage. For example, the premium stabilization programs (risk adjustment, reinsurance, and risk corridors) decrease the risk of financial loss that health insurance issuers might otherwise expect in 2014 and the cost-sharing reductions program and advanced payments of the premium tax credit assist low- and moderate-income consumers in purchasing health insurance. The combined impacts of these provisions affect the private sector, issuers, and customers, through increased access to health care services including preventive services, decreased uncompensated care, lower premiums, and increased plan (and thereby cost) transparency. Through the reduction of financial uncertainty for issuers and increased affordability for consumers, the provisions are expected to increase access to health coverage.

Recent research [53] analyzed the effects of increased insurance coverage. The analysis studied the health effects of expanded Medicaid eligibility in three States (New York, Maine, and Arizona) with comparable States that did not expand Medicaid over a multiyear time period. The study found that increased coverage resulted in:

- Significant reduction in mortality (19.6 deaths per 100,000);
- Increased rate of self-reported health status (by three percent); and
- Reduction in cost-related delays in care (by 21 percent).

While these results may not be entirely generalizable given the population and coverage type, they do replicate other research findings [54] of the importance of health coverage in improving health and reducing mortality.

There are administrative costs to States to set up and administer these programs. For issuers not receiving payments, any contribution is an additional cost, which an issuer could pass on to beneficiaries through premium increases. There are also reporting costs for issuers to submit data and financial information. This RIA discusses in detail the benefits and costs of the provisions in this proposed rule.

In this RIA, we discuss programs and requirements newly implemented by the proposed rule, such as certain provisions related to the cost-sharing reductions program, the advance payment of the premium tax credit program, the medical loss ratio program, the SHOP Exchange, and user fees for a Federally-facilitated Exchange, as well as new regulatory provisions for the three premium stabilization programs (reinsurance, risk adjustment, and risk corridors) which had been introduced as part of the Premium Stabilization Rule (77 FR 17220). In addition to building on the RIA for that earlier rule, we are able, for the analysis of much of the proposed rule, to use the Congressional Budget Office's estimates of the Affordable Care Act's impact on federal spending, revenue collection, and insurance enrollment.

C. Impact Estimates of the Payment Notice Provisions and Accounting Table

In accordance with OMB Circular A–4, Table 19 below depicts an accounting statement summarizing HHS' assessment of the benefits, costs, and transfers associated with this regulatory action.

This proposed rule implements standards for programs that will have numerous effects, including providing consumers with affordable health insurance coverage, reducing the impact of adverse selection, and stabilizing premiums in the individual and small group health insurance markets and in an Exchange. We are unable to quantify benefits of the proposed rule—such as improved health and longevity due to increased insurance enrollment—and some costs—such as the cost to society of providing additional medical services to newly-enrolled individuals. Direct costs in the table below reflect administrative costs to States, health insurance issuers, and Exchanges. The effects in Table 19 reflect estimated cost-sharing reduction payments, which are transfers from the General Fund of the U.S. Treasury to consumers who qualify for cost-sharing reductions. These transfer estimates are based on the Congressional Budget Office's March 2012 baseline estimates, and have been annualized over the 5 year period from FYs 2013–2017. Estimated transfers do not yet reflect any user fees paid by insurance issuers for the Federally-facilitated Exchange because we cannot estimate those fee totals until the number of States operating an Exchange is determined.

TABLE 19—ACCOUNTING TABLE

Category	Estimates	Units		
		Year dollar	Discount rate (%)	Period covered
Benefits				
Annualized Monetized ($millions/year)	Not Estimated Not Estimated			
Costs				
Annualized Monetized ($millions/year)	$518.85 $529.56	2013 2013	7 3	2013–2017 2013–2017
Transfers				
Federal Annualized Monetized ($millions/year)	$6,513.85 $6,787.26	2013 2013	7 3	2013–2017 2013–2017

[53] Sommers, Ben et al. ''Mortality and Access to Care among Adults after State Medicaid Expansions'' New England Journal of Medicine. No: 367 20121025–1034.

[54] Finkelstein, A. et al. ''The Oregon Health Insurance Experiment: Evidence from the First Year.'' NBER Working Paper No. 17190, July 2011.

This impact analysis for the premium stabilization programs references estimates from CBO and CMS. CBO's estimates remain the most comprehensive accounting of all the interacting provisions pertaining to the Affordable Care Act, and contain Federal budget impact estimates of some provisions that have not been independently estimated by CMS. Based on our review, we expect that the provisions of this proposed rule will not significantly alter CBO's estimates of the budget impact of the reinsurance, risk corridors, and risk adjustment programs. The requirements of these programs are well within the parameters used in the modeling of the Affordable Care Act. Our review and analysis of the requirements indicate that the impacts are likely within the model's margin of error.

For this RIA, we are updating the estimates for the reinsurance and risk adjustment programs to reflect the five-year period from fiscal years (FYs) 2013 through 2017. Table 20 includes the CBO estimates for outlays and receipts for the reinsurance and risk adjustment programs from FYs 2013 through 2017. These estimates for reinsurance and risk adjustment reflect CBO's scoring of these provisions. Unlike the current policy, CBO assumed risk adjustment payments and charges would begin to be made in 2014, when in fact these payments and charges will begin in 2015 as discussed above. Additionally, the CBO estimates do not reflect the $5 billion in reinsurance contributions that are submitted to the U.S. Treasury. There are no outlays and receipts for reinsurance and risk adjustment in 2013 because the provisions do not take effect until 2014.

CBO did not separately estimate the program costs of risk corridors, but assumed aggregate collections from some issuers would offset payments made to other issuers. Table 20 summarizes the effects of the risk adjustment and reinsurance programs on the Federal budget, with the additional, societal effects of this proposed rule discussed in this Regulatory Impact Analysis.

TABLE 20—ESTIMATED FEDERAL GOVERNMENT OUTLAYS AND RECEIPTS FOR THE REINSURANCE AND RISK ADJUSTMENT PROGRAMS FROM FYS 2013–2017, IN BILLIONS OF DOLLARS

Year	2013	2014	2015	2016	2017	2013–2017
Reinsurance and Risk Adjustment Program Payments *	.....	11	18	18	18	65
Reinsurance and Risk Adjustment Program Receipts * ..	.....	12	16	18	18	64

* Risk adjustment program payments and receipts lag by one quarter. Receipt will fully offset payments over time.
Source: Congressional Budget Office. 2011. *Letter to Hon. Nancy Pelosi.* March 20, 2010.

Risk Adjustment

Risk adjustment is a permanent program administrable by States that operate an HHS-approved Exchange, with risk adjustment criteria and methods established by HHS, with States having the option of proposing alternative methodologies. Risk adjustment is generally applied to non-grandfathered health plans offered in the individual and small group markets, both inside and outside of the Exchange. A State that does not operate an Exchange cannot operate risk adjustment, although a State operating an Exchange can elect not to run risk adjustment. For States that do not operate an Exchange, do not elect to operate risk adjustment, or do not obtain HHS approval to operate risk adjustment, HHS will administer the risk adjustment functions on the State's behalf.

The Exchange may operate risk adjustment, although a State may also elect to have an entity other than the Exchange perform the risk adjustment functions, provided that the State is approved by HHS to operate risk adjustment. Similar to the approach for reinsurance, multiple States may contract with a single entity to administer risk adjustment, provided that risk is pooled at the State level and that each State is approved to operate their risk adjustment program. Having a single entity administer risk adjustment in multiple States may provide administrative efficiencies. In this proposed rule, we propose to establish a risk adjustment State approval process. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule.

The details of the HHS-developed risk adjustment methodology are specified in this proposed rule. The HHS-developed risk adjustment methodology is based on a model that is concurrent and uses demographic and diagnosis information in a benefit year to predict total plan liability in the benefit year. The national payment transfer methodology is based on the State average premium to ensure that payments and charges net to zero.

States may use this methodology or develop and propose alternate risk adjustment methodologies that meet Federal standards. Once HHS approves an alternate risk adjustment methodology, it will be considered a Federally certified risk adjustment methodology that any State may elect to use. In this proposed rule, we lay out the criteria that HHS will use to evaluate alternate risk adjustment methodologies. Approved Federally certified risk adjustment methodologies will be published in the final HHS notice of benefit and payment parameters.

States that elect to develop their own risk adjustment methodologies are likely to have increased administrative costs. Developing a risk adjustment methodology requires complex data analysis, including population simulation, predictive modeling, and model calibration. States that elect to use the HHS developed methodology would likely reduce administrative costs. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule.

In the Premium Stabilization Rule, we defined a risk adjustment covered plan as any health insurance coverage offered in the individual or small group market with the exception of grandfathered health plans, group health insurance coverage described in § 146.145(c) of this subchapter, individual health insurance coverage described in § 148.220 of this subchapter, and any other plan determined not to be a risk adjustment covered plan in the annual HHS notice of benefit and payment parameters. In this proposed rule, we clarify that plans not subject to certain market reforms and student health plans will not be subject to the issuer requirements in subparts G and H of 45 CFR part 153.

States have the flexibility to merge the individual and small group markets into one risk pool, or keep them separate for the purposes of risk adjustment. Risk adjustment must be conducted separately in unmerged markets. Developing the technology infrastructure required for data

submission will likely require an administrative investment. The risk adjustment process will require significant amounts of demographic and diagnostic data to run through a risk assessment model to determine individual risk scores that form the basis for plan and State averages. The Premium Stabilization Rule requires States to collect or calculate individual risk scores at a minimum. States may vary the amount and type of data collected, provided that States meet specified data collection standards.

Administrative costs will vary across States and health insurance issuers depending on the type of data collection approach used in the State. In States opting to operate risk adjustment using a distributed model of data collection, the costs associated with mapping and storing the required data and, in some cases, the costs associated with running the risk adjustment software will likely be borne by the issuer.

States and issuers that already have systems in place for data collection and reporting will have reduced administrative costs. For example, issuers that already report data for Medicare Advantage (MA) or Medicaid Managed Care may see minimal additional administrative burden for risk adjustment. Additionally, some States risk-adjust their Medicaid Managed Care programs. States with all-payer or multi-payer claims databases may need to modify their systems to meet the requirements of risk adjustment. However, these costs of modification will be less than the costs of establishing these systems. States and issuers that do not have existing technical capabilities will have larger administrative costs related to developing necessary infrastructure.

Issuer characteristics, such as size and payment methodology, will also affect administrative costs. In general, national issuers will likely be better prepared for the requirements of risk adjustment than small issuers. Additionally, administrative costs may be greater for issuers whose providers are paid by capitation and who do not receive claims or encounter data, as they will have to modify their systems to account for the information required for risk adjustment methodology.

In this proposed rule, we provide more details on the data collection approach when we operate risk adjustment on behalf of a State. The Premium Stabilization Rule established that when HHS operates risk adjustment on behalf of a State, it will use a distributed approach. We believe that this approach minimizes issuer burden while protecting enrollee privacy. Under a distributed approach, issuers will need to format risk adjustment data, and maintain that data in compliance with HHS-established guidelines and applicable standards. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule.

The Premium Stabilization Rule directs States to audit a sample of data from each issuer and to ensure proper implementation of risk adjustment software by all issuers that participate in risk adjustment. States may extrapolate results from the sample to adjust the average actuarial risk for the plan. This approach is consistent with the approach now used in Medicare Advantage, where audit sample error rates will be extrapolated to contract-level payments to recoup overpayment amounts.

In this proposed rule, we propose data validation standards for when HHS operates risk adjustment on behalf of a State. We are proposing that HHS conduct a data validation program consisting of six stages: (1) Sample selection; (2) initial validation audit; (3) second validation audit; (4) error estimation; (5) appeals; and (6) payment adjustments. Issuers would engage independent initial auditors to conduct an initial audit of an HHS-selected sample of risk adjustment data. HHS would retain a second validation auditor to verify the findings of the initial validation audit and provide error estimates. However, in this proposed rule we propose that there be no adjustments to payments and charges based on the error estimates for benefit years 2014 and 2015. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule. We are also proposing a process to appeal data validation findings. Issuers will have an opportunity to appeal findings from both the initial validation audit and second validation audit.

Risk adjustment transfers dollars from health plans with lower-risk enrollees to health plans with higher-risk enrollees. From 2014 through 2016, it is estimated that $27 billion will be transferred between issuers. We are updating the cost estimates for this RIA to include 2017, using CBO estimates.[55] From 2014 through 2017, we estimate that there will be $45 billion transferred between issuers.

Risk adjustment protects against adverse selection by allowing insurers to set premiums according to the average actuarial risk in the individual and small group market without respect to the type of risk selection the insurer would otherwise expect to experience with a specific product offering in the market. This should lower the risk premium and allow issuers to price their products closer to the average actuarial risk in the market. In addition, it mitigates the incentive for health plans to avoid unhealthy members.

The risk adjustment program also serves to level the playing field inside and outside of the Exchange, as payments and charges are applied to all non-grandfathered individual and small group plans. This mitigates the potential for excessive premium growth within the Exchange due to anticipated adverse selection.

Reinsurance

The Affordable Care Act creates a transitional reinsurance program for the years 2014, 2015, and 2016. Each State is eligible to establish a reinsurance program. If a State establishes a reinsurance program, the State must enter into a contract with an applicable reinsurance entity to carry out the program. If a State does not elect to establish its own reinsurance program, HHS will carry out the reinsurance program for that State.

The Affordable Care Act requires a reinsurance pool of $10 billion in 2014, $6 billion in 2015, and $4 billion in 2016. It also requires annual contributions to the U.S. Treasury of $2 billion, $2 billion, and $1 billion for those years, respectively. These contributions are funded by health insurance issuers and third party administrators on behalf of self-insured group health plans. Section 1341(b)(3) of the Affordable Care Act directs the Secretary of HHS to establish the method for determining contribution levels for the program. HHS proposes to establish a national per capita contribution rate designed to collect the $12.02 billion in 2014 to cover the required $10 billion in reinsurance payments, the $2 billion contribution to the U.S. Treasury, and the additional $20.3 million to cover the Federal administrative expenses of operating the reinsurance program in 2014. We continue to estimate that we will collect these amounts authorized from 2014 through 2016 for the reinsurance pool, including the annual contributions to the U.S. Treasury.

HHS proposes to collect the required contributions under the national contribution rate from health insurance issuers and self-insured group health

[55] Congressional Budget Office. 2011. *Letter to Hon. Nancy Pelosi.* March 20, 2010.

plans.[56] States establishing their own reinsurance program may collect additional contributions for administrative costs and/or reinsurance payments. Section 1341(a)(3)(B) of the Affordable Care Act requires that the reinsurance contribution amount for each issuer reflect each issuers' fully insured commercial book of business for all major medical products. In this proposed rule, we clarify which types of health insurance coverage and self-insured group health plans are to make reinsurance contributions, and which are not. This clarification does not affect the amounts authorized to be collected for reinsurance.

A State that establishes a reinsurance program may elect to collect additional contributions to provide funding for administrative expenses or supplemental reinsurance payments. Additional contributions for administrative expenses may be collected by the State's applicable reinsurance entity, at the State's election. Any additional contributions for reinsurance payments must be collected by the State's applicable reinsurance entity. In this proposed rule, we propose to collect administrative expenses for HHS-operated reinsurance programs. A State that operates the reinsurance program bears the administrative costs of the applicable reinsurance entity, and must ensure that the reinsurance entity complies with program requirements. HHS will share some of its collections for administrative costs with States that run the program. If a State operates its own reinsurance program, HHS would transfer $0.055 of the per capita administrative fee to the State for purposes of administrative expenses incurred in making reinsurance payments, and retain the remaining $0.055 to offset the costs of contribution collection. A State may have more than one reinsurance entity, and two or more States may jointly enter into an agreement with the same applicable reinsurance entity to carry out reinsurance in their State. Administrative costs will likely increase if multiple reinsurance entities are established within a State, whereas administrative efficiencies may be found if multiple States contract with one applicable reinsurance entity.

We propose in this proposed rule an annual collections and payment cycle. We also considered a quarterly collections and payment cycle, as envisioned by the Premium Stabilization Rule. However, a quarterly cycle would impose significant costs on contributing entities. Because HHS and States operating reinsurance would likely need to hold back a significant portion of reinsurance funds until the end of the year to ensure equitable payment of requests for reinsurance payments. We believe that issuers would receive only limited benefits from a quarterly payment cycle.

In § 153.100(a), a State is required to issue an annual notice of benefit and payment parameters specific to that State if it elects to: (i) Modify the data requirements from the HHS-operated reinsurance program; (ii) collect additional reinsurance contributions, under § 153.220(d); or (iii) use more than one applicable reinsurance entity.

States that establish a reinsurance program will also maintain any records associated with the reinsurance program, as set forth in § 153.240(c). In addition, a State will notify HHS if it intends to collect additional administrative expenses and provide justification for the additional collection. The Premium Stabilization Rule established that reinsurance contributions will be based on a per capita amount. The per capita approach would be less complex to administer in comparison to the percent of premium approach that HHS considered but ultimately decided not to pursue. Further, the per capita approach will better enable HHS to maintain the goals of the reinsurance program by providing issuers with a more straightforward approach to reinsurance contributions. States would be permitted to collect additional contributions towards supplemental reinsurance payments. We describe the administrative costs in the Collection of Information Requirements section of this proposed rule.

In this proposed rule, we establish the methodology to be used for counting covered lives for purposes of calculating reinsurance contributions. This methodology is based upon counting methods permitted under the PCORTF Rule. We believe that relying on a previously established process set forth in the PCORTF Rule for counting enrollees will minimize issuer burden for conducting these counts. In the Collection of Information Requirements section of this proposed rule, we describe the administrative costs for issuers associated with the data requirements in § 153.400(b) for all contributing entities both inside and outside the Exchange. The contributing entities would be required to provide enrollment data to HHS to substantiate contribution amounts.

Reinsurance payments will be made to issuers of individual insurance coverage for high claims costs for enrollees. In this proposed rule, we propose a national attachment point, national reinsurance cap, and national coinsurance rate. In the Premium Stabilization Rule, we established that payments will be made on a portion of claims costs for enrollees in reinsurance eligible plans incurred above an attachment point, subject to a reinsurance cap.

Use of a reinsurance cap, as well as the requirement for health insurance issuer costsharing above the attachment point and below the cap, may incentivize health insurance issuers to control costs. This approach based on claims costs is simpler to implement and more familiar to health insurance issuers, and therefore will likely result in savings in administrative costs as compared to a condition-based reinsurance approach. The program costs of reinsurance are expected to be reflected in changes to health insurance premiums.

A State operating its own reinsurance program may opt to supplement the reinsurance parameters proposed by HHS only if the State elects to collect additional contributions for supplemental reinsurance payments or use additional State funds for supplemental reinsurance payments, and must specify these supplemental payment parameters in its State notice of benefit and payment parameters.

In this proposed rule, we propose that States provide a process through which a reinsurance-eligible plan that does not generate individual enrollee claims may derive costs to request reinsurance payments. In addition, we clarify that when HHS operates a reinsurance program on behalf of a State that these plans may price encounters in accordance with its existing principal, internal encounter pricing methodology. Additionally, we propose in § 153.240(b) of this proposed rule that States operating their own reinsurance program must notify issuers of reinsurance payments to be made, as well as provide reinsurance-eligible plans an estimate of expected requests for reinsurance payments. Moreover, we propose for both State- and HHS-operated reinsurance programs, that only plans subject to the 2014 market

[56] The Department of Labor has reviewed this proposed rule and advised that paying required reinsurance contributions would constitute a permissible expense of the plan for purposes of Title I of the Employee Retirement Income Security Act (ERISA) because the payment is required by the plan under the Affordable Care Act as interpreted in this proposed rule. (See generally, Advisory Opinion 2001–01A to Mr. Carl Stoney, Jr., available at *www.dol.gov/ebsa* discussing settlor versus plan expenses.)

reform rules would be eligible for reinsurance payment.

In this proposed rule, we also provide more details on the data collection approach for HHS-operated reinsurance programs. HHS plans to use the same distributed data collection approach used for risk adjustment; however, only data elements necessary for reinsurance claim selection will be considered for the purpose of determining reinsurance payments. In the Collection of Information Requirements section, we describe the administrative costs required in § 153.410 for issuers of reinsurance-eligible plans in States where HHS is operating reinsurance to receive reinsurance payments. We believe details on the reinsurance data collection approach proposed in the HHS notice of benefit and payment parameters are reflected in these cost estimates.

All health insurance issuers contribute to the reinsurance pool, because successful implementation of the range of reforms in 2014 benefit all of their enrollees (for example, those reforms should lead to fewer unreimbursed health costs, lowering the costs for all issuers and group health plans) while only health insurance issuers with plans in the individual market are eligible to receive payments. This serves to stabilize premiums in the individual market while having a minimal impact on large group issuers and plans. Reinsurance will attenuate individual market rate increases that might otherwise occur because of the immediate enrollment of higher risk individuals, potentially including those currently in State high-risk pools. It will also help prevent insurers from building in risk premiums to their rates given the unknown health of their new enrollees. It is expected that the cost of reinsurance *contributions* will be roughly equal to one percent of premiums in the total market in 2014, less in 2015 and 2016, and will end in 2017. In contrast, it is anticipated that reinsurance *payments* will result in premium decreases in the individual market of between 10 and 15 percent.

Evidence from the Healthy New York (Healthy NY) program [57] supports the magnitude of these estimates. In 2001, the State of New York began operating Healthy NY and required all HMOs in the State to offer policies for which small businesses and low-income individuals would be eligible. The program contained a ''stop-loss'' reinsurance provision designed to lower premiums for enrollees. Under the program, if any enrollee incurred $30,000 in annual claims, his or her insurer was reimbursed for 90 percent of the next $70,000 in claims. Premiums for Healthy NY policies were about 15 percent to 30 percent less than those for comparable HMO policies in the small group market.

Medical Loss Ratio

This proposed rule proposes to amend the MLR and rebate calculation methodologies to include payments and receipts related to the premium stabilization programs. The definition of premium revenue would be modified to account for these payments and receipts. When the MLR annual reporting form is updated for the reporting year 2014 and later, premium stabilization payment and receipt amounts would be considered a part of gross earned premium reported to the Secretary, similar to other elements involved in the derivation of earned premium. The MLR annual reporting form would then account for premium stabilization payment and receipt amounts by removing them from adjusted earned premium, so that these amounts do not have a net impact on the adjusted earned premium used in calculating the MLR denominator and rebates. Additionally, this proposed rule proposes to amend the MLR calculation methodology to add or subtract premium stabilization payment(s) and receipt amounts in the MLR numerator, consistent with the way the statute prescribes the calculation methodology for risk corridors. These adjustments will reduce or increase issuers' MLRs, and may increase or reduce issuers' rebates, respectively. The amended methodology will result in a more accurate calculation of MLR and rebate amounts, since it will reflect issuers' actual claims-related expenditures. This approach will also support the effectiveness of both the MLR and the premium stabilization programs by correctly offsetting the premium stabilization payment and receipt amounts against rebates, consistently with the risk corridors calculation methodology adopted in § 153.530.

Based on HHS's experience with the 2011 MLR reporting year, there are 466 health insurance issuers [58] offering coverage in the individual and group markets to almost 80 million enrollees that will be affected by the proposed amendment to account for premium stabilization payments in MLR and rebate calculations. In 2012, an estimated 54 issuers paid $396 million in rebates for the 2011 MLR reporting year to approximately 4 million enrollees in the individual markets, while 59 issuers in the small group market provided approximately $289 million in rebates to policyholders and subscribers on behalf of over 3 million enrollees, and 47 issuers in the large group market provided approximately $403 million in rebates to policyholders and subscribers on behalf of almost 6 million enrollees. Lack of data makes it difficult to predict how high-risk enrollees will be distributed among issuers and, therefore, how MLRs and total rebates would be affected. Issuers with relatively low-risk enrollees are likely to have positive net premium stabilization payments (that is, payments would be greater than receipts) and, if so, their MLRs will increase as a result of the amended MLR calculation methodology. If any of these issuers fail to meet the MLR standard, taking the premium stabilization payments and receipts into account in the MLR calculations will result in lower rebate payments. Issuers with relatively high-risk enrollees are likely to have positive net receipts (that is, receipts would be greater than payments) and, if so, their MLRs would decrease as a result. If any such issuer fails to meet the MLR standard, its rebate amount will increase. Since such issuers are likely to have high claims expenditures and therefore, high MLRs, they would be less likely to owe rebates. So we do not anticipate that rebates will go up for such issuers.

The Payment Notice proposes to also change the deadlines for MLR report submission and rebate payments so that the deadlines occur after all the premium stabilization payment and receipt amounts are determined. The change in the deadlines will allow issuers to calculate the MLR and rebate amounts based on actual calculated payments and receipts rather than estimated amounts and will improve the accuracy of the rebate payments and reports. This will also reinforce the effectiveness of the premium stabilization programs, since issuers are less likely to pay higher or lower rebates based on inaccurate payment and receipt estimations. Accordingly, we propose to change the date of MLR reporting to the Secretary from June 1 to July 31, and the rebate due date from August 1 to September 30.

Issuers will also have to report their payments and receipts related to the premium stabilization programs in the

[57] Swartz, K. ''Health New York: Making Insurance More Affordable for Low-Income Workers.'' *The Commonwealth Fund.* November 2001.

[58] Issuers represent companies (for example, NAIC company code). These estimates do not include issuers of plans with total annual limits of $250,000 or less (sometimes referred to as ''mini-med'' plans) or expatriate plans.

annual MLR report beginning in the 2014 MLR reporting year. Once issuers calculate these amounts, which they will be required to do regardless of the MLR reporting requirements, the administrative cost of including these amounts in the report will be minimal.

The current MLR calculation methodology allows an issuer to deduct from premiums in the calculation of an issuer's MLR and rebates either the amount it paid in State premium taxes, or the amount of its community benefit expenditures up to a maximum of the highest premium tax rate in the State, whichever is greater, as provided in the final rule with comment period (76 FR 76574) published on December 7, 2011. This proposed rule proposes to amend the MLR methodology and allow a federal income tax exempt not-for-profit issuer to deduct from premium both community benefit expenditures and State premium taxes, limited to the higher of the State's highest premium tax rate or 3 percent of premium. Other issuers would continue to use the current methodology. This would create a level playing field for Federal income tax exempt not-for-profit issuers, who are required to make community benefit expenditures to maintain their federal income tax exempt status and would not discourage community benefit expenditures. This is likely to increase the MLRs for tax exempt not-for-profit issuers. If any of these issuers fail to meet the MLR standard, then this will result in lower rebate payments.

Based on MLR annual reports submitted by issuers for the 2011 MLR reporting year, we estimate that there are 132 not-for-profit issuers that will be affected by this proposed amendment. In the absence of data on tax exempt not-for-profit issuers, we use the estimates for not-for-profit issuers in our analysis. Therefore, the actual impact is likely to be lower. For the 20 not-for-profit issuers that submitted data on community benefit expenditures, such expenditures as a percentage of earned premiums ranged from 0.04 percent to 4.11 percent with an average of 1.57 percent, which is likely to be less than the current limit for most of the issuers and is less than the proposed limit as well. We assume that issuers will maintain the level of community benefit expenditures as reported in their MLR annual reports for the 2011 MLR reporting year. We estimate that under the current policy, in the 2012 MLR reporting year, 17 not-for-profit issuers will owe approximately $182 million in rebates to approximately 1.5 million enrollees. The proposed change in treatment of community benefit expenditures for such issuers will have minimal effect on their MLRs and rebates under this assumption, since their current expenditures are below the current deduction limits.

Issuers with lower rebate payments as a result of these adjustments would need to send fewer rebate notices, and therefore, would have lower administrative costs related to rebates and rebate notices.

Risk Corridors

The Affordable Care Act creates a temporary risk corridors program for the years 2014, 2015, and 2016 that applies to QHPs. The risk corridors program creates a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers. The Affordable Care Act establishes the risk corridors program as a Federal program; consequently, HHS will operate the risk corridors program under Federal rules with no State variation. The risk corridors program will help protect against inaccurate rate setting in the early years of the Exchanges by limiting the extent of issuer losses and gains.

QHP issuers must submit to HHS data on premiums earned, allowable claims and quality costs, and allowable administrative costs, reflecting data categories required under the Medical Loss Ratio Interim Final Rule (75 FR 74918). In designing the program, HHS has sought to leverage existing data reporting for Medical Loss Ratio purposes as much as possible.

As noted above, the risk corridors program is intended to protect QHP issuers in the individual and small group market against inaccurate rate setting. Due to uncertainty about the population during the first years of Exchange operation, issuers may not be able to predict their risk accurately, and their premiums may reflect costs that are ultimately lower or higher than predicted. To determine whether an issuer pays into, or receives payments from, the risk corridors program, HHS will compare allowable costs (essentially, claims costs) and the target amount—the difference between a plan's earned premiums and allowable administrative costs. In this proposed rule, we have provided for adjustments to the risk corridors calculation to account for taxes and profits within its allowable administrative costs. The threshold for risk corridor payments and charges is reached when a QHP issuer's allowable costs exceed, or fall short of, the target amount by at least three percent. A QHP with allowable costs that are at least three percent less than its target amount will pay into the risk corridors program. Conversely, HHS will pay a QHP with allowable costs that exceed its target amount by at least 3 percent. Risk corridor payments and charges are a percentage of the difference between allowable costs and target amount and therefore are not on a ''first dollar'' basis.

In this proposed rule, HHS also specified the annual schedule for the risk corridors program, including dates for claims run-out, data submission, and notification of risk corridors payments and charges.

We believe the proposals on the risk corridors program in this proposed rule have a negligible effect on the impact of the program established by and described in the Premium Stabilization Rule.

Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

The impact analysis for Payment Notice provisions relating to advance payments of the premium tax credit and cost-sharing reductions references estimates from the CBO's March 2012 baseline projections. Based on our review, we expect that those proposed provisions will not alter CBO's March 2012 baseline estimates of the budget impact of those two programs. The requirements are well within the parameters used in the modeling of the Affordable Care Act. Our review and analysis of the requirements indicate that the impacts are likely within the model's margin of error. The Affordable Care Act provides for premium tax credits and the reduction or elimination of cost sharing for certain individuals enrolled in QHPs offered through the Exchanges. This assistance will help many low- and moderate-income individuals and families obtain health insurance—for many people, cost sharing is a barrier to obtaining needed health care.[59]

Section 1402(a)–(c) of the Affordable Care Act directs issuers to reduce cost sharing for essential health benefits for individuals with household incomes between 100 and 400 percent of the FPL who are enrolled in a QHP offered at the silver level of coverage in the individual market on the Exchange and are eligible for a premium tax credit or advance payment of premium tax credits. The Affordable Care Act, at section 1402(d), also directs issuers to eliminate cost sharing for Indians (as defined in § 155.300) with a household income at or below 300 percent of the FPL who are enrolled in a QHP of any metal level in the individual market on the Exchange, and prohibits issuers from requiring cost sharing for Indians, regardless of household income, for items or services

[59] Brook, et al., at footnote 5 above.

furnished directly by the IHS, an Indian Tribe, a Tribal Organization, or an Urban Indian Organization or through referral under contracted health services. Finally, the Affordable Care Act, at section 1412, provides for the advance payments of the premium tax credit and cost-sharing reductions.

A subset of the persons who enroll in QHPs in the individual market through the Exchanges beginning in 2014 will be affected by the provisions relating to advance payments of premium tax credit and cost-sharing reductions (those with household incomes below 400 percent of the FPL and Indians enrolled in QHPs). In March 2012, CBO estimated that there will be approximately 20 million enrollees in Exchange coverage by 2016, including approximately 16 million Exchange enrollees who will be receiving subsidies.[60] Participation rates among potential enrollees are expected to be lower in the first few years of Exchange availability as employers and individuals adjust to the features of the Exchanges.[3]

In this proposed rule, we provide additional details for Exchanges and issuers on the administration of advance payments of premium tax credit and cost-sharing reductions for individuals and families. We clarify the approach to providing for cost-sharing reductions to individuals who purchase a family policy. We also propose standards applicable to Exchanges when setting effective dates for changes in eligibility, collecting premiums from enrollees, and administering advance payments of cost-sharing reductions and the premium tax credit. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule.

Finally, we direct QHP issuers to enroll individuals in the plan variation with the correct cost-sharing structure, and to provide those individuals with the cost-sharing reductions for which they are eligible. QHP issuers are responsible for submitting plan variations containing the cost-sharing structures proposed by HHS as required by the Affordable Care Act. We also clarify which plans are eligible for cost-sharing reductions, and we propose standards relating to advance payments of cost-sharing reductions and reconciliation of those advance payments against actual cost-sharing reduction provided. In addition, we propose that QHP issuers reduce an enrollee's share of premium to account for advance payments of the premium tax credit, and submit allocations of rates and claims costs to allow for the calculation of advance payments of cost-sharing reductions and the premium tax credit. We describe these administrative costs in the Collection of Information Requirements section of this proposed rule.

The cost-sharing reduction and advance payment of the premium tax credit policies will apply to all issuers that choose to seek certification to offer QHPs through the Exchanges for the individual market. QHP issuers will experience costs related to preparing and submitting to HHS data to support the administration of cost-sharing reductions. We anticipate that the provisions for advance payments of the premium tax credit and cost-sharing reductions will result in transfers from the General Fund of the Treasury to people receiving cost-sharing reductions and advance payments of the premium tax credit.

User Fees

To support certain Federal operations of Federally-facilitated Exchanges, we propose in this proposed rule, under section 1311(d)(5)(A) of the Affordable Care and 31 U.S.C. 9701, that a participating issuer offering a plan through a Federally-facilitated Exchange remit a user fee to HHS each month equal to the product of the billable members (that is, members that count towards the premium) enrolled in the QHP offered by the issuer in the Exchange, and the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year. In this proposed rule we set forth our intention to have the Federally-facilitated Exchange user fee generally reflect the user fee in place by State-based Exchanges in 2014. For the 2014 benefit year, we propose a monthly user fee rate equal to 3.5 percent of the monthly premium charged by the issuer for a particular policy under the QHP. Because we seek to align this rate with rates charged by State-based Exchanges, we may adjust this rate to conform with State-based Exchange rates in the final Payment Notice. We do not have an aggregate estimate of the collections from the user fee at this time because we do not yet have a count of the number of States in which HHS will run a Federally-facilitated Exchange. We anticipate that this user fee collection will be sufficient to cover the majority of costs related to the operation of Federally-facilitated Exchanges and maintain balance within the market.

SHOP

The Small Business Health Options Program (SHOP) facilitates the enrollment of small businesses into small group health insurance plans. A qualitative analysis of the costs and benefits of establishing a SHOP was included in the RIA published in conjunction with the Exchange Establishment Rule.[61] This Impact Analysis addresses the additional costs and benefits of the proposed modifications in this proposed rule to the SHOP sections of the Exchange Final Rule.

In this proposed rule, we propose to implement policies for FF–SHOPs designed to prevent significant adverse selection while promoting robust plan choice for employees. These policies include methods a qualified employer may use to make QHPs available to its employees, rules to ensure parity with a market's group participation requirements, rules to permit the display of agent and broker information on FF–SHOP Web sites, alignment of market definitions with other applicable rules, and incentives for issuers to participate in FF–SHOPs. Many of these proposed policies are expected to create no significant new costs.

The Affordable Care Act permits a qualified employer participating in a SHOP to select a metal level of coverage and make all plans in that level of coverage available to its employees. This represents an increase in plan choice over what many employees of small employers have today. Limiting this choice to a single level of coverage reduces potential adverse selection within the group and therefore any additional cost due to expanded choice. In the Exchange Establishment Rule, we did not quantify either the small risk premium or the modest additional consumer benefit resulting from employee choice at a single level of coverage. We seek comment on both limiting employee choice to prevent adverse selection and allowing for choice across two rather than one metal level.

The Exchange Final Rule permits a SHOP to set a minimum participation rate; such authority is limited to the extent the minimum participation rate is permissible under the PHS Act and applicable State law. Minimum participation rates require participation in the health plan by a substantial portion of the employer's group, thereby

[60] ''Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act,'' Congressional Budget Office, March 2012.

[3] Congressional Budget Office, ''Letter to the Honorable Evan Bayh: An Analysis of Health Insurance Premiums under the Patient Protection and Affordable Care Act,'' Washington, DC, 2009.

[61] Available at: *http://cciio.cms.gov/resources/files/Files2/03162012/hie3r-ria-032012.pdf.*

assuring a more representative risk pool and reducing adverse selection. Setting a minimum participation rate that is too low would make it ineffective, while setting it too high would reduce the number of employers offering coverage. This proposed rule proposes, subject to permissibility under the PHS Act, that FF–SHOPs use a default participation rate of 70 percent that may be modified if there is evidence that a higher or lower rate is either customary in the State or required by State statute. Because this policy results in no change in market dynamics, it places no additional costs on employers or issuers.

This proposed rule proposes new incentives for some health insurance issuers to participate in the FF–SHOP. Health insurance issuers that offer coverage in both the individual and small group markets and wish to sell QHPs in an FFE must also offer QHPs in an FF–SHOP. This policy promotes robust issuer participation in the FF–SHOP which will help small employers offer their employees a broad choice of health plan.

The benefits of broad plan choice are quite significant. One study suggests expanding plan choice while holding premiums constant for employees results in a median increase in consumer surplus by 20 percent of the premium cost of coverage.[62] Some of this benefit is due to expanded choice in plan type and health insurance issuer. There are two costs associated with this policy. The first is the cost for the QHP issuer of submitting plans for certification in the FF–SHOP, which is described in the 30-day **Federal Register** Notice for the Initial Plan Data Collection published on November 21, 2012 (77 FR 69846). The second is the cost of additional user fees QHP issuers must pay for participating in the FF–SHOP.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires agencies to prepare an initial regulatory flexibility analysis to describe the impact of the final rule on small entities, unless the head of the agency can certify that the rule will not have a significant economic impact on a substantial number of small entities. The RFA generally defines a ''small entity'' as (1) A proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of ''small entity.'' HHS uses a change in revenues of more than three to five percent as its measure of significant economic impact on a substantial number of small entities.

This proposed rule contains proposed rules for premium stabilization programs required of health plan issuers including the risk adjustment program as well as the transitional reinsurance program and temporary risk corridors programs. Because we believe that few insurance firms offering comprehensive health insurance policies fall below the size thresholds for ''small entities'' established by the SBA, we do not believe that an initial regulatory flexibility analysis is required with respect to such firms.

For purposes of the RFA, we expect the following types of entities to be affected by this proposed rule: (1) Health insurance issuers; (2) health insurance plan sponsors; (3) reinsurance entities; (4) risk adjustment entities; and (5) third-party administrators. We believe that health insurance issuers and plan sponsors would be classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers); reinsurance entities, risk adjustment entities and third party administrators would be classified under NAICS codes 524130 (Reinsurance Carriers), 524298 (Actuarial Services) and 524292 (Third Party Administration of Insurance). According to SBA size standards, entities with average annual receipts of $7 million or less would be considered small entities for these NAICS codes. Issuers could possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be $10 million or less.

