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WHO: Sponsored by the Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:

1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WHEN: Tuesday, February 12, 2013
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

RESERVATIONS: (202) 741–6008

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Reader Aids

Consult the Reader Aids section at the end of this page for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

To subscribe to the Federal Register Table of Contents LISTSERV electronic mailing list, go to http://listserv.access.gpo.gov and select Online mailing list archives, FEDREGTOC-L, Join or leave the list (or change settings); then follow the instructions.

CFR PARTS AFFECTED IN THIS ISSUE

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

Federal Register
Vol. 78, No. 14
Tuesday, January 22, 2013

Presidential Documents

Title 3—

The President

Proclamation 8926 of January 16, 2013

Religious Freedom Day, 2013

By the President of the United States of America

A Proclamation

Foremost among the rights Americans hold sacred is the freedom to worship as we choose. Today, we celebrate one of our Nation's first laws to protect that right—the Virginia Statute for Religious Freedom. Written by Thomas Jefferson and guided through the Virginia legislature by James Madison, the Statute affirmed that ''Almighty God hath created the mind free'' and ''all men shall be free to profess . . . their opinions in matters of religion.'' Years later, our Founders looked to the Statute as a model when they enshrined the principle of religious liberty in the Bill of Rights.

Because of the protections guaranteed by our Constitution, each of us has the right to practice our faith openly and as we choose. As a free country, our story has been shaped by every language and enriched by every culture. We are a nation of Christians and Muslims, Jews and Hindus, Sikhs and non-believers. Our patchwork heritage is a strength we owe to our religious freedom.

Americans of every faith have molded the character of our Nation. They were pilgrims who sought refuge from persecution; pioneers who pursued brighter horizons; protesters who fought for abolition, women's suffrage, and civil rights. Each generation has seen people of different faiths join together to advance peace, justice, and dignity for all.

Today, we also remember that religious liberty is not just an American right; it is a universal human right to be protected here at home and across the globe. This freedom is an essential part of human dignity, and without it our world cannot know lasting peace.

As we observe Religious Freedom Day, let us remember the legacy of faith and independence we have inherited, and let us honor it by forever upholding our right to exercise our beliefs free from prejudice or persecution.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim January 16, 2013, as Religious Freedom Day. I call on all Americans to commemorate this day with events and activities that teach us about this critical foundation of our Nation's liberty, and show us how we can protect it for future generations at home and around the world.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of January, in the year of our Lord two thousand thirteen, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2013–01267
Filed 1–18–13; 8:45 am]
Billing code 3295–F3

Presidential Documents

Memorandum of January 16, 2013

Engaging in Public Health Research on the Causes and Prevention of Gun Violence

Memorandum for the Secretary of Health and Human Services

In addition to being a law enforcement challenge, gun violence is also a serious public health issue that affects thousands of individuals, families, and communities across the Nation. Each year in the United States there are approximately 30,000 firearm-related deaths, and approximately 11,000 of those deaths result from homicides. Addressing this critical issue requires a comprehensive, multifaceted approach.

Recent research suggests that, in developing such an approach, a broader public health perspective is imperative. Significant strides can be made by assessing the causes of gun violence and the successful efforts in place for preventing the misuse of firearms. Taking these steps will improve our understanding of the gun violence epidemic and will aid in the continued development of gun violence prevention strategies.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Research.* The Secretary of Health and Human Services (Secretary), through the Director of the Centers for Disease Control and Prevention and other scientific agencies within the Department of Health and Human Services, shall conduct or sponsor research into the causes of gun violence and the ways to prevent it. The Secretary shall begin by identifying the most pressing research questions with the greatest potential public health impact, and by assessing existing public health interventions being implemented across the Nation to prevent gun violence.

Sec. 2. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 3. *Publication.* You are hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 16, 2013

[FR Doc. 2013–01272
Filed 1–18–13; 8:45 am]
Billing code 4150–42

Presidential Documents

Memorandum of January 16, 2013

Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System

Memorandum for the Heads of Executive Departments and Agencies

Since it became operational in 1998, the National Instant Criminal Background Check System (NICS) has been an essential tool in the effort to ensure that individuals who are prohibited under Federal or State law from possessing firearms do not acquire them from Federal Firearms Licensees (FFLs). The ability of the NICS to determine quickly and effectively whether an individual is prohibited from possessing or receiving a firearm depends on the completeness and accuracy of the information made available to it by Federal, State, and tribal authorities.

The NICS Improvement Amendments Act of 2007 (NIAA) (Public Law 1107–180) was a bipartisan effort to strengthen the NICS by increasing the quantity and quality of relevant records from Federal, State, and tribal authorities accessible by the system. Among its requirements, the NIAA mandated that executive departments and agencies (agencies) provide relevant information, including criminal history records, certain adjudications related to the mental health of a person, and other information, to databases accessible by the NICS. Much progress has been made to identify information generated by agencies that is relevant to determining whether a person is prohibited from receiving or possessing firearms, but more must be done. Greater participation by agencies in identifying records they possess that are relevant to determining whether an individual is prohibited from possessing a firearm and a regularized process for submitting those records to the NICS will strengthen the accuracy and efficiency of the NICS, increasing public safety by keeping guns out of the hands of persons who cannot lawfully possess them.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Improving the Availability of Records to the NICS.* (a) Within 45 days of the date of this memorandum, and consistent with the process described in section 3 of this memorandum, the Department of Justice (DOJ) shall issue guidance to agencies regarding the identification and sharing of relevant Federal records and their submission to the NICS.

(b) Within 60 days of issuance of guidance pursuant to subsection (a) of this section, agencies shall submit a report to DOJ advising whether they possess relevant records, as set forth in the guidance, and setting forth an implementation plan for making information in those records available to the NICS, consistent with applicable law.

(c) In accordance with the authority and responsibility provided to the Attorney General by the Brady Handgun Violence Prevention Act (Public Law 103–159), as amended, the Attorney General, consistent with the process described in section 3 of this memorandum, shall resolve any disputes concerning whether agency records are relevant and should be made available to the NICS.

(d) To the extent they possess relevant records, as set forth in the guidance issued pursuant to subsection (a) of this section, agencies shall prioritize making those records available to the NICS on a regular and ongoing basis.

Sec. 2. *Measuring Progress.* (a) By October 1, 2013, and annually thereafter, agencies that possess relevant records shall submit a report to the President through the Attorney General describing:

(i) the relevant records possessed by the agency that can be shared with the NICS consistent with applicable law;

(ii) the number of those records submitted to databases accessible by the NICS during each reporting period;

(iii) the efforts made to increase the percentage of relevant records possessed by the agency that are submitted to databases accessible by the NICS;

(iv) any obstacles to increasing the percentage of records that are submitted to databases accessible by the NICS;

(v) for agencies that make qualifying adjudications related to the mental health of a person, the measures put in place to provide notice and programs for relief from disabilities as required under the NIAA;

(vi) the measures put in place to correct, modify, or remove records accessible by the NICS when the basis under which the record was made available no longer applies; and

(vii) additional steps that will be taken within 1 year of the report to improve the processes by which records are identified, made accessible, and corrected, modified, or removed.

(b) If an agency certifies in its annual report that it has made available to the NICS its relevant records that can be shared consistent with applicable law, and describes its plan to make new records available to the NICS and to update, modify, or remove existing records electronically no less often than quarterly as required by the NIAA, such agency will not be required to submit further annual reports. Instead, the agency will be required to submit an annual certification to DOJ, attesting that the agency continues to submit relevant records and has corrected, modified, or removed appropriate records.

Sec. 3. *NICS Consultation and Coordination Working Group.* To ensure adequate agency input in the guidance required by section 1(a) of this memorandum, subsequent decisions about whether an agency possesses relevant records, and determinations concerning whether relevant records should be provided to the NICS, there is established a NICS Consultation and Coordination Working Group (Working Group), to be chaired by the Attorney General or his designee.

(a) *Membership.* In addition to the Chair, the Working Group shall consist of representatives of the following agencies:

(i) the Department of Defense;

(ii) the Department of Health and Human Services;

(iii) the Department of Transportation;

(iv) the Department of Veterans Affairs;

(v) the Department of Homeland Security;

(vi) the Social Security Administration;

(vii) the Office of Personnel Management;

(viii) the Office of Management and Budget; and

(ix) such other agencies or offices as the Chair may designate.

(b) *Functions.* The Working Group shall convene regularly and as needed to allow for consultation and coordination between DOJ and agencies affected by the Attorney General's implementation of the NIAA, including with respect to the guidance required by section 1(a) of this memorandum, subsequent decisions about whether an agency possesses relevant records, and determinations concerning whether relevant records should be provided to the NICS. The Working Group may also consider, as appropriate:

(i) developing means and methods for identifying agency records deemed relevant by DOJ's guidance;

(ii) addressing obstacles faced by agencies in making their relevant records available to the NICS;

(iii) implementing notice and relief from disabilities programs; and

(iv) ensuring means to correct, modify, or remove records when the basis under which the record was made available no longer applies.

(c) *Reporting.* The Working Group will review the annual reports required by section 2(a) of this memorandum, and member agencies may append to the reports any material they deem appropriate, including an identification of any agency best practices that may be of assistance to States in supplying records to the NICS.

Sec. 4. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to a department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Independent agencies are strongly encouraged to comply with the requirements of this memorandum.

Sec. 5. *Publication.* The Attorney General is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 16, 2013

[FR Doc. 2013–01274
Filed 1–18–13; 8:45 am]
Billing code 4410–19

Presidential Documents

Memorandum of January 16, 2013

Tracing of Firearms in Connection With Criminal Investigations

Memorandum for the Heads of Executive Departments and Agencies

Reducing violent crime, and gun-related crime in particular, is a top priority of my Administration. A key component of this effort is ensuring that law enforcement agencies at all levels—Federal, State, and local—utilize those tools that have proven most effective. One such tool is firearms tracing, which significantly assists law enforcement in reconstructing the transfer and movement of seized or recovered firearms. Responsibility for conducting firearms tracing rests with the Department of Justice's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Over the years, firearms tracing has significantly assisted law enforcement in solving violent crimes and generating thousands of leads that may otherwise not have been available.

Firearms tracing provides two principal benefits. First, tracing is an important investigative tool in individual cases, providing law enforcement agents with critical information that may lead to the apprehension of suspects, the recovery of other guns used in the commission of crimes, and the identification of potential witnesses, among other things. Second, analysis of tracing data in the aggregate provides valuable intelligence about local, regional, and national patterns relating to the movement and sources of guns used in the commission of crimes, which is useful for the effective deployment of law enforcement resources and development of enforcement strategies. Firearms tracing is a particularly valuable tool in detecting and investigating firearms trafficking, and has been deployed to help combat the pernicious problem of firearms trafficking across the Southwest border.

The effectiveness of firearms tracing as a law enforcement intelligence tool depends on the quantity and quality of information and trace requests submitted to ATF. In fiscal year 2012, ATF processed approximately 345,000 crime-gun trace requests for thousands of domestic and international law enforcement agencies. The Federal Government can encourage State and local law enforcement agencies to take advantage of the benefits of tracing all recovered firearms, but Federal law enforcement agencies should have an obligation to do so. If Federal law enforcement agencies do not conscientiously trace every firearm taken into custody, they may not only be depriving themselves of critical information in specific cases, but may also be depriving all Federal, State, and local agencies of the value of complete information for aggregate analyses.

Maximizing the effectiveness of firearms tracing, and the corresponding impact on combating violent crimes involving firearms, requires that Federal law enforcement agencies trace all recovered firearms taken into Federal custody in a timely and efficient manner.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct the following:

Section 1. *Firearms Tracing.* (a) Federal law enforcement agencies shall ensure that all firearms recovered after the date of this memorandum in the course of criminal investigations and taken into Federal custody are traced through ATF at the earliest time practicable. Federal law enforcement agencies, as well as other executive departments and agencies, are encouraged, to the extent practicable, to take steps to ensure that firearms recovered

prior to the date of this memorandum in the course of criminal investigations and taken into Federal custody are traced through ATF.

(b) Within 30 days of the date of this memorandum, ATF will issue guidance to Federal law enforcement agencies on submitting firearms trace requests.

(c) Within 60 days of the date of this memorandum, Federal law enforcement agencies shall ensure that their operational protocols reflect the requirement to trace recovered firearms through ATF.

(d) Within 90 days of the date of this memorandum, each Federal law enforcement agency shall submit a report to the Attorney General affirming that its operational protocols reflect the requirements set forth in this memorandum.

(e) For purposes of this memorandum, ''Federal law enforcement agencies'' means the Departments of State, the Treasury, Defense, Justice, the Interior, Agriculture, Energy, Veterans Affairs, and Homeland Security, and such other agencies and offices that regularly recover firearms in the course of their criminal investigations as the President may designate.

Sec. 2. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect the authority granted by law to a department or agency, or the head thereof.

(b) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 3. *Publication.* The Attorney General is authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, January 16, 2013

[FR Doc. 2013–01278
Filed 1–18–13; 8:45 am]
Billing code 4410–19

Presidential Documents

Notice of January 17, 2013

Continuation of the National Emergency With Respect to Terrorists Who Threaten To Disrupt the Middle East Peace Process

On January 23, 1995, by Executive Order 12947, the President declared a national emergency pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by grave acts of violence committed by foreign terrorists who threaten to disrupt the Middle East peace process. On August 20, 1998, by Executive Order 13099, the President modified the Annex to Executive Order 12947 to identify four additional persons who threaten to disrupt the Middle East peace process. On February 16, 2005, by Executive Order 13372, the President clarified the steps taken in Executive Order 12947.

Because these terrorist activities continue to threaten the Middle East peace process and to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, the national emergency declared on January 23, 1995, and the measures adopted to deal with that emergency must continue in effect beyond January 23, 2013. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency with respect to foreign terrorists who threaten to disrupt the Middle East peace process.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,

Washington, January 17, 2013.

[FR Doc. 2013–01296

Filed 1–18–13; 8:45 am]

Billing code 3295–F3

Rules and Regulations

Federal Register
Vol. 78, No. 14
Tuesday, January 22, 2013

DEPARTMENT OF AGRICULTURE

Federal Crop Insurance Corporation

7 CFR Part 457

[Docket No. FCIC–12–0006]

RIN 0563–AC39

Common Crop Insurance Regulations; Florida Citrus Fruit Crop Insurance Provisions; Correction

AGENCY: Federal Crop Insurance Corporation, USDA.

ACTION: Final rule; correcting amendment.

SUMMARY: This document contains corrections to the final regulation that was published Friday, December 21, 2012 (74 FR 75509–75521). The regulation pertains to the insurance of Florida Citrus Fruit.

DATES: *Effective Date:* January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Tim Hoffmann, Director, Product Administration and Standards Division, Risk Management Agency, United States Department of Agriculture, Beacon Facility, Stop 0812, Room 421, P.O. Box 419205, Kansas City, MO 64141–6205, telephone (816) 926–7730.

SUPPLEMENTARY INFORMATION:

Background

The final regulation that is the subject of these corrections revised the Florida Citrus Fruit Crop Insurance Provisions that published on Friday, December 21, 2012, (74 FR 75509–75521).

Need for Correction

As published, the final regulation contained errors that may prove to be misleading and need to be clarified.

First, the example in section 10(b)(6) that was proposed to be revised was mistakenly omitted in the revised text. This amendment adds the revised example back into section 10(b)(6).

Second, the newly designated section 10(d) was revised based on comments to show the process of ''relating.'' However, since the newly designated section 10(d)(6)(i) references a calculation in the form of a decimal rather than a percent, an additional revision should have been made to the newly designated section 10(d)(6)(i) by changing the number ''100'' to the number ''1.''

Third, in the newly redesignated section 10(e) the proposed phrase ''a default juice content'' was not retained in the final rule because all citrus fruit insured as fresh will have a default juice content provided in the Special Provisions. However, the entire proposed phrase ''that do not have a default juice content or a Fresh Fruit Factor'' should have been removed and replaced with the phrase ''unless otherwise'' because all fruit insured as fresh will need to have both a default juice content and a Fresh Fruit Factor provided in the Special Provisions for the calculations to work correctly.

List of Subjects in 7 CFR Part 457

Crop insurance, Florida citrus fruit, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 7 CFR part 457 is corrected by making the following correcting amendments:

■ 1. The authority citation for 7 CFR Part 457 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 2. Amend § 457.107 as follows:
■ a. By revising section 10(b)(6);
■ b. By revising the added section 10(d)(6)(i); and
■ c. By revising the newly redesignated section 10(e).

The revisions and additions read as follows:

§ 457.107 Florida citrus fruit crop insurance provisions.

* * * * *

10. * * *

(b) * * *

(6) Totaling all such results of section 10(b)(5) for all applicable combinations of commodity types, intended uses, and age classes of trees in the unit and subtracting any indemnities paid for the current crop year to determine the amount payable for the unit. For example, assume a 55-acre unit sustains late season damage. No previous damage has occurred on the unit during the crop year and no fruit has been harvested. The producer elected the 75 percent coverage level and has a 100 percent share. The amount of insurance is $1,180 per acre, based on the 75 percent coverage level, for the commodity type, intended use, and age class of trees. The amount of potential production is 24,530 boxes and the amount of damaged production is 17,171 boxes. The loss would be calculated as follows:

1. 55 acres × $1,180 = $64,900 amount of insurance for the unit;

2. 17,171 ÷ 24,530 = 70 percent average percent of damage;

3. 70 percent damage − 25 percent deductible (100 percent − 75 percent) = 45 percent;

4. 45 percent ÷ 75 percent = 60 percent adjusted damage; and

5. 60 percent × $64,900 = $38,940 indemnity.

* * * * *

(d) * * *

(6) * * *

(i) Subtracting the result of section 10(d)(5) from 1;

* * * * *

(e) Notwithstanding section 10(d), for citrus fruit insured as fresh, unless otherwise provided in the Special Provisions, any individual citrus fruit not meeting the applicable United States Standards for packing as fresh fruit due to an insured cause of loss will be considered 100 percent damaged, except that the percent of damage for any production sold for an alternative use will be adjusted in accordance with section 10(d).

* * * * *

Signed in Washington, DC, on January 15, 2013.

Brandon C. Willis,

Acting Manager, Federal Crop Insurance Corporation.

[FR Doc. 2013–01056 Filed 1–18–13; 8:45 am]

BILLING CODE 3410–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket FAA No. FAA–2012–1253; Airspace Docket No. 12–AWP–10]

Amendment of Class D and Class E Airspace; Twentynine Palms, CA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; technical amendment.

SUMMARY: This action amends Class D and Class E airspace at Twentynine Palms SELF Airport, Twentynine Palms, CA. This action changes the airport name formerly called Twentynine Palms Expeditionary Air Field (EAF), Marine Corps Base. This action also adjusts the geographic coordinates of the airport to enhance the safety and management of aircraft operations at Twentynine Palms SELF Airport, Twentynine Palms, CA. This action does not change the boundaries of the airspace.

DATES: Effective date, 0901 UTC, March 7, 2013. The Director of the Federal Register approves this incorporation by reference action under 1 CFR Part 51, subject to the annual revision of FAA Order 7400.9 and publication of conforming amendments.

FOR FURTHER INFORMATION CONTACT: Eldon Taylor, Federal Aviation Administration, Operations Support Group, Western Service Center, 1601 Lind Avenue SW., Renton, WA 98057; telephone (425) 203–4537.

SUPPLEMENTARY INFORMATION:

History

The FAA's Aeronautical Products Office requested the change to the airport name and geographic coordinates of Twentynine Palms SELF Airport, Twentynine Palms, CA.

The Class D airspace and Class E airspace designations are published in paragraphs 5000 and 6004, respectively, of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class D airspace and Class E airspace designation listed in this document will be published subsequently in the Order.

The Rule

The FAA amends Title 14 Code of Federal Regulations (14 CFR) Part 71 by changing the airport name described in Class D airspace and Class E airspace designated as an extension to Class D surface area at Twentynine Palms, CA, to Twentynine Palms SELF Airport, formerly Twentynine Palms Expeditionary Air Field (EAF), Marine Corps Base. The geographic coordinates of the airport are also adjusted to be in accordance with the FAA's aeronautical database. Accordingly, since this is an administrative change and does not involve a change in the dimensions or operation requirements of that airspace, notice and public procedures under 5 U.S.C. 553(b) are unnecessary.

The FAA has determined this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation; (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106, describes the authority for the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it amends controlled airspace at Twentynine Palms SELF Airport, Twentynine Palms, CA.

Environmental Review

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

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

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

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

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 5000 Class D airspace.

* * * * *

AWP CA D Twentynine Palms, CA [Amended]

Twentynine Palms SELF Airport, CA
(Lat. 34°17′46″ N., long. 116°09′44″ W.)

That airspace extending upward from the surface to and including 4,600 feet MSL within a 4.3-mile radius of the Twentynine Palms SELF Airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Paragraph 6004 Class E airspace designated as an extension to a Class D surface area.

* * * * *

AWP CA E4 Twentynine Palms, CA [Amended]

Twentynine Palms SELF Airport, CA
(Lat. 34°17′46″ N., long. 116°09′44″ W.)
Twentynine Palms VORTAC
(Lat. 34°06′44″ N., long. 115°46′12″ W.)

That airspace extending upward from the surface within 1.8 miles each side of the Twentynine Palms VORTAC 298° radial extending from the 4.3-mile radius of Twentynine Palms SELF Airport to 13.9 miles west of the VORTAC. This Class E airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective date and time will thereafter be continuously published in the Airport/Facility Directory.

Issued in Seattle, Washington, on December 19, 2012.

Clark Desing,

Manager, Operations Support Group, Western Service Center.

[FR Doc. 2013–01071 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 4

[Docket No. FDA–2009–N–0435]

Current Good Manufacturing Practice Requirements for Combination Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA or Agency) is issuing this regulation on the current good manufacturing practice (CGMP) requirements applicable to combination products. This rule is intended to promote the public health by clarifying which CGMP requirements apply when drugs, devices, and biological products are combined to create combination products. In addition, the rule sets forth a transparent and streamlined regulatory framework for firms to use when demonstrating compliance with CGMP requirements for ''single-entity'' and ''co-packaged'' combination products.

DATES: This rule is effective July 22, 2013.

FOR FURTHER INFORMATION CONTACT: John Barlow Weiner, Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5130, Silver Spring, MD 20993, 301–796–8930.

SUPPLEMENTARY INFORMATION:

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I. Background

A. Rationale for the Rulemaking

As set forth in part 3 (21 CFR part 3), a combination product is a product comprised of any combination of a drug and a device; a device and a biological product; a biological product and a drug; or a drug, a device, and a biological product.[1] Under § 3.2(e), a combination product includes:

1. A product comprised of two or more regulated components, i.e., drug/device, biologic/device, drug/biologic, or drug/device/biologic, that are physically, chemically, or otherwise combined or mixed and produced as a single entity (single-entity combination products);

2. Two or more separate products packaged together in a single package or as a unit and comprised of drug and device products, device and biological products, or biological and drug products (co-packaged combination products);

3. A drug, device, or biological product packaged separately that according to its investigational plan or proposed labeling is intended for use only with an approved individually specified drug, device, or biological product where both are required to achieve the intended use, indication, or effect and where upon approval of the proposed product the labeling of the approved product would need to be changed, e.g., to reflect a change in intended use, dosage form, strength, route of administration, or significant change in dose (a type of cross-labeled combination product); or

4. Any investigational drug, device, or biological product packaged separately that according to its proposed labeling is for use only with another individually specified investigational drug, device, or biological product where both are required to achieve the intended use, indication, or effect (another type of cross-labeled combination product).

The constituent parts of a combination product retain their regulatory status (as a drug or device, for example) after they are combined. Accordingly, the CGMP requirements that apply to each of the constituent parts continue to apply when they are combined to make combination products.[2] To date, however, the Agency has not issued specific regulations clarifying the applicability of the CGMP requirements to combination products. While CGMP regulations are in place that establish requirements for drugs, devices, and biological products, there are currently no regulations that clarify and explain the application of these CGMP requirements when these drugs, devices, and biological products are constituent parts of a combination product. FDA believes that the absence of clear CGMP requirements for combination products could result in inconsistent or differing application of the various CGMP requirements applicable to the constituent parts, which could affect product safety and the public health. In addition, the absence of clear requirements could lead some manufacturers to develop and document manufacturing practices that are redundant and overly burdensome.

In the **Federal Register** of October 4, 2004 (69 FR 59239), the Agency announced the availability of a Draft Guidance for Industry and FDA entitled ''Current Good Manufacturing Practices for Combination Products.'' The Agency received 15 comments, which were largely supportive of the regulatory approach described in the draft guidance. A common theme that emerged from these comments was the need to develop a clear regulatory framework that takes account of the fact that combination products are made up of drug, device, and biological product constituent parts. At the same time, commenters wanted to ensure that the framework would not lead to unnecessary redundancy in the operating systems used to meet CGMP

[1] For purposes of part 3 and this rule, a ''biological product''' means a biological product subject to regulation under section 351 of the Public Health Service Act (the PHS Act) (42 U.S.C. 262). All biological products regulated under the PHS Act meet the definitions of drug or device in section 201 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321).

[2] Section 501 of the FD&C Act (21 U.S.C. 351) states circumstances under which drugs and devices (including biological products, which also meet the definition of either drug or device) are deemed adulterated. Adulteration includes the failure to manufacture a product in accordance with applicable CGMP requirements, regardless of whether the product appears to meet its final specifications. See, generally, 21 U.S.C. 351(a)(2)(B) and (h).

requirements (CGMP operating systems).

After careful consideration of the comments, and of how best to ensure that CGMPs for combination products are consistent and appropriate, FDA determined that rulemaking was warranted. We concluded that rulemaking would best facilitate the manufacture of safe and effective combination products by providing a clear and transparent regulatory roadmap for the application of CGMP requirements to these products. Accordingly, the Agency published a proposed rule in the **Federal Register** of September 23, 2009 (74 FR 48423), as part of FDA's ongoing effort to improve the consistency and aid implementation of the regulatory requirements for combination products.

B. The Proposed Rule

The proposed rule addressed CGMP requirements for all combination products. However, for certain types of combination products, the application of CGMP requirements is fairly straightforward. Specifically, the constituent parts of a combination product are each subject only to the CGMP regulations applicable to that type of constituent part (e.g., drug or device) if the constituent parts are manufactured and marketed separately, as may be the case for constituent parts of cross-labeled combination products. Because these constituent parts, while part of a combination product, are separately manufactured and marketed, they remain separate for purposes of applying the CGMP regulations. Therefore, the proposed rule merely provided that all such constituent parts must be manufactured in accordance with the CGMP requirements that would apply to them if they were not part of a combination product.

The application of CGMP requirements to single-entity and co-packaged combination products is less straightforward. Consequently, the proposed rule expressly addressed the practical application of CGMP requirements to these two categories of combination products. The proposed rule reflected Agency recognition that, in most instances, for single-entity and co-packaged combination products, a CGMP operating system that satisfies the CGMP regulations applicable to one constituent part will also satisfy most of the CGMP requirements applicable to the other constituent part. In particular, we explained that compliance with either the CGMP regulations for drugs at parts 210 and 211 (21 CFR parts 210 and 211) (drug CGMPs) or the quality system (QS) regulation for devices at part 820 (21 CFR part 820) will satisfy many, though not all, of the CGMP requirements applicable to both drug and device constituent parts.

In developing the proposed rule, the Agency reviewed the drug CGMPs and QS regulation. We identified specific provisions from the drug CGMPs and QS regulation that a firm would need to satisfy in addition to complying with the other of these two sets of CGMP requirements to demonstrate compliance with both of these sets of requirements. Based on this assessment, the proposed rule offered two options for demonstrating compliance with the CGMP requirements applicable to a co-packaged or single-entity combination product. These options were either: (1) To demonstrate compliance with the specifics of all CGMP regulations applicable to each of the constituent parts included in the combination product or (2) to demonstrate compliance with the specifics of either the drug CGMPs or the QS regulation, rather than both, when the combination contains both a drug and a device, under certain conditions. These conditions included demonstrating compliance with specified provisions from the other of these two sets of CGMP requirements. In addition, for a combination product that included a biological product, the CGMPs requirements for biological products in parts 600 through 680 (21 CFR parts 600 through 680) would apply, and, for a combination product that included any human cell, tissue, and cellular and tissue-based products (HCT/Ps), the regulations in part 1271 (21 CFR part 1271) would apply.[3]

We intended for the proposed rule to help ensure that CGMP requirements that apply to single-entity and co-packaged combination products are clear and consistent, regardless of which Agency component has lead jurisdiction for the combination product, or which type of application is submitted for marketing authorization. The proposed rule was also intended to streamline demonstrating compliance with CGMP requirements for these types of combination products and to help ensure appropriate implementation of these requirements while avoiding unnecessary redundancy in CGMP operating systems for these products.

After publication of the proposed rule, to facilitate development of comments on the rule, FDA co-sponsored a workshop in January 2010. At this workshop, the Agency provided a summary of the proposed rule and stakeholders then worked in groups to identify issues on which it might be helpful to develop comments.

C. The Final Rule

The final rule is largely identical to the proposed rule. It is organized in the same four sections addressing scope (§ 4.1), definitions (§ 4.2), the CGMPs that apply to combination products (§ 4.3), and how to comply with these CGMP requirements for a single-entity or co-packaged combination product (§ 4.4).

Section 4.1. Section 4.1 states that the rule establishes which CGMP requirements apply to combination products, clarifies the application of these requirements, and provides a regulatory framework for designing and implementing CGMP operating systems at facilities that manufacture copackaged or single-entity combination products.

Section 4.2. Section 4.2 provides definitions for terms used in the regulation. Some of these definitions are included for convenience, for example, cross-referencing an existing definition (such as for ''combination product'') or to establish the meaning for a reference term (such as ''drug CGMP''). Other definitions include content specific to the rule. In addition to cross-referencing the definition for ''device'' in § 3.2(f), the rule states that a device that is a constituent part of a combination product is considered a finished device within the meaning of the QS regulation; and the definition for ''drug'' cross-references § 3.2(g) and also states that a drug that is a constituent part of a combination product is a drug product within the meaning of the drug CGMPs. The definition for ''current good manufacturing practice operating system'' states that such a system is the operating system within an establishment that is designed and implemented to address and meet the CGMP requirements for a combination product.

Section 4.3. Section 4.3 lists all of the requirements that may apply to a combination product under this rule, depending on the types of constituent parts the combination product includes. The CGMP requirements listed are those found in parts 210 and 211 for drugs, part 820 for devices, and parts 600 through 680 for biological products, and

[3] For the purposes of this rule, FDA uses the term ''CGMP requirements'' to include all such requirements found in the standards in parts 600 through 680 that may apply to biological products. FDA notes that biological products, including biological product constituent parts of combination products, must comply with all applicable requirements in parts 600 through 680, but many of the requirements in parts 600 through 680 are not considered CGMP requirements and are therefore not covered by this rule.

the current good tissue practices found in part 1271 for HCT/Ps. We have removed the specific reference to part 606 because it is already reflected in the reference to parts 600 through 680.

Section 4.4. Section 4.4 addresses how to comply with these CGMP requirements for co-packaged and single-entity combination products, as summarized in the subsections that follow.

Section 4.4(a). This subsection states that the CGMP requirements applicable to a combination product can be satisfied in one of two ways. Under § 4.4(a)(1), a manufacturer can demonstrate compliance with each applicable regulation in its entirety (e.g., with all of the drug CGMPs and the QS regulation, for a drug-device combination product). Alternatively, under § 4.4(a)(2), if the combination product is subject to the drug CGMPs and QS regulation, these two sets of requirements can be met by demonstrating compliance with: (1) Either the drug CGMPs or QS regulation and (2) those provisions specified in § 4.4(b) from the other of these two sets of regulations.

Section 4.4(b)(1). This subsection states that if a manufacturer chooses to demonstrate compliance with the drug CGMPs per § 4.4(a)(2), that manufacture must also demonstrate compliance with the following provisions of the QS regulation to demonstrate compliance with both sets of regulations:

- § 820.20. Management responsibility.
- § 820.30. Design controls.
- § 820.50. Purchasing controls.
- § 820.100. Corrective and preventive action.
- § 820.170. Installation.
- § 820.200. Servicing.

Section 4.4(b)(2). This subsection states that if a manufacturer chooses to demonstrate compliance with the QS regulation per § 4.4(a)(2), that manufacturer must also demonstrate compliance with the following provisions of the drug CGMPs to demonstrate compliance with both sets of regulations:

- § 211.84. Testing and approval or rejection of components, drug product containers, and closures.
- § 211.103. Calculation of yield.
- § 211.132. Tamper-evident packaging requirements for over the-counter (OTC) human drug products.
- § 211.137. Expiration dating.
- § 211.165. Testing and release for distribution.
- § 211.166. Stability testing.
- § 211.167. Special testing requirements.
- § 211.170. Reserve samples.

Section 4.4(b)(3). This subsection states that manufacturers must also demonstrate compliance with the CGMPs among the requirements (including standards) for biological products listed in § 4.3(c) if the combination product includes a biological product, and with the requirements for HCT/Ps listed in § 4.3(d) if the combination product includes an HCT/P.

Section 4.4(c). This subsection states that a facility at which a single type of constituent part is manufactured must demonstrate compliance with the CGMP requirements applicable to that type of constituent part.

Section 4.4(d). This subsection states that a facility at which two or more types of constituent parts have arrived or continue to be manufactured may apply a CGMP system that complies with § 4.4(b).

Section 4.4(e). This subsection states that, in the event of a conflict between CGMP requirements applicable to a combination product, the regulations most specifically applicable to the constituent part at issue shall prevail.

II. Comments on the Proposed Rule

FDA received 25 sets of comments from regulated entities, trade associations, and individuals. To make it easier to identify comments and our responses, the word ''Comment'' appears before the comment's description, and the word ''Response'' appears before our response. We have also numbered the comments to help distinguish among them. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was received. Certain comments were grouped together under a single number because the subject matter of the comments was similar.

A. General

(Comment 1) Some commenters sought clarification of what manufacturers must do to ''demonstrate'' compliance for purposes of this rule. Commenters proposed that the Agency confirm that ''demonstrate'' is used in this rule as ''it always has been with respect to GMPs.'' Specifically, commenters stated that the requirements for firms to demonstrate compliance are set forth in the rules and include, for example, the implementation of written procedures, internal auditing and other requirements. Commenters noted that '' 'demonstrate' also encompasses demonstrating and justifying that specific provisions are inapplicable to a facility.''

(Response) We confirm that the term ''demonstrate'' is not intended to have a new meaning for purposes of this rule. The Agency intends for it to be interpreted in the same manner as it would be for purposes of the CGMP regulations listed in § 4.3. As the commenters state, depending on the circumstances and requirements at issue, appropriate means by which to demonstrate compliance with these CGMP requirements may include development of written procedures and maintenance of records documenting use and verification of CGMPs.

B. What is the scope of this subpart? (§ 4.1)

(Comment 2) Some comments stated that the rule is unclear as to whether it applies only to commercial production or also during product development and to investigational products. One commenter proposed including information on the stages of a product's life cycle during which the rule applies. Another requested further guidance on this issue.

(Response) Section 4.3 lists all of the CGMP regulations that apply to a combination product under the rule. The rule does not modify these regulations; rather it addresses how to comply with them for a combination product.

An investigational drug for use in a phase 1 study is subject to the statutory requirements set forth in 21 U.S.C. 351(a)(2)(B). The production of such a drug is exempt from compliance with the regulations in part 211. This exemption does not apply to an investigational combination product or constituent part of a combination product for use by or for the sponsor in phase 2 or phase 3 studies, or when the drug has been lawfully marketed.[4] Similarly, while device sponsors must ensure that investigational devices are manufactured under a state of control, 21 CFR 812.1 provides that investigational devices are exempt from part 820 except for design control requirements under § 820.30. (See 21 CFR 812.30(b)(5)(ii)). The Agency considers both these exemptions, from parts 211 and 820 obligations, to apply to combination products and constituent parts of combination products, whether being studied under an approved investigational device exemption (IDE) or an approved investigational new drug application (IND).

[4] See § 210.2(c).

(Comment 3) One comment noted that the rule does not address products that produce another product on site at the point of care, which the commenter notes are typically devices that produce a drug. The commenter requests that the final rule clarify that the manufacturer is subject only to the CGMP requirements applicable to the product that makes the other product on site.

(Response) This rule applies to combination products. Accordingly, questions regarding CGMPs for non-combination products are beyond its scope. However, this comment raises the question of whether medical products that make other medical products at the point of care are regulated as combination products and, therefore, subject to this rule.

There are two potential scenarios to consider. The first is where a single medical product (e.g., a device) makes another medical product (e.g., a drug) at the point of care. In this case, the medical product that makes the other medical product at the point of care and the medical product manufactured at the point of care would not be regulated as a combination product. Rather, the medical product that makes the other medical product would be regulated in accordance with its own classification and, therefore, subject to the CGMP requirements applicable to that type of article. For example, if the product that makes the other product is a device, it would be subject to the QS regulation.

The second scenario is where two or more different types of medical products (e.g., a device and a biological product) are used together at the point of care to make another medical product. The medical products used to make the other medical product might comprise a combination product. In such cases, the CGMP requirements applicable under this rule to the type of combination product that they constitute (e.g., cross-labeled or co-packaged) may apply. See §§ 4.3 and 4.4. The Agency has not published general guidance on the issue of when two medical products used at the point of care to make another product constitute a combination product. Accordingly, product sponsors are encouraged to contact the Office of Combination Products (OCP) with any questions on this topic.

(Comment 4) One commenter asked for Agency guidance on whether products on the market prior to the establishment of OCP are considered combination products by the Agency and, therefore, subject to the rule. Several commenters stated that the proposed rule did not clearly address its applicability to approved products already being marketed. Commenters requested that the Agency limit application of the rule to new products and to existing products only when a design change, or significant design change, is made to the product, and not be applied retroactively to existing products. One commenter stated that existing manufacturers should be exempt from pre-manufacturing design control requirements. One commenter stated there was a need for guidance regarding how the rule would affect CGMP requirements for products addressed in master files. One stated that the Agency should identify which currently marketed products are subject to this rule.

(Response) This rule does not create new CGMP requirements, but rather attempts to clarify how to apply them to combination products. Compliance with all applicable CGMP requirements is required for all products and appropriate to ensure consistent manufacture of products that meet the safety and effectiveness and quality standards that form the basis for product marketing authorization, regardless of when a product was first marketed or approved.

As noted elsewhere in this document, we intend to provide further information in related guidance, on how to comply with this rule and the underlying regulations to which it refers, including with respect to coming into compliance with pre-manufacturing design control requirements for products currently being marketed.

Regarding the issue of master files, we note that, as discussed throughout this preamble, this rule is not intended to change existing CGMP requirements established under the regulations listed in § 4.3. Rather, this rule is intended to clarify how to comply with those requirements for a combination product. Accordingly, if the manufacture of an item addressed in a master file would be subject to CGMP requirements under a rule listed in § 4.3, those CGMP requirements must be met under this rule, including as provided in § 4.4. If the manufacture of the item would not be subject to CGMP requirements under a rule listed in § 4.3, then no CGMP requirements apply to the manufacture of that item under this rule. For example, if the item is a component of a device and its manufacture, therefore, would not be subject to the QS regulation, the manufacture of that item is not made subject to the QS regulation by this rule. However, the CGMP requirements for manufacturers of combination products and constituent parts of combination products that include items addressed in master files may include duties with respect to such items (e.g., purchasing control requirements under the QS regulation for a combination product that includes a device).

(Comment 5) Some commenters raised concerns regarding application of the rule to co-packaged combination products, arguing that the rule as written would be overly burdensome for these products. One commenter proposed that ''Convenience kits that contain device(s) and drugs or biologics would be governed under 21 CFR 4 only if the device(s) included in the kit are Class II or III.'' The commenter offered as a rationale for this change that application of the approach in the proposed rule to such products would represent ''an unnecessarily burdensome approach to the industry and in most instances will not provide greater protection of the public health.'' Other commenters asked for guidance on the application of CGMP requirements to a drug manufacturer who purchases a finished, ''off-the-shelf'' medical device to include in a kit. A commenter stated that the control, packaging and release of kits can be adequately handled by current parts 210, 211, and 600 CGMP regulations, and that existing guidance and supplement approval requirements (design verification testing for container closure) are adequate to address any additional considerations necessitated by the packaging and labeling of a kit.

(Response) We do not agree that the rule represents an unnecessarily burdensome approach to CGMP compliance for ''convenience kits'' or other kits and do not find it necessary to alter the application of the rule to ''convenience kits.''

This rule is not intended to create new CGMP requirements, and instead seeks to clarify how to apply them to combination products. A kit that includes two or more types of medical products (e.g., a device and a drug), is a combination product and subject to this rule. Accordingly, the manufacture of the products in the kit would also be subject to this rule.

An important question, however, in responding to this comment is how to define the term ''convenience kit.'' For purposes of this rule, we define the term to include only kits that solely include products that are: (1) Also legally marketed independently and (2) included in the kit as already packaged for independent marketing and with the same labeling as for independent marketing. This is an important question because no additional CGMP requirements generally would apply to the products in such a ''convenience

kit'' simply because they have been included in the kit. The only additional CGMP requirements that would generally apply to such a convenience kit would be those applicable to the assembly, packaging, labeling, any sterilization, or further processing of the kit itself. In contrast, if any products to be included in a kit are repackaged, relabeled or otherwise modified for purposes of their inclusion in the kit, the kit is not a ''convenience kit'' for purposes of this rule and all the CGMP requirements applicable under this rule based on any changes made to the constituent parts would apply.

Accordingly, no additional CGMP requirements would apply to an ''off-the-shelf'' device that is packaged and labeled in accordance with its existing marketing authorization for the independent sale solely because of its inclusion in a convenience kit. However, if an off-the-shelf device is included in a co-packaged combination product for an intended use that differs from the intended use for which that device is marketed separately, additional CGMP requirements may apply, including design controls to ensure that the device is appropriate for the specific use to which it is put in the combination product.

C. How does FDA define key terms and phrases in this subpart? (§ 4.2)

(Comment 6) One commenter asked whether a device combined with a medical device accessory would be considered a combination product.

(Response) A combination product must include two or more different types of constituent parts (e.g., a drug and device, or biological product and a drug). The definition of device at section 201(h) of the FD&C Act (21 U.S.C. 321(h)) includes devices that are an ''accessory'' to another device. A device and such an accessory to it are, therefore, both devices and when combined would not constitute a combination product.

(Comment 7) One commenter requested clarification relating to the definition of the term ''manufacture.'' This commenter sought confirmation that the rule is intended to encompass the types of activities included in the definition of manufacture under drug CGMPs and the QS regulation, and to cover the entities undertaking these activities. This commenter also sought clarification of what parties must do to comply with CGMPs, for example, if the manufacture of a combination product involves a specification developer, contract manufacturer, and component manufacturer. This commenter proposed that the responsibility for ensuring that all requirements are met should fall to the manufacturer who holds the marketing application.

(Response) The term ''manufacture'' for purposes of the rule is intended to encompass all activities defined as manufacturing under the drug CGMPs and QS regulation and also under the biological product and HCT/P regulations listed in § 4.3. Both specification developers and contract manufacturers ''manufacture'' and are considered manufacturers for purposes of these underlying CGMP regulations and are, therefore, subject to this rule if they manufacture combination products or constituent parts of combination products However, an entity that is not considered a manufacturer for purposes of the QS regulation, which manufactures a device component, is not subject to this rule even if that component will be incorporated into a combination product or constituent part of a combination product at some other facility. See Quality System (QS) Regulation/Medical Device Good Manufacturing Practices (*http://www.fda.gov/medicaldevices/deviceregulationandguidance/postmarketrequirements/qualitysystemsregulations/default.htm).*

As discussed in response to Comments 13 and 14 of this document, the CGMP requirements applicable to a particular manufacturer for the work done at its facility may vary based upon the type or types of constituent parts being manufactured and the aspects of their manufacture that are being performed. Where multiple facilities bear responsibility for various aspects of the manufacturing process, only the holder of the application or clearance for the product (hereafter referred to as the applicant for purposes of the preamble to this rule) is responsible for compliance with all aspects of the CGMP requirements applicable to the entire manufacturing process and across all facilities.

(Comment 8) Some commenters sought confirmation that containers and closures, which they asserted are currently treated as drug components, would continue to be treated as such. Some commenters sought guidance on whether a prefilled syringe would be considered a combination product.

(Response) The suggestion that containers and closures are treated as drug components for purposes of CGMPs is incorrect. Components are defined under § 210.3 as ''any ingredient intended for use in the manufacture of a drug product, including those that may not appear in such drug product.'' It is true that containers and closures are subject to the drug CGMPs rather than the device QS regulation. While some CGMP requirements apply to both drug components and containers/closures, containers/closures are separately addressed in the drug CGMPs, and distinct CGMP requirements apply to them (see § 211.84).

The Agency will continue to regulate drug containers and closures in accordance with parts 210 and 211. A syringe, however, is not a mere container/closure. A syringe is a device used to deliver another medical product (e.g., a drug) (see, e.g., 21 CFR 880.5860). Accordingly, a prefilled syringe is a combination product and subject to this rule. See also response to Comment 15 of this document distinguishing complete syringe constituent parts from components of syringes. We plan to address distinctions between devices and containers/closures in further detail in later guidance.

(Comment 9) Several commenters asked that the Agency revise and clarify the term ''constituent part,'' arguing that its interpretation is important to understanding the scope of the rule. Some commenters proposed inclusion of a definition for component or language in the codified regarding how manufacturers should address components in their CGMP systems. These and other commenters sought clarification of how the rule might apply to components of devices and ingredients for drugs and biological products. Some commenters also sought clarification of how the definition of constituent part might relate to whether an article should be considered a drug component as opposed to a device, citing container closures as an example. Some commenters also asked that the Agency provide guidance, including examples, of articles the Agency considers constituent parts and articles that we consider components.

(Response) We have declined to revise the definition of constituent part, or to include a definition of component, in the rule. The current definition of constituent part found in § 4.2 provides a succinct way to identify a drug, device, or biological product as included in a combination product. Such a term of reference is needed not only for this rule but in relation to virtually all regulatory activity for combination products.

The rule does not change the scope of the regulations listed in § 4.3. Rather, it expressly codifies the applicability of these requirements to combination products and clarifies how to comply with these regulations for combination products. Accordingly, articles not

otherwise subject to the regulations listed in § 4.3 are not made subject to those regulations by this rule. Therefore, for example, if an article would be considered a device component, and it would not be subject to the QS regulations in the absence of this rule, that device component does not become subject to the QS regulations because of this rule.

In addition, we note that the term component is defined for a drug at § 210.3(b)(3) and for a device at § 820.3(c). The existing definitions appropriately characterize the components of drugs and devices, respectively, and we see no need to develop a distinct definition in relation to combination products.

The Agency appreciates the value of guidance to ensure understanding of this rule by both industry and FDA staff. The Agency is developing guidance on the application of the rule, including examples to illustrate these and other concepts addressed.

(Comment 10) One commenter sought clarification of the definitions for ''co-packaged'' and ''single-entity'' combination products. This commenter also requested a list of examples to clarify these definitions.

(Response) The definitions for co-packaged and single-entity combination product are quoted in part I.A. of this preamble and are found in § 3.2(e). This rule merely cross-references those existing definitions. We note, however, that the term ''component'' as used in the definition for single-entity combination product in § 3.2(e) and this rule, is synonymous with ''constituent part'' under this rule. We recommend visiting the Web page for OCP on the Agency's Web site at *http://www.fda.gov/CombinationProducts/default.htm,* for further information relating to these definitions and examples of combination products.

(Comment 11) One commenter urged the Agency to take care to ensure that stakeholders understand the terminology being used in the rule and its preamble.

(Response) We have been mindful of this consideration in attempting to make the rule and this preamble as clear as possible, including in the selection and manner of defining key terms in § 4.2.

D. What current good manufacturing practice requirements apply to my combination product? (§ 4.3)

(Comment 12) One commenter sought clarification of the CGMP requirements applicable to combination products comprised of constituent parts that are manufactured and marketed separately. This commenter proposed revising § 4.3 to address this issue by replacing ''The current good manufacturing practice requirements in parts 210 and 211 of this chapter apply to a combination product that includes a drug constituent part * * *'' with ''The current good manufacturing practice requirements in parts 210 and 211 of this chapter apply to the drug constituent part of a combination product'' and parallel changes with respect to device and biologic constituent parts.

(Response) The preamble to the proposed rule discussed in some detail the issue of what CGMP requirements apply to the manufacture of constituent parts that are manufactured and marketed separately from one another (see 74 FR 48423 at 48424 to 48425). We do not see a need to revise § 4.3 to provide further clarity as requested by the commenter. Section 4.3 lists the CGMP regulations applicable to combination products. This rule does not change the requirements of these listed regulations. In § 4.4, this rule addresses how to comply with these requirements for single-entity and co-packaged combination products because of the complexity of applying these requirements to these types of combination products. The rule does not expressly address how to comply with these requirements for separately manufactured and marketed constituent parts of combination products because each of these separately manufactured constituent parts is subject only to the regulations listed in § 4.3 that are applicable to that type of constituent part. We note that we have modified § 4.3(c) for clarity.

E. How can I comply with these current good manufacturing practice requirements for a co-packaged or single-entity combination product? (§ 4.4)

(Comment 13) Some commenters noted that not all requirements of the CGMP regulations applicable to combination products may be relevant to a particular product or to when and where particular aspects of the manufacturing process are undertaken. Commenters offered recommendations for addressing this variation in guidance or through revision of the rule.

(Response) This rule does not alter the regulations listed in § 4.3. All of the CGMP requirements applicable to a combination product or constituent part must be met where and when required.

We agree that not all the provisions of the CGMP regulations listed in § 4.3 as applicable to a class of combination product (e.g., drug-device or biological product-drug combination product) or constituent part (drug, device, or biological product) may be relevant to a specific type of combination product or constituent part. The preamble to the proposed rule addressed this point (see 74 FR 48423 at 48426). For example, only combination products that include an OTC drug must comply with tamper-evident packaging requirements, and only combination products that include a type of device that is installed or serviced must comply with installation and servicing requirements.

Similarly, we agree that not all CGMP requirements may apply at a facility that is performing only certain aspects of the manufacture of a combination product. As §§ 210.2(b) and 820.1(a)(1) reflect, an entity that engages in only some operations subject to the regulations in parts 210, 211, 600 through 680, 820, and 1271, need only comply with the regulations applicable to those operations. In addition, manufacturers retain the ability to demonstrate that a departure from stipulated CGMP requirements is appropriate, to the extent that the CGMP regulations for drugs, devices, biological products, and HCT/Ps permit such showings (see, for example, § 820.1(a)(3), providing manufacturers an opportunity to document justifications for determining that requirements qualified by ''where appropriate'' in part 820 are not appropriate for the particular product).

Many, but not all, CGMP requirements are facility specific. Examples of such requirements include requirements for testing of the product by a facility or controls over the supplies brought into the facility. Other requirements, however, are not facility-specific. For example, some concern the product as a whole, such as design controls, and some concern overarching duties for the manufacturing process as a whole, such as Corrective and Preventive Action (CAPA) and management responsibility. Duties associated with such cross-cutting CGMP requirements may be shared by several facilities.