Based on data from Medical Loss Ratio annual report submissions for the 2011 MLR reporting year, there are 22 small entities (companies), each with less than $7 million in earned premiums, that offer individual or group health insurance coverage and would therefore be subject to the provisions related to MLR. These small entities account for less than 5 percent of the estimated 466 issuers that would be affected by the provisions of this rule. Thirty six percent of these small issuers belong to holding groups, and many if not all of these small issuers are likely to have other lines of business that would result in their revenues exceeding $7 million.

In this proposed rule, we propose requirements on employers that choose to participate in a SHOP Exchange. As discussed above, the SHOP is limited by statute to employers with at least one but not more than 100 employees. For this reason, we expect that many employers would meet the SBA standard for small entities. We do not believe that the regulation imposes requirements on employers offering health insurance through SHOP that are more restrictive than the current requirements on small employers offering ESI. For example, we propose to generally match existing minimum participation rates in the outside market. Additionally, as discussed in the Regulatory Impact Analysis, we believe the proposed policy will provide greater choice for the employee among plans and issuers, benefitting both employer and employee and simplify the process for the employer of administering multiple health benefit plans. We believe the processes that we have established constitute the minimum amount of requirements necessary to implement statutory mandates and accomplish our policy goals, and that no appropriate regulatory alternatives could be developed to further lessen the compliance burden.

We believe that a substantial number of sponsors of self-insured group health plans could qualify as ''small entities.'' This proposed rule specifies the reinsurance contributions that would be required from third-party administrators on behalf of such entities. However, we do not believe that these contributions are likely to result in a change in revenues of more than 3 to 5 percent. We request comment on whether the small entities affected by this proposed rule have been fully identified. We also request comment and information on potential costs for these entities and on any alternatives that we should consider.

E. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2012, that threshold is approximately $139 million. Since the impact on State, local, or Tribal governments and the private sector is below the threshold, no analysis under UMRA is required.

[62] Dafny, L., Ho, K., & Varela, M. (2010). *Let them have choice: Gains from shifting away from employer-sponsored health insurance and toward an individual exchange* (No. w15687). National Bureau of Economic Research.

F. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct costs on State and local governments, pre-empts State law, or otherwise has Federalism implications. Because States have flexibility in designing their Exchange and Exchange-related programs, State decisions will ultimately influence both administrative expenses and overall premiums. States are not required to establish an Exchange. For States electing to operate an Exchange, risk adjustment and reinsurance, much of the initial cost of creating Exchanges and Exchange-related programs will be funded by Exchange Planning and Establishment Grants. After establishment, Exchanges will be financially self-sustaining, with revenue sources at the discretion of the State. Current State Exchanges charge user fees to issuers.

In HHS's view, while this proposed rule does not impose substantial direct requirement costs on State and local governments, this regulation has Federalism implications due to direct effects on the distribution of power and responsibilities among the State and Federal governments relating to determining standards relating to health insurance that is offered in the individual and small group markets. Each State electing to establish an Exchange must adopt the Federal standards contained in the Affordable Care Act and in this Payment Notice, or have in effect a State law or regulation that implements these Federal standards. However, HHS anticipates that the Federalism implications (if any) are substantially mitigated because under the statute, States have choices regarding the structure and governance of their Exchanges. Additionally, the Affordable Care Act does not require States to establish an Exchange; if a State elects not to establish an Exchange or the State's Exchange is not approved, HHS, either directly, or through agreement with a non-profit entity, must establish and operate an Exchange in that State.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have Federalism implications or limit the policy making discretion of the States, HHS has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners, and consulting with State insurance officials on an individual basis.

Throughout the process of developing this proposed rule, HHS has attempted to balance the States' interests in regulating health insurance issuers, and Congress' intent to provide access to Affordable Insurance Exchanges for consumers in every State. By doing so, it is HHS's view that we have complied with the requirements of Executive Order 13132.

G. Congressional Review Act

This proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), which specifies that before a rule can take effect, the Federal agency promulgating the rule shall submit to each House of the Congress and to the Comptroller General a report containing a copy of the rule along with other specified information, and has been transmitted to Congress and the Comptroller General for review.

List of Subjects

45 CFR Part 153

Administrative practice and procedure, Adverse selection, Health care, Health insurance, Health records, Organization and functions (Government agencies), Premium stabilization, Reporting and recordkeeping requirements, Reinsurance, Risk adjustment, Risk corridors, Risk mitigation, State and local governments.

45 CFR Part 155

Administrative practice and procedure, Health care access, Health insurance, Reporting and recordkeeping requirements, State and local governments, Cost-sharing reductions, Advance payments of premium tax credit, Administration and calculation of advance payments of the premium tax credit, Plan variations, Actuarial value.

45 CFR Part 156

Administrative practice and procedure, Advertising, Advisory committees, Brokers, Conflict of interest, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, American Indian/Alaska Natives, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, State and local governments, Sunshine Act, Technical assistance, Women, and Youth.

45 CFR Part 157

Employee benefit plans, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, Safety, State and local governments, Sunshine Act, Technical Assistance, Women, and Youth.

45 CFR Part 158

Administrative practice and procedure, Claims, Health care, Health insurance, Health plans, penalties, Reporting and recordkeeping requirements, Premium revenues, Medical loss ratio, Rebating.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 153, 155, 156, 157, and 158 as set forth below:

PART 153—STANDARDS RELATED TO REINSURANCE, RISK CORRIDORS, AND RISK ADJUSTMENT UNDER THE AFFORDABLE CARE ACT

1. The authority citation for part 153 continues to read as follows:

Authority: Secs. 1321, 1341–1343, Pub. L. 111–148, 24 Stat. 119.

2. Section 153.20 is amended by revising the definitions of ''Risk adjustment covered plan'' and ''Risk adjustment data collection approach'' as follows:

§ 153.20 Definitions.

* * * * *

Risk adjustment covered plan means, for the purpose of the risk adjustment program, any health insurance coverage offered in the individual or small group market with the exception of grandfathered health plans, group health insurance coverage described in § 146.145(c) of this subchapter, individual health insurance coverage described in § 148.220 of this subchapter, and any plan determined not to be a risk adjustment covered plan in the applicable Federally certified risk adjustment methodology.

* * * * *

Risk adjustment data collection approach means the specific procedures by which risk adjustment data is to be stored, collected, accessed, transmitted, and validated and the applicable timeframes, data formats, and privacy and security standards.

* * * * *

3. Section 153.100 is amended by—

A. Revising paragraph (a)(1).

B. Removing paragraph (a)(2).

C. Redesignating paragraphs (a)(3) and (4) as paragraphs (a)(2) and (3).

D. Revising newly designated paragraph (a)(2).

E. Removing paragraph (a)(5).

F. Revising paragraph (c).

G. Revising paragraph (d)(1).

H. Removing paragraph (d)(2).

I. Redesignating paragraphs (d)(3) and (4) as paragraphs (d)(2) and (3).

J. Revising newly designated paragraph (d)(2).

K. Removing paragraph (d)(5).

L. Redesignating paragraph (d)(6) as paragraph (d)(4).

The revisions read as follows:

§ 153.100 State notice of benefit and payment parameters.

(a) * * *

(1) Modify the data requirements for health insurance issuers to receive reinsurance payments from those specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year;

(2) Collect additional reinsurance contributions under § 153.220(d) or use additional funds for reinsurance payments under § 153.220(d)(3); or

* * * * *

(c) *State notice deadlines.* If a State is required to publish an annual State notice of benefit and payment parameters for a particular benefit year, then with respect to benefit year 2014, it must do so by March 1, 2013, or by the 30th day following the publication of the final HHS notice of benefit and payment parameters, whichever is later. With respect to subsequent benefit years, a State must do so by March 1 of the calendar year prior to the benefit year for which the notice applies.

(d) * * *

(1) Adhere to the data requirements for health insurance issuers to receive reinsurance payments that are specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year;

(2) Forgo the collection of additional reinsurance contributions under § 153.220(d) and the use of additional funds for reinsurance payments under § 153.220(d)(3);

* * * * *

4. Section 153.110 is amended by:

A. Revising paragraph (a).

B. Removing paragraph (b).

C. Redesignating paragraph (c) as paragraph (b) and revising newly designated paragraph (b).

D. Redesignating paragraph (d) as paragraph (c).

E. Removing newly designated paragraph (c)(2).

F. Removing newly designated paragraph (c)(4).

G. Removing newly designated paragraph (c)(5).

H. Redesignating paragraph (c)(6) as paragraph (c)(3).

I. Removing paragraph (e).

J. Redesignating paragraph (f) as paragraph (d).

The revisions read as follows:

§ 153.110 Standards for the State notice of benefit and payment parameters.

(a) *Data requirements.* If a State that establishes a reinsurance program elects to modify the data requirements for health insurance issuers to receive reinsurance payments from those specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year, the State notice of benefit and payment parameters must specify those modifications.

(b) *Additional collections.* If a State that establishes a reinsurance program elects to collect additional funds under § 153.220(d) or use additional funds for reinsurance payments under § 153.220(d)(3), the State must publish in the State notice of benefit and payment parameters the following:

(1) A description of the purpose of the additional collection, including whether it will be used to cover reinsurance payments made under § 153.232, administrative costs, or both;

(2) The additional contribution rate at which the funds will be collected; and

(3) If the purpose of the additional collection includes reinsurance payments (or if the State is using additional funds for reinsurance payments under § 153.220(d)(3)), the State supplemental reinsurance payment parameters required under § 153.232.

* * * * *

5. Section 153.210 is amended by revising paragraph (a)(2) and adding paragraph (e) to read as follows:

§ 153.210 State establishment of a reinsurance program.

(a) * * *

(2) If a State contracts with more than one applicable reinsurance entity, the State must ensure that each applicable reinsurance entity operates in a distinct geographic area with no overlap of jurisdiction with any other applicable reinsurance entity.

* * * * *

(e) *Reporting to HHS.* Each State that establishes a reinsurance program must ensure that each applicable reinsurance entity provides information regarding requests for reinsurance payments under the national contribution rate made under § 153.410 for all reinsurance-eligible plans for each quarter during the applicable benefit year in a manner and timeframe established by HHS.

6. Section 153.220 is amended by—

A. Revising paragraph (a).

B. Removing paragraph (b).

C. Redesignating paragraph (c) as paragraph (b).

D. Removing paragraph (d).

E. Redesignating paragraph (e) as paragraph (c).

F. Revising newly designated paragraph (c)(2).

G. Removing paragraph (f).

H. Redesignating paragraph (g) as paragraph (d).

I. Revising newly designated paragraph (d).

J. Removing paragraph (h).

The revisions read as follows:

§ 153.220 Collection of reinsurance contribution funds.

(a) *Collections.* If a State establishes a reinsurance program, HHS will collect all reinsurance contributions from all contributing entities for that State under the national contribution rate.

* * * * *

(c) * * *

(2) Payments to the U.S. Treasury as described in paragraph (b)(2) of this section; and

* * * * *

(d) *Additional State collections.* If a State establishes a reinsurance program:

(1) The State may elect to collect more than the amounts that would be collected based on the national contribution rate set forth in the annual HHS notice of benefit and payment parameters for the applicable benefit year to provide:

(i) Funding for administrative expenses of the applicable reinsurance entity; or

(ii) Additional funds for reinsurance payments.

(2) The State must notify HHS within 30 days after publication of the draft annual HHS notice of benefit and payment parameters for the applicable benefit year of the additional contribution rate that it elects to collect for any additional contributions under paragraph (d)(1) of this section.

(3) A State may use additional funds which were not collected as additional reinsurance contributions under this part for reinsurance payments under the State supplemental payment parameters under § 153.232.

* * * * *

7. Section 153.230 is revised to read as follows:

§ 153.230 Calculation of reinsurance payments made under the national contribution rate.

(a) *Eligibility for reinsurance payments under the national reinsurance parameters.* A health insurance issuer of a non-grandfathered individual market plan becomes eligible for reinsurance payments from contributions under the national contribution rate when its claims costs for an individual enrollee's covered benefits in a benefit year exceed the national attachment point.

(b) *National reinsurance payment parameters.* The national reinsurance payment parameters for each year commencing in 2014 and ending in 2016 set forth in the annual HHS notice of benefit and payment parameters for an applicable benefit year will apply with respect to reinsurance payments made from contributions received under the national contribution rate.

(c) *National reinsurance payments.* Each reinsurance payment made from contributions received under the national contribution rate will be calculated as the product of the national coinsurance rate multiplied by the health insurance issuer's claims costs for an individual enrollee's covered benefits that the health insurance issuer incurs between the national attachment point and the national reinsurance cap.

(d) *Uniform adjustment to national reinsurance payments.* If HHS determines that all reinsurance payments requested under the national payment parameters from all reinsurance-eligible plans in all States for a benefit year will exceed all reinsurance contributions collected under the national contribution rate in all States for an applicable benefit year, HHS will determine a uniform pro rata adjustment to be applied to all such requests for reinsurance payments for all States. Each applicable reinsurance entity, or HHS on behalf of a State, must reduce all requests for reinsurance payments for the applicable benefit year by any adjustment required under this paragraph (d).

8. Section 153.232 is added to read as follows:

§ 153.232 Calculation of reinsurance payments made under a State additional contribution rate.

(a) *State supplemental reinsurance payment parameters.* (1) If a State establishes a reinsurance program and elects to collect additional contributions under § 153.220(d)(1)(ii) or use additional funds for reinsurance payments under § 153.220(d)(3), the State must set supplemental reinsurance payment parameters using one or more of the following methods:

(i) Decreasing the national attachment point;

(ii) Increasing the national reinsurance cap; or

(iii) Increasing the national coinsurance rate.

(2) The State must ensure that additional reinsurance contributions and funds projected to be received under § 153.220(d)(1)(ii) and § 153.220(d)(3), as applicable, for any applicable benefit year are reasonably calculated to cover additional reinsurance payments that are projected to be made only under the supplemental reinsurance payment parameters (that will not be paid under the national payment parameters) for the given benefit year.

(3) All applicable reinsurance entities in a State collecting additional reinsurance contributions must apply the State supplemental reinsurance payment parameters established under paragraph (a)(1) of this section when calculating reinsurance payments.

(b) *General requirement for payments under State supplemental reinsurance parameters.* Contributions collected under § 153.220(d)(1)(ii) or funds under § 153.220(d)(3), as applicable, must be applied towards requests for reinsurance payments made under the State supplemental reinsurance payments parameters for each benefit year commencing in 2014 and ending in 2016.

(c) *Eligibility for reinsurance payments under State supplemental reinsurance parameters.* If a State establishes supplemental State reinsurance payment parameters under § 153.232(a)(1), a health insurance issuer of a non-grandfathered individual market plan becomes eligible for reinsurance payments from contributions under § 153.220(d)(1)(ii) or funds under § 153.220(d)(3), as applicable, if its incurred claims costs for an individual enrollee's covered benefits in a benefit year:

(1) Exceed the supplemental State attachment point set forth in the State notice of benefit and payment parameters for the applicable benefit year if a State has established such a supplemental attachment point under § 153.232(a)(1)(i);

(2) Exceed the national reinsurance cap set forth in the annual HHS notice of benefit and payment parameters for the applicable benefit year if a State has established a supplemental State reinsurance cap under § 153.232(a)(1)(ii); or

(3) Exceed the national attachment point set forth in the annual HHS notice of benefit and payment parameters for the applicable benefit year if a State has established a supplemental coinsurance rate under § 153.232(a)(1)(iii).

(d) *Payments under State supplemental reinsurance parameters.* Each reinsurance payment made from contributions received under § 153.220(d)(1)(ii) or funds under § 153.220(d)(3), as applicable, will be calculated with respect to a health insurance issuer's claims costs for an individual enrollee's covered benefits as the sum of the following:

(1) If the State has established a supplemental State attachment point, to the extent the issuer's incurred claims costs for such benefits exceed the supplemental State attachment point but do not exceed the national attachment point, the product of such claims costs between the supplemental State attachment point and the national attachment point multiplied by the national coinsurance rate (or, if the State has established a supplemental State coinsurance rate, the supplemental State coinsurance rate);

(2) If the State has established a supplemental State reinsurance cap, to the extent the issuer's incurred claims costs for such benefits exceed the national reinsurance cap but do not exceed the supplemental State reinsurance cap, the product of such claims costs between the national reinsurance cap and the supplemental State reinsurance cap multiplied by the national coinsurance rate (or, if the State has established a supplemental State coinsurance rate, the supplemental State coinsurance rate); and

(3) If the State has established a supplemental coinsurance rate, the product of the issuer's incurred claims costs for such benefits between the national attachment point and the national reinsurance cap multiplied by the difference between the supplemental coinsurance rate and the national coinsurance rate.

(e) *Uniform adjustment to payments under State supplemental reinsurance payment parameters.* If all requested reinsurance payments under the State supplemental reinsurance parameters calculated in accordance with paragraph (a)(1) of this section from all reinsurance-eligible plans in a State for a benefit year will exceed all reinsurance contributions collected under § 153.220(d)(1)(ii) or funds under § 153.220(d)(3) for the applicable benefit year, the State must determine a uniform pro rata adjustment to be applied to all such requests for reinsurance payments. Each applicable reinsurance entity in the State must reduce all such requests for reinsurance

payments for the applicable benefit year by that adjustment.

(f) *Limitations on payments under State supplemental reinsurance parameters.* A State must ensure that:

(1) The payments made to issuers must not exceed the issuer's total paid amount for the reinsurance-eligible claim(s); and

(2) Any remaining additional funds for reinsurance payments collected under § 153.220(d)(1)(ii) must be used for reinsurance payments under the State supplemental reinsurance payment parameters in subsequent benefit years.

9. Section 153.234 is added to read as follows:

§ 153.234 Eligibility under health insurance market rules.

A reinsurance-eligible plan's covered claims costs for an enrollee incurred prior to the application of the following provisions do not count towards either the national reinsurance parameters or the State supplemental reinsurance parameters: 45 CFR 147.102, 147.104 (subject to 147.145), 147.106 (subject to 147.145), 156.80, and subpart B of part 156.

10. Section 153.235 is added to read as follows:

§ 153.235 Allocation and distribution of reinsurance contributions.

(a) *Allocation of reinsurance contributions.* HHS will allocate and distribute reinsurance contributions collected from contributing entities under the national contribution rate for reinsurance payments to each State based on total requests for reinsurance payments made under the national reinsurance payment parameters in all States and submitted under § 153.410, net of any adjustment under § 153.230(d).

(b) *Excess reinsurance contributions.* Any reinsurance contributions collected from contributing entities under the national contribution rate for reinsurance payments for any benefit year but unused for the applicable benefit year will be used for reinsurance payments under the national reinsurance payment parameters for subsequent benefit years.

11. Section 153.240 is amended by revising paragraphs (a) and (b) and by adding a new paragraph (d) to read as follows:

§ 153.240 Disbursement of reinsurance payments.

(a) *Data collection.* If a State establishes a reinsurance program, the State must ensure that the applicable reinsurance entity:

(1) Collects data required to determine reinsurance payments as described in § 153.230 and § 153.232, as applicable, from an issuer of reinsurance-eligible plans or is provided access to such data, according to the data requirements specified by the State in the State notice of benefit and payment parameters described in subpart B of this part.

(2) Makes reinsurance payments to the issuer of a reinsurance-eligible plan after receiving a valid claim for payment from that health insurance issuer in accordance with the requirements of § 153.410.

(3) Provides a process through which an issuer of a reinsurance-eligible plan that does not generate individual enrollee claims in the normal course of business may use estimated claims costs to make a request for payment (or to submit data to be considered for reinsurance payments) in accordance with the requirements of § 153.410. The State must ensure that such requests for reinsurance payment (or a subset of such requests) are subject to validation.

(b) *Notification of reinsurance payments.* For each applicable benefit year,

(1) A State, or HHS on behalf of the State, must notify issuers annually of:

(i) Reinsurance payments under the national payment parameters, and

(ii) Reinsurance payments under the State supplemental payment parameters if applicable, to be made for the applicable benefit year no later than June 30 of the year following the applicable benefit year.

(2) A State must provide to each reinsurance-eligible plan the expected requests for reinsurance payments made under:

(i) The national payment parameters, and

(ii) State supplemental payments parameters if applicable, from such plan on a quarterly basis during the applicable benefit year in a timeframe and manner determined by HHS.

* * * * *

(d) *Privacy and security.* (1) If a State establishes a reinsurance program, the State must ensure that the applicable reinsurance entity's collection of personally identifiable information is limited to information reasonably necessary for use in the calculation of reinsurance payments, and that use and disclosure of personally identifiable information is limited to those purposes for which the personally identifiable information was collected (including for purposes of data validation).

(2) If a State establishes a reinsurance program, the State must ensure that the applicable reinsurance entity implements security standards that provide administrative, physical, and technical safeguards for the personally identifiable information consistent with the security standards described at 45 CFR 164.308, 164.310, and 164.312.

12. Section 153.310 is amended by:

A. Redesignating paragraphs (c) and (d) as paragraphs (e) and (f), respectively.

B. Adding new paragraphs (a)(4), (c) and (d).

The additions read as follows:

§ 153.310 Risk adjustment administration.

(a) * * *

(4) Beginning in 2015, any State that is approved to operate an Exchange and elects to operate risk adjustment but has not been approved by HHS to operate risk adjustment prior to publication of its State notice of benefit and payment parameters for the applicable benefit year, will forgo implementation of all State functions in this subpart, and HHS will carry out all of the provisions of this subpart on behalf of the State.

* * * * *

(c) *State responsibility for risk adjustment.* (1) A State operating a risk adjustment program for a benefit year must administer the applicable Federally certified risk adjustment methodology through an entity that—

(i) Is operationally ready to implement the applicable Federally certified risk adjustment methodology and process the resulting payments and charges; and

(ii) Has experience relevant to operating the risk adjustment program.

(2) The State must ensure that the risk adjustment entity complies with all applicable provisions of subpart D of this part in the administration of the applicable Federally certified risk adjustment methodology.

(3) The State must conduct oversight and monitoring of its risk adjustment program.

(d) *Certification for a State to operate risk adjustment.* (1) To be approved by HHS to operate risk adjustment under a particular Federally certified risk adjustment methodology for a benefit year, a State must establish that it and its risk adjustment entity meet the standards set forth in paragraph (c) of this section.

(2) To obtain such approval, the State must submit to HHS, in a form and manner specified by HHS, evidence that its risk adjustment entity meets these standards.

13. Section 153.320 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 153.320 Federally certified risk adjustment methodology.

* * * * *

(a) * * *

(1) The risk adjustment methodology is developed by HHS and published in the applicable annual HHS notice of benefit and payment parameters; or

(2) An alternate risk adjustment methodology is submitted by a State in accordance with § 153.330, reviewed and certified by HHS, and published in the applicable annual HHS notice of benefit and payment parameters.

* * * * *

14. Section 153.330 is amended by—

A. Redesignating paragraph (b) as paragraph (c).

B. Adding new paragraph (b).

The additions read as follows:

§ 153.330 State alternate risk adjustment methodology.

* * * * *

(b) *Evaluation criteria for alternate risk adjustment methodology.* An alternate risk adjustment methodology will be certified by HHS as a Federally certified risk adjustment methodology based on the following criteria:

(1) The criteria listed in paragraph (a)(2) of this section;

(2) Whether the methodology complies with the requirements of this subpart D;

(3) Whether the methodology accounts for risk selection across metal levels; and

(4) Whether each of the elements of the methodology are aligned.

* * * * *

15. Section 153.340 is amended by revising paragraph (b)(3) to read as follows:

§ 153.340 Data collection under risk adjustment.

* * * * *

(b) * * *

(3) If a State is operating a risk adjustment program, the State must ensure that any collection of personally identifiable information is limited to information reasonably necessary for use in the applicable risk adjustment model, calculation of plan average actuarial risk, or calculation of payments and charges. Except for purposes of data validation, the State may not collect or store any personally identifiable information for use as a unique identifier for an enrollee's data, unless such information is masked or encrypted by the issuer, with the key to that masking or encryption withheld from the State. Use and disclosure of personally identifiable information is limited to those purposes for which the personally identifiable information was collected (including for purposes of data validation).

* * * * *

16. Section 153.360 is added to subpart D to read as follows:

§ 153.360 Application of risk adjustment to the small group market.

Enrollees in a risk adjustment covered plan must be assigned to the applicable risk pool in the State in which the enrollee's policy was filed and approved.

17. Section 153.400 is revised to read as follows:

§ 153.400 Reinsurance contribution funds.

(a) *General requirement.* Each contributing entity must make reinsurance contributions annually: at the national contribution for all reinsurance contribution enrollees, in a manner specified by HHS; and at the additional State supplemental contribution rate if the State has elected to collect additional contributions under § 153.220(d), in a manner specified by the State.

(1) A contributing entity must make reinsurance contributions for its self-insured group health plans and health insurance coverage except to the extent that:

(i) Such plan or coverage is not major medical coverage;

(ii) In the case of health insurance coverage, such coverage is not considered to be part of an issuer's commercial book of business;

(iii) In the case of health insurance coverage, such coverage is not issued on a form filed and approved by a State.

(2) Accordingly, as specified in paragraph (a)(1) of this section, a contributing entity is not required to make contributions on behalf of the following:

(i) A self-insured group health plan or health insurance coverage that consists solely of excepted benefits as defined by section 2791(c) of the PHS Act;

(ii) Coverage offered by an issuer under contract to provide benefits under any of the following titles of the Social Security Act:

(A) Title XVIII (Medicare);

(B) Title XIX (Medicaid); or

(C)Title XXI (Children's Health insurance Program);

(iii) A Federal or State high-risk pool, including the Pre-Existing Condition Insurance Plan Program;

(iv) Basic health plan coverage offered by issuers under contract with a State as described in section 1331 of the Affordable Care Act;

(v) A health reimbursement arrangement within the meaning of IRS Notice 2002–45 (2002–2 CB 93) or any subsequent applicable guidance, that is integrated with a self-insured group health plan or health insurance coverage;

(vi) A health savings account within the meaning of section 223(d) of the Code;

(vii) A health flexible spending arrangement within the meaning of section 125 of the Code;

(viii) An employee assistance plan, disease management program, or wellness program that does not provide major medical coverage;

(ix) A stop-loss policy or an indemnity reinsurance policy;

(x) TRICARE and other military health benefits for active and retired uniformed services personnel and their dependents;

(xi) A plan or coverage provided by an Indian Tribe to Tribal members and their spouses and dependents (and other persons of Indian descent closely affiliated with the Tribe), in the capacity of the Tribal members as Tribal members (and not in their capacity as current or former employees of the Tribe or their dependents); or

(xii) Health programs operated under the authority of the Indian Health Service.

(b) *Data requirements.* Each contributing entity must submit to HHS data required to substantiate the contribution amounts for the contributing entity, in the manner and timeframe specified by HHS.

18. Section 153.405 is added to read as follows:

§ 153.405 Calculation of reinsurance contributions.

(a) *In general.* The reinsurance contribution required from a contributing entity for its reinsurance contribution enrollees during a benefit year is calculated by multiplying:

(1) The average number of covered lives of reinsurance contribution enrollees during the applicable benefit year for all plans and coverage described in § 153.400(a)(1) of the contributing entity; by

(2) The contribution rate for the applicable benefit year.

(b) *Annual enrollment count.* No later than November 15 of benefit year 2014, 2015, or 2016, as applicable, a contributing entity must submit an annual enrollment count of the average number of covered lives of reinsurance contribution enrollees for the applicable benefit year to HHS. The count must be determined as specified in paragraphs (d) or (e) of this section, as applicable.

(c) *Notification and payment.* (1) Within 15 days of the submission of the annual enrollment count described in

paragraph (b) of this section or by December 15 of the applicable benefit year, whichever is later HHS will notify the contributing entity of the reinsurance contribution amount to be paid for the applicable benefit year.

(2) A contributing entity must remit reinsurance contributions to HHS within 30 days after the date of the notification.

(d) *Procedures for counting covered lives for health insurance issuers.* To determine the average number of covered lives of reinsurance contribution enrollees under a health insurance plan for a benefit year, a health insurance issuer must use one of the following methods:

(1) Adding the total number of lives covered for each day of the first nine months of the benefit year and dividing that total by the number of days in the first nine months;

(2) Adding the total number of lives covered on any date (or more dates, if an equal number of dates are used for each quarter) during the same corresponding month in each of the first three quarters of the benefit year, and dividing that total by the number of dates on which a count was made. For this purpose, the same months must be used for each quarter (for example January, April and July) and the date used for the second and third quarter must fall within the same week of the quarter as the corresponding date used for the first quarter; or

(3) Multiplying the average number of policies in effect for the first nine months of the benefit year by the ratio of covered lives per policy in effect, calculated using the prior National Association of Insurance Commissioners (NAIC) Supplemental Health Care Exhibit (or a form filed with the issuer's State of domicile for the most recent time period).

(e) *Procedures for counting covered lives for self-insured group health plans.* To determine the number of covered lives of reinsurance contribution enrollees under a self-insured group health plan for a benefit year, a plan must use one of the following methods:

(1) One of the methods specified in either paragraph (d)(1) or paragraph (d)(2) of this section;

(2) Adding the total number of lives covered on any date (or more dates, if an equal number of dates are used for each quarter) during the same corresponding month in each of the first three quarters of the benefit year (provided that the date used for the second and third quarters must fall within the same week of the quarter as the corresponding date used for the first quarter), and dividing that total by the number of dates on which a count was made, except that the number of lives covered on a date is calculated by adding the number of participants with self-only coverage on the date to the product of the number of participants with coverage other than self-only coverage on the date and a factor of 2.35. For this purpose, the same months must be used for each quarter (for example, January, April, and July);

(3) Using the number of lives covered for the benefit year calculated based upon the ''Annual Return/Report of Employee Benefit Plan'' filed with the Department of Labor (Form 5500) for the last applicable time period. For purposes of this paragraph (e)(3), the number of lives covered for the benefit year for a plan offering only self-only coverage equals the sum of the total participants covered at the beginning and end of the benefit year, as reported on the Form 5500, divided by 2, and the number of lives covered for the benefit year for a plan offering self-only coverage and coverage other than self-only coverage equals the sum of the total participants covered at the beginning and the end of the benefit year, as reported on the Form 5500; and

(f) *Procedures for counting covered lives for group health plans with a self-insured coverage option and an insured coverage option.* To determine the number of covered lives of reinsurance contribution enrollees under a group health plan with a self-insured coverage option and an insured coverage option for a benefit year, a plan must use one of the methods specified in either paragraph (d)(1) or paragraph (d)(2) of this section.

(g) *Multiple group health plans maintained by the same plan sponsor*—(1) *General rule.* If a plan sponsor maintains two or more self-insured group health plans (including one or more group health plans that provide health insurance coverage) that collectively provide major medical coverage for the same covered lives, then those multiple plans shall be treated as a single self-insured group health plan for purposes of calculating any reinsurance contribution amount due under paragraph (d) of this section.

(2) *Plan Sponsor.* For purposes of this paragraph (g), the term ''plan sponsor'' means:

(i) The employer, in the case of a plan established or maintained by a single employer;

(ii) The employee organization, in the case of a plan established or maintained by an employee organization;

(iii) The joint board of trustees, in the case of a multiemployer plan (as defined in section 414(f) of the Code);

(iv) The committee, in the case of a multiple employer welfare arrangement;

(v) The cooperative or association that establishes or maintains a plan established or maintained by a rural electric cooperative or rural cooperative association (as such terms are defined in section 3(40)(B) of ERISA);

(vi) The trustee, in the case of a plan established or maintained by a voluntary employees' beneficiary association (meaning that the association is not merely serving as a funding vehicle for a plan that is established or maintained by an employer or other person);

(vii) In the case of a plan, the sponsor of which is not described in paragraph (g)(2)(i) through (g)(2)(vi) of this section, the person identified by the terms of the document under which the plan is operated as the plan sponsor, or the person designated by the terms of the document under which the plan is operated as the plan sponsor, provided that designation is made, and that person has consented to the designation, by no later than the date by which the count of covered lives for that benefit year is required to be provided, after which date that designation for that benefit year may not be changed or revoked, and provided further that a person may be designated as the plan sponsor only if the person is one of the persons maintaining the plan (for example, one of the employers that is maintaining the plan with one or more other employers or employee organizations); or

(viii) In the case of a plan, the sponsor of which is not described in paragraph (g)(2)(i) through (g)(2)(vi) of this section, and for which no identification or designation of a plan sponsor has been made under paragraph (g)(2)(i)(vii) of this section, each employer that maintains the plan (with respect to employees of that employer), each employee organization that maintains the plan (with respect to members of that employee organization), and each board of trustees, cooperative or association that maintains the plan.

(3) *Exception.* A plan sponsor is not required to include as part of a single self-insured group health plan as determined under paragraph (g)(1) of this section any self-insured group health plan (including a group health plan that provides health insurance coverage) that consists solely of excepted benefits as defined by section 2791(c) of the PHS Act, or that only provides benefits related to prescription drugs.

(4) *Procedures for counting covered lives for multiple group health plans treated as a single group health plan.*

The rules in this paragraph (g)(4) govern the determination of the average number of covered lives in a benefit year for any set of multiple self-insured group health plans or health insurance plans (or a combination of one or more self-insured group health plans and one or more health insurance plans) that are treated as a single group health plan under paragraph (g)(1) of this section.

(i) *Multiple group health plans including an insured plan.* If at least one of the multiple plans is an insured plan, the average number of covered lives of reinsurance contribution enrollees must be calculated using one of the methods specified in either paragraph (d)(1) or paragraph (d)(2) of this section, applied across the multiple plans as a whole. The following information must be determined by the plan sponsor and reported to HHS, in a manner and timeframe specified by HHS:

(A) The average number of covered lives calculated;

(B) The counting method used; and

(C) The names of the multiple plans being treated as a single group health plan as determined by the plan sponsor and reported to HHS.

(ii) *Multiple group health plans not including an insured plan.* If each of the multiple plans is a self-insured group health plan, the average number of covered lives of reinsurance contribution enrollees must be calculated using one of the methods specified either in paragraph (e)(1) or paragraph (e)(2) of this section, applied across the multiple plans as a whole. The following information must be determined by the plan sponsor and reported to HHS, in a manner and timeframe specified by HHS:

(A) The average number of covered lives calculated;

(B) The counting method used; and

(C) The names of the multiple plans being treated as a single group health plan as determined by the plan sponsor.

19. Section 153.410 is amended by revising paragraph (a) as follows:

§ 153.410 Requests for reinsurance payments.

(a) *General requirement.* An issuer of a reinsurance-eligible plan may make a request for payment when an enrollee of that reinsurance-eligible plan has met the criteria for reinsurance payment set forth in subpart B of this part and the HHS notice of benefit and payment parameters and State notice of benefit and payment parameters for the applicable benefit year, if applicable.

* * * * *

20. Section 153.420 is added to subpart E to read as follows:

§ 153.420 Data collection.

(a) *Data requirement.* To be eligible for reinsurance payments, an issuer of a reinsurance-eligible plan must submit or make accessible all required reinsurance data in accordance with the reinsurance data collection approach established by the State, or by HHS on behalf of the State.

(b) *Deadline for submission of data.* An issuer of a reinsurance-eligible plan must submit or make accessible data to be considered for reinsurance payments for the applicable benefit year by April 30 of the year following the end of the applicable benefit year.

21. Section 153.500 is amended by—

A. Revising the definitions of ''Administrative costs'' and ''Allowable administrative costs.''

B. Adding the definitions of ''After-tax premiums earned,'' ''Profits,'' and ''Taxes'' in alphabetical order.

The revisions and additions read as follows:

§ 153.500 Definitions.

* * * * *

Administrative costs mean, with respect to a QHP, total non-claims costs incurred by the QHP issuer for the QHP, including taxes.

After-tax premiums earned mean, with respect to a QHP, premiums earned with respect to the QHP minus taxes.

Allowable administrative costs mean, with respect to a QHP, the sum of administrative costs of the QHP, other than taxes plus profits earned by the QHP, which sum is limited to 20 percent of after-tax premiums earned with respect to the QHP (including any premium tax credit under any governmental program), plus taxes.

* * * * *

Profits mean, with respect to a QHP, the greater of:

(1) Three percent of after tax premiums earned, and

(2) Premiums earned of the QHP minus the sum of allowable costs and administrative costs of the QHP.

* * * * *

Taxes mean, with respect to a QHP, Federal and State licensing and regulatory fees paid with respect to the QHP as described in § 158.161(a) of this subchapter, and Federal and State taxes and assessments paid with respect to the QHP as described in § 158.162(a)(1) and (b)(1) of this subchapter.

* * * * *

22. Section 153.510 is amended by adding new paragraph (d) to read as follows:.

§ 153.510 Risk corridors establishment and payment methodology.

* * * * *

(d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

23. Section 153.530 is amended by—

A. Revising paragraphs (a), (b) introductory text, (b)(2)(iii), and (c).

B. Adding new paragraph (d).

The revisions and additions read as follows:

§ 153.530 Risk corridors data requirements.

(a) *Premium data.* A QHP issuer must submit to HHS data on the premiums earned with respect to each QHP that the issuer offers in a manner specified by HHS.

(b) *Allowable costs.* A QHP issuer must submit to HHS data on the allowable costs incurred with respect to each QHP that the QHP issuer offers in a manner specified by HHS. For purposes of this subpart, allowable costs must be—

* * * * *

(2) * * *

(iii) Any cost-sharing reduction payments received by the issuer for the QHP to the extent not reimbursed to the provider furnishing the item or service.

(c) *Allowable administrative costs.* A QHP issuer must submit to HHS data on the allowable administrative costs incurred with respect to each QHP that the QHP issuer offers in a manner specified by HHS.

(d) *Timeframes.* For each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following the benefit year.

24. Section 153.630 is added to subpart G to read as follows:

§ 153.630 Data validation requirements when HHS operates risk adjustment.

(a) *General requirement.* An issuer of a risk adjustment covered plan in a State where HHS is operating risk adjustment on behalf of the State for the applicable benefit year must have an initial and second validation audit performed on its risk adjustment data as described in this section.

(b) *Initial validation audit.*

(1) An issuer of a risk adjustment covered plan must engage one or more independent auditors to perform an initial validation audit of a sample of its risk adjustment data selected by HHS.

(2) The issuer must ensure that the initial validation auditors are reasonably capable of performing an initial data validation audit according to the standards established by HHS for such audit, and must ensure that the audit is so performed.

(3) The issuer must ensure that each initial validation auditor is reasonably

free of conflicts of interest, such that it is able to conduct the initial validation audit in an impartial manner and its impartiality is not reasonably open to question.

(4) The issuer must ensure validation of the accuracy of risk adjustment data for a sample of enrollees selected by HHS. The issuer must ensure that the initial validation audit findings are submitted to HHS in a manner and timeframe specified by HHS.

(c) *Second validation audit.* HHS will select a subsample of the risk adjustment data validated by the initial validation audit for a second validation audit. The issuer must comply with, and must ensure the initial validation auditor complies with, standards for such audit established by HHS, and must cooperate with, and must ensure that the initial validation auditor cooperates with, HHS and the second validation auditor in connection with such audit.

(d) *Data validation appeals.* An issuer may appeal the findings of a second validation audit or the application of a risk score error rate to its risk adjustment payments and charges.

(e) *Adjustment of payments and charges.* HHS may adjust payments and charges for issuers that do not comply with audit requirements and standards, as specified in part (b) and (c) of this section.