All manufacturers are responsible for ensuring compliance with all CGMP requirements applicable to the manufacturing activities at their facilities. In addition, the applicant is responsible for ensuring compliance with all of the CGMP requirements applicable to the product, taking into account all of the activities occurring at all facilities involved with the manufacturing process.

Section 4.3 of the rule lists all of the CGMP requirements that may apply to a combination product and its constituent parts. Section 4.4 addresses how manufacturers may comply with these requirements for single-entity and

co-packaged combination products. Section 4.4 states that manufacturers may comply with these requirements through the design and implementation of a CGMP operating system that meets all applicable CGMP requirements. Section 4.2 defines CGMP operating system as the operating system within an establishment that is designed and implemented to address and meet the CGMP requirements for a combination product. Accordingly, if the combination product is manufactured at multiple facilities, each facility would need such an operating system, including the facility from which the applicant oversees all of the manufacturing activities and compliance with all CGMP requirements related to the product.

The issues raised in these comments are not peculiar to combination products or their constituent parts, though addressing them may present some added complexity because of the number of sets of regulations that may apply to a combination product, the relatively complex nature of these products, and the multiple Agency components that may have an interest in ensuring compliance with CGMP requirements for these products. Examples and clarification to aid compliance will be provided in subsequent guidance.

(Comment 14) Some commenters sought clarification of § 4.4(b)(1) and (b)(2) and confirmation of whether the rule requires compliance with both the drug CGMPs and with the QS regulation throughout the entire manufacturing process for combination products and their constituent parts, or only at facilities where constituent parts subject to both of these two sets of requirements are being made. Commenters asserted that applying both sets of requirements throughout the entire manufacturing process of a combination product would result in a more demanding and complex CGMP system than currently expected for non-combination medical products. Other commenters proposed that the rule should be revised to have a ''product-based'' rather than a ''facility-based'' approach.

(Response) As discussed in response to Comment 13 of this document, the applicability of some CGMP requirements will vary depending on the circumstances, including what aspect of a product's manufacture takes place at a facility and whether multiple facilities are involved in the manufacture of a combination product. Accordingly, we do not agree that the rule should be either ''product-based'' or ''facility-based.'' A manufacturer must comply with the requirements applicable to the activities undertaken at its facility, including applicable aspects of requirements that apply to multiple facilities or the overall manufacturing process for the product, and a product applicant must ensure compliance with all CGMP requirements for its product.

The rule provides that a facility that is manufacturing only one type of constituent part of a co-packaged or single-entity combination product need only comply with the CGMP requirements applicable to that constituent part type (§ 4.4(c)). Facilities that perform manufacturing activities for more than one type of constituent part of such a combination product must comply with the CGMP requirements applicable to each type of constituent part being manufactured at that facility (§ 4.4(d)). The rule permits the use of the streamlined approach to demonstrate compliance with the drug CGMP and device QS regulation requirements when both are applicable to a facility's manufacturing activities for a single-entity or co-packaged combination product (§ 4.4(a) and (b)).

With regard to CAPA requirements and the parallel requirements of the drug CGMPs, for example, the applicant and any other manufacturer(s) for a single-entity or co-packaged combination product must ensure that an appropriately comprehensive review of activities is undertaken at whatever facilities may be relevant to determine the root cause of manufacturing problems, deviations, or nonconformities. These requirements also call for corrective actions and preventive measures to be taken with regard to all relevant manufacturing steps at all relevant facilities, so that the problem is corrected and potential problems will be prevented or mitigated going forward. In the case of the product applicant these duties are comprehensive, applying to all relevant facilities and all appropriate measures for the product. For products with multiple manufacturers, the scope of the duties for each manufacturer parallels and depends upon the scope of the activity undertaken at that manufacturer's facility. The related guidance for this rule will address these issues further.

(Comment 15) Some commenters sought clarification of the language of § 4.4(d) that states that a facility where two or more different types of constituent parts have arrived or at which their manufacture is proceeding may apply the streamlined approach provided for under § 4.4(a)(2) and (b). One commenter proposed that this streamlined system should only have to be met once two or more types of constituent parts have been assembled. Some commenters proposed that once initiated, the system should apply on a ''forward-looking'' basis and should not reach back to manufacturing operations that occurred prior to when the constituent parts begin being manufactured together at the same facility.

(Response) As discussed previously in response to Comment 13 of this document, there are various types of CGMP requirements, some of which are facility-specific, and some that apply to multiple facilities or the overall manufacturing process for the product. All of these requirements must be met for a combination product. As these comments suggest, the requirements applicable to a particular manufacturer depend on the activities undertaken at the facility or facilities that manufacturer operates, with the applicant having responsibilities for compliance with all CGMP requirements for its product.

Section 4.4(d) concerns the CGMP operating system for a specific facility participating in the manufacture of a single-entity or co-packaged combination product. If a facility manufactures only one type of constituent part of such a combination product, it must comply with the CGMPs for that type of product (e.g., the QS regulation if the constituent part is a device). In contrast, when two or more constituent parts of a combination product are being manufactured at the same facility, the manufacturer must comply with the CGMPs applicable to each type of constituent part (e.g., the drug CGMPs and device QS regulation if the facility is combining or otherwise manufacturing both drug and device constituent parts). Accordingly, § 4.4(d) states that a facility may initiate a CGMP operating system that complies with § 4.4(b) when the manufacture of two or more different types of constituent parts is being conducted at that facility. Section 4.4(d) is intended to clarify that when a facility must comply with the CGMP requirements for more than one type of constituent part, a § 4.4(b)-compliant CGMP operating system is available as a means of demonstrating compliance.

We reject the proposal that the CGMP requirements applicable to a constituent part come into effect only after that constituent part has been formed. Such an approach would be inconsistent with the application of the underlying CGMP regulations listed in § 4.3. The trigger is whether the facility is conducting manufacturing operations that would be subject to the underlying CGMP

requirements. For example, if a facility is manufacturing only device components, it might not be subject to CGMP requirements under the QS regulation. However, a facility that is manufacturing a finished device from such components is subject to the QS regulation. Therefore, for example, if a facility is manufacturing a finished combination product, a prefilled syringe for instance, from device components and drug components, that facility is subject to both the QS regulation and drug CGMPs.

(Comment 16) One commenter asserted that due to ambiguities associated with an out-of-specification (OOS) investigation, excessive work may be involved if there is a need to perform a device component review.

(Response) FDA disagrees with this comment. Medical device In Vitro Diagnostic (IVD) product manufacturers routinely perform OOS investigations successfully. OOS investigation is conducted under § 211.192 for drugs and under §§ 820.80(d) and 820.90 for devices. In some cases, as for IVD devices, OOS for a device may be similar to OOS for a drug. In others, the approach may differ. This rule is not intended to alter the scope of such investigations for drugs or devices. Accordingly, whether a combination product manufacturer opts to institute a CGMP operating system that implements the QS regulation plus the called-out provisions from part 211, or one that implements the drug CGMPs plus the specified provisions of the QS regulation, OOS for the combination product should be appropriate to address the considerations articulated in § 211.192 for the drug constituent part and in §§ 820.80(d) and 820.90 for the device constituent part. For example, unexplained discrepancies (or the failure of a batch or any components to meet any specifications) shall be thoroughly investigated as appropriate.

(Comment 17) Some commenters requested that the Agency clarify selection criteria for whether to adopt the approach under § 4.4(b)(1) that calls for implementation of the drug CGMPs plus specified provisions of the QS regulation or the approach under § 4.4(b)(2) that calls for implementation of the QS regulation plus specified provisions of the drug CGMPs. One commenter suggested the primary mode of action of the combination product as one possible basis for selection.

(Response) We do not see a need to limit under what circumstances a manufacturer may or should select the approach under § 4.4(b)(1) or (b)(2). It is appropriate to leave the decision of whether to implement a system in accordance with § 4.4(b)(1) or (b)(2) to the discretion of the manufacturer. Some facilities, for example, may already operate under either the drug CGMPs or QS regulation in manufacturing other products, and may prefer to demonstrate compliance with both sets of regulations by taking the steps necessary to demonstrate compliance with the called out provisions of the regulation under which they do not otherwise operate. Other facilities may have no pre-existing manufacturing approach, for example, and select an option on other grounds. Both the approaches permitted in § 4.4(b) are permissible under the rule, and neither is considered preferable by the Agency.

(Comment 18) One commenter sought guidance on how to implement a CGMP system in accordance with § 4.4(a)(1), which permits establishment of a system that fully implements all of the CGMP regulations applicable to the combination product under § 4.3. Specifically, this commenter sought guidance on how to resolve conflicts among requirements of the regulations applicable to a combination product if implemented in accordance with § 4.4(a)(1).

(Response) As discussed previously in this document, the requirements of the drug CGMP and QS regulation are similar in many respects. Further, the various regulations listed in § 4.3 are generally compatible with one another. Nonetheless, we appreciate that questions as to how to reconcile them and actual conflicts may arise. Accordingly, regulations listed in § 4.3 and this regulation include provisions addressing how to resolve any conflicts among them. These provisions essentially call for following whichever requirement is more specifically applicable. See §§ 211.1(b), 820.1(b), and 4.4(e) of this rule. This determination may be based on such factors such as which regulation addresses a manufacturing issue most precisely and which requirement arises from the regulation most specifically applicable to the constituent part. Should we become aware of potential conflicts with respect to combination products in general or classes of combination products, we intend to address them in guidance. However, we are not aware of any such potential conflicts at this time.

(Comment 19) One commenter requested that the following language be added to § 4.4(c): ''Device components and constituent parts are governed under QSR. The drug components and constituent parts are governed under CGMPs. The components of constituent parts would be governed under the quality system in which they are specified.'' A second commenter proposed a similar change to § 4.3(a) to state that drug CGMPs ''apply to the drug constituent part of a combination product,'' and corresponding changes to § 4.3(b) through (d).

(Response) We have not made either proposed revision because we do not agree that they would clarify the rule, and also because they could cause confusion. Section 4.4(c) provides that all CGMP requirements applicable to a constituent part of a single-entity or co-packaged combination product must be satisfied during any period in which that constituent part is manufactured at a separate facility. In some cases, the CGMPs applicable to that constituent part may arise from only one of the regulations listed in § 4.3. In other cases, the applicable CGMPs may arise from several of these listed regulations. Similarly, as explained in sections E.1 and E.2 of this document, the CGMP requirements listed in § 4.3 apply to the combination product, and compliance with them may involve policies, procedures, and practices applicable to the combination product as a whole or to multiple constituent parts.

E.1. How To Comply With QS Regulation Requirements Under § 4.4(b)(1)

(Comment 20) As discussed previously in this document, some commenters sought guidance concerning the applicability of the requirements specified in § 4.4(b) as a general matter. The great majority of comments addressing in particular the application of the QS regulation requirements specified under § 4.4(b)(1) focused on § 820.30 (design controls). Some commenters asked for clarification of how to apply design controls to combination products. Some questioned whether design controls should apply other than to the device constituent part of a combination product. Some asked for guidance regarding how to apply design controls to non-device constituent parts of a combination product, noting that the decision to incorporate such an article into a combination product may occur after that article has already been developed.

(Response) Design controls apply when a device constituent part is used in a combination product. Design controls require the manufacturer of a combination product which includes a device constituent part to establish and maintain procedures to ensure that the design requirements for the combination product are appropriate and address the

intended use of the combination product, including the needs of the user and patient. The design control process may rely on existing information for the constituent parts, such as information provided in support of the combination product's marketing authorization.

The design history file for a combination product with device and drug or biological product constituent part must address all design issues resulting from the combination of the constituent parts, regardless of whether the manufacturer chooses to apply a CGMP operating system that implements part 820 plus the provisions of part 211 specified in § 4.4(b)(2) of this rule or implements part 211 plus the provisions of part 820 specified in § 4.4(b)(1) of this rule. For example, with regard to a drug or biologic product constituent part in a combination product, the design history file would document and provide objective evidence that the drug or biologic is appropriate for use with the device (e.g., why the formulation of the drug constituent part is appropriate for use in a drug-eluting stent given the need to ensure controlled elution, resistance to flaking, etc.). Similarly, with regard to a device constituent part in a combination product, the design history file would document and provide objective evidence that the device constituent part is appropriate for use with the drug or biological product (e.g., that a syringe is appropriate for use as a delivery device for a drug by providing assurance that there is no interaction with the drug, that the syringe will deliver the drug properly, and that container closure integrity and shelf life can be maintained, etc.).

The combination product manufacturer is responsible for design and development planning, including the design of processes for the manufacture of the combination product. For products manufactured by multiple manufacturers, the finished combination product manufacturer and the application holder (if they are not the same entity), each are responsible for these duties. The design inputs must ensure that the design requirements are appropriate and address the intended use of the combination product, including the needs of the patient and the user of that combination product. Design output procedures must ensure that those design outputs that are essential for the proper functioning of the combination product are identified. The total finished design output consists of the combination product, its packaging, and its labeling. In addition, design control requirements for review, verification, validation, design changes and design history file apply. If a sponsor wishes to use an existing or off-the-shelf product as a constituent part of a combination product, the design controls must ensure that the existing product meets appropriate design requirements for the combination product to be safe and effective, which may require modification of the existing product for use as part of the combination product. See § 820.30. Further explanation will be provided in the related guidance.

E.2. How To Comply With Drug CGMP Requirements Under § 4.4(b)(2)

(Comment 21) Some commenters proposed adding the requirements from §§ 211.160 (general requirements) and 211.194 (laboratory records) of the drug CGMP requirements to the list of requirements with which manufacturers must demonstrate compliance under § 4.4(b)(2).

(Response) We do not find that it is necessary to add §§ 211.160 and 211.194 to § 4.4(b)(2). The topics addressed in these sections are adequately addressed in part 820, including, for example, in §§ 820.70 (production and process controls), 820.72 (calibration), 820.80 (acceptance activities), 820.180 (general requirements), and 820.250 (statistical techniques).

Section 211.160 is primarily concerned with the ''establishment of * * * specifications, standards, sampling plans, test procedures, or other * * * control mechanisms'' with respect to the laboratory. This section also states that these control mechanisms and changes to them shall be drafted by the appropriate organizational unit and reviewed by the quality control unit. These requirements shall be followed and documented, and any deviation shall be recorded and justified. Also, appropriate ''instruments, apparatus, gauges, and recording devices'' shall be calibrated. While we recognize that pharmaceutical laboratory control is critical to the quality of drug components, in-process materials, and the final product, this section's requirements are broad enough to be comparable to requirements specified in §§ 820.70(a) and (b) (general requirements and changes to production and process controls), 820.80(c) (in-process acceptance activities), 820.250 (statistical techniques), 820.20(a)(1) (responsibility and authority), and 820.72(b) (calibration).

Section 211.194 is primarily concerned with the management and maintenance of official records with respect to the laboratory. This section's requirements are comparable to requirements specified in § 820.180 (general requirements for official records). While § 211.194 specifies some requirements for testing of laboratory samples, ''complete records'' of all data generated within a laboratory is comparable to ''all records'' as described in § 820.180. Section 211.194 can be used as a source of information for specific pharmaceutical laboratory testing records needing to be managed and maintained, as well as relevant CGMP guidance with respect to pharmaceutical and microbiological laboratories.

(Comment 22) Some commenters sought clarification of circumstances under which § 211.103 (calculation of yield) should be satisfied and questioned whether determining yield would provide meaningful information beyond what the QS regulation requires regarding whether processes are under control. One sought clarification of whether the requirement applies only to drug constituent parts.

(Response) Section 211.103 states that calculation of yield ''shall be determined at the conclusion of each appropriate phase of manufacturing, processing, packaging, or holding'' for a drug product. This may provide valuable information and insight to the status of a manufacturing process at significant evaluation points, not just for the final product. In addition, § 211.103 provides an important quality check both for a pharmaceutical production process as a whole and for individual unit operations of the process. It is important to account for any increase or decrease in expected yield of materials during the manufacturing process. When either occurs, it is important to conduct a prompt and thorough investigation. Appropriate manufacturing controls can help prevent deviations from expected process yield, which can be important to the success of manufacturing steps and to ensuring that the final product meets specifications. Any phase of the pharmaceutical process that is subject to potential component, in-process material, or product loss, due to physical or chemical means, should be evaluated with respect to actual and theoretical yield of these materials. Section 211.103 does not apply to device constituent parts of combination products.

(Comment 23) Some commenters sought clarification of the application of § 211.170 (reserve samples). Some argued that reserve sample requirements should apply only to drug constituent parts of combination products and not to device constituent parts or the entire combination product, asserting that keeping samples of devices or complete

combination products would be cost prohibitive. Others sought guidance regarding how to comply with reserve sampling requirements for ''small lot'' products with less than 100 products in a lot, or products that come in multiple sizes and shapes.

(Response) Reserve samples are needed to help ensure the postmarket safety and effectiveness of combination products, as they are for drugs and biological products. They are used, for example, to address certain product complaints, evaluate stability concerns, and assess the causes of adverse events. Under § 211.170, reserve samples must be maintained for each lot of a drug (or biological product) ''under conditions consistent with product labeling,'' ''stored in the same immediate container-closure system in which the drug product is marketed or in one that has essentially the same characteristics,'' and must consist of ''at least twice the quantity necessary to perform all the required tests, except those for sterility and pyrogens.''

For a single-entity combination product, such as a prefilled syringe or a drug-eluting disc or stent, it would be appropriate to retain samples of the complete product from each lot and, in any event, the samples should include the drug and all device components that come into direct contact with the drug. For co-packaged and cross-labeled combination products, it generally should be sufficient to maintain samples of each lot of the drug or biological product in the immediate container/closure in which it is marketed. Specific questions or concerns about reserve samples should be discussed with the lead review center for the combination product. We will provide further information regarding how to comply with sample retention requirements for combination products in related guidance for this rule.

(Comment 24) Some commenters sought guidance on compliance with batch release testing requirements under § 211.165. One asserted that such ''testing-in'' requirements are in conflict with ''design-in'' requirements of the QS regulation. Some sought clarification of who is responsible for batch release for drug constituent parts, and whether the release is under a Certificate of Analysis or based on actual approval of the batch records. One asked how ''batch'' would be defined, specifically whether the batching of the device constituent part or the drug would prevail in determining what is a ''batch.'' One noted that a different approach might be appropriate for smaller production batches (for example, of less than 100) as opposed to batches that might contain 100,000 units. One asked if the Agency agreed that flexibility in applying the requirements would be appropriate if the combination product has a device primary mode of action. One asked if the Agency would consider testing of selected batches appropriate for small batch, high-cost combination products. One asked whether the Agency would permit combining sub-batches or testing of representative samples of the finished product. One asked, with regard to devices that contain antimicrobials, whether testing of antimicrobial activity could be considered a suitable surrogate endpoint for the determination of strength of the active ingredient.

(Response) Section 4.4 applies to single-entity and co-packaged combination products. Testing and release for distribution of finished pharmaceuticals is a critical step in drug product manufacture and quality control. This applies to all single entity and co-packaged combination products that contain a drug constituent part. Such testing requirements do not conflict with design-based controls. Rather, the two work hand-in-hand to ensure appropriate manufacture and product performance.

Each combination product manufacturer should establish procedures defining ''a batch'' in all phases of production, and describe all batch numbering systems used for incoming material, in-process material, and finished products. These procedures allow the manufacturer to connect specific lots of constituent parts, components and in-process material to the specific lot of combination product in which they were used as well as provide traceability of sampling and testing, packaging and labeling activities. Master production and control records should be designed to enable this traceability. Batch definition, control, and tracking procedures should be explained in product applications and available for review on inspection.

All proposed testing and sampling plans of drug constituent parts should be conducted in accordance with §§ 211.160 and 211.165. Sampling plans should be designed to assure appropriate statistical quality control criteria are met as a condition for the drug constituent part's approval and release. The acceptance criteria for all sampling and testing of a drug constituent part for product release should be reviewed and approved by the firm's quality unit.

''Release'' of pharmaceutical ingredients, excipients, and/or products may mean different things depending on where in the manufacturing process the materials are being tested. Incoming ingredients, excipients, and supplies from suppliers must be tested, controlled, and documented in accordance with § 211.84. Reliance on reports of analysis and certificates of testing may be permitted under certain circumstances as provided at § 211.84(d) so long as at least one specific identity test is conducted for each component of a drug constituent part. Acceptable materials can be ''released'' into the drug constituent part or combination product production system. Finished drug constituent parts or combination products must also be tested, controlled, and documented before they can be ''released'' for distribution to other clients or the market.

Regarding the issue of whether verification and testing of antimicrobial activity could be a suitable surrogate for the determination of strength, we note that it would not be appropriate to use a qualitative activity determination (such as a determination of general antimicrobial activity) in place of a quantitative determination of biological activity (such as a determination of microbial inhibitory concentration (MIC)). Further, what type of test to conduct can depend on the purpose of the antimicrobial. For example, if a device is coated with an antimicrobial drug, and the intended use of the combination product involves dissemination of the drug to produce a pharmacologic effect, then ''strength'' could be determined by chemical analysis (reflecting chemical content) or by MIC (reflecting biological activity). However, if the antimicrobial coating serves only to inhibit or prevent microbial colonization of the device, then an antimicrobial preservative effectiveness test might be more appropriate.

We plan to discuss batch release testing further in the related guidance for this rule.

(Comment 25) Some commenters sought clarification of how to comply with §§ 211.166 (stability testing) and 211.137 (expiration dating) requirements. Two comments sought clarification of stability testing and expiration testing for kits, and one questioned the practicality of annual stability testing for each ''size and shape'' of a combination product.

(Response) Combination products that include drug constituent parts must comply with § 211.166. A written testing program must be established to verify the stability of the drug constituent part. These stability testing programs are critical in determining appropriate storage conditions and

expiration dating. Any drug product manufactured for commercial distribution should be subjected to stability testing, including each type of drug constituent part included in a kit. Among other considerations, this testing must enable evaluation of any effects of storage in a container closure system, which may be a device constituent part, on the stability of the drug. See § 211.166(a)(4). As stated in § 211.137, expiration dating must comply with 21 CFR 201.17. We plan to provide additional information on how to comply with the requirements of §§ 211.166 and 211.137 in the related guidance for this rule.

E.3. How To Comply With Biological Product and HCT/P Requirements Under § 4.4(b)(3)

(Comment 26) Some commenters sought clarification of which CGMP requirements for biological products and HCT/Ps might apply to a combination product. Some noted that the proposed rule provided that manufacturers of drug-device combination products could demonstrate compliance with both the drug CGMPs and device QS regulation by demonstrating compliance with one of these regulations in its entirety and with specified provisions of the other regulation. In contrast, they noted, the proposed rule stated that manufacturers of combination products that include a biological product or HCT/P must demonstrate compliance with all of the CGMP requirements applicable to a biological product or HCT/P, respectively. Commenters asked whether the Agency could specify biological product and HCT/P CGMP requirements with which compliance must be demonstrated if a manufacturer has demonstrated compliance with the drug CGMPs or device QS regulation.

(Response) As noted previously in this document, and stated in the definition for biological product at § 4.2, a biological product is also by definition a drug or a device. Accordingly, a biological product is always either subject to the drug CGMP regulations described in parts 210 and 211, or to the QS regulation described in part 820, as appropriate, regardless of whether the biological product is a constituent part of a combination product. Furthermore, biological products, including those that are constituent parts of combination products, must comply with all applicable requirements in parts 600 through 680. To the extent that requirements in parts 600 through 680 pertain to manufacturing for biological products, these requirements apply in conjunction with the CGMP regulations in parts 210, 211, and 820 and do not create a separate CGMP operating system. Therefore, the additional requirements that pertain to manufacturing for biological products in parts 600 through 680 that would otherwise apply to a biological product if it were not part of a combination product must still be met when that biological product is a constituent part of a combination product.

As noted in the preamble to the proposed rule, many requirements in parts 600 through 680 are not considered CGMP requirements. Moreover, many requirements in parts 600 through 680 are applicable only to certain types of biological products. For example, blood and blood components are subject to the CGMP requirements for such products under part 606. Additionally, a vaccine manufactured using a spore-forming microorganism would be subject to § 600.11(e)(3) (work with Spore-forming microorganisms). As a result, the specific requirements in parts 600 through 680 that apply will depend on the type of biological product.

An HCT/P that is not regulated solely under section 361 of the PHS Act (42 U.S.C. 264) is regulated as a drug, device, and/or biological product (see §§ 1271.10 and 1271.20).[5] The requirements for HCT/Ps under part 1271 are designed to prevent the introduction, transmission, and spread of communicable diseases. These requirements must be met for HCT/Ps, and are essential to protecting the public health. However, the Agency recognizes that there are some sections of part 1271 that overlap with the requirements under the drug CGMPs and the QS regulation, and has addressed these overlaps in draft guidance. See ''Guidance for Industry; Current Good Tissue Practice (CGTP) and Additional Requirements for Manufacturers of Human Cells, Tissues, and Cellular and Tissue-Based Products (HCT/Ps)'' (*http://www.fda.gov/downloads/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Tissue/UCM285223.pdf).*

(Comment 27) One commenter sought clarification of how to reconcile conflicts between HCT/P manufacturing requirements and drug CGMP and QS regulation requirements. This commenter stated that some HCT/Ps are also considered xenotransplantation products due to their exposure to animal materials (mouse, insects) during manufacturing and that FDA should consider addressing this topic in the final rule and/or associated guidance.

(Response) Based on experience to date, the Agency believes that conflicts are unlikely to occur between the HCT/Ps manufacturing requirements listed in § 4.3(d) and the drug CGMPs or device QS regulation. Further, as discussed in response to Comment 18 of this document, the rule includes a provision at § 4.4(e) on how to resolve conflicts between CGMP requirements. Accordingly, we do not see a need to revise the rule in respect to this issue or to address it in guidance at this time. Regarding the issue of xenotransplantation products, we note that the Agency has already addressed this topic in guidance (see ''Guidance for Industry: Source Animal, Product, Preclinical, and Clinical Issues Concerning the Use of Xenotransplantation Products in Humans,'' (*http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/Guidances/Xenotransplantation/ucm074354.htm).*

F. Enforcement and Effective Date

(Comment 28) Several commenters recommended delaying the effective date, in most cases to 1 year after publication of this rule. Some noted a need to coordinate various functions and conduct extensive communications and analyses in developing a compliant system. Others noted the time the Agency provided for implementation of aspects of other rules, such as the design control requirements of the QS regulation. Some addressed the time and financial costs of making such changes, arguing that the Agency has substantially underestimated the costs of implementing this rule, and should extend the effective date in light of the greater costs they believe will be incurred.

(Response) This final rule serves to clarify options for manufacturers to comply with the sets of CGMPS applicable to their combination product. As stated in the preamble to the proposed rule, manufacturers are responsible for compliance with the CGMP requirements that apply to each constituent part of their combination

[5] The HCT/P regulation at part 1271 distinguishes between HCT/Ps regulated solely under section 361 of the PHS Act (42 U.S.C. 264) and those that are regulated as drugs, devices and/or biological products under the PHS Act. The HCT/P regulation provides that an HCT/P that is combined with another article (other than water, crytalloids, or a sterilizing, preserving or storage agent) does not meet the criteria for regulation solely under section 361 of the PHS Act, but would be regulated as a drug, device and/or biological product. Refer to §§ 1271.10 and 1271.20 when considering what regulations apply to a combination product with an HCT/P constituent part.

products (74 FR 48423 at 48424). This rule does not establish any new requirements. Accordingly, we see no reason to delay its effective date, and consistent with the plan described in the proposed rule, we are issuing this rule to be effective in 180 days. The Agency wants to move forward in providing greater assurance that the streamlined approach outlined in the 2004 draft guidance and codified in § 4.4(b) of this rule may be used to demonstrate compliance with CGMPs for combination products. As noted throughout this notice, we are preparing companion guidance to provide further, general information regarding our expectations for compliance with CGMPs for combination products, and we remain available to work with manufacturers to resolve product-specific questions. We intend to continue to apply a risk-based approach to facility inspection and, consistent with ensuring protection of the public health and in light of the specific circumstances, to offer manufacturers a reasonable opportunity to correct deficiencies before taking further compliance or enforcement actions.

G. Alternate Approaches

(Comment 29) Some commenters proposed alternate approaches, suggesting a more ''unified'' approach would be preferable or arguing that the drug CGMPs and device QS regulation are not well-suited for application to products including devices and drugs, respectively. Some encouraged reliance on guidance instead.

(Response) As discussed in the preamble to the proposed rule and summarized in section I.A of this document, the Agency undertook an extensive evaluation of the drug CGMPs, device QS regulation, and biological product and HCT/P requirements in developing this rule. This process included consideration of comments received on the draft guidance that proposed an approach much the same as the approach offered in the proposed rule and adopted in this final rule. The comments received on that draft guidance and on the proposed rule were largely supportive of this approach, and the Agency believes that this approach offers an efficient and effective means to ensure that combination products are manufactured in accordance with all appropriate CGMP requirements.

We see no reason to develop an entirely new regime for combination products, but rather find that it is appropriate to utilize the well-established and understood CGMP requirements that already exist for the constituent parts of which combination products are comprised. At the same time, it is important to establish with clarity and certainty the CGMP requirements that apply to combination products, to ensure effective compliance and consistent, appropriate regulation. Accordingly, we determined that a rulemaking rather than reliance on guidance alone is appropriate to achieve these goals. As discussed throughout this preamble and in the preamble to the proposed rule, we understand that guidance is important to the effective implementation of this rule, and are issuing companion guidance for this reason.

H. Guidance

(Comment 30) Several commenters requested that FDA issue companion guidance for this rule. Some requested that such guidance include relevant case studies or descriptions of what would constitute a demonstration of compliance with requirements for examples of combination products and manufacturing activities. One proposed that the guidance address the application of provisions of the drug CGMPs and QS regulation that are not specified in the rule and their compatibility with those provisions that are specified in § 4.4(b) from the other of these two regulations. One commenter proposed guidance on the application of CGMP requirements for combination products in relation to master files. One commenter proposed a need for a table of key CGMP considerations for developing a streamlined system and for audit instructions and inspection check lists. Some emphasized the need to address what actions existing facilities should take to come into compliance. One encouraged harmonization with international efforts where possible. One stated that FDA should provide additional guidance on how the rule will affect Agency policy on CGMP requirements for investigational device constituent parts in combination products for which the Center for Biologics Evaluation and Research or the Center for Drug Evaluation and Research has the lead. One requested that guidance provide for the opportunity to discuss CGMP issues with the Agency. Some requested that such guidance issue prior to the final rule. One commenter advised that we review existing guidance to ensure its consistency with this rule.

(Response) As noted in the proposed rulemaking, FDA recognizes that timely, comprehensive guidance is important to help ensure consistent and appropriate implementation of this rule. FDA intends to issue such guidance to industry and staff, focusing on the implementation of the regulatory requirements for use of a streamlined CGMP operating system for single-entity and co-packaged combination products. We welcome the comments received on this issue and look forward to further feedback in response to the guidance we issue. With regard to the requests that we issue draft guidance prior to issuance of this final rule, we did not believe it would be appropriate to anticipate the content of this rule by publishing guidance concerning its content prior to its finalization.

We remain committed to international harmonization efforts, including those related to CGMP requirements for combination products. A practical challenge for combination products in particular is that international collaboration and harmonization efforts are at an early stage for these products. At the same time, there is a current need to clarify and rationalize our domestic CGMP requirements for this rapidly growing class of products. We have taken an approach that integrates underlying CGMP approaches for drugs, devices, and biological products, which have each benefited in various respects from substantial international harmonization efforts. The approach adopted in this rule will facilitate implementation of streamlined CGMP operating systems for combination products that will integrate as readily as possible with these existing and ongoing harmonization efforts. We are committed to continuing to work with our foreign counterparts on CGMPs and other issues for combination products, and to pursuing domestic regulatory approaches in the United States that will enable such efforts to the extent practicable and appropriate consistent with meeting our domestic regulatory needs.

With regard to the comment concerning review of existing guidance for consistency with this rule, we note that any prior guidance must be read in light of subsequent changes to legal requirements, whether through new statutory law or issuance of new regulations. The Agency will continue to review all guidance to ensure its continued utility and accuracy.

I. Other

(Comment 31) Some commenters recommended using the term ''hybrid'' rather than ''streamlined'' in reference to the compliance option under § 4.4(b) for single-entity and co-packaged combination products. One commenter suggested that the rule does not reduce the burden of compliance with both the drug CGMPs and QS regulation. Some

commenters argued that the term streamlined might suggest a relaxation of requirements when § 4.4(b), in fact, does not relax CGMP requirements for such products.

(Response) We appreciate the concerns raised by these commenters. However, we disagree with the conclusion that § 4.4(b) does not provide a means to streamline compliance with the drug CGMPs and device QS regulations for single-entity and co-packaged combination products. The alternative to the approach permitted under § 4.4(b) is that of § 4.4(a), under which a facility would need to demonstrate compliance with all applicable requirements under both of these regulations. Section 4.4(b), in contrast, reflects the Agency's judgment that many provisions of these two regulations are similar to one another and that demonstrating compliance with most requirements of one of these sets of regulations suffices to demonstrate compliance with similar provisions of the other set.

We also disagree that use of the term ''streamlined,'' which is consistent with the rule's removal of redundant requirements for compliance with similar provisions of the drug CGMPs and QS regulation, implies a relaxation of CGMP requirements. Rather, it reflects the provision of a more efficient means to satisfy them.

(Comment 32) Some commenters raised issues concerning training of compliance staff, inspection standards, coordination and allocation of responsibilities among Agency staff, and tracking and oversight for compliance activities within the Agency.

(Response) The Agency recognizes the importance of effective and appropriate training, oversight, and standards for CGMP inspection, and for efficient, effective coordination among staff. We intend to address such matters through appropriate inspectional standards, training, and other mechanisms used in relation to other CGMP inspectional activities. However, these issues are matters of internal Agency operation outside the scope of this rulemaking and we do not address them further here.

(Comment 33) Some commenters stated that the Agency should address how to ensure appropriate change controls for combination products, with one comment highlighting the issue with respect to cross-labeled combination products. Some commenters proposed that the Agency consider requiring constituent part manufacturers to notify one another before making changes to the constituent part. Some commenters also addressed the question of which post-approval change requirements should apply under what circumstances, proposing that the submission requirements for the change be those applicable to the constituent part being changed, or the most stringent requirement applicable to any of the constituent parts being changed if a change is being made to more than one.

(Response) We agree that coordination with regard to changes among manufacturers participating in the manufacture of a combination product is an important CGMP issue. It is not unique to combination products however, and we do not see a need to establish additional requirements specifically for combination products. Where constituent parts of single-entity or co-packaged combination products are being made by one entity and supplied to another's facility where the finished combination product is made, compliance with purchasing control requirements, for example, would necessitate tracking of changes and confirmation that the change will not prevent the combination product from meeting its specifications.

Similarly, the manufacturers of separately manufactured and marketed constituent parts of cross-labeled combination products are subject to the CGMP requirements applicable to the type of constituent part they are manufacturing. They must ensure that the manufacture of their constituent part complies with the specifications established to ensure the safe and effective use of that constituent part in combination with the other constituent parts for the combination product's intended use(s). Appropriate coordination among manufacturers with respect to CGMP compliance for changes to constituent parts of combination products will be further addressed in later guidance.

The requirements for reporting post-marketing changes to the Agency or for obtaining Agency review of post-marketing changes, when making a post-market change to a combination product or a constituent part of a cross-labeled combination product, are beyond the scope of this rule. The issue of what type of submission to make to the Agency for a post-approval change to a combination product is also beyond the scope of this rule. However, we note that we intend to issue guidance addressing post-marketing change submission requirements.

(Comment 34) One commenter raised an issue regarding reporting of adverse events for ''cross-labeled'' combination products. One commenter asked for guidance on labeling requirements for combination products. Another proposed that the Agency develop a new master file category for combination product constituent parts and components to address application and quality requirements for these parts of combination products. Another requested that planned guidance for the rule address establishment registration and product listing for manufacturers and importers of combination products. Another commenter proposed development of a new export certificate program for combination product CGMP compliance. Another sought guidance on needle registration, labeling, and testing.

(Response) We appreciate these comments, which raise issues that we may address in other contexts. However, these issues are beyond the scope of this rule and, therefore, we are not offering substantive responses to them here.

III. Legal Authority

The Agency derives its authority to issue the regulations in 21 CFR part 4, subpart A, from 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360b–360f, 360h–360j, 360l, 360hh–360ss, 360aaa–360bbb, 371(a), 372–374, 379e, 381, 383, and 394, Federal Food, Drug, and Cosmetic Act, and 42 U.S.C. 216, 262, 263a, 264, and 271, Public Health Service Act.

Most importantly, the provisions at sections 501(a)(2)(B) and (h) of the FD&C Act (21 U.S.C. 351(a)(2)(B) and (h)) require drugs and devices to be manufactured in accordance with CGMPs. Section 520(f) of the FD&C Act (21 U.S.C. 360j(f)) specifically authorizes the issuance of CGMP regulations for devices. Section 501 of the FD&C Act states that a drug or device is deemed adulterated if it is not manufactured in accordance with CGMPs. This provision applies to biological products including those that are constituent parts of combination products because these products meet the definition of drug or device under section 201 of the FD&C Act. This provision also applies to HCT/Ps that do not meet the criteria for regulation solely as HCT/Ps under section 361 of the PHS Act, because they meet the definition of a drug, or device under section 201 of the FD&C Act. In addition, section 351 of the PHS Act (42 U.S.C. 262) authorizes FDA to issue manufacturing standards for biological products. Section 361 of the PHS Act authorizes the issuance of regulations to prevent the introduction, transmission, or spread of communicable diseases.

Under applicable statutory provisions, the following CGMP regulations were previously issued for drugs, devices, biological products, and HCT/Ps that

may be included in combination products:

- Drug CGMP regulations for finished pharmaceuticals or drug products set forth at parts 210 and 211). Drug products not subject to these regulations (e.g., bulk drugs or active pharmaceutical ingredients) must still meet the current good manufacturing practice general standard required by the statute.
- QS regulation for devices set forth at part 820.
- Requirements that pertain to manufacturing within the requirements (including standards) for biological products in parts 600 through 680.
- Current good tissue practices for HCT/Ps set forth in part 1271.

There is considerable overlap in the drug CGMPs and QS regulation, and for the most part the overlap is clear. For example, both establish requirements for management, organization, and personnel; both require documentation and recordkeeping; and both allow flexibility in their application to the manufacture of a particular product. FDA considers the drug CGMPs and the QS regulation to be similar, and they are meant to achieve the same general goals.

Nevertheless, these two sets of regulations differ somewhat because each is tailored to the characteristics of the types of products for which it was designed. Each set of regulations contains certain specific requirements for various CGMP concepts that are only more generally addressed in the other regulation. For example, the QS regulation has detailed CAPA requirements (§ 820.100) while CAPA principles are currently more generally addressed in the drug CGMP regulation as part of Subpart J, Records and Reports, specifically at §§ 211.180(e) and 211.192).

This rule clarifies the applicability of these two regulations to combination products and provides a streamlined option for practical implementation for co-packaged and single-entity combination products. Because the drug and device CGMP requirements are so similar, when using this streamlined approach, demonstrating compliance with the requirements of one of these two set of regulations (e.g., drug CGMPs), along with demonstrating compliance with the requirements of the specified provisions from the other set (e.g., QS regulation), would be considered to be demonstrating compliance with all requirements from both.

The CGMP requirements specific to each constituent part of a combination product also apply to the combination product itself because, by definition, combination products consist of drugs, devices, and/or biological products. (See § 3.2(e)). These articles do not lose their discrete regulatory identity when they become constituent parts of a combination product. Therefore, all combination products are subject to at least two sets of CGMP requirements. For example, in the case of a drug-device combination product, the QS regulation in part 820 and the drug CGMP regulations in parts 210 and 211 would apply to the combination product.

Although combination products retain the regulatory identities of their constituent parts, the FD&C Act also recognizes combination products as a category of products that are distinct from products that are solely drugs, devices, or biological products. For example, section 503(g)(4)(A) of the FD&C Act (21 U.S.C. 353(g)(4)(A)) requires OCP to ''designate'' a product as a combination product as well as to ensure ''consistent and appropriate postmarket regulation of like products subject to the same statutory requirements.'' Further, section 563(a) of the FD&C Act, (21 U.S.C. 360bbb–2(a)), governs the ''classification'' of products as ''drug, biological product, device, or a combination product subject to section 503(g)'' (emphasis added). In this respect, the FD&C Act identifies a combination product as a distinct type of product that could be subject to specialized regulatory controls.

Under the preceding authorities and section 701(a) of the FD&C Act (21 U.S.C. 371), which authorizes FDA to issue regulations for the efficient enforcement of the FD&C Act, FDA has the authority to issue regulations clarifying the applicability of CGMP requirements to combination products. The Agency is also authorized under these authorities to issue regulations specifying how compliance with CGMP requirements for combination products may be demonstrated.

IV. Analysis of Economic Impacts

A. Introduction

FDA has examined the impacts of the final rule under Executive Order 12866, Executive Order 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). Executive Orders 12866 and 13563 direct Agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). FDA believes that this final rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Flexibility Act requires Agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because the final rule codifies what is currently in effect, the Agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that Agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $139 million, using the most current (2011) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1-year expenditure that would meet or exceed this amount.

B. Rationale for Final Rule

The final rule has two related purposes. The first is to clarify the CGMP requirements that apply to combination products, and the second is to help ensure the consistent and appropriate application and enforcement of these requirements. Constituent parts and manufacturing practices vary among combination products; different CGMP requirements apply depending upon the constituent parts in the combination product and what manufacturing practices are used. The final rule attempts to streamline the practical implementation of CGMP requirements for co-packaged and single-entity combination products.

C. Response to Comments

A number of comments suggested that the regulatory impact analysis of the proposed rule underestimated the incremental cost to comply with this rule; however they did not suggest alternative estimates or methodologies. There were divergent views as to whether the burden of compliance would be greater for legacy products or for small firms and those new to manufacturing combination products. One comment suggested the rule, as proposed, would inhibit innovation.

FDA disagrees with these comments. The Agency has made its views clear

that all manufacturers are already responsible for compliance with the CGMP requirements that apply to each constituent part of their combination products. This final rule clarifies and codifies this view. The CGMPs for drugs, devices, and biological products all require periodic review and update to the systems to ensure they remain current with advances in technology and regulatory practice. Those manufacturers who choose to streamline their systems for legacy products that are in compliance with current practice, do so voluntarily, and it is assumed would only do so if the private benefits of doing it out-weigh the private costs. Because the final rule clarifies and codifies Agency practice on the application of existing CGMP regulations to combination products, it will make it simpler and less burdensome for all manufacturers to apply the regulations when developing new products. It could even shorten approval times for some products by reducing delays caused by lack of systems in place to comply with all applicable CGMP requirements.

D. Impact of Final Rule

FDA estimates that approximately 300 manufacturers of combination products will be affected by the final rule. These manufacturers of combination products should benefit from the greater clarity provided regarding what regulatory provisions apply to their products and how they may comply with them. For both existing and future products, the streamlined approach set forth in the final rule will help ensure that CGMP requirements for co-packaged and single-entity combination products are consistent and appropriate, without duplicative or otherwise unnecessary aspects. This codification of CGMP requirements for combination products will also help ensure predictability and consistency in the application and enforcement of these regulatory requirements with regard to all combination products across FDA.

Firms must already comply with the CGMP regulations for drugs, devices, and biological products, including the current good tissue practice regulations for HCT/Ps, found at parts 211, 820, 600 through 680, and 1271, that are applicable to the constituent parts of their combination products. The cost of this final rule would be the incremental costs to modify or streamline existing standard operating systems. Because this final rule is codifying our current practice, any firms that choose to streamline or modify existing SOPs are doing so because the private benefits are greater than the private costs. If some firms choose to modify their SOPs as a result of this final rule, the net benefits of the rule will be greater than the costs.

Some firms may incur one-time incremental costs reassessing compliance with the final rule. Because this final rule codifies Agency practice that is described in current guidance documents and because no new CGMP requirements are proposed, we believe the time required would be small and estimate it to be about 25 hours per product. The amount of these compliance assessment costs for an individual firm, and the impact of any such costs, will depend on the number and nature of the products the firm produces and how the firm has applied current regulations. Nonetheless, because the time required would be limited, the Agency believes the impact will not be significant on entities considered small based on the Small Business Administration's definition of a small entity (500 employees for device and biological product firms and 750 employees for drug firms).

V. Environmental Impact

FDA has determined under 21 CFR 25.30(a), 25.30(h), 25.30(j), 25.31(a), (c), (h), and (j), and 25.34(a) and (d) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VI. Paperwork Reduction Act of 1995

We note that the information collected under the underlying CGMP regulations for drugs, devices, and biological products, including current good tissue practices for HCT/Ps, found at parts 211, 820, 600 through 680, and 1271, have already been approved and are in effect. The provisions of part 211 are approved under the Office of Management and Budget (OMB) control number 0910–0139. The provisions of part 820 are approved under OMB control number 0910–0073. The provisions of parts 606, 640, and 660 are approved under OMB control number 0910–0116. The provisions of part 610 are approved under OMB control number 0910–0116 and OMB control number 0910–0338 (also for part 680). The provisions of part 1271, subparts C and D, are approved under OMB control number 0910–0543. This final rule contains no new collections of information. Therefore, clearance by OMB under the Paperwork Reduction Act of 1995 is not required.

VII. Executive Order 13132: Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that 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. Accordingly, the Agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required. The sole statutory provision giving preemptive effect to this rule is section 751 of the FD&C Act (21 U.S.C. 379r), which would apply only with respect to OTC drug constituent parts of combination products.

List of Subjects in 21 CFR Part 4

Combination products, Biological products, Devices, Drugs, and Human cell, Tissue, and cellular and tissue based products, Regulation of combination products.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 4 is added to read as follows:

PART 4—REGULATION OF COMBINATION PRODUCTS

Subpart A—Current Good Manufacturing Practice Requirements for Combination Products

Sec.

Subpart B [Reserved]

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360b–360f, 360h–360j, 360l, 360hh–360ss, 360aaa–360bbb, 371(a), 372–374, 379e, 381, 383, 394; 42 U.S.C. 216, 262, 263a, 264, 271.

Subpart A—Current Good Manufacturing Practice Requirements for Combination Products

§ 4.1 What is the scope of this subpart?

This subpart applies to combination products. It establishes which current good manufacturing practice

requirements apply to these products. This subpart clarifies the application of current good manufacturing practice regulations to combination products, and provides a regulatory framework for designing and implementing the current good manufacturing practice operating system at facilities that manufacture co-packaged or single-entity combination products.

§ 4.2 How does FDA define key terms and phrases in this subpart?

The terms listed in this section have the following meanings for purposes of this subpart:

Biological product has the meaning set forth in § 3.2(d) of this chapter. A biological product also meets the definitions of either a drug or device as these terms are defined under this section.

Combination product has the meaning set forth in § 3.2(e) of this chapter.

Constituent part is a drug, device, or biological product that is part of a combination product.

Co-packaged combination product has the meaning set forth in § 3.2(e)(2) of this chapter.

Current good manufacturing practice operating system means the operating system within an establishment that is designed and implemented to address and meet the current good manufacturing practice requirements for a combination product.

Current good manufacturing practice requirements means the requirements set forth under § 4.3(a) through (d).

Device has the meaning set forth in § 3.2(f) of this chapter. A device that is a constituent part of a combination product is considered a finished device within the meaning of the QS regulation.

Drug has the meaning set forth in § 3.2(g) of this chapter. A drug that is a constituent part of a combination product is considered a drug product within the meaning of the drug CGMPs.

Drug CGMPs refers to the current good manufacturing practice regulations set forth in parts 210 and 211 of this chapter.

HCT/Ps refers to human cell, tissue, and cellular and tissue-based products, as defined in § 1271.3(d) of this chapter. An HCT/P that is not solely regulated under section 361 of the Public Health Service Act may be a constituent part of a combination product. Such an HCT/P is subject to part 1271 of this chapter and is also regulated as a drug, device, and/or biological product.

Manufacture includes, but is not limited to, designing, fabricating, assembling, filling, processing, testing, labeling, packaging, repackaging, holding, and storage.

QS regulation refers to the quality system regulation in part 820 of this chapter.

Single-entity combination product has the meaning set forth in § 3.2(e)(1) of this chapter.

Type of constituent part refers to the category of the constituent part, which can be either a biological product, a device, or a drug, as these terms are defined under this section.

§ 4.3 What current good manufacturing practice requirements apply to my combination product?

If you manufacture a combination product, the requirements listed in this section apply as follows:

(a) The current good manufacturing practice requirements in parts 210 and 211 of this chapter apply to a combination product that includes a drug constituent part;

(b) The current good manufacturing practice requirements in part 820 of this chapter apply to a combination product that includes a device constituent part;

(c) The current good manufacturing practice requirements among the requirements (including standards) for biological products in parts 600 through 680 of this chapter apply to a combination product that includes a biological product constituent part to which those requirements would apply if that constituent part were not part of a combination product; and

(d) The current good tissue practice requirements including donor eligibility requirements for HCT/Ps in part 1271 of this chapter apply to a combination product that includes an HCT/P.

§ 4.4 How can I comply with these current good manufacturing practice requirements for a co-packaged or single-entity combination product?

(a) Under this subpart, for single entity or co-packaged combination products, compliance with all applicable current good manufacturing practice requirements for the combination product shall be achieved through the design and implementation of a current good manufacturing practice operating system that is demonstrated to comply with:

(1) The specifics of each set of current good manufacturing practice regulations listed under § 4.3 as they apply to each constituent part included in the combination product; or

(2) Paragraph (b) of this section.

(b) If you elect to establish a current good manufacturing practice operating system in accordance with paragraph (b) of this section, the following requirements apply:

(1) If the combination product includes a device constituent part and a drug constituent part, and the current good manufacturing practice operating system has been shown to comply with the drug CGMPs, the following provisions of the QS regulation must also be shown to have been satisfied; upon demonstration that these requirements have been satisfied, no additional showing of compliance with respect to the QS regulation need be made:

(i) Section 820.20 of this chapter. Management responsibility.

(ii) Section 820.30 of this chapter. Design controls.

(iii) Section 820.50 of this chapter. Purchasing controls.

(iv) Section 820.100 of this chapter. Corrective and preventive action.

(v) Section 820.170 of this chapter. Installation.

(vi) Section 820.200 of this chapter. Servicing.

(2) If the combination product includes a device constituent part and a drug constituent part, and the current good manufacturing practice operating system has been shown to comply with the QS regulation, the following provisions of the drug CGMPs must also be shown to have been satisfied; upon demonstration that these requirements have been satisfied, no additional showing of compliance with respect to the drug CGMPs need be made:

(i) Section 211.84 of this chapter. Testing and approval or rejection of components, drug product containers, and closures.

(ii) Section 211.103 of this chapter. Calculation of yield.

(iii) Section 211.132 of this chapter. Tamper-evident packaging requirements for over-the-counter (OTC) human drug products.

(iv) Section 211.137 of this chapter. Expiration dating.

(v) Section 211.165 of this chapter. Testing and release for distribution.

(vi) Section 211.166 of this chapter. Stability testing.

(vii) Section 211.167 of this chapter. Special testing requirements.

(viii) Section 211.170 of this chapter. Reserve samples.

(3) In addition to being shown to comply with the other applicable manufacturing requirements listed under § 4.3, if the combination product includes a biological product constituent part, the current good manufacturing practice operating system must also be shown to implement and comply with all manufacturing requirements identified under § 4.3(c) that would apply to that biological product if that constituent part were not part of a combination product.

(4) In addition to being shown to comply with the other applicable current good manufacturing practice requirements listed under § 4.3, if the combination product includes an HCT/P, the current good manufacturing practice operating system must also be shown to implement and comply with all current good tissue practice requirements identified under § 4.3(d) that would apply to that HCT/P if it were not part of a combination product.

(c) During any period in which the manufacture of a constituent part to be included in a co-packaged or single entity combination product occurs at a separate facility from the other constituent part(s) to be included in that single-entity or co-packaged combination product, the current good manufacturing practice operating system for that constituent part at that facility must be demonstrated to comply with all current good manufacturing practice requirements applicable to that type of constituent part.

(d) When two or more types of constituent parts to be included in a single-entity or co-packaged combination product have arrived at the same facility, or the manufacture of these constituent parts is proceeding at the same facility, application of a current good manufacturing process operating system that complies with paragraph (b) of this section may begin.

(e) The requirements set forth in this subpart and in parts 210, 211, 820, 600 through 680, and 1271 of this chapter listed in § 4.3, supplement, and do not supersede, each other unless the regulations explicitly provide otherwise. In the event of a conflict between regulations applicable under this subpart to combination products, including their constituent parts, the regulations most specifically applicable to the constituent part in question shall supersede the more general.

Subpart B [Reserved]

Dated: January 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–01068 Filed 1–18–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 573

Compliance and Enforcement

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Correcting amendments.

SUMMARY: On August 9, 2012, the National Indian Gaming Commission (NIGC) published a final rule amending its enforcement regulation to include a graduated pre-enforcement process for voluntary compliance. That rule referenced a rule that was later withdrawn and also incorrectly referenced an internal citation. This publication corrects the error and makes technical amendments to reference the Commission's recently finalized appeal rules contained in a new subchapter.

DATES: *Effective:* February 6, 2013.

FOR FURTHER INFORMATION CONTACT: Maria Getoff, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Email: *maria_getoff@nigc.gov;* telephone: (202) 632–7003.

SUPPLEMENTARY INFORMATION:

I. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission (''Commission'') and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA includes providing a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

On August 9, 2012, the Commission published a final rule amending part 573 (Compliance and Enforcement) to include a graduated pre-enforcement process through which a tribe may come into voluntary compliance. 77 FR 47517, Aug. 9, 2012. The part also sets forth general rules governing the Commission's enforcement of the IGRA, NIGC regulations, and tribal ordinances and resolutions approved by the Chair under 25 CFR part 522.

On September 25, 2012, the Commission published a final rule consolidating all appeal proceedings before the Commission into a new subchapter H (Appeal Proceedings Before the Commission), thereby removing former parts 524, 539, and 577. 77 FR 58941, Sept. 25, 2012. Thus, any reference in part 573 to appeal rights in former part 577 is obsolete and must be revised to reference the new subchapter H.

This document amends the final rule by making two technical amendments and a correction to the final rule to accurately identify referenced regulations. Specifically, this technical amendment amends § 573.4(c)(3) and § 573.5(a) to accurately reference the new subchapter H in place of part 577. Also, this document corrects an error in § 573.2(c) by replacing a cross reference to paragraph ''(b)'' with paragraph ''(a).''

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of $100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the

requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

This rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 2501, *et seq.,* and is therefore not subject to review by the Office of Management and Budget.

List of Subjects in 25 CFR Part 573

Enforcement, Enforcement actions, Gambling, Gaming, Indians, Indian gaming.

Text of the Rules

For the reasons discussed in the Preamble, the Commission corrects its regulations at 25 CFR part 573 as follows:

PART 573—COMPLIANCE AND ENFORCEMENT

■ 1. The authority citation for part 573 continues to read as follows:

Authority: 25 U.S.C. 2706(b)(1); 2713; E.O. 13175, 65 FR 67249, 3 CFR 2000 Comp., p. 304.

■ 2. In § 573.2, revise paragraph (c) to read as follows:

§ 573.2 When may a letter of concern be issued?

* * * * *

(c) A letter of concern issued under paragraph (a) of this section must provide a time period for the respondent to respond. If the letter of concern is resolved without enforcement action, NIGC staff may send an investigation completion letter pursuant to § 571.4 of this chapter.

* * * * *

■ 3. In § 573.4, revise paragraph (c)(3) to read as follows:

§ 573.4 When may the Chair issue an order of temporary closure?

* * * * *

(c) * * *

(3) Whether or not a respondent seeks informal expedited review under this paragraph, within thirty (30) days after the Chair serves an order of temporary closure the respondent may appeal the order to the Commission under subchapter H of this chapter. Otherwise, the order shall remain in effect unless rescinded by the Chair for good cause.

■ 4. In § 573.5, revise paragraph (a) to read as follows:

§ 573.5 When does and enforcement action become final agency action?

* * * * *

(a) A respondent fails to appeal the enforcement action as provided for in subchapter H of this chapter and does not enter into a settlement agreement resolving the matter in its entirety; or

* * * * *

Dated: January 14, 2013, Washington, DC.

Tracie L. Stevens,

Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2013–00946 Filed 1–18–13; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Occupational Exposure to Hazardous Chemicals in Laboratories (Non-Mandatory Appendix); Technical Amendment

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Technical amendment.

SUMMARY: This document updates a non-mandatory appendix in OSHA's Occupational Exposure to Hazardous Chemicals in Laboratories Standard. The non-mandatory appendix is being updated to include the contents of the latest National Academy of Sciences publication entitled, ''Prudent Practices in the Laboratory: Handling and Management of Chemical Hazards,'' 2011 edition. All revisions being made are minor and non-substantive.

DATES: The effective date of this technical amendment to the standard is January 22, 2013.

FOR FURTHER INFORMATION CONTACT:

Press inquiries: Frank Meilinger, Director, Office of Communications, OSHA, U.S. Department of Labor, Room N–3647, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1999.

General and technical information: Andrew Levinson, OSHA Directorate of Standards and Guidance, Office of Biological Hazards, Room N–3718, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–1950.

SUPPLEMENTARY INFORMATION:

Background

When the OSHA Laboratory Standard was published in 1990, the non-mandatory Appendix A was based on the 1981 edition of ''Prudent Practices for Handling Hazardous Chemicals in Laboratories'' and the 1983 edition of ''Prudent Practices for Disposal of Chemicals from Laboratories,'' both published by National Academy Press. Since then, there have been many changes in the culture of safety in laboratories. The National Academies of Science (NAS) recognized these changes and has revised and updated its earlier ''Prudent Practices,'' reflected in the 2011 edition of ''Prudent Practices in the Laboratory: Handling and Management of Chemical Hazards'' (National Academies Press). The 2011 edition of ''Prudent Practices'' is being used by OSHA as the basis for non-mandatory Appendix A because of its wide distribution and acceptance and because of its preparation by recognized authorities in the laboratory community. OSHA has reviewed the 2011 edition and collaborated with the NAS to revise non-mandatory Appendix A. This new revision addresses current laboratory practices, security, and emergency response, as well as promoting safe handling of highly toxic and explosive chemicals and their waste products.

Inapplicability of Public Notice and Delayed Effective Date Requirements

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. OSHA has determined that there is good cause, pursuant to 5 U.S.C. 553(b)(3)(B), Section 6(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655(b)), and 29 CFR 1911.5, for making this technical amendment final without prior proposal and opportunity for comment because the amendment does not modify or revoke existing rights or obligations, and does not establish new rights or obligations. Its revisions are non-mandatory and disseminated for informational purposes only. For the same reasons, the Agency finds good cause under 5 U.S.C. 553(d)(3) to make the amendments effective upon publication.

List of Subjects in 29 CFR Part 1910

Occupational safety and health, Laboratories.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this document.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, OSHA is amending 29 CFR part 1910 by making the following technical amendment:

PART 1910—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

Subpart Z—[Amended]

■ 1. The authority citation for Part 1910 Subpart Z continues to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), 6–96 (62 FR 111), 3–2000 (65 FR 50017), or 5–2007 (72 FR 31159), 4–2010 (75 FR 55355) or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

All of subpart Z issued under section 6(b) of the Occupational Safety and Health Act of 1970, except those substances that have exposure limits listed in Tables Z–1, Z–2, and Z–3 of 29 CFR 1910.1000. The latter were issued under section 6(a) (29 U.S.C. 655(a)).

Section 1910.1000, Tables Z–1, Z–2 and Z–3 also issued under 5 U.S.C. 553, but not under 29 CFR part 1911 except for the arsenic (organic compounds), benzene, cotton dust, and chromium (VI) listings.

Section 1910.1001 also issued under section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3704) and 5 U.S.C. 553.

Section 1910.1002 also issued under 5 U.S.C. 553, but not under 29 U.S.C. 655 or 29 CFR part 1911.

Sections 1910.1018, 1910.1029, and 1910.1200 also issued under 29 U.S.C. 653.

Section 1910.1030 also issued under Pub. L. 106–430, 114 Stat. 1901.

Section 1910.1201 also issued under 49 U.S.C. 1801–1819 and 5 U.S.C. 533.

■ 2. Amend § 1910.1450 by revising Appendix A to read as follows:

§ 1910.1450 Occupational exposure to hazardous chemicals in laboratories.

* * * * *

APPENDIX A TO § 1910.1450—NATIONAL RESEARCH COUNCIL RECOMMENDATIONS CONCERNING CHEMICAL HYGIENE IN LABORATORIES (NON-MANDATORY)

To assist employers in developing an appropriate laboratory Chemical Hygiene Plan (CHP), the following non-mandatory recommendations were based on the National Research Council's (NRC) 2011 edition of ''Prudent Practices in the Laboratory: Handling and Management of Chemical Hazards.'' This reference, henceforth referred to as ''Prudent Practices,'' is available from the National Academies Press, 500 Fifth Street NW., Washington DC 20001 (*www.nap.edu*). ''Prudent Practices'' is cited because of its wide distribution and acceptance and because of its preparation by recognized authorities in the laboratory community through the sponsorship of the NRC. However, these recommendations do not modify any requirements of the OSHA Laboratory standard. This appendix presents pertinent recommendations from ''Prudent Practices,'' organized into a form convenient for quick reference during operation of a laboratory and during development and application of a CHP. For a detailed explanation and justification for each recommendation, consult ''Prudent Practices.''

''Prudent Practices'' deals with both general laboratory safety and many types of chemical hazards, while the Laboratory standard is concerned primarily with chemical health hazards as a result of chemical exposures. The recommendations from ''Prudent Practices'' have been paraphrased, combined, or otherwise reorganized in order to adapt them for this purpose. However, their sense has not been changed.

Section F contains information from the U.S. Chemical Safety Board's (CSB) Fiscal Year 2011 Annual Performance and Accountability report and Section F contains recommendations extracted from the CSB's 2011 case study, ''Texas Tech University Laboratory Explosion,'' available from: *http://www.csb.gov/.*

Culture of Safety

With the promulgation of the Occupational Safety and Health Administration (OSHA) Laboratory standard (29 CFR 1910.1450), a culture of safety consciousness, accountability, organization, and education has developed in industrial, governmental, and academic laboratories. Safety and training programs have been implemented to promote the safe handling of chemicals from ordering to disposal, and to train laboratory personnel in safe practices. Laboratory personnel must realize that the welfare and safety of each individual depends on clearly defined attitudes of teamwork and personal responsibility. Learning to participate in this culture of habitual risk assessment, experiment planning, and consideration of worst-case possibilities—for oneself and one's fellow workers—is as much part of a scientific education as learning the theoretical background of experiments or the step-by-step protocols for doing them in a professional manner. A crucial component of chemical education for all personnel is to nurture basic attitudes and habits of prudent behavior so that safety is a valued and inseparable part of all laboratory activities throughout their career.

Over the years, special techniques have been developed for handling chemicals safely. Local, state, and federal regulations hold institutions that sponsor chemical laboratories accountable for providing safe working environments. Beyond regulation, employers and scientists also hold themselves personally responsible for their own safety, the safety of their colleagues and the safety of the general public. A sound safety organization that is respected by all requires the participation and support of laboratory administrators, workers, and students. A successful health and safety program requires a daily commitment from everyone in the organization. To be most effective, safety and health must be balanced with, and incorporated into, laboratory processes. A strong safety and health culture is the result of positive workplace attitudes—from the chief executive officer to the newest hire; involvement and buy-in of all members of the workforce; mutual, meaningful, and measurable safety and health improvement goals; and policies and procedures that serve as reference tools, rather than obscure rules.

In order to perform their work in a prudent manner, laboratory personnel must consider the health, physical, and environmental hazards of the chemicals they plan to use in an experiment. However, the ability to accurately identify and assess laboratory hazards must be taught and encouraged through training and ongoing organizational support. This training must be at the core of every good health and safety program. For management to lead, personnel to assess worksite hazards, and hazards to be eliminated or controlled, everyone involved must be trained.

A. General Principles

1. Minimize All Chemical Exposures and Risks

Because few laboratory chemicals are without hazards, general precautions for handling all laboratory chemicals should be adopted. In addition to these general guidelines, specific guidelines for chemicals that are used frequently or are particularly hazardous should be adopted.

Laboratory personnel should conduct their work under conditions that minimize the risks from both known and unknown hazardous substances. Before beginning any laboratory work, the hazards and risks associated with an experiment or activity should be determined and the necessary safety precautions implemented. Every laboratory should develop facility-specific policies and procedures for the highest-risk materials and procedures used in their laboratory. To identify these, consideration should be given to past accidents, process conditions, chemicals used in large volumes, and particularly hazardous chemicals.

Perform Risk Assessments for Hazardous Chemicals and Procedures Prior to Laboratory Work:

(a) Identify chemicals to be used, amounts required, and circumstances of use in the experiment. Consider any special employee or laboratory conditions that could create or increase a hazard. Consult sources of safety and health information and experienced scientists to ensure that those conducting the risk assessment have sufficient expertise.

(b) Evaluate the hazards posed by the chemicals and the experimental conditions.

The evaluation should cover toxic, physical, reactive, flammable, explosive, radiation, and biological hazards, as well as any other potential hazards posed by the chemicals.

(c) For a variety of physical and chemical reasons, reaction scale-ups pose special risks, which merit additional prior review and precautions.

(d) Select appropriate controls to minimize risk, including use of engineering controls, administrative controls, and personal protective equipment (PPE) to protect workers from hazards. The controls must ensure that OSHA's Permissible Exposure Limits (PELs) are not exceeded. Prepare for contingencies and be aware of the institutional procedures in the event of emergencies and accidents.

One sample approach to risk assessment is to answer these five questions:

(a) What are the hazards?

(b) What is the worst thing that could happen?

(c) What can be done to prevent this from happening?

(d) What can be done to protect from these hazards?

(e) What should be done if something goes wrong?

2. Avoid Underestimation of Risk

Even for substances of no known significant hazard, exposure should be minimized; when working with substances that present special hazards, special precautions should be taken. Reference should be made to the safety data sheet (SDS) that is provided for each chemical. Unless otherwise known, one should assume that any mixture will be more toxic than its most toxic component and that all substances of unknown toxicity are toxic.

Determine the physical and health hazards associated with chemicals before working with them. This determination may involve consulting literature references, laboratory chemical safety summaries (LCSSs), SDSs, or other reference materials. Consider how the chemicals will be processed and determine whether the changing states or forms will change the nature of the hazard. Review your plan, operating limits, chemical evaluations and detailed risk assessment with other chemists, especially those with experience with similar materials and protocols.

Before working with chemicals, know your facility's policies and procedures for how to handle an accidental spill or fire. Emergency telephone numbers should be posted in a prominent area. Know the location of all safety equipment and the nearest fire alarm and telephone.

3. Adhere to the Hierarchy of Controls

The hierarchy of controls prioritizes intervention strategies based on the premise that the best way to control a hazard is to systematically remove it from the workplace, rather than relying on employees to reduce their exposure. The types of measures that may be used to protect employees (listed from most effective to least effective) are: engineering controls, administrative controls, work practices, and PPE. Engineering controls, such as chemical hoods, physically separate the employee from the hazard. Administrative controls, such as employee scheduling, are established by management to help minimize the employees' exposure time to hazardous chemicals. Work practice controls are tasks that are performed in a designated way to minimize or eliminate hazards. Personal protective equipment and apparel are additional protection provided under special circumstances and when exposure is unavoidable.

Face and eye protection is necessary to prevent ingestion and skin absorption of hazardous chemicals. At a minimum, safety glasses, with side shields, should be used for all laboratory work. Chemical splash goggles are more appropriate than regular safety glasses to protect against hazards such as projectiles, as well as when working with glassware under reduced or elevated pressures (e.g., sealed tube reactions), when handling potentially explosive compounds (particularly during distillations), and when using glassware in high-temperature operations. Do not allow laboratory chemicals to come in contact with skin. Select gloves carefully to ensure that they are impervious to the chemicals being used and are of correct thickness to allow reasonable dexterity while also ensuring adequate barrier protection.

Lab coats and gloves should be worn when working with hazardous materials in a laboratory. Wear closed-toe shoes and long pants or other clothing that covers the legs when in a laboratory where hazardous chemicals are used. Additional protective clothing should be used when there is significant potential for skin-contact exposure to chemicals. The protective characteristics of this clothing must be matched to the hazard. Never wear gloves or laboratory coats outside the laboratory or into areas where food is stored and consumed.

4. Provide Laboratory Ventilation

The best way to prevent exposure to airborne substances is to prevent their escape into the working atmosphere by the use of hoods and other ventilation devices. To determine the best choice for laboratory ventilation using engineering controls for personal protection, employers are referred to Table 9.3 of the 2011 edition of ''Prudent Practices.'' Laboratory chemical hoods are the most important components used to protect laboratory personnel from exposure to hazardous chemicals.

(a) Toxic or corrosive chemicals that require vented storage should be stored in vented cabinets instead of in a chemical hood.

(b) Chemical waste should not be disposed of by evaporation in a chemical hood.

(c) Keep chemical hood areas clean and free of debris at all times.

(d) Solid objects and materials, such as paper, should be prevented from entering the exhaust ducts as they can reduce the air flow.

(e) Chemical hoods should be maintained, monitored and routinely tested for proper performance.

A laboratory ventilation system should include the following characteristics and practices:

(a) Heating and cooling should be adequate for the comfort of workers and operation of equipment. Before modification of any building HVAC, the impact on laboratory or hood ventilation should be considered, as well as how laboratory ventilation changes may affect the building HVAC.

(b) A negative pressure differential should exist between the amount of air exhausted from the laboratory and the amount supplied to the laboratory to prevent uncontrolled chemical vapors from leaving the laboratory.

(c) Local exhaust ventilation devices should be appropriate to the materials and operations in the laboratory.

(d) The air in chemical laboratories should be continuously replaced so that concentrations of odoriferous or toxic substances do not increase during the workday.

(e) Laboratory air should not be recirculated but exhausted directly outdoors.

(f) Air pressure should be negative with respect to the rest of the building. Local capture equipment and systems should be designed only by an experienced engineer or industrial hygienist.

(g) Ventilation systems should be inspected and maintained on a regular basis. There should be no areas where air remains static or areas that have unusually high airflow velocities.

Before work begins, laboratory workers should be provided with proper training that includes how to use the ventilation equipment, how to ensure that it is functioning properly, the consequences of improper use, what to do in the event of a system failure or power outage, special considerations, and the importance of signage and postings.

5. Institute a Chemical Hygiene Program

A comprehensive chemical hygiene program is required. It should be designed to minimize exposures, injuries, illnesses and incidents. There should be a regular, continuing effort that includes program oversight, safe facilities, chemical hygiene planning, training, emergency preparedness and chemical security. The chemical hygiene program must be reviewed annually and updated as necessary whenever new processes, chemicals, or equipment is implemented. Its recommendations should be followed in all laboratories.

6. Observe the PELs and TLVs

OSHA's Permissible Exposure Limits (PELs) must not be exceeded. The American Conference of Governmental Industrial Hygienists' Threshold Limit Values (TLVs) should also not be exceeded.

B. Responsibilities

Persons responsible for chemical hygiene include, but are not limited to, the following:

1. Chemical Hygiene Officer

(a) Establishes, maintains, and revises the chemical hygiene plan (CHP).

(b) Creates and revises safety rules and regulations.

(c) Monitors procurement, use, storage, and disposal of chemicals.

(d) Conducts regular inspections of the laboratories, preparations rooms, and chemical storage rooms, and submits detailed laboratory inspection reports to administration.

(e) Maintains inspection, personnel training, and inventory records.

(f) Assists laboratory supervisors in developing and maintaining adequate facilities.

(g) Seeks ways to improve the chemical hygiene program.

2. Department Chairperson or Director

(a) Assumes responsibility for personnel engaged in the laboratory use of hazardous chemicals.

(b) Provides the chemical hygiene officer (CHO) with the support necessary to implement and maintain the CHP.

(c) After receipt of laboratory inspection report from the CHO, meets with laboratory supervisors to discuss cited violations and to ensure timely actions to protect trained laboratory personnel and facilities and to ensure that the department remains in compliance with all applicable federal, state, university, local and departmental codes and regulations.

(d) Provides budgetary arrangements to ensure the health and safety of the departmental personnel, visitors, and students.

3. Departmental Safety Committee reviews accident reports and makes appropriate recommendations to the department chairperson regarding proposed changes in the laboratory procedures.

4. Laboratory Supervisor or Principal Investigator has overall responsibility for chemical hygiene in the laboratory, including responsibility to:

(a) Ensure that laboratory personnel comply with the departmental CHP and do not operate equipment or handle hazardous chemicals without proper training and authorization.

(b) Always wear personal protective equipment (PPE) that is compatible to the degree of hazard of the chemical.

(c) Follow all pertinent safety rules when working in the laboratory to set an example.

(d) Review laboratory procedures for potential safety problems before assigning to other laboratory personnel.

(e) Ensure that visitors follow the laboratory rules and assumes responsibility for laboratory visitors.

(f) Ensure that PPE is available and properly used by each laboratory employee and visitor.

(g) Maintain and implement safe laboratory practices.

(h) Provide regular, formal chemical hygiene and housekeeping inspections, including routine inspections of emergency equipment;

(i) Monitor the facilities and the chemical fume hoods to ensure that they are maintained and function properly. Contact the appropriate person, as designated by the department chairperson, to report problems with the facilities or the chemical fume hoods.

5. Laboratory Personnel

(a) Read, understand, and follow all safety rules and regulations that apply to the work area;

(b) Plan and conduct each operation in accordance with the institutional chemical hygiene procedures;

(c) Promote good housekeeping practices in the laboratory or work area.

(d) Notify the supervisor of any hazardous conditions or unsafe work practices in the work area.

(e) Use PPE as appropriate for each procedure that involves hazardous chemicals.

C. The Laboratory Facility

General Laboratory Design Considerations

Wet chemical spaces and those with a higher degree of hazard should be separated from other spaces by a wall or protective barrier wherever possible. If the areas cannot be separated, then workers in lower hazard spaces may require additional protection from the hazards in connected spaces.

1. Laboratory Layout and Furnishing

(a) Work surfaces should be chemically resistant, smooth, and easy to clean.

(b) Hand washing sinks for hazardous materials may require elbow, foot, or electronic controls for safe operation.

(c) Wet laboratory areas should have chemically resistant, impermeable, slip-resistant flooring.

(d) Walls should be finished with a material that is easy to clean and maintain.

(e) Doors should have view panels to prevent accidents and should open in the direction of egress.

(f) Operable windows should not be present in laboratories, particularly if there are chemical hoods or other local ventilation systems present.

2. Safety Equipment and Utilities

(a) An adequate number and placement of safety showers, eyewash units, and fire extinguishers should be provided for the laboratory.

(b) Use of water sprinkler systems is resisted by some laboratories because of the presence of electrical equipment or water-reactive materials, but it is still generally safer to have sprinkler systems installed. A fire large enough to trigger the sprinkler system would have the potential to cause far more destruction than the local water damage.

D. Chemical Hygiene Plan (CHP)

The OSHA Laboratory standard defines a CHP as ''a written program developed and implemented by the employer which sets forth procedures, equipment, personal protective equipment and work practices that are capable of protecting employees from the health hazards presented by hazardous chemicals used in that particular workplace.'' (29 CFR 1910.1450(b)). The Laboratory Standard requires a CHP: ''Where hazardous chemicals as defined by this standard are used in the workplace, the employer shall develop and carry out the provisions of a written Chemical Hygiene Plan.'' (29 CFR 1910.1450(e)(1)). The CHP is the foundation of the laboratory safety program and must be reviewed and updated, as needed, and at least on an annual basis to reflect changes in policies and personnel. A CHP should be facility specific and can assist in promoting a culture of safety to protect workers from exposure to hazardous materials.

1. The Laboratory's CHP must be readily available to workers and capable of protecting workers from health hazards and minimizing exposure. Include the following topics in the CHP:

(a) Individual chemical hygiene responsibilities;

(b) Standard operating procedures;

(c) Personal protective equipment, engineering controls and apparel;

(d) Laboratory equipment;

(e) Safety equipment;

(f) Chemical management;

(g) Housekeeping;

(h) Emergency procedures for accidents and spills;

(i) Chemical waste;

(j) Training;

(k) Safety rules and regulations;

(l) Laboratory design and ventilation;

(m) Exposure monitoring;

(n) Compressed gas safety;

(o) Medical consultation and examination.

It should be noted that the nature of laboratory work may necessitate addressing biological safety, radiation safety and security issues.

2. Chemical Procurement, Distribution, and Storage

Prudent chemical management includes the following processes:

Chemical Procurement:

(a) Information on proper handling, storage, and disposal should be known to those who will be involved before a substance is received.

(b) Only containers with adequate identifying labels should be accepted.

(c) Ideally, a central location should be used for receiving all chemical shipments.

(d) Shipments with breakage or leakage should be refused or opened in a chemical hood.

(e) Only the minimum amount of the chemical needed to perform the planned work should be ordered.

(f) Purchases of high risk chemicals should be reviewed and approved by the CHO.

(g) Proper protective equipment and handling and storage procedures should be in place before receiving a shipment.

Chemical Storage:

(a) Chemicals should be separated and stored according to hazard category and compatibility.

(b) SDS and label information should be followed for storage requirements.

(c) Maintain existing labels on incoming containers of chemicals and other materials.

(d) Labels on containers used for storing hazardous chemicals must include the chemical identification and appropriate hazard warnings.

(e) The contents of all other chemical containers and transfer vessels, including, but not limited to, beakers, flasks, reaction vessels, and process equipment, should be properly identified.

(f) Chemical shipments should be dated upon receipt and stock rotated.

(g) Peroxide formers should be dated upon receipt, again dated upon opening, and stored away from heat and light with tight-fitting, nonmetal lids.

(h) Open shelves used for chemical storage should be secured to the wall and contain ¾-inch lips. Secondary containment devices should be used as necessary.

(i) Consult the SDS and keep incompatibles separate during transport, storage, use, and disposal.

(j) Oxidizers, reducing agents, and fuels should be stored separately to prevent contact in the event of an accident.

(k) Chemicals should not be stored in the chemical hood, on the floor, in areas of egress, on the benchtop, or in areas near heat or in direct sunlight.

(l) Laboratory-grade, flammable-rated refrigerators and freezers should be used to store sealed chemical containers of flammable liquids that require cool storage. Do not store food or beverages in the laboratory refrigerator.

(m) Highly hazardous chemicals should be stored in a well-ventilated and secure area designated for that purpose.

(n) Flammable chemicals should be stored in a spark-free environment and in approved flammable-liquid containers and storage cabinets. Grounding and bonding should be used to prevent static charge buildups when dispensing solvents.

(o) Chemical storage and handling rooms should be controlled-access areas. They should have proper ventilation, appropriate signage, diked floors, and fire suppression systems.

Chemical Handling:

(a) As described above, a risk assessment should be conducted prior to beginning work with any hazardous chemical for the first time.

(b) All SDS and label information should be read before using a chemical for the first time.

(c) Trained laboratory workers should ensure that proper engineering controls (ventilation) and PPE are in place.

Chemical Inventory:

(a) Prudent management of chemicals in any laboratory is greatly facilitated by keeping an accurate inventory of the chemicals stored.

(b) Unneeded items should be discarded or returned to the storeroom.

Transporting Chemicals:

(a) Secondary containment devices should be used when transporting chemicals.

(b) When transporting chemicals outside of the laboratory or between stockrooms and laboratories, the transport container should be break-resistant.

(c) High-traffic areas should be avoided.

Transferring Chemicals:

(a) Use adequate ventilation (such as a fume hood) when transferring even a small amount of a particularly hazardous substance (PHS).

(b) While drum storage is not appropriate for laboratories, chemical stockrooms may purchase drum quantities of solvents used in high volumes. Ground and bond the drum and receiving vessel when transferring flammable liquids from a drum to prevent static charge buildup.

(c) If chemicals from commercial sources are repackaged into transfer vessels, the new containers should be labeled with all essential information on the original container.

Shipping Chemicals: Outgoing chemical shipments must meet all applicable Department of Transportation (DOT) regulations and should be authorized and handled by the institutional shipper.

3. Waste Management

A waste management plan should be in place before work begins on any laboratory activity. The plan should utilize the following hierarchy of practices:

(a) Reduce waste sources. The best approach to minimize waste generation is by reducing the scale of operations, reducing its formation during operations, and, if possible, substituting less hazardous chemicals for a particular operation.

(b) Reuse surplus materials. Only the amount of material necessary for an experiment should be purchased, and, if possible, materials should be reused.

(c) Recycle waste. If waste cannot be prevented or minimized, the organization should consider recycling chemicals that can be safely recovered or used as fuel.

(d) Dispose of waste properly. Sink disposal may not be appropriate. Proper waste disposal methods include incineration, treatment, and land disposal. The organization's environmental health and safety (EHS) office should be consulted in determining which methods are appropriate for different types of waste.

Collection and Storage of Waste:

(a) Chemical waste should be accumulated at or near the point of generation, under the control of laboratory workers.

(b) Each waste type should be stored in a compatible container pending transfer or disposal. Waste containers should be clearly labeled and kept sealed when not in use.

(c) Incompatible waste types should be kept separate to ensure that heat generation, gas evolution, or another reaction does not occur.

(d) Waste containers should be segregated by how they will be managed. Waste containers should be stored in a designated location that does not interfere with normal laboratory operations. Ventilated storage and secondary containment may be appropriate for certain waste types.

(e) Waste containers should be clearly labeled and kept sealed when not in use. Labels should include the accumulation start date and hazard warnings as appropriate.

(f) Non-explosive electrical systems, grounding and bonding between floors and containers, and non-sparking conductive floors and containers should be used in the central waste accumulation area to minimize fire and explosion hazards. Fire suppression systems, specialized ventilation systems, and dikes should be installed in the central waste accumulation area. Waste management workers should be trained in proper waste handling procedures as well as contingency planning and emergency response. Trained laboratory workers most familiar with the waste should be actively involved in waste management decisions to ensure that the waste is managed safely and efficiently. Engineering controls should be implemented as necessary, and personal protective equipment should be worn by workers involved in waste management.

4. Inspection Program

Maintenance and regular inspection of laboratory equipment are essential parts of the laboratory safety program. Management should participate in the design of a laboratory inspection program to ensure that the facility is safe and healthy, workers are adequately trained, and proper procedures are being followed.

Types of inspections: The program should include an appropriate combination of routine inspections, self-audits, program audits, peer inspections, EHS inspections, and inspections by external entities.

Elements of an inspection:

(a) Inspectors should bring a checklist to ensure that all issues are covered and a camera to document issues that require correction.

(b) Conversations with workers should occur during the inspection, as they can provide valuable information and allow inspectors an opportunity to show workers how to fix problems.

(c) Issues resolved during the inspection should be noted.

(d) An inspection report containing all findings and recommendations should be prepared for management and other appropriate workers.

(e) Management should follow-up on the inspection to ensure that all corrections are implemented.

5. Medical Consultation and Examination

The employer must provide all employees who work with hazardous chemicals an opportunity to receive medical attention, including any follow-up examinations that the examining physician determines to be necessary, whenever an employee develops signs or symptoms associated with a hazardous chemical to which the employee may have been exposed in the laboratory. If an employee encounters a spill, leak, explosion or other occurrence resulting in the likelihood of a hazardous exposure, the affected employee must be provided an opportunity for a medical consultation by a licensed physician. All medical examinations and consultations must be performed by or under the direct supervision of a licensed physician and must be provided without cost to the employee, without loss of pay and at a reasonable time and place. The identity of the hazardous chemical, a description of the incident, and any signs and symptoms that the employee may experience must be relayed to the physician.

6. Records

All accident, fatality, illness, injury, and medical records and exposure monitoring records must be retained by the institution in accordance with the requirements of state and federal regulations (see 29 CFR part 1904 and § 1910.1450(j)). Any exposure monitoring results must be provided to affected laboratory staff within 15 working days after receipt of the results (29 CFR 1910.1450(d)(4)).

7. Signs

Prominent signs of the following types should be posted:

(a) Emergency telephone numbers of emergency personnel/facilities, supervisors, and laboratory workers;

(b) Location signs for safety showers, eyewash stations, other safety and first aid equipment, and exits; and

(c) Warnings at areas or equipment where special or unusual hazards exist.

8. Spills and Accidents

Before beginning an experiment, know your facility's policies and procedures for how to handle an accidental release of a hazardous substance, a spill or a fire. Emergency response planning and training are especially important when working with highly toxic compounds. Emergency telephone numbers should be posted in a prominent area. Know the location of all safety equipment and the nearest fire alarm and telephone. Know who to notify in the event of an emergency. Be prepared to provide basic emergency treatment. Keep your co-workers informed of your activities so they can respond appropriately. Safety equipment, including spill control kits, safety shields, fire safety equipment, PPE, safety showers and eyewash units, and emergency equipment should be available in well-marked highly visible locations in all chemical laboratories. The laboratory supervisor or CHO is responsible for ensuring that all personnel are aware of the locations of fire extinguishers and are trained in their use. After an extinguisher has been used, designated personnel must promptly recharge or replace it (29 CFR 1910.157(c)(4)). The laboratory supervisor or CHO is also responsible for ensuring proper training and providing supplementary equipment as needed.

Special care must be used when handling solutions of chemicals in syringes with needles. Do not recap needles, especially when they have been in contact with chemicals. Remove the needle and discard it immediately after use in the appropriate sharps containers. Blunt-tip needles are available from a number of commercial sources and should be used unless a sharp needle is required to puncture rubber septa or for subcutaneous injection.

For unattended operations, laboratory lights should be left on, and signs should be posted to identify the nature of the experiment and the hazardous substances in use. Arrangements should be made, if possible, for other workers to periodically inspect the operation. Information should be clearly posted indicating who to contact in the event of an emergency. Depending on the nature of the hazard, special rules, precautions, and alert systems may be necessary.

9. Training and Information

Personnel training at all levels within the organization, is essential. Responsibility and accountability throughout the organization are key elements in a strong safety and health program. The employer is required to provide employees with information and training to ensure that they are apprised of the hazards of chemicals present in their work area (29 CFR 1910.1450(f)). This information must be provided at the time of an employee's initial assignment to a work area where hazardous chemicals are present and prior to assignments involving new exposure situations. The frequency of refresher information and training should be determined by the employer. At a minimum, laboratory personnel should be trained on their facility's specific CHP, methods and observations that may be used to detect the presence or release of a hazardous chemical (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous chemicals when being released), the physical and health hazards of chemicals in the work area and means to protect themselves from these hazards. Trained laboratory personnel must know shut-off procedures in case of an emergency. All SDSs must be made available to the employees.

E. General Procedures for Working With Chemicals

The risk of laboratory injuries can be reduced through adequate training, improved engineering, good housekeeping, safe work practice and personal behavior.

1. General Rules for Laboratory Work With Chemicals

(a) Assigned work schedules should be followed unless a deviation is authorized by the laboratory supervisor.

(b) Unauthorized experiments should not be performed.

(c) Plan safety procedures before beginning any operation.

(d) Follow standard operating procedures at all times.

(e) Always read the SDS and label before using a chemical.

(f) Wear appropriate PPE at all times.

(g) To protect your skin from splashes, spills and drips, always wear long pants and closed-toe shoes.

(h) Use appropriate ventilation when working with hazardous chemicals.

(i) Pipetting should never be done by mouth.

(j) Hands should be washed with soap and water immediately after working with any laboratory chemicals, even if gloves have been worn.

(k) Eating, drinking, smoking, gum chewing, applying cosmetics, and taking medicine in laboratories where hazardous chemicals are used or stored should be strictly prohibited.

(l) Food, beverages, cups, and other drinking and eating utensils should not be stored in areas where hazardous chemicals are handled or stored.

(m) Laboratory refrigerators, ice chests, cold rooms, and ovens should not be used for food storage or preparation.

(n) Contact the laboratory supervisor, Principal Investigator, CHO or EHS office with all safety questions or concerns.

(o) Know the location and proper use of safety equipment.

(p) Maintain situational awareness.

(q) Make others aware of special hazards associated with your work.

(r) Notify supervisors of chemical sensitivities or allergies.

(s) Report all injuries, accidents, incidents, and near misses.

(t) Unauthorized persons should not be allowed in the laboratory.

(u) Report unsafe conditions to the laboratory supervisor or CHO.

(v) Properly dispose of chemical wastes.

Working Alone in the Laboratory

Working alone in a laboratory is dangerous and should be strictly avoided. There have been many tragic accidents that illustrate this danger. Accidents are unexpected by definition, which is why coworkers should always be present. Workers should coordinate schedules to avoid working alone.

Housekeeping

Housekeeping can help reduce or eliminate a number of laboratory hazards. Proper housekeeping includes appropriate labeling and storage of chemicals, safe and regular cleaning of the facility, and proper arrangement of laboratory equipment.

2. Nanoparticles and Nanomaterials

Nanoparticles and nanomaterials have different reactivities and interactions with biological systems than bulk materials, and understanding and exploiting these differences is an active area of research. However, these differences also mean that the risks and hazards associated with exposure to engineered nanomaterials are not well known. Because this is an area of ongoing research, consult trusted sources for the most up to date information available. Note that the higher reactivity of many nanoscale materials suggests that they should be treated as potential sources of ignition, accelerants, and fuel that could result in fire or explosion. Easily dispersed dry nanomaterials may pose the greatest health hazard because of the risk of inhalation. Operations involving these nanomaterials deserve more attention and more stringent controls than those where the nanomaterials are embedded in solid or suspended in liquid matrixes.

Consideration should be given to all possible routes of exposure to nanomaterials including inhalation, ingestion, injection, and dermal contact (including eye and mucous membranes). Avoid handling nanomaterials in the open air in a free-particle state. Whenever possible, handle and store dispersible nanomaterials, whether suspended in liquids or in a dry particle form, in closed (tightly-sealed) containers. Unless cutting or grinding occurs, nanomaterials that are not in a free form (encapsulated in a solid or a nanocomposite) typically will not require engineering controls. If a synthesis is being performed to create nanomaterials, it is not enough to only consider the final material in the risk assessment, but consider the hazardous properties of the precursor materials as well.

To minimize laboratory personnel exposure, conduct any work that could generate engineered nanoparticles in an enclosure that operates at a negative pressure differential compared to the laboratory personnel breathing zone. Limited data exist regarding the efficacy of PPE and ventilation systems against exposure to nanoparticles. However, until further information is available, it is prudent to follow standard chemical hygiene practices. Conduct a hazard evaluation to determine PPE appropriate for the level of hazard according to the requirements set forth in OSHA's Personal Protective Equipment standard (29 CFR 1910.132).

3. Highly Toxic and Explosive/Reactive Chemicals/Materials

The use of highly toxic and explosive/reactive chemicals and materials has been an area of growing concern. The frequency of academic laboratory incidents in the U.S. is an area of significant concern for the Chemical Safety Board (CSB). The CSB issued a case study on an explosion at Texas Tech University in Lubbock, Texas, which severely injured a graduate student handling a high-energy metal compound. Since 2001, the CSB has gathered preliminary information on 120 different university laboratory incidents that resulted in 87 evacuations, 96 injuries, and three deaths.

It is recommended that each facility keep a detailed inventory of highly toxic chemicals and explosive/reactive materials. There should be a record of the date of receipt, amount, location, and responsible individual for all acquisitions, syntheses, and disposal of these chemicals. A physical inventory should be performed annually to verify active inventory records. There should be a procedure in place to report security breaches, inventory discrepancies, losses, diversions, or suspected thefts.

Procedures for disposal of highly toxic materials should be established before any experiments begin, possibly even before the chemicals are ordered. The procedures should address methods for decontamination of any laboratory equipment that comes into contact with highly toxic chemicals. All waste should be accumulated in clearly labeled impervious containers that are stored in unbreakable secondary containment.

Highly reactive and explosive materials that may be used in the laboratory require appropriate procedures and training. An explosion can occur when a material undergoes a rapid reaction that results in a violent release of energy. Such reactions can happen spontaneously and can produce pressures, gases, and fumes that are hazardous. Some reagents pose a risk on contact with the atmosphere. It is prudent laboratory practice to use a safer alternative whenever possible.

If at all possible, substitutes for highly acute, chronic, explosive, or reactive chemicals should be considered prior to beginning work and used whenever possible.

4. Compressed Gas

Compressed gases expose laboratory personnel to both chemical and physical hazards. It is essential that these are monitored for leaks and have the proper labeling. By monitoring compressed gas inventories and disposing of or returning gases for which there is no immediate need, the laboratory can substantially reduce these risks. Leaking gas cylinders can cause serious hazards that may require an immediate evacuation of the area and activation of the emergency response system. Only appropriately trained hazmat responders may respond to stop a leaking gas cylinder under this situation.

F. Safety Recommendations—Physical Hazards

Physical hazards in the laboratory include combustible liquids, compressed gases, reactives, explosives and flammable chemicals, as well as high pressure/energy procedures, sharp objects and moving equipment. Injuries can result from bodily contact with rotating or moving objects, including mechanical equipment, parts, and devices. Personnel should not wear loose-fitting clothing, jewelry, or unrestrained long hair around machinery with moving parts.

The Chemical Safety Board has identified the following key lessons for laboratories that address both physical and other hazards:

(1) Ensure that research-specific hazards are evaluated and then controlled by developing specific written protocols and training.

(2) Expand existing laboratory safety plans to ensure that all safety hazards, including physical hazards of chemicals, are addressed.

(3) Ensure that the organization's EHS office reports directly to an identified individual/office with organizational authority to implement safety improvements.

(4) Develop a verification program that ensures that the safety provisions of the CHP are communicated, followed, and enforced at all levels within the organization.

(5) Document and communicate all laboratory near-misses and previous incidents to track safety, provide opportunities for education and improvement to drive safety changes at the university.

(6) Manage the hazards unique to laboratory chemical research in the academic environment. Utilize available practice guidance that identifies and describes methodologies to assess and control hazards.

(7) Written safety protocols and training are necessary to manage laboratory risk.

G. Emergency Planning

In addition to laboratory safety issues, laboratory personnel should be familiar with established facility policies and procedures regarding emergency situations. Topics may include, but are not limited to:

(1) Evacuation procedures—when it is appropriate and alternate routes;

(2) Emergency shutdown procedures—equipment shutdown and materials that should be stored safely;

(3) Communications during an emergency—what to expect, how to report, where to call or look for information;

(4) How and when to use a fire extinguisher;

(5) Security issues—preventing tailgating and unauthorized access;

(6) Protocol for absences due to travel restrictions or illness;

(7) Safe practices for power outage;

(8) Shelter in place—when it is appropriate;

(9) Handling suspicious mail or phone calls;

(10) Laboratory-specific protocols relating to emergency planning and response;

(11) Handling violent behavior in the workplace; and

(12) First-aid and CPR training, including automated external defibrillator training if available.

It is prudent that laboratory personnel are also trained in how to respond to short-term, long-term and large-scale emergencies. Laboratory security can play a role in reducing the likelihood of some emergencies and assisting in preparation and response for others. Every institution, department, and individual laboratory should consider having an emergency preparedness plan. The level of detail of the plan will vary depending on the function of the group and institutional planning efforts already in place.

Emergency planning is a dynamic process. As personnel, operations, and events change, plans will need to be updated and modified. To determine the type and level of emergency planning needed, laboratory personnel need to perform a vulnerability assessment. Periodic drills to assist in training and evaluation of the emergency plan are recommended as part of the training program.

H. Emergency Procedures

(1) Fire alarm policy. Most organizations use fire alarms whenever a building needs to be evacuated—for any reason. When a fire alarm sounds in the facility, evacuate immediately after extinguishing all equipment flames. Check on and assist others who may require help evacuating.

(2) Emergency safety equipment. The following safety elements should be met:

a. A written emergency action plan has been provided to workers;

b. Fire extinguishers, eyewash units, and safety showers are available and tested on a regular basis; and

c. Fire blankets, first-aid equipment, fire alarms, and telephones are available and accessible.

(3) Chemical spills. Workers should contact the CHO or EHS office for instructions before cleaning up a chemical spill. All SDS and label instructions should be followed, and appropriate PPE should be worn during spill cleanup.

(4) Accident procedures. In the event of an accident, immediately notify appropriate personnel and local emergency responders. Provide an SDS of any chemical involved to the attending physician. Complete an accident report and submit it to the appropriate office or individual within 24 hours.

(5) Employee safety training program. New workers should attend safety training before they begin any activities. Additional training should be provided when they advance in their duties or are required to perform a task for the first time. Training documents should be recorded and maintained. Training should include hands-on instruction of how to use safety equipment appropriately.

(6) Conduct drills. Practice building evacuations, including the use of alternate routes. Practice shelter-in-place, including plans for extended stays. Walk the fastest route from your work area to the nearest fire alarm, emergency eye wash and emergency shower. Learn how each is activated. In the excitement of an actual emergency, people rely on what they learned from drills, practice and training.

(7) Contingency plans. All laboratories should have long-term contingency plans in place (e.g., for pandemics). Scheduling, workload, utilities and alternate work sites may need to be considered.

I. Laboratory Security

Laboratory security has evolved in the past decade, reducing the likelihood of some emergencies and assisting in preparation and response for others. Most security measures are based on the laboratory's vulnerability. Risks to laboratory security include, but are not limited to:

(1) Theft or diversion of chemicals, biologicals, and radioactive or proprietary materials, mission-critical or high-value equipment;

(2) Threats from activist groups;

(3) Intentional release of, or exposure to, hazardous materials;

(4) Sabotage or vandalism of chemicals or high-value equipment;

(5) Loss or release of sensitive information; and

(6) Rogue work or unauthorized laboratory experimentation. Security systems in the laboratory are used to detect and respond to a security breach, or a potential security breach, as well as to delay criminal activity by imposing multiple layered barriers of increasing stringency. A good laboratory security system will increase overall safety for laboratory personnel and the public, improve emergency preparedness by assisting with preplanning, and lower the organization's liability by incorporating more rigorous planning, staffing, training, and command systems and implementing emergency communications protocols, drills, background checks, card access systems, video surveillance, and other measures. The security plan should clearly delineate response to security issues, including the coordination of institution and laboratory personnel with both internal and external responders.

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[FR Doc. 2013–00788 Filed 1–18–13; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–1097]

RIN 1625–AA00

Safety Zone; Sellwood Bridge Move; Willamette River, Portland, OR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing of a temporary safety zone around the Sellwood Bridge, located on the Willamette River in Portland, Oregon, while it is being relocated 66 feet downriver as part of the new Sellwood Bridge construction project. This action is necessary to ensure the safety of persons and vessels transiting the Willamette River in the vicinity of the Sellwood Bridge as it is being moved. This safety zone will also allow full maneuverability for construction operations in this area during the bridge movement operation. The safety zone will be effective for two days, but will only be enforced as long as is necessary to complete the bridge movement.

DATES: This rule is effective from 12:01 a.m. on January 19, 2013 to 11:59 p.m. on January 20, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–1097]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Ian P. McPhillips, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast Guard; telephone (503) 240–9319, email *D13-SG-M-MSUPORTLANDWWM@uscg.mil.* If you have questions on viewing or submitting material to 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 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 to do so would be impracticable as the Coast Guard received a late notification of the event. The reason for the late notification was that the date of the bridge move could be set only after an exact date of the completion of the two structures was established. Additionally, because of the complexity of moving the bridge in one piece to new abutments and piers, the construction team could not reschedule the move.

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** because to do otherwise would be impracticable as the Coast Guard received a notification of the event one month prior to it. The bridge construction contractor was constrained by the completion of the temporary structures and the availability of the subcontractor conducting the actual bridge move, so the date of the move could not be established any earlier.

B. Basis and Purpose

The Sellwood Bridge Move is part of the Sellwood Bridge Project to replace the existing 86-year-old bridge that is structurally inadequate and functionally obsolete. The project includes moving the bridge 66 feet north and building two temporary structures. A safety zone is needed to help ensure the safety of persons and vessels transiting the area from any overhead hazards created during the bridge move.

C. Discussion of the Final Rule

This rule establishes a safety zone that covers the waters of the Willamette River, extending 100 feet upriver and 160 feet downriver of the Sellwood Bridge and to the east and west shorelines. This safety zone prohibits all vessel traffic for the duration of the bridge move with the exception of emergency vessels. A passage through the safety zone for commercial vessels may be requested with a four-hour advance notice through the Captain of the Port by contacting the Sector Columbia River Command Center at (503) 861–6211, or the Patrol Commander on VHF Channel 23.

This safety zone encompasses an existing safety zone along the east and west shorelines of the Sellwood Bridge (See Sellwood Bridge Project, Docket No. USCG–2012–0131), which was established for the entire duration of the construction of the new bridge, expected to be completed in July 2015. This safety zone will be effective on January 19 and 20, 2013. We note that upon the expiration of this safety zone, the Sellwood Bridge Project safety zone will continue to remain in place.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and

executive orders related to rulemaking. Below we summarize our analyses based on these statutes and 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. Although the safety zone would apply to the entire width of the river, the effect of this rule will not be significant because: (i) The safety zone is limited in size; (ii) traffic would be allowed to pass through the zone with the permission of the Captain of the Port; (iii) all river users in the area have been notified of the date and time of the temporary closure; and (iv) before the activation of the zone, the Coast Guard will issue maritime advisories widely available to users in the river.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. Although the safety zone would apply to the entire width of the river, this rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zone is limited in size; (ii) traffic would be allowed to pass through the zone with the permission of the Captain of the Port; (iii) all known river users in the area have been notified of the date and time of the temporary closure; and (iv) before enforcing the zone, the Coast Guard will issue maritime advisories widely available to users in the river.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

7. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. Technical Standards

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

14. 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 temporary safety

zone around the Sellwood Bridge on the Willamette River in Portland, OR. This rule 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, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 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.T13–238 to read as follows:

§ 165.T13.238 Safety Zone; Sellwood Bridge Move; Willamette River, Portland, OR.