(f) *Data security and transmission.*

(1) An issuer must submit the risk adjustment data and source documentation for the initial and second validation audits specified by HHS to HHS or its designee in the manner and timeframe specified by HHS.

(2) An issuer must ensure that it and its initial validation auditor comply with the security standards described at 45 CFR 164.308, 164.310, and 164.312 in connection with the initial validation audit, the second validation audit, and any appeal.

25. Subpart H is added to read as follows:

Subpart H—Distributed Data Collection for HHS-Operated Programs

Sec.

153.700 Distributed data environment.
153.710 Data requirements.
153.720 Establishment and usage of masked enrollee identification numbers.
153.730 Deadline for submission of data.

Subpart H—Distributed Data Collection for HHS-Operated Programs

§ 153.700 Distributed data environment.

(a) *Dedicated distributed data environments.* For each benefit year in which HHS operates the risk adjustment or reinsurance program on behalf of a State, an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in the State, as applicable, must establish a dedicated data environment and provide data access to HHS, in a manner and timeframe specified by HHS, for any HHS-operated risk adjustment and reinsurance program.

(b) *Timeline.* An issuer must establish the dedicated data environment (and confirm proper establishment through successfully testing the environment to conform with applicable HHS standards for such testing) three months prior to the first date of full operation.

§ 153.710 Data requirements.

(a) *Enrollment, claims, and encounter data.* An issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must provide to HHS, through the dedicated data environment, access to enrollee-level plan enrollment data, enrollee claims data, and enrollee encounter data as specified by HHS.

(b) *Claims data.* All claims data submitted by an issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must have resulted in payment by the issuer.

(c) *Claims data from capitated plans.* An issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, that does not generate individual enrollee claims in the normal course of business must derive the costs of all applicable provider encounters using its principal internal methodology for pricing those encounters. If the issuer does not have such a methodology, or has an incomplete methodology, it must supplement the methodology in a manner that yields derived claims that are reasonable in light of the specific service and insurance market that the plan is serving.

§ 153.720 Establishment and usage of masked enrollee identification numbers.

(a) *Enrollee identification numbers.* An issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must—

(1) Establish a unique masked enrollee identification number for each enrollee; and

(2) Maintain the same masked enrollee identification number for an enrollee across enrollments or plans within the issuer, within the State, during a benefit year.

(b) *Prohibition on personally identifiable information.* An issuer of a risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program on behalf of the State, as applicable, may not—

(1) Include enrollee's personally identifiable information in the masked enrollee identification number; or

(2) Use the same masked enrollee identification number for different enrollees enrolled with the issuer.

§ 153.730 Deadline for submission of data.

A risk adjustment covered plan or a reinsurance-eligible plan in a State in which HHS is operating the risk adjustment or reinsurance program, as applicable, must submit data to be considered for risk adjustment payments and charges and reinsurance payments for the applicable benefit year by April 30 of the year following the applicable benefit year.

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

26. The authority citation for part 155 continues to read as follows:

Authority: Secs. 1301, 1302, 1303, 1304, 1311, 1312, 1313, 1321, 1322, 1331, 1334, 1401, 1402, 1411, 1412, 1413.

27. Section 155.20 is amended by—

A. Revising the definitions of ''Large employer'' and ''Small employer''.

B. Adding definitions of ''Federally-facilitated Exchange,'' ''Federally-facilitated SHOP,'' and ''Full-time employee'' in alphabetical order.

The revisions and additions read as follows:

§ 155.20 Definitions.

* * * * *

Federally-facilitated Exchange means an Exchange established and operated within a State by the Secretary under section 1321(c)(1) of the Affordable Care Act.

Federally-facilitated SHOP means a Small Business Health Options Program established and operated within a State by the Secretary under section 1321(c)(1) of the Affordable Care Act.

Full-time employee has the meaning given in section 4980H (c)(4) of the Code effective for plan years beginning on or after January 1, 2016, except for operations of a Federally-facilitated

SHOP for which it is effective for plan years beginning on or after October 1, 2013.

* * * * *

Large employer means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 101 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. In the case of plan years beginning before January 1, 2016, a State may elect to define larger employer by substituting ''51 employees'' for ''101 employees.'' The number of employees shall be determined using the method set forth in section 4980H (c)(2)(E) of the Code, effective for plan years beginning on or after January 1, 2016, except for operations of a Federally-facilitated SHOP for which the method shall be used for plan years beginning on or after October 1, 2013.

* * * * *

Small employer means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 1 but not more than 100 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year. In the case of plan years beginning before January 1, 2016, a State may elect to define small employer by substituting ''50 employees'' for ''100 employees.'' The number of employees shall be determined using the method set forth in section 4980H (c)(2)(E) of the Code, effective for plan years beginning on or after January 1, 2016, except for operations of a Federally-facilitated SHOP for which the method shall be used for plan years beginning on or after October 1, 2013.

* * * * *

28. Section 155.220 is amended by revising paragraph (b) to read as follows—

§ 155.220 Ability to States to permit agents and brokers to assist qualified individuals, qualified employers, or qualified employees enrolling in QHPs.

* * * * *

(b)(1) *Web site disclosure.* The Exchange or SHOP may elect to provide information regarding licensed agents and brokers on its Web site for the convenience of consumers seeking insurance through that Exchange and may elect to limit the information to information regarding licensed agents and brokers who have completed any required Exchange or SHOP registration and training process.

(2) A Federally-facilitated Exchange or SHOP will limit the information provided on its Web site regarding licensed agents and brokers to information regarding licensed agents and brokers who have completed registration and training.

* * * * *

29. Section 155.305 is amended by revising paragraph (g)(3) to read as follows:

§ 155.305 Eligibility standards.

* * * * *

(g) * * *

(3) *Special rule for family policies.* To the extent that an enrollment in a QHP in the individual market offered through an Exchange under a single policy covers two or more individuals who, if they were to enroll in separate individual policies would be eligible for different cost sharing, the Exchange must deem the individuals under such policy to be collectively eligible only for the category of eligibility last listed below for which all the individuals covered by the policy would be eligible:

(i) Individuals not eligible for changes to cost sharing;

(ii) Individuals described in § 155.350(b) (the special cost-sharing rule for Indians regardless of income);

(iii) Individuals described in paragraph (g)(2)(iii) of this section;

(iv) Individuals described in paragraph (g)(2)(ii) of this section;

(v) Individuals described in paragraph (g)(2)(i) of this section; and

(vi) Individuals described in § 155.350(a) (the cost-sharing rule for Indians with household incomes under 300 percent of the FPL).

* * * * *

30. Section 155.330 is amended by adding paragraph (g) to read as follows:

§ 155.330 Eligibility redetermination during a benefit year.

* * * * *

(g) *Recalculation of advance payments of the premium tax credit and cost-sharing reductions.* (1) When recalculating the amount of advance payments of the premium tax credit for which a tax filer is determined eligible as a result of an eligibility redetermination in accordance with this section, the Exchange must —

(i) Account for any advance payments already made on behalf of the tax filer for the benefit year for which information is available to the Exchange, such that the recalculated advance payment amount is projected to result in total advance payments for the benefit year that correspond to the tax filer's total projected premium tax credit for the benefit year, calculated in accordance with 26 CFR 1.36B–3; and

(ii) Ensure that that the advance payment provided on the tax filer's behalf is greater than or equal to zero and is calculated in accordance with 26 CFR 1.36B–3(d)(1).

(2) When redetermining eligibility for cost-sharing reductions in accordance with this section, the Exchange must determine an individual eligible for the category of cost-sharing reductions that corresponds to his or her expected annual household income for the benefit year (subject to the special rule for family policies set forth in § 155.305(g)(3).

31. Section 155.340 is amended by adding paragraphs (e) and (f) to read as follows:

§ 155.340 Administration of advance payments of the premium tax credit and cost-sharing reductions.

* * * * *

(e) *Allocation of advance payments of the premium tax credit between policies.* If advance payments of the premium tax credit are to be made on behalf of a tax filer (or two tax filers who are a married couple), and individuals in the tax filer's tax household are enrolled in more than one QHP or stand-alone dental plan, then the advance payments must be allocated as follows:

(1) That portion of the advance payment of the premium tax credit that is less than or equal to the aggregate adjusted monthly premiums, as defined in 26 CFR § 1.36B–3(e), for the QHP policies properly allocated to EHB must be allocated among the QHP policies in proportion to the respective portions of the premiums for the policies properly allocated to EHB; and

(2) Any remaining advance payment of the premium tax credit must be allocated among the stand-alone dental policies (if any) in proportion to the respective portions of the adjusted monthly premiums for the stand-alone dental policies properly allocated to the pediatric dental essential health benefit.

(f) *Reduction of enrollee's portion of premium to account for advance payments of the premium tax credit.* If an Exchange is facilitating the collection and payment of premiums to QHP issuers and stand-alone dental plans on behalf of enrollees under § 155.240, and if a QHP issuer or stand-alone dental plan has been notified that it will receive an advance payment of the premium tax credit on behalf of an enrollee for whom the Exchange is facilitating such functions, the Exchange must—

(1) Reduce the portion of the premium for the policy collected from the individual for the applicable month(s) by the amount of the advance payment of the premium tax credit; and

(2) Include with each billing statement, as applicable, to or for the individual the amount of the advance payment of the premium tax credit for the applicable month(s) and the remaining premium owed for the policy.

32. Section 155.705 is amended by revising paragraph (b)(3) and by adding new paragraphs (b)(10)(i), (b)(10)(ii), (b)(11)(i) and (b)(11)(ii) to read as follows:

§ 155.705 Functions of a SHOP.

* * * * *

(b) * * *

(3) (i) *SHOP options with respect to employer choice requirements.* With regard to QHPs offered through the SHOP, the SHOP may allow a qualified employer to make one or more QHPs available to qualified employees by a method other than the method described in paragraph (b)(2) of this section.

(ii) A Federally-facilitated SHOP will only permit a qualified employer to make available to qualified employees all QHPs at the level of coverage selected by the employer as described in paragraph (b)(2) of this section.

* * * * *

(10) * * *

(i) Subject to sections 2702 and 2703 of the Public Health Service Act, a Federally-facilitated SHOP must use a minimum participation rate of 70 percent, calculated as the number of qualified employees accepting coverage under the employer's group health plan, divided by the number of qualified employees offered coverage, excluding from the calculation any employee who, at the time the employer submits the SHOP application, is enrolled in coverage through another employer's group health plan or through a governmental plan such as Medicare, Medicaid, or TRICARE.

(ii) Notwithstanding paragraph (b)(10)(i) of this section, a Federally-facilitated SHOP may utilize a different minimum participation rate in a State if there is evidence that a State law sets a minimum participation rate or that a higher or lower minimum participation rate is customarily used by the majority of QHP issuers in that State for products in the State's small group market outside the SHOP.

(11) * * *

(i) To determine the employer and employee contributions, a SHOP may establish one or more standard methods that employers may use to define their contributions toward employee and dependent coverage.

(ii) A Federally-facilitated SHOP must use the following method for employer contributions:

(A) The employer will select a level of coverage as described in paragraph (b)(2) and (b)(3) of this section.

(B) The employer will select a QHP within that level of coverage to serves as a reference plan on which contributions will be based.

(C) The employer will define a percentage contribution toward premiums for employee-only coverage under the reference plan and, if dependent coverage is offered, a percentage contribution toward premiums for dependent coverage under the reference plan.

(D) An employer may establish, to the extent allowed by Federal and State law, different percentages for different employee categories.

(E) Either State law or the employer may require that a Federally-facilitated SHOP base contributions on a calculated composite premium for the reference plan for employees, for adult dependents, and for dependents below age 21.

(F) The resulting contribution amounts for each employee's coverage may then be applied toward the QHP selected by the employee.

33. Section 155.1030 is added to read as follows:

§ 155.1030 QHP certification standards related to advance payments of the premium tax credit and cost-sharing reductions.

(a) *Review of plan variations for cost-sharing reductions.* (1) The Exchange must ensure that each issuer that offers or seeks to offer a health plan at any level of coverage in the individual market on the Exchange submits the required plan variations for the health plan as described in § 156.420 of this subchapter. The Exchange must certify that the plan variations meet the requirements of § 156.420.

(2) The Exchange must provide to HHS the actuarial values of each QHP and silver plan variation, calculated under § 156.135 of this subchapter, in the manner and timeframe established by HHS.

(b) *Information for administering advance payments of the premium tax credit and advance payments of cost-sharing reductions.* (1) The Exchange must collect and review annually the rate allocation, the expected allowed claims cost allocation, and the actuarial memorandum that an issuer submits to the Exchange under § 156.470 of this subchapter, to ensure that such allocations meet the standards set forth in § 156.470(c) and (d).

(2) The Exchange must submit, in the manner and timeframe established by HHS, to HHS the approved allocations and actuarial memorandum underlying the approved allocations for each health plan at any level of coverage or stand-alone dental plan offered, or proposed to be offered in the individual market on the Exchange.

(3) The Exchange must collect annually any estimates and supporting documentation that a QHP issuer submits to receive advance payments of certain cost-sharing reductions, under § 156.430(a) of this subchapter, and submit, in the manner and timeframe established by HHS, the estimates and supporting documentation to HHS for review.

(4) HHS may use the information provided to HHS by the Exchange under this section for the approval of the estimates that an issuer submits for advance payments of cost-sharing reductions, as described in § 156.430 of this subchapter, and the oversight of the advance payments of cost-sharing reductions and premium tax credits programs.

PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES

34. The authority citation for part 156 is revised to read as follows:

Authority: Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321–1322, 1324, 1334, 1342–1343, 1401–1402, and 1412, Pub. L. 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701).

35. Section 156.20 is amended by adding definitions for ''Federally-facilitated SHOP'' and ''Issuer group'' in alphabetical order to read as follows:

§ 156.20 Definitions.

* * * * *

Federally-facilitated SHOP has the meaning given to the term in § 155.20 of this subchapter.

* * * * *

Issuer group means all entities treated under subsection (a) or (b) of section 52 of the Internal Revenue Code of 1986 as a member of the same controlled group of corporations as (or under common control with) a health insurance issuer, or issuers affiliated by the common use of a nationally licensed service mark.

* * * * *

36. Section 156.50 is amended by revising paragraph (b) and by adding paragraph (c) to read as follows:

§ 156.50 Financial support.

* * * * *

(b) *Requirement for State-based Exchange user fees.* A participating issuer must remit user fee payments, or any other payments, charges, or fees, if assessed by a State-based Exchange under § 155.160 of this subchapter.

(c) *Requirement for Federally-facilitated Exchange user fee.* To support the functions of Federally-facilitated Exchanges, a participating issuer offering a plan through a Federally-facilitated Exchange must remit a user fee to HHS each month, in the timeframe and manner established by HHS, equal to the product of the billable members enrolled through the Exchange in the plan offered by the issuer, and the monthly user fee rate specified in the annual HHS notice of benefit and payment parameters for the applicable benefit year. For purposes of this paragraph, billable members are defined under 45 CFR 147.102(c)(1) as each family member in a policy, with a limitation of three family members under age 21.

37. Section 156.200 is amended by adding paragraphs (f) and (g) to read as follows:

§ 156.200 QHP issuer participation standards.

* * * * *

(f) *Broker compensation in a Federally-facilitated Exchange.* A QHP issuer must pay the same broker compensation for QHPs offered through a Federally-facilitated Exchange that the QHP issuer pays for similar health plans offered in the State outside a Federally-facilitated Exchange.

(g) *Certification standard specific to a Federally-facilitated Exchange.* A Federally-facilitated Exchange may certify a QHP in the individual market of a Federally-facilitated Exchange only if the QHP issuer meets one of the conditions below:

(1) The QHP issuer also offers through a Federally-facilitated SHOP serving that State at least one small group market QHP at the silver level of coverage and one at the gold level of coverage as described in section 1302(d) of the Affordable Care Act;

(2) The QHP issuer does not offer small group market products in that State, but another issuer in the same issuer group offers through a Federally-facilitated SHOP serving that State at least one small group market QHP at the silver level of coverage and one at the gold level of coverage; or

(3) Neither the issuer nor any other issuer in the same issuer group offers a small group market product in that State.

38. Section 156.215 is added to read as follows:

§ 156.215 Advance payments of the premium tax credit and cost-sharing reduction standards.

(a) *Standards relative to advance payments of the premium tax credit and cost-sharing reductions.* In order for a health plan to be certified as a QHP initially and to maintain certification to be offered in the individual market on the Exchange, the issuer must meet the requirements related to the administration of cost-sharing reductions and advance payments of the premium tax credit set forth in subpart E of this part.

(b) [Reserved]

39. Section 156.285 is amended by adding paragraph (c)(7) to read as follows:

§ 156.285 Additional standards specific to SHOP.

* * * * *

(c) * * *

(7) A QHP issuer must enroll a qualified employee only if the Exchange—

(i) Notifies the QHP issuer that the employee is a qualified employee; and

(ii) Transmits information to the QHP issuer as provided in § 155.400(a) of this subchapter.

* * * * *

40. Subpart E is added to read as follows:

Subpart E—Health Insurance Issuer Responsibilities With Respect to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

Sec.

156.400 Definitions.
156.410 Cost-sharing reductions for enrollees.
156.420 Plan variations.
156.425 Changes in eligibility for cost-sharing reductions.
156.430 Payment for cost-sharing reductions.
156.440 Plans eligible for advance payments of the premium tax credit and cost-sharing reductions.
156.460 Reduction of enrollee's share of premium to account for advance payments of the premium tax credit.
156.470 Allocation of rates and claims costs for advance payments of cost-sharing reductions and the premium tax credit.

Subpart E—Health Insurance Issuer Responsibilities With Respect to Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions

§ 156.400 Definitions.

The following definitions apply to this subpart:

Advance payments of the premium tax credit has the meaning given to the term in § 155.20 of this subchapter.

Affordable Care Act has the meaning given to the term in § 155.20 of this subchapter.

Annual limitation on cost sharing means the annual dollar limit on cost sharing required to be paid by an enrollee that is established by a particular qualified health plan.

De minimis variation means the allowable variation in the AV of a health plan that does not result in a material difference in the true dollar value of the health plan as established in § 156.140(c)(1).

De minimis variation for a silver plan variation means a single percentage point.

Federal poverty level or *FPL* has the meaning given to the term in § 155.300(a) of this subchapter.

Indian has the meaning given to the term in § 155.300(a) of this subchapter.

Limited cost sharing plan variation means, with respect to a QHP at any level of coverage, the variation of such QHP described in § 156.420(b)(2).

Maximum annual limitation on cost sharing means the highest annual dollar amount that qualified health plans (other than QHPs with cost-sharing reductions) may require in cost sharing for a particular year, as established for that year under § 156.130.

Most generous or *more generous* means, between a QHP (including a standard silver plan) or plan variation, and one or more other plan variations of the same QHP, the QHP or plan variation designed for the category of individuals last listed in § 155.305(g)(3) of this subchapter.

Plan variation means a zero cost sharing plan variation, a limited cost sharing plan variation, or a silver plan variation.

Reduced maximum annual limitation on cost sharing means the dollar value of the maximum annual limitation on cost sharing for a silver plan variation that remains after applying the reduction, if any, in the maximum annual limitation on cost sharing required by section 1402 of the Affordable Care Act as announced in the annual HHS notice of benefit and payment parameters.

Silver plan variation means, with respect to a standard silver plan, any of the variations of that standard silver plan described in § 156.420(a).

Stand-alone dental plan means a plan offered through an Exchange under § 155.1065 of this subchapter.

Standard plan means a QHP offered at one of the four levels of coverage, defined at § 156.140, with an annual limitation on cost sharing that conforms to the requirements of § 156.130(a). A standard plan at the bronze, silver, gold, or platinum level of coverage is referred to as a standard bronze plan, a standard silver plan, a standard gold plan, and a standard platinum plan, respectively.

Zero cost sharing plan variation means, with respect to a QHP at any level of coverage, the variation of such QHP described in § 156.420(b)(1).

§ 156.410 Cost-sharing reductions for enrollees.

(a) *General requirement.* A QHP issuer must ensure that an individual eligible for cost-sharing reductions, as demonstrated by assignment to a particular plan variation, pay only the cost sharing required of an eligible individual for the applicable covered service under the plan variation. The cost-sharing reduction for which an individual is eligible must be applied when the cost sharing is collected.

(b) *Assignment to applicable plan variation.* If an individual is determined to be eligible to enroll in a QHP in the individual market offered through an Exchange and elects to do so, the QHP issuer must assign the individual under enrollment and eligibility information submitted by the Exchange as follows—

(1) If the individual is determined eligible by the Exchange for cost-sharing reductions under § 155.305(g)(2)(i), (ii), or (iii) of this subchapter (subject to the special rule for family policies set forth in § 155.305(g)(3) of this subchapter) and chooses to enroll in a silver health plan, the QHP issuer must assign the individual to the silver plan variation of the selected silver health plan described in § 156.420(a)(1), (2), or (3), respectively.

(2) If the individual is determined eligible by the Exchange for cost-sharing reductions for Indians with lower household income under § 155.350(a) of this subchapter (subject to the special rule for family policies set forth in § 155.305(g)(3) of this subchapter), and chooses to enroll in a QHP, the QHP issuer must assign the individual to the zero cost sharing plan variation of the selected QHP with all cost sharing eliminated described in § 156.420(b)(1).

(3) If the individual is determined by the Exchange to be eligible for cost-sharing reductions for Indians regardless of household income under § 155.350(b) of this subchapter (subject to the special rule for family policies set forth in § 155.305(g)(3) of this subchapter), and chooses to enroll in a QHP, the QHP issuer must assign the individual to the limited cost sharing plan variation of the selected QHP with the prohibition on cost sharing for benefits received from the Indian Health Service and certain other providers described in § 156.420(b)(2).

(4) If the individual is determined by the Exchange not to be eligible for cost-sharing reductions (including eligibility under the special rule for family policies set forth in § 155.305(g)(3) of this subchapter), and chooses to enroll in a QHP, the QHP issuer must assign the individual to the selected QHP with no cost-sharing reductions.

§ 156.420 Plan variations.

(a) *Submission of silver plan variations.* For each of its silver health plans that an issuer seeks to offer or to continue to offer in the individual market on an Exchange, the issuer must submit annually to the Exchange for certification prior to each benefit year the standard silver plan and three variations of the standard silver plan, as follows—

(1) For individuals eligible for cost-sharing reductions under § 155.305(g)(2)(i) of this subchapter, a variation of the standard silver plan with:

(i) An annual limitation on cost sharing no greater than the reduced maximum annual limitation on cost sharing specified in the annual HHS notice of benefit and payment parameters for such individuals, and

(ii) Other cost-sharing reductions such that the AV of the silver plan variation is 94 percent plus or minus the de minimis variation for a silver plan variation;

(2) For individuals eligible for cost-sharing reductions under § 155.305(g)(2)(ii) of this subchapter, a variation of the standard silver plan with:

(i) An annual limitation on cost sharing no greater than the reduced maximum annual limitation on cost sharing specified in the annual HHS notice of benefit and payment parameters for such individuals, and

(ii) Other cost-sharing reductions such that the AV of the silver plan variation is 87 percent plus or minus the de minimis variation for a silver plan variation; and

(3) For individuals eligible for cost-sharing reductions under § 155.305(g)(2)(iii) of this subchapter, a variation of the standard silver plan with:

(i) An annual limitation on cost sharing no greater than the reduced maximum annual limitation on cost sharing specified in the annual HHS notice of benefit and payment parameters for such individuals, and

(ii) Other cost-sharing reductions such that the AV of the silver plan variation is 73 percent plus or minus the de minimis variation for a silver plan variation (subject to § 156.420(h)).

(b) *Submission of zero and limited cost sharing plan variations.* For each of its health plans at any level of coverage that an issuer seeks QHP certification for the individual market on an Exchange, the issuer must submit to the Exchange for certification the health plan and two variations of the health plan, as follows—

(1) For individuals eligible for cost-sharing reductions under § 155.350(a) of this subchapter, a variation of the health plan with all cost sharing eliminated; and

(2) For individuals eligible for cost-sharing reductions under § 155.350(b) of this subchapter, a variation of the health plan with no cost sharing on any item or service that is an EHB furnished directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization (each as defined in 25 U.S.C. 1603), or through referral under contract health services.

(c) *Benefit and network equivalence in silver plan variations.* A standard silver plan and each silver plan variation thereof must cover the same benefits and providers, and require the same out-of-pocket spending for benefits other than essential health benefits. Each silver plan variation is subject to all requirements applicable to the standard silver plan (except for the requirement that the plan have an AV as set forth in § 156.140(b)(2)).

(d) *Benefit and network equivalence in zero and limited cost sharing plan variations.* A QHP and each zero cost sharing plan variation or limited cost sharing plan variation thereof must cover the same benefits and providers, and require the same out-of-pocket spending for benefits other than essential health benefits. A limited cost sharing plan variation must have the same cost sharing on items or services not described in paragraph (b)(2) of this section as the QHP with no cost-sharing reductions. Each zero cost sharing plan variation or limited cost sharing plan variation is subject to all requirements applicable to the QHP (except for the requirement that the plan have an AV as set forth in § 156.140(b)).

(e) *Decreasing cost sharing in higher AV silver plan variations.* The cost sharing required of enrollees under any silver plan variation of a standard silver plan for an essential health benefit from a provider (including a provider outside the plan's network) may not exceed the corresponding cost sharing required in the standard silver plan or any other silver plan variation thereof with a lower AV.

(f) *Minimum AV differential between 70 percent and 73 percent silver plan variations.* Notwithstanding any permitted de minimis variation in AV for a health plan or permitted de minimis variation for a silver plan variation, the AVs of a standard silver plan and the silver plan variation thereof described in paragraph (a)(3) of this section must differ by at least 2 percentage points.

§ 156.425 Changes in eligibility for cost-sharing reductions.

(a) *Effective date of change in assignment.* If the Exchange notifies a QHP issuer of a change in an enrollee's eligibility for cost-sharing reductions (including a change in the individual's eligibility under the special rule for family policies set forth in § 155.305(g)(3) of this subchapter due to a change in eligibility of another individual on the same policy), then the QHP issuer must change the individual's assignment such that the individual is assigned to the applicable standard plan or plan variation of the QHP as required under § 156.410(b) as of the effective date of eligibility required by the Exchange.

(b) *Continuity of deductible and out-of-pocket amounts.* In the case of a change in assignment to a different plan variation (or standard plan without cost-sharing reductions) of the same QHP in the course of a benefit year under this section, the QHP issuer must ensure that any cost sharing paid by the applicable individual under previous plan variations (or standard plan without cost-sharing reductions) for that benefit year is taken into account in the new plan variation (or standard plan without cost-sharing reductions) for purposes of calculating cost sharing based on aggregate spending by the individual, such as for deductibles or for the annual limitations on cost sharing.

§ 156.430 Payment for cost-sharing reductions.

(a) *Estimates of value of cost-sharing reductions for purposes of advance payments.* (1) For each health plan that an issuer offers, or intends to offer, in the individual market on an Exchange as a QHP, the issuer must provide to the Exchange annually prior to the benefit year, for approval by HHS, an estimate of the dollar value of the cost-sharing reductions to be provided over the benefit year. The estimate must:

(i) If the QHP is a silver health plan, identify separately the per member per month dollar value of the cost-sharing reductions to be provided under each silver plan variation identified in § 156.420(a)(1), (2), and (3);

(ii) Regardless of the level of coverage of the QHP, identify the per member per month dollar value of the cost-sharing reductions to be provided under the zero cost sharing plan variation;

(iii) Be accompanied by supporting documentation validating the estimate; and

(iv) Be developed using the methodology specified by HHS in the applicable annual HHS notice of benefit and payment parameters.

(2) If an issuer seeks advance payments for the cost-sharing reductions to be provided under the limited cost sharing plan variation of a health plan it offers, or seeks to offer, in the individual market on the Exchange as a QHP at any level of coverage, the issuer must provide to the Exchange annually prior to the benefit year, for approval by HHS, an estimate of the per member per month dollar value of the cost-sharing reductions to be provided over the benefit year under such limited cost sharing plan variation. The estimate must:

(i) Be accompanied by supporting documentation validating the estimate; and

(ii) Be developed using the methodology specified by HHS in the annual HHS notice of benefit and payment parameters.

(3) HHS's approval of the estimate will be based on whether the estimate is made consistent with the methodology specified by HHS in the annual HHS notice of benefit and payment parameters.

(b) *Advance payments.* A QHP issuer will receive periodic advance payments based on the approved advance estimates provided under paragraph (a) of this section and the actual enrollment in the applicable plan variation.

(c) *Submission of actual amounts.* A QHP issuer must submit to HHS, in the manner and timeframe established by HHS, the following—

(1) In the case of a benefit for which the QHP issuer compensates the applicable provider in whole or in part on a fee-for-service basis, the total allowed costs for essential health benefits charged for an enrollees' policy for the benefit year, broken down by what the issuer paid, what the enrollee paid, and the amount reimbursed to the provider by the QHP issuer for the amount that the enrollee would have paid under the standard QHP without cost-sharing reductions; and

(2) In the case of a benefit for which the QHP issuer compensates the applicable provider in any other manner, the total allowed costs for essential health benefits charged for an enrollees' policy for the benefit year, broken down by what the issuer paid, what the enrollee paid, and what the enrollee would have paid under the standard QHP without cost-sharing reductions.

(d) *Reconciliation of amounts.* HHS will perform periodic reconciliations of any advance payments of cost-sharing reductions provided to a QHP issuer under paragraph (b) of this section against—

(1) The actual amount of cost-sharing reductions provided to enrollees and reimbursed to providers by the QHP issuer for benefits for which the QHP issuer compensates the applicable providers in whole or in part on a fee-for-service basis; and

(2) The actual amount of cost-sharing reductions provided to enrollees for benefits for which the QHP issuer compensates the applicable providers in any other manner.

(e) *Payment of discrepancies.* If the actual amounts of cost-sharing reductions described in paragraphs (d)(1) and (2) of this section are—

(1) More than the amount of advance payments provided and the QHP issuer has timely provided the actual amounts of cost-sharing reductions as required under paragraph (c) of this section, HHS will reimburse the QHP issuer for the difference; and

(2) Less than the amount of advance payments provided, the QHP issuer must repay the difference to HHS in the manner and timeframe specified by HHS.

(f) *Cost-sharing reductions during special periods.* (1) Notwithstanding the reconciliation process described in paragraphs (c) through (e) of this section, a QHP issuer will not be eligible for reimbursement of any cost-sharing reductions provided following a termination of coverage effective date with respect to a grace period as described in § 155.430(b)(2)(ii)(A) or (B) of this subchapter. However, the QHP issuer will be eligible for reimbursement of cost-sharing reductions provided prior to the termination of coverage effective date. Advance payments of cost-sharing reductions will be paid to a QHP issuer prior to a determination of termination (including during any grace period, but the QHP issuer will be

required to repay any advance payments made with respect to any month after any termination of coverage effective date during a grace period).

(2) Notwithstanding the reconciliation process described in paragraphs (c) through (e) of this section, if the termination of coverage effective date is prior to the determination of termination other than in the circumstances described in paragraph (f)(1) of this section, and if the termination (or the late determination thereof) is the fault of the QHP issuer, as reasonably determined by the Exchange, the QHP issuer will not be eligible for advance payments and reimbursement for cost-sharing reductions provided during the period following the termination of coverage effective date and prior to the determination of the termination.

(3) Subject to the requirements of the reconciliation process described in paragraphs (c) through (e) of this section, if the termination of coverage effective date is prior to the determination of termination other than in the circumstances described in paragraph (f)(1) of this section, and if the reason for the termination (or late determination thereof) is not the fault of the QHP issuer, as reasonably determined by the Exchange, the QHP issuer will be eligible for advance payments and reimbursement for cost-sharing reductions provided during such period.

(4) Subject to the requirements of the reconciliation process described in paragraphs (c) through (e) of this section, a QHP issuer will be eligible for advance payments and reimbursement for cost-sharing reductions provided during any period of coverage pending resolution of inconsistencies in information required to determine eligibility for enrollment under § 155.315(f) of this subchapter.

§ 156.440 Plans eligible for advance payments of the premium tax credit and cost-sharing reductions.

Except as noted in paragraph (a) through (c) of this section, the provisions of this subpart apply to qualified health plans offered in the individual market on the Exchange.

(a) *Catastrophic plans.* The provisions of this subpart do not apply to catastrophic plans as described in § 156.155.

(b) *Stand-alone dental plans.* The provisions of this subpart, to the extent relating to cost-sharing reductions, do not apply to stand-alone dental plans. The provisions of this subpart, to the extent relating to advance payments of the premium tax credit, apply to stand-alone dental plans.

(c) *Child-only plans.* The provisions of this subpart apply to child-only QHPs, as described in § 156.200(c)(2).

§ 156.460 Reduction of enrollee's share of premium to account for advance payments of the premium tax credit.

(a) *Reduction of enrollee's share of premium to account for advance payments of the premium tax credit.* A QHP issuer that receives notice from the Exchange that an individual enrolled in the issuer's QHP is eligible for an advance payment of the premium tax credit must—

(1) Reduce the portion of the premium charged to or for the individual for the applicable month(s) by the amount of the advance payment of the premium tax credit;

(2) Notify the Exchange of the reduction in the portion of the premium charged to the individual in accordance with § 156.265(g); and

(3) Include with each billing statement, as applicable, to or for the individual the amount of the advance payment of the premium tax credit for the applicable month(s), and the remaining premium owed.

(b) *Delays in payment.* A QHP issuer may not refuse to commence coverage under a policy or terminate coverage on account of any delay in payment of an advance payment of the premium tax credit on behalf of an enrollee if the QHP issuer has been notified by the Exchange under § 155.340(a) of this subchapter that the QHP issuer will receive such advance payment.

§ 156.470 Allocation of rates and claims costs for advance payments of cost-sharing reductions and the premium tax credit.

(a) *Allocation to additional health benefits for QHPs.* An issuer must provide to the Exchange annually for approval, in the manner and timeframe established by HHS, for each health plan at any level of coverage offered, or proposed to be offered in the individual market on an Exchange, an allocation of the rate and the expected allowed claims costs for the plan, in each case, to:

(1) EHB, other than services described in § 156.280(d)(1), and

(2) Any other services or benefits offered by the health plan not described paragraph (a)(1) of this section.

(b) *Allocation to additional health benefits for stand-alone dental plans.* An issuer must provide to the Exchange annually for approval, in the manner and timeframe established by HHS, for each stand-alone dental plan offered, or proposed to be offered, in the individual market on the Exchange, a dollar allocation of the expected premium for the plan, to:

(1) The pediatric dental essential health benefit, and

(2) Any benefits offered by the stand-alone dental plan that are not the pediatric dental essential health benefit.

(c) *Allocation standards for QHPs.* The issuer must ensure that the allocation described in paragraph (a) of this section—

(1) Is performed by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies;

(2) Reasonably reflects the allocation of the expected allowed claims costs attributable to EHB (excluding those services described in § 156.280(d)(1));

(3) Is consistent with the allocation applicable to State-required benefits to be submitted by the issuer under § 155.170(c) of this subchapter, and the allocation requirements described in § 156.280(e)(4) for certain services; and

(4) Is calculated under the fair health insurance premium standards described at 45 CFR 147.102, the single risk pool standards described at 45 CFR 156.80, and the same premium rate standards described at 45 CFR 156.255.

(d) *Allocation standards for stand-alone dental plans.* The issuer must ensure that the dollar allocation described in paragraph (b) of this section—

(1) Is performed by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies;

(2) Is consistent with the allocation applicable to State-required benefits to be submitted by the issuer under § 155.170(c) of this subchapter;

(3) Is calculated under the fair health insurance premium standards described at 45 CFR 147.102, except for the provision related to age set forth at § 147.102(a)(1)(ii); the single risk pool standards described at 45 CFR 156.80; and the same premium rate standards described at 45 CFR 156.255 (in each case subject to paragraph (d)(4) of this section); and

(4) Is calculated so that the dollar amount of the premium allocable to the pediatric dental essential health benefit for an individual under the age of 19 years does not vary, and the dollar amount of the premium allocable to the pediatric dental essential health benefit for an individual aged 19 years or more is equal to zero.

(e) *Disclosure of attribution and allocation methods.* An issuer of a health plan at any level of coverage or a stand-alone dental plan offered, or proposed to be offered in the individual

market on the Exchange must submit to the Exchange annually for approval, an actuarial memorandum, in the manner and timeframe specified by HHS, with a detailed description of the methods and specific bases used to perform the allocations set forth in paragraphs (a) and (b), and demonstrating that the allocations meet the standards set forth in paragraphs (c) and (d) of this section, respectively.

PART 157—EMPLOYER INTERACTIONS WITH EXCHANGES AND SHOP PARTICIPATION

41. The authority citation for part 157 continues to read as follows:

Authority: Title I of the Affordable Care Act, sections 1311, 1312, 1321, 1411, 1412, Pub. L. 111–148, 124 Stat. 199.

42. Section 157.20 is amended by adding the definitions for ''Federally-facilitated SHOP,'' ''Full-time employee,'' and ''Large employer'' in alphabetical order to read as follows:

§ 157.20 Definitions.

* * * * *

Federally-facilitated SHOP has the meaning given to the term in § 155.20 of this subchapter.

Full-time employee has the meaning given to the term in § 155.20 of this subchapter.

Large employer has the meaning given to the term in § 155.20 of this subchapter.

* * * * *

PART 158—ISSUER USE OF PREMIUM REVENUE: REPORTING AND REBATE REQUIREMENTS

43. The authority citation for part 158 continues to read as follows:

Authority: Section 2718 of the Public Health Service Act (42 U.S.C. 300gg–18), as amended.

44. Section 158.110 is amended by revising paragraph (b) to read as follows:

§ 158.110 Reporting requirements related to premiums and expenditures.

* * * * *

(b) *Timing and form of report.* The report for each of the 2011, 2012, and 2013 MLR reporting years must be submitted to the Secretary by June 1 of the year following the end of an MLR reporting year, on a form and in the manner prescribed by the Secretary. Beginning with the 2014 MLR reporting year, the report for each MLR reporting year must be submitted to the Secretary by July 31 of the year following the end of an MLR reporting year, on a form and in the manner prescribed by the Secretary.

* * * * *

45. Section 158.130 is amended by adding paragraph (b)(5) to read as follows:

§ 158.130 Premium revenue.

* * * * *

(b) * * *

(5) Account for the net payments or receipts related to risk adjustment, risk corridors, and reinsurance programs under sections 1341, 1342, and 1343 of the Patient Protection and Affordable Care Act, 42 U.S.C. 18061, 18062, 18063.

46. Section 158.140 is amended by adding paragraph (b)(4)(ii) and revising paragraph (b)(5)(i) to read as follows:

§ 158.140 Requirements for clinical services provided to enrollees.

* * * * *

(b) * * *

(4) * * *

(ii) Net payments or receipts related to risk adjustment, risk corridors, and reinsurance programs under sections 1341, 1342, and 1343 of the Patient Protection and Affordable Care Act, 42 U.S.C. 18061, 18062, 18063.

(5) * * *

(i) Affiliated issuers that offer group coverage at a blended rate may choose whether to make an adjustment to each affiliate's incurred claims and activities to improve health care quality, to reflect the experience of the issuer with respect to the employer as a whole, according to an objective formula that must be defined by the issuer prior to January 1 of the MLR reporting year, so as to result in each affiliate having the same ratio of incurred claims to earned premium for that employer group for the MLR reporting year as the ratio of incurred claims to earned premium calculated for the employer group in the aggregate.

* * * * *

47. Section 158.162 is amended by revising paragraph (b)(1)(vii) and adding paragraph (b)(1)(viii) to read as follows:

§ 158.162 Reporting of Federal and State taxes.

* * * * *

(b) * * *

(1) * * *

(vii) Payments made by a Federal income tax exempt issuer for community benefit expenditures as defined in paragraph (c) of this section, limited to the highest of either:

(A) Three percent of earned premium; or

(B) The highest premium tax rate in the State for which the report is being submitted, multiplied by the issuer's earned premium in the applicable State market.

(viii) In lieu of reporting amounts described in paragraph (b)(1)(vi) of this section, an issuer that is not exempt from Federal income tax may choose to report payment for community benefit expenditures as described in paragraph (c) of this section, limited to the highest premium tax rate in the State for which the report is being submitted multiplied by the issuer's earned premium in the applicable State market.

* * * * *

48. Section 158.221 is amended by revising paragraph (c) to read as follows:

§ 158.221 Formula for calculating an issuer's medical loss ratio.

* * * * *

(c) *Denominator.* The denominator of an issuer's MLR must equal the issuer's premium revenue, as defined in § 158.130, excluding the issuer's Federal and State taxes and licensing and regulatory fees, described in §§ 158.161(a) and 158.162(a)(1) and (b)(1), and after accounting for payments or receipts for risk adjustment, risk corridors, and reinsurance, described in § 158.130(b)(5).

49. Section 158.232 is amended by revising paragraph (c)(1)(i) and paragraph (d) introductory text to read as follows:

§ 158.232 Calculating the credibility adjustment.

* * * * *

(c) * * *

(1) * * *

(i) The per person deductible for a policy that covers a subscriber and the subscriber's dependents shall be the lesser of: the deductible applicable to each of the individual family members; or the overall family deductible for the subscriber and subscriber's family divided by two (regardless of the total number of individuals covered through the subscriber).

* * * * *

(d) *No credibility adjustment.* Beginning with the 2013 MLR reporting year, the credibility adjustment for and MLR based on partially credible experience is zero if both of the following conditions are met:

* * * * *

50. Section 158.240 is amended by revising paragraphs (c) and (d) to read as follows:

§ 158.240 Rebating premium if the applicable medical loss ratio standard is not met.

* * * * *

(c) *Amount of rebate to each enrollee.* (1) For each MLR reporting year, an

issuer must rebate to the enrollee the total amount of premium revenue, as defined in § 158.130 of this part, received by the issuer from the enrollee, after subtracting Federal and State taxes and licensing and regulatory fees as provided in §§ 158.161(a) and 158.162(a)(1) and (b)(1), and after accounting for payments or receipts for risk adjustment, risk corridors, and reinsurance as provided in § 158.130(b)(5), multiplied by the difference between the MLR required by § 158.210 or § 158.211, and the issuer's MLR as calculated under § 158.221.

(2) For example, an issuer must rebate a pro rata portion of premium revenue if it does not meet an 80 percent MLR for the individual market in a State that has not set a higher MLR. If an issuer has a 75 percent MLR for the coverage it offers in the individual market in a State that has not set a higher MLR, the issuer must rebate 5 percent of the premium paid by or on behalf of the enrollee for the MLR reporting year after subtracting taxes and fees and accounting for payments or receipts related to reinsurance, risk adjustment and risk corridors. In this example, an enrollee may have paid $2,000 in premiums for the MLR reporting year. If the issuer received net payments related to reinsurance, risk adjustment and risk corridors of $200, the gross earned premium would be $2,200. If the Federal and State taxes and licensing and regulatory fees that may be excluded from premium revenue as described in §§ 158.161(a), 158.161(a)(1), and 158.162(b)(1) are $150 and the net payments related to reinsurance, risk adjustment and risk corridors that must be accounted for in premium revenue as described in §§ 158.130(b)(5), 158.221 and 158.240 are $200, then the issuer would subtract $150 and $200 from gross premium revenue of $2,200, for a base of $1,850 in premium. The enrollee would be entitled to a rebate of 5 percent of $1,850, or $92.50.

(d) *Timing of rebate.* For each of the 2011, 2012, and 2013 MLR reporting years, an issuer must provide any rebate owing to an enrollee no later than August 1 following the end of the MLR reporting year. Beginning with the 2014 MLR reporting year, an issuer must provide any rebate owing to an enrollee no later than September 30 following the end of the MLR reporting year.

* * * * *

51. Section 158.241 is amended by revising paragraph (a)(2) to read as follows:

§ 158.241 Form of rebate.

(a) * * *

(2) For each of the 2011, 2012, and 2013 MLR reporting years, any rebate provided in the form of a premium credit must be provided by applying the full amount due to the first month's premium that is due on or after August 1 following the MLR reporting year. If the amount of the rebate exceeds the premium due for August, then any overage shall be applied to succeeding premium payments until the full amount of the rebate has been credited. Beginning with the 2014 MLR reporting year, any rebate provided in the form of a premium credit must be provided by applying the full amount due to the first month's premium that is due on or after September 30 following the MLR reporting year. If the amount of the rebate exceeds the premium due for October, then any overage shall be applied to succeeding premium payments until the full amount of the rebate has been credited.

* * * * *

Dated: *November 28, 2012.*

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: *November 28, 2012.*

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2012–29184 Filed 11–30–12; 11:15 am]

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Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

Endangered and Threatened Wildlife and Plants: Proposed Listing Determinations for 82 Reef-Building Coral Species; Proposed Reclassification of Acropora palmata and Acropora cervicornis From Threatened to Endangered; Proposed Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 0911231415–2625–02]

RIN 0648–XT12

Endangered and Threatened Wildlife and Plants: Proposed Listing Determinations for 82 Reef-Building Coral Species; Proposed Reclassification of *Acropora palmata* and *Acropora cervicornis* from Threatened to Endangered

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

ACTION: Proposed rule; request for comments.

SUMMARY: We, NMFS, have completed comprehensive status reviews under the Endangered Species Act (ESA) of 82 reef-building coral species in response to a petition submitted by the Center for Biological Diversity (CBD) to list the species as either threatened or endangered. We have determined, based on the best scientific and commercial data available and efforts being made to protect the species, that 12 of the petitioned coral species warrant listing as endangered (five Caribbean and seven Indo-Pacific), 54 coral species warrant listing as threatened (two Caribbean and 52 Indo-Pacific), and 16 coral species (all Indo-Pacific) do not warrant listing as threatened or endangered under the ESA. Additionally, we have determined, based on the best scientific and commercial information available and efforts undertaken to protect the species, two Caribbean coral species currently listed warrant reclassification from threatened to endangered. We are announcing that 18 public hearings will be held during the public comment period to provide additional opportunities and formats to receive public input. See **SUPPLEMENTARY INFORMATION** for public hearing dates, times, and locations.

DATES: Comments on this proposal must be received by March 7, 2013. See **SUPPLEMENTARY INFORMATION** for public hearing dates, times, and locations.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2010–0036, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal *www.regulations.gov.* To submit comments via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter NOAA–NMFS–2010–0036 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the ''Submit a Comment'' icon on the right of that line.
- *Mail:* Submit written comments to Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814; or Assistant Regional Administrator, Protected Resources, National Marine Fisheries Service, Southeast Regional Office, 263 13th Avenue South, Saint Petersburg, FL 33701, Attn: 82 coral species proposed listing.
- *Fax:* 808–973–2941; *Attn:* Protected Resources Regulatory Branch Chief; or 727–824–5309; Attn: Protected Resources Assistant Regional Administrator.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) you submit will 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). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

You can obtain the petition and reference materials regarding this determination via the NMFS Pacific Island Regional Office Web site: *http://www.fpir.noaa.gov/PRD/PRD_coral.html;* NMFS Southeast Regional Office Web site: *http://sero.nmfs.noaa.gov/pr/esa/82CoralSpecies.htm;* NMFS HQ Web site: *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html;* or by submitting a request to the Regulatory Branch Chief, Protected Resources Division, National Marine Fisheries Service, Pacific Islands Regional Office, 1601 Kapiolani Blvd., Suite 1110, Honolulu, HI 96814, Attn: 82 coral species. See **SUPPLEMENTARY INFORMATION** for public hearing dates, times, and locations.

FOR FURTHER INFORMATION CONTACT: Chelsey Young, NMFS, Pacific Islands Regional Office, 808–944–2137; Lance Smith, NMFS, Pacific Island Regional Office, 808–944–2258; Jennifer Moore, NMFS, Southeast Regional Office, 727–824–5312; or Marta Nammack, NMFS, Office of Protected Resources, 301–427–8469.

SUPPLEMENTARY INFORMATION:

Background

On October 20, 2009, the Center for Biological Diversity (CBD) petitioned us to list 83 reef-building coral species as either threatened or endangered under the ESA and to designate critical habitat. The 83 species included in the petition are: *Acanthastrea brevis, Acanthastrea hemprichii, Acanthastrea ishigakiensis, Acanthastrea regularis, Acropora aculeus, Acropora acuminata, Acropora aspera, Acropora dendrum, Acropora donei, Acropora globiceps, Acropora horrida, Acropora jacquelineae, Acropora listeri, Acropora lokani, Acropora microclados, Acropora palmerae, Acropora paniculata, Acropora pharaonis, Acropora polystoma, Acropora retusa, Acropora rudis, Acropora speciosa, Acropora striata, Acropora tenella, Acropora vaughani, Acropora verweyi, Agaricia lamarcki, Alveopora allingi, Alveopora fenestrata, Alveopora verrilliana, Anacropora puertogalerae, Anacropora spinosa, Astreopora cucullata, Barabattoia laddi, Caulastrea echinulata, Cyphastrea agassizi, Cyphastrea ocellina, Dendrogyra cylindrus, Dichocoenia stokesii, Euphyllia cristata, Euphyllia paraancora, Euphyllia paradivisa, Galaxea astreata, Heliopora coerulea, Isopora crateriformis, Isopora cuneata, Leptoseris incrustans, Leptoseris yabei, Millepora foveolata, Millepora tuberosa, Montastraea annularis, Montastraea faveolata, Montastraea franksi, Montipora angulata, Montipora australiensis, Montipora calcarea, Montipora caliculata, Montipora dilatata, Montipora flabellata, Montipora lobulata, Montipora patula, Mycetophyllia ferox, Oculina varicosa, Pachyseris rugosa, Pavona bipartita, Pavona cactus, Pavona decussata, Pavona diffluens, Pavona venosa, Pectinia alcicornis, Physogyra lichtensteini, Pocillopora danae, Pocillopora elegans, Porites horizontalata, Porites napopora, Porites nigrescens, Porites pukoensis, Psammocora stellata, Seriatopora aculeata, Turbinaria mesenterina, Turbinaria peltata, Turbinaria reniformis,* and *Turbinaria stellulata.* Eight of the petitioned species occur in the Caribbean and 75 of the petitioned species occur in the Indo-Pacific region.

Most of the 83 species can be found in the United States, its territories (Puerto Rico, U.S. Virgin Islands, Navassa, Northern Mariana Islands, Guam, American Samoa, Pacific Remote Island Areas), or its freely associated states (Republic of the Marshall Islands, Federated States of Micronesia, and Republic of Palau), though many occur more frequently in other countries.

On February 10, 2010, we published a positive 90-day finding (75 FR 6616; February 10, 2010) in which we described our determination that the petition contained substantial scientific and commercial information indicating that the petitioned actions may be warranted for all of the petitioned species except the Caribbean species *Oculina varicosa.* Subsequently, we announced the initiation of a formal status review of the remaining 82 species (hereinafter referred to as ''candidate species'') as required by section 4(b)(3)(A) of the ESA. Concurrently, we solicited input from the public on six categories of information: (1) Historical and current distribution and abundance of these species throughout their ranges (U.S. and foreign waters); (2) historical and current condition of these species and their habitat; (3) population density and trends; (4) the effects of climate change on the distribution and condition of these coral species and other organisms in coral reef ecosystems over the short and long term; (5) the effects of all other threats including dredging, coastal development, coastal point source pollution, agricultural and land use practices, disease, predation, reef fishing, aquarium trade, physical damage from boats and anchors, marine debris, and aquatic invasive species on the distribution and abundance of these coral species over the short and long term; and (6) management programs for conservation of these species, including mitigation measures related to any of the threats listed under (5) above.

The ESA requires us to make determinations on whether species are threatened or endangered ''solely on the basis of the best scientific and commercial data available * * * after conducting a review of the status of the species * * * '' (16 U.S.C. 1533). Further, consistent with case law, our implementing regulations specifically direct us not to take possible economic or other impacts of listing species into consideration (50 CFR 424.11(b)). In order to conduct a comprehensive status review for this petition, given the number of species, the geographic scope and issues surrounding coral biology and extinction risk, we convened a Coral Biological Review Team (BRT) composed of seven Federal scientists from NMFS' Pacific Islands, Northwest, and Southeast Fisheries Science Centers, as well as the U.S. Geological Survey and National Park Service. The members of the BRT are a diverse group of scientists with expertise in coral biology, coral ecology, coral taxonomy, physical oceanography, global climate change, and coral population dynamics. The BRT's comprehensive, peer-reviewed Status Review Report (SRR, Brainard *et al.,* 2011) incorporates and summarizes the best available scientific and commercial information as of August 2011 on the following topics: (1) Long-term trends in abundance throughout each species' range; (2) potential factors for any decline of each species throughout its range (human population, ocean warming, ocean acidification, overharvesting, natural predation, disease, habitat loss, etc.); (3) historical and current range, distribution, and habitat use of each species; (4) historical and current estimates of population size and available habitat; and (5) knowledge of various life history parameters (size/age at maturity, fecundity, length of larval stage, larval dispersal dynamics, etc.). The SRR evaluates the status of each species, identifies threats to the species, and estimates the risk of extinction for each of the candidate species out to the year 2100. The BRT also considered the petition, comments we received as a result of the 90-day Finding (75 FR 6616; February 10, 2010), and the results of the peer review of the draft SRR, and incorporated relevant information from these sources into the final SRR. Given the scope of the undertaking to gather and evaluate biological information for an 82-species status review, the BRT elected not to evaluate adequacy of existing regulatory mechanisms and conservation efforts in addressing threats to the 82 coral species. Thus, we developed a supplementary, peer-reviewed Draft Management Report (NMFS, 2012a) to identify information relevant to factor 4(a)(1)(D), inadequacy of existing regulatory mechanisms, and protective efforts that may provide protection to the corals pursuant to ESA section 4(b). We combined the information from the SRR and the Draft Management Report to develop and apply the listing Determination Tool (discussed below).

On April 17, 2012, we published a **Federal Register** notice announcing the availability of the SRR and the Draft Management Report. The response to the petition to list 83 coral species is one of the broadest and most complex listing reviews we have ever undertaken. Given the petition's scale and the precedential nature of the issues, we determined that our decision-making process would be strengthened if we took additional time to allow the public, non-federal experts, non-governmental organizations, state and territorial governments, and academics to review and provide information related to the SRR and the Draft Management Report prior to issuing our 12-month finding. We specifically requested information on the following: (1) Relevant scientific information collected or produced since the completion of the SRR or any relevant scientific information not included in the SRR; and (2) Relevant management information not included in the Draft Management Report, such as descriptions of regulatory mechanisms for greenhouse gas emissions globally, and for local threats in the 83 foreign countries and the U.S. (Florida, Hawaii, Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and Northern Mariana Islands), where the 82 coral species collectively occur. Further, in June 2012, we held listening sessions and scientific workshops in the Southeast region and Pacific Islands region to engage the scientific community and the public in person. During this public engagement period, which ended on July 31, 2012, we received over 42,000 letters and emails. Also, we were provided or we identified approximately 400 relevant scientific articles, reports, or presentations either produced since the SRR was finalized or not originally included in the SRR. We compiled and synthesized all relevant information that we identified or received into the Supplemental Information Report (SIR; NMFS, 2012b). Additionally, we incorporated all relevant management and conservation information into the Final Management Report (NMFS, 2012c).

Therefore, the 82 candidate coral species comprehensive status review consists of the SRR (Brainard *et al.,* 2011), the SIR (NMFS, 2012b), and the Final Management Report (NMFS, 2012c). The findings on the petition described in this notice are based on the information contained within these reports.

Listing Species Under the Endangered Species Act

We are responsible for determining whether each of the 82 candidate corals are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*) We first must consider whether each candidate species meets the definition of a ''species'' in section 3 of the ESA, then whether the status of each species

qualifies it for listing as threatened or endangered under the ESA. As described above, we convened the BRT which produced the SRR (Brainard *et al.,* 2011), then a public engagement period was opened which led to the SIR and Final Management Report (NMFS, 2012b; NMFS, 2012c). We developed a Determination Tool to consistently interpret and apply the information in the three reports to the definitions of ''endangered'' and ''threatened'' species in the ESA, in order to produce proposed listing determinations for each of the 82 species (the Determination Tool is introduced and described in the Risk Analyses section below). The BRT participated in the implementation of the Determination Tool, and concurred that its inputs (demographic, spatial, and threat vulnerability ratings for each species) are the best available information. Further, the BRT believes our listing determinations for the 82 candidate species are consistent with their extinction risk analyses.

This finding begins with an overview of coral biology, ecology, and taxonomy in the Introduction to Corals and Coral Reefs section below, which also discusses whether each candidate species meets the definition of a ''species'' for purposes of the ESA. Other relevant background information in this section includes the general characteristics of the habitats and environments in which the 82 candidate species are found. The finding then summarizes information on factors adversely affecting and posing extinction risk to corals in general in the Threats to Coral Species section. The Risk Analyses section then describes development and application of the Determination Tool that resulted in proposed listing statuses for the 82 candidate species.

Introduction to Corals and Coral Reefs

Corals are marine invertebrates in the phylum Cnidaria that occur as polyps, usually forming colonies of many clonal polyps on a calcium carbonate skeleton. The Cnidaria include true stony corals (class Anthozoa, order Scleractinia), the blue coral (class Anthozoa, order Helioporacea), and fire corals (class Hydrozoa, order Milleporina). Members of these three orders are represented among the 82 candidate coral species (79 Scleractinia, one Helioporacea, and two Milleporina). All 82 candidate species are reef-building corals, because they secrete massive calcium carbonate skeletons that form the physical structure of coral reefs. Reef-building coral species collectively produce coral reefs over time in high-growth conditions, but these species also occur in non-reef habitats (*i.e.,* they are reef-building, but not reef-dependent). There are approximately 800 species of reef-building corals in the world.

Most reef-building coral species are in the order Scleractinia, consisting of over 25 families, 100 genera, and the great majority of the approximately 800 species. Most Scleractinian corals form complex colonies made up of a tissue layer of polyps (a column with mouth and tentacles on the upper side) growing on top of a calcium carbonate skeleton, which the polyps produce through the process of calcification. Scleractinian corals are characterized by polyps with multiples of six tentacles around the mouth for feeding and capturing prey items in the water column. In contrast, the blue coral, *Heliopora coerulea,* is characterized by polyps always having eight tentacles, rather than the multiples of six that characterize stony corals. The blue coral is the only species in the suborder Octocorallia (the ''octocorals'') that forms a skeleton, and as such is the primary octocoral reef-building species. Finally, *Millepora* fire corals are also reef-building species, but unlike the scleractinians and octocorals, they have near microscopic polyps containing tentacles with stinging cells.

Reef-building coral species are capable of rapid calcification rates because of their symbiotic relationship with single-celled dinoflagellate algae, zooxanthellae, which occur in great numbers within the host coral tissues. Zooxanthellae photosynthesize during the daytime, producing an abundant source of energy for the host coral that enables rapid growth. At night, polyps extend their tentacles to filter-feed on microscopic particles in the water column such as zooplankton, providing additional nutrients for the host coral. In this way, reef-building corals obtain nutrients autotrophically (*i.e.,* via photosynthesis) during the day, and heterotrophically (*i.e.,* via predation) at night. In contrast, non-reef-building coral species do not contain zooxanthellae in their tissues, and thus are not capable of rapid calcification. Unlike reef-building corals, these ''azooxanthellate'' species are not dependent on light for photosynthesis, and thus are able to occur in low-light habitats such as caves and deep water. We provide additional information in the following sections on the biology and ecology of reef-building corals and coral reefs.

Taxonomic Uncertainty in Reef-Building Corals

In addressing the species question, the BRT had to address issues related to the considerable taxonomic uncertainty in corals (*e.g.,* reliance on morphological features rather than genetic and genomic science to delineate species) and corals' evolutionary history of reticulate processes (*i.e.,* individual lineages showing repeated cycles of divergence and convergence via hybridization). To address taxonomic uncertainty, except as described below where there was genetic information available, the BRT accepted the nominal species designation as listed in the petition, acknowledging that future research may result in taxonomic reclassification of some of the candidate species. Additionally, to address complex reticulate processes in corals, the BRT attempted to distinguish between a ''good species'' that has a hybrid history—meaning it may display genetic signatures of interbreeding and back-crossing in its evolutionary history—and a ''hybrid species'' that is composed entirely of hybrid individuals (as in the case of *Acropora prolifera,* discussed in the status review of acroporid corals in the Caribbean; *Acropora* Biological Review Team, 2005). The best available information indicates that, while several of the candidate species have hybrid histories, there is no evidence to suggest any of them are ''hybrid species'' (all individuals of a species being F1 hybrids); thus, they were all considered to meet the definition of a ''species''.

Studies elucidating complex taxonomic histories were available for several of the genera addressed in the status review, and the BRT was able to incorporate those into their species determinations. Thus, while the BRT made species determinations for most of the 82 candidate coral species on the nominal species included in the petition, it deliberated on the proper taxonomic classification for the candidate species *Montipora dilatata* and *M. flabellata; Montipora patula;* and *Porites pukoensis* based on genetic studies*;* and *Pocillopora elegans* because the two geographically-distant populations have different modes of reproduction. The BRT decided to subsume a nominal species (morpho-species) into a larger clade whenever genetic studies failed to distinguish between them (*e.g., Montipora dilatata, M. flabellata* and *M. turgescens* (not petitioned) and *Porites* Clade 1 *forma pukoensis*). Alternatively, in the case of *Pocillopora elegans,* the BRT identified likely differentiation within the nominal species. So, for the purposes of this status review, the BRT chose to separate *P. elegans* into two geographic subgroups, considered each subgroup as

a species as defined by the ESA, and estimated extinction risk separately for each of the two subgroups (eastern Pacific and the Indo-Pacific). The combining of nominal species (*i.e., Montipora* spp. and *Porites* spp.) and the separation of geographically isolated populations of another species (*P. elegans*) resulted in 82 candidate species being evaluated for ESA listing status; however, these are not the same 82 ''species'' included in the petition in that: *Montipora dilatata* and *M. flabellata* were combined into one species; and *P. elegans* was separated into two. The combining of the petitioned species *Montipora patula* with the non-petitioned species *P. verrilli* did not affect the number of candidate species. We did not receive any additional information suggesting alteration to the BRT's species delineation nor indicating any of the other 82 candidates should be separated or combined. We have made listing determinations on the 82 candidate species identified by the BRT in the SRR. Finally, a coral is a marine invertebrate, and as such, we cannot subdivide it into DPSs (16 U.S.C. 1532(15)).

Reproductive Life History of Reef-Building Corals

Corals use a number of diverse reproductive strategies that have been researched extensively; however, many individual species' reproductive modes remain poorly described. Most coral species use both sexual and asexual propagation. Sexual reproduction in corals is primarily through gametogenesis (*i.e.,* development of eggs and sperm within the polyps near the base). Some coral species have separate sexes (gonochoric), while others are hermaphroditic. Strategies for fertilization are either by ''brooding'' or ''broadcast spawning'' (*i.e.,* internal or external fertilization, respectively). Brooding is relatively more common in the Caribbean, where nearly 50 percent of the species are brooders, compared to less than 20 percent of species in the Indo-Pacific. Asexual reproduction in coral species most commonly involves fragmentation, where colony pieces or fragments are dislodged from larger colonies to establish new colonies, although the budding of new polyps within a colony can also be considered asexual reproduction. In many species of branching corals, fragmentation is a common and sometimes dominant means of propagation.

Depending on the mode of fertilization, coral larvae (called planulae) undergo development either mostly within the mother colony (brooders) or outside of the mother colony, adrift in the ocean (broadcast spawners). In either mode of larval development, planula larvae presumably experience considerable mortality (up to 90 percent or more) from predation or other factors prior to settlement and metamorphosis. (Such mortality cannot be directly observed, but is inferred from the large amount of eggs and sperm spawned versus the much smaller number of recruits observed later.) Coral larvae are relatively poor swimmers; therefore, their dispersal distances largely depend on the duration of the pelagic phase and the speed and direction of water currents transporting the larvae. The documented maximum larval life span is 244 days (*Montastraea magnistellata*), suggesting that the potential for long-term dispersal of coral larvae, at least for some species, may be substantially greater than previously thought and may partially explain the large geographic ranges of many species.

The spatial and temporal patterns of coral recruitment have been studied extensively. Biological and physical factors that have been shown to affect spatial and temporal patterns of coral recruitment include substratum availability and community structure, grazing pressure, fecundity, mode and timing of reproduction, behavior of larvae, hurricane disturbance, physical oceanography, the structure of established coral assemblages, and chemical cues. Additionally, factors other than dispersal may influence recruitment and several other factors may influence reproductive success and reproductive isolation, including external cues, genetic precision, and conspecific signaling.

In general, on proper stimulation, coral larvae, whether brooded by parental colonies or developed in the water column, settle and metamorphose on appropriate substrates. Some evidence indicates that chemical cues from crustose coralline algae, microbial films, and/or other reef organisms or acoustic cues from reef environments stimulate settlement behaviors. Initial calcification ensues with the forming of the basal plate. Buds formed on the initial corallite develop into daughter corallites. Once larvae are able to settle onto appropriate hard substrate, metabolic energy is diverted to colony growth and maintenance. Because newly settled corals barely protrude above the substrate, juveniles need to reach a certain size to limit damage or mortality from threats such as grazing, sediment burial, and algal overgrowth. Once recruits reach about 1 to 2 years post-settlement, growth and mortality rates appear similar across species. In some species, it appears that there is virtually no limit to colony size beyond structural integrity of the colony skeleton, as polyps apparently can bud indefinitely.

Distribution and Abundance of Reef-Building Corals

Corals need hard substrate on which to settle and form; however, only a narrow range of suitable environmental conditions allows the growth of corals and other reef calcifiers to exceed loss from physical, chemical, and biological erosion. While corals do live in a fairly wide temperature range across geographic locations, accomplished via either adaptation (genetic changes) or acclimatization (physiological or phenotypic changes), reef-building corals do not thrive outside of an area characterized by a fairly narrow mean temperature range (typically 25 °C–30 °C). Two other important factors influencing suitability of habitat are light and water quality. Reef-building corals require light for photosynthetic performance of their zooxanthellae, and poor water quality can negatively affect both coral growth and recruitment. Deep distribution of corals is generally limited by availability of light. Hydrodynamic condition (*e.g.,* high wave action) is another important habitat feature, as it influences the growth, mortality, and reproductive rate of each species adapted to a specific hydrodynamic zone.

The 82 candidate coral species are distributed throughout the wider-Caribbean (*i.e.,* the tropical and sub-tropical waters of the Caribbean Sea, western Atlantic Ocean, and Gulf of Mexico; herein referred to collectively as ''Caribbean''), the Indo-Pacific biogeographic region (*i.e.,* the tropical and sub-tropical waters of the Indian Ocean, the western and central Pacific Ocean, and the seas connecting the two in the general area of Indonesia), and the tropical and sub-tropical waters of the eastern Pacific Ocean. The 82 candidate species occur in 84 countries. Seven of the 82 candidate species occur in the Caribbean (*Agaricia lamarcki, Dendrogyra cylindrus, Dichocoenia stokesii, Montastraea annularis, Montastraea franksi, Montastraea faveola* and *Mycetophyllia ferox*) in the United States (Florida, Puerto Rico, U.S. Virgin islands (U.S.V.I.), Navassa), Antigua and Barbuda, Bahamas, Barbados, Belize, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, France (includes Guadeloupe, Martinique, St. Barthelemy, and St. Martin), Grenada, Guatemala, Haiti, the Netherlands (includes Aruba, Bonaire,

Curaçao, Saba, St. Eustatius, and Saint Maarten), Honduras, Jamaica, Mexico, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, the United Kingdom (includes British territories of Anguilla, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands), and Venezuela. The remaining 75 species occur across the Indo-Pacific region in the United States (Hawaii, Commonwealth of the Northern Mariana Islands, Territories of Guam and American Samoa, and the U.S. Pacific Island Remote Area), Australia (includes Australian colonies of Cocos-Keeling Islands, Christmas Island, and Norfolk Island), Bahrain, Brunei, Cambodia, Chile, China, Colombia, Comoros Islands, Costa Rica, Djibouti, Ecuador, El Salvador, Egypt, Eritrea, Federated States of Micronesia, Fiji, France (includes French territories of New Caledonia, French Polynesia, Mayotte, Reunion, and Wallis and Futuna), Guatemala, Honduras, India, Indonesia, Iran, Israel, Japan, Jordan, Kenya, Kiribati, Kuwait, Madagascar, Malaysia, Maldives, Marshall Islands, Mauritius, Mexico, Mozambique, Myanmar, Nauru, New Zealand (includes New Zealand colonies of Cook Islands and Tokelau), Nicaragua, Niue, Oman, Palau, Pakistan, Panama, Papua New Guinea, Philippines, Qatar, Samoa, Saudi Arabia, Seychelles, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Sudan, Taiwan, Tanzania, Thailand, Timor-Leste, Tonga, Tuvalu, United Arab Emirates, the United Kingdom (includes British colonies of Pitcairn Islands and British Indian Ocean Territory), Vanuatu, Vietnam, and Yemen.

Determining abundance of the 82 candidate coral species presented a unique challenge because corals are clonal, colonial invertebrates, and colony growth occurs by the addition of new polyps. Colonies can exhibit partial mortality in which a subset of the polyps in a colony dies, but the colony persists. Colonial species present a special challenge in determining the appropriate unit to evaluate for status (*i.e.,* abundance). In addition, new coral colonies, particularly in branching species, can be added to a population by fragmentation (breakage from an existing colony of a branch that reattaches to the substrate and grows) as well as by sexual reproduction (see above, and Fig. 2.2.1 in SRR). Fragmentation results in multiple, genetically identical colonies (ramets) while sexual reproduction results in the creation of new genetically distinct individuals (genotypes or genets). Thus, in corals, the term ''individual'' can be interpreted as the polyp, the colony, or the genet.

Quantitative abundance estimates were available for only a few of the candidate species. In the Indo-Pacific, many reports and long-term monitoring programs describe coral percent cover only to genus level because of the substantial diversity within many genera and difficulties in field identification among congeneric species. In the Caribbean, most of the candidate species are either too rare to document meaningful trends in abundance from literature reports (*e.g., Dendrogyra cylindrus*), or commonly identified only to genus (*Mycetophyllia* and *Agaricia* spp.), or potentially misidentified as another species. The only comprehensive abundance data in the Caribbean were for the three *Montastraea* species, partially because they historically made up a predominant part of live coral cover. Even for these species, the time series data are often of very short duration (they were not separated as sibling species until the early 1990s and many surveys continue to report them as *Montastraea annularis* complex) and cover a very limited portion of the species range (*e.g.,* the time series only monitors a sub-section of a single national park). In general, the available quantitative abundance data were so limited or compromised due to factors such as small survey sample sizes, lack of species-specific data, etc., that they were considerably less informative for evaluating the risk to species than other data, and were therefore generally not included as part of the BRT individual species extinction risk evaluations. Thus, qualitative abundance characterizations (*e.g.,* rare, common), available for all species, were considered in the BRT's individual species extinction risk evaluations.

Coral Reefs, Other Coral Habitats, and Overview of Candidate Coral Environments

A coral reef is a complex three-dimensional structure providing habitat, food, and shelter for numerous marine species and, as such, fostering exceptionally high biodiversity. Scleractinian corals produce the physical structure of coral reefs, and thus are foundational species for these generally productive ecosystems. It has been estimated that coral reef ecosystems harbor around one-third of all marine species even though they make up only 0.2 percent in area of the marine environment. Coral reefs serve the following essential functional roles: Primary production and recycling of nutrients in relatively nutrient poor (oligotrophic) seas, calcium carbonate deposition yielding reef construction, sand production, modification of near-field or local water circulation patterns, and habitat for secondary production, including fisheries. These functional roles yield important ecosystem services in addition to direct economic benefits to human societies such as traditional and cultural uses, food security, tourism, and potential biomedical compounds. Coral reefs protect shorelines, coastal ecosystems, and coastal inhabitants from high seas, severe storm surge, and tsunamis.

As described above in Distribution and Abundance, reef-building corals have specific habitat requirements, including hard substrate, narrow mean temperature range, adequate light, and adequate water flow. These habitat requirements most commonly occur on shallow tropical and subtropical coral reefs, but also occur in non-reefal and mesophotic areas (NMFS 2012b, SIR Section 4.3). While some reef-building corals do not require hard substrates, all of the 82 candidate species in this status review do require hard substrates. Thus, in this finding, ''non-reefal habitat'' refers to hard substrates where reef-building corals can grow, including marginal habitat where conditions prevent reef development (*e.g.,* turbid or high-latitude or upwelling-influenced areas) and recently available habitat (*e.g.,* lava flows). The term ''mesophotic habitat'' refers to hard substrates between approximately 30 m and 100 m of depth. The total area of non-reefal and mesophotic habitats is greater than the total area of shallow coral reefs within the ranges of the 82 species, as described in more detail below (NMFS, 2012b, SIR Section 4.3).

The Caribbean and Indo-Pacific basins contrast greatly both in size and in condition. The Caribbean basin is geographically small and partially enclosed, has high levels of connectivity, and has relatively high human population densities. The wider-Caribbean occupies five million square km of water and has 55,383 km of coastline, including approximately 5,000 islands. Shallow coral reefs occupy approximately 25,000 square km (including ≈2,000 square km within US waters), or about 10 percent of the total shallow coral reefs of the world. The amount of non-reefal and mesophotic habitat that could potentially be occupied by corals in the Caribbean is unknown, but is likely greater than the area of shallow coral reefs in the Caribbean (NMFS 2012b, SIR Section 4.3).

The Caribbean region has experienced numerous disturbances to coral reef systems throughout recorded human history. Fishing has affected Caribbean reefs since before European contact. Beginning in the early 1980s, a series of basin-scale disturbances has led to altered community states, and a loss of resilience (*i.e.,* inability of corals and coral communities to recover after a disturbance event). Massive, Caribbean-wide mortality events from disease conditions of both the keystone grazing urchin *Diadema antillarum* and the dominant branching coral species *Acropora palmata* and *Acropora cervicornis* precipitated widespread and dramatic changes in reef community structure. None of the three important keystone species (*Acropora palmata, Acropora cervicornis,* and *Diadema antillarum*) have shown much recovery over decadal time scales. In addition, continuing coral mortality from periodic acute events such as hurricanes, disease outbreaks, and bleaching events from ocean warming have added to the poor state of Caribbean coral populations and yielded a remnant coral community with increased dominance by weedy brooding species, decreased overall coral cover, and increased macroalgal cover. Additionally, iron enrichment in the Caribbean may predispose the basin to algal growth. Further, coral growth rates in the Caribbean have been declining over decades.

Caribbean-wide meta-analyses suggest that the current combination of disturbances, stressful environmental factors such as elevated ocean temperatures, nutrients and sediment loads, and reduced observed coral reproduction and recruitment have yielded poor resilience, even to natural disturbances such as hurricanes. Coral cover (percentage of reef substrate occupied by live coral) across the region has declined from approximately 50 percent in the 1970s to approximately 10 percent in the early 2000s (*i.e.,* lower densities throughout the range, not range contraction), with concurrent changes between subregions in overall benthic composition and variation in dominant species. Further, a recent model suggests coral cover is likely to fall below five percent in the Southeastern Caribbean by 2100, even with accounting for potential adaptation by corals to increasing ocean temperatures caused by any warming scenario (NMFS, 2012b, SIR Section 3.2.2). These wide-scale changes in coral populations and communities have affected habitat complexity and may have already reduced overall reef-fish abundances; the trends are expected to continue. In combination, these regional factors are considered to contribute to elevated extinction risk for all Caribbean species.

With the exception of coral reefs in the eastern Pacific, ocean basin size and diversity of habitats, as well as some vast expanses of ocean area with only very local, spatially-limited, direct human influences, have provided substantial buffering of Indo-Pacific corals from many of the threats and declines manifest across the Caribbean. The Indo-Pacific is enormous (Indian and Pacific Oceans) and hosts much greater coral diversity than the Caribbean region (~700 species compared with 65 species). The Indo-Pacific region encompasses the tropical and sub-tropical waters of the Indian Ocean, the western and central Pacific Ocean, and the seas connecting the two in the general area of Indonesia. This vast region occupies at least 60 million square km of water (more than ten times larger than the Caribbean), and includes 50,000 islands and over 40,000 km of continental coastline, spanning approximately 180 degrees of longitude and 60 degrees of latitude. There are approximately 240,000 square km of shallow coral reefs in this vast region, which is more than 90 percent of the total coral reefs of the world. In addition, the Indo-Pacific includes abundant non-reefal habitat, as well as vast but scarcely known mesophotic areas that provide coral habitat. The amount of non-reefal and mesophotic habitat that could potentially be occupied by corals in the Indo-Pacific is unknown, but is likely greater than the area of shallow coral reefs in the Indo-Pacific (NMFS, 2012b; SIR Section 4.3).

While the reef communities in the Caribbean have lost resilience, the reefs in the central Pacific (*e.g.,* American Samoa, Moorea, Fiji, Palau, and the Northwestern Hawaiian Islands) appear to remain relatively resilient despite major bleaching events from ocean warming, hurricanes, and crown-of-thorns seastar (COTS, *Acanthaster planci*) predation outbreaks. That is, even though the reefs have experienced significant impacts, corals have been able to recover. Several factors likely result in greater resilience in the Indo-Pacific than in the Caribbean: (1) The Indo-Pacific is more than 10-fold larger than the Caribbean, including many remote areas; (2) the Indo-Pacific has approximately 10-fold greater diversity of reef-building coral species than the Caribbean; (3) broad-scale Caribbean reef degradation likely began earlier than in the Indo-Pacific; (4) iron enrichment in the Caribbean may predispose it to algal growth; (5) there is greater coral cover on mesophotic reefs in the Indo-Pacific than in the Caribbean; and (6) there is greater resilience to algal phase shifts in the Indo-Pacific than in the Caribbean.