(a) *Location.* The following area is a safety zone: All waters of the Willamette River around the Sellwood bridge in Portland, OR bounded by a line beginning at the west shoreline north of the Sellwood bridge at 45°27′54″ N, 122°40′01″ W; thence to the east at 45°27′54″ N, 122°39′52″ W; thence to the east shoreline south of the Sellwood bridge at 45°27′52″ N, 122°39′49″ W; thence to the west at 45°27′52″ N, 122°40′01″ W; thence north along the west shoreline to the point of origin.

(b) *Enforcement Periods.* The Coast Guard Sector Columbia River Captain of the Port will cause notice of the enforcement of this safety zone to be made by all appropriate means to effect the widest publicity among the affected segments of the public as practicable, in accordance with 33 CFR 165.7. Such means of notification may include, but are not limited to, Broadcast Notices to Mariners or Local Notices to Mariners. The Sector Columbia River Captain of the Port will issue a Broadcast Notice to Mariners and Local Notice to Mariners notifying the public when enforcement of the safety zone is suspended. Upon notice of enforcement by the Sector Columbia River Captain of the Port, the Coast Guard will enforce the safety zone in accordance with rules set out in this section. Upon notice of suspension of enforcement by the Sector Columbia River Captain of the Port, all persons and vessels are authorized to enter, transit, and exit the safety zone, consistent with the Navigation Rules.

(c) *Regulations.* In accordance with the general regulations in § 165.23 of this part, no person or vessel may enter or remain in this zone unless authorized by the Captain of the Port or his designated representatives. To request transit through this zone contact the Sector Columbia River Command Center at (503) 861–6211, or the Patrol Commander on VHF Channel 23.

Dated: January 7, 2013.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Sector Columbia River.

[FR Doc. 2013–01139 Filed 1–18–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2012–0738; FRL–9772–9]

RIN 2050–AG73

National Oil and Hazardous Substances Pollution Contingency Plan; Revision To Increase Public Availability of the Administrative Record File

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: Because EPA received adverse comment, we are withdrawing the direct final rule for *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File,* published on November 7, 2012.

DATES: Effective January 22, 2013, EPA withdraws the direct final rule published at 77 FR 66729 on November 7, 2012.

FOR FURTHER INFORMATION CONTACT: For general information, contact Melissa Dreyfus at (703) 603–8792 (*dreyfus.melissa@epa.gov*), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460–0002, Mail Code 5204P.

SUPPLEMENTARY INFORMATION: Because EPA received adverse comment, we are withdrawing the direct final rule for *National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File,* published on November 7, 2012 (77 FR 66729). We stated in that direct final rule that if we received adverse comment by December 7, 2012, the direct final rule would not take effect and we would publish a timely withdrawal in the **Federal Register**. We subsequently received adverse comment on that direct final rule, which we plan to address in a subsequent final rulemaking based on the parallel proposed rule also published on November 7, 2012 (77 FR 66783). As stated in the direct final rule and the parallel proposed rule, we will not institute a second comment period on this action.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: January 15, 2013.

Mathy Stanislaus,

Assistant Administrator, Office of Solid Waste and Emergency Response.

Accordingly, EPA withdraws the amendment to 40 CFR 300.805(c), published in the **Federal Register** on November 7, 2012 (77 FR 66729), as of January 22, 2013.

[FR Doc. 2013–01191 Filed 1–18–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0784; FRL–9770–4]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Requirements for Determining General Conformity of Federal Actions to Applicable State Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the West Virginia State Implementation Plan (SIP). The SIP revision consists of a legislative rule adopted by West Virginia to amend its prior general conformity rule for the purpose of incorporating revisions to Federal general conformity requirements established under rules promulgated by

EPA in July of 2006 and in April of 2010. EPA is approving West Virginia's SIP revision to amend its general conformity SIP to comply with recent changes in Federal general conformity requirements. This rulemaking action is in accordance with the requirements of the Clean Air Act (CAA).

DATES: This rule is effective on March 25, 2013 without further notice, unless EPA receives adverse written comment by February 21, 2013. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0784 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: mastro.donna@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0784, Donna Mastro, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0784. EPA's policy is that all comments received 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 information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy 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 West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, (215) 814–2176, or by email at *rehn.brian@epa.gov.*

SUPPLEMENTARY INFORMATION: The following outline is provided to aid in locating information in this preamble.

I. General Conformity Requirements and Affect on Air Quality

The intent of the general conformity requirement is to prevent the air quality impacts of Federal actions from causing or contributing to a violation of a National Ambient Air Quality Standard (NAAQS) or interfering with the purpose of a SIP. Under the CAA as amended in 1990, Congress recognized that actions taken by Federal agencies could affect states' and local agencies' abilities to attain and maintain the NAAQS. Section 176(c) of the CAA requires Federal agencies to assure that their actions conform to the applicable SIP for attaining and maintaining compliance with the NAAQS. General conformity is defined to apply to NAAQS established pursuant to section 109 of the CAA, including NAAQS for carbon monoxide (CO), nitrogen dioxide (NO_2), ozone, particulate matter, and sulfur dioxide (SO_2). Because certain provisions of section 176(c) of the CAA apply only to highway and mass transit funding and approval actions, EPA published two sets of regulations to implement section 176(c) of the CAA—one set for transportation conformity and one set for general conformity. The Federal General Conformity Requirements Rule was published in the November 30, 1993 edition of the **Federal Register** (58 FR 63214) and codified in the Code of Federal Regulations at 40 CFR 93.150.

EPA revised the Federal General Conformity Requirements Rule via a final rule issued in the April 5, 2006 edition of the **Federal Register** (71 FR 17003). EPA had promulgated a new NAAQS July 18, 1997 (62 FR 38652) that established a separate NAAQS for fine particulate matter smaller than 2.5 micrometers in diameter ($PM_{2.5}$). The prior coarse particulate matter NAAQS promulgated in 1997 pertains to particulate matter smaller than 10 micrometers in diameter (PM_{10}). EPA's 2006 revision to the Federal General Conformity Requirements Rule added requirements for $PM_{2.5}$ for the first time, including annual emission limits of $PM_{2.5}$ above which covered Federal actions in NAAQS nonattainment or maintenance areas would be subject to general conformity applicability.

On April 5, 2010, EPA revisited the Federal General Conformity Requirements Rule to clarify the conformity process, authorize innovative and flexible compliance approaches, remove outdated or unnecessary requirements, reduce the paperwork burden, provide transition tools for implementing new standards, address issues raised by Federal agencies affected by the rules, and provide a better explanation of conformity regulations and policies. EPA's April 2010 revised rule simplified state SIP requirements for general conformity, eliminating duplicative general conformity provisions codified at 40 CFR part 93, Subpart B and 40 CFR part 51, Subpart W. Finally, the April 2010 revision updated the Federal General Conformity Requirements Rule to reflect changes to governing laws passed by Congress since EPA's 1993 rule. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) passed by Congress in 1995 contains a provision eliminating the CAA requirement for states to adopt general conformity SIPs. As a result of

SAFETEA–LU, EPA's April 2010 rule eliminated the Federal regulatory requirement for states to adopt and submit general conformity SIPs, instead making submission of a general conformity SIP a state option.

II. West Virginia's General Conformity SIP Revision

On June 6, 2012, West Virginia submitted a formal revision to its SIP. The SIP revision submittal consists of an amendment to West Virginia's legislative rule (Title 45 of the Consolidated Statute of Regulations Series 35, entitled ''Determining Conformity of General Federal Actions to Applicable Implementation Plans'') that establishes criteria and procedures for use by Federal agencies in determining whether a planned Federal action conforms to the applicable SIP (also referred to as ''general conformity.'' The purpose of the SIP revision is to amend West Virginia's general conformity requirements through a legislative rule adopted by West Virginia for purposes of incorporating recent changes made to Federal general conformity requirements, which are at 40 CFR Part 93, Subpart B (effective July 6, 2010).

The SIP revision submittal includes a revision of West Virginia's 1995 legislative rule under Title 45, Series 35 of the Code of State Rules (45CSR35). The revised State rule 45CSR35, now titled ''Determining Conformity of General Federal Actions to Applicable Implementation Plans (General Conformity)'' with a State effective date of June 1, 2012, has been updated to incorporate by reference the most recent Federal general conformity rules at 40 CFR part 93, Subpart B that were effective June 1, 2011.

West Virginia's legislative rule has also been updated to slightly revise several definitions, including ''Applicable implementation plan'' and ''Applicable SIP.'' Several terms no longer used in 45CSR35 were deleted, including ''Director,'' ''Division of Environmental Protection,'' ''State Governor,'' ''State and Local Air Agencies,'' and ''State Agency.'' Definitions were added for the terms ''Clean Air Act'' and ''Secretary.'' The legislative rule amending 45CSR35 also adds requirements that require a Federal agency to make a determination that a Federal action conforms to the applicable SIP before the action is taken. In the event an action would result in emissions that originate in more than one nonattainment or maintenance area, conformity must be evaluated for each area separately. Finally, a conformity determination under 40 CFR Part 93, Subpart B does not exempt the action from any other requirements of the applicable SIP, the CAA, or the National Environmental Policy Act (NEPA).

A prior version of West Virginia's general conformity rule (45CSR35), which became State effective May 1, 1995, was approved by EPA as part of the West Virginia SIP via a final rule published on September 5, 1995 (60 FR 46029). West Virginia's June 6, 2012 SIP revision submittal, which is the subject of this rulemaking action, supersedes the prior approved West Virginia general conformity SIP.

III. EPA Action

EPA has reviewed West Virginia's June 6, 2012 SIP revision submittal and found this revision to be in compliance with section 176(c) of the CAA and with the related requirements of the Federal General Conformity Requirements Rule, codified at 40 CFR Part 93, Subpart B. West Virginia's SIP revision serves to reduce the impact of Federal actions (not otherwise subject to transportation conformity, which is addressed under a separate provision in the West Virginia SIP), and will prevent subject Federal actions from causing or contributing to a new violation of a NAAQS, interfering with attainment or maintenance of a NAAQS, or otherwise interfering with the West Virginia SIP.

West Virginia's June 6, 2012 SIP revision meets the requirements set forth in section 110 of the CAA with respect to adoption and submission of SIP revisions. The approval of West Virginia's general conformity SIP revision will strengthen the West Virginia SIP and will assist the state in complying with Federal NAAQS.

Therefore, EPA is approving West Virginia's revision to its general conformity SIP to comply with the most recent Federal General Conformity Requirements Rule. EPA is publishing this rule without prior proposal because it constitutes a noncontroversial amendment and EPA anticipates no adverse comment. However, in the ''Proposed Rules'' section of today's **Federal Register**, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision if adverse comments are filed. This rule will be effective on March 25, 2013 without further notice unless EPA receives adverse comment by February 21, 2013. If EPA receives adverse comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that the rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this rulemaking action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using

practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action to approve West Virginia's general conformity rule must be filed in the United States Court of Appeals for the appropriate circuit by March 25, 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 to approve West Virginia's general conformity SIP revision 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, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 19, 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 XX—West Virginia

■ 2. In § 52.2520, the table in paragraph (c) is amended by revising the heading of 45 CSR Series 35 and by:

■ a. Revising the entries for 45–35–1 through 45–35–4; and

■ b. Adding a new entry in numerical order for 45–35–5.

The revised and added text reads as follows:

§ 52.2520 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE WEST VIRGINIA SIP

State citation	Title/subject	State effective date	EPA approval date	Additional explanation/ citation at 40 CFR 52.2565
*	*	*	*	*
[45 CSR] Series 35	Determining Conformity of General Federal Actions to Applicable Implementation Plans (General Conformity)			
Section 45–35–1	General	6/1/12	1/22/13 [*Insert page number where the document begins*].	
Section 45–35–2	Definitions	6/1/12	1/22/13 [*Insert page number where the document begins*].	
Section 45–35–3	Requirements	6/1/12	1/22/13 [*Insert page number where the document begins*].	
Section 45–35–4	Adoption of Requirements	6/1/12	1/22/13 [*Insert page number where the document begins*].	
Section 45–35–5	Inconsistency Between Rules	6/1/12	1/22/13 [*Insert page number where the document begins*].	

* * * * *

[FR Doc. 2013–00710 Filed 1–18–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2009–0710; FRL–9770–9]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving the submittal from the State of New Mexico pursuant to the Clean Air Act (CAA or Act) that addresses the infrastructure elements specified in the CAA necessary to implement, maintain, and enforce the 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS or standard). The submittal addresses the infrastructure elements specified in the CAA necessary to implement, maintain and enforce the 2006 $PM_{2.5}$ NAAQS. We find that the current New Mexico State Implementation Plan (SIP) contains the infrastructure elements for the 2006 $PM_{2.5}$ NAAQS.

DATES: This final rule is effective on February 21, 2013.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R06–OAR–2009–0710. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. John Walser, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–7128; fax number 214–665–6762; email address *walser.john@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means EPA.

Table of Contents

I. Background

The background for today's action is discussed in detail in our October 12, 2012 proposal (77 FR 62191). In that notice we proposed to approve the submittal from New Mexico that addresses the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 2006 $PM_{2.5}$ standards. The submittal is dated June 12, 2009. We proposed to find that the following section 110(a)(2) elements are contained in the current New Mexico SIP and provide the infrastructure for implementing the 2006 $PM_{2.5}$ standards: Emission limits and other control measures (section 110(a)(2)(A)); ambient air quality monitoring/data system (section 110(a)(2)(B)); the program for enforcement of control measures (section 110(a)(2)(C)); international and interstate pollution abatement (section 110(a)(2)(D)(ii)); adequate resources (section 110(a)(2)(E)); stationary source monitoring system (section 110(a)(2)(F)); emergency power (section 110(a)(2)(G)); future SIP revisions (section 110(a)(2)(H)); consultation with government officials (section 110(a)(2)(J)); public notification (section 110(a)(2)(J)); prevention of significant deterioration (PSD) and visibility protection (section 110(a)(2)(J)); air quality modeling data (section 110(a)(2)(K)); permitting fees (section 110(a)(2)(L)); and consultation/participation by affected local entities (section 110(a)(2)(M)).

In addition, we proposed to find that New Mexico has adequately addressed one of the four required elements (or prongs) of CAA section 110(a)(2)(D)(i), the element which requires that the SIP prohibit air emissions from sources within a state from interfering with measures required to prevent significant deterioration of air quality in any other state. We are determining that emissions from sources in New Mexico (excluding Bernalillo County and Indian country) do not interfere with measures to prevent significant deterioration of air quality in any other state for the 2006 $PM_{2.5}$ NAAQS (CAA section 110(a)(2)(D)(i)(II)).

Our October 12, 2012 proposal provides a detailed description of all relevant submittals and the rationale for EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period for this action closed on November 13, 2012, and we did not receive any comments. In a separate concurrent action also dated October 12, 2012, EPA proposed approval of SIP revisions that revised the state's PSD and Nonattainment New Source Review (NNSR) permitting regulations to address the requirements necessary to implement the 2006 $PM_{2.5}$ NAAQS (see Docket ID EPA–R06–OAR–2011–033). That action will be finalized on or before this final action to allow full approval of the CAA section 110(a)(2)(c) infrastructure requirements.

II. Final Action

We are approving the submittal provided by the State of New Mexico to demonstrate that the New Mexico SIP meets the infrastructure elements for the 2006 $PM_{2.5}$ NAAQS listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);

Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);

Program for enforcement of control measures (110(a)(2)(C) of the Act);

Interstate and international transport (110(a)(2)(D)(ii) of the Act);

Adequate resources (110(a)(2)(E) of the Act);

Stationary source monitoring system (110(a)(2)(F) of the Act);

Emergency power (110(a)(2)(G) of the Act);

Future SIP revisions (110(a)(2)(H) of the Act);

Consultation with government officials (110(a)(2)(J) of the Act);

Public notification (110(a)(2)(J) of the Act);

Prevention of significant deterioration and visibility protection (110(a)(2)(J) of the Act);

Air quality modeling data (110(a)(2)(K) of the Act);

Permitting fees (110(a)(2)(L) of the Act); and

Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

We are approving the portion of the New Mexico submittal that addresses the requirement of section (110)(a)(2)(D)(i)(II) of the Act that emissions from sources in New Mexico do not interfere with measures required in the SIP of any other state under part C of the Act regarding PSD for the 2006 $PM_{2.5}$ NAAQS.

EPA is approving these revisions in accordance with section 110 and part C of the Act and EPA's regulations and consistent with EPA guidance. EPA's approval does not extend to areas within Indian country as defined in 18 U.S.C. Section 1151. EPA, or eligible Indian tribes, as appropriate, will retain jurisdiction and responsibilities under the Clean Air Act, Section 110 within Indian country.

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, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 25, 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 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: January 3, 2013.

Ron Curry,

Regional Administrator, Region 6.

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 GG—New Mexico

■ 2. Section 52.1620(e) is amended by adding a new entry at the end of the second table entitled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the New Mexico SIP'' to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE NEW MEXICO SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/ effective date	EPA approval date	Explanation
* *	* *	*	* *	*
Infrastructure for 2006 $PM_{2.5}$ and Interstate Transport regarding noninterference with other states' programs for PSD for the 2006 $PM_{2.5}$ NAAQS.	Statewide, except for Bernalillo County and Indian country.	6/12/2009	1/22/2013 [Insert FR page number where document begins].	Approval for 110(a)(2)(A), (B), (C), (D)(i)(II) (PSD portion), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

[FR Doc. 2013–00731 Filed 1–18–13; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0033; FRL–9770–8]

Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving revisions to the New Mexico SIP to update the New Mexico NNSR and PSD SIP permitting programs consistent with federal requirements. EPA finds that these revisions to the New Mexico SIP meet the Federal Clean Air Act (the Act or CAA) and EPA regulations, and are consistent with EPA policies. New Mexico submitted the PSD and NNSR SIP permitting revisions in two SIP submittals on June 11, 2009 and May 23, 2011. EPA is finalizing this action under section 110 and parts C and D of the Act.

DATES: This final rule will be effective February 21, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2011–0033. All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202.

The State submittal is also available for public inspection during official business hours by appointment: New Mexico Environment Department, Air Quality Bureau, 1301 Siler Road, Building B, Santa Fe, New Mexico 87502.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–2115; fax number 214–665–6762; email address *wiley.adina@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' means EPA.

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I. Background for Final Action

The background for today's action is discussed in detail in our October 12, 2012 proposal (77 FR 62200). In that notice we proposed to approve portions of two submittals from New Mexico, dated June 11, 2009 and May 23, 2011, that update the New Mexico Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) permitting SIP rules consistent with federal requirements. Specifically, these SIP submittals address federal PSD and NNSR permitting requirements promulgated in EPA's Phase 2 8-hour Ozone Implementation Rule (70 FR 71612, November 29, 2005), NSR $PM_{2.5}$ Rule (73 FR 28321, May 16, 2008), $PM_{2.5}$ PSD Increment—Significant Impact Levels (SILs)—Significant Monitoring Concentration (SMC) Rule (75 FR 64864, October 20, 2010) and Reasonable Possibility in Recordkeeping Rule (72 FR 72607, December 21, 2007).

Our October 12, 2012 proposal provides a detailed description of all relevant submittals and the rationale for EPA's proposed actions, together with a discussion of the opportunity to comment. The public comment period closed for this action on November 13, 2012; we did not receive any comments.

II. Final Action

EPA is approving portions of two revisions to the New Mexico SIP submitted by the Governor of New Mexico on June 11, 2009 and May 23, 2011. EPA has made the determination that the submitted regulations are approvable in accordance with section 110 and parts C and D of the Act and EPA's regulations, and consistent with EPA guidance. EPA is approving revisions to Part 74 of the New Mexico Administrative Code (NMAC), Title 20 (Environment Protection), Chapter 2 (Air Quality) except for revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011. EPA is approving revisions to Part 79 NMAC, Title 20, Chapter 2 submitted on June 11, 2009 and May 23, 2011.

Specifically, EPA is approving the following revisions to Part 74 submitted on May 23, 2011. These revisions satisfy

the $PM_{2.5}$ PSD requirements under EPA's May 16, 2008 and October 20, 2010 final $PM_{2.5}$ PSD permitting implementation rules, and EPA's December 21, 2007 Reasonable Possibility in Recordkeeping Rule.

- 20.2.74.7 NMAC—Definitions;
- 20.2.74.300 NMAC—Obligations of Owners or Operators of Sources;
- 20.2.74.303 NMAC—Ambient Impact Requirements;
- 20.2.74.306 NMAC—Monitoring Requirements;
- 20.2.74.403 NMAC—Additional Requirements for Sources Impacting Class I Federal Areas;
- 20.2.74.502 NMAC—Significant Emission Rates;
- 20.2.74.503 NMAC—Significant Monitoring Concentrations;
- 20.2.74.504 NMAC—Allowable PSD Increment; and
- 20.2.74.505 NMAC—Maximum Allowable Increases for Class I Waivers.

EPA is approving the following revisions to Part 79 submitted June 11, 2009. These revisions satisfy EPA's November 29, 2005 Phase 2 8-hour Ozone Implementation Rule for nonattainment areas.

- 20.2.79.7 NMAC—Definitions;
- 20.2.79.109 NMAC—Applicability; and
- 20.2.79.115 NMAC—Emission Offsets.

EPA is also approving the following revisions to Part 79 submitted May 23, 2011. These revisions satisfy EPA's $PM_{2.5}$ NNSR requirements under EPA's May 16, 2008 and October 20, 2010 final $PM_{2.5}$ NSR permitting implementation rules, and the December 21, 2007 Reasonable Possibility in Recordkeeping Rule. New Mexico also made some nonsubstantive changes in 2011 to 20.2.79.109 NMAC as adopted and submitted in 2009, and we are approving these nonsubstantive changes.

- 20.2.79.7 NMAC—Definitions;
- 20.2.79.109 NMAC—Applicability; and
- 20.2.79.119 NMAC—Tables.

EPA explained in the proposal for this action that it is severing the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011 relating to $PM_{2.5}$ significant impact levels (SILs). These revisions are equivalent to the provisions EPA has requested the DC Circuit Court in pending litigation to remand and vacate at 40 CFR 51.166(k)(2) that were promulgated on October 20, 2010, and conflict with our intentions for the use of SILs to demonstrate compliance with CAA section 163(a). (*Sierra Club* v. *EPA,* Case No 10–1413, DC Circuit). Therefore, 20.2.74.303 NMAC as adopted by NMED on January 1, 2011, and SIP-approved by EPA on July 20, 2011, remains the SIP-approved section. See 76 FR 43149. The NMED continues to retain the ability to implement the $PM_{2.5}$ SILs at 20.2.79.119 NMAC consistent with EPA's interpretation of CAA section 163(a). Further, the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011, will remain before EPA for review. EPA will revisit these submitted revisions after the court addresses EPA's request for remand with vacatur or EPA initiates rulemaking to revise 40 CFR 51.166(k)(2).

III. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after its 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 March 25, 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 may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Particulate matter, Reporting and recordkeeping requirements.

Dated: January 3, 2013.

Ron Curry,

Regional Administrator, Region 6.

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 GG—New Mexico

■ 2. Section 52.1620(c) is amended by revising the entries for Parts 74 and 79 under the first table titled ''New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality''.

The revisions read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED NEW MEXICO REGULATIONS

State citation	Title/subject	State approval/ effective date	EPA approval date	Comments
New Mexico Administrative Code (NMAC) Title 20—Environment Protection Chapter 2—Air Quality				
* * *	* * *	* * *	* * *	* * *
Part 74	Permits—Prevention of Significant Deterioration.	6/3/2011	1/22/2013 [Insert *FR* page number where document begins].	Revisions to 20.2.74.303(A) NMAC submitted 5/23/2011, effective 6/3/2011, are *NOT* part of SIP. 20.2.74.303 NMAC submitted 12/1/2010, effective 1/1/2011, remains SIP approved (6/20/2011, 76 FR 43149).
* * *	* * *	* * *	* * *	* * *
Part 79	Permits—Nonattainment Areas.	6/3/2011	1/22/2013 [Insert *FR* page number where document begins].	
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[FR Doc. 2013–00729 Filed 1–18–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2011–0114; FRL–9771–9]

Approval, Disapproval and Promulgation of State Implementation Plans; State of Utah; Regional Haze Rule Requirements for Mandatory Class I Areas Under 40 CFR 51.309; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: The EPA is supplementing the preamble to the final rule that appeared in the **Federal Register** on December 14, 2012. This final rule partially approved and partially disapproved a State Implementation Plan (SIP) revision submitted by the State of Utah on May 26, 2011 that addresses regional haze. The final rule preamble inadvertently did not include language pertaining to judicial review, and this document adds that language.

DATES: Effective on January 14, 2013.

FOR FURTHER INFORMATION CONTACT: Laurel Dygowski, Air Program, Mailcode 8P–AR, Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado 80202–1129, (303) 312–6144, *dygowski.laurel@epa.gov*.

SUPPLEMENTARY INFORMATION: In **Federal Register** document 2012–29406 published in the **Federal Register** on December 14, 2012 (77 FR 74355), the following corrections are made:

1. On page 74372, in the first column, in section V. *Statutory and Executive Order Reviews,* paragraph L. is added to read as follows: ''*L. Judicial Review*—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 March 25, 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 may not be challenged later in proceedings to enforce its requirements. (See CAA section 307(b)(2).)''

Dated: December 20, 2012.

James B. Martin,

Regional Administrator, Region 8.

[FR Doc. 2013–01081 Filed 1–18–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R04–OAR–2011–0316; FRL–9771–1]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; Alabama; Redesignation of the Birmingham 1997 Annual Fine Particulate Matter Nonattainment Area to Attainment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve a request submitted on May 2, 2011, from the State of Alabama, through the Alabama Department of Environmental Management (ADEM), Air Division, to redesignate the Birmingham fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter referred to as the ''Birmingham Area'' or

''Area'') to attainment for the 1997 Annual $PM_{2.5}$ national ambient air quality standards (NAAQS). The Birmingham 1997 Annual $PM_{2.5}$ nonattainment area is comprised of Jefferson and Shelby Counties in their entireties and a portion of Walker County. EPA's approval of the redesignation request is based on the determination that the State of Alabama has met the criteria for redesignation to attainment set forth in the Clean Air Act (CAA or Act), including the determination that the Birmingham Area has attained the 1997 Annual $PM_{2.5}$ NAAQS. Additionally, EPA is approving a revision to the Alabama state implementation plan (SIP) to include the 1997 Annual $PM_{2.5}$ maintenance plan for the Birmingham Area that contains the new 2024 motor vehicle emission budgets (MVEBs) for nitrogen oxides (NO_X) and $PM_{2.5}$. This action also approves the 2009 emissions inventory submitted with the maintenance plan.

DATES: *Effective Date:* This rule will be effective on February 21, 2013.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2011–0316. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Joel Huey, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Joel Huey may be reached by phone at (404) 562–9104 or via electronic mail at *huey.joel@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. What is the background for the actions?

As stated in our proposed approval notice published on November 10, 2011 (76 FR 70078), this redesignation action addresses the Birmingham Area's status solely with respect to the 1997 Annual $PM_{2.5}$ NAAQS, for which designations were finalized on January 5, 2005 (70 FR 944) and April 14, 2005 (70 FR 19844). On May 2, 2011, the State of Alabama, through ADEM, submitted a request to redesignate the Birmingham Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS and for EPA approval of the Alabama SIP revisions containing a maintenance plan for the Area. In the November 10, 2011, notice, EPA proposed to take the following three separate but related actions, some of which involve multiple elements: (1) To redesignate the Birmingham Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS, provided EPA approves the emissions inventory submitted with the maintenance plan; (2) to approve into the Alabama SIP, under section 175A of the CAA, Alabama's 1997 Annual $PM_{2.5}$ NAAQS maintenance plan, including the associated MVEBs; and (3) to approve, under CAA section 172(c)(3), the emissions inventory submitted with the maintenance plan. No comments were received on the proposed action. EPA is now taking final action on the three actions identified above. Additional background for today's action, and other details regarding the proposed redesignation, is set forth in EPA's November 10, 2011, proposal and is summarized below. The following information also: (1) Affirms that the most recent available ambient monitoring data continue to support this redesignation action, (2) summarizes the NO_X and $PM_{2.5}$ MVEBs for the year 2024 for the Birmingham Area, and (3) provides additional information on events that have occurred since the November 10, 2011, proposal.

With regard to the data, EPA has reviewed the most recent ambient monitoring data, which indicate that the Birmingham Area continues to attain the 1997 Annual $PM_{2.5}$ NAAQS beyond the 3-year attainment period of 2008–2010, which was provided with Alabama's May 2, 2011, submittal and request for redesignation. As stated in EPA's November 10, 2011, proposal notice, the 3-year design value of 13.7 $\mu g/m^3$ for 2008–2010 meets the NAAQS of 15.0 $\mu g/m^3$. Quality assured and certified data now in EPA's Air Quality System (AQS) for 2011 provide a 3-year design value of 12.9 $\mu g/m^3$ for 2009–2011. Furthermore, preliminary monitoring data for 2012 indicate that the Area is continuing to attain the 1997 Annual $PM_{2.5}$ NAAQS. The 2012 preliminary data are available in AQS although are not yet quality assured and certified.

The MVEBs, specified in tons per year (tpy), included in the maintenance plan are as shown in Table 1 below. In the November 10, 2011, proposed action, EPA noted that the period for public comment on the adequacy of these MVEBs (as contained in Alabama's submittal) began on March 24, 2011, and closed on April 25, 2011. No comments were received during the public comment period. Through this final action, EPA is finding the 2024 NO_X and $PM_{2.5}$ MVEBs adequate for transportation conformity purposes and finalizing the approval of the budgets.

TABLE 1—BIRMINGHAM AREA $PM_{2.5}$ NO_X MVEBS

[tpy]

	$PM_{2.5}$	NO_X
2024 On-road Mobile Emissions	335.70	8,738.39
Safety Margin Allocated to MVEBs	106.37	7,243.11
2024 Conformity MVEBs	442.07	15,981.50

In the November 10, 2011, proposed redesignation of the Birmingham Area, EPA proposed to determine that the emission reduction requirements that contributed to attainment of the 1997 Annual $PM_{2.5}$ standard in the

nonattainment area could be considered permanent and enforceable. *See* 76 FR at 70092, 70097–70099. At the time of proposal, EPA noted that the requirements of the Clean Air Interstate Rule (CAIR),[1] which had been in place since 2005, were to be replaced, starting in 2012, by the requirements in the then recently promulgated Cross-State Air Pollution Rule (CSAPR), 76 FR 48208 (August 8, 2011). CSAPR included regulatory changes to sunset (i.e., discontinue) the CAIR requirements for control periods in 2012 and beyond. *See* 76 FR at 48322. Although Alabama's redesignation request and maintenance plan included reductions associated with CAIR, EPA proposed to approve the request based in part on the fact that CSAPR achieved similar or greater reductions in the relevant areas in 2012 and beyond. *See* 76 FR at 70092, 70097–70099. Because CSAPR requirements were expected to replace the CAIR requirements starting in 2012, EPA considered the impact of CSAPR related reductions on the Birmingham Area. On this basis, EPA proposed to determine that, pursuant to CAA section 107(d)(3)(E)(iii), the pollutant transport part of the reductions that led to attainment in the Birmingham Area could be considered permanent and enforceable. *See* 76 FR at 70079, 70084–70086.

On December 30, 2011, shortly after EPA's proposed approval of the Birmingham redesignation, the D.C. Circuit issued an order addressing the status of CSAPR and CAIR in response to motions filed by numerous parties seeking a stay of CSAPR pending judicial review. In that order, the court stayed CSAPR pending resolution of the petitions for review of that rule in *EME Homer City Generation, L.P.* v. *EPA* (No. 11–1302 and consolidated cases), also referred to as *EME Homer City.* The court also indicated that EPA was expected to continue to administer CAIR in the interim until judicial review of CSAPR was completed. Subsequently, on August 21, 2012, the D.C. Circuit issued a decision in *EME Homer City* to vacate and remand CSAPR and to keep CAIR in place. Specifically, the court ordered EPA to continue administering CAIR pending the promulgation of a valid replacement. *EME Homer City Generation, L.P.* v. *EPA,* 696 F.3d 7, 38 (D.C. Cir. 2012). The D.C. Circuit has not yet issued the final mandate in *EME Homer City* as EPA (as well as several intervenors) petitioned for rehearing *en banc,* asking the full court to review the decision. While rehearing proceedings are pending, EPA intends to act in accordance with the panel opinion in the *EME Homer City* opinion.

Subsequent to the *EME Homer City* opinion, EPA published several proposals to redesignate both particulate matter and ozone nonattainment areas to attainment. These proposals explained the legal status of CAIR and CSAPR, and provided a basis on which EPA would consider emissions reductions associated with CAIR to be permanent and enforceable for redesignation purposes, pursuant to CAA section 107(d)(3)(D)(iii). In those actions, EPA explained that in light of the August 21, 2012, order by the D.C. Circuit, CAIR remains in place and enforceable until substituted by a ''valid'' replacement rule. *See, e.g.,* 77 FR 69409 (November 19, 2012); 77 FR 68087 (November 15, 2012).

Alabama's May 2, 2011, SIP submittal supporting its redesignation request includes CAIR as a control measure, which became state-effective on April 3, 2007, and was approved by EPA on October 1, 2007, for the purpose of reducing SO_2 and NO_X emissions. *See* 72 FR 55659. Due to the legal status of CSAPR at the time that EPA proposed approval of Alabama's May 2, 2011, redesignation submittal, EPA was able to rely on CSAPR related reductions. EPA also recognized that the monitoring data used to demonstrate the Birmingham Area's attainment of the 1997 Annual $PM_{2.5}$ NAAQS included reductions associated with CAIR. Due to the uncertainty regarding the legal status of CAIR when Alabama provided its submittal on May 2, 2011, the State's analysis assumed that no additional reductions in SO_2 or NO_X emissions from utilities would occur above and beyond those achieved through 2012 as a result of CAIR. To the extent that the Alabama submittal relies on CAIR reductions that occurred through 2012, the recent directive from the D.C. Circuit in *EME Homer City* ensures that the reductions associated with CAIR will be permanent and enforceable for the necessary time period for purposes of CAA section 107(d)(3)(E)(iii). EPA has been ordered by the court to develop a new rule, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process; states have had an opportunity to draft and submit SIPs; EPA has reviewed the SIPs to determine if they can be approved; and EPA has taken action on the SIPs, including promulgating a Federal Implementation Plan, if appropriate. The court's clear instruction to EPA is that it must continue to administer CAIR until a ''valid replacement'' exists, and thus CAIR reductions may be relied upon until the necessary actions are taken by EPA and states to administer CAIR's replacement. Furthermore, the court's instruction provides an additional backstop; by definition, any rule that replaces CAIR and meets the court's direction would require upwind states to have SIPs that eliminate significant contributions to downwind nonattainment and prevent interference with maintenance in downwind areas.

Further, in deciding to vacate CSAPR and to require EPA to continue administering CAIR, the D.C. Circuit emphasized that the consequences of vacating CAIR ''might be more severe now in light of the reliance interests accumulated over the intervening four years.'' *EME Homer City,* 696 F.3d at 38. The accumulated reliance interests include the interests of states who reasonably assumed they could rely on reductions associated with CAIR, which brought certain nonattainment areas into attainment with the NAAQS. If EPA were prevented from relying on reductions associated with CAIR in redesignation actions, states would be forced to impose additional, redundant reductions on top of those achieved by CAIR. EPA believes this is precisely the type of irrational result the court sought to avoid by ordering EPA to continue administering CAIR. For these reasons also, EPA believes it is appropriate to allow states to rely on CAIR, and the existing emissions reductions achieved by CAIR, as sufficiently permanent and enforceable for purposes such as redesignation. Following promulgation of the replacement rule, EPA will review SIPs as appropriate to identify whether there are any issues that need to be addressed.

In light of these unique circumstances and for the reasons explained above, EPA is approving the redesignation request and the related SIP revision for Jefferson and Shelby Counties in their entireties and a portion of Walker County in Alabama, including Alabama's plan for maintaining attainment of the 1997 Annual $PM_{2.5}$ NAAQS in the Birmingham Area. EPA

[1] On May 12, 2005, EPA published CAIR, which requires significant reductions in emissions of sulfur dioxide (SO_2) and NO_X from electric generating units to limit the interstate transport of these pollutants and the ozone and fine particulate matter they form in the atmosphere. *See 70 FR 25162. The* U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) initially vacated CAIR, *North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur to preserve the environmental benefits provided by CAIR, *North Carolina* v. *EPA,* 550 F.3d 1176, 1178 (D.C. Cir. 2008).

continues to implement CAIR in accordance with current direction from the court, and thus CAIR is in place and enforceable, and will remain so, until substituted by a valid replacement rule. Alabama's SIP revision lists CAIR as a control measure, which became state-effective on April 3, 2007, and was approved by EPA on October 1, 2007, for the purpose of reducing SO_2 and NO_X emissions. The monitoring data used to demonstrate the Area's attainment of the 1997 Annual $PM_{2.5}$ NAAQS by the April 2010 attainment deadline was impacted by CAIR.

II. What are the actions EPA is taking?

In today's rulemaking, EPA is approving: (1) A change to the legal designation of the Birmingham Area from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS; (2) under CAA section 175A, Alabama's 1997 Annual $PM_{2.5}$ NAAQS maintenance plan, including the associated MVEBs; and (3) under CAA section 172(c)(3), the emissions inventory submitted with the maintenance plan for the Area. The maintenance plan is designed to demonstrate that the Birmingham Area will continue to attain the 1997 Annual $PM_{2.5}$ NAAQS through 2024. EPA's approval of the redesignation request is based on EPA's determination that the Birmingham Area meets the criteria for redesignation set forth in CAA, sections 107(d)(3)(E) and 175A, including EPA's determination that the Birmingham Area has attained the 1997 Annual $PM_{2.5}$ NAAQS. EPA's analyses of Alabama's redesignation request, emissions inventory, and maintenance plan are described in detail in the November 10, 2011, proposed rule (76 FR 70078).

Consistent with the CAA, the maintenance plan that EPA is approving also includes 2024 NO_X and $PM_{2.5}$ MVEBs for the Birmingham Area. In this action, EPA is approving these NO_X and $PM_{2.5}$ MVEBs for the Birmingham Area for the purposes of transportation conformity. For required regional emissions analysis years that involve 2024 or beyond, the applicable budgets will be the new 2024 NO_X and $PM_{2.5}$ MVEBs.

III. Why is EPA taking these actions?

EPA has determined that the Birmingham Area has attained the 1997 Annual $PM_{2.5}$ NAAQS and has also determined that all other criteria for the redesignation of the Birmingham Area from nonattainment to attainment of the 1997 Annual $PM_{2.5}$ NAAQS have been met. *See* CAA section 107(d)(3)(E). One of those requirements is that the Birmingham Area has an approved plan demonstrating maintenance of the 1997 Annual $PM_{2.5}$ NAAQS. EPA is also taking final action to approve the maintenance plan for the Birmingham Area as meeting the requirements of sections 175A and 107(d)(3)(E) of the CAA. In addition, EPA is approving the new NO_X and $PM_{2.5}$ MVEBs for the year 2024 for the Birmingham Area as contained in Alabama's maintenance plan because these MVEBs are consistent with maintenance of the 1997 Annual $PM_{2.5}$ standard in the Birmingham Area. Finally, EPA is approving the emissions inventory as meeting the requirements of section 172(c)(3) of the CAA. The detailed rationale for EPA's determinations and actions are set forth in the proposed rulemaking and in other discussion in this final rulemaking.

IV. What are the effects of these actions?

Approval of the redesignation request changes the legal designation of the Birmingham Area from nonattainment to attainment for the 1997 Annual $PM_{2.5}$ NAAQS. EPA is modifying the regulatory table in 40 CFR 81.301 to reflect a designation of attainment for these full and partial counties. EPA is also approving, as a revision to the Alabama SIP, Alabama's plan for maintaining the 1997 Annual $PM_{2.5}$ NAAQS in the Birmingham Area through 2024. The maintenance plan includes contingency measures to remedy possible future violations of the 1997 Annual $PM_{2.5}$ NAAQS and establishes NO_X and $PM_{2.5}$ MVEBs for the year 2024 for the Birmingham Area. Additionally, this action approves the emissions inventory for the Birmingham Area pursuant to section 172(c)(3) of the CAA.

V. Final Action

EPA is taking final action to approve three separate but related actions, some of which involve multiple elements: (1) The redesignation of the Birmingham Area to attainment for the 1997 Annual $PM_{2.5}$ NAAQS; (2) under CAA section 175A, Alabama's 1997 Annual $PM_{2.5}$ NAAQS maintenance plan, including the associated MVEBs; and (3) under CAA section 172(c)(3), the emissions inventory submitted with the maintenance plan for the Area. The 1997 Annual $PM_{2.5}$ maintenance plan for the Birmingham Area includes the new 2024 NO_X and $PM_{2.5}$ MVEBs of 15,981.50 tpy and 442.07 tpy, respectively. Within 24 months from the effective date of EPA's adequacy determination, the transportation partners will need to demonstrate conformity to the new NO_X and $PM_{2.5}$ MVEBs pursuant to 40 CFR 93.104(e).[2]

VI. Statutory and Executive Order Reviews

Under the CAA, redesignation of an area to attainment and the accompanying approval of the maintenance plan under CAA section 107(d)(3)(E) are actions that affect the status of a geographical area and do not impose any additional regulatory requirements on sources beyond those required by state law. A redesignation to attainment does not in and of itself impose any new requirements, but rather results in the application of requirements contained in the CAA for areas that have been redesignated to attainment. Moreover, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For these reasons, these actions:

- Are 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);
- Do not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Are 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.*);
- Do 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);
- Do not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Are not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Are not significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Are not subject to requirements of Section 12(d) of the National

[2] The adequacy finding becomes effective upon the date of publication of this notice in the **Federal Register**. 40 CFR 93.118(f)(2)(iii).

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,

• Do 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 final rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 25, 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 may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, and Particulate matter.

40 CFR Part 81

Environmental protection, Air pollution control, National parks.

Dated: January 9, 2013.

Gwendolyn Keyes Fleming,

Regional Administrator, Region 4.

40 CFR parts 52 and 81 are 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 B—Alabama

■ 2. Section 52.50(e) is amended by adding a new entry for ''1997 Annual $PM_{2.5}$ Maintenance Plan for the Birmingham Alabama Area'' at the end of the table to read as follows:

§ 52.50 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED ALABAMA NON-REGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approval date	Explanation
*	*	*	*	*
1997 Annual $PM_{2.5}$ Maintenance Plan for the Birmingham Area.	Birmingham $PM_{2.5}$ Nonattainment Area.	5/2/11	1/22/13 [Insert citation of publication].	

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

■ 2. In § 81.301, the table entitled ''Alabama—$PM_{2.5}$ (Annual NAAQS)'' is amended under ''Birmingham, AL'' by revising the entry for ''Jefferson County, Shelby County, Walker County (part)'' to read as follows:

§ 81.301 Alabama.

* * * * *

ALABAMA—$PM_{2.5}$ (ANNUAL NAAQS)

Designated area	Designation [a]	
	Date [1]	Type
Birmingham, AL:		
Jefferson County	This action is effective 1/22/13	Attainment.
Shelby County	This action is effective 1/22/13	Attainment.
Walker County (part) The area described by U.S. Census 2000 block group identifiers 01–127–0214–5, 01–127–0215–4, and 01–127–0216–2.	This action is effective 1/22/13	Attainment.
*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[1] This date is 90 days after January 5, 2005, unless otherwise noted.

* * * * *

[FR Doc. 2013–00954 Filed 1–18–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 111207737–2141–2]

RIN 0648–XC452

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher/Processors Using Trawl Gear in the Western Regulatory Area of the Gulf of Alaska

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher/processors (C/Ps) using trawl gear in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the A season allowance of the 2013 Pacific cod total allowable catch apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), January 20, 2013, through 1200 hours, A.l.t., September 1, 2013.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (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. Regulations governing sideboard protections for GOA groundfish fisheries appear at subpart B of 50 CFR part 680.

The A season allowance of the 2013 Pacific cod total allowable catch (TAC) apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA is 188 metric tons (mt), as established by the final 2012 and 2013 harvest specifications for groundfish of the GOA (77 FR 15194, March 14, 2012) and inseason adjustment to the final 2013 harvest specifications for Pacific cod (78 FR 267, January 3, 2013).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator) has determined that the A season allowance of the 2013 Pacific cod TAC apportioned to C/Ps using trawl gear in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 0 mt, and is setting aside the remaining 188 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by C/Ps using trawl gear in the Western Regulatory Area of the GOA. After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

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) as such 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 directed fishing closure of Pacific cod for C/Ps using trawl gear in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 15, 2013.

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.

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: January 16, 2013.

Kara Meckley,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–01165 Filed 1–16–13; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 14
Tuesday, January 22, 2013

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

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

6 CFR Part 5

[Docket No. DHS–2012–0035]

Privacy Act of 1974: Implementation of Exemptions; Department of Homeland Security; U.S. Customs and Border Protection; DHS/CBP–004-Intellectual Property Rights e-Recordation and Search Systems, System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is giving concurrent notice of a newly established system of records pursuant to the Privacy Act of 1974 for the ''Department of Homeland Security/U.S. Customs and Border Protection; DHS/CBP–004-Intellectual Property Rights e-Recordation and Search Systems (IPRRSS), System of Records'' and this proposed rulemaking. In this proposed rulemaking, the Department proposes to exempt portions of the system of records from one or more provisions of the Privacy Act because of criminal, civil, and administrative enforcement requirements.

DATES: Comments must be received on or before February 21, 2013.

ADDRESSES: You may submit comments, identified by docket number DHS–2012–0035, by one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–343–4010.
- *Mail:* Jonathan R. Cantor, Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Laurence E. Castelli (202–325–0280), CBP Privacy Officer, Office of International Trade/Regulations and Rulings, U.S. Customs and Border Protection, Mint Annex, 799 9th Street NW., Washington, DC 20229–1177. For privacy issues please contact: Jonathan R. Cantor (202–343–1717), Acting Chief Privacy Officer, Privacy Office, Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) proposes to establish a new DHS system of records titled, ''DHS/CBP–004-Intellectual Property Rights e-Recordation and Search Systems System of Records.''

The Intellectual Property Rights e-Recordation and Search Systems (IPRRSS) collect, use, and maintain records related to intellectual property rights recordations and their owners. The purpose of IPRRSS is to aid in the enforcement of intellectual property rights by making intellectual property recordations available to the public and to CBP officials.

IPRRSS collectively encompasses three separate systems. The first system is the online Intellectual Property Rights e-Recordation (IPRR) system, which allows intellectual property owners to submit applications for trademark and copyright recordations. The IPRR system shares information with the public Intellectual Property Rights Search (IPRS) system and the CBP Intellectual Property Rights Internal Search (IPRiS) system. Because CBP may collect personally identifiable information (PII) about intellectual property rights holders, their agents, or their licensees in IPRR, IPRS, and IPRiS (collectively IPRRSS), CBP is providing the public notice about how CBP collects, uses, and maintains records related to intellectual property rights recordations.

The authority for this system derives from Section 42 of the Lanham Act (Trademark Act of 1946), as amended, 15 U.S.C. 1124; Sections 101 and 602 through 603 of the Copyright Act of 1976, as amended, 17 U.S.C. 101, 602–603; and Sections 526, 595a, and 624 of the Tariff Act of 1930, as amended, 19 U.S.C. 1526, 1595a, and 1624. The cited sections provide that intellectual property rights owners may submit information to CBP to enable CBP officials to identify infringing articles at the borders and prevent the importation of counterfeit or pirated merchandise. Owners seeking to have merchandise excluded from entry must provide proof to CBP of the validity of the intellectual property rights they seek to protect.

Pursuant to the Independent Offices Appropriations Act of 1952, 31 U.S.C. 9701, and regulations at 19 CFR 133.3, 133.13, and 133.33, intellectual property rights owners or their agents must pay a fee when they apply for the recordation with CBP of their trademark, trade name, or copyright. Through IPRR's web-based interface, the user will be prompted through several steps that capture the user's required application information. Once the applicant has entered all required application information, IPRR will guide the applicant through a series of prompts seeking his/her billing name, billing address, and credit card information. IPRR forwards this payment information to Pay.gov for payment processing, and the applicant name and an IPRR tracking number to the DHS/CBP–003 Credit/Debit Card Data System (CDCDS) System of Records for payment reconciliation. Pay.gov sends a nightly activity file, including the last four digits of the credit card, authorization number, billing name, billing address, IPRR tracking number, and Pay.gov tracking numbers to CDCDS. Pay.gov also sends a daily batch file with the necessary payment information to a commercial bank for settlement processing. After processing, the commercial bank sends a settlement file, including the full credit card number, authorization number, card type, transaction date, amount, and IPRR tracking number to CDCDS. Once IPRR receives confirmation from Pay.gov that the payment has been processed successfully, IPRR will retain the Pay.gov tracking number for payment

reconciliation purposes in accordance with the CDCDS system of records retention schedule.

When an applicant enters the registration number of a copyright or trademark he or she would like to record with CBP, the IPRR system must receive a positive match response from the U.S. Patent and Trademark Office (USPTO) and U.S. Copyright Office Web sites in order for the application to proceed. Only the registration number is shared with the USPTO and U.S. Copyright Office Web sites. If the registration number entered in IPRR does not match an entry in either of these Web sites, the applicant cannot record their trademark or copyright with CBP. Once a positive match response is received from these systems, certain fields in the application are automatically populated with public data taken directly from the U.S. Copyright Office or USPTO Web sites. All of the information copied from the U.S. Copyright Office or USPTO Web sites is publicly available at *www.uspto.gov* and *www.copyright.gov.*

The public may search for trademark, trade name, and copyright information in IPRS, the public facing portion of this system of records. The IPRS database collects and retains only a portion of the information entered by the right holder in IPRR, such as the name, address, and phone number of the right holder or representative, along with a text description of the recorded trademark or copyright. This information allows retailers, consumers, and other businesses to contact the right owner to ensure that they are not obtaining goods that infringe on the owner's intellectual property rights.

CBP and U.S. Immigration and Customs Enforcement (ICE) officials have access to IPRiS to assist in the enforcement of intellectual property rights. IPRiS provides a central searchable database of all trademark, trade name, and copyright recordation information. IPRiS contains the same information as IPRS, but with additional fields containing confidential information submitted by the right holder, including the names of entities who have used the trademark or copyright, the country of manufacture of merchandise, images of the recorded trademark or copyright, lists of licensees, and any additional information relating to enforcement of the intellectual property right. Only CBP and ICE officials may search IPRiS.

Only a few users within CBP have access to an administrative interface to process IPRR recordations. Those authorized CBP users with administrative access process the renewals of existing trademark and copyright recordations, trade name recordations, and information about ownership changes or cancellations.

Consistent with DHS' information-sharing mission, information stored in the DHS/CBP–004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems may be shared with other DHS components with a need to know the information. In addition, these records may be shared with appropriate federal, state, local, tribal, territorial, foreign, or international government agencies so long as the recipient has a need to know the information to carry out functions consistent with the routine uses set forth in the system of records notice (SORN).

The Department of Homeland Security is issuing this Notice of Proposed rulemaking to exempt this system of records from certain provisions of the Privacy Act, concurrent with the system of records notice. DHS is not exempting any data in the system regarding an individual's application for recordation of his or her trademark, trade name, or copyright. This system, however, may contain records or information pertaining to the accounting of disclosures of records pertaining to persons or entities, who are alleged to have made an infringing use of a recorded intellectual property right, made from this system to other national security, law enforcement, or intelligence agencies (federal, state, local, foreign, international or tribal) in accordance with the published routine uses or statutory basis for disclosure under 5 U.S.C. 552a(b). For the accounting of these disclosures only, in accordance with 5 U.S.C. 552a (j)(2) and (k)(2), DHS will claim exemptions for these records or information.

II. Privacy Act

The Privacy Act embodies fair information practice principles in a statutory framework governing the means by which the federal government collects, maintains, uses, and disseminates personally identifiable information. The Privacy Act applies to information that is maintained in a ''system of records.'' A ''system of records'' is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. In the Privacy Act, an individual is defined to encompass U.S. citizens and lawful permanent residents. As a matter of policy, DHS extends administrative Privacy Act protections to all persons, regardless of citizenship, where systems of records maintain information on U.S. citizens, lawful permanent residents, and visitors.

The Privacy Act allows government agencies to exempt certain records from the access and amendment provisions. If an agency claims an exemption, however, it must issue a Notice of Proposed Rulemaking to make clear to the public the reasons why a particular exemption is claimed.

DHS is claiming exemptions from certain requirements of the Privacy Act for DHS/CBP–004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records. Some information in DHS/CBP–004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records relates to official DHS national security, law enforcement or intelligence activities, and that information includes records or information pertaining to the accounting of disclosures made from this system to other law enforcement or intelligence agencies (federal, state, local, foreign, international, or tribal) in accordance with the published routine uses or statutory basis for disclosure pursuant to 5 U.S.C. 552a(b). In addition, some information in DHS/CBP–004-Intellectual Property Rights e-Recordation and Intellectual Property Rights Search Systems System of Records relates to information or records about individuals who may have used an intellectual property right without the intellectual property right owner's authorization. These exemptions are needed to protect information relating to DHS national security, law enforcement, or intelligence activities from disclosure to subjects or others related to these activities. Specifically, the exemptions are required to preclude subjects of these activities from frustrating these processes and to avoid disclosure of activity techniques. Disclosure of information to the subject of the inquiry could also permit the subject to avoid detection or apprehension.

The exemptions proposed here are standard intelligence, law enforcement, and national security exemptions exercised by a large number of federal law enforcement and intelligence agencies. In appropriate circumstances, when compliance would not appear to interfere with or adversely affect the law enforcement purposes of this system and the overall law enforcement process, the applicable exemptions may be waived on a case by case basis.

A notice of system of records for DHS/CBP–004-Intellectual Property Rights e-

Recordation and Search Systems System of Records is also published in this issue of the **Federal Register**.

List of Subjects in 6 CFR Part 5

Freedom of information; Privacy.

For the reasons stated in the preamble, DHS proposes to amend Chapter I of Title 6, Code of Federal Regulations, as follows:

PART 5—DISCLOSURE OF RECORDS AND INFORMATION

■ 1. The authority citation for Part 5 continues to read as follows:

Authority: Pub. L. 107–296, 116 Stat. 2135; (6 U.S.C. 101 et seq.); 5 U.S.C. 301. Subpart A also issued under 5 U.S.C. 552. Subpart B also issued under 5 U.S.C. 552a.

■ 2. Add at the end of Appendix C to Part 5, the following new paragraph ''69'':

Appendix C to Part 5—DHS Systems of Records Exempt From the Privacy Act

* * * * *

69. The DHS/CBP–004 Intellectual Property Rights e-Recordation and Search Systems System of Records consists of electronic and paper records and will be used by DHS and its components. The DHS/CBP–004-Intellectual Property Rights e-Recordation and Search Systems System of Records is a repository of information held by DHS in connection with its several and varied missions and functions, including, but not limited to, the enforcement of civil and criminal laws; investigations, inquiries, and proceedings; national security; and intelligence activities. The DHS/CBP–004-Intellectual Property Rights e-Recordation and Search Systems System of Records contains information that is collected by, on behalf of, in support of, or in cooperation with DHS and its components and may contain personally identifiable information collected by other federal, state, local, tribal, territorial, foreign, or international government agencies. CBP will not assert any exemptions with respect to information in the systems submitted by the intellectual property right owner or the owner's representative. Information in the system pertaining to persons alleged to have infringed on an intellectual property right may be shared with national security, law enforcement, or intelligence agencies pursuant to the published routine uses. The Privacy Act requires DHS to maintain an accounting of the disclosures made pursuant to all routines uses. Disclosing the fact that national security, law enforcement or intelligence agencies have sought particular records may affect ongoing national security, law enforcement, or intelligence activity. As such, pursuant to 5 U.S.C. 552a(j)(2), DHS will claim exemption from subsections (c)(3), (e)(8), and (g) of the Privacy Act of 1974, as amended, as necessary and appropriate to protect this information. In addition, because the system may contain information or records about the unauthorized use of intellectual property rights and disclosure of that information could impede law enforcement investigations, DHS will claim, pursuant to 5 U.S.C. 552a(k)(2), exemption from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f) of the Privacy Act of 1974, as necessary and appropriate to protect this information.

Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(a) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(b) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of DHS or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(c) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(d) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore DHS is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(e) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with DHS's ability to obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(f) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Jonathan R. Cantor,

Acting Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2013–01049 Filed 1–18–13; 8:45 am]

BILLING CODE 9110–06–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 360

RIN 3064–AD99

Records of Failed Insured Depository Institutions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing a rule, with request for comments, that would implement section 11(d)(15)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(15)(D)). This statutory provision provides time frames for the retention of records of a failed insured depository institution. The proposed rule incorporates the statutory time frames and defines the term ''records.''

DATES: Written comments on the Rule must be received by the FDIC no later than March 25, 2013.

ADDRESSES: You may submit comments by any of the following methods:

- *Agency Web Site: http://www.fdic.gov/regulations/laws/federal.* Follow instructions for Submitting comments on the Agency Web Site.
- *Email: Comments@FDIC.gov.* Include ''RIN 3064–AD99'' in the subject line of the message.
- *Mail:* Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429
- *Hand Delivery/Courier:* Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EST).
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Public Inspection: All comments received will be posted without change to *http://www.fdic.gov/regulations/laws/federal* including any personal information provided. Comments may be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–I002, Arlington, VA 22226, between 9 a.m. and 5 p.m. (EST) on business days. Paper copies of public comments may be ordered from the Public Information Center by telephone at (877) 275–3342 or (703) 562–2200.

FOR FURTHER INFORMATION CONTACT: Thomas P. Bolt, Legal Division, (703) 562–2046; Jerilyn Rogin, Legal Division, (703) 562–2409; Gregory D. Talley, Division of Resolutions and Receiverships, (703) 516–5115. Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

I. Background

When acting as receiver of a failed insured depository institution, the FDIC succeeds to the books and records of the institution.[1] Section 11(d)(15)(D) of the Federal Deposit Insurance Act (12 U.S.C. 1821(d)(15)(D)), hereafter ''Section 1821(d)(15)(D),'' provides that after the end of the six-year period beginning on the date of its appointment as receiver, the FDIC may destroy any records of a failed insured depository institution that the FDIC in its discretion determines to be unnecessary, unless directed not to do so by a court of competent jurisdiction or governmental agency or prohibited by law. In addition, the FDIC may destroy any records that are at least 10 years old as of the date of appointment.

The term ''records'' is not defined in the FDI Act and the legislative history does not provide any guidance on how the term should be interpreted. A broad interpretation is problematic because it would encompass not only all documentary materials that clearly relate to the business of the institution but also materials that have no relevance to its business, or which lack evidentiary value and would not ordinarily be considered ''records.'' In addition, advances in information technology and data storage capabilities have substantially increased the volume of material generated by financial institutions. To illustrate, a ''terabyte'' of electronically stored information (''ESI'') is the equivalent of 77 million printed pages. A typical failed insured depository institution has between 3 and 9 terabytes of ESI, or between 231 million and 693 million pages of material. Currently, the FDIC is housing on its recordkeeping systems 775 terabytes of data from failed insured depository institutions for which the FDIC has been appointed as receiver since 2007—the equivalent of 59.675 billion pages. If the term ''records'' were to be interpreted to encompass all documentary material that the FDIC as receiver obtains from a failed insured depository institution, regardless of its significance or evidentiary value, then the capture, processing, and maintenance of ever-increasing amounts of such material would pose significant unnecessary burdens and inefficiencies both now and in the future. For this reason, the FDIC is proposing a rule to define the term ''records'' in order to designate more specifically the materials that are subject to the FDI Act's record retention provision, thereby enabling the FDIC to manage the records of insured depository institutions in receivership more efficiently and in a legally appropriate manner.

II. Proposed Rule

Authority and Purpose

The FDI Act gives the FDIC broad authority to carry out its statutory responsibilities. Section 11(d)(1) of the FDI Act authorizes the FDIC to ''prescribe such regulations as [it] determines to be appropriate regarding the conduct of conservatorships or receiverships.'' [2] Additionally, section 10(g) of the FDI Act authorizes the FDIC to prescribe regulations, including defining terms, as necessary to carry out the FDI Act.[3] The purpose of the proposed rule is to identify more specifically the materials that are subject to the FDI Act's records retention provision thereby enabling the FDIC to manage the records of an insured depository institution in receivership in a realistic, efficient and legally appropriate manner.

Section-by-Section Analysis

Definitions

Under the proposed rule, documentary materials will be characterized as records for purposes of Section 1821(d)(15)(D) by meeting a formal definition (paragraph (a)) and a functional test (paragraph (b)). The FDIC believes that this two-tiered approach will have the effect of excluding extraneous material that is not related in any way to the transaction of the failed insured depository institution's business.

Paragraph (a)(3) of the proposed rule defines the term ''records'' for purposes of Section 1821(d)(15)(D) to mean ''any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically created record generated or maintained by an insured depository institution in the course of and necessary to its transaction of business.'' This definition is consistent with the definition of ''records'' in section 210(a)(16)(D) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[4] which addresses the retention of records of a systemically important financial (non-bank) institution for which the FDIC is appointed as receiver. The qualification in the definition that ''records'' be ''reasonably accessible'' reflects the text of Federal Rule of Civil Procedure 26(b)(2)(B), which provides that a party from whom discovery is sought need not provide ESI from sources that the party identifies as not reasonably accessible because of undue cost or burden. (For example, a party may be excused from restoring ESI from aging back-up tapes.) Use of the phrase ''reasonably accessible'' would make the definition of ''records'' in the proposed rule consistent with the discovery standard and would also protect the FDIC as receiver from incurring expenses associated with restoring or maintaining the legacy systems of multiple failed insured depository institutions in order to extract documentary material from those systems that is not needed by the Receiver to carry out its functions and was not in use by the insured depository institution to carry out its day-to-day operations prior to its failure.

Paragraph (a) also provides a non-exclusive list of examples of material that will ordinarily be understood to constitute records of the failed institution, specifically, board or committee meeting minutes, contracts to which the insured depository institution is a party, deposit account information, employee and employee benefits information, general ledger and financial reports or data, litigation files, and loan documents.

Two types of materials are excluded from the definition of records in paragraph (a)(3). The first exclusion is for multiple copies of records, either in paper or electronic format. The retention of multiple copies is unnecessary and is not cost-efficient. The second exclusion is for

[1] 12 U.S.C. 1821(d)(2)(A).

[2] 12 U.S.C. 1821(d)(1).

[3] 12 U.S.C. 1820(g).

[4] 12 U.S.C. 5390(a)(16)(D), which defines ''records'' to mean ''any document, book, paper, map, photograph, microfiche, microfilm, computer or electronically of and necessary to its transaction of business.''

examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of insured depository institutions. The FDIC has consistently maintained that reports of examination and other confidential supervisory correspondence or information prepared by FDIC examiners with respect to an open insured depository institution belong exclusively to the FDIC and not to the insured depository institution, but insured depository institutions often retain copies of reports of examination and other supervisory correspondence.

Determination of Whether Material Constitutes Records

In determining whether particular material obtained from a failed insured depository institution constitutes a record, the FDIC will consider four factors set forth in paragraph (b). If the FDIC in its discretion determines that one or more of the factors weigh in favor of classifying the material as a record, it will be classified as a record for purposes of Section 1821(d)(15)(D).

The first factor is whether the documentary material relates to the business of the failed insured depository institution. This factor is modeled after section 210(a)(16)(D)(iii) of the Dodd-Frank Act defining ''records'' as materials generated or maintained ''in the course of and necessary to [the institution's] transaction of business.''

The second factor is whether the documentary material was generated or maintained in accordance with the failed insured depository institution's own recordkeeping practices and procedures or pursuant to standards established by the failed insured depository institution's regulators. Thus, the FDIC will consider whether documentary material was retained pursuant to the insured depository institution's recordkeeping practices when determining whether specific documentary material is a record for the purposes of Section 1821(d)(15)(D) and the proposed rule. Likewise, the FDIC will consider whether documentary material was retained pursuant standards imposed by state or federal regulators when determining whether specific documentary material is a record for the purposes of Section 1821(d)(15)(D) and the proposed rule.

The third factor is whether the documentary material is needed by the FDIC to carry out its functions as receiver. This inquiry would permit the classification of documents as records when they are used by the FDIC to carry out its function as receiver, for example, to transfer the failed insured depository institution's assets or liabilities, assume or repudiate the institution's contracts, determine claims, and collect liabilities owed to the institution.

The fourth factor used to determine whether documentary material should be classified as records is the expected evidentiary needs of the FDIC. Records generated and maintained by the failed insured depository institution are used to support enforcement actions and litigation. In addition, records of the insured depository institution may also be required to respond to requests filed under the Freedom of Information Act. This factor is modeled on section 210(a)(16)(D)(i)(II) of the Dodd-Frank Act requiring the FDIC to prescribe records retention regulations with due regard for ''the expected evidentiary needs of the Corporation as receiver of a covered financial company and the public regarding the records of covered financial companies.'' [5]

Paragraph (c) of the proposed rule provides that the FDIC's designation of material as records pursuant to paragraph (b) is solely for the purpose of identifying records that are subject to the retention requirements of Section 1821(d)(15)(D) and the FDIC's designation of specific material as a record under Section 1821(d)(15)(D) should have no effect on whether the material is discoverable or admissible in any court, tribunal or other adjudicative proceeding, nor on whether such material is subject to the Freedom of Information Act, the Privacy Act or other law. Thus, whether specific material is a record pursuant to the proposed rule does not alter its status under evidentiary rules such as the Federal Rules of Evidence (''FRE''). For example, FRE 803(1) provides that ''records of regularly conducted activity'' (''business records'') are not excluded from evidence by the rule against hearsay, regardless of whether the declarant is available as a witness. If certain documentary material meets the requirements of a business record pursuant to FRE 803(1), then whether or not the FDIC determines that specific documentary material constitutes ''records'' pursuant to the proposed rule will not affect the documentary material's status as a business record under FRE 803(1). Likewise, whether specific material is or is not designated as a record for purposes of Section 1821(d)(15)(D) should not affect whether it may be subject to a litigation hold or a request under the Freedom of Information Act, the Privacy Act or other law.

[5] 12 U.S.C. 5390(a)(16)(D)(i)(II).

Destruction of Records

Section 1821(d)(15)(D) sets forth the timeframes for the destruction of a failed insured depository institution's records. Paragraph (d) of the proposed rule incorporates these timeframes: after the end of the six-year period beginning on the date of its appointment as receiver, the FDIC may destroy any records of a failed insured depository institution that the FDIC in its discretion determines to be unnecessary to maintain, unless directed not to by a court of competent jurisdiction or governmental agency or prohibited by law. The FDIC may destroy any records that are at least 10 years old as of the date of appointment. In addition, the proposed rule provides that the FDIC will not destroy records subject to a legal hold imposed by the FDIC. By including legal holds, the proposed rule implements the policy of the FDIC to preserve information (both ESI and paper) that the FDIC may be required to produce to opposing parties in litigation or when otherwise subject to a legal requirement to produce information.

Transfer of Records

In many resolutions of failed insured depository institutions, an acquiring institution will purchase assets or assume liabilities of the failed insured depository institution and, in such a case, must obtain custody of records related to such assets and liabilities. Paragraph (f) of the proposed rule provides that the FDIC's transfer of records to a third party in connection with that party's purchase of assets or assumption of liabilities will satisfy the records retention obligations under Section 1821(d)(15)(D) so long as the transfer is made pursuant to a purchase and assumption agreement under which the transferee agrees that it will not destroy the transferred records for at least six years from the date of the appointment of the FDIC as receiver of the failed insured depository institution unless otherwise notified in writing by the FDIC.

Policies and Procedures

Paragraph (f) of the proposed rule provides that the FDIC may establish policies and procedures with respect to the retention and destruction of records. It is expected that these policies and procedures will address specific matters related to the capture, processing and storage of failed bank records, such as collecting computer hard drives, email databases, and backup and disaster recovery tapes.

III. Request for Comments

The FDIC seeks comments on all aspects of the Proposed Rule. Comments will be considered by the FDIC and appropriate revisions will be made to the Proposed Rule, if necessary, before a final rule is issued. All comments must be received by the FDIC not later than March 25, 2013.

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

No collections of information pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.,* are contained in the proposed rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.,* requires that each Federal agency either certify that a proposed rule would not, if adopted in final form, have a significant economic impact on a substantial number of small entities or prepare an initial regulatory flexibility analysis of the rule and publish the analysis for comment. For purposes of the RFA analysis or certification, financial institutions with total assets of $175 million or less are considered to be ''small entities.'' The FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The proposed rule defines the term ''records'' under section 1821(d)(15)(D) for purposes of the FDIC's own internal operations and recordkeeping, enabling it to more efficiently manage the records of an insured depository institution in receivership. Accordingly, there will be no significant economic impact on a substantial number of small entities as a result of this rule.

C. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the proposed rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–277, 112 Stat. 2681).

D. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471), requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Proposed Rule in a simple and straightforward manner.

List of Subjects in 12 CFR 360

Banks, Banking, Bank deposit insurance, Holding companies, National banks, Participations, Reporting and record keeping requirements, Savings associations, Securitizations.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation proposes to amend Part 360 of title 12 of the Code of Federal Regulations as follows:

PART 360—RESOLUTION AND RECEIVERSHIP RULES

■ 1. The authority citation for part 360 is revised to read as follows:

Authority: 12 U.S.C. 1817(b), 1818(a)(2), 1818(t), 1819(a) Seventh, Ninth and Tenth, 1820(b)(3), (4), 1821(d)(1), 1821(d)(10)(c), 1821(d)(11), 1821(d)(15)(D), 1821(e)(1), 1821(e)(8)(D)(i), 1823(c)(4), 1823(e)(2); Sec. 401(h), Pub. L. 101–73, 103 Stat. 357.

■ 2. Add new § 360.11 to read as follows:

§ 360.11 Records of failed insured depository institutions.

(a) *Definitions.* For purposes of this section, the following definitions apply—

(1) *Failed insured depository institution* is an insured depository institution for which the FDIC has been appointed receiver pursuant to 12 U.S.C. 1821(c)(1).

(2) *Insured depository institution* has the same meaning as provided by 12 U.S.C. 1813(c)(2).

(3) *Records* means any reasonably accessible document, book, paper, map, photograph, microfiche, microfilm, computer or electronically-created record generated or maintained by an insured depository institution in the course of and necessary to its transaction of business.

(i) Examples of records include, without limitation, board or committee meeting minutes, contracts to which the insured depository institution is a party, deposit account information, employee and employee benefits information, general ledger and financial reports or data, litigation files, and loan documents.

(ii) Records do not include:

(A) Multiple copies of records; or

(B) Examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of insured depository institutions.

(b) *Determination of records.* In determining whether particular documentary material obtained from a failed insured depository institution is a record for purposes of 12 U.S.C. 1821(d)(15)(D), the FDIC in its discretion will determine whether one or more of the following factors weigh in favor of classifying the material as a record:

(1) Whether the documentary material relates to the business of the failed insured depository institution,

(2) Whether the documentary material was generated or maintained as records in the regular course of the business of the failed insured depository institution in accordance with its own recordkeeping practices and procedures or pursuant to standards established by the failed insured depository institution's regulators,

(3) Whether the documentary material is needed by the FDIC to carry out its receivership function, and

(4) The expected evidentiary needs of the FDIC.

(c) The FDIC's determination that documentary materials from a failed insured depository institution constitute records is solely for the purpose of identifying those documentary materials that must be maintained pursuant to 12 U.S.C. 1821(d)(15)(D) and shall not bear on the discoverability or admissibility of such documentary materials in any court, tribunal or other adjudicative proceeding, nor on whether such documentary materials are subject to release under the Freedom of Information Act, the Privacy Act or other law.

(d) *Destruction of records.*

(1) Except as provided in paragraph (d)(2) of this section, after the end of the six-year period beginning on the date the FDIC is appointed as receiver of an insured depository institution, the FDIC may destroy any records of such institution which the FDIC, in its discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, prohibited by law, or subject to a legal hold imposed by the FDIC.

(2) Notwithstanding paragraph (d)(1) of this section, the FDIC may destroy records of an insured depository institution which are at least 10 years old as of the date on which the FDIC is appointed as the receiver of such depository institution in accordance with paragraph (d)(1) of this section at any time after such appointment is final, without regard to the six-year period of limitation contained in paragraph (d)(1) of this section.

(e) *Transfer of records.* If the FDIC transfers records to a third party in connection with an agreement for the

purchase and assumption of assets and liabilities of a failed insured depository institution, the recordkeeping requirements of 12 U.S.C. 1821(d)(15)(D), and paragraph (d) of this section shall be satisfied if the transferee agrees that it will not destroy such records for six years from the date the FDIC was appointed as receiver of such failed insured depository institution unless otherwise notified in writing by the FDIC.

(f) *Policies and procedures.* The FDIC may establish policies and procedures with respect to the retention and destruction of records that are consistent with this section.

Dated at Washington, DC, this 15th day of January 2013.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–01080 Filed 1–18–13; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1295; Airspace Docket No. 12–AAL–10]

RIN 2120–AA66

Proposed Amendment of Area Navigation (RNAV) Route T–266; AK

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify low-altitude RNAV route T–266 in the state of Alaska by removing two non-directional beacons (NDB) as the navigation signal source and replacing them with RNAV waypoints. This action would enhance the safety and efficiency of the National Airspace System (NAS).

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–1295 and Airspace Docket No. 12–AAL–10 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1295 and Airspace Docket No. 12–AAL–10) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2012–1295 and Airspace Docket No. 12–AAL–10.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 1601 Lind Ave. SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify RNAV route T–266 in Alaska. T–266 is currently defined by the Coghland Island, AK, NDB; the Fredericks Point, AK, NDB; and the Annette Island, AK, VOR/DME. The Annette Island VOR/DME would remain as one end point of the route, but the two NDBs would be removed from the route description and replaced by the addition of eight RNAV waypoints (WP). The existing RADKY, AK, fix (near the Coghland Island NDB) would be relocated to the southeast of its current position and would serve as the other endpoint of the route. These changes would enhance safety by providing lower IFR minimum en route altitudes (MEA) on T–266, which would allow aircraft to fly at lower altitudes when inflight icing conditions are encountered. Additionally, the changes support the expanded use of RNAV within the NAS by reducing the reliance on ground-based NDBs for navigation guidance.

RNAV routes are published in paragraph 6011 of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when

promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure in Alaska as required to preserve the safe and efficient flow of air traffic.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9V, Airspace Designations and Reporting Points, Dated August 9, 2011, and effective September 15, 2011, is amended as follows:

Paragraph 6011 United States Area Navigation Routes

* * * * *

T–266 RADKY, AK to Annette Island, AK (ANN) [Amended]

RADKY, AK	Fix	(Lat. 58°08′00″ N., long. 134°29′56″ W.)
XADZY, AK	WP	(Lat. 57°01′00″ N., long. 133°00′00″ W.)
VULHO, AK	WP	(Lat. 56°49′05″ N., long. 132°49′30″ W.)
FOGID, AK	WP	(Lat. 56°43′31″ N., long. 132°42′02″ W.)
YICAX, AK	WP	(Lat. 56°39′45″ N., long. 132°37′00″ W.)
NEREE, AK	WP	(Lat. 56°32′36″ N., long. 132°30′34″ W.)
VAZPU, AK	WP	(Lat. 56°27′24″ N., long. 132°25′56″ W.)
DOOZI, AK	Fix	(Lat. 55°37′57″ N., long. 132°10′29″ W.)
Annette Island, AK (ANN)	VOR/DME	(Lat. 55°03′37″ N., long. 131°34′42″ W.)

Issued in Washington, DC, on December 12, 2012.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–01115 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1294; Airspace Docket No. 11–ANM–28]

RIN 2120–AA66

Proposed Establishment of Area Navigation (RNAV) Routes; OR

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish two new low-altitude RNAV routes in the state of Oregon, designated T–302 and T–304. The routes would replace segments of an existing VHF Omnidirectional Range (VOR) Federal airway that will be removed due to the planned decommissioning of the Portland, OR, VOR/DME in 2013. This action would advance the implementation of RNAV and provide continued en route navigation guidance in the affected airspace.

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–1294 and Airspace Docket No. 11–ANM–28 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov*.

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

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1294 and Airspace Docket No. 11–ANM–28) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2012–1294 and Airspace Docket No. 11–ANM–28.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before

taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Western Service Center, Operations Support Group, Federal Aviation Administration, 1601 Lind Ave. SW., Renton, WA 98057.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish two new RNAV routes, designated T–302 and T–304, in Oregon. The new routes would replace segments of a VOR Federal airway that will be affected by the planned decommissioning of the Portland, OR, VOR/DME in 2013. The new routes would extend between navigation fixes located southeast of the Portland, OR, VOR/DME and navigation fixes located north of the Deschutes, OR, VORTAC. T–302 would extend between the existing CUKIS, OR, fix and the existing CUPRI, OR, fix. T–304 would extend between the existing GLARA, OR, fix and the existing HERBS, OR, fix. Additional new waypoints would be added along the proposed routes between the end-point fixes. This action would enhance safety and efficiency, expand the use of RNAV in the National Airspace System, and provide for continued en route navigation guidance in a portion of Seattle Air Route Traffic Control Center's airspace.

RNAV routes are published in paragraph 6011 of FAA Order 7400.9W dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies the route structure as required to preserve the safe and efficient flow of air traffic within the National Airspace System.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9W, Airspace Designations and Reporting Points, Dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 6011 United States area navigation routes

* * * * *

T–302 CUKIS, OR to CUPRI, OR [New]

CUKIS, OR	Fix	(45°21′00″ N., long. 122°21′49″ W.)
JJACE, OR	WP	(45°09′52″ N., long. 122°03′03″ W.)
JJETT, OR	WP	(44°56′35″ N., long. 121°40′56″ W.)
JERMM, OR	WP	(44°46′05″ N., long. 121°27′06″ W.)
CUPRI, OR	Fix	(44°37′04″ N., long. 121°15′14″ W.)

T–304 GLARA, OR to HERBS, OR [New]

GLARA, OR	Fix	(45°16′40″ N., long. 122°36′11″ W.)
PUTZZ, OR	WP	(45°06′14″ N., long. 122°07′19″ W.)
JJETT, OR	WP	(44°56′35″ N., long. 121°40′56″ W.)
WISSL, OR	WP	(44°35′49″ N., long. 121°24′59″ W.)
HERBS, OR	Fix	(44°25′07″ N., long. 121°16′52″ W.)

Issued in Washington, DC, on December 12, 2012.

Gary A. Norek,

Manager, Airspace Policy and ATC Procedures Group.

[FR Doc. 2013–01067 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2012–1168; Airspace Docket No. 07–AWA–3]

RIN 2120–AA66

Proposed Modification of the Dallas/Fort Worth Class B Airspace Area; TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the Dallas/Fort Worth, TX, Class B airspace area to ensure containment of large turbine-powered aircraft flying instrument procedures to and from the Dallas/Fort Worth International Airport (DFW) and Dallas Love Field Airport (DAL) within Class B airspace. The FAA is proposing these actions to further support its national airspace redesign goal of optimizing terminal and en route airspace areas to enhance safety, improving the flow of air traffic, and reducing the potential for near midair collision in the DFW terminal area.

DATES: Comments must be received on or before March 25, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2012–1168 and Airspace Docket No. 07–AWA–3 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy and ATC Procedures Group, AJV–113, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2012–1168 and Airspace Docket No. 07–AWA–3) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Nos. FAA–2012–1168 and Airspace Docket No. 07–AWA–3.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd. Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

Background

In 1973, the FAA issued a final rule (38 FR 13635) which established the Dallas-Fort Worth, TX, Terminal Control Area (TCA) around the Dallas-Fort Worth Airport, later renamed the Dallas/Fort Worth International Airport (DFW), with an effective date of September 30, 1973. In 1993, the FAA issued the Airspace Reclassification final rule (56 FR 65638), which replaced the term ''terminal control area'' with the term ''Class B airspace area.''

The primary purpose of Class B airspace is to reduce the potential for midair collisions in the airspace surrounding airports with high density air traffic operations by providing an area in which all aircraft are subject to certain operating rules and equipment requirements. FAA policy requires that Class B airspace areas be designed to contain all instrument procedures and that air traffic controllers vector aircraft to remain within Class B airspace after entry. If it becomes necessary to extend the flight path outside Class B airspace for spacing, controllers must inform the aircraft when leaving and re-entering Class B airspace. However, in the interest of safety, FAA policy dictates that such extensions be the exception rather than the rule.

The configuration of the Dallas/Fort Worth Class B airspace area has been modified five times since being established as a TCA, with the last modification accomplished in 1996. In 1978, 1984, and 1986, the FAA issued final rules (43 FR 17937, 49 FR 25424, and 51 FR 19749) to fully contain large turbine-powered aircraft within TCA airspace as the aircraft flew instrument procedures to and from DFW. In 1992, the FAA issued a final rule (57 FR 166) that revoked the Airport Radar Service Area surrounding DAL and incorporated the airport into the surface area of the Dallas Fort-Worth TCA. The FAA determined the mix of small propeller and high performance aircraft at lower altitudes around DAL necessitated modifying the TCA design to include DAL within the TCA in the interest of flight safety and that it would result in a greater degree of protection for the greatest number of people during fight in the DFW terminal area. In 1996, the FAA issued the last rule (61 FR 47815) modifying the Dallas/Fort Worth Class B airspace area. That rule raised the upper limit of the Class B airspace area to 11,000 feet mean sea level (MSL), except in the northern and southern portions of the airspace area, and redefined several existing subareas to improve the flow of aviation traffic and enhance safety in the Class B airspace area while

accommodating the concerns of airspace users.

Since the last Dallas/Fort Worth Class B airspace modification in 1996, the air traffic operations into and out of both DFW and DAL have changed dramatically due to increased traffic levels, a considerable different fleet mix, updated instrument approach and departure procedures, and airport infrastructure improvements. The Class B airspace configuration has not kept pace with airport expansions and increasing operations and the current design makes it difficult to comply with FAA's policy to contain certain aircraft operations within Class B airspace. For calendar years 2009, 2010, and 2011, DFW documented 638,782; 652,258; and 646,803 total airport operations and was rated 4th among all Commercial Service Airports with 26,663,984; 27,100,656; and 27,518,358 passenger enplanements each year, respectively. During the same calendar year periods, DAL documented 172,962; 168,544; and 179,198 total airport operations.

Under the current Class B airspace configuration, aircraft routinely enter, exit, and then re-enter Class B airspace while flying published instrument approach procedures to DFW runway 13R, DAL runways 31R and 31L, and DAL runways 13R and 13L, which is contrary to FAA Orders. Modeling of existing traffic flows has shown that the proposed Dallas/Fort Worth Class B airspace modifications would enhance safety by containing all instrument procedures, and associated traffic patterns, at DFW and DAL within the confines of Class B airspace and better segregate IFR aircraft arriving and departing DFW and DAL and the VFR aircraft operating in the vicinity of the Dallas/Fort Worth Class B airspace area. The proposed Class B airspace modifications described in this NPRM are intended to address these issues.

Changes Needed to Existing Class B Airspace

The current Class B design does not fully contain large turbine-powered aircraft flying instrument arrival procedures to DFW and DAL once they have entered the airspace as required by FAA policy. With a renewed safety emphasis on retaining all large turbine-powered aircraft within the Class B airspace to avoid mixing with other aircraft that are not in contact with Air Traffic Control (ATC), keeping those aircraft within the existing Dallas/Fort Worth Class B airspace is not always possible. For example, when operations are on a south flow, arrivals to DFW runway 13R flying straight-in from Bowie, TX, routinely exit the bottom of the Class B airspace shelf with a 5,000 foot MSL floor and re-enter the side of the Class B airspace shelf with a 4,000 foot MSL floor. Approximately half of the arrivals to DAL runways 13R and 13L from the northeast exit the bottom of the Class B airspace shelf with a 3,000 foot MSL floor into the Addison, TX (ADS), Class D airspace and re-enter the side of the Class B airspace shelf with a 2,000 foot MSL floor. When operations are on a north flow, aircraft arrivals to DAL runways 31R and 31L flying straight-in from Cedar Creek, TX, routinely exit the bottom of the Class B airspace shelf with a 4,000 foot MSL floor and re-enter the side of the Class B airspace shelf with a 2,500 foot MSL floor or the surface area, or they exit the bottom of the Class B airspace shelf with a 2,500 foot MSL floor and re-enter the side of the surface area.

Pre-NPRM Public Input

In January 2008, an Ad Hoc Committee was formed to provide comments and recommendations for the FAA to consider in designing a proposed modification to the Dallas/Fort Worth Class B airspace area. The committee met three times between January and April, 2008, and forwarded three recommendations to the FAA on May 16, 2008. The Ad Hoc Committee membership consisted of representatives from the City of Dallas-Department of Aviation, Aircraft Owners and Pilots Association (AOPA), National Business Aviation Association (NBAA), Texas Soaring Association, Skydive Dallas, American and Southwest Airlines, and representatives from Addison Airport, TX (ADS); Lancaster Regional Airport, TX (LNC); and Mesquite Metro Airport, TX (HQZ).

In addition, as announced in the **Federal Register** (73 FR 50258), informal airspace meetings were held on November 3, 2008, at the Lancaster Recreation Center, Lancaster, TX; on November 6, 2008, at the Cavanaugh Flight Museum, Addison, TX; on November 13, 2008, at the Denton Airport Terminal Building, Denton, TX; and on November 18, 2008, at the Mesquite Airport Terminal Building, Mesquite, TX. The purpose of these meetings was to provide interested airspace users with an opportunity to present their views and offer suggestions regarding planned modifications to the Dallas/Fort Worth Class B airspace area. All substantive comments received as a result of the informal airspace meetings and the recommendations made by the Ad Hoc Committee were considered in developing this proposal.

Discussion of Recommendations and Comments

Ad Hoc Committee Recommendations

As a starting point for discussion, a preliminary Class B design was presented to the Ad Hoc Committee for review. In general, the preliminary design proposal consisted of lowering Class B airspace subarea floors within portions of existing Class B airspace northwest, north, and northeast of DFW and southeast of DAL to ensure containment of large turbine-powered aircraft flying instrument procedures within Class B airspace. Specifically, a portion of existing Class B airspace (Area G) northwest of DFW was lowered 1,000 feet to support aircraft flying instrument approaches to DFW runway 13R; portions of existing Class B airspace (Areas D, E, & F) north of DFW were lowered 500 feet to 1,000 feet to support aircraft flying instrument approaches to DFW runways 17R, 17C, and 17L and runways 18R and 18L; a portion of existing Class B airspace (Area D) northeast of DFW was lowered 500 feet to support aircraft flying instrument approaches to DAL runways 13R and 13L; and portions of existing Class B airspace (Areas C & E) southeast of DAL were lowered 1,000 feet to 1,500 feet to support aircraft flying instrument approaches to DAL runways 31R and 31L. The preliminary design also expanded the Class B airspace boundary north of DFW to a 30 nautical mile (NM) radius of the Point of Origin, over the Ray Roberts Lake, to contain aircraft within Class B airspace when DFW is on a southerly landing flow. The Ad Hoc Committee submitted three recommendations to the FAA regarding the proposed modifications of the DFW Class B airspace area.

The Ad Hoc Committee was concerned with the proposed preliminary design that lowered a portion of existing Class B airspace (Area E) located southeast of DAL between 20–NM and 30–NM of the Point of Origin from a 4,000 feet MSL floor to a 2,500 feet MSL floor. They stated lowering the Class B airspace in this subarea to 2,500 feet MSL compromised safety by compressing general aviation traffic attempting to transit through that area. They recommended the FAA split this proposed subarea into two sections and raise the Class B airspace floors for one section to 3,000 feet MSL and the other to 4,000 feet MSL with the boundary between the two determined by the point where instrument approaches to the DAL runways 31R and 31L fall below 4,000 feet MSL.

The FAA accepted the Ad Hoc Committee's recommendation to split the proposed subarea and raise the Class B airspace floor altitude(s). After reviewing the DAL runway 31R and 31L arrival flight tracks from the southeast, the FAA determined a single, smaller Class B airspace subarea with the floor altitude raised would contain the instrument procedures and large turbine-powered aircraft flying the procedures within Class B airspace. The proposed subarea (Area I) has been reduced in size by half from the original design to only extend between 20–NM and 25–NM from the Point of Origin with the floor raised from 2,500 feet MSL to 3,000 feet MSL. The FAA incorporated these proposal changes to overcome the Ad Hoc Committee's safety concerns of compressing general aviation aircraft flying in the area while still containing aircraft flying the instrument approaches to DAL runways 31R and 31L within Class B airspace.

The Ad Hoc Committee was also concerned with the design of existing Class B airspace (Area D) northeast of DFW and directly over the ADS Class D airspace area that was lowered from 3,000 feet MSL to 2,500 feet MSL. They commented that VFR aircraft entering and leaving the ADS Class D airspace area would be unnecessarily compressed with these changes and recommended the FAA determine an arc, parallel to the existing 10–NM Class B airspace surface area arc, to define a smaller Class B airspace subarea with a 2,500 foot MSL floor. They argued this mitigation would retain the existing ceiling on the North and East side of the ADS Class D airspace area and eliminate the possibility for the compression noted above.

The FAA redefined the outer boundary of the proposed Class B airspace subarea with an arc, parallel to the 10–NM arc of the Class B surface area boundary, to prevent overlapping the entire ADS Class D airspace area with a 2,500 foot MSL Class B airspace floor. The FAA also reduced the size of the proposed subarea (Area F) by matching the outer boundary with the 13–NM arc of the adjacent existing Class B airspace (Area B) located north of DFW. The proposed Class B airspace subarea (Area F) would be established with a 2,500 foot MSL floor between the 10–NM and 13–NM arcs of the Point of Origin and the adjacent existing Class B airspace (Area B) segments. The Class B airspace located northeast of DFW outside the 13–NM arc from the Point of Origin would remain unchanged with the existing 3,000 foot MSL floor. Reducing the size of the proposed Class B airspace (Area F) would continue to support VFR aircraft ingressing and egressing ADS from/to the East without compression, as addressed by the Ad Hoc Committee, and ensure large turbine-powered aircraft flying instrument procedures to DAL runways 13R and 13L are contained within Class B airspace.

Additionally, to overcome potential confusion, unintentional airspace incursions, or perceived flight safety issues associated with the ADS Class D airspace area having two different ceilings as a result of this proposed action, the FAA is also considering amending the ADS Class D airspace area with a single ceiling, ''to but not including 2,500 feet MSL,'' as a separate airspace action. Consideration of this amendment action would not affect VFR aircraft ingressing and egressing ADS from/to the East, as noted by the Ad Hoc Committee.

Lastly, the Ad Hoc Committee recommended the FAA use prominent visual landmarks to depict boundaries and redefine the northern boundary of the Dallas/Fort Worth Class B airspace area using the southern shore and dam of the Ray Roberts Lake or the secondary road that is adjacent to the lake. They reiterated the importance of new Class B airspace boundaries being defined by prominent visual landmarks for easy identification by non-participating VFR aircraft flying in the vicinity of those boundaries.

The FAA agrees that using prominent landmarks, when available and supportive, to describe Class B airspace boundaries enables non-participant VFR aircraft to visually identify the boundaries and to avoid unintended incursions into Class B airspace. As such, the northern boundary described in the proposed Dallas/Fort Worth Class B airspace area (new Area L) was changed from a 30–NM radius of the Point of Origin, which extends over the Ray Roberts Lake, to a boundary that is parallel to the existing northern boundary and intersects the southern-most point of the Ray Roberts Lake dam for visual reference by non-participating VFR aircraft.

Informal Airspace Meeting Comments

Thirty-three comments and one petition signed by forty-one individuals addressed concerns with the Class B airspace extension north of DFW, which was designed to protect aircraft flying approaches from the north into DFW. The proposed extension involves lowering a portion of one existing Class B airspace subarea (Area D) from 3,000 feet MSL to 2,500 feet MSL, as well as lowering a portion of the floors in two other existing subareas (Areas E and F) from 4,000 feet MSL to 3,000 feet MSL over the Hidden Valley and Lakeview areas. The commenters requested that the existing Class B airspace floor be retained based on obstacle clearance issues with existing towers in the area; increased noise and emissions associated with large turbine-powered aircraft and VFR aircraft flying at lower altitudes over residential areas; economic consequences to VFR aircraft based on increased fuel burn associated with flying at lower altitudes or longer distances to circumnavigate the new area; and safety implications associated with increased numbers of aircraft at the lower, compressed altitudes.

The FAA reviewed the proposed Class B airspace extension north of DFW and alternatives available to contain the large turbine-powered aircraft flying instrument procedures within Class B airspace. In lieu of proposing to lower existing Class B airspace north of DFW as noted above, the FAA initiated procedural changes, which included modifying the instrument approach procedures and changing turn-on altitudes for aircraft flying approaches to DFW runways 17R, 17C, and 17L, and runways 18R and 18L. The FAA determined the procedural change actions would ensure consistent containment of large turbine-powered aircraft within Class B airspace and therefore is not pursuing this proposed Class B airspace modification north of DFW.

Nine comments were received about the proposed lower Class B airspace extension southeast of DAL, with seven opposing the extension altogether and one suggesting to raise the Class B airspace floor for a segment of the proposed extension. Six of the commenters were concerned about compression of VFR aircraft and the lack of viable altitudes for bi-directional VFR flight in an area frequently used by VFR aircraft. Four of the commenters argued that lowering the Class B airspace extension would force Dallas Executive Airport (RBD) and Lancaster Regional Airport (LNC) departures flying East and Northeast to remain at low altitudes for extended distances until clear of the extension; create a narrow corridor between the towers located at Cedar Hill (southwest of RBD) and the proposed extension (southeast of RBD) that student pilots flying out of RBD would have to remain within; and increase the potential for numerous unintended incursions into the proposed extension. Lastly, one commenter highlighted increased noise concerns with large turbine-powered aircraft flying at lower altitudes inbound to DAL, and one commenter contended

DAL was not a primary airport and the associated instrument procedures were not required to be contained within Class B airspace.

While the FAA acknowledges the commenters' concerns, the lower Class B airspace floors southeast of DAL are necessary to contain the existing large turbine-powered aircraft flying DAL instrument procedures in use today within Class B airspace. Lowering a portion of existing Class B airspace (Area C) southeast of DAL between 15–NM and 20–NM of the Point of Origin from 2,500 feet MSL to 2,000 feet MSL, as well as a portion of existing Class B airspace (Area E) southeast of DAL between 20–NM and 25–NM of the Point of Origin, as proposed, would mitigate the commenters' concerns as much as possible while still containing large turbine-powered aircraft within Class B airspace. However, comments are invited on this proposal.

The FAA also acknowledges that compression issues may result where pilots elect to fly below the floor of Class B airspace. The Dallas/Fort Worth terminal area encompasses not only the FAA's fourth busiest airport (with over 686,000 airport operations in CY 2011), but also DAL in close proximity (with over 179,000 airport operations in CY 2011). Plus, there are numerous other airports situated in and around the Dallas/Fort Worth terminal area that contribute to the complex, high density airspace environment containing a very diverse mix of aircraft types and aviation activities. Currently, large turbine-powered aircraft and VFR aircraft are flying simultaneously in the same airspace. It is an essential safety requirement to segregate the DFW and DAL traffic from the non-participating VFR aircraft that may not be in communication with ATC. Consequently, some non-participating VFR aircraft may have to fly a little further, or at different altitudes, in order to remain clear of the proposed Class B airspace area. Ultimately, it is the pilot's responsibility to evaluate all factors that could affect a planned flight and determine the safest course of action whether it should be circumnavigating the Class B airspace, flying beneath the Class B airspace, utilizing a charted VFR flyway, or requesting Class B clearance from the Dallas/Fort Worth Terminal Radar Approach Control (TRACON).

Seven commenters objected to lowering a portion of existing Class B airspace (Area D) northeast of DFW between 10–NM and 13–NM of the Point of Origin from 3,000 feet MSL to 2,500 feet MSL to establish a proposed Class B airspace Area F. The commenters again noted increased noise and flight safety concerns associated with a lower Class B airspace floor based on large turbine-powered jets flying lower and a portion of the ADS Class D airspace area being reduced 500 feet. One commenter was concerned the lower Class B airspace shelf would negatively impact flights into both ADS and DAL. Another commenter argued that the proposed lower Class B airspace northeast of DFW provided only a 500 foot clearance between the floor of the Class B airspace and the JERIT final approach fix of the runway 15 ILS approach to ADS; highlighting that this minimal altitude separation jeopardized IFR traffic in both airspaces.

The FAA considered the Ad Hoc Committee's recommendation to reduce the size of this proposed subarea (Area F), as discussed previously, and defined the outer boundary so the proposed subarea would not overlay the entire ADS Class D airspace area. The proposal retains the proposed 2,500 foot MSL floor, but reduces the lateral size of the proposed subarea (Area F) by adjusting the outer boundary to match the 13–NM arc of the adjacent existing Class B airspace (Area B) segment located north of DFW. The proposed Class B airspace subarea (Area F) presented at the informal airspace meetings would be established with a 2,500 foot MSL floor between the 10–NM and 13–NM arcs from the Point of Origin and the adjacent existing Class B airspace (Area B) segments. The existing Class B airspace located northeast of DFW outside the 13–NM arc from the Point of Origin would remain unchanged. As previously mentioned, the proposed Class B airspace (Area F) would continue to support VFR aircraft ingressing and egressing ADS from/to the East without compression and would contain the large turbine-powered aircraft currently flying the instrument procedures to DAL runways 13R and 13L within Class B airspace. No adjustments or changes to existing traffic flows, traffic patterns, or assigned altitudes are anticipated as a result of this proposed Class B subarea. It is not expected that there would be an increase in noise or loss of flight safety associated with lower flying aircraft as a result of this proposal. Additionally, aircraft arriving and departing ADS would continue to be able to use existing landmarks. Further, aircraft operating in the ADS Class D and DFW Class B airspace areas northeast of DFW would continue to be positively controlled and required to be in contact with ATC (ADS control tower, DAL control tower, or DFW TRACON) using existing frequency procedures. This positive control and communication requirement would ensure established separation standards are applied and flight safety is not compromised.

As mentioned before, to overcome potential confusion, unintentional airspace incursions, or perceived flight safety issues associated with the ADS Class D airspace area having two different ceilings, the FAA is also considering amending the ADS Class D airspace with a single ceiling, ''to but not including 2,500 feet MSL,'' as a separate airspace action. Consideration of this amendment would not affect VFR aircraft ingressing and egressing ADS from/to the East, VFR aircraft circumnavigating Class B airspace, or large turbine-powered aircraft flying instrument procedures to/from DAL.

Two comments recommended the FAA consider incorporating the sliver of existing Class B airspace (Area B) located southwest and south of ADS [north of DAL] with a 2,000 foot MSL floor into the proposed Class B airspace subarea (Area F) northeast of DFW with a 2,500 foot MSL floor. The commenters offered that inclusion of the sliver of existing Class B airspace into a larger proposed Class B airspace extension northeast of DFW would reduce the complexity of Class B airspace in that area, as well as reduce the associated chart clutter.

Including the sliver of existing Class B airspace (Area B) that has a 2,000 foot MSL floor into the proposed Area F with a 2,500 foot MSL floor would be counterproductive to the FAA's efforts to ensure large turbine-powered aircraft flying instrument procedures would be contained within Class B airspace. The sliver of existing Class B airspace (Area B) is necessary to contain aircraft descending to 2,000 feet MSL for a 6–NM to 8–NM left base for turn-on to intercept the DAL ILS/RNAV/RNP approaches to runways 13R and 13L. This tight turn-on, from 2,000 feet MSL, to DAL is necessary to remain clear of air traffic landing at DFW on runway 17L.

Conversely, lowering the proposed Class B airspace (Area F) northeast of DFW to reflect a 2,000 foot MSL floor to match the sliver of existing Class B airspace (Area B), to overcome chart clutter and airspace complexity concerns, would be inappropriate as it would incorporate more airspace in the Class B airspace configuration than is necessary. Therefore, the FAA is not proposing any amendment to the sliver of existing Class B airspace (Area B) discussed above.

One commenter challenged the necessity of lowering the airspace extensions northwest of DFW and

southeast of DAL to contain the instrument procedures for DFW and DAL since the areas extend beyond the reliable ILS service volume distance of 18–NM as addressed in the Aeronautical Information Manual (paragraph 1–1–9).

The proposed Class B airspace extension southeast of DAL actually overlaps the ILS Localizer service area volumes supporting DAL runways 31R and 31L. The ILS Localizer service volumes supporting DFW runways 13R and 13L extend out the standard 18–NM; however, simultaneous ILS approach operations to those runways require the aircraft being turned onto parallel final approach courses be separated by 3 miles longitudinally, or 1,000 feet vertically until they are established on the final approach course. As such, the Class B airspace extension northwest of DFW was proposed with the minimum amount of airspace necessary to contain the large turbine-powered aircraft flying the procedures within Class B airspace.

One commenter opposed lowering a portion of existing Class B airspace (Area G) located northwest of DFW from 5,000 feet MSL to the proposed 4,000 feet MSL, stating that the lower Class B airspace would force transient non-participating VFR aircraft to fly closer to multiple 3,000 foot towers located just northwest of the DFW Class B airspace area.

The multiple 3,000 foot towers addressed by the commenter are located approximately 12–NM outside the nearest Dallas/Fort Worth Class B airspace area boundary. The nearest existing Class B airspace subarea (Area F) to these towers has a 4,000 foot MSL floor and is not affected by this action. Lowering a portion of existing Class B airspace (Area G) from 5,000 feet MSL to 4,000 feet MSL would also not affect any VFR aircraft operating in the vicinity of the towers.

Lastly, one comment was received stating that unless additional data could be provided, the 11,000 foot MSL ceiling of the Dallas/Fort Worth Class B airspace area was not needed. The commenter recommended the FAA take note of other busy terminal airspace areas that do not use such a high ceiling; using the New York City Class B and Boston Class B airspaces with 7,000 foot MSL ceilings as examples. The commenter further determined that the DFW Class B airspace area could safely operate with a ceiling of 8,500 feet MSL and argued this would have a positive impact on all airspace users by decongesting air traffic control frequencies and permitting non-participating VFR pilots to transition the DFW Class B airspace area without the need to contact the Dallas/Fort Worth TRACON.