Even given the relatively higher resilience in the Indo-Pacific as compared to the Caribbean, meta-analysis of overall coral status throughout the Indo-Pacific indicates that substantial loss of coral cover (*i.e.,* lower densities throughout the range, not range contraction) has already occurred in most subregions. As of 2002–2003, the Indo-Pacific had an overall average of approximately 20 percent live coral cover, down from approximately 50 percent, compared to an overall average of approximately 10 percent live coral cover in the Caribbean at the same time. This indicates that both basins have experienced conditions leading to coral mortality and prevention of full recovery; however, the Caribbean has been more greatly impacted. While basin-wide averages are useful for large scale comparisons, they do not describe conditions at finer, regional scales. For example, decreases in overall live coral cover have occurred since 2002 in some areas, such as on the Great Barrier Reef, while increases have occurred in other areas, such as in American Samoa.

In the eastern Pacific (from Mexico in the north to Ecuador in the south, and from the coast west out to the remote Revillagigedo, Clipperton, Cocos, Malpelo, and Galápagos Islands), coral reefs are exposed to a number of conditions that heighten extinction risk. Compared to the Caribbean, coral reefs in the eastern Pacific have approximately one third as many genera, less than half the species, less reef area, and strong regional climate variability. Severe climate swings typical of the region continue to be a hindrance to reef growth today, with major losses of coral cover and even entire reefs lost from Mexico to the Galápagos Islands. Regional climatic variability not only has killed corals in recent decades, it has resulted in major loss of reef structure. This regional climatic variability produces extreme temperature variability (both extreme upwelling and high temperatures during El Niño), storm events, and changes in the abundance, distribution, and behavior of both corallivores and bioeroders. Eastern Pacific reefs have been among the slowest in the world to recover after disturbance. Additionally, the naturally low calcium carbonate saturation state of eastern Pacific waters has made these reefs among the most fragile and subject to bioerosion in the world. In conclusion, there have been

declines in coral cover in all basins. However, thus far, the Indo-Pacific has been less affected as a whole, due to the differentiating factors described above. The Caribbean and Eastern Pacific basins continue to experience more severe adverse conditions than the Indo-Pacific.

Threats Evaluation

Section 4(a)(1) of the ESA and NMFS's implementing regulations (50 CFR 424) state that the agency must determine whether a species is endangered or threatened because of any one or a combination of five factors: (A) Present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The BRT evaluated factors A, B, C, and E in the SRR; the ''Inadequacy of Regulatory Mechanisms'' (factor D) is evaluated separately in this 12-month Finding and is informed by the Final Management Report. Our consideration of the five factors was further informed by information received during the public engagement period and provided in the SIR, as explained in more detail below. The BRT identified factors acting directly as stressors to the 82 coral species (*e.g.,* sedimentation and elevated ocean temperatures) as distinct from the sources responsible for those factors (*e.g.,* land management practices and climate change) and qualitatively evaluated the impact each threat has on the candidate species' extinction risk over the foreseeable future, defined as the year 2100 as described below.

We established that the appropriate period of time corresponding to the foreseeable future is a function of the particular type of threats, the life-history characteristics, and the specific habitat requirements for coral species under consideration. The timeframe established for the foreseeable future takes into account the time necessary to provide for the conservation and recovery of each threatened species and the ecosystems upon which they depend, but is also a function of the reliability of available data regarding the identified threats and extends only as far as the data allow for making reasonable predictions about the species' response to those threats. As described below, the more vulnerable a coral species is to the threats with the highest influence on extinction risk (*i.e.,* ''high importance threats''; ocean warming, diseases, ocean acidification), the more likely the species is at risk of extinction. The BRT determined that ocean warming and related impacts of climate change have already created a clear and present threat to many corals, that will continue into the future; the threat posed by the most optimistic scenarios of greenhouse gas emissions in the 21st century and even the threat posed by unavoidable warming due to emissions that have already occurred represents a plausible extinction risk to the 82 candidate coral species. We agree with the BRT's judgment that the threats related to global climate change (*e.g.,* bleaching from ocean warming, ocean acidification) pose the greatest potential extinction risk to corals and have been assessed with sufficient certainty out to the year 2100. Therefore, we have determined the foreseeable future for the 82 candidate species to be to the year 2100.

The BRT qualitatively ranked each threat as high, medium, low, or negligible (or combinations of two; *e.g.,* ''low-medium'') importance in terms of their contribution to extinction risk of all coral species across their ranges. The BRT considered the severity, geographic scope, the level of certainty that corals in general are affected (given the paucity of species-level information) by each threat, the projections of potential changes in the threat, and the impacts of the threat on each species. The BRT determined that global climate change directly influences two of the three highest ranked threats, ocean warming and ocean acidification, and indirectly (through ocean warming) influences the remaining highest ranked threat, disease.

Overall, the BRT identified 19 threats (see Table 1) as posing either current or future extinction risk to the 82 corals. Of these, the BRT considers ocean warming, ocean acidification, and disease to be overarching and influential in posing extinction risk to each of the 82 candidate coral species. These impacts are or are expected to become ubiquitous, and pose direct population disturbances (mortality and/or impaired recruitment) in varying degrees to each of the candidate coral species. There is also a category of threats (some of which have been responsible for great coral declines in the past) that the BRT considers important to coral reef ecosystems, but of medium influence in posing extinction risk because their effects on coral populations are largely indirect and/or local to regional in spatial scale. This category includes fishing, sea level rise, and water quality issues related to sedimentation and nutrification. The remaining threats can be locally acute, but because they affect limited geographic areas, are considered to be of minor overall importance in posing extinction risk. Examples in this category are predator outbreaks or collection for the ornamental trade. These types of threats, although minor overall, can be important in special cases, such as for species with extremely narrow geographic ranges and/or those species at severely depleted population levels. Based on the BRT's characterization of the threats to corals, the most important threats to the extinction risk of reef-building corals are shown in Table 1 below, and described below. The description of the remaining ten threats can be found in the SRR and SIR. While these ten threats did not rank highly in their contribution to extinction risk, they do adversely affect the species.

Table 1—All Threats Considered by the BRT in Assessing Extinction Risks to the 82 Candidate Coral Species. The Table is Ordered by the BRT Estimate of the Threat's Importance to Extinction Risk for Corals in General. The Threat is Paired With its Corresponding ESA Section 4 Factor in the Last Column. The Nine Threats Included in the Threats Evaluation are Shown in bold.

Threat	Importance	Section 4 Factor
Ocean Warming	High	E
Disease	High	C
Ocean Acidification	Medium-High	E
Trophic Effects of Fishing	Medium	A
Sedimentation	Low-Medium	A and E
Nutrients	Low-Medium	A and E
Sea-Level Rise	Low-Medium	A
Toxins	Low	E
Changing Ocean Circulation	Low	E
Changing Storm Tracks/Intensities	Low	E
Predation	Low	C
Reef Fishing—Destructive Fishing Practices	Low	A
Collection and Trade	Low	B
Natural Physical Damage	Low	E
Human-induced Physical Damage	Negligible-Low	A and E
Aquatic Invasive Species	Negligible-Low	E
Salinity	Negligible	E
African/Asian Dust	Negligible	E
Changes in Insolation	Probably Negligible	E

While we received and collected numerous sources of information during the public engagement period pertaining to the 19 threats identified in the SRR, no new threats were identified, and no new information suggested changes to their relative importance. However, some of the new information is relevant to characterizing the important threats, particularly those related to Global Climate Change, and is included in the sections below.

Global Climate Change—General Overview

Several of the most important threats contributing to the extinction risk of corals are related to global climate change. Thus, we provide a general overview of the state of the science related to climate change before discussing each threat and its specific impacts on corals. The main concerns regarding impacts of climate change on coral reefs generally, and on the 82 candidate coral species in particular, are the magnitude and the rapid pace of change in greenhouse gas (GHG) concentrations (*e.g.,* carbon dioxide) and atmospheric warming since the Industrial Revolution in the mid-19th century. These changes are increasing the warming of the global climate system and altering the carbonate chemistry of the ocean (ocean acidification), which affects a number of biological processes in corals including secretion of their skeletons. The atmospheric concentration of the main GHG, carbon dioxide (CO_2), has steadily increased from ~ 280 parts per million (ppm) at the start of the Industrial Revolution to over 390 ppm in 2009. Rates of human-induced emissions of CO_2 are also accelerating, rising from 1.5 ppm/yr during 1990–1999 to 2.0 ppm/yr during 2000–2007. Furthermore, GHG emissions are expected to continue increasing and atmospheric and ocean warming are likely to accelerate. Moreover, because GHGs can remain in the atmosphere for exceptionally long periods of time, even if all anthropogenic sources of GHG emissions ceased immediately, at least another 1.0 °C of atmospheric warming will occur as a result of past emissions, and at our current emissions rate, the earth's atmosphere is expected to warm 4 °C (likely range 2.4 °C–6.4 °C), and waters around coral reefs are expected to warm 2.8 °C–3.6 °C by the year 2100 (NMFS 2012b, SIR Section 3.2.2). As discussed below, temperature increases of this magnitude can have severe consequences for corals, including bleaching and colony death.

Supplemental information gathered during the public engagement period shows that global temperatures continue to increase and that temperature patterns differ regionally. New models (Representative Concentration Pathways or RCPs) developed for the Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report (due to publish in 2014) result in a larger range of temperature estimates than the range of scenarios IPCC Fourth Assessment Report (Special Reports on Emission Scenarios or SRES), but the global mean temperature projections by the end of the twenty-first century for the RCPs are very similar to those of their closest SRES counterparts. Another study used the second-generation Canadian earth system model (CanESM2) to project future warming under three of the new RCPs and found simulated atmospheric warming of 2.3

°C over the time period 1850–2100 in the lowest RCP emissions scenario (RCP2.6) and up to 4.9 °C in the highest (RCP8.5; NMFS 2012b, SIR Section 3.2.2).

Nine Most Important Threats to Reef-Building Corals

As described above and shown in Table 1, the BRT considered nine threats to be the most important to the current or expected future extinction risk of reef-building corals: ocean warming, coral disease, ocean acidification, trophic effects of reef fishing, sedimentation, nutrients, sea-level rise, predation, and collection and trade. Vulnerability of a coral species to a threat is a function of susceptibility and exposure, considered at the appropriate spatial and temporal scales. In this finding, the spatial scale is the current range of the species, and the temporal scale is from now until the year 2100. Susceptibility, exposure, and vulnerability are described generally below, and species-specific threat vulnerabilities are described in the Vulnerability to Threats under Risk Analyses below.

Susceptibility refers to the response of coral colonies to the adverse conditions produced by the threat. Susceptibility of a coral species to a threat is primarily a function of biological processes and characteristics, and can vary greatly between and within taxa (*i.e.,* family, genus, or species). Susceptibility depends on direct effects of the threat on the species, and it also depends on the cumulative (*i.e.,* additive) and interactive (*i.e.,* synergistic or antagonistic) effects of multiple threats acting simultaneously on the species. For example, ocean warming affects coral colonies through the direct effect of bleaching, together with the interactive effect of bleaching and disease, because bleaching increases disease susceptibility. We discuss how cumulative and interactive effects of threats affected individual threat susceptibilities in the Vulnerability to Threats under Risk Analyses section below.

Vulnerability of a coral species to a threat also depends on the proportion of colonies that are exposed to the threat. Exposure is primarily a function of physical processes and characteristics that limit or moderate the impact of the threat across the range of the species. For example, prevailing winds may moderate exposure of coral colonies on windward sides of islands to ocean warming, tidal fluctuations may moderate exposure of coral colonies on reef flats to ocean acidification, and large distances of atolls from runoff may moderate exposure of the atoll's coral colonies from sedimentation.

Vulnerability of a coral species to a threat is a function of susceptibility and exposure, considered at the spatial scale of the entire current range of the species, and the temporal scale of from now to the year 2100. For example, a species that is highly susceptible to a threat is not necessarily highly vulnerable to the threat, if exposure is low over the appropriate spatial and temporal scales. Consideration of the appropriate spatial (range of species) and temporal (to 2100) scales is particularly important, because of high variability in the threats over the large spatial scales, and the predictions in the SRR that nearly all threats are likely to increase over the large temporal scale. The nine most important threats are summarized below, including general descriptions of susceptibility and exposure. Species-specific threat vulnerabilities are described in the Vulnerability to Threats under the Risk Analyses section.

Ocean Warming (High Importance Threat, ESA Factor E)

Ocean warming is considered under ESA Factor E—other natural or manmade factors affecting the continued existence of the species—because the effect of the threat results from human activity and affects individuals of the species directly, and not their habitats. Mean seawater temperatures in reef-building coral habitat in both the Caribbean and Indo-Pacific have increased during the past few decades, and are predicted to continue to rise between now and 2100. More importantly, the frequency of warm-season temperature extremes (warming events) in reef-building coral habitat in both the Caribbean and Indo-Pacific has increased during the past two decades, and is also predicted to increase between now and 2100.

Ocean warming is one of the most important threats posing extinction risks to the 82 candidate coral species; however, individual susceptibility varies among species. The primary observable coral response to ocean warming is bleaching of adult coral colonies, wherein corals expel their symbiotic zooxanthellae in response to stress. For corals, an episodic increase of only 1°C–2°C above the normal local seasonal maximum ocean temperature can induce bleaching. Corals can withstand mild to moderate bleaching; however, severe, repeated, or prolonged bleaching can lead to colony death. While coral bleaching patterns are complex, with several species exhibiting seasonal cycles in symbiotic dinoflagellate density, thermal stress has led to bleaching and associated mass mortality in many coral species during the past 25 years. In addition to coral bleaching, other effects of ocean warming detrimentally affect virtually every life-history stage in reef-building corals. Impaired fertilization, developmental abnormalities, mortality, impaired settlement success, and impaired calcification of early life phases have all been documented.

In evaluating extinction risk from ocean warming, the BRT relied heavily on the IPCC Fourth Assessment Report because the analyses and synthesis of information developed for it are the most thoroughly documented and reviewed assessments of future climate and represent the best available scientific information on potential future changes in the earth's climate system. Emission rates in recent years have met or exceeded levels found in the worst-case scenarios considered by the IPCC, resulting in all scenarios underestimating the projected climate condition. Further, newer studies have become available since the completion of the SRR. New information suggests that regardless of the emission concentration pathway, more than 97 percent of reefs will experience severe thermal stress by 2050. However, new information also highlights the spatial and temporal ''patchiness'' of warming, as described in the next paragraph. This patchiness has the potential to provide refugia for the species from thermal stress if the temperature patches are spatially and temporally consistent, but the distributional nature of the patchiness is not currently well understood (NMFS 2012b, SIR Section 3.2.2).

Spatially, exposure of colonies of a species to ocean warming can vary greatly across its range, depending on colony location (*e.g.,* latitude, depth, bathymetry, habitat type, etc.) and physical processes that affect seawater temperature and its effects on coral colonies (*e.g.,* winds, currents, upwelling shading, tides, etc.). Colony location can moderate exposure of colonies of the species to ocean warming by latitude or depth, because colonies in higher latitudes and/or deeper areas are usually less affected by warming events. Also, some locations are blocked from warm currents by bathymetric features, and some habitat types reduce the effects of warm water, such as highly-fluctuating environments. Physical processes can moderate exposure of colonies of the species to ocean warming in many ways, including processes that increase mixing (*e.g.,* wind, currents, tides),

reduce seawater temperature (*e.g.,* upwelling, runoff), or increase shading (*e.g.* turbidity, cloud cover). For example, warming events in Hawaii in 1996 and 2002 resulted in variable levels of coral bleaching because colony exposure was strongly affected by winds, cloud cover, complex bathymetry, waves, and inshore currents (NMFS 2012b, SIR Section 3.2.2).

Temporally, exposure of colonies of a species to ocean warming between now and 2100 will likely vary annually and decadally, while increasing over time, because: (1) Numerous annual and decadal processes that affect seawater temperatures will continue to occur in the future (*e.g.,* inter-decadal variability in seawater temperatures and upwelling related to El-Niño Southern Oscillation); and (2) ocean warming is predicted to substantially worsen by 2100. While exposure of the 82 candidate coral species to ocean warming varies greatly both spatially and temporally, exposure is expected to increase for all species across their ranges between now and 2100 (NMFS 2012b, SIR Section 3.2.2).

Multiple threats stress corals simultaneously or sequentially, whether the effects are cumulative (the sum of individual stresses) or interactive (*e.g.,* synergistic or antagonistic). Ocean warming is likely to interact with many other threats, especially considering the long-term consequences of repeated thermal stress, and ocean warming is expected to continue to worsen over the foreseeable future. Increased seawater temperature interacts with coral diseases to reduce coral health and survivorship. Coral disease outbreaks often have either accompanied or immediately followed bleaching events, and also follow seasonal patterns of high seawater temperatures. The effects of greater ocean warming (*i.e.,* increased bleaching, which kills or weakens colonies) are expected to interact with the effects of higher storm intensity (*i.e.,* increased breakage of dead or weakened colonies) in the Caribbean, resulting in an increased rate of coral declines. Likewise, ocean acidification and nutrients may reduce thermal thresholds to bleaching, increase mortality and slowing recovery.

There is also mounting evidence that warming ocean temperatures can have direct impacts on early life stages of corals, including abnormal embryonic development at 32°C and complete fertilization failure at 34°C for one Indo-Pacific *Acropora* species. In addition to abnormal embryonic development, symbiosis establishment, larval survivorship, and settlement success have been shown to be impaired in Caribbean brooding and broadcasting coral species at temperatures as low as 30°C–32°C. Further, the rate of larval development for spawning species is appreciably accelerated at warmer temperatures, which suggests that total dispersal distances could also be reduced, potentially decreasing the likelihood of successful settlement and the potential for replenishment of extirpated areas.

Finally, warming is and will continue causing increased stratification of the upper ocean, because water density decreases with increasing temperature. Increased stratification results in decreased vertical mixing of both heat and nutrients, leaving surface waters warmer and nutrient-poor. While the implications for corals and coral reefs of these increases in warming-induced stratification have not been well studied, it is likely that these changes will both exacerbate the temperature effects described above (*i.e.,* increase bleaching and decrease recovery) and decrease the overall net productivity of coral reef ecosystems (*i.e.,* fewer nutrients) throughout the tropics and subtropics.

Overall, there is ample evidence that climate change (including that which is already committed to occur from past GHG emissions and that which is reasonably certain to result from continuing and future emissions) will follow a trajectory that will have a major impact on corals. If many coral species are to survive anticipated global warming, corals and their zooxanthellae will have to undergo significant acclimatization and/or adaptation. There has been a recent research emphasis on the processes of acclimatization and adaptation in corals, but, taken together, the body of research is inconclusive on how these processes may affect individual corals' extinction risk, given the projected intensity and rate of ocean warming (NMFS 2012b, SIR Section 3.2.2.1). In determining extinction risk for the 82 candidate coral species, the BRT was most strongly influenced by observations that corals have been bleaching and dying under ocean warming that has already occurred. Thus, the BRT determined that ocean warming and related impacts of global climate change are already having serious negative impacts on many corals, and that ocean warming is one of the most important threats posing extinction risks to the 82 candidate coral species between now and the year 2100 (Brainard *et al.* 2011). These conclusions are reinforced by the new information in the SIR (NMFS 2012b, SIR Section 3.2.2.1).

Disease (High Importance Threat, ESA Factor C)

Disease is considered under ESA Factor C—disease or predation. Disease adversely affects various coral life history events, including causing adult mortality, reducing sexual and asexual reproductive success, and impairing colony growth. A diseased state results from a complex interplay of factors including the cause or agent (*e.g.,* pathogen, environmental toxicant), the host, and the environment. In the case of corals, the host is a complex community of organisms, referred to as a holobiont, which includes the coral animal, the dinoflagellates, and their microbial symbionts. All impacts incorporated and ranked as ''coral disease'' in this status review are presumed infectious diseases or those attributable to poorly-described genetic defects and often associated with acute tissue loss. Other manifestations of disease in the broader sense, such as coral bleaching from ocean warming, are incorporated under other factors (*i.e.,* manmade factors such as ocean warming as a result of climate change).

Coral diseases are a common and significant threat affecting most or all coral species and regions to some degree, although the scientific understanding of individual disease causes in corals remains very poor. The incidence of coral disease appears to be expanding geographically in the Indo-Pacific and there is evidence that massive coral species are not recovering from disease events in certain locations. The prevalence of disease is highly variable between sites and species. There is documented increased prevalence and severity of diseases with increased water temperatures, which may correspond to increased virulence of pathogens, decreased resistance of hosts, or both. Moreover, the expanding coral disease threat has been suggested to result from opportunistic pathogens that become damaging only in situations where the host integrity is compromised by physiological stress and/or immune suppression. Overall, there is mounting evidence that warming temperatures and coral bleaching responses are linked (albeit with mixed correlations) with increased coral disease prevalence and mortality. Complex aspects of temperature regimes, including winter and summer extremes, may influence disease outbreaks. Bleaching and coral abundance seem to increase the susceptibility of corals to disease contraction. Further, most recent research shows strong correlations between elevated human population

density in close proximity to reefs and disease prevalence in corals.

Although disease causes in corals remain poorly understood, some general patterns of biological susceptibility are beginning to emerge. There appear to be predictable patterns of immune capacity across coral families, corresponding with trade-offs with their life history traits, such as reproductive output and growth rate. *Acroporidae,* representing the largest number of candidate species, has low immunity to disease. Likewise, *Pocilloporidae* has low immunity; however, both of these families have intermediate/high reproductive outputs. Both *Faviidae* and *Mussidae* are intermediate to high in terms of disease immunity and reproductive output. Finally, while *Poritidae* has high immunity to disease, it has a low reproductive output. Overall, disease represents a high importance threat in terms of extinction risk posed to coral species; however, individual susceptibility varies among the 82 candidate species.

As with ocean warming, the effects of coral disease depend on exposure of the species to the threat, which can vary spatially across the range of the species, and temporally between now and 2100. Spatially, exposure to coral disease in the Caribbean is moderated by distance of some coral habitats from the primary causes of most disease outbreaks, such as stressors resulting from sedimentation, nutrient over-enrichment, and other local threats. Exposure to coral disease for some species in the Indo-Pacific may be somewhat more moderated spatially than in the Caribbean, due to a greater proportion of reef-building coral habitats located in remote areas that are much farther away from local sources of disease outbreaks. Exposure to coral disease can also be moderated by depth of many habitats in both regions, but again more so in the Indo-Pacific than in the Caribbean. Deep habitats are generally less affected by disease outbreaks associated with stressors resulting from ocean warming, especially in the Indo-Pacific. Disease exposure in remote areas and deep habitats appears to be low but gradually increasing. Temporally, exposure to coral disease will increase as the causes of disease outbreaks (*e.g.,* warming events) increase over time (NMFS, 2012b, SIR Section 3.3.2).

As explained above, disease may be caused by a threat such as ocean warming and bleaching, nutrients, toxins, etc. However, interactive effects are also important for this threat, because diseased colonies are more susceptible to the effects of some other threats. For example, diseased or recovering colonies may be more quickly stressed than healthy colonies by land-based sources of pollution (sedimentation, nutrients, and toxins), more quickly succumb to predators, and more easily break during storms or as a result of other physical impacts. There are likely many other examples of cumulative and interactive effects of disease with other threats to corals.

Ocean Acidification (Medium-High Importance Threat, ESA Factor E)

Ocean acidification is considered under ESA Factor E—other natural or manmade factors affecting the continued existence of the species—because the effect is a result of human activity and affects individuals of the coral species, not their habitats. As with ocean warming, ocean acidification is a result of global climate change caused by increased GHG accumulation in the atmosphere. Reef-building corals produce skeletons made of the aragonite form of calcium carbonate; thus, reductions in aragonite saturation state caused by ocean acidification pose a major threat to these species and other marine calcifiers. Ocean acidification has the potential to cause substantial reduction in coral calcification and reef cementation. Further, ocean acidification adversely affects adult growth rates and fecundity, fertilization, pelagic planula settlement, polyp development, and juvenile growth. The impacts of ocean acidification can lead to increased colony breakage and fragmentation and mortality. Based on observations in areas with naturally low pH, the effects of increasing ocean acidification may also include potential reductions in coral size, cover, diversity, and structural complexity.

As CO_2 concentrations increase in the atmosphere, more CO_2 is absorbed by the oceans, causing lower pH and reduced availability of carbonate ions, which in turn results in lower aragonite saturation state in seawater. Because of the increase in CO_2 and other GHGs in the atmosphere since the Industrial Revolution, ocean acidification has already occurred throughout the world's oceans, including in the Caribbean and Indo-Pacific, and is predicted to considerably worsen between now and 2100. Along with ocean warming and disease, the BRT considered ocean acidification to be one of the most important threats posing extinction risks to coral species between now and the year 2100; however, individual susceptibility varies among the 82 candidate species.

Numerous laboratory and field experiments have shown a relationship between elevated CO_2 and decreased calcification rates in particular corals and other calcium carbonate secreting organisms. However, because only a few species have been tested for such effects, it is uncertain how most will fare in increasingly acidified oceans. In addition to laboratory studies, recent field studies have demonstrated a decline in linear growth rates of some coral species, suggesting that ocean acidification is already significantly reducing growth of corals on reefs. However, this has not been shown for all corals at all reefs, indicating that all corals may not be affected at the same rate or that local factors may be ameliorating the saturation states on reefs. A potential secondary effect is that ocean acidification may reduce the threshold at which bleaching occurs. Overall, the best available information demonstrates that most corals exhibit declining calcification rates with rising CO_2 concentrations, declining pH, and declining carbonate saturation state—although the rate and mode of decline can vary among species. Recent publications also discuss the physiological effects of ocean acidification on corals and their responses. Corals are able to regulate pH within their tissues, maintaining higher pH values in their tissues than the pH of surrounding waters. This is an important mechanism in naturally highly fluctuating environments (*e.g.,* many backreef pools have diurnally fluctuating pH) and suggests that corals have some adaptive capacity to acidification. However, as with ocean warming, there is high uncertainty as to whether corals will be able to adapt commensurate with the rate of acidification.

In addition to the direct effects on coral calcification and growth, ocean acidification may also affect coral recruitment, reef cementation, and other important reef-building species like crustose coralline algae (CCA). Studies suggest that the low pH associated with ocean acidification may impact coral larvae in several ways, including reduced survival and recruitment. Ocean acidification may influence settlement of coral larvae on coral reefs more by indirect alterations of the benthic community, which provides settlement cues, than by direct physiological disruption. A major potential impact from ocean acidification is a reduction in the structural stability of corals and reefs, which results both from increases in bioerosion and decreases in reef cementation. As atmospheric CO_2 rises globally, reef-building corals are

expected to calcify more slowly and become more fragile. Increased bioerosion of coral reefs from ocean acidification may be facilitated by declining growth rates of CCA. Recent studies demonstrate that ocean acidification is likely having a great impact on corals and reef communities by affecting community composition and dynamics, exacerbating the effects of disease and other stressors (*e.g.,* temperature), contributing to habitat loss, and affecting symbiotic function. Some studies have found that an atmospheric CO_2 level twice as high as pre-industrial levels will start to dissolve coral reefs; this level could be reached as early as the middle of this century. Further, the rate of acidification may be an order of magnitude faster than what occurred 55 million years ago during the Paleocene-Eocene Thermal Maximum (Brainard *et al.* 2011; NMFS, 2012b, SIR Section 3.2.3).

Spatially, while CO_2 levels in the surface waters of the ocean are generally in equilibrium with the lower atmosphere, there can be considerable variability in seawater pH across reef-building coral habitats, resulting in colonies of a species experiencing high spatial variability in exposure to ocean acidification. The spatial variability in seawater pH occurs from reef to global scales, driven by numerous physical and biological characteristics and processes, including at least seawater temperature, proximity to land-based runoff and seeps, proximity to sources of oceanic CO_2, salinity, nutrients, photosynthesis, and respiration. CO_2 absorption is higher in colder water, causing lower pH in colder water. Land-based runoff decreases salinity and increases nutrients, both of which can raise pH. Local sources of oceanic CO_2 like upwelling and volcanic seeps lower pH. Photosynthesis in algae and seagrass beds draws down CO_2, raising pH. These are just some of the sources of spatial variability in pH, which results in high spatial variability in ocean acidification across the ranges of the 82 species (NMFS, 2012b, SIR Section 3.2.3).

Temporally, high variability over diurnal to decadal time-scales is produced by numerous processes, including diurnal cycles of photosynthesis and respiration, seasonal variability in seawater temperatures, and decadal cycles in upwelling. Temporal variability in pH can be very high diurnally in highly-fluctuating or semi-enclosed habitats such as reef flats and back-reef pools, due to high photosynthesis during the day (pH goes up) and high respiration during the night (pH goes down). In fact, pH fluctuations during one 24-hr period in such reef-building coral habitats can exceed the magnitude of change expected by 2100 in open ocean subtropical and tropical waters. As with spatial variability in exposure to ocean warming, temporal variability in exposure to ocean acidification is a combination of high variability over short time-scales together with long-term increases. While exposure of the 82 candidate coral species to ocean acidification varies greatly both spatially and temporally, exposure is expected to increase for all species across their ranges between now and 2100 (NMFS, 2012b, SIR Section 3.2.3).

Acidification is likely to interact with other threats, especially considering that acidification is expected to continue to worsen over the foreseeable future. For example, acidification may reduce the threshold at which bleaching occurs, increasing the threat posed by ocean warming. One of the key impacts of acidification is reduced calcification, resulting in reduced skeletal growth and skeletal density, which may lead to numerous interactive effects with other threats. Reduced skeletal growth compromises the ability of coral colonies to compete for space against algae, which grows more quickly as nutrient over-enrichment increases. Reduced skeletal density weakens coral skeletons, resulting in greater colony breakage from natural and human-induced physical damage.

Trophic Effects of Fishing (Medium Importance Threat, ESA Factor A)

Trophic effects of fishing is considered under ESA Factor A—the present or threatened destruction, modification, or curtailment of its habitat or range—because the main effect of concern is to limit availability of habitat for corals. Fishing, particularly overfishing, can have large scale, long-term ecosystem-level effects that can change ecosystem structure from coral-dominated reefs to algal-dominated reefs (''phase shifts''). Fishing pressure alters trophic interactions that are particularly important in structuring coral reef ecosystems. These trophic interactions include reducing population abundance of herbivorous fish species that control algal growth, limiting the size structure of fish populations, reducing species richness of herbivorous fish, and releasing corallivores from predator control. Thus, an important aspect of maintaining resilience in coral reef ecosystems is to sustain populations of herbivores, especially the larger scarine herbivorous wrasses such as parrotfish.

On topographically complex reefs, population densities can average well over a million herbivorous fishes per km^2, and standing stocks can reach 45 metric tons per km^2. In the Caribbean, parrotfishes can graze at rates of more than 150,000 bites per square meter per day, and thereby remove up to 90–100 percent of the daily primary production (*e.g.,* algae). Under these conditions of topographic complexity with substantial populations of herbivorous fishes, as long as the cover of living coral is high and resistant to mortality from environmental changes, it is very unlikely that the algae will take over and dominate the substratum. However, if herbivorous fish populations, particularly large-bodied parrotfish, are heavily fished and a major mortality of coral colonies occurs, then algae can grow rapidly and prevent the recovery of the coral population. The ecosystem can then collapse into an alternative stable state, a persistent phase shift in which algae replace corals as the dominant reef species. Although algae can have negative effects on adult coral colonies (*i.e.,* overgrowth, bleaching from toxic compounds), the ecosystem-level effects of algae are primarily from inhibited coral recruitment. Filamentous algae can prevent the colonization of the substratum by planula larvae by creating sediment traps that obstruct access to a hard substratum for attachment. Additionally, macroalgae can suppress the successful colonization of the substratum by corals through occupation of the available space, shading, abrasion, chemical poisoning, and infection with bacterial disease.

Overfishing can have further impacts on coral mortality via trophic cascades. In general larger fish are targeted, resulting in fish populations of small individuals. For parrotfishes, the effect of grazing by individuals greater than 20 cm in length is substantially greater than that of smaller fish. Up to 75 individual parrotfishes with lengths of about 15 cm are necessary to have the same effect on reducing algae and promoting coral recruitment as a single individual 35 cm in length. Species richness of the herbivorous fish population is also necessary to enhance coral populations. Because of differences in their feeding behaviors, several species of herbivorous fishes with complementary feeding behaviors can have a substantially greater positive effect than a similar biomass of a single species on reducing the standing stock of macroalgae, of increasing the cover of CCA, and increasing live coral cover.

Spatially, exposure to the trophic effects of fishing in the Caribbean is

moderated by distance of some coral habitats from fishing effort. Exposure to the trophic effects of fishing in the Indo-Pacific is somewhat more moderated by distance than in the Caribbean, due to a greater proportion of reef-building coral habitats located in remote areas that are much farther away from fishing effort. Exposure to the trophic effects of reef fishing is also moderated by depth of many habitats in both regions, but again more so in the Indo-Pacific than in the Caribbean. Deep habitats are generally less affected by the trophic effects of fishing especially in the Indo-Pacific. Temporally, exposure to the trophic effects of fishing will increase as the human population increases over time (NMFS, 2012b, SIR Section 3.3.4).

The trophic effects of fishing are likely to interact with many other threats, especially considering that fishing impacts are likely to increase within the ranges of many of the 82 species over the foreseeable future. For example, when carnivorous fishes are overfished, corallivore populations may increase, resulting in greater predation on corals. Further, overfishing appears to increase the frequency of coral disease. Fishing activity usually targets the larger apex predators. When the predators are removed, corallivorous butterfly fishes become more abundant and can transmit disease from one coral colony to another as they transit and consume from each coral colony. With increasing abundance, they transmit disease to higher proportions of the corals within the population.

Sedimentation (Low-Medium Importance Threat, ESA Factors A and E)

Sedimentation is considered under ESA Factor A—the present or threatened destruction, modification, or curtailment of its habitat or range—and ESA Factor E—other natural or manmade factors affecting the continued existence of the species—because the effect of the threat, resulting from human activity, is both to limit the availability of habitat for corals and directly impact individuals of coral species. Impacts from land-based sources of pollution include sedimentation, nutrients, toxicity, contaminants, and changes in salinity regimes. The BRT evaluated the extinction risk posed by each pollution component individually. Only the stressors of sedimentation and nutrients were considered low-medium threats to corals, although the 82 candidate species vary in susceptibility. The BRT considered contaminants, despite their primarily local sources and impacts, to pose low, but not negligible, extinction risks, and salinity effects to be a local and negligible overall contributor to extinction risk to the 82 candidate coral species; however, individual species vary in susceptibility. All four threats associated with land-based sources of pollution are described in the SRR, and sedimentation and nutrients are considered separately below. Human activities in coastal watersheds introduce sediment into the ocean by a variety of mechanisms, including river discharge, surface runoff, groundwater seeps, and atmospheric deposition. Humans introduce sewage into coastal waters through direct discharge, treatment plants, and septic leakage; agricultural runoff brings additional nutrients from fertilizers. Elevated sediment levels are generated by poor land use practices, and coastal and nearshore construction. Additionally, as coastal populations continue to increase, it is likely that pollution from land-based sources will also increase.

The most common direct effect of sedimentation is deposition of sediment on coral surfaces as sediment settles out from the water column. Corals with certain morphologies (*e.g.,* mounding) can passively reject settling sediments. In addition, corals can actively displace sediment by ciliary action or mucous production, both of which require energetic expenditures. Corals with large calices (skeletal component that holds the polyp) tend to be better at actively rejecting sediment. Some coral species can tolerate complete burial for several days. Corals that are unsuccessful in removing sediment will be smothered and die. Sediment can also induce sublethal effects, such as reductions in tissue thickness, polyp swelling, zooxanthellae loss, and excess mucus production. In addition, suspended sediment can reduce the amount of light in the water column, making less energy available for coral photosynthesis and growth. Finally, sediment impedes fertilization of spawned gametes and reduces larval settlement, as well as the survival of recruits and juveniles.

Although it is difficult to quantitatively predict the extinction risk that sedimentation poses to the 82 candidate coral species, human activity has resulted in quantifiable increases in sediment inputs in some reef areas. Continued increases in coastal populations combined with poor land use and nearshore development practices will likely increase sediment delivery to reef systems. Nearshore sediment levels will also likely increase with sea level rise. Greater inundation of reef flats can erode soil at the shoreline and resuspend lagoon deposits, producing greater sediment transport and potentially leading to leeward reefs being flooded with turbid lagoon waters or buried by off-bank sediment transport. Finally, while some corals may be more tolerant of elevated short-term levels of sedimentation, sediment stress and turbidity can induce bleaching. Sedimentation is a low-medium importance threat of extinction risk to corals; however, individual susceptibility varies among the 82 candidate species.

The BRT acknowledged that individual land-based sources of pollution interact in complex ways, and therefore also considered the holistic nature of this type of threat (*i.e.,* sedimentation, nutrient over-enrichment, and contaminants). All land-based sources of pollution act primarily at a local level and have direct linkage to human population, consumption of resources, and land use within the local area. This linkage is supported by correlative and retrospective studies of both threat dosage of and coral response to land-based sources of pollution. Therefore, land-based sources of pollution would pose a substantial extinction risk only to species with extremely limited distributions. However, local stresses can still be sufficiently severe to cause local extirpation and interact with global stresses to increase extinction risk.

Spatially, exposure to sedimentation in the Caribbean can be moderated by distance of some coral habitats from areas where sedimentation is chronically or sporadically heavy (*i.e.,* heavily populated areas), resulting in some areas of coral habitats being unaffected or very lightly affected by sedimentation. Exposure to sedimentation can be more moderated in the Indo-Pacific by the large distances of many coral habitats from areas where sedimentation is chronically or sporadically heavy (*i.e.,* heavily populated areas), resulting in vast areas of coral habitats and areas being unaffected or very lightly affected by sedimentation. Exposure to sedimentation for particular species could also be moderated by depth of many habitats in both regions, but again more so in the Indo-Pacific than in the Caribbean. Deep habitats are generally less affected by sedimentation, especially in the Indo-Pacific. Temporally, exposure to sedimentation will increase as human activities that produce sedimentation increase over time, but in the Indo-Pacific will still be strongly moderated for certain species by distance (NMFS, 2012b, SIR Section 3.3.1).

Sedimentation is also likely to interact with many other threats, especially considering that sedimentation is likely to increase across the ranges of many of the 82 species over the foreseeable future. For example, when coral communities that are chronically affected by sedimentation experience a warming-induced bleaching event and associated disease outbreaks, the consequences for corals can be much more severe than in communities not affected by sedimentation.

Nutrients (Low-Medium Importance Threat, ESA Factors A and E)

Nutrient enrichment is considered under ESA Factor A—the present or threatened destruction, modification, or curtailment of its habitat or range—and ESA Factor E—other natural or manmade factors affecting the continued existence of the species—because the effect of the threat, resulting from human activity, is both to limit the availability of habitat for corals and directly impact individuals of coral species. The impacts of nutrient over-enrichment were determined by the BRT to be of low-medium importance in terms of posing extinction risk to coral species; however, individual susceptibility varies among the 82 candidate species. Elevated nutrients affect corals through two main mechanisms—direct impacts on coral physiology and indirect effects through nutrient-stimulation of other community components (*e.g.,* macroalgal turfs and seaweeds, and filter feeders) that compete with corals for space on the reef. Increased nutrients can decrease calicification; however, nutrients may also enhance linear extension, but reduce skeletal density. Either condition results in corals that are more prone to breakage or erosion. Notably, individual species have varying tolerance to increased nutrients. The main vectors of anthropogenic nutrients are point-source discharges (such as rivers or sewage outfalls) and surface runoff from modified watersheds. Natural processes, such as in situ nitrogen fixation and delivery of nutrient-rich deep water by internal waves and upwelling, bring nutrients to coral reefs as well. Nutrient over-enrichment has low-medium importance to the extinction risk of all 82 corals species.

Spatially, exposure to nutrients is moderated by distance of some coral habitats from areas where nutrients are chronically or sporadically heavy (*i.e.,* heavily populated areas). However, nutrient over-enrichment can result from very small human populations, and nutrients can be quickly transported large distances; thus, distance is less of a moderating factor for nutrients than for sedimentation. Similarly, although nutrient exposure may also be moderated by depth of some habitats, nutrient impacts can reach much farther than sedimentation impacts. Temporally, exposure to nutrients will increase as human activities that produce nutrients increase over time (NMFS, 2012b, SIR Section 3.3.1).

Nutrients are likely to interact with many other threats, especially considering that nutrient over-enrichment is likely to increase across the ranges of many of the 82 candidate species over the foreseeable future. For example, when coral communities that are chronically affected by nutrients experience a warming-induced bleaching event and associated disease outbreaks, the consequences for corals can be much more severe than in communities not affected by nutrients.

Sea-Level Rise (Low-Medium Threat, ESA Factor A)

Sea-level rise is considered under ESA Factor A—the present or threatened destruction, modification, or curtailment of its habitat or range—because the effect of the threat is to availability of corals' habitat and not directly to the species themselves. The effects of sea-level rise may affect various coral life history events, including larval settlement, polyp development, and juvenile growth, and contribute to adult mortality and colony fragmentation, mostly due to increased sedimentation and decreased water quality (reduced light availability) caused by coastal inundation. The best available information suggests that sea level will continue to rise due to thermal expansion and the melting of land and sea ice. Theoretically, any rise in sea-level could potentially provide additional habitat for corals living near the sea surface. Many corals that inhabit the relatively narrow zone near the ocean surface have rapid growth rates when healthy, which allowed them to keep up with sea-level rise during the past periods of rapid climate change associated with deglaciation and warming. However, depending on the rate and amount of sea level rise, rapid rises can lead to reef drowning. Rapid rises in sea level could affect many of the candidate coral species by both submerging them below their common depth range and, more likely, by degrading water quality through coastal erosion and potentially severe sedimentation or enlargement of lagoons and shelf areas. Rising sea level is likely to cause mixed responses in the 82 candidate coral species depending on their depth preferences, sedimentation tolerances, growth rates, and the nearshore topography. Reductions in growth rate due to local stressors, bleaching, infectious disease, and ocean acidification may prevent the species from keeping up with sea level rise (*e.g.,* from growing at a rate that will allow them to continue to occupy their preferred depth range despite sea-level rise).

The rate and amount of future sea level rise remains uncertain. Until the past few years, sea level rise was predicted to be in the range of only about one half meter by 2100. However, more recent estimated rates are higher, based upon evidence that the Greenland and Antarctic ice sheets are much more vulnerable than previously thought. Hence, there is large variability in predictions of the sea-level rise, but the IPCC Fourth Assessment Report likely underestimated the rates.

Fast-growing branching corals were able to keep up with the first 3 m of sea level rise during the warming that led to the last interglacial period. However, whether the 82 candidate coral species will be able to survive 3 m or more of future sea level rise will depend on whether growth rates are reduced as a result of other risk factors, such as local environmental stressors, bleaching, infectious disease, and ocean acidification. Additionally, lack of suitable new habitat, limited success in sexual recruitment, coastal runoff, and coastal hardening will compound some corals' ability to survive rapid sea level rise.

This threat is expected to disproportionately affect shallow areas adjacent to degraded coastlines, as inundation results in higher levels of sedimentation from the newly-inundated coastlines to the shallow areas. Spatially, exposure to sea-level rise will be moderated by horizontal and vertical distances of reef-building coral habitats from inundated, degraded coastlines. Temporally, exposure to sea-level rise will increase over time as the rate of rise increases (NMFS, 2012b, SIR Section 3.2.4).

Sea-level rise is likely to interact with other threats, especially considering that sea-level rise is likely to increase across the ranges of the 82 candidate species over the foreseeable future. For example, the inundation of developed areas (*e.g.,* urban and agricultural areas) and other areas where shoreline sediments are easily eroded by sea-level rise is likely to degrade water quality of adjacent coral habitat, through increased sediment and nutrient runoff, and the potential release of toxic contamination.

Predation (Low Threat, ESA Factor C)

Predation is considered under ESA Factor C—disease or predation. While the BRT ranked predation as having low importance to the extinction risk of corals in general, predation on some coral genera by many corallivorous species of fish and invertebrates (*e.g.,* snails and seastars) is a chronic, though occasionally acute, energy drain. It is a threat that has been identified for most coral life stages. Thus, predation factored into the extinction risk analysis for each of the 82 candidate species. Numerous studies have documented the quantitative impact of predation by various taxa on coral tissue and skeleton. Predators can indirectly affect the distribution of corals by preferentially consuming faster-growing coral species, thus allowing slower-growing corals to compete for space on the reef. The most notable example of predation impacts in the Indo-Pacific are from large aggregations of crown-of-thorns seastar (*Acanthaster planci;* COTS), termed outbreaks; the specific causative mechanism of COTS outbreaks is unknown. COTS can reduce living coral cover to less than one percent during outbreaks, change coral community structure, promote algal colonization, and affect fish population dynamics. Therefore, predation, although considered to be of low importance to the extinction risk of corals in general, can be significant to individual species.

Spatially, exposure to predation by corallivores is moderated by presence of predators of the corallivores (*i.e.,* predators of the predators). For example, corallivorous reef fish prey on corals, and piscivorous reef fish and sharks prey on the corallivores; thus, high abundances of piscivorous reef fish and sharks moderates coral predation. Abundances of piscivorous reef fish and sharks vary spatially because of different ecological conditions and human exploitation levels. Spatially, exposure to predation is also moderated by distance from physical conditions that allow corallivore populations to grow. For example, in the Indo-Pacific, high nutrient runoff from continents and high islands improves reproductive conditions for COTS, thus coral predation by COTS is moderated by distance from such conditions. Predation can also be moderated by depth of many habitats because abundances of many corallivorous species decline with depth. Temporally, exposure to predation will increase over time as conditions change, but will still be strongly moderated by distance and depth for certain species, depending upon the distribution and abundances of a species' populations, relative to this threat (NMFS, 2012b, SIR Section 3.3.3).

Predation of coral colonies can increase the likelihood of the colonies being infected by disease, and likewise diseased colonies may be more likely to be preyed upon. There are likely other examples of cumulative and interactive effects of predation with other threats to corals.

Collection and Trade (Low Threat, ESA Factor B)

Collections and trade is considered under ESA Factor B—overutilization for commercial, recreational, scientific, or educational purposes. While the BRT ranked collection and trade as having low importance to the extinction risk of corals in general, particular species are preferentially affected; therefore, the BRT considered collection and trade when evaluating the extinction risk of individual species. Globally, 1.5 million live stony coral colonies are reported to be collected from at least 45 countries each year, with the United States consuming the largest portion of live corals (64 percent) and live rock (95 percent) for the aquarium trade. The imports of live corals taken directly from coral reefs (not from aquaculture) increased by 600 percent between 1988 and 2007, while the global trade in live coral increased by nearly 1,500 percent. Harvest of stony corals is usually highly destructive, and results in removing and discarding large amounts of live coral that go unsold and damaging reef habitats around live corals. While collection is a highly spatially focused impact, it can result in significant impacts and was considered to contribute to individual species' extinction risk.

Spatially, exposure to collection and trade is moderated by demand, and can be moderated by distance and depth. Demand is highly species-specific, resulting in variable levels of collection pressure. However, even for heavily-collected species, geographic and depth distributions strongly moderate collection because distance from land and depth create barriers to human access. Temporally, exposure to collection and trade may increase over time, but will still continue to be strongly moderated by demand, distance, and depth (NMFS, 2012b, SIR Section 3.3.6).

Collection and trade of coral colonies can increase the likelihood of the colonies being infected by disease, due to both the directed and incidental breakage of colonies, which are then more easily infected. There are likely other examples of cumulative and interactive effects of collection and trade with other threats to corals.

Inadequacy of Existing Regulatory Mechanisms (ESA Factor D)

As we previously described, the SRR does not assess the contribution of ''inadequacy of regulatory mechanisms'' to the extinction risk of corals. Therefore, we developed a Draft Management Report that identifies: (1) Existing regulatory mechanisms relevant to threats to the 82 candidate coral species; and (2) conservation efforts with regard to the status of the 82 candidate coral species. This Draft was peer reviewed and released with the SRR in April 2012, with a request for any information that we may have omitted. The information that we received was incorporated into the Final Management Report, which forms the basis of our evaluation of this factor's effect on the extinction risk of the 82 candidate coral species.

The relevance of existing regulatory mechanisms to extinction risk for an individual species depends on the vulnerability of that species to each of the threats identified under the other factors of ESA Section 4, and the extent to which regulatory mechanisms could or do control the threats that are contributing to the species' extinction risk. If a species is not currently, and not expected within the foreseeable future to become, vulnerable to a particular threat, it is not necessary to evaluate the adequacy of existing regulatory mechanisms for addressing that threat. Conversely, if a species is vulnerable to a particular threat (now or in the foreseeable future), we do evaluate the adequacy of existing measures, if any, in controlling or mitigating that threat. In the following paragraphs, we will discuss existing regulatory mechanisms for addressing the threats to corals, generally, and assess their adequacy for controlling those threats. In the Risk Analyses section, we determine if the inadequacy of regulatory mechanisms is a contributing factor to an individual species' status as threatened or endangered because the existing regulatory mechanisms fail to adequately control or mitigate the underlying threats.

As shown in Table 1 above, we identified 19 threats affecting all coral species in general. Of the 19 threats, ocean warming, coral disease, and ocean acidification are the most serious threats to coral species. As described in the SRR, the SIR and the Final Management Report, ocean warming and ocean acidification are directly linked, and disease is indirectly linked, to

increasing anthropogenic GHGs in the atmosphere. The 19 threats to the 82 candidate coral species also include threats from more localized human activities, such as reef fishing, sedimentation, collection, physical damage, and other threats (see Table 1). The Final Management Report identifies existing regulatory mechanisms that are relevant to the threats to the 82 candidate coral species and is organized in two sections: (1) Existing regulatory mechanisms that are relevant to addressing global-scale threats to corals linked to GHG emissions; and (2) existing regulatory mechanisms that are relevant to addressing other threats to corals. A summary of the information in the report is provided below.

GHG emissions are regulated through agreements, at the international level, and through statutes and regulations, at the national, state, or regional level. These two levels of regulation are interrelated because climate change is a global phenomenon in which emissions anywhere in the world mix in the global atmosphere. Reflecting this interdependency of nations, often the national laws are enacted as a result of commitments to international agreements. The information presented in the Management Report (NMFS, 2012c; Final Management Report, Section 2.1.3) suggests that existing regulatory mechanisms with the objective of reducing GHG emissions are inadequate to prevent the impacts to corals and coral reefs from ocean warming, ocean acidification, and other climate change-related threats described above.

One of the key international agreements relevant to attempts to control GHG emissions, the Copenhagen Accord, was developed in 2009 by the Conference of Parties to the United Nations Framework Conventions on Climate Change. The Copenhagen Accord identifies specific information provided by Parties on quantified economy-wide emissions targets for 2020 and on nationally appropriate mitigation actions to the goal of capping increasing average global temperature at 2 °C above pre-industrial levels. Annex I countries are developed nations and Annex II countries are developing nations. In terms of coral reef protection, even if participating countries were reducing emissions enough and at a quick enough rate to meet the goal of capping increasing average global temperature at 2 °C above pre-industrial levels, there would still be moderate to severe consequences for coral reef ecosystems. Tipping points analyses indicate that rising atmospheric CO_2 concentrations and climate change could lead to major biodiversity transformations at levels near or below the 2 °C global warming defined by the IPCC as ''dangerous,'' including widespread coral reef degradation (Leadley *et al.,* 2010). While there will be spatial variation in climate warming throughout the globe, according to the SRR, at the current rate of CO_2 emissions, a further temperature increase in waters around coral reefs of 2.8–3.6 °C is expected during this century, depending on the ocean basin. The global atmospheric CO_2 concentration was up to 387 ppm by the end of 2009, 39% above the concentration at the start of the industrial revolution (about 280 ppm in 1750). The present concentration is the highest during at least the last 2 million years (Global Carbon Project, 2010). It has been estimated in some reports that atmospheric CO_2 must be reduced to levels similar to those present in the 1970's (or below 340 ppm) to ensure healthy coral growth over the long term (Brainard *et al.,* 2011).

In addition to the insufficiency of the 2 °C target (and the associated estimated peak in atmospheric CO_2 concentration) in terms of preventing widespread damage to coral reefs, several analyses show that pledges made under the Copenhagen Accord are not sufficient to achieve even this target. Rogelj *et al.* (2010) state that higher ambitions for 2020 are necessary to keep the options for 2 ° and 1.5 °C viable without relying on potentially infeasible reduction rates after 2020. According to the IPCC Fourth Assessment report, Annex I emission reduction targets of 25 to 40% below 1990 levels in 2020 would be consistent with stabilizing long-term greenhouse gas concentration levels at 450 ppm CO_2 equivalent, which corresponds to 1.2 ° to 2.3 °C in global warming over the next 100 years (Cubasch *et al.* 2001). The aggregated reduction target by 2020 of all Annex I pledges under the Copenhagen Accord ranges from 12 to 18% relative to the 1990 level which is insufficient to stabilize GHG concentrations and achieve the desired range of maximum warming (den Elzen and Höhne, 2008; Gupta *et al.,* 2007; Pew Center for Global Climate Change, 2010). Even in the high pledge scenario of the Copenhagen Accord, this reduction goal will not be met (den Elzen *et al.,* 2010). Note, again, that even at this range of warming, full protection of coral reefs is probably not feasible (O'Neill and Oppenheimer, 2002). In terms of global emissions, Copenhagen Accord pledges of Annex I countries and the action plans of the seven major emerging economies would lead to a gap towards the 2 °C target of between 3 and 9 Gt CO_2 equivalents (den Elzen *et al.,* 2010; Light, 2010; UNEP, 2010c). Anticipated global efforts toward GHG emission reduction are unlikely to close this gap and may even be insufficient to prevent warming of 3 °C or more (Parry, 2010). With or without this gap, studies indicate that steep emission reductions are needed post 2020 in order to maintain the feasibility of limiting warming to 2 °C or 1.5 °C (UNEP, 2010).

The Climate Change Performance Index (Burck *et al.,* 2010) evaluates and compares the climate protection performance of the top 60 GHG emitting countries that are together responsible for more than 90% of global energy-related CO_2 emissions. Performance rankings are based on an index including emissions level, emissions trend, and national and international climate change policy in each country. Each year, the top three ranks are reserved for countries that have reduced per capita emissions enough to meet the requirements to keep the increase in global temperature below 2 °C. According to the 2011 report, no countries are meeting those criteria. Importantly, the performance of the top 10 emitters that account for over 60% of global emissions is of particular concern as all but three of them are ranked as either 'poor' or 'very poor' in overall performance (Burck *et al.,* 2010). In particular, the U.S. and China both contribute the largest proportions to global emissions and both have 'very poor' ranks in the 2011 Climate Change Performance Index. It is important to note that even the most aggressive actions to reduce emissions will only slow warming, not prevent it.

The evidence presented here suggests that existing regulatory mechanisms at the global scale in the form of international agreements to reduce GHG emissions are insufficient to prevent widespread impacts to corals. It appears unlikely that Parties will be able to collectively achieve, in the near term, climate change avoidance goals outlined via international agreements. Additionally, none of the major global initiatives to date appear to be ambitious enough, even if all terms were met, to reduce GHG emissions to the level necessary to minimize impacts to coral reefs and prevent what are predicted to be severe consequences for corals worldwide.

Existing regulatory mechanisms directly or indirectly addressing all of the localized threats identified in the SRR (*i.e.,* those threats not related to GHGs and global climate change) are primarily national and local fisheries,

coastal, and watershed management laws and regulations in the 84 countries within the collective ranges of the 82 coral species. Because of the large number of threats, and the immense number of regulatory mechanisms in the 84 countries, a regulation-by-regulation assessment of adequacy was not possible. Furthermore, there is not enough information available to determine the effects of specific regulatory mechanisms on individual coral species given the lack of information on specific locations of individual species. We have information on the overall distribution of the species from range maps and literature that identify particular locations where the species have been observed, but this information is not sufficient to do a species by species, regulation by regulation evaluation of inadequacy. However, general patterns include: (1) Fisheries management regimes regulate reef fishing in many parts of the collective ranges of the 82 candidate coral species albeit at varying levels of success; (2) laws addressing land-based sources of pollution are less effective than those regulating fisheries; (3) coral reef and coastal marine protected areas have increased several-fold in the last decade, reducing some threats through regulation or banning of fishing, coastal development, and other activities contributing to localized threats; and (4) the most effective regulatory mechanisms address the threats other than climate change, *i.e.,* laws regulating destructive fishing practices, physical damage, and collection. Because the local threats have impacted and continue to impact corals across their ranges, we can generally conclude that, collectively, the existing regulations are not preventing or controlling local threats. However, we do not have sufficient information to determine if an individual species' extinction risk is increased or exacerbated by inadequacy of individual existing regulations.

Based on the Final Management Report, we conclude that existing regulatory mechanisms for GHG emissions are inadequate to prevent threats related to GHG emissions from worsening anywhere within the range of the 82 candidate species and within the foreseeable future. These threats include the three most important threats to the 82 candidate coral species: Bleaching from ocean warming, coral disease related to ocean warming, and ocean acidification. In the Risk Analyses section, we determine if the inadequacy of existing regulatory mechanisms for GHG emissions is a contributing factor to an individual species' status as threatened or endangered because the existing regulatory mechanisms fail to adequately control or mitigate these three threats.

Risk Analyses

We developed a Determination Tool to consistently interpret the information in the SRR, Final Management Report, and SIR, in order to produce proposed listing determinations for each of the 82 species. The Determination Tool provides a replicable method to distill relevant information that contributes to each species' extinction risk and listing status, and contains justifications for the assigned ranking for each factor for each species. Copies of the entire Determination Tool are available at *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html.* The following discussion provides the basis and rationale for our development of the Determination Tool instead of directly assigning endangered, threatened, or not warranted status to the extinction risk determinations of the BRT.

In the SRR, the BRT evaluated the status of each species, identified threats to the species corresponding to four of the five factors identified in ESA section 4(a)(1), and estimated the risk of extinction for each of the candidate species out to the year 2100. Predicting risk of absolute extinction (*i.e.,* when there will be zero living members of a species) is extremely challenging. In typically clonal organisms like corals, where colonies can be very long-lived (many hundreds of years), a species may be functionally unviable long before the last colony dies. Further, problems associated with low density may render a species at severely elevated risk well before extinction. Rather than try to predict risk of absolute extinction, the BRT estimated the likelihood that a population would fall below a Critical Risk Threshold (CRT) within a specified period of time. The CRT was not quantitatively defined. Rather, the BRT defined the CRT as a condition where a species is of such low abundance, or so spatially disrupted, or at such reduced diversity, that the species is at extremely high risk of extinction with little chance for recovery (a condition we consider to be worse than ''endangered''; discussed below). Through a structured expert opinion process, the BRT assigned a category describing the likelihood of each of the 82 species falling below the CRT by 2100. The category boundaries and labels the BRT used for this review were based on those used by the IPCC for summarizing conclusions about climate change research, and are, in order of most severe to least severe: Virtually certain (>99%); very likely (90–99%); likely (66–90%), more likely than not (50–66%); less likely than not (33–50%); unlikely (10–33%); very unlikely (1–10%), and exceptionally unlikely (<1%). The BRT provided a summary of votes by each expert (tallied in each risk likelihood category), mean (and standard error) likelihood of falling below the CRT by 2100, and the mean likelihood range for each of the 82 candidate coral species, ranked by mean likelihood. To read a summary of how the BRT ranked these species, see pages xxxv–xxxvii in the SRR.

While the BRT's review of the 82 candidates' status was rigorous and extensive, the framework used does not allow us to easily or clearly translate a particular BRT category of a certain likelihood of falling below the CRT to an ESA listing status. Structured expert opinion is a valid and commonly used method of evaluating extinction risk; however, the scoring methods used by this BRT created a number of issues that we must address to make listing determinations. For example, some species with the same mean score might have widely different ranges in the scores, suggesting differences in confidence within or between BRT members. Additionally, the BRT scoring was based on qualitative risk categories, which were then quantified and summarized statistically. Thus, there is likely no precisely describable distinction between two species with mean scores of 49 and 50, even though one species' score would seem to place it in a higher risk category. In addition, in our judgment, the CRT approach used for this status review does not correlate well with the ESA's definitions of endangered and threatened.

The ESA defines an ''endangered species'' as ''any species which is in danger of extinction throughout all or a significant portion of its range.'' The CRT, as defined by the BRT, is a condition worse than endangered, because it essentially precludes recovery. In developing our Determination Tool discussed below, we carefully examined the definitions of endangered and threatened species pursuant to section 3 of the ESA, wherein (1) ''endangered species'' is defined as ''any species which is in danger of extinction throughout all or a significant portion of its range'', and (2) ''threatened species'' is defined as ''any species which is likely to become an endangered species in the foreseeable future throughout all or a significant portion of its range'' (16 U.S.C. 1532 (6) and (20)). Recent case law (*In Re Polar Bear Endangered Species Act Listing*

and § 4(d) Rule Litigation, 794 F. Supp.2d 65 (D.D.C. 2011); 748 F.Supp.2d 19 (D.D.C. 2010)) regarding FWS' listing of the polar bear as threatened provides a thorough discussion of the ESA's definitions and the Services' broad discretion to determine on a case-by-case basis whether a species is in danger of extinction. The Court determined that the phrase ''in danger of extinction'' is ambiguous. The Court held that there is a temporal distinction between endangered and threatened species in terms of the proximity of the ''danger'' of extinction, noting that the definition of ''endangered species'' is phrased in the present tense, whereas a threatened species is ''likely to become'' so in the future. However, the Court also ruled that neither the ESA nor its legislative history compels the interpretation of ''endangered'' as a species being in ''imminent'' risk of extinction. Thus, in the context of the ESA, a key statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either now (endangered) or in the foreseeable future (threatened). The Court ruled that although imminence of harm is clearly one factor that the Services weigh in their decision-making process, it is not necessarily a limiting factor, and that Congress did not intend to make any single factor controlling when drawing the distinction between endangered and threatened species. In many cases, the Services might appropriately find that the imminence of a particular threat is the dispositive factor that warrants listing a species as 'threatened' rather than 'endangered,' or vice versa. Nevertheless, as discussed in the supplemental explanation filed by FWS to further explain its decision to list the polar bear, to be listed as endangered does not require that extinction be certain or probable, and that it is possible for a species validly listed as ''endangered'' to actually persist indefinitely. These considerations were incorporated into our identification of the appropriate information that makes a species in danger of extinction now, likely to become in danger of extinction in the foreseeable future, or not warranting listing. For example, two major factors determining the immediacy of the danger of extinction for corals are the certainty of impacts from high importance threats and a species' current or future capacity to resist adverse effects. While a threatened species may be impacted by the same threats as an endangered species, a threatened species is less exposed, less susceptible, or has a buffering capacity, which results in a temporal delay in extinction risk. Thus, there is a temporal distinction between endangered and threatened species in terms of the proximity of the ''danger'' of extinction.

Development of the Determination Tool involved 3 major steps: (1) Identification of information elements that are significant in determining and differentiating extinction risk for the candidate coral species; (2) determining the conditions under which the elements contribute to a species being endangered or threatened, or under which the elements moderate extinction risk; and (3) developing appropriate values to represent the state of the elements for each of the candidate species.

For the first major step, the main components of the Determination Tool were derived from the specific elements that the BRT identified in the SRR as significant in terms of increasing or decreasing a species' extinction risk, and refined by information in the SIR. These elements were grouped into 3 categories as follows: Vulnerability to threats (susceptibility and exposure), demography (rangewide abundance, trends in abundance, and relative recruitment rate), and spatial structure (overall distribution and ocean basin). Certain combinations of these elements pose more immediate danger of extinction for corals. For example, based on the analyses by the BRT, a coral species with characteristics such as high vulnerability to bleaching from ocean warming, narrow overall distribution, and rare abundance would have an increased likelihood of extinction. In contrast, a species that has low vulnerability to bleaching, wide overall distribution, and common abundance would have a low likelihood of extinction. Thus, in step 2 of developing the Determination Tool, we determined the particular combinations of threat vulnerabilities, demographic information, and spatial information that correspond to a particular proposed listing status. Endangered species are species with a current high extinction risk; they are highly vulnerable to one or more of the high importance threats and have either already been seriously adversely affected by one of these threats, as evidenced by a declining trend, and high susceptibility to that threat, or they lack a buffer to protect them from serious adverse effects from these threats in the future (*e.g.,* rare abundance or narrow overall distribution). Threatened species are species that are not currently in danger of extinction, but are likely to become so within the foreseeable future. The Determination Tool evaluates species' extinction risk over the foreseeable future, to the year 2100, through the identification of specific threat vulnerabilities, demographic traits, and distributional states. There are two ways in which a species can warrant listing as threatened. Threatened coral species are highly or moderately vulnerable to one or more of the high importance threats or highly vulnerable to one or more of the lower importance threats, but have either not yet exhibited effects in their populations (*e.g.,* stable or increasing trend), or they have the buffering protection of a more common abundance or wider overall distribution.

Notably, one major distinction between endangered and threatened status for corals is based on the certainty of impacts from high importance threats and a species' current or future capacity to resist adverse effects. This is closely linked to the species' exposure and susceptibility to these threats, as well as their demographic and spatial elements. While a threatened species may be impacted by the same threats as an endangered species, a threatened species is less exposed, less susceptible, or has a buffering capacity, which results in a temporal delay in extinction risk. Given the certainty that the climate threats are increasing, and the particular combinations of species-specific elements, a threatened species will be in danger of extinction by 2100. Thus, there is a temporal distinction between endangered and threatened species in terms of the proximity of the ''danger'' of extinction.

Species that do not warrant listing are species that are found not to be in danger of extinction currently and not likely to become so by 2100 because they have: Low vulnerability to the high importance threats, or low or moderate vulnerability to all the lower importance threats, and common abundance or wide overall distribution. Species that are not warranted for listing are distinguished from threatened and endangered species because they have a lower susceptibility to threats and the buffering capacity to resist adverse effect on their status now and into the future, meaning few individuals are affected by threats (lower vulnerability) and the high abundance and wide range buffers the species from declines. Thus there is low extinction risk for these species, which supports their not warranted status.

In the third step of the risk analysis we developed a range of values for each of the information elements comprising the Determination Tool, to provide an adequate description of that elements'

contribution to each species' extinction risk, and to allow evaluation of meaningful distinctions between species. For example, rangewide abundance is rated as rare, uncommon, or common; depth distribution is shallow, moderate or wide; threat susceptibilities are rated as high, moderate or low, or as intermediate values. These values for each of the Determination Tool elements are summarized in Table 3D below.

Detailed Description of Determination Tool Elements

As mentioned above, the Determination Tool uses three categories of information for evaluating the status of each of the 82 candidate species: Vulnerability to threats, demography and spatial structure (Table 2). These three categories were selected based on the influence this particular type of information has on the extinction risk of corals. There are specific elements within each of these categories with which we populated the Determination Tool. The following is a list of the specific elements in their categories:

(1) Vulnerability to threats—(each of the nine most important threats described in the Threats Evaluation section above) based on a species' susceptibility and exposure to each of the threats;

(2) Demography—abundance, trends in abundance, relative recruitment rate; and

(3) Spatial structure—overall distribution (which is a combination of geographic and depth distributions), and ocean basin.

Where data were available within these elements for a particular species, the Determination Tool provided a consistent method to consider those elements for classifying each species in terms of its listing status. However, if data were unavailable (*i.e.,* no inference could be made from the genus or family) on a particular element for a species, that element had no effect on listing status (*i.e.,* no available information on which to identify contribution to extinction risk). Notably, there were available data for at least one element in each of the categories for each species to adequately populate the Determination Tool for a listing status. Summaries of each element considered in the Determination Tool, and its effect on listing status, are shown in Table 2 below. In all cases, the effect on listing shown in the table is a generality that depends on other elements, because each outcome depends on a combination of the vulnerability, demographic, and spatial structure ratings. Detailed descriptions of each of the elements, and how they are rated in the Determination Tool, follow after Table 2.

TABLE 2—SUMMARY OF EACH ELEMENT CONSIDERED IN THE DETERMINATION TOOL, AND ITS EFFECT ON LISTING STATUS. THE CORRESPONDING ESA SECTION 4 LISTING FACTOR IS LISTED IN PARENTHESES AFTER EACH THREAT IN THE ELEMENT COLUMN. "E" MEANS "ENDANGERED" AND "T" MEANS "THREATENED."

Category	Element	Definition	Species-specific classification	Effect on listing status
Vulnerability to High Importance Threats.	Ocean Warming (E)	Elevation of ocean temperatures above tolerated range resulting primarily in bleaching (expulsion of symbiotic algae) and other detrimental physiological responses.	high, moderate, low	high contributes to E or T depending on other elements. moderate contributes to T depending on other elements.
	Disease (C)	Presumed infectious diseases often associated with acute tissue loss.	high, moderate, low	high contributes to E or T depending on other elements. moderate contributes to T depending on other elements.
	Ocean Acidification (E)	Increased CO_2 in the surface ocean, resulting in reduced pH and reduced availability of carbonate ions.	high, moderate, low	high contributes to E or T depending on other elements. moderate contributes to T depending on other elements.
Vulnerability to Lower Importance Threats.	Reef Fishing Impacts (Trophic Cascades) (A).	The alteration (through the removal of fish biomass) of trophic interactions that is particularly important in structuring coral reef ecosystems.	high, moderate, low	high or moderate contributes to E or T depending on other elements.
	Sedimentation (A & E)	Delivery of terrestrial sediments and re-mobilization of in situ sediments.	high, moderate, low	high contributes to T depending on other elements.
	Nutrient Over-enrichment (A & E).	An overabundance of chemicals that organisms need to live and grow, which results in detrimental physiological or ecological imbalances.	high, moderate, low	high contributes to T depending on other elements.

TABLE 2—SUMMARY OF EACH ELEMENT CONSIDERED IN THE DETERMINATION TOOL, AND ITS EFFECT ON LISTING STATUS. THE CORRESPONDING ESA SECTION 4 LISTING FACTOR IS LISTED IN PARENTHESES AFTER EACH THREAT IN THE ELEMENT COLUMN. ''E'' MEANS ''ENDANGERED'' AND ''T'' MEANS ''THREATENED.''—Continued

Category	Element	Definition	Species-specific classification	Effect on listing status
	Sea-level Rise (A & E)	Increase of observed sea level due to thermal expansion and the melting of both land and sea ice as direct consequences of increases in atmospheric greenhouse gases.	high, moderate, low	high contributes to T depending on other elements.
	Predation (C)	The feeding on corals by fish or invertebrates.	high, moderate, low	high contributes to T depending on other elements.
	Collection and Trade (B)	The removal and transport of coral colonies.	high, moderate, low	high contributes to T depending on other elements.
Demographic	Qualitative Range-wide Abundance (E).	A qualitative estimate of the abundance of a species.	rare, uncommon, common ...	rare or uncommon contributes to E depending on other elements. rare contributes to T depending on other elements.
	Trends in Abundance (E)	A quantitative or qualitative indicator of a species' trajectory; represents realized productivity.	decreasing, stable, increasing.	decreasing contributes to E depending on other elements.
	Relative Recruitment Rate (E).	Number of recruits per spawner.	low, moderate, high	low contributes to E or T depending on other elements.
Spatial Structure ...	Overall Distribution (E)	The latitudinal, longitudinal, habitat, and depth extent occupied by the species.	narrow, moderate, wide	narrow contributes to E or T depending on other elements. moderate or wide contributes to T depending on other elements.
	Ocean Basin (E)	The restriction of a species to a particular ocean basin.	Caribbean, Eastern Pacific, Indo-Pacific.	Restriction to Caribbean or Eastern Pacific contributes to E or T depending on other elements.

Vulnerability to Threats

The first information category in the Determination Tool is vulnerability of coral species to the most important threats. The future trajectories of the 82 candidate coral species will largely depend on their vulnerabilities to these threats, thus threat vulnerability is the key component to the 82 extinction risk analyses. As described in the Threats to Coral Species section above, vulnerability of a coral species to a threat is a function of susceptibility and exposure, where susceptibility refers to the response of coral colonies to the adverse conditions produced by the threat, and exposure refers to the proportion of colonies that come into contact with the threat across the range of the species. Vulnerability applies to large spatial and temporal scales—for each species and each threat, susceptibilities and exposures are considered for its entire range, from now to the year 2100. Species-specific ratings of susceptibilities and exposures were made in the Determination Tool, leading to species-specific vulnerability ratings, as described in more detail below.

Susceptibility generally refers to the response of coral colonies to the adverse conditions produced by the threat. Susceptibility of a coral species to a threat is primarily a function of biological processes and characteristics, and can vary greatly between and within taxa (*i.e.,* family, genus, and species). In the Determination Tool, susceptibility of each of the 82 candidate corals species to each of the nine threats was rated as high, high-moderate, moderate, moderate-low, or low, based on the information in the SRR and SIR. Susceptibility of a species to a threat depends on the combination of: (1) Direct effects of the threat on the species; and (2) the cumulative (*i.e.,* additive) and interactive (*i.e.,* synergistic or antagonistic) effects of the threat with the effects of other threats on the species. Therefore, when rating the susceptibilities to each threat, we specifically considered how the cumulative or interactive effects, for which we have information, altered the rating that would be assigned to a threat susceptibility in isolation. In many cases the interactive and cumulative effects of threats increased a species' susceptibility rating to a particular threat, specifically when the species has moderate or high susceptibilities to the individual threats. Further, species with low susceptibilities to individual threats are not expected to have increased susceptibilities when considering cumulative or interactive effects, because low susceptibility means that few individuals of the species exhibit adverse impacts to the threat. Thus, there is a low likelihood of multiple low susceptibility threats affecting the same individuals either cumulatively or interactively. The threat susceptibility ratings from the Determination Tool for each of the candidate species for each threat are shown in Table 3. In addition, the Determination Tool includes a

justification sheet that provides the rationale for each of the susceptibility ratings. In the justifications sheet, we identify the complete basis on which we assigned a ranking, including cumulative and interactive effects of threats. Copies of the entire Determination Tool are available at *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html*.

As described above, vulnerability of a coral species to a threat also depends on the proportion of colonies that are exposed to the threat. Exposure is primarily a function of physical processes and characteristics that limit or moderate the impact of the threat across the range of the species. In the Determination Tool, exposure of each of the 82 candidate corals species to each of the nine threats was rated as high, high-moderate, moderate, moderate-low, or low, based on the information in the SRR and SIR. Exposure of a species to a threat depends on the spatial and temporal scales over which exposure to the threat is being considered. As explained above, the appropriate spatial scale is the entire current range of the species, and the appropriate temporal scale is from now to the year 2100. The threat exposure ratings from the Determination Tool for each of the candidate species for each threat are shown in Table 3. In addition, the Determination Tool includes a justification sheet that provides the rationale for each of the exposure ratings.

Vulnerability of a coral species to a threat is a function of susceptibility and exposure. Thus, in the Determination Tool, the vulnerability rating for each species to each threat is determined by the sum of the susceptibility and exposure ratings, resulting in a threat vulnerability rating that we ranked as high, moderate, or low. The threat vulnerability ratings from the Determination Tool for each of the candidate species for each threat are shown in Table 3.

The three most important threats that contribute to a species' extinction risk are ocean warming, disease, and ocean acidification. We considered these threats to be the most significant threats posing extinction risk to the 82 candidate coral species currently and out to the year 2100. Thus, vulnerability to these threats highly influenced the listing status for each of the 82 coral species. Threats of lower importance—trophic effects of reef fishing, sedimentation, nutrients, sea-level rise, predation, and collection and trade—were also considered as contributing to extinction risks, but to a lesser extent. Therefore, the vulnerability to the lower importance threats only contributed to threatened or endangered status if the species had a high vulnerability to that threat. Last, the threats not considered in the tool, or those that have moderate or low ranking, may still have negative effects on individual species, just not enough to significantly affect extinction risk.

Demography (ESA Factor E)

Demographic elements that cause a species to be at heightened risk of extinction, alone or in combination with threats under other listing factors, are considered under ESA Factor E—other natural or manmade factors affecting the continued existence of the species. Because the demographic elements of abundance and productivity have such interactive effects on extinction risk and because they are often both estimated from the same time series data, we address these two parameters together. Information related to coral abundance and productivity can be divided into several qualitative and quantitative metrics. However, abundance and trend data for the 82 coral species are limited; the data that do exist suffer from substantial uncertainties (see Section 4.2 of the SRR). Therefore, the Determination Tool relies on the qualitative rangewide abundance and qualitative trends in abundance.

Species-specific qualitative abundance estimates, coded as ''common'', ''uncommon'', or ''rare'' for the candidate species, are based on information in Sections 6 and 7 of the SRR and SIR. A qualitative rangewide abundance estimate was the only abundance metric that was available for all of the 82 candidate species. In general, ''rare'' or ''uncommon'' species are more vulnerable than common ones, although some species are naturally rare and have likely persisted in that rare state for tens of thousands of years or longer. However, naturally rare species may generally be at greater risk of extinction than naturally more common species when confronted with global threats to which they are vulnerable. Thus, in the Determination Tool, rarity or uncommonness increased extinction risk and contributed to an endangered or threatened status. Trends in abundance directly demonstrate how the focal species responds under current or recent-past conditions. Trend data for the 82 species were scarce; however, a declining trend increased extinction risk and contributed to endangered status in the Determination Tool.

Productivity is perhaps a more important indicator of extinction risk than commonness. Productivity is defined here as the tendency of the population to increase in abundance if perturbed to low numbers and is often expressed as ''recruits per spawner,'' although the term ''recruit'' can be difficult to apply in the case of corals, which reproduce both sexually and asexually (see Section 2.2.1 of the SRR). Many of the 82 candidate coral species are long-lived, with low or episodic productivity, making them highly vulnerable to trends of increased mortality or catastrophic mortality events. As an example of the high influence recruitment rate has on extinction risk, the BRT considered a species that has lost the ability for successful recruitment of sexually-produced progeny to be below the CRT, even if it can still reproduce asexually; thus such a species would be at high risk of extinction. Recruitment rate estimates for the 82 candidate species were scarce; however, in the Determination Tool, where estimates were available, low relative recruitment rates increased the extinction risk and contributed to endangered or threatened status.