Although other locations have Class B airspace ceilings lower than the Dallas/Fort Worth Class B airspace area, Class B airspace dimensions are individually tailored to meet site-specific requirements. The Class B airspace area proposed in this action is the minimum amount of airspace necessary to contain large turbine-powered aircraft flying instrument arrival and departure procedures within Class B airspace. Additionally, the existing 10,000 foot/11,000 foot MSL Dallas/Fort Worth Class B airspace ceiling was established in 1996 (61 FR 47815) to accommodate arriving aircraft using standard instrument arrival routes and departing aircraft using standard instrument departure routes into and out of the DFW Metroplex area. Lowering the Class B airspace area ceilings would mix the large turbine-powered aircraft flying on the eight primary arrival and sixteen departure routes to and from DFW and DAL, transitioning between the en route and terminal airspace environments, with the uncontrolled VFR aircraft transiting over the top of the Class B airspace area. By keeping the Dallas/Fort Worth Class B airspace ceilings unchanged at 10,000 feet/11,000 feet MSL, the FAA is able to provide positive control to IFR aircraft arriving and departing DFW and DAL and the VFR aircraft that have obtained Class B airspace clearances from the non-participating VFR aircraft transiting in the vicinity of the Class B airspace area. Having VFR aircraft that are not in communication with ATC operating in this terminal airspace area reduces the margin of safety in the high volume airspace surrounding the FAA's fourth busiest airport. For these reasons, the FAA is not proposing to change the Dallas/Fort Worth Class B airspace area ceilings.

The Proposal

The FAA is proposing an amendment to Title 14 of the Code of Federal Regulations (14 CFR) part 71 to modify the Dallas/Fort Worth, TX, Class B airspace area. This action (depicted on the attached chart) proposes to lower the northern portion of existing Area G located northwest of DFW to 4,000 feet MSL, lower a portion of existing Area D located northeast of DFW between the 10–NM and 13–NM arcs from the Point of Origin to 2,500 feet MSL, lower approximately the southern half of existing Area C located southeast of DAL to 2,000 feet MSL, lower a portion of existing Area E located southeast of DAL between the 20–NM and 25–NM arcs from the Point of Origin to 3,000 feet MSL, and redefine the northern boundary of the Class B airspace area using the Ray Roberts Lake dam. The Class B airspace ceiling would remain unchanged. These proposed modifications to the Dallas/Fort Worth Class B airspace area would provide the minimum airspace necessary to contain the existing large turbine-powered aircraft flying instrument procedures to and from DFW and DAL within the confines of Class B airspace.

Except for existing Area A, which extends upward from the surface to and including 11,000 feet MSL within an area surrounding the point of origin, DFW, and DAL, the proposed descriptions of all other subareas that make up the Dallas/Fort Worth Class B airspace area would be reconfigured, re-described, and realigned by geographic position in relation to the point of origin, rather than the previous practice of combining geographically separate areas that share a common altitude floor into one large, complex subarea description. The current Dallas/Fort Worth Class B airspace area consists of eight subareas (A through H) while the proposed configuration would consist of fourteen subareas (A through N). The proposed revisions to the Dallas/Fort Worth Class B airspace area, by subarea, are outlined below.

Area A. Area A is the surface area that extends from the surface up to 11,000 feet MSL. The FAA is not proposing any changes to Area A.

Area B. Area B extends upward from 2,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area B that is located north, west, and south of DFW. The FAA is not proposing any changes to this portion of that Class B airspace.

Area C. Area C extends upward from 2,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area B that is located east of DFW. The FAA is not proposing any changes to this portion of that Class B airspace.

Area D. Area D is a new area extending upward from 2,000 feet MSL to 11,000 feet MSL located southeast of DAL from the Cowboy VOR/DME (CVE) 117°T/111°M radial clockwise to the 129°T/123°M bearing from the Point of Origin and between 15–NM and 20–NM of the Point of Origin. This new area would lower a portion of Class B airspace contained in the current Area C, south of the CVE 117°T/111°M radial, by 500 feet to overcome the issue of aircraft arriving DAL runways 31R and 31L from the southeast exiting the bottom of the Class B airspace shelf with a 2,500 foot MSL floor and then

reentering the side of the Class B airspace surface area.

Area E. Area E extends upward from 2,500 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area C that is not incorporated in the new Area D described above. The FAA is not proposing any changes to this Class B airspace.

Area F. Area F is a new area extending upward from 2,500 feet MSL to 11,000 feet MSL located northeast of DFW from the 023°T/017°M bearing from the Point of Origin clockwise to Interstate I–635 and between 10–NM and 13–NM of the Point of Origin. This new area would lower a portion of Class B airspace contained in the current Area D, northeast of DFW, by 500 feet to overcome the issue of aircraft arriving DAL runways 13R and 13L from the northeast exiting the bottom of the Class B airspace shelf with a 3,000 foot MSL floor, flying through the ADS Class D airspace area, and then reentering the side of the Class B airspace shelf with a 2,000 foot MSL floor or the side of the Class B airspace surface area.

Area G. Area G extends upward from 3,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area D that is located south of DFW. The FAA is not proposing any changes to this portion of that Class B airspace.

Area H. Area H extends upward from 3,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area D that is located north of DFW and not incorporated in the new Area F described above. The FAA is not proposing any changes to this Class B airspace.

Area I. Area I is a new area extending upward from 3,000 feet MSL to 11,000 feet MSL located southeast of DAL from the Cowboy VOR/DME (CVE) 117°T/111°M radial clockwise to the 129°T/123°M bearing from the Point of Origin between 20–NM and 25–NM of the Point of Origin. This new area would lower a portion of Class B airspace contained in the current Area E by 1,000 feet to overcome the issue of aircraft arriving DAL runways 31R and 31L from the southeast exiting the bottom of the Class B airspace shelf with a 4,000 foot MSL floor and then reentering the side of the Class B airspace shelf with a 2,500 foot MSL floor.

Area J. Area J extends upward from 4,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area E with an extension northwest of DFW that would include a portion of Class B airspace contained in the current Area G, northwest of the 311°T/305°M bearing from the Point of Origin. This new area would overcome the issue of aircraft arriving DFW runways 13R and 13L from the northwest exiting the bottom of the Class B airspace shelf with a 5,000 foot MSL floor and then reentering the side of the Class B airspace shelf with a 4,000 foot MSL floor.

Area K. Area K extends upward from 4,000 feet MSL to 10,000 feet MSL in the Class B airspace contained in the current Area F that is located south of DFW. The FAA is not proposing any changes to this portion of that Class B airspace.

Area L. Area L extends upward from 4,000 feet MSL to 10,000 feet MSL in the Class B airspace contained in the current Area F that is located north of DFW. The FAA is proposing to extend the northern boundary further north, parallel to the existing boundary, to intercept the southern-most point of the Ray Roberts Lake dam for visual reference.

Area M. Area M extends upward from 5,000 feet MSL to 11,000 feet MSL in the remaining portion of Class B airspace contained in the current Area G that is not incorporated in the new Area J described above. The FAA is not proposing any changes to this Class B airspace.

Area N. Area N extends upward from 6,000 feet MSL to 11,000 feet MSL in the Class B airspace contained in the current Area H. The FAA is not proposing any changes to this Class B airspace.

Finally, this proposed action would update the DFW airport reference point (ARP) coordinates and includes the Cowboy VOR/DME (CVE) navigation aid information in the Class B airspace legal description to reflect current National Airspace System data.

Implementation of these proposed modifications to the Dallas/Fort Worth Class B airspace area would ensure the containment of instrument procedures and large turbine-powered aircraft flying those procedures within Class B airspace, as required by FAA directives, and enhance the efficient use of the airspace, the management of aircraft operations, and flight safety in the DFW and DAL terminal area.

All radials listed in the Dallas/Fort Worth Class B airspace description in this NPRM are stated in degrees relative to both True North and Magnetic North. Additionally, all geographic coordinates for this proposed action are stated in degrees, minutes, and seconds based on North American Datum 83.

Class B airspace areas are published in paragraph 3000 of FAA Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR section 71.1. The Class B airspace area listed in this document would be published subsequently in the Order.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. We have determined that there is no new information collection requirement associated with this NPRM.

Regulatory Evaluation Summary

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 and Executive Order 13563 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Public Law 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impacts of this proposed rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared. Such a determination has been made for this proposed rule. The reasoning for this determination follows:

This action proposes to modify the DFW Class B airspace area to ensure the containment of large turbine-powered aircraft flying instrument procedures to

and from the Dallas/Fort Worth International Airport and Dallas Love Field Airport within Class B airspace, reduce controller workload, and reduce the potential for near midair collision in the DFW terminal area. It lowers the Class B airspace floor in some sections to encompass existing IFR traffic. Lowering the floor of the Class B airspace would increase safety by segregating large turbine-powered aircraft from aircraft that may not be in contact with ATC. It would reduce air traffic controller workload by reducing the number of radio communications that air traffic controllers must use to inform IFR aircraft when they are leaving and re-entering Class B airspace. This would reduce the amount of distraction that air traffic controllers face in issuing these communications and free radio time for more important control instructions. IFR traffic would not be rerouted as a result of this proposal.

The proposed airspace restructuring would result in safety benefits and increased operational efficiencies. This rule would enhance safety by reducing the number of aircraft entering, exiting, and reentering Class B airspace and consequently reducing air traffic controller workload and radio frequency congestion. By expanding the Class B airspace area where aircraft are subject to certain operating rules and equipment requirements it would also reduce the potential for midair collisions. The proposed modification of the Class B airspace would provide operational advantages as well by establishing necessary airspace for controllers to sequence aircraft within Class B airspace and thereby reducing the need for controllers to vector arrivals and departures to avoid nonparticipating traffic. The change may cause some VFR pilots to have to choose between flying below Class B airspace, circumnavigating the Class B airspace area, or requesting Class B clearance to transition the area. This has the potential of increasing costs to VFR operations if the alternative routes are longer, take more time and burn more fuel. However, due to the specific restructuring we do not anticipate that VFR flights would have to travel far to circumnavigate the new proposed Class B airspace.

The FAA expects an increase in safety, some operational efficiencies from the larger Class B airspace offset slightly by possible VFR re-routings resulting in minimal cost overall. The proposal would not require updating of materials outside the normal update cycle, and would not require rerouting of IFR traffic. The expected outcome would be a minimal impact with positive net benefits, and a regulatory evaluation was not prepared. The FAA requests comments with supporting justification about the FAA determination of minimal impact.

The FAA has, therefore, determined that this proposed rule is not a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866, and is not ''significant'' as defined in DOT's Regulatory Policies and Procedures.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) (RFA) establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.'' The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA.

However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

The proposed rule is expected to improve safety and efficiency by redefining Class B airspace boundaries and would impose only minimal costs because it would not require rerouting of IFR traffic, could possibly cause some VFR aircraft to travel alternative routes that are not expected to be appreciably longer than with the current airspace design, and would not require updating of materials outside the normal update cycle. Therefore, the expected outcome would be a minimal economic impact on small entities affected by this rulemaking action.

Therefore, the FAA certifies this proposed rule, if promulgated, would not have a significant impact on a substantial number of small entities. The FAA solicits comments regarding this determination. Specifically, the FAA requests comments on whether the proposed rule creates any specific compliance costs unique to small entities. Please provide detailed economic analysis to support any cost claims. The FAA also invites comments regarding other small entity concerns with respect to the proposed rule.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would have only a domestic impact and therefore no effect on international trade.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $143.1 million in lieu of $100 million. This proposed rule does not contain such a mandate; therefore, the requirements of Title II of the Act do not apply.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures,'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 3000 Class B airspace.

* * * * *

ASW TX B Dallas/Fort Worth, TX [Amended]

Dallas/Fort Worth International Airport
(Primary Airport)
(Lat. 32°53′49″ N., long. 97°02′17″ W.)
Point of Origin
(Lat. 32°51′57″ N., long. 97°01′41″ W.)
Cowboy VOR/DME (CVE)
(Lat. 32°53′25″ N., long. 96°54′14″ W.)
Boundaries.

Area A. That airspace extending upward from the surface to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 10–NM radius from the Point of Origin and Josey Lane at lat. 32°59′08″ N., long. 96°53′26″ W., thence southbound along Josey Lane to intersect Forest Lane at lat. 32°54′34″ N., long. 96°52′54″ W., thence eastbound along Forest Lane to intersect the 15–NM radius from the Point of Origin at lat. 32°54′33″ N., long. 96°44′07″ W., thence clockwise along the 15–NM radius to intersect the 129°T/123M bearing from the Point of Origin at lat. 32°42′29″ N., long. 96°47′52″ W., thence northwest along the 129°T/123°M bearing to intersect I–30 at lat. 32°46′04″ N., long. 96°53′07″ W., thence west along I–30 to intersect the 7–NM radius from the Point of Origin at lat. 32°45′34″ N., long. 97°05′07″ W., thence clockwise along the 7–NM radius to intersect the 310°T/304°M bearing from the Point of Origin at lat. 32°56′27″ N., long. 97°08′03″ W., thence northwest along the 310°T/304°M bearing to intersect the 10–NM radius from the Point of Origin at lat. 32°58′23″ N., long. 97°10′47″ W., thence clockwise along the 10–NM radius to the point of beginning.

Area B. That airspace extending upward from 2,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 10–NM radius from the Point of Origin and the 310°T/304°M bearing from the Point of Origin at lat. 32°58′23″ N., long. 97°10′47″ W., thence southeast along the 310°T/304°M bearing to intersect the 7–NM radius from the Point of Origin at lat. 32°56′27″ N., long. 97°08′03″ W., thence counterclockwise along the 7–NM radius to intersect I–30 at lat. 32°45′34″ N., long. 97°05′07″ W., thence east along I–30 to intersect the 129°T/123°M bearing from the Point of Origin at lat. 32°46′04″ N., long. 96°53′07″ W., thence southeast on the 129°T/123°M bearing to intersect the 10–NM radius from the Point of Origin at lat. 32°45′38″ N., long. 96°52′28″ W., thence clockwise along the 10–NM radius to intersect SH–303 at lat. 32°42′23″ N., long. 96°58′18″ W., thence west along SH–303 to intersect the 10–NM radius from the Point of Origin at lat. 32°42′29″ N., long. 97°05′30″ W., thence clockwise along the 10–NM radius to intersect the 300°T/294°M bearing from the Point of Origin at lat. 32°56′57″ N., long. 97°11′58″ W., thence northwest along the 300°T/294°M bearing to intersect the 13–NM radius from the Point of Origin at lat. 32°58′27″ N., long. 97°15′04″ W., thence clockwise along the 13–NM radius to intersect the 023°T/017°M bearing from the Point of Origin at lat. 33°03′56″ N., long. 96°55′38″ W., thence southwest along the 023°T/017°M bearing to intersect the 10–NM radius from the Point of Origin at lat. 33°01′10″ N., long. 96°57′02″ W., thence counterclockwise along the 10–NM radius to the point of beginning.

Area C. That airspace extending upward from 2,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 10–NM radius from the Point of Origin and Josey Lane at lat. 32°59′08″ N., long. 96°53′26″ W., thence southbound along Josey Lane to intersect Forest Lane at lat. 32°54′34″ N., long. 96°52′54″ W., thence eastbound along Forest Lane to intersect the 15–NM radius from the Point of Origin at lat. 32°54′33″ N., long. 96°44′07″ W., thence counter-clockwise along the 15–NM radius to intersect I–635 at lat. 32°54′42″ N., long. 96°44′09″ W., thence west along I–635 to intersect the 10–NM radius from the Point of Origin at lat. 32°55′25″ N., long. 96°50′32″ W., thence counterclockwise along the 10–NM radius to the Point of beginning.

Area D. That airspace extending from 2,000 feet MSL up to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the CVE 117°T/111°M radial and the 15–NM radius from the Point of Origin at lat. 32°49′06″ N., long. 96°44′12″ W., thence clockwise along the 15–NM radius to intersect the 129°T/123°M bearing from the Point of Origin at lat. 32°42′29″ N., long. 96°47′52″ W., thence southeast along the 129°T/123°M bearing to intersect the 20 NM radius from the Point of Origin at lat. 32°39′19″ N., long. 96°43′16″ W., thence counterclockwise along the 20–NM radius to intersect the CVE 117°T/111°M radial at lat. 32°46′45″ N., long. 96°38′46″ W., thence northwest along the CVE 117°T/111°M radial to the point of beginning.

Area E. That airspace extending upward from 2,500 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of I–635 and the 15–NM radius from the Point of Origin at lat. 32°54′42″ N., long. 96°44′09″ W., thence clockwise along the 15–NM radius to intersect the CVE 117°T/111°M radial at lat. 32°49′06″ N., long. 96°44′12″ W., thence southeast along the CVE 117°T/111°M radial to intersect the 20–NM radius from the Point of Origin at lat. 32°46′45″ N., long. 96°38′46″ W., thence counterclockwise along the 20–NM radius to intersect I–635 at lat. 32°50′40″ N., long. 96°38′03″ W., thence northwest along I–635 to the point of beginning.

Area F. That airspace extending upward from 2,500 feet MSL, to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 023°T/017°M bearing from the Point of Origin and the 13–NM radius from the Point of Origin at lat. 33°03′56″ N., long. 96°55′38″ W., thence clockwise along the 13–NM radius to intersect I–635 at lat. 32°55′26″ N., long. 96°46′ 49″ W., thence west along I–635 to intersect the 10–NM radius from the Point of Origin at lat. 32°55′25″ N., long. 96°50′32″ W., thence counterclockwise along the 10–NM radius to intersect the 023°T/017°M bearing from the Point of Origin at lat. 33°01′10″ N., long. 96°57′02″ W., thence northeast along the 023°T/017°M bearing to the point of beginning.

Area G. That airspace extending upward from 3,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 300°T/294°M bearing from the Point of Origin and the 10–NM radius from the Point of Origin at lat. 32°56′57″ N., long. 97°11′58″ W., thence counterclockwise along the 10–NM radius to intersect SH–303 at lat. 32°42′29″ N., long. 97°05′30″ W., thence east along SH–303 to intersect the 10–NM radius from the Point of Origin at lat. 32°42′23″ N., long. 96°58′18″ W., thence counterclockwise along the 10–NM radius to intersect the 129°T/123°M bearing from the Point of Origin at lat. 32°45′38″ N., long. 96°52′28″ W., thence southeast along the 129°T/123°M bearing to intersect the 20–NM radius from the Point of Origin at lat. 32°39′19″ N., long. 96°43′16″ W., thence clockwise along the 20–NM radius to intersect the 217°T/211°M bearing from the Point of Origin at lat. 32°35′56″ N., long. 97°15′56″ W., thence northeast along the 217°T/211°M bearing to intersect the 13–NM radius from the Point of Origin at lat. 32°41′32″ N., long. 97°10′57″ W., thence clockwise along the 13–NM radius to intersect the 300°T/294°M bearing from the Point of Origin at lat. 32°58′27″ N., long. 97°15′04″ W., thence southeast along the 300°T/294°M bearing to the point of beginning.

Area H. That airspace extending upward from 3,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 13–NM radius from the Point of Origin and the 300°T/294°M bearing from the Point of Origin at lat. 32°58′27″ N., long. 97°15′04″ W., thence northwest along the 300°T/294°M bearing to intersect the 20–NM radius from the Point of Origin at lat. 33°01′56″ N., long. 97°22′17″ W., thence clockwise along the 20–NM radius to intersect I–635 at lat. 32°50′40″

N., long. 96°38′03″ W., thence northwest along I–635 to intersect the 13–NM radius from the Point of Origin at lat. 32°55′26″ N., long. 96°46′49″ W., thence counterclockwise along the 13–NM radius to the point of beginning.

Area I. That airspace extending upward from 3,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 20–NM radius from the Point of Origin and the 129°T/123°M bearing from the Point of Origin at lat. 32°39′19″ N., long. 96°43′16″ W., thence southeast along the 129°T/123°M bearing to intersect the 25–NM radius from the Point of Origin at lat. 32°36′09″ N., long. 96°38′41″ W., thence counterclockwise along the 25–NM radius to intersect the CVE 117°T/111°M radial at lat. 32°44′25″ N., long. 96°33′24″ W., thence northwest along the CVE 117°T/111°M radial to intersect the 20–NM radius from the Point of Origin at lat. 32°46′45″ N., long. 96°38′46″ W., thence clockwise along the 20–NM radius to the point of beginning.

Area J. That airspace extending upward from 4,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 217°T/211°M bearing from the Point of Origin and the 20–NM radius from the Point of Origin at lat. 32°35′56″ N., long. 97°15′56″ W., thence counterclockwise along the 20–NM radius to intersect the 129°T/123°M bearing from the Point of Origin at lat. 32°39′19″ N., long. 96°43′16″ W., thence southeast along the 129°T/123°M bearing to intersect the 25–NM radius from the Point of Origin at lat. 32°36′09″ N., long. 96°38′41″ W., thence counterclockwise along the 25–NM radius to intersect the CVE 117°T/111°M radial at lat. 32°44′25″ N., long. 96°33′24″ W., thence northwest along the CVE 117°T/111°M radial to intersect the 20–NM radius from the Point of Origin at lat. 32°46′45″ N., long. 96°38′46″ W., thence counterclockwise along the 20–NM radius to intersect the 300°T/294°M bearing from the Point of Origin at lat. 33°01′56″ N., long. 97°22′17″ W., thence southeast along the 300°T/294°M bearing to intersect the 13–NM radius from the Point of Origin at lat. 32°58′27″ N., long. 97°15′04″ W., thence counterclockwise along the 13–NM radius to intersect the 217°T/211°M bearing from the Point of Origin at lat. 32°41′32″ N., long. 97°10′57″ W., thence southwest along the 217°T/211°M bearing to intersect the 20–NM radius from the Point of Origin at lat. 32°35′56″ N., long. 97°15′56″ W., thence clockwise along the 20–NM radius to intersect I–20 at lat. 32°39′56″ N., long. 97°20′39″ W., thence west along I–20 to intersect I–820 at lat. 32°41′51″ N., long. 97°28′14″ W., thence north along I–820 to intersect the 23–NM radius from the Point of Origin at lat. 32°46′46″ N., long. 97°28′17″ W., thence clockwise along the 23–NM radius to intersect the 311°T/305°M bearing from the Point of Origin at lat. 33°07′02″ N., long. 97°22′21″ W., thence northwest along the 311°T/305°M bearing to intersect the 30–NM radius from the Point of Origin at lat. 33°11′37″ N., long. 97°28′40″ W., thence clockwise along the 30–NM radius to intersect the 315°T/309°M bearing from the Point of Origin at lat. 33°13′10″ N., long. 97°26′58″ W., thence east to the intersection of the 041°T/035°M bearing of the Point of Origin and the 30–NM radius from the Point of Origin at lat. 33°14′36″ N., long. 96°38′13″ W., thence clockwise along the 30–NM radius to intersect the 138°T/132°M bearing from the Point of Origin at lat. 32°29′34″ N., long. 96°37′57″ W., thence west to the intersection of the 217°T/211°M bearing from the Point of Origin and the 28.3 NM radius from the Point of Origin at lat. 32°29′17″ N., long. 97°21′49″ W., thence northeast along the 217°T/211°M bearing to the point of beginning.

Area K. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 138°T/132°M bearing from the Point of Origin and the 30–NM radius from the Point of Origin at lat. 32°29′34″ N., long. 96°37′57″ W., thence clockwise along the 30–NM radius to intersect the 149°T/143°M bearing from the Point of Origin at lat. 32°26′10″ N., long. 96°43′26″ W., thence west to the intersection of the 210°T/204°M bearing from the Point of Origin and the 30–NM radius from the Point of Origin at lat. 32°25′54″ N., long. 97°19′24″ W., thence clockwise along the 30–NM radius to intersect the 217°T/211°M bearing from the Point of Origin at lat. 32°27′55″ N., long. 97°23′01″ W., thence northeast along the 217°T/211°M bearing to intersect the 28.3–NM radius from the Point of Origin at lat. 32°29′17″ N., long. 97°21′49″ W., thence east to the point of beginning.

Area L. That airspace extending upward from 4,000 feet MSL to and including 10,000 feet MSL within an area bounded by a line beginning at the intersection of the 315°T/309°M bearing from the Point of Origin and the 30–NM radius from the Point of Origin at lat. 33°13′10″ N., long. 97°26′58″ W., thence clockwise along the 30–NM radius to the intersection of the 30–NM radius from the Point of Origin and the 344°T/338°M bearing from the Point of Origin at lat. 33°20′50″ N., long. 97°11′33″ W., thence east to the intersection of the 012°T/006°M bearing from the Point of Origin and the 30–NM radius from the Point of Origin at lat. 33°21′21″ N., long. 96°54′14″ W., thence clockwise along the 30–NM radius to intersect the 041°T/035°M bearing from the Point of Origin at lat. 33°14′36″ N., long. 96°38′13″ W., thence west to the point of beginning.

Area M. That airspace extending upward from 5,000 feet MSL up to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 311°T/305°M bearing from the Point of Origin and the 30–NM radius from the Point of Origin at lat. 33°11′37″ N., long. 97°28′40″ W., thence counterclockwise along the 30–NM radius to intersect the 293°T/287°M bearing from the Point of Origin at lat. 33°03′37″ N., long. 97°34′32″ W., thence southeast along the 293°T/287°M bearing to intersect the 26–NM radius from the Point of Origin at lat. 32°02′04″ N., long. 97°30′09″ W., thence counterclockwise along the 26–NM radius to intersect SH–377 at lat. 32°39′49″ N., long. 97°28′58″ W., thence southwest along SH–377 to intersect the 30–NM radius from the Point of Origin at lat. 32°36′56″ N., long. 97°32′26″ W., thence counterclockwise along the 30–NM radius to intersect the 217°T/211°M bearing from the Point of Origin at lat. 32°27′55″ N., long. 97°23′01″ W., thence northeast along the 217°T/211°M bearing to intersect the 20–NM radius from the Point of Origin at lat. 32°35′56″ N., long. 97°15′56″ W., thence clockwise along the 20–NM radius to intersect I–20 at lat. 32°39′56″ N., long. 97°20′38″ W., thence west along I–20 to intersect I–820 at lat. 32°41′51″ N., long. 97°28′14″ W., thence north along I–820 to intersect the 23–NM radius from the Point of Origin at lat. 32°46′46″ N., long. 97°28′17″ W., thence clockwise along the 23–NM radius to intersect the 311°T/305°M bearing from the Point of Origin at lat. 33°07′02″ N., long. 97°22′21″ W., thence northwest along the 311°T/305°M bearing to the point of beginning.

Area N. That airspace extending upward from 6,000 feet MSL to and including 11,000 feet MSL within an area bounded by a line beginning at the intersection of the 30–NM radius from the Point of Origin and the 293°T/287°M bearing from the Point of Origin at lat. 33°03′37″ N., long. 97°34′32″ W., thence southeast along the 293°T/287°M bearing to intersect the 26–NM radius from the Point of Origin at lat. 33°02′04″ N., long. 97°30′09″ W., thence counterclockwise along the 26–NM radius to intersect SH–377 at lat. 32°39′49″ N., long. 97°28″ 58″ W., thence southwest along SH- 377 to intersect the 30–NM radius from the Point of Origin at lat. 32°36′56″ N., long. 97°32′26″ W., thence clockwise along the 30–NM radius to the point of beginning.

* * * * *

Issued in Washington, DC, on December 12, 2012.

Gary A. Norek,

Manager, Airspace Policy and Air Traffic Control Procedures Group.

BILLING CODE 4910–13–P

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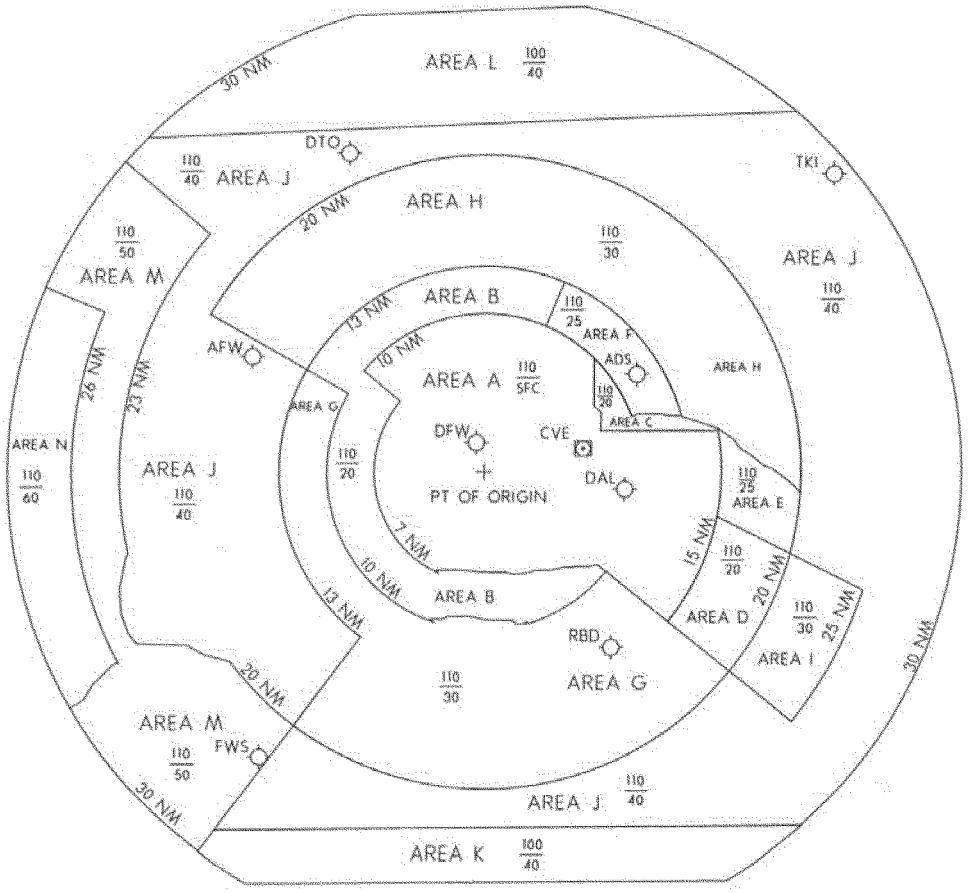

NOT FOR NAVIGATION

[FR Doc. 2013–01118 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–68660; File No. S7–08–12]

RIN 3235–AL12

Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Requirements for Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: On November 23, 2012, the Securities and Exchange Commission (''Commission'') published in the **Federal Register** a proposed rule for public comment to establish capital, margin, and segregation requirements for security-based swap dealers and major security-based swap participants under the Securities Exchange Act of 1934 (''Exchange Act'') and amend capital requirements for broker-dealers. The Commission is extending the time period in which to provide the Commission with comments.

DATES: Comments should be received on or before February 22, 2013.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an email to *rule-comments@sec.gov*. Please include File Number S7–08–12 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–08–12. This file number should be included on the subject line if email is used. To help us 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/proposed*). Comments will also 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Michael A. Macchiaroli, Associate Director, at (202) 551–5525; Thomas K. McGowan, Deputy Associate Director, at (202) 551–5521; Randall W. Roy, Assistant Director, at (202) 551–5522; Mark M. Attar, Branch Chief, at (202) 551–5889; Sheila Dombal Swartz, Special Counsel, at (202) 551–5545; Valentina M. Deng, Attorney, at (202) 551–5778; or Teen I. Sheng, Attorney, at 202–551–5511, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: On November 23, 2012, the Commission issued Release No. 34–68071 soliciting comment on proposed rules and rule amendments establishing capital, margin, and segregation requirements for persons who register with the Commission as security-based swap dealers or major security-based swap participants and amending capital requirements for broker-dealers.[1] The Commission originally requested that comments on this proposal be received by January 22, 2013. The Commission has recently been requested to extend the comment period and believes that extending the comment period is appropriate in order to give the public additional time to comment on the matters addressed by the release.[2] This extension will allow for 91 days of comment which the Commission believes should provide the public with sufficient additional time to consider thoroughly the matters addressed by the release and to submit comprehensive responses to the release which would benefit the Commission in its consideration of the final rules. Therefore, the Commission is extending the public comment period for 31 days until Friday, February 22, 2013.

Dated: January 15, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–01053 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 581, 584, and 585

Appeal Proceedings Before the Commission

AGENCY: National Indian Gaming Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Indian Gaming Commission (NIGC or Commission) proposes to revise its appeals rules to include, amongst the appealable actions, the Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards.

DATES: The agency must receive comments on or before February 6, 2013.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- *Email comments to: reg.review@nigc.gov.*
- *Mail comments to:* Armando Acosta, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.
- *Hand deliver comments to:* 1441 L Street NW., Suite 9100, Washington, DC 20005.
- *Fax comments to:* Armando Acosta, National Indian Gaming Commission, at (202) 632–0045.

FOR FURTHER INFORMATION CONTACT: Armando Acosta, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Email: *armando_acosta@nigc.gov;* telephone: (202) 632–7003.

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposed rules.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100–497, 25 U.S.C. 2701 *et seq.,* was signed into law on October 17, 1988. The Act established the Commission and set out a comprehensive framework for the regulation of gaming on Indian lands. The Act requires that the Commission, by regulation, provide an opportunity for an appeal and a hearing before the Commission on fines levied by the Chair against the tribal operator of an Indian game or a management contractor, and to determine whether a temporary closure order issued by the Chair should be made permanent or dissolved. 25 U.S.C. 2713(a)(2), 2713(b). By regulation, the Commission has also provided rights to tribes and/or management contractors to appeal ordinance disapprovals, management contract approvals or disapprovals, enforcement actions, and actions to void an approved management contract. The appellate procedures for these actions are all consolidated in this subchapter.

On September 21, 2012, the Commission published two final rules amending 25 CFR parts 543 and 547. In its final rule for part 543, the Commission provided tribal gaming regulatory authorities (TGRA) with

[1] *See* Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70213 (Nov. 23, 2012).

[2] *See* Letter from Kenneth E. Bentson, Jr., Public Policy and Advocacy Executive Vice President, SIFMA, to Elizabeth M. Murphy, Secretary, Commission, dated Jan. 3, 2013; *see also* Letter from Richard M. Whiting, Executive Director and General Counsel, Financial Services Roundtable, to Elizabeth M. Murphy, Secretary, Commission, dated Jan. 2, 2013.

rights to appeal the Chair's decisions to approve or object to a TGRA's adoption of alternate standards from those required by the Commission's minimum internal control standards contained in part 543 (77 FR 58708, Sept. 21, 2012). In its final rule for part 547, the Commission provided TGRAs with rights to appeal the Chair's decisions to approve or object to a TGRA's adoption of alternate standards from those required by the Commission's technical standards contained in part 547 (77 FR 58473, Sept. 21, 2012).

III. Development of the Proposed Rule

On September 25, 2012, the Commission published a final rule consolidating all appeal proceedings before the Commission into the current subchapter H (Appeal Proceedings Before the Commission). 77 FR 58941, Sept. 25, 2012. However, the new appeal rights provided under parts 543 and 547 were not included in the current subchapter H. Thus, subchapter H must be revised to include the new appeal rights provided to TGRAs under parts 543 and 547.

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant impact on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Moreover, Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an effect on the economy of $100 million or more. The rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, local government agencies or geographic regions. Nor will the rule have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of the enterprises, to compete with foreign based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Commission has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.,* and is therefore not subject to review by the Office of Management and Budget.

Text of the Proposed Rules

For the reasons discussed in the Preamble, the Commission proposes to amend its regulations in 25 CFR chapter III, subchapter H as follows:

SUBCHAPTER H—APPEAL PROCEEDINGS BEFORE THE COMMISSION

PART 581—MOTIONS IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

■ 1. The authority citation for part 581 continues to read as follows:

Authority: 25 U.S.C. 2706, 2713, 2715.

■ 2. In § 581.1, the introductory text of paragraph (a) is republished and paragraphs (a)(3) and (a)(4) are revised to read as follows:

§ 581.1 What is the scope of this part?

(a) This part governs motion practice under:

* * * * *

(3) Part 584 of this subchapter relating to appeals before a presiding official of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, the Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards, and notices of late fees and late fee assessments; and

(4) Part 585 of this subchapter relating to appeals to the Commission on written submissions of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, the Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards, and notices of late fees and late fee assessments.

* * * * *

■ 3. Revise § 581.4 to read as follows:

§ 581.4 How do I file a motion before a presiding official?

Motion practice before a presiding official on appeals of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decisions to void or modify management contracts, the Commission's proposals to remove certificates of self-regulation, the Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards, and notices of late fees and late fee assessments is governed by § 584.4 of this subchapter.

PART 584—APPEALS BEFORE A PRESIDING OFFICIAL OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISIONS TO VOID OR MODIFY MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSALS TO REMOVE A CERTIFICATE OF SELF–REGULATION, THE CHAIR'S DECISIONS TO APPROVE OR OBJECT TO THE ADOPTION OF ALTERNATE STANDARDS FROM THOSE REQUIRED BY THE COMMISSION'S MINIMUM INTERNAL CONTROL STANDARDS AND/OR TECHNICAL STANDARDS, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

■ 4. The authority citation for part 584 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

■ 5. Revise the part heading to part 584 to read as set forth above.

■ 6. In § 584.1, the introductory text of paragraph (a) is republished. Redesignate paragraph (a)(6) as paragraph (a)(8) and add new paragraphs (a)(6) and (a)(7) to read as follows:

§ 584.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant elects a hearing before a presiding official:

* * * * *

(6) The Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards under part 543 of this chapter;

(7) The Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's technical standards under part 547 of this chapter; and

* * * * *

■ 7. Amend § 584.2 to add new paragraph (c) to read as follows:

§ 584.2 Who may appeal?

* * * * *

(c) Appeals of the Chair's decisions to approve or object to the adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards may only be brought by the tribal gaming regulatory authority that approved the alternate standards for the gaming operation(s).

■ 8. Revise the section heading to § 584.3 to read as follows:

§ 584.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, the Chair's decision to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards, and a notice of late fees and late fee assessments?

* * * * *

PART 585—APPEALS TO THE COMMISSION ON WRITTEN SUBMISSIONS OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISIONS TO VOID OR MODIFY MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSALS TO REMOVE A CERTIFICATE OF SELF–REGULATION, THE CHAIR'S DECISIONS TO APPROVE OR OBJECT TO THE ADOPTION OF ALTERNATE STANDARDS FROM THOSE REQUIRED BY THE COMMISSION'S MINIMUM INTERNAL CONTROL STANDARDS AND/OR TECHNICAL STANDARDS, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

■ 9. The authority citation for part 585 continues to read as follows:

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

■ 10. Revise the part heading to part 585 to read as set forth above.

■ 11. In § 585.1, the introductory text of paragraph (a) is republished. Redesignate paragraph (a)(6) as paragraph (a)(8) and add new paragraphs (a)(6) and (a)(7) to read as follows:

§ 585.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant does not elect a hearing before a presiding official and instead elects to have the matter decided by the Commission solely on the basis of the written submissions:

* * * * *

(6) The Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards under part 543 of this chapter;

(7) The Chair's decisions to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's technical standards under part 547 of this chapter; and

* * * * *

■ 12. Amend § 585.2 to add new paragraph (c) to read as follows:

§ 585.2 Who may appeal?

* * * * *

(c) Appeals of the Chair's decisions to approve or object to the adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards may only be brought by the tribal gaming regulatory authority that approved the alternate standards for the gaming operation(s).

■ 13. Revise the section heading to § 585.3 to read as follows:

§ 585.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self regulation, the Chair's decision to approve or object to a tribal gaming regulatory authority's adoption of alternate standards from those required by the Commission's minimum internal control standards and/or technical standards, and notices of late fees and late fee assessments?

* * * * *

Dated: January 14, 2013.

Tracie L. Stevens,

Chairwoman.

Daniel J. Little,

Associate Commissioner.

[FR Doc. 2013–00941 Filed 1–18–13; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0784; FRL–9770–3]

Approval and Promulgation of Air Quality Implementation Plans; West Virginia; Requirements for Determining General Conformity of Federal Actions to Applicable State Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the State of West Virginia for the purpose of amending the State's prior general conformity rule to incorporate the most recent changes to Federal general conformity requirements established under rules promulgated by the EPA in July of 2006 and in April of 2010. In the Final Rules section of this **Federal Register,** EPA is approving the State's SIP submittal as a direct final rule without prior proposal because EPA views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rulemaking action, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will

not institute a second comment period. Any parties interested in commenting on this action should do so at this time.

DATES: Comments must be received in writing by February 21, 2013.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0784 by one of the following methods:

A. *www.regulations.gov*. Follow the on-line instructions for submitting comments.

B. *Email: mastro.donna@epa.gov*.

C. *Mail:* EPA–R03–OAR–2012–0784, Donna Mastro, Acting Associate Director, Office of Air Program Planning, Mailcode 3AP30, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0784. EPA's policy is that all comments received 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 information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *ww.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy 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 West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE., Charleston, West Virginia 25304.

FOR FURTHER INFORMATION CONTACT: Brian Rehn, (215) 814–2176, or by email at *rehn.brian@epa.gov*.

SUPPLEMENTARY INFORMATION: For further information, please see the information provided in the direct final action, with the same title, that is located in the ''Rules and Regulations'' section of this **Federal Register** publication.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule to approve West Virginia's general conformity SIP revision, 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.

Dated: December 26, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2013–00708 Filed 1–18–13; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375; FCC 12–167]

Rates for Interstate Inmate Calling Services

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on the inmate calling services industry and how to ensure just and reasonable rates for inmate calling services.

DATES: Comments are due on or before March 25, 2013. Reply comments are due on or before April 22, 2013.

ADDRESSES: You may submit comments, identified by WC Docket No. 12–375, by any of the following methods:

- Federal Communications Commission's Web Site: *http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: (202) 418–0530 or TTY: (202) 418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Lynne Hewitt Engledow, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1520 or (202) 418–0484 (TTY), or via email at *lynne.engledow@fcc.gov*.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in WC Docket No. 12–375, FCC 12–167, adopted on December 24, 2012, and released on December 28, 2012. The full text of this document is available for public inspection during regular business hours in the Commission's Reference Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The full text of this document may be downloaded at the following Internet address: *http://www.fcc.gov/document/rates-interstate-inmate-calling-services*. The complete text may be purchased from Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554. To request alternate formats for persons with disabilities (*e.g.* Braille, large print, electronic files, audio format, etc.) or reasonable accommodations for filing comments (*e.g.* accessible format documents, sign language interpreters, CARTS, etc.), send an email to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

I. Introduction

1. In this item we grant two longstanding petitions for rulemaking filed in the docket that seek to ''secure the 'just and reasonable' interstate rates for prisoners required by Section 201(b) of the Communications Act'' by initiating this Notice of Proposed Rulemaking (NPRM or Notice) to

consider changes to our rules governing rates for interstate interexchange inmate calling services (ICS). In the first petition for rulemaking, filed in 2003, (First Wright Petition), Petitioners requested that the Commission ''prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with prison telephone systems. * * *'' In the second petition for rulemaking, filed in 2007, (Alternative Wright Petition), Petitioners proposed that the Commission require debit calling, prohibit per-call charges and establish rate caps for all interstate, interexchange inmate calling services. The Commission received significant comment on the two Petitions for Rulemaking. Recently, there has been substantial renewed interest and comment in this docket highlighting both the wide disparity among interstate interexchange ICS rate levels and significant public interest concerns. We believe it is appropriate to seek comment to refresh the record and consider whether changes to our rules are necessary to ensure just and reasonable ICS rates for interstate, long distance calling at publicly- and privately-administered correctional facilities.

II. Background

A. Description of Inmate Calling Services

2. Inmate calling services are typically limited to collect or debit-based calling from payphones. Collect calls from a correctional facility usually incur a two-part charge; a per-call set up charge and a per-minute charge. Debit calling (charges are deducted from an inmate's account), typically incurs a per-minute charge only. Based on the record, the per-call charge can vary significantly from $0.50 to $3.95 and per-minute charges can vary significantly from $0.05 to $0.89. Some commenters state that ICS rates vary based on such factors as facility size, call volume and the jurisdiction of the call. Local and intrastate ICS rates are generally set by the states. The Commission does not currently regulate interstate ICS rates. ICS rates in federal prisons are set by the Federal Bureau of Prisons.

3. *Public Policy Considerations.* Petitioners and some commenters argue that ICS rate reform is a public policy imperative because high ICS rates limit the ability of most inmates to maintain contact with their families. Commenters point to studies showing that regular contact with family reduces inmate recidivism. Commenters note that regular telephone contact with loved ones also benefits those receiving the calls, including inmates' children, as inmates may be assigned to correctional facilities far from their homes thus limiting in-person visits. Commenters contend that regular telephone contact between inmates and their loved ones at high rates places a heavy burden on inmates' families because families typically bear the burden of paying for the calls. In addition, they assert that the lack of regular telephone contact between inmates and their loved ones is a hardship on families because neither the inmates nor their families can afford the high rates.

4. We note that the Government Accountability Office (GAO) has twice recognized the conclusions of Federal Bureau of Prison officials that contact with family ''aids an inmate's success when returning to the community'' and thus lowers recidivism. Moreover, the GAO recently found that ''crowded visiting rooms make it more difficult for inmates to visit with their families'' and that ''[t]he infrastructure of the facility may not support the increase in visitors as a result of the growth in the prison population.'' As such, we believe that regular telephone contact between inmates and their families is an important public policy matter, and that we should consider the impact that interstate ICS rates have.

5. *Unique Characteristics of ICS.* The Commission has recognized that ICS differs from traditional payphone services in a number of respects. First, although barriers to entry are low for payphone providers in most locations, a correctional facility typically grants an exclusive contract to a single ICS provider for a particular facility, essentially creating a monopoly at that facility. As such, competition exists for ICS contracts but once an ICS provider wins a contract it becomes the sole ICS provider in that facility. Unlike non-incarcerated customers who have access to alternative calling platforms on public payphones, inmates only have access to payphones operated by a single provider for all available services at that payphone. These contracts additionally often include a site commission or location fee paid to the correctional facility. The Commission has previously found that ''[t]o have a realistic chance of winning a contract, the bidder must include an amount to cover commissions paid to the inmate facility.'' Five years ago Petitioners estimated that ''commissions add an average of 43 percent * * * to all other costs before commissions.''

6. Security considerations also differentiate ICS from public payphone services. For instance, correctional facilities typically use an automated voice-processing system to screen and process inmate collect calls rather than a pre-subscribed operator service provider. ICS providers also employ blocking mechanisms to prevent inmates from making direct-dialed (that is calls made without using the automated voice-processing system) calls, access code calls, 800/900 number calls, or calls to restricted individuals, such as judges or witnesses. Correctional facilities also require that payphones be monitored for frequent calls to the same number. Moreover, correctional facilities often require periodic voice overlays that identify the call as being placed from a correctional facility, as well as listening and recording capabilities for all calls. Commenters note that the costs of these security features, hardware and software costs, and training for staffers make ICS more costly to provide than public payphone service.

7. The record to date indicates a wide disparity in ICS rates between states. These rates reflect the higher security and network costs that are inherent in ICS; the disparity thus may reflect whether the rates in question include site commissions. For instance, correctional facilities located in states that do not require commissions from ICS providers often charge lower ICS rates. For example, New York state prohibited site commissions in state prisons and interstate per-minute rates in such prisons are as low as $0.048. In contrast, in Colorado, a state that has site commissions, interstate per-minute rates can be as high as $0.89. However, in Montana, another state with site commissions, the interstate per-minute rate is $0.12. Such record evidence raises questions about whether ICS rates accurately reflect the costs of providing ICS and whether site commission payments are a reasonable cost of providing ICS that therefore should be recovered in the ICS rates inmates are charged.

8. We seek comment on the Commission's legal authority in Section III.E below to address the issues raised by the Petitioners. While we believe that we have jurisdiction to address interstate ICS calls we believe those calls may be a relatively small subset of all inmate telephone calls. However, several commenters argue that interstate calls are often the most expensive and therefore Commission action, such as establishing an interstate rate benchmark, would nevertheless be effective in helping lower the cost of

contact between inmates and their families. In the interest of developing a complete and current record, this Notice seeks comment on the reasonableness of current ICS rates and what steps the Commission can and should take to ensure reasonable ICS rates going forward.

B. Inmate Calling Order on Remand and NPRM

9. On February 12, 2002, the Commission adopted an order addressing whether section 276 of the Communications Act of 1934, as amended, (Act) requires the Commission either to preempt state rate caps on local collect calls or permits ICS providers to collect an additional per-call surcharge above state rate caps on local collect calls. In the *Inmate Calling Order on Remand and NPRM,* the Commission concluded that section 276 does not require either preemption or an additional surcharge and also concluded that it was unnecessary to impose nonstructural safeguards on the Bell Operating Companies' provision of ICS services. In making these determinations, the Commission recognized the unique nature of ICS, and concluded that the ''fair compensation'' requirement of section 276 did not necessarily mean that payphones with higher costs should receive greater compensation than other payphones.

10. In the NPRM portion of the *Inmate Calling Order on Remand and NPRM,* the Commission asked ''whether the current regulatory regime applicable to the provision of inmate calling services is responsive to the needs of correctional facilities, ICS providers, and inmates, and, if not, whether and how we might address those unmet needs.'' Specifically, the Commission sought detailed comments on ICS rates, commissions paid to the confinement facilities, cost and revenue data, information from states on how they handle inmate calling, alternatives to the current system, and information on call disconnections. The NPRM also proposed methods to lower ICS rates, including allowing the use of debit cards or commissary accounts.

C. Two Petitions for Rulemaking

1. First Wright Petition

11. In 2000, current and former inmates of Corrections Corporation of America (CCA) confinement facilities, and the individuals that receive their telephone calls, filed a class-action lawsuit against CCA seeking relief from exclusive dealing arrangements CCA had with ICS providers. The plaintiffs alleged that the exclusive dealing resulted in restricted telephone service choices for inmates and caused rates for those services to substantially increase, in violation of various constitutional and statutory provisions, including section 201(b) of the Act. On August 22, 2001, the United States District Court for the District of Columbia dismissed the lawsuit. Pursuant to the doctrine of primary jurisdiction, the court directed the parties to file the appropriate pleadings with the Commission to resolve the issues the plaintiffs raised.

12. On November 3, 2003, Petitioners filed the First Wright Petition with the Commission pursuant to the court's directive. Petitioners requested that the Commission address high ICS rates by prohibiting exclusive ICS contracts and collect-call-only restrictions at privately-administered prisons, and requiring such facilities to permit multiple long-distance carriers to interconnect with prison telephone systems. The Commission sought and received comment on the First Wright Petition.

2. Alternative Wright Petition

13. On March 1, 2007, Petitioners filed an alternative rulemaking petition proposing that the Commission address high ICS rates by requiring debit calling, prohibiting per-call charges and establishing rate caps for all interstate, interexchange ICS. The Commission sought and received comment on the Alternative Wright Petition. On August 15, 2008, a group of ICS providers filed the Inmate Calling Services Interstate Call Cost Study (ICS Provider Proposal), which included cost information to support their proposed rate methodology and rate levels for ICS.