Spatial Structure (ESA Factor E)

Spatial elements that cause a species to be at heightened risk of extinction, alone or in combination with threats under other listing factors, are considered under ESA Factor E—other natural or manmade factors affecting the continued existence of the species. Spatial structure is important at a variety of scales. At small spatial scales within a single population, issues of gamete density and other Allee effects (when, in small populations, the reproduction and survival rates of individuals decreases with declining population density) can have significant impacts on population persistence. A wide geographic distribution can buffer a population or a species from environmental fluctuations or catastrophic events; it ''spreads the risk'' among multiple populations (see Section 4.3 of the SRR). We explicitly described how exposure to individual threats varies at different spatial scales in the Threats Evaluation section above. The extent to which an individual species' extinction risk is contributed to or moderated by those spatial aspects is considered in exposure. Here, we are identifying the general area a species may occupy across its geographic and depth distributions. Generally, having a wide geographic or depth distribution provides more potential area to occupy. However, if populations are too isolated (even within a large distribution), gene flow and larval connectivity may be reduced, making the species less likely to recover from mortality events. Thus,

a robust spatial structure includes a wide geographic distribution, with substantial connectivity to maintain proximity of populations and individuals within the range. We considered the geographic (including longitudinal, latitudinal, and habitat) distribution and depth distribution in rating the overall distribution for each species. Based on the information above on how distribution influences extinction risk, a narrow overall distribution increases extinction risk. However, in some cases a moderate or wide distribution is not sufficient to reduce extinction risk to a level that the species would not warrant listing.

We also considered the ocean basin in which a species exists under spatial structure in the Determination Tool. The Caribbean basin is geographically small and partially enclosed, biologically well-connected, and has relatively high human population densities with a long history of adversely affecting coral reef systems across the basin. The eastern Pacific basin is geographically isolated from the Indo-Pacific and has an environment that may be one of the least hospitable to reef development and coral biodiversity. Further, since 1980, six of the 40 known reef-building scleractinian and hydrocoral species in the eastern Pacific may have become extinct or locally extirpated. The eastern Pacific contains approximately one third of the number of genera and less than half the number of species compared to the Caribbean, less reef area than in the Caribbean, and strong climate variability. If a species is restricted to one of these basins, its extinction risk is significantly increased, and thus contributed to a status of endangered or threatened.

In the Determination Tool, the geographic distribution ratings are defined as follows: All Caribbean species are rated as ''narrow; in the Indo-Pacific, ''narrow'' is a portion of the Coral Triangle, or the eastern Pacific, or the Hawaiian archipelago, or a similarly small portion of the Indian and Pacific Oceans; ''moderate'' is somewhat restricted latitudinally or longitudinally in the Indo-Pacific, but not as much as the narrow species (*e.g.,* species distributed throughout the Coral Triangle are rated as moderate, not narrow); and ''wide'' is broadly distributed latitudinally and longitudinally throughout most of the Indo-Pacific. For all species, the depth distribution ratings are defined as: ''Shallow'' is near the surface to approximately 15 m, ''moderate'' is near the surface to approximately 50 m, and ''wide'' is near the surface to approximately 100 m. Species that are found predominantly in deeper water potentially occur near the surface in low-light environments (*e.g.,* turbid habitats, overhangs, caves, etc.). Overall distribution ratings are simply sums of the geographic and depth ratings; thus, justifications for the overall distribution ratings are not provided in the Determination Tool.

Summary of the Determination Tool

As discussed above and described in the outline below, particular combinations of threat vulnerabilities, demographic information, and spatial information result in a particular proposed listing status. The outline below is the textual description of the Determination Tool. A graphical depiction of the Determination Tool is available at *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html.* The 82 outcomes are provided in the Listing Determinations section that follows.

(1) A species warrants listing as endangered if:

(a) It is highly vulnerable to any high importance threat *and*

(b) It has any of the following demographic elements:

(i) Rare or uncommon abundance; *or*

(ii) Declining trend; *or*

(iii) Low recruitment rate; *and*

(c) It has any of the following spatial elements:

(i) Narrow overall distribution *or*

(ii) Occurs only in the E. Pacific or Caribbean; *and*

(d) The existing regulatory mechanisms are inadequately regulating the high importance threats contributing to the species' status.

(2) A species warrants listing as threatened if:

(a) It is highly vulnerable to any high importance threat, but does not have both one of the demographic elements and one of the spatial elements listed under 1b and 1c above, *or*

(b) It is moderately vulnerable to any high importance threat, or highly vulnerable to any lower importance threat, *and*

(i) It has any of the following qualities:

(1) Rare abundance *or*

(2) Narrow overall distribution; *and*

(c) The existing regulatory mechanisms are inadequately regulating the threats contributing to the species' status.

(3) A species does not warrant listing as threatened or endangered if:

(a) It is not highly or moderately vulnerable to any high importance threat, nor highly vulnerable to any lower importance threat, *and*

(b) It has one of the following qualities:

(i) Uncommon or common abundance *and* moderate or wide overall distribution; *or*

(ii) The existing regulatory mechanisms are adequately regulating the threats contributing to the species' status

Tables 3A–3D: The four tables below show all demographic (3A), spatial (3A), and threat vulnerability (3B & 3C) data for each of the 84 species considered in the Determination Tool. Keys to the data are shown in Table 3D. Copies of the entire Determination Tool are available at *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html.*

TABLE 3A—DEMOGRAPHIC AND SPATIAL DATA FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW

SRR order	Species	Demographic (E)			Spatial (E)				
		Generalized rangewide abundance	Trends in abundance	Relative recruitment rate	Geographic distribution	Depth distribution	Overall distribution	Restricted to Caribbean	Restricted to Eastern Pacific
0	*Acropora cervicornis*	2	1	1	1	1	2	Y	N
0	*Acropora palmata*	2	1	1	1	2	3	Y	N
1	*Agaricia lamarcki*	3	2	1	1	3	4	Y	N
2	*Mycetophyllia ferox*	1	1	1	1	3	4	Y	N
3	*Dendrogyra cylindrus*	1	n/a	1	1	2	3	Y	N
4	*Dichocoenia stokesii*	3	n/a	2	1	3	4	Y	N
5	*Montastraea faveolata*	3	1	1	1	3	4	Y	N
6	*Montastraea franksi*	3	1	1	1	3	4	Y	N
7	*Montastraea annularis*	3	1	1	1	2	3	Y	N
8	*Millepora foveolata*	2	n/a	3	1	1	2	N	N
9	*Millepora tuberosa*	3	n/a	3	1	1	2	N	N

TABLE 3A—DEMOGRAPHIC AND SPATIAL DATA FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW—Continued

SRR order	Species	Demographic (E)			Spatial (E)				
		Generalized rangewide abundance	Trends in abundance	Relative recruitment rate	Geographic distribution	Depth distribution	Overall distribution	Restricted to Caribbean	Restricted to Eastern Pacific
10	*Heliopora coerulea*	3	n/a	2	3	3	6	N	N
11	*Pocillopora danae*	2	n/a	n/a	2	2	4	N	N
12	*Pocillopora elegans* (East Pacific)	3	n/a	1	1	3	4	N	Y
13	*Pocillopora elegans* (Indo-Pacific)	3	n/a	n/a	3	3	6	N	N
14	*Seriatopora aculeata*	2	n/a	n/a	2	2	4	N	N
15	*Acropora aculeus*	3	n/a	n/a	3	2	5	N	N
16	*Acropora acuminata*	2	n/a	2	3	2	5	N	N
17	*Acropora aspera*	3	n/a	n/a	2	1	3	N	N
18	*Acropora dendrum*	1	n/a	n/a	2	2	4	N	N
19	*Acropora donei*	2	n/a	n/a	2	2	4	N	N
20	*Acropora globiceps*	3	n/a	n/a	2	1	3	N	N
21	*Acropora horrida*	2	n/a	n/a	3	2	5	N	N
22	*Acropora jacquelineae*	1	n/a	n/a	1	2	3	N	N
23	*Acropora listeri*	2	n/a	n/a	3	1	4	N	N
24	*Acropora lokani*	1	n/a	n/a	1	2	3	N	N
25	*Acropora microclados*	2	n/a	n/a	3	2	5	N	N
26	*Acropora palmerae*	2	n/a	n/a	2	2	4	N	N
27	*Acropora paniculata*	2	n/a	n/a	3	2	5	N	N
28	*Acropora pharaonis*	3	n/a	n/a	1	2	3	N	N
29	*Acropora polystoma*	2	n/a	n/a	3	1	4	N	N
30	*Acropora retusa*	2	n/a	n/a	3	1	4	N	N
31	*Acropora rudis*	2	n/a	n/a	1	1	2	N	N
32	*Acropora speciosa*	2	n/a	n/a	2	2	4	N	N
33	*Acropora striata*	2	n/a	n/a	2	2	4	N	N
34	*Acropora tenella*	2	n/a	n/a	2	3	5	N	N
35	*Acropora vaughani*	2	n/a	2	3	2	5	N	N
36	*Acropora verweyi*	3	n/a	n/a	3	1	4	N	N
37	*Anacropora puertogalerae*	2	n/a	n/a	2	2	4	N	N
38	*Anacropora spinosa*	2	n/a	n/a	1	1	2	N	N
39	*Astreopora cucullata*	2	n/a	n/a	3	1	4	N	N
40	*Isopora crateriformis*	3	n/a	n/a	2	2	4	N	N
41	*Isopora cuneata*	3	n/a	3	3	1	4	N	N
42	*Montipora angulata*	2	n/a	2	3	2	5	N	N
43	*Montipora australiensis*	2	n/a	2	3	2	5	N	N
44	*Montipora calcarea*	2	n/a	2	3	2	5	N	N
45	*Montipora caliculata*	2	n/a	2	3	2	5	N	N
46	*Montipora dilatata/flabellata(/turgescens).*	3	n/a	n/a	3	2	5	N	N
47	*Montipora lobulata*	2	n/a	2	3	2	5	N	N
48	*Montipora patula(/verrilli)*	3	n/a	2	1	2	3	N	N
49	*Alveopora allingi*	2	n/a	n/a	3	1	4	N	N
50	*Alveopora fenestrata*	2	n/a	n/a	3	2	5	N	N
51	*Alveopora verrilliana*	2	n/a	2	3	3	6	N	N
52	*Porites horizontalata*	3	n/a	n/a	3	2	5	N	N
53	*Porites napopora*	3	n/a	n/a	2	1	3	N	N
54	*Porites nigrescens*	3	n/a	n/a	3	2	5	N	N
55	*Porites* (Clade 1 forma *pukoensis*)	3	n/a	n/a	3	2	5	N	N
56	*Psammocora stellata*	2	n/a	n/a	2	2	4	N	N
57	*Leptoseris incrustans*	2	n/a	n/a	3	3	6	N	N
58	*Leptoseris yabei*	2	n/a	n/a	3	3	6	N	N
59	*Pachyseris rugosa*	3	n/a	n/a	3	2	5	N	N
60	*Pavona bipartite*	2	n/a	n/a	3	2	5	N	N
61	*Pavona cactus*	3	n/a	n/a	3	2	5	N	N
62	*Pavona decussata*	3	n/a	n/a	3	2	5	N	N
63	*Pavona diffluens*	2	n/a	n/a	1	2	3	N	N
64	*Pavona venosa*	2	n/a	n/a	3	2	5	N	N
65	*Galaxea astreata*	3	n/a	n/a	3	3	6	N	N
66	*Pectinia alcicornis*	2	n/a	n/a	3	2	5	N	N
67	*Acanthastrea brevis*	2	n/a	n/a	3	2	5	N	N
68	*Acanthastrea hemprichii*	2	n/a	n/a	3	2	5	N	N
69	*Acanthastrea ishigakiensis*	2	n/a	n/a	3	1	4	N	N
70	*Acanthastrea regularis*	2	n/a	n/a	2	2	4	N	N
71	*Barabattoia laddi*	2	n/a	n/a	2	1	3	N	N
72	*Caulastrea echinulata*	2	n/a	n/a	1	2	3	N	N
73	*Cyphastrea agassizi*	2	n/a	n/a	3	2	5	N	N
74	*Cyphastrea ocellina*	2	n/a	n/a	3	2	5	N	N
75	*Euphyllia cristata*	2	n/a	n/a	2	2	4	N	N
76	*Euphyllia paraancora*	2	n/a	n/a	2	3	5	N	N
77	*Euphyllia paradivisa*	2	n/a	n/a	1	2	3	N	N
78	*Physogyra lichtensteini*	3	n/a	n/a	3	2	5	N	N
79	*Turbinaria mesenterina*	3	n/a	3	3	2	5	N	N
80	*Turbinaria peltata*	3	n/a	n/a	3	2	5	N	N
81	*Turbinaria reniformis*	3	n/a	n/a	3	2	5	N	N
82	*Turbinaria stellulata*	2	n/a	n/a	3	2	5	N	N

TABLE 3B—EXPOSURE (EXP.), SUSCEPTIBILITY (SUSC.), AND VULNERABILITY (VUL.) RATINGS FOR FIVE THREATS FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW.

SRR Order	Species	High importance threats									Medium and low importance threats					
		Ocean warming			Disease			Ocean acidification			Trophic effects of reef fishing			Sedimentation		
		Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.
0	*Acropora cervicornis*	1.5	1	2.5	1.5	1	2.5	1.5	1.5	3	1.5	2	3.5	2	1	3
0	*Acropora palmata*	1.5	1	2.5	1.5	1	2.5	1.5	1.5	3	1.5	2	3.5	2	1	3
1	*Agaricia lamarcki*	1.5	2	3.5	1.5	2	3.5	1.5	2	3.5	1.5	2	3.5	2	2	4
2	*Mycetophyllia ferox*	1.5	3	4.5	1.5	1	2.5	1.5	2	3.5	1.5	2	3.5	2	2	4
3	*Dendrogyra cylindrus*	1.5	2	3.5	1.5	1	2.5	1.5	2	3.5	1.5	2	3.5	2	2	4
4	*Dichocoenia stokesii*	1.5	3	4.5	1.5	1	2.5	1.5	2	3.5	1.5	2	3.5	2	1.5	3.5
5	*Montastraea faveolata*	1.5	1	2.5	1.5	1	2.5	1.5	1.5	3	1.5	2	3.5	2	1	3
6	*Montastraea franksi*	1.5	1	2.5	1.5	1	2.5	1.5	1.5	3	1.5	2	3.5	2	1	3
7	*Montastraea annularis*	1.5	1	2.5	1.5	1	2.5	1.5	1.5	3	1.5	2	3.5	2	1	3
8	*Millepora foveolata*	1.5	1	2.5	2	2	4	1.5	2	3.5	2	2	4	3	2	5
9	*Millepora tuberosa*	1.5	1	2.5	2	2	4	1.5	2	3.5	2	2	4	3	2	5
10	*Heliopora coerulea*	1.5	3	4.5	2	3	5	1.5	2	3.5	2	2	4	3	3	6
11	*Pocillopora danae*	1.5	1.5	3	2	2.5	4.5	1.5	2	3.5	2	2	4	3	2.5	5.5
12	*Pocillopora elegans* (East Pacific).	1.5	1.5	3	2	2.5	4.5	1.5	2	3.5	2	2	4	3	2.5	5.5
13	*Pocillopora elegans* (Indo-Pacific).	1.5	1.5	3	2	2.5	4.5	1.5	2	3.5	2	2	4	3	2.5	5.5
14	*Seriatopora aculeata*	1.5	1.5	3	2	2.5	4.5	1.5	2	3.5	2	2	4	3	2.5	5.5
15	*Acropora aculeus*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
16	*Acropora acuminata*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
17	*Acropora aspera*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
18	*Acropora dendrum*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
19	*Acropora donei*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
20	*Acropora globiceps*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
21	*Acropora horrida*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
22	*Acropora jacquelineae*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
23	*Acropora listeri*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
24	*Acropora lokani*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
25	*Acropora microclados*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
26	*Acropora palmerae*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
27	*Acropora paniculata*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
28	*Acropora pharaonis*	1.5	1	2.5	2	1	3	1.5	2	3.5	2	2	4	3	2.5	5.5
29	*Acropora polystoma*	1.5	1	2.5	2	1	3	1.5	2	3.5	2	2	4	3	2.5	5.5
30	*Acropora retusa*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
31	*Acropora rudis*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
32	*Acropora speciosa*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
33	*Acropora striata*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
34	*Acropora tenella*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
35	*Acropora vaughani*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
36	*Acropora verweyi*	1.5	1	2.5	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
37	*Anacropora puertogalerae*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2	5
38	*Anacropora spinosa*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
39	*Astreopora cucullata*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2	5
40	*Isopora crateriformis*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2	5
41	*Isopora cuneata*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2	5
42	*Montipora angulata*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2	5
43	*Montipora australiensis*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2	5
44	*Montipora calcarea*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2	5
45	*Montipora caliculata*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2	5
46	*Montipora dilatata/flabellata(/turgescens).*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2	5
47	*Montipora lobulata*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2	5
48	*Montipora patula(/verrilli)*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	1.5	4.5
49	*Alveopora allingi*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
50	*Alveopora fenestrata*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
51	*Alveopora verrilliana*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
52	*Porites horizontalata*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
53	*Porites napopora*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
54	*Porites nigrescens*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	2.5	5.5
55	*Porites* (Clade 1 forma *pukoensis*).	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
56	Psammocora stellata	1.5	2.5	4	2	2.5	4.5	1.5	2	3.5	2	2	4	3	2.5	5.5
57	*Leptoseris incrustans*	1.5	3	4.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
58	*Leptoseris yabei*	1.5	3	4.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
59	*Pachyseris rugosa*	1.5	1.5	3	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
60	*Pavona bipartite*	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
61	*Pavona cactus*	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
62	*Pavona decussata*	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
63	*Pavona diffluens*	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
64	*Pavona venosa*	1.5	2	3.5	2	2	4	1.5	2	3.5	2	2	4	3	2.5	5.5
65	*Galaxea astreata*	1.5	2	3.5	2	2.5	4.5	1.5	2	3.5	2	2	4	3	3	6
66	*Pectinia alcicornis*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	3	6
67	*Acanthastrea brevis*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	3	6
68	*Acanthastrea hemprichii*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	3	6

TABLE 3B—EXPOSURE (EXP.), SUSCEPTIBILITY (SUSC.), AND VULNERABILITY (VUL.) RATINGS FOR FIVE THREATS FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW.—Continued

SRR Order	Species	High importance threats									Medium and low importance threats					
		Ocean warming			Disease			Ocean acidification			Trophic effects of reef fishing			Sedimentation		
		Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.
69	*Acanthastrea ishigakiensis*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	3	6
70	*Acanthastrea regularis*	1.5	1.5	3	2	1.5	3.5	1.5	2	3.5	2	2	4	3	3	6
71	*Barabattoia laddi*	1.5	2.5	4	2	2	4	1.5	2	3.5	2	2	4	3	n/a	n/a
72	*Caulastrea echinulata*	1.5	2.5	4	2	2	4	1.5	2	3.5	2	2	4	3	n/a	n/a
73	*Cyphastrea agassizi*	1.5	2.5	4	2	2	4	1.5	2	3.5	2	2	4	3	n/a	n/a
74	*Cyphastrea ocellina*	1.5	2.5	4	2	2	4	1.5	2	3.5	2	2	4	3	n/a	n/a
75	*Euphyllia cristata*	1.5	1.5	3	2	2.5	4.5	1.5	2.5	4	2	2	4	3	2.5	5.5
76	*Euphyllia paraancora*	1.5	1.5	3	2	2.5	4.5	1.5	2.5	4	2	2	4	3	2.5	5.5
77	*Euphyllia paradivisa*	1.5	1.5	3	2	2.5	4.5	1.5	2.5	4	2	2	4	3	2.5	5.5
78	*Physogyra lichtensteini*	1.5	1.5	3	2	2	4	1.5	2.5	4	2	2	4	3	2.5	5.5
79	*Turbinaria mesenterina*	1.5	3	4.5	2	2	4	1.5	2.5	4	2	2	4	3	2.5	5.5
80	*Turbinaria peltata*	1.5	3	4.5	2	2	4	1.5	2.5	4	2	2	4	3	2.5	5.5
81	*Turbinaria reniformis*	1.5	3	4.5	2	2	4	1.5	2.5	4	2	2	4	3	2.5	5.5
82	*Turbinaria stellulata*	1.5	3	4.5	2	2	4	1.5	2.5	4	2	2	4	3	2.5	5.5

TABLE 3C—EXPOSURE (EXP.), SUSCEPTIBILITY (SUSC.), AND VULNERABILITY (VUL.) RATINGS FOR FOUR THREATS FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL, AND REGULATORY MECHANISMS RESULTS. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW.

SRR Order	Species	Medium and low importance threats												Inadequacy of regulatory mechanisms?
		Nutrients			Sea-level rise			Predation			Collection & trade			
		Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	
0	*Acropora cervicornis*	2	1	3	3	2	5	3	1.5	4.5	3	3	6	YES.
0	*Acropora palmata*	2	1	3	3	2	5	3	1.5	4.5	3	3	6	YES.
1	*Agaricia lamarcki*	2	2	4	3	2	5	3	n/a	n/a	3	3	6	YES.
2	*Mycetophyllia ferox*	2	1	3	3	2	5	3	3	6	2.5	2.5	5	YES.
3	*Dendrogyra cylindrus*	2	1.5	3.5	3	2	5	3	3	6	2.5	2.5	5	YES.
4	*Dichocoenia stokesii*	2	n/a	n/a	3	2	5	3	2.5	5.5	3	3	6	YES.
5	*Montastraea faveolata*	2	1	3	3	2	5	3	2.5	5.5	3	3	6	YES.
6	*Montastraea franksi*	2	1	3	3	2	5	3	2.5	5.5	3	3	6	YES.
7	*Montastraea annularis*	2	1	3	3	2	5	3	2.5	5.5	3	3	6	YES.
8	*Millepora foveolata*	2	2	4	3	2	5	3	2	5	3	3	6	YES.
9	*Millepora tuberosa*	2	2	4	3	2	5	3	2	5	3	3	6	YES.
10	*Heliopora coerulea*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	NO.
11	*Pocillopora danae*	2	2	4	3	2	5	3	2	5	3	3	6	YES.
12	*Pocillopora elegans* (East Pacific)	2	2	4	3	2	5	3	2	5	3	3	6	YES.
13	*Pocillopora elegans* (Indo-Pacific)	2	2	4	3	2	5	3	2	5	3	3	6	YES.
14	*Seriatopora aculeata*	2	2	4	3	2	5	3	1.5	4.5	3	3	6	YES.
15	*Acropora aculeus*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
16	*Acropora acuminata*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	YES.
17	*Acropora aspera*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
18	*Acropora dendrum*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
19	*Acropora donei*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
20	*Acropora globiceps*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
21	*Acropora horrida*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
22	*Acropora jacquelineae*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
23	*Acropora listeri*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
24	*Acropora lokani*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
25	*Acropora microclados*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
26	*Acropora palmerae*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
27	*Acropora paniculata*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
28	*Acropora pharaonis*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
29	*Acropora polystoma*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
30	*Acropora retusa*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
31	*Acropora rudis*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
32	*Acropora speciosa*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
33	*Acropora striata*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
34	*Acropora tenella*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
35	*Acropora vaughani*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
36	*Acropora verweyi*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
37	*Anacropora puertogalerae*	2	2	4	3	2	5	3	1.5	4.5	3	3	6	YES.
38	*Anacropora spinosa*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
39	*Astreopora cucullata*	2	2	4	3	2	5	3	1.5	4.5	3	3	6	YES.
40	*Isopora crateriformis*	2	2	4	3	2	5	3	1.5	4.5	3	3	6	YES.
41	*Isopora cuneata*	2	2	4	3	2	5	3	1.5	4.5	3	3	6	YES.
42	*Montipora angulata*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
43	*Montipora australiensis*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
44	*Montipora calcarea*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
45	*Montipora caliculata*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
46	*Montipora dilatata/flabellata(/turgescens)*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.

TABLE 3C—EXPOSURE (EXP.), SUSCEPTIBILITY (SUSC.), AND VULNERABILITY (VUL.) RATINGS FOR FOUR THREATS FOR EACH OF THE 84 SPECIES CONSIDERED IN THE DETERMINATION TOOL, AND REGULATORY MECHANISMS RESULTS. A KEY FOR THE RATINGS IS PROVIDED IN TABLE 3D BELOW.—Continued

SRR Order	Species	Medium and low importance threats												Inadequacy of regulatory mechanisms?
		Nutrients			Sea-level rise			Predation			Collection & trade			
		Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	Exp.	Susc.	Vul.	
47	*Montipora lobulata*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
48	*Montipora patula(/verrilli)*	2	2.5	4.5	3	2	5	3	1.5	4.5	3	3	6	YES.
49	*Alveopora allingi*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
50	*Alveopora fenestrata*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
51	*Alveopora verrilliana*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
52	*Porites horizontalata*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
53	*Porites napopora*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
54	*Porites nigrescens*	2	2.5	4.5	3	2	5	3	2	5	3	3	6	YES.
55	*Porites* (Clade 1 forma *pukoensis*)	2	2.5	4.5	3	2	5	3	2	5	3	3	6	NO.
56	*Psammocora stellata*	2	2	4	3	2	5	3	2	5	3	3	6	NO.
57	*Leptoseris incrustans*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
58	*Leptoseris yabei*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
59	*Pachyseris rugosa*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	YES.
60	*Pavona bipartita*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
61	*Pavona cactus*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
62	*Pavona decussata*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
63	*Pavona diffluens*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	YES.
64	*Pavona venosa*	2	n/a	n/a	3	2	5	3	2	5	3	3	6	NO.
65	*Galaxea astreata*	2	n/a	n/a	3	2	5	3	3	6	3	3	6	NO.
66	*Pectinia alcicornis*	2	3	5	3	2	5	3	1	4	3	3	6	YES.
67	*Acanthastrea brevis*	2	n/a	n/a	3	2	5	3	n/a	n/a	3	3	6	YES.
68	*Acanthastrea hemprichii*	2	n/a	n/a	3	2	5	3	n/a	n/a	3	3	6	YES.
69	*Acanthastrea ishigakiensis*	2	n/a	n/a	3	2	5	3	n/a	n/a	3	3	6	YES.
70	*Acanthastrea regularis*	2	n/a	n/a	3	2	5	3	n/a	n/a	3	3	6	YES.
71	*Barabattoia laddi*	2	2	4	3	2	5	3	n/a	n/a	3	3	6	YES.
72	*Caulastrea echinulata*	2	2	4	3	2	5	3	n/a	n/a	3	3	6	YES.
73	*Cyphastrea agassizi*	2	2	4	3	2	5	3	n/a	n/a	3	3	6	NO.
74	*Cyphastrea ocellina*	2	2	4	3	2	5	3	n/a	n/a	3	3	6	NO.
75	*Euphyllia cristata*	2	2.5	4.5	3	2	5	3	n/a	n/a	3	2	5	YES.
76	*Euphyllia paraancora*	2	2.5	4.5	3	2	5	3	n/a	n/a	3	2	5	YES.
77	*Euphyllia paradivisa*	2	2.5	4.5	3	2	5	3	n/a	n/a	3	2	5	YES.
78	*Physogyra lichtensteini*	2	2.5	4.5	3	2	5	3	n/a	n/a	3	3	6	YES.
79	*Turbinaria mesenterina*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	NO.
80	*Turbinaria peltata*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	NO.
81	*Turbinaria reniformis*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	NO.
82	*Turbinaria stellulata*	2	2.5	4.5	3	2	5	3	3	6	3	3	6	NO.

TABLE 3D—GUIDE TO VALUES FOR THE DETERMINATION TOOL'S ELEMENT RATINGS

Family	Taxonomic Family to which the species belongs.
SRR order	Order in which the species occurs in the Status Review Report.
CRT score	The score assigned to each species indicating the mean likelihood that the species would fall below the critical risk threshold (CRT) by 2100. The CRT is defined as a condition where a species is of such low abundance, or so spatially disrupted, or at such reduced diversity, that the species is at extremely high risk of extinction with little chance for recovery.
CRT Mode	The mode of the likelihood that the species would fall below the CRT by 2100.
Proposed Listing Status Oct 2012	The listing status determined by the determination tool as populated in October 2012.
Generalized Rangewide Abundance	Scale (based on SRR's Abundance rating, unless otherwise noted in the Justification): 1 = rare. 2 = uncommon. 3 = common.
Trends in abundance	Scale: 1 = decreasing. 2 = stable. 3 = increasing.
Relative Recruitment Rate	Scale: 1 = low. 2 = moderate. 3 = high.
Geographic Distribution	Scale: 1 = narrow (Caribbean or restricted to a portion of the Coral Triangle, or the eastern Pacific, or the Hawaiian archipelago, or a similarly small portion of the Indian and Pacific Oceans). 2 = moderate (somewhat restricted latitudinally or longitudinally in the Indo-Pacific, but not as much as the narrow species (*e.g.,* species distributed throughout the Coral Triangle are rated as moderate, not narrow). 3 = wide (broadly distributed latitudinally and longitudinally.
Predominant Depth Distribution	Scale: 1 = shallow (near surface to approximately 15 m). 2 = moderate (near the surface to approximately 50 m).

TABLE 3D—GUIDE TO VALUES FOR THE DETERMINATION TOOL'S ELEMENT RATINGS—Continued

	3 = wide (near the surface to approximately 100 m).
Overall distribution	Characterization of the total possible area the species can occupy. Rated by adding the geographic distribution rating to the depth distribution rating. Scale: 2–3 = narrow. 4 = moderate. 5–6 = wide.
Restricted to Caribbean Sea	Identification of the species' restriction to relatively small, partially enclosed, highly-disturbed wider-Caribbean as Y or N.
Restricted to Eastern Pacific	Identification of the species' restriction to the highly-vulnerable Eastern Pacific as Y or N.
Threat Exposure	Exposure of colonies of a species to a particular threat varies greatly across its range, depending on colony location (*e.g.,* latitude, depth, bathymetry, habitat type, etc.), and physical processes that affect seawater temperature and its effects on coral colonies (*e.g.,* winds, currents, upwelling, shading, tides, etc.). Exposure of colonies to a particular threat also varies temporally daily, seasonally, and annually, and is assessed now and within the foreseeable future. Last, species may be exposed to multiple threats simultaneously or sequentially. For most threats exposure will increase over time. Scale: 1 = high. 1.5 = high-to-moderate. 2 = moderate. 2.5 = moderate-to-low. 3 = low.
Threat Susceptibility	Susceptibility to a particular threat is a function of the species' initial response to a threat and its capacity to recover. Susceptibility to a particular threat is also affected by the interactive or cumulative effects of other threats by altering the organism or its environment biologically, chemically, or physically. Scale: 1 = high. 1.5—high-to-moderate. 2 = moderate. 2.5 = moderate-to-low. 3 = low.
Threat Vulnerability	Species-specific vulnerability to each threat is a function of the species-specific exposure and susceptibility. It is assessed by adding the species-specific exposures and susceptibilities. Scale: 2–3 = high. 3.5–4.5 = moderate. 5–6 = low.
Inadequacy of Regulatory Mechanisms (D)	Evaluates if ESA Factor D—Inadequacy of regulatory mechanisms is contributing to the listing status because regulations are intended to control threats that contribute to listing status are inadequate. Scale: Y = Yes—Factor D contributes to listing status. N = No—Factor D does not contribute to listing status. n/a = not applicable because species is not endangered.

Significant Portion of Its Range

The listing determination process described above was based on applying the Determination Tool to each candidate species throughout its range. The ESA requires that a species be listed if it is threatened or endangered throughout all or in a significant portion of its range (SPOIR) (16 U.S.C. 1532(6)). However, the ESA does not provide a definition of the phrase ''significant portion of its range.'' Therefore, we (with the U.S. Fish and Wildlife Service) have proposed a ''Draft Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species''' (76 FR 76987; December 9, 2011), which is consistent with our past practice as well as our understanding of the statutory framework and language. While the Draft Policy remains in draft form, the Services are to consider the interpretations and principles contained in the Draft Policy as non-binding guidance in making individual listing determinations, while taking into account the unique circumstances of the species under consideration.

The Draft Policy provides that: (1) If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply across the species' entire range; (2) a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination; and (4) if the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies. As discussed above, dividing invertebrate species such as corals into DPSs is not authorized by the ESA.

As explained in the Draft Policy, the analysis of a species' listing status begins with an assessment of status throughout its range, and this analysis generally will be determinative unless there is particular information in the record to suggest that a particular portion of the range warrants further

consideration (76 FR 76987 at 77002; December 9, 2011). Because a listing decision can be driven by considerations of status in a portion of the species' range only where the portion is both ''significant'' and more imperiled than the species overall, we only need to conduct detailed analysis of portions where there is substantial information to suggest both of these criteria might be met. Thus, where there are no facts in the record to suggest that the members of the species in a particular geographic area are either of high biological significance or subject to a higher risk of extinction (due to concentration of threats in the particular geographic area), the agencies' risk analysis is properly concluded after assessing rangewide status.

The BRT did not identify any particular populations or portions of ranges for any of the 82 coral species as being significant or at a higher extinction risk, largely due to a lack of information regarding abundance and geographic distributions. No additional information on this topic was provided during the public engagement period. Because there is a general lack of species-specific data regarding quantitative abundance, distribution, diversity, and productivity of coral species, we are not able to identify any populations or portions of any of the ''threatened'' or ''not warranted'' candidate species' ranges that can be considered unusually biologically significant. Further, we have no information to indicate that particular local threats are more severe in a particular portion of an individual species' range. We do not have any information that would help elucidate whether any species has significant populations nor whether any species is at higher exposure to threats in a particular area of its range. That is not to say that these conditions do not exist. It is just that we do not have any information on which to base a determination that any of the 82 candidates are at elevated risk within a SPOIR. Further, we were not able to identify any portion of the species' range where threats are so actute or concentrated that, if the species were removed from that portion, would so impair the abundance, spatial distribution, productivity, and diversity of the species in its remaining range that it would be in danger of extinction. Thus, we did not identify any significant portions of any of the candidate species' ranges and our determinations on the entire species are based on the best available information.

Conservation Efforts

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into account those efforts, if any, being made by any State or foreign nation to protect the species. In judging the efficacy of protective efforts, we rely on the Services' joint ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (''PECE;'' 68 FR 15100; March 28, 2003). The PECE is designed to guide determinations on whether any conservation efforts that have been recently adopted or implemented, but not yet proven to be successful, will result in recovering the species to the point at which listing is not warranted or contribute to forming a basis for listing a species as threatened rather than endangered. The purpose of the PECE is to ensure consistent and adequate evaluation of future or recently implemented conservation efforts identified in conservation agreements, conservation plans, management plans, and similar documents when making listing decisions. The PECE provides direction for the consideration of such conservation efforts that have not yet been implemented, or have been implemented but have not yet demonstrated effectiveness. The policy is expected to facilitate the development by states and other entities of conservation efforts that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary. The PECE established two basic criteria: (1) The certainty that the conservation efforts will be implemented, and (2) the certainty that the efforts will be effective. Satisfaction of the criteria for implementation and effectiveness establishes a given protective effort as a candidate for consideration, but does not mean that an effort will ultimately change the risk assessment for the species. Overall, the PECE analysis ascertains whether the formalized conservation effort improves the status of the species at the time a listing determination is made.

Existing and planned protective efforts and their effectiveness with regard to the status of the 82 candidate coral species were thoroughly identified and are summarized in the Final Management Report. The report acknowledges innumerable conservation initiatives, projects, agreements, etc., that are either currently in place or planned in the future to address global and local threats to the 82 candidate coral species.

Various partnerships and initiatives exist to address climate change at the global level, as well as regionally throughout the world. While varying approaches are being used via conservation efforts, they share a common objective of reducing GHG emissions in participating countries. Therefore, their overall effectiveness can be inferred from an evaluation of the progress made thus far in reducing GHG emissions, both at the national level and in aggregate globally. Globally, GHG emissions have increased approximately 38 percent from 1990 to 2008. Based on the current state of international laws, regulations, and non-regulatory protective efforts, total world GHG emissions are projected to increase to 97 percent above 1990 levels by 2035. Additionally, there are no foreseen conservation efforts for global threats that will significantly contribute to improved status of the 82 candidate species.

The number of coral reef conservation programs and projects addressing local threats to the 82 candidate species continues to increase and expand. Many international agreements and conventions have been signed and ratified to assist in the recovery of coral reef resources. Additionally, voluntary marine protected areas have been established in numerous areas, outreach and education programs are increasingly growing in developing nations, and active coral reef restoration projects are becoming increasingly popular as a management tool. In many cases, the most effective conservation projects being conducted are non-governmental organization-sponsored coral reef management programs. In addition, most of the conservation efforts do an excellent job of raising awareness about the status of coral reefs around the world. However, although there are many laudable coral conservation efforts being implemented on a local level, these activities are only addressing minor anthropogenic threats that were ranked as either low or negligible in terms of their level of impact and extinction risk to corals (*e.g.,* anchor damage, vessel strikes, and tourism). We therefore conclude that conservation efforts on global or local scales do not change the status determined for the 82 candidate species as a result of application of the Determination Tool.

Listing Determinations

As described above in the Risk Analyses section, each of the 82 listing decisions is based on the threat vulnerabilities, demography, and spatial structure for each species, which are in turn based on the information in the SRR, and SIR, and Final Management Report. The threat vulnerabilities,

demography, and spatial structure for each of the 82 candidate species are summarized below, along with the proposed listing status for each species. The relevant ESA section 4 factor is included in parentheses following the associated threat element.

While we did not directly relate an ESA listing status to specific ranges of CRT scores that resulted from the BRT's extinction risk analysis, the CRT scores do provide a qualitative indication of relative extinction risk. There is agreement between the relative ranking of species according to CRT score and our determinations. Minor inconsistencies are a result of information not considered by the BRT for a particular species that either increased or decreased extinction risk. The BRT reviewed the Determination Tool and the inputs to the tool, and concurs that it is populated with the best available information. Note that we determine if the inadequacy of existing regulatory mechanisms is a contributing factor to a species' extinction risk (factor D) because the existing regulatory mechanisms fail to adequately control or mitigate the relevant high importance threats caused by global climate change.

Caribbean Species: Listing Determinations

The seven Caribbean species are listed below by genus (five genera). A summary of the supporting data for the determinations and proposed listing status for each species is provided, with the relevant ESA factors noted (A, B, C, D, or E).

Agaricia (1 Species)

Elements that contribute to *Agaricia lamarcki*'s status are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); low relative recruitment rate (E); moderate overall distribution (based on narrow geographic distribution and wide depth distribution; E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *A. lamarcki* warrants listing as threatened because of ESA factors C, D, and E.

Mycetophyllia (1 Species)

Elements that contribute to *Mycetophyllia ferox*'s status are: High vulnerability to disease (C); moderate vulnerability to ocean warming (E) and acidification (E); high vulnerability to nutrient over-enrichment (A and E); rare general rangewide abundance (E); decreasing trend in abundance (E); low relative recruitment rate (E); moderate overall distribution (based on narrow geographic distribution and wide depth distribution (NMFS, 2012b, SIR Section 6.2.1); E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *M. ferox* warrants listing as endangered because of ESA factors A, C, D, and E.

Dendrogyra (1 Species)

Elements that contribute to *Dendrogyra cylindrus'* status are: High vulnerability to disease (C); moderate vulnerability to ocean warming (E) and acidification (E); rare general rangewide abundance (E); low relative recruitment rate (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *D. cylindrus* warrants listing as endangered because of ESA factors C, D, and E.

Dichocoenia (1 Species)

Elements that contribute to *Dichocoenia stokesii*'s status are: High vulnerability to disease (C); moderate vulnerability to ocean warming (E) and acidification (E); moderate overall distribution (based on narrow geographic distribution and wide depth distribution; E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *D. stokesii* warrants listing as threatened because of ESA factors C, D, and E.

Montastraea (3 Species)

Elements that contribute to *Montastraea faveolata*'s status are: High vulnerability to ocean warming (E) disease (C), and ocean acidification (E); high vulnerability to sedimentation (A and E) and nutrient over-enrichment (A and E); decreasing trend in abundance (E); low relative recruitment rate (E); moderate overall distribution (based on narrow geographic distribution and wide depth distribution (NMFS, 2012b, SIR Section 6.5); E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *M. faveolata* warrants listing as endangered because of ESA factors A, C, D, and E.

Elements that contribute to *Montastraea franksi*'s status are: High vulnerability to ocean warming (E) disease (C), and ocean acidification (E); high vulnerability to sedimentation (A and E) and nutrient over-enrichment (A and E); decreasing trend in abundance (E); low relative recruitment rate (E); moderate overall distribution (based on narrow geographic distribution and wide depth distribution (NMFS, 2012b, SIR Section 6.5); E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *M. franksi* warrants listing as endangered because of ESA factors A, C, D, and E.

Elements that contribute to *Montastraea annularis*'s status are: High vulnerability to ocean warming (E); disease (C), and ocean acidification (E); high vulnerability to sedimentation (A and E) and nutrient over-enrichment (A and E); decreasing trend in abundance (E); low relative recruitment rate (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); restriction to the Caribbean; and inadequacy of regulatory mechanisms (D). Therefore, *M. annularis* warrants listing as endangered because of ESA factors A, C, D, and E.

Indo-Pacific Species: Listing Determinations

The 75 Indo-Pacific species are listed below by genus (24 genera). A summary of the supporting data for the determinations for each of the 75 species is provided, with the relevant ESA factors noted (A, B, C, D, or E).

Millepora (2 Species)

Elements that contribute to *Millepora foveolata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. foveolata* warrants listing as endangered due to ESA factors C, D, and E.

Elements that contribute to *Millepora tuberosa's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. tuberosa* warrants listing as threatened due to ESA factors C, D, and E.

Heliopora (1 Species)

Elements that contribute to *Heliopora coerulea*'s status are: Moderate vulnerability to ocean warming (E) and acidification (E); low vulnerability to disease (C); common generalized range wide abundance (E); and wide overall distribution (based on wide geographic distribution and wide depth distribution, E). Therefore, *H. coerulea*

is not warranted for listing under the ESA.

Pocillopora (3 Species)

Elements that contribute to *Pocillopora danae*'s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. danae* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *P. elegans'* (East Pacific) status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); overall moderate distribution (based on narrow geographic distribution and wide depth distribution; E); restricted to the eastern Pacific; E; low relative recruitment rate (E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. elegans* (East Pacific) warrants listing as endangered due to ESA factors C, D, and E.

Elements that contribute to *P. elegans'* (Indo-Pacific) status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and wide depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. elegans* (Indo-Pacific) warrants listing as threatened due to ESA factors C, D, and E.

Seriatopora (1 Species)

Elements that contribute to *Seriatopora aculeata*'s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *S. aculeata* warrants listing as threatened due to ESA factors C, D, and E.

Acropora (22 Species)

Elements that contribute to *Acropora aculeus'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. aculeus* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora acuminata'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. acuminata* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora aspera'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); narrow overall distribution (based on moderate geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. aspera* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora dendrum'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); rare generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms. Therefore, *A. dendrum* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora donei'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. donei* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora globiceps'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); narrow overall distribution (based on moderate geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. globiceps* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora horrida'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. horrida* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora jacquelineae'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); rare generalized range wide abundance (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. jacquelineae* warrants listing as endangered due to ESA factors C, D, and E.

Elements that contribute to *Acropora listeri'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized range wide abundance (E); overall moderate distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. listeri* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora lokani'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); rare generalized range wide abundance (E); overall narrow distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. lokani* warrants listing as endangered due to ESA factors C, D, and E.

Elements that contribute to *Acropora microlados'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. microclados* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora palmerae'*s status are: High vulnerability

to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. palmerae* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora paniculata'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. paniculata* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora pharaonis'* status are: High vulnerability to ocean warming (E) and disease (C); moderate vulnerability to acidification (E); common generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. pharaonis* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora polystoma'*s status are: High vulnerability to ocean warming (E) and disease (C); moderate vulnerability to acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. polystoma* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora retusa'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. retusa* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora rudis'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. rudis* warrants listing as endangered due to ESA factors C, D, and E.

Elements that contribute to *Acropora speciosa'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. speciosa* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora striata'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. striata* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora tenella'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on moderate geographic distribution and wide depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. tenella* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora vaughani'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. vaughani* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Acropora verweyi'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. verweyi* warrants listing as threatened due to ESA factors C, D, and E.

Anacropora (2 Species)

Elements that contribute to *Anacropora puertogalerae'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. puertogalerae* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *A. spinosa'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. spinosa* warrants listing as endangered due to ESA factors C, D, and E.

Astreopora (1 Species)

Elements that contribute to *Astreopora cucullata'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms. Therefore, *A. cucullata* warrants listing as threatened due to ESA factors C, D, and E.

Isopora (2 Species)

Elements that contribute to *Isopora crateriformis'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *I. crateriformis* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *I. cuneata'*s status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); moderate

overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms. Therefore, *I. cuneata* warrants listing as threatened due to ESA factors C, D, and E.

Montipora (7 Species)

Elements that contribute to *Montipora angulata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. angulata* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to *M. australiensis'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. australiens* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to *M. calcarea's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms. Therefore, *M. calcarea* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to *M. caliculata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. caliculata* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to the status of *Montipora dilatata/flabellata/turgescens* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized range wide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. dilatata/flabellata/turgescens* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to *M. lobulata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); overall wide distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *M. lobulata* warrants listing as threatened due to ESA factors C, D, and E.

Factors that contribute to the status of *Montipora patula (/verrili)* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common relative rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *Montipora patula (/verrili)* warrants listing as threatened due to ESA factors C, D, and E.

Alveopora (3 Species)

Elements that contribute to *Alveopora allingi's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon relative rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. allingi* warrants listing as threatened due to ESA factors D and E.

Elements that contribute to *Alveopora fenestrata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon relative rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. fenestrata* warrants listing as threatened due to ESA factors C, D and E.

Elements that contribute to *Alveopora verrilliana's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification; uncommon relative rangewide abundance (E); wide overall distribution (based on wide geographic distribution and wide depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. verrilliana* warrants listing as threatened due to ESA factors C, D and E.

Porites (4 Species)

Elements that contribute to *Porites horizontilata's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. horizontilata* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Porites napapora's* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); narrow overall distribution (based on moderate geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. napapora* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to *Porites nigrescens'* status are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. nigrescens* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to the status of *Porites* (Clade 1 forma *pukoensis*) are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *Porites* (Clade 1 forma *pukoensis*) is not warranted for listing under the ESA.

Psammocora (1 Species)

Elements that contribute to *Psammocora stellata's* status are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E). Therefore, *P. stellata* is not warranted for listing under the ESA.

Leptoseris (2 Species)

Elements that contribute to the status of *Leptoseris incrustans* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and wide depth distribution; E). Therefore, *L. incrustans* is not warranted for listing under the ESA.

Elements that contribute to the status of *L. yabei* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and wide depth distribution; E). Therefore, *L. yabei* is not warranted for listing under the ESA.

Pachyseris (1 Species)

Elements that contribute to the status of *Pachyseris rugosa* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. rugosa* warrants listing as threatened due to ESA factors C, D, and E.

Pavona (5 Species)

Elements that contribute to *Pavona bipartita*'s status are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic range and moderate depth distribution; E). Therefore, *P. bipartita* is not warranted for listing under the ESA.

Elements that contribute to the status of *P. cactus* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic range and moderate depth distribution; E). Therefore, *P. cactus* is not warranted for listing under the ESA.

Elements that contribute to the status of *P. decussata* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic range and moderate depth distribution; E). Therefore, *P. decussata* is not warranted for listing under the ESA.

Elements that contribute to the status of *P. diffluens* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic range and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. diffluens* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to the status of *P. venosa* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic range and moderate depth distribution; E). Therefore, *P. venosa* is not warranted for listing under the ESA.

Galaxea (1 Species)

Elements that contribute to the status of *Galaxea astreata* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and wide depth distribution (NMFS 2012b, SIR Section 7.16); E). Therefore, *G. astreata* is not warranted for listing under the ESA.

Pectinia (1 Species)

Elements that contribute to the status of *Pectinia alcicornis* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic range and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. alcicornis* warrants listing as threatened due to ESA factors C, D, and E.

Acanthastrea (4 Species)

Elements that contribute to the status of *Acanthatsrea brevis* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic range and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. brevis* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to the status of *Acanthastrea hemprichii* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on wide geographic range and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. hemprichii* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to the status of *A. ishigakiensis* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on wide geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. ishigakiensis* warrants listing as threatened due to ESA factors C, D, and E.

Elements that contribute to the status of *Acanthastrea regularis* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *A. regularis* warrants listing as threatened due to ESA factors C, D, and E.

Barabattoia (1 Species)

Elements that contribute to the status of *Barabattoia laddi* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on moderate geographic distribution and shallow depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *B. laddi* warrants listing as threatened due to ESA factors C, D, and E.

Caulastrea (1 Species)

Elements that contribute to *Caulastrea echinulata*'s status are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *C. echinulata* warrants listing as threatened due to ESA factors C, D, and E.

Cyphastrea (2 Species)

Elements that contribute to *Cyphastrea agassizi*'s status are: Moderate vulnerability to ocean

warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *C. agassizi* is not warranted for listing under the ESA.

Elements that contribute to *C. ocellina's* status are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *C. ocellina* is not warranted for listing under the ESA.

Euphyllia (3 Species)

Elements that contribute to the status of *Euphyllia cristata* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); moderate overall distribution (based on moderate geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *E. cristata* warrants listing as threatened due to ESA factors C, D and E.

Elements that contribute to the status of *E. paraancora* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); wide overall distribution (based on moderate geographic distribution and wide depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *E. paraancora* warrants listing as threatened due to ESA factors C, D and E.

Elements that contribute to the status of *E. paradivisa* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); uncommon generalized rangewide abundance (E); narrow overall distribution (based on narrow geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *E. paradivisa* warrants listing as endangered due to ESA factors C, D and E.

Physogyra (1 Species)

Elements that contribute to the status of *Physogyra lichtensteini* are: High vulnerability to ocean warming (E); moderate vulnerability to disease (C) and acidification (E); common generalized rangewide abundance (E); wide overall distribution (based on wide geographic distribution and moderate depth distribution; E); and inadequacy of existing regulatory mechanisms (D). Therefore, *P. lichtensteini* warrants listing as threatened due to ESA factors C, D and E.

Turbinaria (4 Species)

Elements that contribute to the status of *Turbinaria mesenterina* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *T. mesenterina* is not warranted for listing under the ESA.

Elements that contribute to the status of *T. peltata* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *T. peltata* is not warranted for listing under the ESA.

Elements that contribute to the status of *T. reniformis* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); common generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *T. reniformis* is not warranted for listing under the ESA.

Elements that contribute to the status of *T. stellulata* are: Moderate vulnerability to ocean warming (E), disease (C), and acidification (E); uncommon generalized rangewide abundance (E); and wide overall distribution (based on wide geographic distribution and moderate depth distribution; E). Therefore, *T. stellulata* is not warranted for listing under the ESA.

Reclassification of *Acropora palmata* and *Acropora cervicornis*

After reviewing the status of the 82 candidate species, we also evaluated the current status of the two threatened corals in the Caribbean, *Acropora palmata* and *A. cervicornis.* The two species were listed as threatened in May 2006 due to a combination of factors including disease, elevated sea surface temperature, and hurricanes (70 FR 24359; May 9, 2006). The species were listed as threatened because we determined they were likely to become in danger of extinction within the foreseeable future, as defined in that case. We based our determination on the information available at that time, including the high number of colonies of the species, the species' large geographic ranges that remained intact, and the fact that asexual reproduction provided a source for new colonies that can buffer natural demographic and environmental variability. We concluded that both species would retain significant potential for persistence and they were not in danger of extinction throughout their ranges at that time.

This BRT, during its deliberation on developing its method for evaluating the 82 candidate species, evaluated the likelihood of *A. palmata* and *A. cervicornis* falling below the CRT by 2050 as 75 percent and 73 percent, respectively. The BRT based this evaluation on its general knowledge of the current status of the two species and the threats affecting them, but it did not specifically collect the best available scientific and commercial data available as it did for the 82 candidate species. The relatively high likelihoods of the two species falling below the CRT by 2050, along with new understanding of the impacts of some threats on these species, led us to re-evaluate the two species' status. We collected the best available scientific and commercial information on the status of the two species. We also relied on the information in the SRR and SIR on the characteristics shared by all species in the genus *Acropora* (described above). Specifically, the genus *Acropora* is highly susceptible to bleaching from ocean warming, ocean acidification, disease, and most local threats. Those susceptibilities coupled with relatively high exposure rates lead to high vulnerabilities to the threats that increase extinction risk for both these species.

Our final determination to list *A. palmata* and *A. cervicornis* as threatened, made over 8 years ago, found that the species were not yet in danger of extinction, but were likely to become so within the next 30 years, citing the large number of remaining individuals, their large, intact geographic ranges, and their ability to reproduce through fragmentation. Since then population declines have continued to occur, with certain populations of both species decreasing up to an additional 50 percent or more since the time of listing (Lundgren, 2008; Muller *et al.* 2008; Williams *et al.* unpubl. data; Williams *et al.,* 2008; Colella *et al.,* 2012; Rogers and Muller *et al.,* 2012). Further, there are documented instances of recruitment failure in some populations (Williams, *et al.,* 2008). In addition, minimal levels of thermal stress (*e.g.,* 30 degrees C)

have been shown to impair larval development, larval survivorship, and settlement success of *A. palmata* (Randall and Szmant, 2009) and near-future levels of acidification have been demonstrated to impair fertilization, settlement success, and post-settlement growth rates in *A. palmata* (Albright *et al.,* 2012). We also understand that on average 50 percent of the colonies are clones, meaning the effective number of genetic individuals is half the total population size (Baums *et al.,* 2006). The species' ranges are not known to have contracted, but with continued declines local extirpations are likely, resulting in a reduction of absolute range size. Furthermore, we are taking into account that the BRT identified restriction to the Caribbean as a spatial factor increasing extinction risk. Also, while asexual reproduction (fragmentation) provides a source for new colonies (albeit clones) that can buffer natural demographic and environmental variability remains true, reliance on asexual reproduction is not sufficient to prevent extinction of the species. Last, the previous status review and listing determination underestimated the global climate change-associated impacts to *A. palmata* and *A. cervicornis,* based on our current knowledge of trends in emissions, likely warming scenarios, and ocean acidification. In particular, in the previous determination, we identified ocean acidification only as a factor that ''may be contributing'' to the status of two species, in comparison to our current understanding that ocean acidification is one of the three highest order threats affecting extinction risk for corals.

Elements that contribute to *Acropora palmata's* status are: High vulnerability to ocean warming (E); ocean acidification (E) and disease (C); high vulnerability to sedimentation (A and E) and nutrient over-enrichment (A and E); uncommon abundance (E); decreasing trend in abundance (E); low relative recruitment rate (E); narrow overall distribution (E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *A. palmata* warrants listing as endangered because of ESA factors A, C, D, and E.

Elements that contribute to *Acropora cervicornis'* status are: High vulnerability to ocean warming (E); ocean acidification (E) and disease (C); high vulnerability to sedimentation (A and E) and nutrient over-enrichment (A and E); uncommon abundance (E); decreasing trend in abundance (E); low relative recruitment rate (E); narrow overall distribution (E); restriction to the Caribbean (E); and inadequacy of regulatory mechanisms (D). Therefore, *A. cervicornis* warrants listing as endangered because of ESA factors A, C, D, and E.

Summary of Determinations

We are responsible for determining whether each of the 82 candidate coral species are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). Section 4(b)(1)(A) of the ESA requires us to make listing determinations based solely on the best scientific and commercial data available after conducting reviews of the statuses of the species and after taking into account efforts being made by any state or foreign nation to protect the species. We concluded that conservation efforts are not protecting the candidate coral species in a way that alters our determination that these corals are endangered or threatened. Finally, section 4(b)(1)(B) of the ESA requires us to give consideration to species which (1) have been designated as requiring protection from unrestricted commerce by any foreign nation, or (2) have been identified as in danger of extinction, or likely to become so within the foreseeable future, by any state agency or by any agency of a foreign nation. All stony corals are listed under Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, which regulates international trade of species to ensure survival. Thus, the proposed listing is consistent with the Convention's classification. *Dendrogyra cylindrus* is listed as threatened by the State of Florida and all stony corals are protected under the U.S. Virgin Islands Indigenous and Endangered Species Act of 1990. All the proposed corals are listed in the IUCN Red List of Threatened Species as vulnerable, endangered, or critically endangered. Thus, the proposed listing is consistent with these classifications.

We have determined that the following 12 species warrant listing as endangered: In the Caribbean (five): *Dendrogyra cylindrus, Montastraea annularis, Montastraea faveolata, Montastraea franksi,* and *Mycetophyllia ferox;* and in the Indo-Pacific (seven): *Millepora foveolata, Pocillopora elegans* (eastern Pacific), *Acropora jacquelineae, Acropora lokani, Acropora rudis, Anacropora spinosa,* and *Euphyllia paradivisa.* The following 54 species warrant listing as threatened: In the Caribbean (two), *Agaricia lamarcki* and *Dichocoenia stokesii;* and in the Indo-Pacific (52): *Millepora tuberosa, Pocillopora danae, Pocillopora elegans* (Indo-Pacific), *Seriatopora aculeata, Acropora aculeus, Acropora acuminata, Acropora aspera, Acropora dendrum, Acropora donei, Acropora globiceps, Acropora horrida, Acropora listeri, Acropora microclados, Acropora palmerae, Acropora paniculata, Acropora pharaonis, Acropora polystoma, Acropora retusa, Acropora speciosa, Acropora striata, Acropora tenella, Acropora vaughani, Acropora verweyi, Anacropora puertogalerae, Astreopora cucullata, Isopora crateriformis, Isopora cuneata, Montipora angulata, Montipora australiensis, Montipora calcarea, Montipora caliculata, Montipora dilatata/flabellata/turgescens, Montipora lobulata, Montipora patula/verrilli, Alveopora allingi, Alveopora fenestrata, Alveopora verrilliana, Porites horizontalata, Porites napopora, Porites nigrescens, Acanthastrea brevis, Acanthastrea hemprichii, Acanthastrea ishigakiensis, Acanthastrea regularis, Pachyseris rugosa, Pectinia alcicornis, Barabattoia laddi, Pavona diffluens, Caulastrea echinulata, Euphyllia cristata, Euphyllia paraancora,* and *Physogyra lichtensteini.* Two species in the Caribbean currently listed as threatened warrant reclassification as endangered: *Acropora palmata* and *Acropora cervicornis.* A total of 16 candidate species (all in the Indo-Pacific) do not warrant listing as endangered or threatened: *Heliopora coerulea, Cyphastrea agassizi, Cyphastrea ocellina, Galaxea astreata, Leptoseris incrustans, Leptoseris yabei, Pavona bipartita, Pavona cactus, Pavona decussata, Pavona venosa, Porites (*Clade 1 forma *pukoensis), Psammocora stellata, Turbinaria mesenterina, Turbinaria peltata, Turbinaria reniformis,* and *Turbinaria stellulata.*

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery plans (16 U.S.C. 1553(f)), critical habitat designations, Federal agency consultation requirements (16 U.S.C. 1536), and prohibitions on taking (16 U.S.C. 1538). Recognition of the species' plight through listing promotes conservation actions by Federal and state agencies, private groups, and individuals, as well as the international community. Should the proposed listing be made final, a recovery program could be implemented, and critical habitat will be designated to the maximum extent prudent and determinable. We anticipate that protective regulations for threatened corals and recovery programs for all the proposed corals may need to be developed in the context of

conserving aquatic ecosystem health. The cooperation and participation of many Federal, state and private sector actors will be needed to effectively and efficiently conserve the listed coral species and the ecosystems upon which they depend.

Should the proposed reclassification of *Acropora palmata* and *A. cervicornis* become final, the existing critical habitat designation (50 CFR 226.216) would remain valid, as the bases for the critical habitat designated for these species are not changed by revising their status from threatened to endangered. The specific areas within the species' occupied geographical area that contain the substrate feature that is essential to the conservation of the species and which may require special management considerations or protection have not changed since designation.

The existing protective regulations promulgated pursuant to ESA section 4(d) (50 CFR 223.208) for *Acropora palmata* and *A. cervicornis* would no longer be valid because such rules apply only to threatened species. The take prohibition of ESA Section 9 instead applies directly to endangered species. Therefore, should the proposed reclassification become final, we would revoke the existing regulations.

Identifying Section 7 Conference and Consultation Requirements

Section 7(a)(4) of the ESA and NMFS/FWS regulations require Federal agencies to confer with us on actions likely to jeopardize the continued existence of species proposed for listing, or likely to result in the destruction or adverse modification of proposed critical habitat. If a proposed species is ultimately listed, Federal agencies must consult under section 7 on any action they authorize, fund, or carry out if those actions may affect the listed species or designated critical habitat. Based on currently available information, we can conclude that examples of Federal actions that may affect the 68 coral species proposed to be listed or reclassified include, but are not limited to: Energy projects, discharge of pollution from point sources, non-point source pollution, dredging, pile-driving, setting of water quality standards, vessel traffic, aquaculture facilities, military activities, and fisheries management practices.

Critical Habitat

Critical habitat is defined in section 3 of the ESA as: ''(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species'' (16 U.S.C. 1532(5)(A)). ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary (16 U.S.C. 1532(3)). Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, critical habitat be designated concurrently with the final listing of a species (16 U.S.C. 1533(a)(3)(A)(i)). To the maximum extent prudent and determinable, we will publish a proposed designation of critical habitat for the coral species in a separate rule. Designations of critical habitat must be based on the best scientific data available and must take into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure that they do not fund, authorize, or carry out any actions that are likely to destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure that their actions do not jeopardize the continued existence of listed species.

Section 9 Take Prohibitions

Because we are proposing to list seven Caribbean species, one in the Eastern Pacific, and six in the Indo-Pacific as endangered, all of the take prohibitions of section 9(a)(1) of the ESA will apply to those particular species if they become listed as endangered. These include prohibitions against importing, exporting, engaging in foreign or interstate commerce, or ''taking'' of the species. ''Take'' is defined under the ESA as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.'' These prohibitions apply to all persons subject to the jurisdiction of the United States, including in the United States, its territorial sea, or on the high seas.

The ESA section 9 prohibitions do not automatically apply to threatened species listed by NMFS. Therefore, pursuant to ESA section 4(d), we will evaluate whether there are protective regulations we deem necessary and advisable to the conservation of any of the candidate species listed as threatened in the final listing rule, including application of some or all of the take prohibitions.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and FWS published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species' range. Based on available information, we believe the following categories of activities are those most likely to result in a violation of the ESA section 9 prohibitions. We emphasize that whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. The mere fact that an activity may fall within one of these *categories* does not mean that the specific *activity* will cause a violation; due to such factors as location and scope, specific actions may not result in direct or indirect adverse effects on the species. Further, an activity not listed may in fact result in a violation. However, based on currently available information, we conclude that the following types of activities are those that may be most likely to violate the prohibitions in section 9:

1. Activities that result in elevated water temperatures in coral habitat that causes bleaching or other degradation of physiological function of listed corals.

2. Activities that result in water acidification in coral habitat that causes reduced calcification, reproductive impairment, or other degradation of physiological function of listed corals.

3. Removing, damaging, poisoning, or contaminating listed corals.

4. Removing, poisoning, or contaminating plants, wildlife, or other biota required by listed corals for feeding, sheltering, or completing other essential life history functions.

5. Harm to the species' habitat resulting in injury or death of the species, such as removing or altering substrate, vegetation, or other physical structures.

6. Altering water flow or currents to an extent that impairs spawning, feeding, or other essential behavioral patterns of listed corals.

7. Discharging pollutants, such as oil, toxic chemicals, radioactivity,

carcinogens, mutagens, teratogens, or organic nutrient-laden water, including sewage water, into listed corals' habitat to an extent that harms or kills listed corals.

8. Releasing non-indigenous or artificially propagated species into listed corals' habitat or locations resulting in mortality or harm to listed corals.

9. Interstate and foreign commerce dealing in listed corals, and importing or exporting listed corals.

10. Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) that may harm or kill listed corals, for instance by disrupting or preventing the reproduction, settlement, reattachment, development, or normal physiology of listed corals. Such disturbances could include land development, run-off, dredging, and disposal activities that result in direct deposition of sediment on corals, shading, or covering of substrate for fragment reattachment or larval settlement.

11. Activities that modify water chemistry in coral habitat to an extent that disrupts or prevents the reproduction, development, or normal physiology of listed corals.

This list provides examples of the types of activities that could have the potential to cause a violation, but it is not exhaustive. It is intended to help people avoid violating the ESA should these proposed listings become final after public comment. Further, the scientific research community is encouraged to submit applications for research to be conducted within the United States on the seven Caribbean species and the seven Indo-Pacific species being proposed as endangered so that the research can continue uninterrupted should they become listed as endangered.

Policies on Role of Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation. The OMB Bulletin, implemented under the Information Quality Act (Public Law 106–554) is intended to enhance the quality and credibility of the Federal government's scientific information, and applies to influential or highly influential scientific information disseminated on or after June 16, 2005. To satisfy our requirements under the OMB Bulletin, the BRT obtained independent peer review of the draft Status Review Report, and NMFS obtained independent peer review of the draft Management Report. Independent specialists were selected from the academic and scientific community, Federal and state agencies, and the private sector for this review. All peer reviewer comments were addressed prior to dissemination of the final Status Review Report and publication of this proposed rule.

On July 1, 1994, the Services published a policy for peer review of scientific data (59 FR 34270). The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing, we will solicit the expert opinions of three qualified specialists, concurrent with the public comment period. Independent specialists will be selected from the academic and scientific community, Federal and State agencies, and the private sector.

Public Comments Solicited

To ensure that any final action resulting from this proposal will be as accurate and effective as possible, we are soliciting comments from the public, other concerned governmental agencies, the scientific community, industry, and any other interested parties. We must base our final determination on the best available scientific and commercial information when making listing determinations. We cannot, for example, consider the economic effects of a listing determination. Final promulgation of any regulation(s) on these species or withdrawal of this listing proposal will take into consideration the comments and any additional information we receive, and such communications may lead to a final regulation that differs from this proposal or result in a withdrawal of this listing proposal.

Solicitation of Information

In addition to comments on the proposed rule, we are soliciting information on features and areas that may support designations of critical habitat for the coral species newly proposed to be listed. As to *Acropora palmata* and *A. cervicornis,* for which critical habitat has already been designated, we have broad discretion to revise existing designations from time to time as appropriate, and we may decide to exercise this discretion based on information received and available on potential critical habitat features for the other coral species. Information provided should identify the physical and biological features essential to the conservation of the species and areas that contain these features for the coral species proposed to be listed. Areas outside the occupied geographical area should also be identified if such areas themselves are essential to the conservation of the species. Essential features may include, but are not limited to, features specific to individual species' ranges, habitats and life history characteristics within the following general categories of habitat features: (1) Space for individual growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for reproduction and development of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of the species (50 CFR 424.12(b)). ESA implementing regulations at 50 CFR 424.12(h) specify that critical habitat shall not be designated within foreign countries or in other areas outside of U.S. jurisdiction. Therefore, we request information only on potential areas of critical habitat within waters in U.S. jurisdiction.

For features and areas potentially qualifying as critical habitat, we also request information describing: (1) Activities or other threats to the essential features or activities that could be affected by designating them as critical habitat, and (2) the positive and negative economic, national security and other relevant impacts, including benefits to the recovery of the species, likely to result if these areas are designated as critical habitat.

Public Hearing Dates and Locations

Public hearings will be held at 20 locations in Puerto Rico, the U.S. Virgin Islands, Florida, Hawaii, Guam, the Northern Mariana Islands, and American Samoa, during the public comment period. The public hearings in Hawaii, Guam, the Northern Mariana Islands, and American Samoa will be held from 6:30 p.m. to 9:30 p.m. to gather formal public comments on this proposed rule, preceded by town hall meetings from 5:00 p.m. to 6:30 p.m. to provide information about the proposed rule. The specific dates and locations of these meetings are listed below:

(1) Monday, January 14, 2013, at the Nova Southeastern University Center of Excellence for Coral Reef Ecosystem Science, 8000 North Ocean Drive, Dania Beach, FL 33004, 7–9 p.m.

(2) Tuesday, January 15, 2013, at the John Pennekamp State Park Visitors Center, 102601 Overseas Highway, Key Largo, Florida 33037, 7–9 p.m.

(3) Wednesday, January 16, 2013, at the Florida Keys Eco-Discovery Center, 35 East Quay Road, Key West, FL 33040, 7–9 p.m.

(4) Monday, February 4, 2013, at the Department of Natural and Environmental Resources, 4th Floor Conference Room, Road 8838, km. 6.3, Sector El Cinco, Río Piedras, Puerto Rico, 6–8 p.m.

(5) Tuesday, February 5, 2013, at the University of Puerto Rico—Mayagüez Campus, Salas Eugene Francis, Physics Building, Room # 229, Mayagüez, Puerto Rico, 6–8 p.m.

(6) Wednesday, February 6, 2013, at the Buck Island Reef National Monument, 2100 Church Street, #100, Christiansted, St. Croix, U.S. Virgin Islands, 7–9 p.m.

(7) Thursday, February 7, 2013, at the Windward Passage Hotel, Veterans Drive, Charlotte Amalie, St. Thomas, U.S. Virgin Islands, 7–9 p.m.

(8) Tuesday, January 22, 2013, at the Mokupapapa Discovery Center, 308 Kamehameha Ave., Hilo, HI 96720, 5–9:30 p.m.

(9) Thursday, January 24, 2013, at the Kahakai Elementary School, 76147 Royal Poinciana Drive, Kailua Kona, HI 96740, 5–9:30 p.m.

(10) Monday, January 28, 2013, at the Mitchell Pauole Center, 90 Ainoa Street Kaunakakai, Molokai, HI 96748, 5–9:30 p.m.

(11) Wednesday, January 30, 2013, at the J. Walter Cameron Center, 95 Mahalani St., Wailuku, HI 96796, 5–9:30 p.m.

(12) Monday, February 4, 2013, at the Kauai Veteran's Center, 3125 Kapule Highway, Lihue, HI 96766, 5–9:30 p.m.

(13) February 7, 2013, at the Tokai University, 2241 Kapiolani Blvd., Honolulu, HI 96826, 5–9:30 p.m.

(14) Monday, February 11, 2013, at the Guam Hilton, 202 Hilton Road, Tumon Bay, Hagatna, 96913, Guam, 5–9:30 p.m.

(15) Tuesday, February 12, 2013, at the Multipurpose Center, Beach Road, Susupe Saipan, 96950, MP, 5–9:30 p.m.

(16) Tuesday, February 13, 2013, at Sadie's by the Sea, Main Rd., Pago Pago, Tutuila 96799, American Samoa, 5–9:30 p.m.

(17) Wednesday, February 13, 2013, at the Fleming Hotel, P.O. Box 68, Tinian, 96952, MP, 5–9:30 p.m.

(18) Friday, February 15, 2013, at the Mayor's Office, Tatachog Rd., Rota, 96961, MP, 5–9:30 p.m.

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The NMFS reports referenced above are available at: *http://www.nmfs.noaa.gov/stories/2012/11/82corals.html.*

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act), we have concluded that ESA listing actions are not subject to requirements of the National Environmental Policy Act.

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this proposed rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, we have made a preliminary determination that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant state agencies in each state in which the species is believed to occur, and those states will be invited to comment on this proposal. As we proceed, we intend to continue engaging in informal and formal contacts with the state, and other affected local or regional entities, giving careful consideration to all written and oral comments received.

Executive Order 12898, Environmental Justice

Executive Order 12898 requires that Federal actions address environmental justice in the decision-making process. In particular, the environmental effects of the actions should not have a disproportionate effect on minority and low-income communities. This proposed rule is not expected to have a disproportionately high effect on minority populations or low-income populations.

Coastal Zone Management Act (16 U.S.C. 1451 et seq.

Section 307(c)(1) of the Federal Coastal Zone Management Act (CZMA) of 1972 requires that all Federal activities that affect any land or water use or natural resource of the coastal zone be consistent with approved state coastal zone management programs to the maximum extent practicable. We have preliminarily determined that this action is consistent to the maximum extent practicable with the enforceable policies of approved CZMA programs of each of the states within the range of the 49 proposed coral species. Letters documenting NMFS' proposed determination, along with the proposed rule, will be sent to the coastal zone management program offices in each affected state. A list of the specific state contacts and a copy of the letters are available upon request.

List of Subjects

50 CFR Part 223

Endangered and threatened species; Exports; Imports; Transportation.

50 CFR Part 224

Administrative practice and procedure; Endangered and threatened species; Exports; Imports; Reporting and recordkeeping requirements; Transportation.

Dated: November 29, 2012.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, in the table, amend paragraph (d) by removing existing paragraphs (d)(1) and (d)(2) and adding paragraphs (d)(1) through (d)(54) to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
*	*	*	*	*
(d) * * *.				
(1)	*Acropora aculeus*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(2)	*Acropora acuminata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(3)	*Acropora aspera*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(4)	*Acropora dendrum*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(5)	*Acropora donei*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(6)	*Acropora globiceps*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(7)	*Acropora horrida*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(8)	*Acropora listeri*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(9)	*Acropora microclados*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(10)	*Acropora palmerae*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(11)	*Acropora paniculata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(12)	*Acropora pharaonis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(13)	*Acropora polystoma*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(14)	*Acropora retusa*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(15)	*Acropora speciosa*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(16)	*Acropora striata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(17)	*Acropora tenella*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(18)	*Acropora vaughani*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(19)	*Acropora verweyi*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(20)	*Acanthastrea brevis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(21)	*Acanthastrea hemprichii*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(22)	*Acanthastrea ishigakiensis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(23)	*Acanthastrea regularis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(24) Lamarck's sheet coral	*Agaricia lamarcki*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(25)	*Alveopora allingi*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(26)	*Alveopora fenestrata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(27)	*Alveopora verrilliana*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(28)	*Anacropora puertogalerae*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(29)	*Astreopora cucullata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(30)	*Barabattoia laddi*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(31)	*Caulastrea echinulata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(32) Elliptical Star Coral	*Dichocoenia stokesii*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(33)	*Euphyllia cristata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(34)	*Euphyllia paraancora*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(35)	*Isopora crateriformis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(36)	*Isopora cuneata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(37)	*Millepora tuberosa*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(38)	*Montipora angulata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(39)	*Montipora australiensis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(40)	*Montipora calcarea*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(41)	*Montipora caliculata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(42)	*Montipora dilatata/flabellata/turgescens*.	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(43)	*Montipora lobulata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(44)	*Montipora patula(/verrilli)*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(45)	*Pachyseris rugosa*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(46)	*Pavona diffluens*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(47)	*Pectinia alcicornis*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(48)	*Physogyra lichtensteini*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(49)	*Pocillopora danae*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(50)	*Pocillopora elegans* (Indo-Pacific).	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(51)	*Porites horizontalata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(52)	*Porites napopora*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(53)	*Porites nigrescens*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA

Species [1]		Where listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(54)	*Seriatopora aculeata*	Wherever found. Indo-Pacific	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
*	*	*	*	*	*	*

[1] Species includes taxonomic species, subspecies, distinct population segments of vertebrates (DPSs) (for a policy statement; see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement; see 56 FR 58612, November 20, 1991).

* * * * *

For the reasons set out in the preamble, 50 CFR part 224 is proposed to be amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

1. The authority citation of part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

2. In § 224.101, paragraph (d) is revised to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

* * * * *

(d) *Marine invertebrates.* The following table lists the common and scientific names of endangered species, the locations where they are listed, and the citations for the listings and critical habitat designations.

* * * * *

Species [1]		Where listed	Citation(s) for listing determinations	Citation(s) for critical habitat designations
Common name	Scientific name			
(1) Black abalone	*Haliotis cracherodii*	USA, CA. From Crescent City, California, USA to Cape San Lucas, Baja California, Mexico, including all offshore islands.	*NOAA 2009; 74 FR 1937, January 14, 2009.*	NOAA 2011; 76 FR 66806, October 27, 2011.
(2) White abalone	*Haliotis sorenseni*	USA, CA. From Point Conception, California to Punta Abreojos, Baja California, Mexico including all offshore islands and banks.	NOAA 2001; 66 FR 29054, May, 29, 2001.	Deemed not prudent NOAA 2001; 66 FR 29054, May, 29, 2001.
(3) Staghorn coral	*Acropora cervicornis*	Wherever found. Caribbean, Western Atlantic.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(4)	*Acropora jacquelineae*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(5)	*Acropora lokani*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(6) Elkhorn coral	*Acropora palmata*	Wherever found. Caribbean, Western Atlantic.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(7)	*Acropora rudis*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(8)	*Anacropora spinosa*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(9) Pillar coral	*Dendrogyra cylindrus*	Wherever found. Caribbean, Western Atlantic.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(10)	*Euphyllia paradivisa*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(11)	*Millepora foveolata*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(12) Boulder star coral	*Montastraea annularis*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(13) Boulder star coral	*Montastraea faveolata*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA

Species [1]		Where listed	Citation(s) for listing determinations	Citation(s) for critical habitat designations
Common name	Scientific name			
(14) Mountainous star coral	*Montastraea franksi*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(15) Rough cactus coral	*Mycetophyllia ferox*	Wherever found. Caribbean, Western Atlantic, Gulf of Mexico.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(16)	*Millepora foveolata*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
(17)	*Pocillopora elegans (East Pacific).*	Wherever found. Indo-Pacific.	[FR CITATION & DATE WHEN PUBLISHED AS A FINAL RULE].	NA
*	* *	*	* *	*

[1] Species includes taxonomic species, subspecies, distinct population segments of vertebrates (DPSs) (for a policy statement; see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement; see 56 FR 58612, November 20, 1991).

* * * * *

[FR Doc. 2012–29350 Filed 12–6–12; 8:45 am]

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To extend the Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act of 2006, and for other purposes. (Dec. 4, 2012; 126 Stat. 1484)

H.R. 6570/P.L. 112–204

To amend the American Recovery and Reinvestment Act of 2009 and the Emergency Economic Stabilization Act of 2008 to consolidate certain CBO reporting requirements. (Dec. 4, 2012; 126 Stat. 1485)

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