14. As described fully below, in this Notice, we seek updated information on the ICS market and request answers to questions raised by the Petitioners. We specifically request comment from state departments of corrections and state officials responsible for prison telecommunications decision making. After the ICS Provider Proposal was filed, a consensus appeared to be forming about how best to address inmate calling; we hope to revive those discussions and consensus building through our action today.

15. Since the *Inmate Calling Order on Remand and NPRM* was released in 2002, the Commission has received numerous comments regarding ICS reform. Responses to the NPRM and subsequent requests for comment on the First Wright Petition and the Alternative Wright Petition have provided an extensive record on ICS reform. We believe it is appropriate at this time to open a new docket exclusive to ICS reform in light of the lengthy record, as well as the fact that the ICS record is part of the general payphone docket (CC Docket No. 96–128) which relates to competition among payphone providers and the deployment of payphone services. As such, comments and reply comments on this Notice must be filed in WC Docket No. 12–375. We incorporate comments, reply comments and *ex parte* filings from CC Docket No. 96–128 into WC Docket No. 12–375.

III. Ensuring ICS Rates Are Just and Reasonable

16. There are multiple proposals to address ICS rates in the record. We seek to balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act. Ensuring just and reasonable ICS rates may be accomplished through incentives or regulations, or a combination of both; we seek comment on these proposals below.

A. Rate Caps in the ICS Market

17. In the Alternative Wright Petition, Petitioners requested that the Commission set rate caps for interstate long distance ICS. Specifically, Petitioners requested that the Commission ''establish a benchmark rate for domestic interstate interexchange inmate debit calling service of $0.20 per minute and a benchmark rate for domestic interstate interexchange inmate collect calling service of $0.25 per minute, with no set-up or other per-call charge.'' The Petitioners used 15 and 20 minute call durations to calculate the rate caps and based their proposed rate caps on then current Federal Bureau of Prison and several individual states' ICS rates. We seek comment on the elements of the rate cap proposal and whether the criteria used to develop the proposed caps are appropriate.

18. *Per-Call Charge.* Each time an inmate places a payphone call there are typically two elements that make up its cost—a per-call set up charge and a per-minute charge. We first seek comment on the per-call charge. Petitioners propose eliminating the call set up or per-call charge, which can be as much as $3.95, and allowing only per-minute charges. We seek comment on this proposal. What costs are associated with the per-call charge? Would the elimination of the per-call charge help ensure just and reasonable ICS rates? Would a prohibition on per-call charges result in below-cost service?

19. Petitioners note that inmates often incur multiple per-call charges when calls are dropped after a pause in conversation. We seek data on the average number of dropped calls that inmates experience. We request that commenters suggest ways to prevent multiple per-call charges for a single conversation that is disconnected by security triggers and subsequently allowed to continue while maintaining appropriate security measures. For example, if the per-call charge is maintained, Petitioners suggest that if a disconnected call is reinitiated within two minutes, it should not incur another per-call charge. Should the Commission require such a measure? What other steps could be taken to prevent inmates from being charged multiple per-call charges for what amounts to one conversation? What are the costs associated with call security and are they incurred on a fixed or per-call basis?

20. *Per-Minute Rate Caps.* Would the per-minute rate cap approach proposed by the Petitioners ensure just and reasonable rates? Are the proposed rate caps just and reasonable consistent with sections 201 and 276 of the Act? If not, would different rate caps be appropriate? What factors should the Commission consider in determining an appropriate per-minute rate cap? Commenters advocating an alternative per-minute rate cap should provide specific, detailed cost information and other relevant data to support their proposed per-minute rate caps. Should the domestic interstate interexchange ICS per-minute rate cap proposed above apply to both publicly- and privately-administered correctional facilities?

21. Some commenters argue that the proposed per-minute rate caps are arbitrary and capricious because they would preclude providers from recovering their legitimate costs of providing service. Others argue that the Alternative Wright Petition proposal is confiscatory or may otherwise put ICS providers out of business. We seek evidence in support of or disproving such arguments. Commenters also argue that the adoption of per-minute rate caps would chill innovation and ultimately result in reductions in service levels because the proposed caps will not adequately compensate the providers, thus making ICS a less attractive service to offer. Others note that new providers are entering the ICS market. Commenters supporting such assertions are asked to provide specific, detailed information about the ICS market to support their positions and describe how market trends influence ICS rates.

22. In the Alternative Wright Petition, Petitioners argue that several benefits would accrue from setting per-minute rate caps, such as administrative ease and the absence of jurisdictional challenges. We seek comment on this argument. Can commenters identify any other benefits to introducing per-minute rate caps? What are the perceived problems or challenges associated with introducing per-minute rate caps? For example, parties argue that differences between correctional facilities including size, location, security levels, facility age and staffing levels will not allow a one size fits all solution, such as per-minute rate caps. Is this accurate? How can the Commission establish a solution that addresses the many variations among confinement facilities?

23. If the Commission decides to implement rate caps in the ICS market how should we? What additional data, if any, does the Commission require to set rates? Would a rate cap approach require the Commission to conduct rate cases, as some commenters suggest? We seek comment on the best ways to determine just and reasonable caps for ICS rates.

24. *Marginal Location Methodology.* In 2008, ICS providers submitted the ICS Provider Proposal for ICS rates. The ICS Provider Proposal uses the ''marginal location'' methodology, previously adopted by the Commission to calculate public payphone rates, to calculate proposed ICS rates. The ICS providers believe the ''marginal location'' methodology provides a ''basis for rates that represent 'fair compensation' as set forth in'' section 276(b)(1)(A) of the Communications Act. The ICS Provider Proposal advocates a two-part rate structure that includes both a fixed per-call charge and a per-minute rate, arguing that per-call charges must be maintained to cover such expenses as equipment costs and monthly line charges. The ICS providers determined that the methodology and data yield a requisite fixed per-call charge of $1.56 with a per-minute rate of $0.06 for debit calls, and a fixed per-call charge of $2.49 with a per-minute rate of $0.07 for collect calls, applicable to all ICS providers. In response, Petitioners point out that the ICS Provider Proposal ''largely supports Petitioners' requested benchmark rates.'' Petitioners calculate that the ICS Provider Proposal two-part rate structure equals rate caps of $0.16 per minute for a 15-minute debit call and $0.24 per minute for a 15-minute collect call.

25. We seek comment on whether the ICS Provider Proposal methodology would result in a just and reasonable rate. We also encourage commenting parties that disagree with the ICS Provider Proposal or proposed methodology to provide alternative methodologies supported by sufficiently-detailed data. We seek comment on whether the ICS Provider Proposal has provided sufficient cost, demand, and revenue detail to allow the Commission to determine whether the proposed rates are just and reasonable.

26. We also seek comment on whether the underlying cost and demand factors for public payphones and ICS are similar enough to justify using a cost methodology designed for public payphones to set ICS rates. In particular, we seek comment on the extent to which ICS rates and call volumes vary among prisons across the country, and how the rates and call volumes compare with the variation that occurs with public payphones. We seek comment on whether an additional justification exists for adopting this cost methodology.

27. *Impact of Rate Reductions on Call Volumes.* We seek comment on whether call volumes have increased where rates have been lowered, and the resulting impact on ICS providers' revenues. We note that the 2011 GAO Report found that only approximately 25 percent of inmates in the Federal Bureau of Prisons use their entire monthly allotted minutes for calls and that if rates were lowered it would encourage greater communications with families, which the Bureau of Prisons ''has stated facilitates the reintegration of inmates into society upon release from prison.'' Do other correctional facilities find that incarcerated individuals are not using all their allotted time to make calls? How much time is allotted, and what is the percentage of individuals who use all their time?

28. *Tiered Pricing.* A recent *ex parte* filing by Petitioners attached a transcript from a New Mexico Public Service Commission hearing that described the possible use of a tiered, by monthly volume of minutes, pricing structure in the state. Do commenters believe a per-minute rate set by usage volume is a viable option? Would tiered pricing address concerns over a one size fits all reform approach such as rate caps? What factors should the Commission consider in establishing pricing tiers? What are potential problems with tiered pricing?

29. *Market Forces.* Petitioners note that telecommunications costs in general, and long distance costs in particular, are decreasing and therefore, they believe, ICS rates should follow the market and decrease as well. Some participants in this proceeding note that

''rates in the largest majority of correctional facilities are moving in a downward trend.'' Is this accurate? Can commenters provide concrete examples of decreases in ICS rates?

30. *Collect Calling v. Debit Calling.* The Alternative Wright Petition suggests two different rate caps: one for collect calling and one for debit calling. A collect call is a call in which the called person pays for the call and a debit call deducts the cost of the call from a prepaid account. Petitioners argue that collect calling is more expensive because its costs include billing costs and uncollectibles, while debit calling is less expensive because it reduces staff responsibilities and uncollectibles. Do commenters agree that there should be different per-minute rate caps for collect and debit calling? What are the benefits of debit calling? For example, do commenters believe that debit calling will exert downward pressure on collect calling rates?

31. Some commenters have expressed concern about the expense and difficulty of implementing debit calling. Specifically, they cite difficulty in blocking restricted telephone numbers, the expense of purchasing new equipment and the challenges of establishing new processes and procedures and verifying calling party identities. Parties have also expressed safety concerns related to debit calling. Some prisons already allow for debit calling. For example, the Federal Bureau of Prisons allows debit calling in some of its facilities and the state of Iowa offers debit calling only. What safety concerns are raised by debit calling service, and how have those concerns been addressed where debit calling already is permitted? Commenters also note the increased administrative workload and cost associated with debit calling caused by such tasks as issuing PINs to each inmate in facilities with high turnover. Have commenters experienced such challenges, and how have they been overcome? What are the other pros or cons of debit calling? We seek comment on ICS providers' overall experiences with offering debit calling.

32. How many correctional facilities currently offer debit calling? Has debit calling become more common? What are the current ratios of debit to collect calling in correctional facilities? Should the Commission mandate debit calling in privately- and publicly-administered correctional facilities? One commenter says it offers debit calling to all of the facilities it serves, but it is not practical to mandate debit calling because not all correctional facilities want the service. What are other challenges to mandating debit calling?

33. *Prepaid Calling.* Commenters suggest prepaid calling as an alternative to collect and debit calling. Prepaid calling allows inmates or their family members to prepay for minutes, usually at a discount. This is different from debit calls, in which money is deducted from an account, but the minutes are not purchased in advance. Commenters argue that the benefits of this approach may include administrative ease for the providers, increased safety, controlled costs for call recipients, and eliminating the need to block calls because of a call recipients' credit standing. However, Petitioners note that there are outstanding questions with prepaid calling such as: how to handle monthly fees; how to load an inmate's account; and minimum required account balance. If these issues can be sufficiently addressed, is prepaid calling a viable ICS option? Do any ICS providers currently offer prepaid calling? What are some other concerns or considerations with prepaid calling?

34. *Intrastate-Interstate Parity.* Another alternative would be to adopt an intrastate-interstate parity principle that would require that rates for interstate, long-distance calls not exceed rates for intrastate, long-distance calls. Rates for intrastate, long-distance calls are typically set by state public utility commissions, and those commissions may set rates that take into account the varying cost of providing inmate calling services within each state given the security and other features required by state law. To the extent that interstate rates for inmate calling services are significantly higher than intrastate rates, how would a requirement that ICS providers set interstate rates at a level no higher than intrastate, long-distance rates affect the justness and reasonableness of those rates? How many states set rates specifically for ICS? What is the rate structure for ICS calls in those states, and what are the rates for intrastate, long-distance calls? How do states that set specific ICS rates ensure that ICS providers are ''fairly compensated?'' How do intrastate, long-distance rates differ between states that establish general rate caps and those that set specific caps for ICS? If the Commission adopts a parity principle, should there be any exceptions to that principle?

B. Additional Proposals in the Record

35. There are multiple other proposals in the record that do not directly address per-call and per-minute ICS rates. We seek comment on any other proposals parties contend address the concerns raised in this proceeding, including any proposals in the record that are not addressed below.

36. *Competition in the ICS Market.* The First Wright Petition requested that the Commission mandate the opening of the ICS market to competition and prohibit collect call only restrictions in privately-administered correctional facilities. ICS contracts are typically exclusive; competition appears to exist in winning an ICS contract but once an ICS provider wins a contract it becomes the sole provider. How do exclusive contracts influence ICS rates? How would competitive ICS services be provided? The First Wright Petition also argued that the collect calling-only limitations imposed by many confinement facilities increase costs to both ICS providers and inmates that are not outweighed by corresponding benefits and that such limitations should therefore be prohibited. To the extent ICS is still limited to collect calling in some correctional facilities, we seek comment on the rationale behind this restriction.

37. *Site Commissions.* ICS contracts frequently include a site commission or location rent which is paid to the facility and in some instances may go to fund inmate services at the facility. What types of inmate services or other services do site commissions fund? How do site commissions in ICS contracts vary by facility? Petitioners argue that ICS rates are inflated to cover commissions, which can be as much as 65 percent of gross revenues, causing the rates to be unreasonable in violation of section 201(b). Is this accurate? We seek updated data on how much these site commissions are and how much they add to per-call costs. The FCC has previously found that ''under most contracts, the commission is the single largest component affecting the rates for inmate calling service'' and ''because the bidder who charges the highest rates can afford to offer the confinement facilities the largest location commissions, the competitive bidding process may result in higher rates.'' Do commenters believe this is still accurate? The Commission has also found that ''location rents are not a cost of payphones, but should be treated as profit.'' Do commenters agree with that conclusion?

38. Some site commissions are mandated by state statute, while several states have reduced or eliminated commissions in ICS contracts. If a state has reduced or eliminated site commissions, how has any resulting rate transition been handled? How has the lowering or elimination of site commissions impacted rates? Is this evidence that site commissions are not

necessary, or is it evidence that the market is working and the Commission need not intervene? Must the Commission address site commissions and the effect they have on ICS rates in order to ensure just and reasonable ICS rates?

39. *Offer No-Cost Calling.* In the Alternative Wright Petition, Petitioners include a suggestion they contend will advance the Commission's universal service goals and provide all inmates valuable contact with the outside world. Specifically, Petitioners suggest that ICS providers provide a certain amount of no-cost calling per inmate per month in each of the facilities they serve in exchange for the right to charge a higher per-minute rate. Petitioners suggest implementing rate caps of $0.22 per minute for debit calling and $0.275 per minute for collect calling if ICS providers offer 20 minutes of free calling per inmate per month. Can or should the Commission mandate a certain amount of free calling per inmate per month, or should this be offered at the providers' discretion? What legal questions are raised by this proposal? What other considerations are raised by this proposal?

40. *Billing-Related Call Blocking.* Petitioners also express concern over billing-related call blocking in correctional facilities. Specifically, Petitioners note that ICS providers are increasingly unable or unwilling to enter into agreements with LECs to provide for ICS providers' billing the LECs' customers receiving collect calls from inmates. As a result, ICS providers cannot bill for an increasing percentage of inmate calls and thus ''block inmate collect calls to numbers served by LECs with which the service providers have no billing arrangements.'' Petitioners argue that in facilities where collect calling is the only option, this practice may ultimately prevent inmates from being able to make any telephone calls. Commenters note that many ICS providers have solutions to ''ensure that inmates can contact customers served by these CLECs that refuse to bill for collect calls.'' Does this practice continue? Petitioners argue that debit calling, which requires pre-payment, may prevent the need to block calls when the ICS provider does not have a billing arrangement with the terminating LEC. Is this accurate? Do commenters have experience with billing-related call blocking? Can commenters provide data on the average number of calls that are blocked per month and the reason for the blocking? Are there ways, other than mandating debit calling, to deter or prevent billing-related call blocking?

41. *Non-Geographic Numbers.* ICS providers have argued that lowering interstate calling rates may create an incentive for call recipients to obtain telephone numbers from other states, perhaps from wireless or VoIP providers, to take advantage of the lowered interstate rates. Petitioners counter that the opposite is currently happening; call recipients are obtaining telephone numbers, from wireless or VoIP providers, that are local to the prison to take advantage of lower local calling rates. Have commenters experienced either of these practices? Do these practices raise any security concerns and if so what are those concerns?

42. *Disabilities Access.* There is evidence in the record to indicate that inmates with hearing disabilities may not have access to ICS at reasonable rates using TTYs. The record suggests that because the average length of a telephone conversation using a TTY is approximately four times longer than a voice telephone conversation, deaf and hard of hearing inmates who use TTYs have to pay more than their hearing counterparts. The record also suggests that TTY users have had to pay additional fees for connecting to a TTY relay operator. We seek comment on the types of ICS access that individuals who are deaf or hard of hearing experience during their incarceration. Where such access to ICS is provided, are the rates the same as those available to those without a disability? If the rates differ, what is that difference and what are the explanations for such difference? We note that section 276(b)(1)(A) specifically exempts ''telecommunications relay service calls for hearing disabled individuals'' from the Commission-established ''per call compensation plan'' ensuring that ICS providers are ''fairly compensated.'' How should the Commission take this exemption into account in examining rates?

43. *Updated Data.* We seek updated data from all interested parties and the public, but especially from ICS providers. Commenters note that the record regarding nationwide interstate ICS rates is limited to an ''analysis of prison phone contracts nationwide'' that was conducted by Prison Legal News in April 2011. As such, we seek comment on the accuracy and reliability of the study. In addition, from independent research we have found more-current state rates, which continue to demonstrate a range of prices for ICS calls among states. For example, for a 15-minute interstate call, we found the following rates: $6.65 in California; $2.04 in Montana; $6.45 in Texas; and $16.55 in Idaho. We encourage commenters to submit the most up-to-date information available regarding interstate ICS rates to aid us in developing a clearer understanding of the ICS market. This includes per-call and per-minute rates, information on commissions and what percentage of a rate they comprise, the number of disconnected calls, the average length of calls, and how calls break out by type, *i.e.,* collect, prepaid and debit.

44. We also seek comment on whether the Alternative Wright Petition and ICS Provider Proposal are grounded in sufficiently-reliable data. For example, the ICS Provider Proposal contains data for less than 30 correctional facilities, none of which impose site commissions. Is this too small a sample, or a non-representative sample, on which to base a nationwide solution? ICS providers argue that in calculating their proposed rate caps the Petitioners relied on data from facilities with low cost calling. We therefore invite parties to comment on whether the data supporting the First Wright Petition, the Alternative Wright Petition and the ICS Provider Proposal is representative of correctional facilities across the country.

45. *Existing Contracts.* Petitioners suggest that if the Commission implements a rate cap it should also mandate a one-year fresh look, transition period for existing ICS contracts. Petitioners envision that this transition period would allow for any necessary review and termination or renegotiation of existing ICS contracts in order to introduce rate caps which would be effective by the end of the transition period. Commenters argue that the Commission cannot insert itself into the procurement decisions of correctional agencies, and that any new ICS-related rules should not be applied to existing contracts but only to contracts entered into after the adoption of new rules.

46. Would it be appropriate to mandate a fresh look period or should any new ICS rules apply only to contracts entered into after the adoption of new rules? With renegotiated contracts, how long should the transition period last? What are typical ICS contract terms? Do such contracts usually have change of law provisions that would be triggered by a Commission order? How does the length of existing contracts affect the implementation of any of the proposals discussed above? If commenters provide alternative proposals not discussed above, they should include information on how the contractual process will function with each specific proposal. After implementing a new ICS regime,

should the Commission require a periodic rate review to ensure that the rates remain just and reasonable?

47. We encourage comment on any new issues that have arisen in the ICS market or issues that have not been addressed above. We request that commenters provide evidentiary support for their comments and suggestions in this proceeding.

C. Cost/Benefit Analysis of Proposals

48. Acknowledging the potential difficulty of quantifying costs and benefits, we seek to determine whether the proposals above will provide public benefits that outweigh their costs, and we seek to maximize the net benefits to the public from any proposals we adopt. For example, commenters have argued that inmate recidivism is decreased with regular family contact. Accordingly, we seek specific comment on the costs and benefits of the proposals above and any additional proposals received in response to this Notice. We also seek any information or analysis that would help us to quantify these costs or benefits. Further, we seek comment on any considerations regarding the manner in which the proposals could be implemented that would increase the number of people who benefit from them, or otherwise increase their net public benefit. We request that interested parties discuss whether, how and by how much they will be impacted in terms of costs and benefits of the proposals included herein. We recognize that the costs and benefits may vary based on such things as the correctional facility served and ICS provider. We request that parties file specific analysis and facts to support any claims of significant costs or benefits associated with the proposals herein.

D. Legal Authority

49. We seek comment on the scope of the Commission's legal authority to regulate ICS. Section 276 of the Communications Act of 1934 (Act) requires that all payphone providers, including ICS providers, be ''fairly compensated.'' We seek comment on our authority to address interstate interexchange ICS rates under section 276(b)(1)(A), which directs the Commission to ''establish a per call compensation plan to ensure that all payphone service providers [(PSPs)] are fairly compensated for each and every completed intrastate and interstate call.'' We also seek comment on our authority to address interstate interexchange ICS rates under section 201(b) of the Act, which requires common carriers to provide service at ''just and reasonable'' rates and authorizes the Commission to ''prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.'' Does the Commission have the jurisdiction to establish per-minute rate caps for privately- and publicly-administered facilities? We encourage commenters to discuss additional sources of legal authority for the Commission to address ICS rates.

50. We note that only a portion of the telephone calls inmates make from correctional facilities are interstate, interexchange ICS. Many calls made from correctional facilities are intrastate local or long distance calls, which are regulated by the states. We therefore seek comment on how the Commission can encourage states to reevaluate their policies regarding intrastate ICS rates.

51. We also seek comment on how and whether use of VoIP technologies by ICS providers impacts our analysis under section 276 of the Act. To what extent are providers currently utilizing VoIP technology to provide ICS? Would the use of VoIP technology affect the authority of state regulators to address intrastate ICS rates? What authority regarding ICS rates would control in that circumstance?

52. We recognize the important role that states play in managing correctional facilities and in contracting with private correctional management companies. Some parties believe ICS is exclusively a state issue because it involves management of correctional facilities and therefore its regulation should be left to state correctional officials. How would such a conclusion be reconciled with the Commission's obligations under sections 201 and 276 and the fact that the question of the reasonableness of ICS rates was referred to the Commission under the doctrine of primary jurisdiction? Would the Commission's fulfillment of its obligations under sections 201 and 276 potentially result in preemption of states' exercise of regulatory or police power authority?

53. We also seek comment specific to the proposals discussed above. Does the Commission have the authority to disallow an additional call set up charge when inmates' calls are disconnected? Does the Commission have the legal authority to mandate that ICS providers offer debit calling? What legal authority does the Commission have to address the site commissions common in ICS contracts?

IV. Procedural Matters

A. Filing Instructions

54. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998). Comments and reply comments on this NPRM must be filed in WC Docket No. 12–375.

- Electronic Filers: Direct cases and other pleadings may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

B. Ex Parte Requirements

55. The proceeding this Notice initiates shall be treated as a ''permit-

but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b). In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

C. Initial Regulatory Flexibility Analysis

56. As required by the Regulatory Flexibility Act of 1980 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this Notice, of the possible significant economic impact on small entities of the policies and rules addressed in this document. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice provided on or before the dates indicated on the first page of this Notice. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Notice of Proposed Rulemaking, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

D. Initial Paperwork Reduction Act of 1995 Analysis

57. This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

V. Ordering Clauses

58. *Accordingly, it is ordered* that, pursuant to sections 1, 2, 4(i)–(j), 201(b) and 276 of the Communications Act of 1934, as amended, 47 USC 151, 152, 154(i)–(j), 201(b) and 276, this Notice of Proposed Rulemaking *is adopted*.

59. *It is further ordered,* that the Petition of Martha Wright et al. for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking is GRANTED IN PART.

60. *It is further ordered,* that the Petitioners' Alternative Rulemaking Proposal is *granted in part*.

61. *It is further ordered,* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

62. *It is further ordered,* that pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1) and 1.103(a), that the Notice of Proposed Rulemaking *shall be effective* on the date of publication of a summary thereof in the **Federal Register**.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–01154 Filed 1–18–13; 8:45 am]

BILLING CODE 6712–01–P

Notices

Federal Register
Vol. 78, No. 14
Tuesday, January 22, 2013

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

Forest Service

Annual List of Newspapers To Be Used by the Alaska Region for Publication of Legal Notices of Proposed Hazardous Fuel Reduction Projects Subject to the Pre-decisional Administrative Review Process at 36 CFR 218, Subpart A

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that Ranger Districts, Forests, and the Regional Office of the Alaska Region will use to publish legal notices of the opportunity to object to proposed hazardous fuel reduction projects authorized under the Healthy Forests Restoration Act of 2003. The intended effect of this action is to inform interested members of the public which newspapers will be used to publish legal notice of actions subject to the pre-decisional administrative review process at 36 CFR 218, thereby allowing them to receive constructive notice of the proposed actions, to provide clear evidence of timely notice, and to achieve consistency in administering the pre-decisional review process.

DATES: Publication of legal notices in the listed newspapers begins on February 1, 2013. This list of newspapers will remain in effect until it is superceded by a new list, published in the **Federal Register**.

ADDRESSES: Robin Dale, Alaska Region Group Leader for Appeals, Litigation and FOIA; Forest Service, Alaska Region; P.O. Box 21628; Juneau, Alaska 99802–1628.

FOR FURTHER INFORMATION CONTACT: Robin Dale; Alaska Region Group Leader for Appeals, Litigation and FOIA; (907) 586–9344.

SUPPLEMENTARY INFORMATION: This notice provides the list of newspapers that Responsible Officials in the Alaska Region will use to give notice of proposed hazardous fuel reduction projects subject to the pre-decisional administrative review process at 36 CFR part 218. The timeframe for objection to a proposed hazardous fuel reduction project subject to this process shall be based on the date of publication of the legal notice of the project in the newspaper of record identified in this notice.

The newspapers to be used for giving notice of Forest Service projects in the Alaska Region are as follows:

Alaska Regional Office

Decisions of the Alaska Regional Forester: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska; and the Anchorage Daily News, published daily in Anchorage, Alaska.

Chugach National Forest

Decisions of the Forest Supervisor and the Glacier and Seward District Rangers: Anchorage Daily News, published daily in Anchorage, Alaska.

Decisions of the Cordova District Ranger: Cordova Times, published weekly in Cordova, Alaska.

Tongass National Forest

Decisions of the Forest Supervisor and the Craig, Ketchikan/Misty, and Thorne Bay District Rangers: Ketchikan Daily News, published daily except Sundays and official holidays in Ketchikan, Alaska.

Decisions of the Admiralty Island National Monument Ranger, the Juneau District Ranger, the Hoonah District Ranger, and the Yakutat District Ranger: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska.

Decisions of the Petersburg District Ranger: Petersburg Pilot, published weekly in Petersburg, Alaska.

Decisions of the Sitka District Ranger: Daily Sitka Sentinel, published daily except Saturday, Sunday, and official holidays in Sitka, Alaska.

Decisions of the Wrangell District Ranger: Wrangell Sentinel, published weekly in Wrangell, Alaska.

Supplemental notices may be published in any newspaper, but the timeframes for filing objections will be calculated based upon the date that legal notices are published in the newspapers of record listed in this notice.

Dated: January 7, 2013.

Beth G. Pendleton,

Regional Forester.

[FR Doc. 2013–01015 Filed 1–18–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Idaho Panhandle National Forests, Coeur d'Alene River Ranger District, Shoshone County, ID; Beaver Creek Project

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service will prepare an Environmental Impact Statement (EIS) on a proposal to accomplish vegetation management in the Beaver Creek Resource Area, which is located on National Forest System lands administered by the Idaho Panhandle National Forests in Shoshone County, Idaho.

The proposed action would include timber harvest (commercial thin, shelterwood, improvement cut, and seed tree treatments); hazardous fuels treatment (underburning, jackpot burning, mastication, grapple piling and yarding tops associated with the timber harvest); prescribed burning not associated with timber harvest; and watershed restoration (decommissioning roads currently not open to motorized use, upgrading aquatic organism passage barriers; and road construction (both permanent and temporary). Other activities included in the proposed action are road storage, road reconstruction and maintenance, site preparation, reforestation, and fuel break development.

This project is designed to achieve the goals of enhanced forest stand resilience and resistance, hazardous fuel reduction, and restoration of water quality and aquatic habitats.

DATES: Comments concerning the scope of the analysis must be received by February 21, 2013. Additional opportunity for formal comments will be accepted after release of the Draft Environmental Impact Statement (DEIS), which is expected to be published in April 2013. The Final Environmental Impact Statement (FEIS) is expected to be published in August 2013.

ADDRESSES: Send or hand-deliver written comments to the Coeur d'Alene River Ranger District, Attn: Project Leader Lauren Goschke, 2502 E Sherman Avenue, Coeur d'Alene, ID 83814. Comments may also be sent via email to *comments-northern-idpanhandle-coeur-dalene@fs.fed.us,* or via facsimile to 208–769–3062.

FOR FURTHER INFORMATION CONTACT: Lauren Goschke, Project Leader, Coeur d'Alene River Ranger District, 2502 E. Sherman Avenue, Coeur d'Alene ID, 83814; telephone (208) 769–3046, email *lgoschke@fs.fed.us,* or Jeanne White, Ecosystems Staff Officer, telephone (208) 769–3022, email *jlwhite@fs.fed.us,* also at the Coeur d'Alene River Ranger District. Additional information is available on the Idaho Panhandle National Forests internet web page: *http://www.fs.usda.gov/projects/ipnf/landmanagement/projects*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

The purpose of the Beaver Creek proposed action is to move the project area towards the desired conditions identified by the Forest Plan. There is a need to maintain existing and recruit additional long-lived early seral species to facilitate greater forest health and increased resiliency to disturbance. There is a need to manage the landscape arrangement of forest structure and age class within the Beaver Creek watershed to ensure diverse and sustainable forest stands.

Dead and dying trees throughout the project area are increasing fuel loading throughout the watershed. Treatment is needed to reduce the risk of hazardous fuels which could threaten wildland urban interface areas.

There is also a need to restore water quality and aquatic habitats in the Beaver Creek watershed to meet State water quality standards, improve the abundance of fisheries and other aquatic organisms, and improve the longevity of road conditions by reducing maintenance costs and providing for long term public access.

Proposed Action

The proposed action would harvest timber (commercial thin, shelterwood, improvement cuts, and seed tree treatments) and treat hazardous fuels (underburning, jackpot burning, mastication, grapple piling and yarding tops associated with the timber harvest) on approximately 2,000 acres, Prescribed burning would occur on an additional 2,300 acres NOT associated with the timber harvest.

Watershed restoration activities would include decommissioning 64 miles of road currently not open to motorized use, upgrading 20 aquatic organism passage barriers, constructing 1.5 miles of permanent road and 1.2 miles of temporary road. Other activities included in the proposed action are road storage, road reconstruction and maintenance, site preparation, reforestation, and fuel break development.

Possible Alternatives

Scoping comments will be used by the Forest Service to develop a range of alternatives in response to any significant issues that are identified. A no-action alternative will be analyzed during the analysis process.

Responsible Official

The responsible official for the decision on this project is the Forest Supervisor for the Idaho Panhandle National Forests, 3815 Schreiber Way, Coeur d'Alene, ID 83815.

Nature of Decision To Be Made

The Forest Supervisor will decide whether to implement the action as proposed or as modified by an alternative, or whether to take no action at this time. If it proceeds, she will also decide what project design features and monitoring requirements will be applied to the project.

Preliminary Issues

Preliminary concerns identified by the project team include (1) effects of the proposed activities on forest vegetation; (2) effects of the proposed activities on hazardous fuel levels; (3) effects of the proposed activities on elk thermal cover, (4) effects of the proposed activities on public recreation access, (5) effects of the proposed activities on water quality, water quantity, and fish distribution; and (6) revenues and the local economy.

Permits or Licenses Required

Due to the nature of some of the restoration activities, such as culvert upgrades to facilitate aquatic organism passage or to improve hydrologic function, it is anticpated that permits associated with Section 404 of the Clean Water Act will be required.

Scoping Process

This project was previously scoped as an Environmental Assessment. This notice of intent, which guides the development of the EIS, continues the scoping process. A scoping document was mailed to potentially interested or affected members of the public on October 5, 2012. It is available on the Idaho Panhandle National Forests internet Web site (*http://fs.usda.gov/goto/ipnf/projects*). Please refer to the October 5, 2012 scoping document to obtain project details and project maps. It is not necessary to resubmit your comments if you responded to the October 5, 2012 scoping letter. Comments already submitted in response to the October 5, 2012 scoping letter will be used in the preparation of the EIS. While public participation in this analysis is welcome at any time, additional comments can best be used to prepare the EIS if received within 30 days of publication of this notice.

It is important that reviewers provide their comments at such times and in such a manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, anonymous comments will not provide the respondent with standing to participate in subsequent administrative or judicial review.

Dated: January 14, 2013.

Mary Farnsworth,

Forest Supervisor, Idaho Panhandle National Forests.

[FR Doc. 2013–01126 Filed 1–18–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Annual List of Newspapers To Be Used by the Alaska Region for Publication of Legal Notices of Proposed Actions and Legal Notices of Decisions Subject to Administrative Appeal Under 36 CFR Part 215

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: This notice lists the newspapers that Ranger Districts, Forests, and the Regional Office of the Alaska Region will use to publish legal

notice of all decisions subject to appeal under 36 CFR Part 215 and to publish legal notices for public comment on actions subject to the notice and comment provisions of 36 CFR Part 215, as updated on June 4, 2003. The intended effect of this action is to inform interested members of the public which newspapers will be used to publish legal notice of actions subject to public comment and decisions subject to appeal under 36 CFR Part 215, thereby allowing them to receive constructive notice of a decision or proposed action, to provide clear evidence of timely notice, and to achieve consistency in administering the appeals process.

DATES: Publication of legal notices in the listed newspapers begins on February 1, 2013. This list of newspapers will remain in effect until it is superceded by a new list, published in the **Federal Register**.

ADDRESSES: Robin Dale, Alaska Region Group Leader for Appeals, Litigation and FOIA; Forest Service, Alaska Region; P.O. Box 21628; Juneau, Alaska 99802–1628.

FOR FURTHER INFORMATION CONTACT: Robin Dale; Alaska Region Group Leader for Appeals, Litigation and FOIA; (907) 586–9344.

SUPPLEMENTARY INFORMATION: This notice provides the list of newspapers that Responsible Officials in the Alaska Region will use to give notice of decisions subject to notice, comment, and appeal under 36 CFR Part 215. The timeframe for comment on a proposed action shall be based on the date of publication of the legal notice of the proposed action in the newspapers of record identified in this notice. The timeframe for appeal under 36 CFR Part 215 shall be based on the date of publication of the legal notice of the decision in the newspaper of record identified in this notice.

The newspapers to be used for giving notice of Forest Service decisions in the Alaska Region are as follows:

Alaska Regional Office

Decisions of the Alaska Regional Forester: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska; and the Anchorage Daily News, published daily in Anchorage, Alaska.

Chugach National Forest

Decisions of the Forest Supervisor and the Glacier and Seward District Rangers: Anchorage Daily News, published daily in Anchorage, Alaska.

Decisions of the Cordova District Ranger: Cordova Times, published weekly in Cordova, Alaska.

Tongass National Forest

Decisions of the Forest Supervisor and the Craig, Ketchikan/Misty, and Thorne Bay District Rangers: Ketchikan Daily News, published daily except Sundays and official holidays in Ketchikan, Alaska.

Decisions of the Admiralty Island National Monument Ranger, the Juneau District Ranger, the Hoonah District Ranger, and the Yakutat District Ranger: Juneau Empire, published daily except Saturday and official holidays in Juneau, Alaska.

Decisions of the Petersburg District Ranger: Petersburg Pilot, published weekly in Petersburg, Alaska.

Decisions of the Sitka District Ranger: Daily Sitka Sentinel, published daily except Saturday, Sunday, and official holidays in Sitka, Alaska.

Decisions of the Wrangell District Ranger: Wrangell Sentinel, published weekly in Wrangell, Alaska.

Supplemental notices may be published in any newspaper, but the timeframes for making comments or filing appeals will be calculated based upon the date that notices are published in the newspapers of record listed in this notice.

Dated: January 7, 2013.

Beth G. Pendleton,

Regional Forester.

[FR Doc. 2013–01014 Filed 1–18–13; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which RUS intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, Rural Development, United States Department of Agriculture, 4000 Independence Ave., SW., STOP 1522, Room 5162 South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078. Fax: (202) 720–8435. Email: *Michele.Brooks@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

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 proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, Room 5162, STOP 1522, 1400 Independence Ave., SW., Washington, DC 20250–1522. Fax: (202)690–1078. Email: *Michele.Brooks@wdc.usda.gov.*

Title: Wholesale Contracts for the Purchase and Sale of Electric Power.

OMB Control Number: 0572–0089.

Type of Request: Revision of a currently approved information collection.

Abstract: Most RUS financed electric systems are cooperatives and are organized in a two-tiered structure. Retail customers are members of the distribution system that brings electricity to their homes and business. Distribution cooperatives, in turn, are members of power supply cooperatives, also known as generation and transmission cooperatives (G&T's) that generate or purchase power and transmit the power to the distribution systems.

For a distribution system, a lien on the borrower's assets generally represents adequate security. However,

since most G&T revenues flow from its distribution members, RUS requires, as a condition of a loan or loan guarantee to a G&T that long-term requirements wholesale power contract to purchase their power from the G&T at rates that cover all the G&T's expenses, including debt service and margins. RUS Form 444 is the standard form of the wholesale power contract. Most borrowers adapt this form to meet their specific needs. The contract is prepared and executed by the G&T and each member and by RUS.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 6 hours per response.

Respondents: Small business or other for-profit; not-for-profit organizations.

Estimated Number of Respondents: 30.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 180 hours.

Copies of this information collection can be obtained from MaryPat Daskal, Program Development and Regulatory Analysis, at (202) 720–7853; Email: *MaryPat.Daskal@wdc.usda.gov:* Fax: (202) 720–7853.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: January 15, 2013.

John Charles Padalino,

Acting Administrator.

[FR Doc. 2013–01150 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Information Collection Activity; Comment Request

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the Rural Utilities Service (RUS) invites comments on this information collection for which RUS intends to request approval from the Office of Management and Budget (OMB).

DATES: Comments on this notice must be received by March 25, 2013.

FOR FURTHER INFORMATION CONTACT: Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, 1400 Independence Ave. SW., STOP 1522, Room 5162-South Building, Washington, DC 20250–1522. Telephone: (202) 690–1078, FAX: (202) 720–8435 or email *michele.brooks@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION: The Office of Management and Budget's (OMB) regulation (5 CFR part 1320) implementing provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13) requires that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d)). This notice identifies an information collection that RUS is submitting to OMB for extension.

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 proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Michele L. Brooks, Director, Program Development and Regulatory Analysis, Rural Utilities Service, U.S. Department of Agriculture, STOP 1522, 1400 Independence Ave. SW., Washington, DC 20250–1522. Telephone: (202) 205–3660, Fax: (202) 720–8435 or email *michele.brooks@wdc.usda.gov.*

Title: Seismic Safety of New Building Construction.

OMB Control Number: 0572–0099.

Type of Request: Revision of a currently approved collection.

Abstract: The Earthquake Hazards Reduction Act of 1977 (42 U.S.C. 7701 *et seq.*) was enacted to reduce risks to life and property through the National Earthquake Hazards Reduction Program (NEHRP). The Federal Emergency Management Agency (FEMA) is designated as the agency with the primary responsibility to plan and coordinate the NEHRP. This program includes the development and implementation of feasible design and construction methods to make structures earthquake resistant.

Executive Order 12699 of January 5, 1990, Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction, requires that measures to assure seismic safety be imposed on Federally assisted new building construction.

7 CFR part 1792, subpart C, Seismic Safety of Federally Assisted New Building Construction, identifies acceptable seismic standards which must be employed in new building construction funded by loans, grants, or guarantees made by the Rural Utilities Service, hereinafter referred to as agency, through lien accommodations or subordinations approved by the agency. This subpart implements and explains the provisions of the loan contract utilized by the agency for both electric and telecommunications borrowers concerning acceptable seismic standards. The subpart requires RUS borrowers or grant recipients provide a written acknowledgement for each applicable building from the architect or engineer responsible for the design certifying that seismic provisions pursuant to 7 CFR part 1792 subpart C, will be used in the design and construction of the building.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .75 hour per response.

Respondents: Small business or organizations.

Estimated Number of Respondents: 192.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 144.

Copies of this information collection can be obtained from Rebecca Hunt, Program Development and Regulatory Analysis, at (202) 205–3660, Fax: (202) 720–8435 or email: *rebecca.hunt@wdc.usda.gov.*

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: January 15, 2013.

John Charles Padalino,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2013–01152 Filed 1–18–13; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meetings of the New Hampshire Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act

(FACA), that a planning meeting of the New Hampshire Advisory Committee to the Commission will convene at 10:00 a.m. (ET) on Friday, February 1, 2013, at the New Hampshire State House, 107 North Main Street, Concord, NH 03301. The purpose of the planning meeting is to plan future activities. The purpose of the press conference is to re-release the committee report on Goffstown Prison.

Members of the public are entitled to submit written comments. The comments must be received in the regional office by Friday, March 1, 2012. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to *ero@usccr.gov*. Persons who desire additional information may contact the Eastern Regional Office at 202–376–7533.

Persons needing accessibility services should contact the Eastern Regional Office at least five working days before the scheduled date of the meeting.

Records generated from this meeting may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, *www.usccr.gov,* or to contact the Eastern Regional Office at the above phone number, email or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, on January 15, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–01093 Filed 1–18–13; 8:45 am]

BILLING CODE 6335–01–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 Oceanic and Atmospheric Administration (NOAA).

Title: Northeast Region Logbook Family of Forms.

OMB Control Number: 0648–0212.

Form Number(s): NA.

Type of Request: Regular submission (revision and extension of a current information collection).

Number of Respondents: 6,378.

Average Hours Per Response: Logbooks, 5 minutes except for shellfish logbook, 12.5 minutes; interactive voice response (IVR) landings reports, 5 minutes; declaration of days out of gillnet fishery, 3 minutes; departure/landing call-ins for monkfish and limited access occasional sea scallop trips, 2 minutes.

Burden Hours: 15,057.

Needs and Uses: This request is for a revision and extension of a currently approved information collection.

Under the Magnuson-Stevens Fishery Conservation and Management Act, the Secretary of Commerce (Secretary) has the responsibility for the conservation and management of marine fishery resources. Much of this responsibility has been delegated to the National Oceanic and Atmospheric Administration (NOAA)/National Marine Fisheries Service (NMFS). Under this stewardship role, the Secretary was given certain regulatory authorities to ensure the most beneficial uses of these resources. One of the regulatory steps taken to carry out the conservation and management objectives is to collect data from users of the resource. Thus, as regional Fishery Management Councils develop specific Fishery Management Plans (FMP), the Secretary has promulgated rules for the issuance and use of a vessel Interactive Voice Response (IVR) system, a Vessel Monitoring System (VMS) and vessel logbooks (VTR) to obtain fishery-dependent data to monitor, evaluate, and enforce fishery regulations.

Fishing vessels permitted to participate in Federally-permitted fisheries in the Northeast are required to submit logbooks containing catch and effort information about their fishing trips. Permitted vessels that catch halibut are also asked to voluntarily provide additional information on the estimated size of the fish and the time of day caught through vessel logbooks. Participants in the herring, tilefish and red crab fisheries are also required to make weekly reports on their catch through IVR. In addition, vessels fishing under a days-at sea (DAS) management system can use the IVR system to request a DAS credit when they have canceled a trip for unforeseen circumstances. The information submitted is needed for the management of the fisheries.

This revision/extension removes the VMS requirement for Northeast multispecies permit holders participating in the special access programs (SAPs), the Category B (regular) Days-at-Sea (DAS) program, and fishing in the United States/Canada Resource Sharing Understanding Area to avoid duplication, as this information collection is approved under another collection (OMB Control No. 0648–0605).

Affected Public: Business or other for-profit organizations.

Frequency: Monthly, weekly and on occasion.

Respondent's Obligation: Mandatory.

OMB Desk Officer: *OIRA_Submission@omb.eop.gov*.

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 *OIRA_Submission@omb.eop.gov*.

Dated: January 15, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–01091 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–3–2013]

Foreign-Trade Zone 45—Portland, Oregon; Application for Reorganization and Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Port of Portland, grantee of FTZ 45, requesting authority to reorganize and expand the zone under the alternative site framework (ASF) adopted by the Board (15 CFR Sec. 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new subzones or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000-acre activation limit for a zone. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the

regulations of the Board (15 CFR part 400). It was formally docketed on January, 15, 2013.

FTZ 45 was approved by the Board on December 18, 1978 (Board Order 140, 43 FR 60323, 12/27/1978) and expanded on April 5, 1991 (Board Order 518, 56 FR 16067, 04/19/1991). The current zone includes the following sites: *Site 1* (1,830 acres)—Rivergate Industrial Park, Port Terminal Nos. 5 and 6, and the adjacent Oregon Steel Mills facilities, North Marine Drive and North Lombard Street, Portland; *Site 2* (1,163 acres)—Portland International Airport and adjacent Portland International Center, 7000 NE Airport Way and NE Alderwood Road, Portland; *Site 3* (254 acres)—Portland Ship Repair Yard, 5555 N. Channel Avenue, Portland; *Site 4* (43 acres)—Port Terminal No. 1, 2220 NW Front Street, Portland; *Site 5* (49 acres)—Port Terminal No. 2, 3556 NW Front Street, Portland; *Site 6* (241 acres)—Port Terminal No. 4, Port Terminal Road and North Lombard Street, Portland; *Site 7* (4 acres)—Tektronix Inc. 14400 SW Millikan Way, Beaverton; and, *Site 8* (2.5 acres)—Physical Distribution, Inc., 3610 N. Suttle Road, Portland.

The grantee's proposed service area under the ASF would be all of Clackamas, Multnomah and Washington Counties, Oregon, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Portland, Oregon U.S. Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include Sites 1, 2, 3 and 6 as ''magnet'' sites and Site 7 as a ''usage-driven'' site. The ASF allows for the possible exemption of one magnet site from the ''sunset'' time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. The applicant is also requesting as part of the reorganization that Sites 4, 5 and 8 be removed from the zone project and that acreage be reduced at Site 2. In addition, the applicant is also requesting the approval of the following new magnet site: *Proposed Site 9* (173 acres)—Gresham Vista Business Park, NE Glisan Street and SE Stark Street, between NE 223rd and NE 242nd Avenues, Gresham (Multnomah County). The application would have no impact on FTZ 45's previously authorized subzones.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 25, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 8, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz*. For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: January 15, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–01184 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–4–2013]

Proposed Foreign-Trade Zone—Northwest Iowa; Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Northwest Iowa Development Corporation to establish a foreign-trade zone (FTZ) at sites in Northwest Iowa, adjacent to the Sioux Falls, South Dakota, CBP port of entry, under the alternative site framework (ASF) adopted by the Board (15 CFR 400.2(c)). The ASF is an option for grantees for the establishment or reorganization of zones and can permit significantly greater flexibility in the designation of new ''subzones'' or ''usage-driven'' FTZ sites for operators/users located within a grantee's ''service area'' in the context of the Board's standard 2,000-acre activation limit for a zone project. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on January 15, 2013. The applicant is authorized to make the proposal under Iowa Code 490.901.

The proposed zone would be the second zone for the Sioux Falls CBP port of entry, but would be the first zone in Iowa adjacent to that port of entry. The existing zone is: FTZ 220, Sioux Falls, South Dakota (Grantee: Sioux Falls Development Foundation, Board Order 882, 4/8/1997).

The applicant's proposed service area under the ASF would be Cherokee, Lyon, O'Brien, Osceola, Plymouth and Sioux Counties, Iowa. If approved, the applicant would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Sioux Falls Customs and Border Protection port of entry.

The proposed zone would include one ''magnet'' site: Proposed Site 1 (417.4 acres)—City of Le Mars Industrial Park in the southwest corner of Le Mars bounded by the CN rail line to the west, Industrial Road/Lynx Road to the east and County Route 38 to the south in Plymouth County. The proposed zone would also include two initial ''usage-driven'' sites: Proposed Site 2 (3.4 acres)—ChemSol, LLC, 1020 4th Avenue, Sibley, Osceola County; and Proposed Site 3 (0.15 acres)—Hummingbird Calibra, 202–206 First Avenue, Rock Rapids, Lyon County.

The application indicates a need for zone services in the Northwest Iowa, area. Several firms have indicated an interest in using zone procedures for warehousing/distribution activities. Specific production approvals are not being sought at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, Elizabeth Whiteman of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 25, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to April 8, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's

Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Elizabeth Whiteman at *Elizabeth.Whiteman@trade.gov* or (202) 482–0473.

Dated: January 15, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–01189 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–2–2013]

Foreign-Trade Zone 117—Orange, Texas; Notification of Proposed Production Activity; Signal International Texas GP, LLC (Shipbuilding), Orange, TX

The Foreign Trade Zone of Southeast Texas, Inc., grantee of FTZ 117, submitted a notification of proposed production activity on behalf of Signal International Texas GP, LLC (Signal), located in Orange, Texas. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on January 10, 2013.

The Signal facility is located at 91 Front Street, Orange (Orange County), Texas. A separate application for subzone status at the Signal facility was submitted and will be processed under Section 400.31 of the Board's regulations. The facility is used for the construction and repair of oceangoing vessels. Pursuant to 15 CFR 400.14(b) of the regulations, FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (as described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt Signal from customs duty payments on foreign status components used in export production. On its domestic sales, Signal would be able to choose the duty rate during customs entry procedures that apply to oceangoing vessels (duty rate—free) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

Components and materials sourced from abroad include: coatings/resins, fittings, flanges, couplings, sleeves, anchors, wire, copper fittings, fasteners, aluminum rods/profiles/fittings, marine engines, boxes/crates/bins, handles, knobs, gaskets, tarpaulins, life jackets, insulation, plaster tiles, tableware, winches, ladders, hangers, pipes/fittings of lead and tin, flexible tubing of base metals, boilers, steam turbines and related parts, diesel engines and related parts, non-aircraft gas turbines, hydro jet engines, pumps and related parts, compressors, turbochargers, refrigeration/cooling equipment, electric motors, generators, evaporative air coolers, derricks, other machinery, valves, filters, liquid purifiers, sprayers, electrical ballasts, transformers, bearings, acoustic baffles, heaters, transmission shafts, propellers, starters, radio/TV/radar equipment, signaling devices, electrical components and panels, wiring harnesses, lamps, cables, mirrors, sonar apparatus, optical instruments, micrometers and calipers, thermostats, chronometers, regulators, controllers, and search lights (duty rate ranges from free to 6.7%). The production activity under FTZ procedures would be subject to the ''standard shipyard restriction'' applicable to foreign origin steel mill products (*e.g.,* angles, pipe, plate), which requires that all applicable duties be paid on such items.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 4, 2013.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Pierre Duy at *Pierre.Duy@trade.gov* or (202) 482–1378.

Dated: January 15, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–01190 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–351–825]

Stainless Steel Bar From Brazil: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012

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 stainless steel bar (SSB) from Brazil. The period of review (POR) is February 1, 2011, through January 31, 2012. The review covers one producer/exporter of the subject merchandise, Villares Metals S.A. (Villares). We preliminarily find that subject merchandise has not been sold at less than normal value.

DATES: *Effective Date:* January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Sandra Dreisonstok or Minoo Hatten, 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) 482–0768, and (202) 482–1690, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The merchandise subject to the order is SSB. The SSB subject to the order is currently classifiable under subheadings 7222.10.00, 7222.11.00, 7222.19.00, 7222.20.00, 7222.30.00 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes. A full description of the scope of the order is contained in the memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, ''Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Bar from Brazil'' dated concurrently with this notice (''Preliminary Decision Memorandum''), which is hereby adopted by this notice. The written description is dispositive.

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 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/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

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 by Villares in the home market which were made at below-cost prices. For a full description of the methodology underlying our conclusions, *see* Preliminary Decision Memorandum.

Preliminary Results of Review

As a result of this review, we preliminarily determine that a weighted-average dumping margin of 0.00 percent exists for Villares for the period February 1, 2011, through January 31, 2012.

Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), interested parties may submit cases 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 be filed not later than five days after the date for filing case briefs. 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.

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. 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 intends to 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

Upon completion of the administrative review, the Department shall determine and U.S. Customs and Border Protection (CBP) shall assess antidumping duties on all appropriate entries. If Villares' weighted-average dumping margin is above *de minimis* 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 antidumping duties calculated for the importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1). If Villares' weighted-average dumping margin continues to be zero or *de minimis* in the final results of review, we will instruct CBP not to assess duties on any of its entries in accordance with the *Final Modification for Reviews, i.e.,* ''{w}here the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis,* no antidumping duties will be assessed.'' [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 Villares 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 Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

We intend to issue instructions to CBP 15 days after publication of the final results of this review.

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 SSB from Brazil 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 Villares 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 19.43 percent, the all-others rate established in the *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Brazil,* 59 FR 66914 (December 28, 1994). 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)(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.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 14, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix I

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope of the Order
3. Fair Value Comparisons
4. Product Comparisons
5. Date of Sale
6. Constructed Export Price
7. Home Market Viability as Comparison Market
8. Level of Trade
9. Cost of Production
10. Calculation of Normal Value Based on Comparison Market Prices
11. Currency Conversion

[FR Doc. 2013–01180 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101, 80102 (February 14, 2012).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–836]

Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2011–2012

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 certain cut-to-length carbon-quality steel plate products (CTL plate) from the Republic of Korea (Korea). The period of review (POR) is February 1, 2011, through January 31, 2012. We preliminarily find that the subject merchandise has not been sold at less than normal value.

DATES: *Effective Date:* January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Yang Jin Chun, 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) 482–5760.

Scope of the Order

The products covered by the antidumping duty order are certain CTL plate. Imports of CTL plate are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 7208.40.30.30, 7208.40.30.60, 7208.51.00.30, 7208.51.00.45, 7208.51.00.60, 7208.52.00.00, 7208.53.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.13.00.00, 7211.14.00.30, 7211.14.00.45, 7211.90.00.00, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00, 7225.40.30.50, 7225.40.70.00, 7225.50.60.00, 7225.99.00.90, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. The HTSUS subheadings are provided for convenience and customs purposes. The written description is dispositive. A full description of the scope of the order is contained in the memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, ''Preliminary Decision Memorandum for the Administrative Review of the Antidumping Duty Order on Certain Cut-to-Length Carbon-Quality Steel Plate Products 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 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/.* The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Preliminary Determination of No Reviewable Entries

We received timely submission of letters from Daewoo International Corp. (Daewoo), Dongbu Steel Co., Ltd. (Dongbu), GS Global Corp. (GS Global), and Hyundai Steel Co. (Hyundai Steel) reporting to the Department that they had no exports, sales or entries of subject merchandise to the United States during the POR.[1] Based on record evidence, we preliminarily determine that Daewoo, Dongbu, GS Global, and Hyundai Steel had no reviewable entries during the POR.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(B) 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 Dongkuk Steel Mill Co., Ltd. (DSM) in the home market which were made at below-cost prices.

For a full description of the methodology underlying our conclusions, *see* Preliminary Decision Memorandum.

Rates for Respondents Not Selected for Individual Examination

Generally we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents not selected for individual review.

Therefore, based on the facts available, and in accordance with the statute, we determine that a reasonable method for determining the weighted-average dumping margins for the non-selected respondents in this review (*i.e.,* Samsung C&T Corp. and TCC Steel Corp.) is to assign the rate calculated for DSM, which is the sole company selected for individual examination.

For a full description of the methodology we used in calculating rates for respondents not selected for individual examination, *see* Preliminary Decision Memorandum.

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 February 1, 2011, through January 31, 2012.

Manufacturer/Exporter	Weighted-average dumping margin (percent)
Dongkuk Steel Mill Co., Ltd.	0.00
Samsung C&T Corp.	0.00
TCC Steel Corp.	0.00

Disclosure and Public Comment

Pursuant to 19 CFR 351.309(c), 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 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]

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.[4] Requests should contain: (1) The party's name, address and telephone number;

[1] *See* the letters from Daewoo, Dongbu, GS Global, and Hyundai Steel dated May 22, 2012, April 26, 2012, May 22, 2012, and April 24, 2012, respectively.

[2] *See* 19 CFR 351.309(d).

[3] *See* 19 CFR 351.309(c)(2) and (d)(2).

[4] *See* 19 CFR 351.310(c).

(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

If DSM's weighted-average dumping margin is above *de minimis* 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 antidumping duties calculated for the importer's examined sales and the total entered value of the sales in accordance with 19 CFR 351.212(b)(1).[5] If DSM's weighted-average dumping margin continues to be zero or *de minimis* in the final results of review, we will instruct U.S. Customs and Border Protection (CBP) not to assess duties on any of its entries in accordance with the *Final Modification for Reviews, i.e.,* ''where the weighted-average margin of dumping for the exporter is determined to be zero or *de minimis,* no antidumping duties will be assessed.'' [6]

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 DSM, which is the company selected for individual examination in this review, 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 Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

For the companies which were not selected for individual examination, Samsung C&T Corp. and TCC Steel Corp., we will instruct CBP to apply the rates listed above to all entries of subject merchandise produced and/or exported by those firms.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

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 CTL plate 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 companies subject to this review 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 0.98 percent,[7] the all-others rate established in the less-than-fair-value investigation, adjusted for the export-subsidy rate in the companion countervailing duty investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

The Department is issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 14, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

[FR Doc. 2013–01179 Filed 1–18–13; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–898]

Chlorinated Isocyanurates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: On July 16, 2012, the Department of Commerce (the Department) published the preliminary results of an administrative review of the antidumping duty order on chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (PRC).[1] The period of review (POR) for this administrative review was June 1, 2010, through May 31, 2011. We invited interested parties to comment on our *Preliminary Results.* Based on our analysis of the comments received, we have made changes to the margin calculations. Therefore, the final results differ from the preliminary results. The final dumping margins for this review

[5] In these preliminary 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 Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*).

[6] *See Final Modification for Reviews,* 77 FR at 8102.

[7] *See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review,* 77 FR 21527, 21529 (April 10, 2012).

[1] *See Chlorinated Isocyanurates From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 77 FR 41746 (July 16, 2012) (*Preliminary Results*).

are listed in the ''Final Results of Review'' section below.

DATES: *Effective Date:* January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Emily Halle or Andrew Huston, 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) 482–0176 or (202) 482–4261, respectively.

SUPPLEMENTARY INFORMATION:

Background

Since the publication of the *Preliminary Results,* the following events have occurred. On August 6, 2012, Zhucheng Taisheng Chemical Co., Ltd. (Zhucheng) timely filed surrogate value information.[2] On September 5, 2012, Clearon Corporation and Occidental Chemical Corporation (Petitioners), Hebei Jiheng Chemical Company, Ltd. (Jiheng), and Juancheng Kangtai Chemical Co., Ltd. (Kangtai) timely filed surrogate value information.[3] Petitioners submitted rebuttal surrogate value comments on September 17, 2012.[4] The Department conducted verification of Jiheng from October 15 through 19, 2012, and released the verification report on November 21, 2012.[5] On December 3, 2012, Jiheng, Kangtai, Zhucheng, and Petitioners filed case briefs. Jiheng, Kangtai and Petitioners filed rebuttal briefs on December 10, 2012. In response to timely requests from Petitioners and Jiheng to hold a public hearing,[6] the Department conducted a public hearing on December 21, 2012.[7]

On September 4, 2012, the Department extended the deadline for the final results of review to January 12, 2013.[8] 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.[9] 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 January 14, 2012.

Scope of the Order

The products covered by the order are chlorinated isocyanurates (chlorinated isos), which are derivatives of cyanuric acid, described as chlorinated s-triazine triones.[10] Chlorinated isos are currently classifiable under subheadings 2933.69.6015, 2933.69.6021, 2933.69.6050, 3808.40.50, 3808.50.40 and 3808.94.5000 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes only; the written product description of the scope of the order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal brief comments by parties in this review are addressed in the Decision Memorandum, which is hereby adopted by this notice. A list of the issues that parties raised and to which we responded in the Decision Memorandum is attached to this notice as an appendix. The 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 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

The Department has made several adjustments to our analysis and programming language. First, we now determine that sodium hypochlorite is comparable merchandise.[11] Second, we are selecting the Philippines as the primary surrogate country to value the respondents' factors of production.[12] Therefore, for all surrogate values, with certain exceptions, we are relying on Philippine data, including the surrogate value for labor and the surrogate financial ratios. We are also adjusting the calculation of the respondents' ammonia gas and sulfuric acid by-products. Finally, for Jiheng, we are adding several freight expenses to its raw materials input valuations.[13]

Separate Rates

In proceedings involving non-market economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of subject merchandise in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent to be eligible

[2] *See* Letter from Zhucheng regarding ''Chlorinated Isocyanurates from the People's Republic of China: Submission of Publicly Available Surrogate Value Information,'' August 6, 2012.

[3] *See* Letter from Petitioners regarding ''Chlorinated Isocyanurates from The People's Republic of China: Sixth Administrative Review: Information Regarding Surrogate Values for Factors of Production,'' September 5, 2012; Letter from Jiheng regarding ''Chlorinated Isocyanurates from China (Sixth Administrative Review)—Hebei Jiheng Chemical Company, Ltd. Resubmission of Surrogate Value Information for Factors of Production,'' September 5, 2012; Letter from Kangtai regarding ''Chlorinated Isocyanurates from the People's Republic of China Surrogate Values for Final Determination,'' September 5, 2012.

[4] *See* Letter from Petitioners regarding ''Chlorinated Isocyanurates from the People's Republic of China (6th Antidumping Administrative Review): Petitioners' Submission of Rebuttal Information Regarding Surrogate Values for Factors of Production,'' September 17, 2012.

[5] *See* Memorandum titled ''Verification of the Sales and Factors Response of Hebei Jiheng Chemical Company Ltd. in the Antidumping Review of Chlorinated Isocyanurates from the People's Republic of China,'' November 20, 2012.

[6] *See* Letter from Petitioners regarding ''Chlorinated Isocyanurates from The People's Republic of China: Sixth Administrative Review: Request for Hearing,'' August 15, 2012; Letter from Jiheng regarding ''Chlorinated Isocyanurates from China (Sixth Administrative Review)—Hebei Jiheng Chemical Company, Ltd. Request for Hearing,'' August 15, 2012.

[7] *See* transcript for public hearing in the matter, ''The Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China,'' December 21, 2012.

[8] *See* Memorandum ''Chlorinated Isocyanurates from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' September 4, 2012.

[9] *See* Memorandum to the Record from Paul Piquado, Assistant Secretary for Import Administration, ''Tolling of Administrative Deadlines As a Result of the Government Closure During Hurricane Sandy,'' dated October 31, 2012.

[10] For a complete description of the Scope of the Order, *see* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the Final Results of the 2010–2011 Administrative Review of Chlorinated Isocyanurates from the People's Republic of China,'' dated concurrently with this notice (Decision Memorandum).

[11] *See* Decision Memorandum.

[12] *See* Decision Memorandum. *See also* Memorandum to the File, ''2010–2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Final Results Surrogate Value Memorandum,'' January 14, 2013.

[13] *See* Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, ''Analysis for the Final Results of the 2010–2011 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Hebei Jiheng Chemical Company Ltd.,'' January 14, 2013, for a detailed discussion of these changes.

for a separate rate.[14] In the *Preliminary Results,* the Department found that Jiheng, Kangtai, Nanning Chemical Industry Co., Ltd. (Nanning), and Zhucheng demonstrated their eligibility for separate rate status.[15] No parties commented on these separate rate eligibility determinations. Thus, for these final results, we continue to find that the evidence placed on the record of this review by Jiheng, Kangtai, Nanning and Zhucheng demonstrates both a *de jure* and *de facto* absence of government control, with respect to their exports of the merchandise under review, and, thus, that these companies are eligible for separate rate status.

Rate for Non-Selected Companies

The separate rate shall be an amount equal to the weighted average of the calculated weighted-average dumping margins established for mandatory respondents, excluding any zero and *de minimis* margins, and any margins determined entirely on adverse facts available.[16] In this review, the Department calculated company-specific rates for the two mandatory respondents. Using a weighted average of these two company-specific rates to calculate a separate rate would risk disclosure of the mandatory respondents' business proprietary information. Therefore, the Department used a simple average of these two company specific rates to calculate a separate rate, which is 34.08 percent.

Final Results of Review

We determine that the following weighted-average dumping margins exist for the period June 1, 2010, through May 31, 2011.

Exporter	Weighted-average margin percentage
Hebei Jiheng Chemical Co., Ltd	29.91
Juancheng Kangtai Chemical Co., Ltd	38.25
Nanning Chemical Industry Co., Ltd	34.08
Zhucheng Taisheng Chemical Co., Ltd	34.08

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b), the Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. Where we do not have entered values for all U.S. sales to a particular importer/customer, we calculate a per-unit assessment rate by aggregating the antidumping duties due for all U.S. sales to that importer (or customer) and dividing this amount by the total quantity sold to that importer (or customer).[17] To determine whether the duty assessment rates are *de minimis,* in accordance with the requirement set forth in 19 CFR 351.106(c)(2), we calculated importer- (or customer-) specific *ad valorem* ratios based on the estimated entered value. Where an importer- (or customer-) specific *ad valorem* rate is zero or *de minimis,* we will instruct CBP to liquidate appropriate entries without regard to antidumping duties.[18] Based on this methodology, no respondent had a *de minimis* rate. For the two non-reviewed separate respondents, we will direct CBP to assess duties on an *ad valorem* basis at a rate equal to the margins indicated above. The Department intends to issue assessment instructions directly to CBP 15 days after the publication of this notice.

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.[19]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in the final results of this review (except, if the rate is zero or *de minimis, i.e.,* less than 0.5 percent, a zero cash deposit rate will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) 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 the PRC-wide rate of 285.63 percent; [20] and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) 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 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 Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

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 regulations and terms of an APO is a violation which is subject to sanction.

Disclosure

In accordance with 19 CFR 351.224(b), we intend to disclose the calculations performed for these final results to parties in this proceeding within five days of the date of publication of this notice.

[14] *See Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991), as further developed in *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994).

[15] *See Preliminary Results,* 77 FR at 41750.

[16] *See* section 735(c)(5)(A) of the Tariff Act of 1930, as amended (Act).

[17] *See* 19 CFR 351.212(b)(1).

[18] *See* 19 CFR 351.106(c)(2).

[19] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

[20] For an explanation on the derivation of the PRC-wide rate, *see Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China,* 70 FR 24502, 24505 (May 10, 2005).

We are issuing and publishing these final results of review in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 14, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

List of Comments and Issues in the Issues and Decision Memorandum

Selection of Primary Surrogate Country

Comment 1: Whether Sodium Hypochlorite is Comparable Merchandise
Comment 2: Surrogate Country Selection
Comment 3: Surrogate Values if the Philippines is Not Selected as the Surrogate Country

Surrogate Value Selection Comments

Comment 4: Sodium Chloride
Comment 5: Urea
Comment 6: Water
Comment 7: Chlorine
Comment 8: Hydrogen
Comment 9: Steam Coal
Comment 10: Electricity
Comment 11: Steam
Comment 12: Labor
Comment 13: Financial Ratios
Comment 14: Whether the Ammonia Gas and Sulfuric Acid Surrogate Values are Reasonable

Jiheng-Specific Comments

Comment 15: Whether Jiheng's Ammonia Gas ''Absorption Rate'' Adjustment is Warranted
Comment 16: Whether Jiheng's Normal Value was Correctly Adjusted for Transportation Costs

Kangtai-Specific Comments

Comment 17: Whether Kangtai's Ammonia Gas By-product Was Calculated Using the Correct Concentration Level
Comment 18: Whether Kangtai's Sodium Hydroxide Surrogate Value Should be Adjusted

[FR Doc. 2013–01185 Filed 1–18–13; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–932]

Certain Steel Threaded Rod From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2010–2011

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Jerry Huang, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington DC 20230; telephone: (202) 482–4047.

SUPPLEMENTARY INFORMATION:

Background

On November 9, 2012, the Department of Commerce (''Department'') published in the **Federal Register** the final results of the administrative review of the antidumping duty order on certain steel threaded rod from the People's Republic of China (''PRC'').[1] On November 13, 2012, Vulcan Threaded Products Inc. (''Petitioner'') filed timely allegations that the Department made various ministerial errors in the *Final Results* and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial errors. No other party submitted ministerial error allegations. On November 19, 2012, RMB Fasteners Ltd. and IFI & Morgan Ltd., and their affiliated producer Jiaxing Brother Standard Part Co., Ltd., (collectively ''RMB/IFI Group'') submitted rebuttal comments on Petitioner's ministerial error allegations.

Before the Department could take action on the alleged ministerial errors, RMB/IFI Group filed a summons and complaint with the U.S. Court of International Trade (''CIT'') challenging the *Final Results,* which vested the CIT with jurisdiction over the administrative proceeding.[2] On December 28, 2012, the CIT granted the Department leave to publish amended final results to correct certain ministerial errors.[3]

Scope of the Order

The merchandise covered by the order is steel threaded rod.[4] Steel threaded rod is certain threaded rod, bar, or studs, of carbon quality steel, having a solid, circular cross section, of any diameter, in any straight length, that have been forged, turned, cold-drawn, cold-rolled, machine straightened, or otherwise cold–finished, and into which threaded grooves have been applied. Certain steel threaded rod subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings 7318.15.5051, 7318.15.5056, 7318.15.5090, and 7318.15.2095. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise is dispositive.[5]

Amended Final Results

Section 751(h) of the Tariff Act of 1930, as amended (''the Act''), defines ''ministerial error'' as including ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.'' After analyzing Petitioner and RMB/IFI Group's comments, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made certain ministerial errors in the final results with respect to our calculation of freight and brokerage charges, as well as not including the cost of packing labor for RMB/IFI Group.[6]

For a detailed discussion of these ministerial errors, as well as the Department's analysis of these errors, *see* Ministerial Errors Memo. In accordance with section 751(h) of the Act and 19 CFR 351.224(e), we are amending the *Final Results* of this administrative review of certain steel threaded rod from the PRC. The dumping margins for the period of review for these amended final results are as follows:

Exporter	Weighted-average margin (percent)
RMB Fasteners Ltd., and IFI & Morgan Ltd. (''RMB/IFI Group'')	21.15
PRC-wide Entity	206.00

These amended final results and notice are issued and published in accordance with sections 751(h), and 777(i)(1) of the Act, and 19 CFR 351.224(e).

Dated: January 14, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2013–01177 Filed 1–18–13; 8:45 am]

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[1] *See Certain Steel Threaded Rod From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review; 2010–2011,* 77 FR 67332 (November 9, 2012) *(''Final Results'').*

[2] *See Zenith Elecs. Corp.* v. *United States,* 884 F.2d 556, 561–62 (Fed. Cir. 1989).

[3] *See Jiaxing Brother Fastener Co., Ltd.* v. *United States,* Court No. 12–00384 (Ct. Int'l Trade December 28, 2012) (order granting the Department leave to publish amended final results correcting ministerial errors no later than February 1, 2013).

[4] *See Certain Steel Threaded Rod from the People's Republic of China: Notice of Antidumping Duty Order,* 74 FR 17154 (April 14, 2009).

[5] *See* Memorandum to Paul Piquado, from Christian Marsh, regarding ''Second Antidumping Administrative Review of Certain Steel Threaded Rod from the People's Republic of China: Ministerial Error Memorandum,'' dated concurrently with this notice (''Ministerial Errors Memo'').

[6] *See* Ministerial Errors Memo.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seats for the Monterey Bay National Marine Sanctuary Advisory Council

AGENCY: Office of National Marine Sanctuaries (ONMS), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The ONMS is seeking applications for the following vacant seats on the Monterey Bay National Marine Sanctuary Advisory Council: Agriculture (1), Business/Industry (1), and Education (1). Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the sanctuary. Applicants who are chosen should expect to serve until February 2016.

DATES: Applications are due by February 15, 2013.

ADDRESSES: Application kits may be obtained from 99 Pacific Street, Bldg. 455A, Monterey, CA, 93940 or online at *http://montereybay.noaa.gov/.* Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Jacqueline Sommers, 99 Pacific Street, Bldg. 455A, Monterey, CA, 93940, (831) 647–4206, *Jacqueline.sommers@noaa.gov.*

SUPPLEMENTARY INFORMATION: The MBNMS Advisory Council is a community-based group that was established in March 1994 to assure continued public participation in the management of the Sanctuary. Since its establishment, the Advisory Council has played a vital role in decisions affecting the Sanctuary along the central California coast.

The Advisory Council's twenty voting members represent a variety of local user groups, as well as the general public, plus seven local, state and federal governmental jurisdictions. In addition, the respective managers or superintendents for the four California National Marine Sanctuaries (Channel Islands National Marine Sanctuary, Cordell Bank National Marine Sanctuary, Gulf of the Farallones National Marine Sanctuary and the Monterey Bay National Marine Sanctuary) and the Elkhorn Slough National Estuarine Research Reserve sit as non-voting members.

Four working groups support the Advisory Council: The Research Activity Panel (''RAP'') chaired by the Research Representative, the Sanctuary Education Panel (''SEP'') chaired by the Education Representative, the Conservation Working Group (''CWG'') chaired by the Conservation Representative, and the Business and Tourism Activity Panel (''BTAP'') co-chaired by the Business/Industry Representative and Tourism Representative, each dealing with matters concerning research, education, conservation and human use. The working groups are composed of experts from the appropriate fields of interest and meet monthly, or bimonthly, serving as invaluable advisors to the Advisory Council and the Sanctuary Superintendent.

The Advisory Council represents the coordination link between the Sanctuary and the state and federal management agencies, user groups, researchers, educators, policy makers, and other various groups that help to focus efforts and attention on the central California coastal and marine ecosystems.

The Advisory Council functions in an advisory capacity to the Sanctuary Superintendent and is instrumental in helping develop policies, program goals, and identify education, outreach, research, long-term monitoring, resource protection, and revenue enhancement priorities. The Advisory Council works in concert with the Sanctuary Superintendent by keeping him or her informed about issues of concern throughout the Sanctuary, offering recommendations on specific issues, and aiding the Superintendent in achieving the goals of the Sanctuary program within the context of California's marine programs and policies.

Authority: 16 U.S.C. 1431, et seq. (Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Daniel J. Basta,

Director, Office of National Marine Sanctuaries, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 2013–00933 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–NK–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC448

Fisheries of the South Atlantic; Southeast Data, Assessment and Review (SEDAR); Public Meetings

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

ACTION: Notice of SEDAR 32 Data Workshop for South Atlantic gray triggerfish (*Balistes capriscus*) and blueline tilefish (*Caulolatilus microps*).

SUMMARY: The SEDAR 32 assessments of the South Atlantic stocks of gray triggerfish and blueline tilefish will consist of: a Data Workshop; a series of Assessment Webinars; and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 32 Data Workshop will be held from 1 p.m. on February 11, 2013 until 1 p.m. on February 15, 2013; the Assessment Webinars and Review Workshop dates and times will publish in a subsequent issue in the **Federal Register**. See **SUPPLEMENTARY INFORMATION**.

ADDRESSES:

Meeting address: The SEDAR 32 Data Workshop will be held at the Crowne Plaza Hotel, 4831 Tanger Outlet Boulevard, North Charleston, SC 29418; telephone: (843) 744–4422.

SEDAR address: 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: *Julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment

analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Consensus Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office and Southeast Fisheries Science Center. Participants include: data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Data Workshop agenda are as follows:

1. An assessment data set and associated documentation will be developed.

2. Participants will evaluate all available data and select appropriate sources for providing information on life history characteristics, catch statistics, discard estimates, length and age composition, and fishery dependent and fishery independent measures of stock abundance, as specified in the Terms of Reference for the workshop.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) (3) days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: January 16, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–01128 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC454

New England Fishery Management Council; Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Monkfish Committee to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Thursday, February 7, 2013 at 9 a.m.

ADDRESSES: The meeting will be held at the Hotel Providence, 139 Mathewson Street, Providence, RI 02903; telephone: (401) 861–8000; fax: (401) 732–9309.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Monkfish Oversight Committee will review the report of the Monkfish Advisory Panel's January 9th meeting, and consider finalizing its recommendations on the range of alternatives in Amendment 6 pertaining to modifications to the current management system based on days-at-sea (DAS) and trip limits. These changes may include adoption of a DAS leasing program, and in that context, the NMFS Regional Office staff will give a presentation on the DAS leasing program adopted in the Northeast Multispecies Fishery Management Plan. The Committee will meet in closed session at the end of the meeting to review applications to fill two vacant seats on the Advisory Panel.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 16, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–01129 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC447

North Pacific Fishery Management Council; Public Meetings

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

ACTION: Meetings of the North Pacific Fishery Management Council and its advisory committees.

SUMMARY: The North Pacific Fishery Management Council (Council) and its advisory committees will hold public meetings, February 6–12, 2013 in Portland, OR.

DATES: The meetings will be held on Wednesday, February 6, 2013 through Tuesday, February 12, 2013. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: The meetings will be held at the Benson Hotel, 309 SW Broadway, Mayfair Ballroom, Portland, OR.

Council address: North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: David Witherell, Council staff; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Council will begin its plenary session at 8 a.m. on Wednesday, February 6

continuing through Tuesday, February 12, 2013. The Scientific Statistical Committee (SSC) will begin at 8 a.m. on Monday, February 4 and continue through Wednesday, February 6, the Council's Advisory Panel (AP) will begin at 8 a.m. on Tuesday, February 5 and continue through Saturday, February 9. The Ecosystem Committee will meet February 5, from 8:30 a.m. to 12:30 p.m. The Enforcement Committee will meet 1 p.m. to 5 p.m. (T). All meetings are open to the public, except executive sessions.

Council Plenary Session: The agenda for the Council's plenary session will include the following issues. The Council may take appropriate action on any of the issues identified.

1. Executive Director's Report (including status report on stock structure workshop; recent legislation regarding Amendment 80 and American Fisheries Act (AFA) vessels):

NMFS Management Report (including NOAA Report on Deep Sea Coral Strategic Plan, update on coral petition listing, update on observer program)
ADF&G Report
NOAA Enforcement Report
United States Coast Guard (USCG) Report (Report on Aleutian Island Risk Assessment)
United States Fish & Wildlife Service (USFWS) Report
International Pacific Halibut Commission (IPHC) Report
Protected Species Report (Report on Steller Sea Lion (SSL) Environmental Impact Statement (EIS); action as necessary)

2. Habitat Issues: Final action on Habitat Area of Particular Concern (HAPC)—Skate egg concentration areas; Review discussion paper on Bristol Bay red king crab.

3. Groundfish Issues: Discussion paper on crab bycatch limits in Bering Sea Aleutian Island (BSAI) groundfish fisheries; Initial review of BSAI Flatfish Specifications Flexibility. (T); Initial review of Gulf of Alaska (GOA) Pacific cod sideboards for Freezer Longliners (FFL); Initial review of AFA Vessel Replacement GOA Sideboards.

4. GOA Trawl Issues: Discussion paper on Central Gulf of Alaska (CGOA) Trawl Economic Data Collection; Discussion paper on CGOA Trawl Catch Shares; Review and discuss Western GOA issues and discuss next steps.

5. BSAI Crab Issues: Final Action on BSAI Crab Right of First Refusal (ROFR); Initial review of BSAI Crab active participation requirements. Discussion paper on BSAI Crab Cooperative Provisions for Crew.

6. Miscellaneous Issues: Discussion paper on the definition of a Fishing Guide; NMFS discussion paper on Halibut/Sablefish Individual Fishing Quota (IFQ) leasing prohibition. (T)

7. Staff Tasking: Review Committees and tasking.

The SSC agenda will include the following issues:

1. Discussion paper on Bristol Bay Red King crab
2. Bering Sea Flatfish Specifications Flexibility
3. AFA Vessel Replacement GOA Sideboards
4. CGOA Trawl Economic Data Collection
5. BSAI Crab ROFR
6. BSAI Crab active participation

The Advisory Panel will address most of the same agenda issues as the Council except B reports. The Agenda is subject to change, and the latest version will be posted at *http://www.alaskafisheries.noaa.gov/npfmc/.*

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: January 16, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–01127 Filed 1–18–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting; Correction

AGENCY: DoD.

ACTION: Meeting notice; correction.

SUMMARY: On December 31, 2012 (77 FR 77046), the Department of Defense published a notice announcing a meeting of the Defense Business Board. 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 the meeting time, meeting location, and agenda have changed. All other information in the December 31, 2012 notice remains the same.

DATES: The public meeting of the Defense Business Board will be held on Thursday, January 24, 2013. The meeting will now begin at 8:45 a.m. and end at 10:30 a.m.

ADDRESSES: Room 3D557 in the Pentagon, Washington, DC.

Purpose of the Meeting: At this meeting, the Board will deliberate the findings and draft recommendations from ''Employing Our Veterans Part II: Review of Pilot Transition Goal Plans Success Program'' and ''Taking Advantage of Opportunities for Commercial Satellite Communications Services'' Task Group Studies. The Board will also hear an update from the Task Group ''Applying Best Business Practices for Corporate Performance Management to DoD.''

Meeting Agenda

8:45 a.m.–10:30 a.m. Task Group Outbriefs, Board Deliberations and Update

''Employing Our Veterans Part II: Review of Pilot Transition Goal Plans Success (GPS) Program''—Outbrief

''Taking Advantage of Opportunities for Commercial Satellite Communications Services''—Outbrief

''Applying Best Business Practices for Corporate Performance Management to DoD''—Update

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Ms. Debora Duffy at the number listed in this notice no later than noon on Wednesday, January 16 to register and make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Metro Entrance with sufficient time to complete security screening no later than 8:15 a.m. on January 24. To

complete security screening, please come prepared to present two forms of identification and one must be a pictured identification card.

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer is Phyllis Ferguson, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Phyllis.Ferguson@osd.mil*, 703–695–7563. For meeting information please contact Ms. Debora Duffy, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Debora.Duffy@osd.mil*, (703) 697–2168.

Dated: January 15, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–01087 Filed 1–18–13; 8:45 am]

BILLING CODE 5001–06–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act Notice

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice of Public Meeting and Hearing.

SUMMARY: Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), and as authorized by 42 U.S.C. 2286b, notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) public meeting and hearing described below. The Board invites any interested persons or groups to present any comments, technical information, or data concerning safety issues related to the matters to be considered.

TIME AND DATE OF MEETING: Session I: 1:00 p.m.–5:30 p.m., March 14, 2013; Session II: 7:00 p.m.–9:00 p.m., March 14, 2013.

PLACE: Amarillo Civic Center, 401 S. Buchanan Street, Amarillo, Texas 79101. The Board will convene the hearing in the Regency Room which is accessible from Entrance 4 on the Johnson Street side of the Civic Center.

STATUS: Open. While the Government in the Sunshine Act does not require that the scheduled discussion be conducted in a meeting, the Board has determined that an open meeting in this specific case furthers the public interests underlying both the Government in the Sunshine Act and the Board's enabling legislation.

MATTERS TO BE CONSIDERED: In Session I of this public meeting and hearing, the Board will receive testimony from the National Nuclear Security Administration (NNSA) and its contractor concerning the safety culture at the Pantex Plant. Areas of inquiry will include identification of shortfalls in the Pantex safety culture, potential impacts that a flawed safety culture may have on nuclear explosives operations, and management approaches to improving safety culture. The Board will also examine the status of emergency preparedness at the Pantex Plant. The Board will focus on plans and capabilities to respond to a site emergency, demonstrated performance in drills and exercises, and preparation for severe events resulting from natural phenomena, such as the event that occurred at the Fukushima Daiichi complex. During Session II, the Board will receive testimony concerning safety at Pantex defense nuclear facilities. The Board will examine issues related to nuclear explosive safety, fire protection systems, and facility structures.

FOR FURTHER INFORMATION CONTACT: Debra H. Richardson, Deputy General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: Public participation in the hearing is invited. The Board is setting aside time at the end of each session of the hearing for presentations and comments from the public. Requests to speak may be submitted in writing or by telephone. The Board asks that commenters describe the nature and scope of their oral presentations. Those who contact the Board prior to close of business on March 11, 2013, will be scheduled to speak at the session of the hearing most relevant to their presentations. At the beginning of Session I, the Board will post a schedule for speakers at the entrance to the hearing room. Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Documents will be accepted at the hearing or may be sent to the Board's Washington, DC office. The Board will hold the record open until April 15, 2013, for the receipt of additional materials. The hearing will be presented live through Internet video streaming. A link to the presentation will be available on the Board's web site (*www.dnfsb.gov*). A transcript of the hearing, along with a DVD video recording, will be made available by the Board for inspection and viewing by the public at the Board's Washington office and at DOE's public reading room at the DOE Federal Building, 1000 Independence Avenue SW., Washington, DC 20585. The Board specifically reserves its right to further schedule and otherwise regulate the course of the meeting and hearing, to recess, reconvene, postpone, or adjourn the meeting and hearing, conduct further reviews, and otherwise exercise its power under the Atomic Energy Act of 1954, as amended.

Dated: January 17, 2013.

Peter S. Winokur,

Chairman.

[FR Doc. 2013–01256 Filed 1–17–13; 11:15 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

SOCIAL SECURITY ADMINISTRATION

Applications for New Awards; Minorities and Retirement Security Program

AGENCY: Office of Postsecondary Education, Department of Education; Office of Retirement and Disability Policy, Social Security Administration.

ACTION: Notice.

Overview Information:

Minorities and Retirement Security Program

Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.414A.

DATES: Applications Available: January 22, 2013.

Deadline for Transmittal of Applications: March 25, 2013.

Deadline for Intergovernmental Review: May 22, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Minorities and Retirement Security (MRS) Program is a new discretionary grant program jointly administered by the United States Department of Education (ED or the Department) and the United States Social Security Administration (SSA). The MRS Program will provide grants to support research by graduate students at selected graduate institutions with high proportions of minority and low-income students (referred to in this notice as Minority Serving Institutions (MSIs)) in the areas of retirement security, financial literacy, and financial decisionmaking (personal savings, labor force planning, personal debt, etc.)

within minority and low-income communities.

SUPPLEMENTARY INFORMATION: SSA will provide the grant funds and will share responsibility with ED for selecting reviewers and monitoring the funded projects. ED is responsible for administration of the grant competition, making the grant awards, and monitoring the grantees' compliance with ED's financial requirements.

The grantee may be eligible for funding for up to five years, depending upon performance of the grantee and budget constraints of SSA and/or ED. If funding is available after the first year, ED will make continuation awards after considering SSA's assessments of the grantees' project progress. If a grantee receives a continuation award it must continue to use the funds to support graduate students who conduct research on retirement security, financial literacy, and financial decisionmaking within minority and low-income communities. An institution may only receive one MRS Program award in any given fiscal year.

Priority, Definitions, and Requirement: We are establishing this priority, these definitions, and this requirement for the FY 2013 grant competition and any subsequent year in which we make awards from the list of unfunded applicants from this competition, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priority: This priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is: *Retirement Security, Financial Literacy, and Financial Decisionmaking.*

Background:

ED has partnered with the SSA to establish the MRS Program to increase the capacity for producing, and quality of, published research by MSIs in the areas of retirement security, financial literacy, and financial decisionmaking within minority and low-income communities. These grants also seek to expand the talent pool of scientists and researchers from MSIs who are prepared to conduct rigorous research in this area. Grants will be awarded to eligible MSIs that are conducting research across a variety of relevant disciplines and fields (for example, business, economics, education, human development, political science, public policy, psychology, sociology, and statistics).

Priority:

The purpose of this program is to increase the number of researchers at MSIs who conduct high quality retirement security research within minority and low-income communities. Grantees are to conduct research in the areas of retirement security, financial literacy, and financial decisionmaking within minority and low-income communities. Grantees are expected to produce research findings for publication, and to submit them to peer reviewed journals for consideration. Grantees are also required to disseminate their research findings through published papers and conference presentations, or such other means as proposed in its grant application. The grantee may, at its discretion, either: Develop a tool or program in the areas of retirement security, financial literacy, and financial decisionmaking within minority and low-income communities and evaluate the efficacy of that tool or program; or may evaluate the efficacy of an existing tool or program in the areas of retirement security, financial literacy, and financial decisionmaking within minority and low-income communities.

Such activities must be principally conducted by graduate students at the grantee MSI. Faculty at the grantee MSI must mentor students doing the research.

Research activities may include:

1. Empirical research using extant microlevel data to document the retirement security of minorities and the early, mid-life, and late-life causes of inadequate retirement income among minority and low-income households. Examples of extant microlevel data studies where the focus is on individual respondents (as opposed to organizations or groups) that may be used for this purpose are the Health and Retirement Study, the Survey of Consumer Finances, the Survey of Program Participation, the Current Population Survey, the American Life Panel, the Panel Survey of Income Dynamics, individual-level databases maintained by the National Center for Education Statistics, and other large-scale individual-level databases. The surveys listed as examples have public use files, which are subject to an expedited Institutional Review Board (IRB) review. Applicants using other data sources must submit their proposed research through a regular IRB review, which may take longer. IRB reviews are not required at the time of application. However, if funded, all applicants must follow their IRB review procedures.

2. Evaluation of pre-existing or development and evaluation of original research-based financial literacy and financial decisionmaking interventions for students at eligible MSIs, especially minority and low-income students. Interventions may include, but are not limited to: Counseling; workshops; publications; or programs on effective money management, debt, and staying in and paying for college. These interventions may include behavioral economic concepts designed to teach students how to make optimal financial decisions.

3. Evaluation of pre-existing or development and evaluation of original research-based financial literacy and financial decisionmaking interventions for members of minority and low-income communities, including students at postsecondary institutions. Interventions may include, but are not limited to: Counseling; workshops; publications; adult education courses; or other programs on financial literacy and financial decisionmaking, debt management and reduction, credit report and score improvements, and personal savings plans, such as for retirement, a child's education, or an emergency fund. These interventions may include behavioral economic concepts designed to teach members of minority and low-income communities how to make optimal financial decisions.

4. Evaluation of pre-existing or development and evaluation of original research-based high school or college curricula for minority and low-income students designed to improve these students' financial literacy and financial decisionmaking. The curricula may be designed as entire courses or as new modules to be included within an already existing course (e.g., integrating financial literacy and financial decisionmaking topics into math, economics, or psychology courses).

5. Evaluation of pre-existing or development and evaluation of original research-based professional development programs on financial literacy and financial decisionmaking for librarians, social workers, counselors, and others working in community-based organizations in minority and low-income communities. These programs should use a ''train-the-trainer'' model where librarians, social workers, counselors, and others are trained in financial literacy and financial decisionmaking issues germane to the minority and low-income communities they serve so that they can educate those same communities through financial counseling, literature, seminars, or workshops.

6. Other research projects that support activities within minority and low-income communities designed to improve financial literacy and financial

decisionmaking related to educational attainment, labor market outcomes, and retirement security.

Requirement: Each applicant must conduct a literature review that summarizes current research and practice supporting the significance of its project. Each applicant must indicate whether the project would take a new direction or build on current or previous national, State, or community efforts that have shown promise of effectiveness.

Definitions:

Financial literacy means the ability to make informed judgments and to take effective actions regarding the current and future use and management of money. It includes the ability to understand financial choices, plan for the future, spend wisely, and manage the challenges associated with life events such as a job loss, saving for retirement, or paying for a child's education. (*www.financialeducatorscouncil.org/financial-literacy-definition.html*)

Good standing means the status of a grantee that has not been found to be a significant project or institutional risk, as indicated by ED's risk management review, which includes an assessment of the institution's ED grant project, financial standing, audits, and accreditation agency reports.

Low-income means income of less than 50 percent of the median household income—less than $31,200 in 2011. Grantees may suggest other measures of low income as appropriate to their research focus—for instance, State-specific levels of median household income, or median rural household income. These measures must be derived from nationally recognized sources such as Federal statistical agencies or the Census Bureau.

Personal debt means debts that are owed as a result of purchasing goods that are consumable or do not appreciate. (*www.investopedia.com/terms/c/consumer-debt.asp#axzz1VyK6apGi*)

Personal savings means savings by households. Personal savings equals disposable personal income minus spending for consumption and interest payments. (*www.teachmefinance.com/Financial_Terms/personal_saving.html*)

Personal savings rate means personal savings as a percentage of disposable personal income.

Retirement security means an individual's level of comfort with the resources that are intended to support such individual through retirement and provide a standard of living similar to what was experienced before retirement. (*www.annuitydigest.com/retirement-security/definition*)

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, definitions, and requirements. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements, regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for this program under section 1110(a) of the Social Security Act (42 U.S.C. 1310(a)) and therefore qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forego public comment on the priority, definitions, and requirement under section 437(d)(1) of GEPA. This priority, definitions, and requirement will apply to the FY 2013 grant competition and any subsequent year in which we make awards from the list of unfunded applicants from this competition.

Program Authority: Section 1110(a) of the Social Security Act (42 U.S.C. 1310(a)).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 86, 97, 98, and 99. (b) The Education Department debarment and suspension regulations in 2 CFR part 3485. (c) The Social Security Administration program regulations in 20 CFR parts 435 and 437.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $440,000.

Estimated Range of Awards: $60,000–$120,000.

Estimated Average Size of Awards: $90,000.

Estimated Number of Awards: 4.

Note: ED and SSA are not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Institutions of higher education (IHEs) that currently are grantees under one of the following programs: Strengthening Historically Black Graduate Institutions (HBGI) [84.031B]; Master's Degree Programs at Historically Black Colleges and Universities (HBCU) [84.382G]; Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) [84.031M], and Master's Degree Programs at Predominantly Black Institutions (PBI) [84.382D]. In addition, to be eligible for this program, an applicant must be in good standing in regard to its other grants from ED.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Address to Request Application Package:* Karen Epps, U.S. Department of Education, 1990 K Street NW., Room 6012, Washington, DC 20006–8510. Telephone: (202) 502–7774 or by email: *karen.epps@ed.gov.*

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.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

Page Limit: The application narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the application narrative to no more than 40 pages. The application's Appendix should only include the information requested. For the purpose of determining compliance with the page limit, each page on which there are words will be counted as one full page. Applicants must use the following standards:

- A ''page'' is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be within the 1″ margin.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in figures and graphs. Text in charts and tables may be single-spaced. You should also include a table of contents in the application narrative, which will not be counted against the 40-page limit.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman and Arial Narrow) will not be accepted.

The page limit does not apply to Part I—Application for Federal Assistance

(SF 424); Supplemental SF 424 Part II—Budget Information, Non-Construction Programs (ED Form 524); the one-page Project Abstract form; or Part IV—Assurances and Certifications. However, the page limit does apply to all the application's narrative section (Part III—Selection Criteria) and the entire appendix. We will reject your application if you exceed the page limit.

3. *Submission Dates and Times:*

Applications Available: January 22, 2013.

Deadline for Transmittal of Applications: March 25, 2013.

Applications for grants under this program must be submitted electronically using the *Grants.gov* Apply site (*Grants.gov*). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: May 22, 2013.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* Applicants are subject to the ED funding restrictions outlined in the *Applicable Regulations* section of this notice.

Only IHEs that currently have a grant from one of the following programs may apply: Strengthening Historically Black Graduate Institutions (HBGI) [84.031B]; Master's Degree Programs at Historically Black Colleges and Universities (HBCU) [84.032G]; Promoting Postbaccalaureate Opportunities for Hispanic Americans (PPOHA) [84.031M]; and Master's Degree Programs at Predominantly Black Institutions (PBI) [84.382D]. Funds can only be used to cover research activities related to retirement security, financial literacy, and financial decisionmaking within minority and low-income communities conducted by graduate students.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. Electronic Submission of Applications

Applications for grants under the Minorities and Retirement Security Program, CFDA Number 84.414A, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the Minorities and Retirement Security Program at *www.Grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.414, not 84.414A).

Please note the following:

- When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.
- Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.
- The amount of time it can take to upload an application will vary

depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

- You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Assistance (SF 424), Department of Education Supplemental Information for SF 424, Budget Information, Non-Construction Programs (ED 524), and all necessary assurances and certifications.
- You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.
- Your electronic application must comply with any page-limit requirements described in this notice.
- After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specified identifying number unique to your application).
- We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues with the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; and
- No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: John Clement, U.S. Department of Education, 1990 K Street NW., Room 6006, Washington, DC 20006–8510. FAX: (202) 502–7861.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. Submission of Paper Applications by Mail

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.414A), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. Submission of Paper Applications by Hand Delivery

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.414A) 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition were developed pursuant to a waiver of rulemaking under section 437(d)(1) of GEPA and are listed in the application package.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In making a competitive grant award, Federal agencies require various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

ED will be responsible for receiving and reviewing all applications for eligibility. A review panel selected by ED and SSA that consists of at least three persons will be formed. Each panelist will objectively review and score applications using the selection criteria. All three scores will be added and divided by three, providing the overall score of each application. A slate with all applicants' overall scores will be prepared. Applications will be funded in rank order.

3. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary of Education and the SSA Commissioner may impose special conditions on a grant if the applicant or grantee: is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we will notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirement in 2 CFR 170 should you receive the funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For other specific requirements on reporting, please go to *http://www.ssa.gov/oag/grants/grantspolicyhandbk.pdf.*

4. *Performance Measures:* The success of this SSA–ED joint grant program will be measured by the quality and usefulness of grantees' research and development and evaluation activities, as evidenced by the publication of research findings in peer-reviewed journals or other publications, the presentation of research findings at conferences, and the development of materials or curricula based on research findings.

5. *Continuation Awards:* In making a continuation award, the Secretary may consider, under 34 CFR 75.253, the extent to which a grantee has made ''substantial progress toward meeting the objectives in its approved application.'' In determining whether a grantee has made substantial progress, the Secretary will consider SSA's review of a grantee's progress in meeting the targets and projected outcomes in its approved application, and whether the grantee has expended funds in a manner that is consistent with its approved application and budget, as monitored by ED. In making a continuation grant, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from ED (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Agency Contacts

FOR FURTHER INFORMATION CONTACT: For questions regarding the program: Karen Epps, U.S. Department of Education, 1990 K Street NW., room 6012, Washington, DC 20006–8510. Telephone: (202) 502–7774 or by email: *karen.epps@ed.gov.*

Or contact John Clement, U.S. Department of Education, 1990 K Street NW., room 6006, Washington, DC 20006–8510. Telephone: (202) 502–7520 or by email: *john.clement@ed.gov.*

For application content-related questions contact: David Rogofsky, Office of Policy Research, Social Security Administration, 500 E Street SW., Washington, DC 20254–0003.

Telephone: (202) 358–6209 or by email: *david.rogofsky@ssa.gov.*

Or contact John Murphy, Office of Policy Research, Social Security Administration, 500 E Street SW., Washington, DC 20254–0003. Telephone: (202) 358–6033 or by email: *john.murphy@ssa.gov.*

If you use a TDD or TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

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.

Dated: January 16, 2013.

Laura Haltzel,

Acting Deputy Associate Commissioner for the Office of Retirement Policy, Social Security Administration.

David A. Bergeron,

Acting Assistant Secretary for Postsecondary Education, Department of Education.

[FR Doc. 2013–01176 Filed 1–18–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Council on Indian Education (NACIE)

AGENCY: U.S. Department of Education.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule for the upcoming public meeting of the National Advisory Council on Indian Education (the Council) and is intended to notify the general public of the meeting. This notice also describes the functions of the Council. Notice of the Council's meetings is required under Section 10(a)(2) of the Federal Advisory Committee Act.

Date and Time: February 6–8, 2013;

February 6, 2013—9:30 a.m.–5:00 p.m. Eastern Standard Time.

February 7, 2013—8:00 a.m.–1:00 p.m. Eastern Standard Time.

February 8, 2013—9:00 a.m.–4:00 p.m. Eastern Standard Time.

Location: Holiday Inn—Washington Capitol, Discovery II Room, 550 C Street SW., Washington, DC 20024, Phone: (202) 479–4000.

Additional details about the meeting will be posted on the NACIE Web site by January 31, 2013.

Web site: *www.NACIE-ED.org* (To RSVP, and for NACIE Meeting Updates, and Final Agenda).

SUPPLEMENTARY INFORMATION: The National Advisory Council on Indian Education is authorized by Section 7141 of the Elementary and Secondary Education Act. The Council is established within the Department of Education to advise the Secretary of Education on the funding and administration (including the development of regulations and administrative policies and practices) of any program over which the Secretary has jurisdiction and includes Indian children or adults as participants or programs that may benefit Indian children or adults, including any program established under Title VII, Part A of the Elementary and Secondary Education Act of 1965, as amended (ESEA). The Council submits to the Congress, no later than June 30 of each year, a report on the activities of the Council that includes recommendations the Council considers appropriate for the improvement of Federal education programs that include Indian children or adults as participants or that may benefit Indian children or adults, and recommendations concerning the funding of any such program.

The purpose of this meeting is to convene the Council to continue its responsibilities for developing recommendations to the Secretary of Education, and conduct discussions on the development of the report to Congress that should be submitted no later than June 30, 2013.

There will be an opportunity for public comment during this meeting on February 6, 2013, from 2:30 p.m.–4:00 p.m., Eastern Standard Time. Comments should pertain to the work of NACIE and/or the Office of Indian Education. Speakers will be allowed to comment for three to five minutes.

Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistive listening devices, or material in alternative format) should notify Jenelle Leonard at (202) 401–3641, no later than Monday, January 28, 2013. We will attempt to meet requests for accommodations after this date, but, cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

FOR FURTHER INFORMATION CONTACT: Jenelle Leonard, Designated Federal Official, Office of Indian Education, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202. Telephone: 202–205–2161. Fax: 202–205–5870.

A report of the activities of the meeting and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public within 21 days of the meeting. Records are kept of all Council proceedings and are available for public inspection at the at the Office of Indian Education, United States Department of Education, 400 Maryland Avenue SW., Washington, DC 20202. Monday-Friday, 8:30 a.m. to 5 p.m. Eastern Standard Time.

Electronic Access to This Document: You may 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) on the Internet at the following site: *www.ed.gov/news/fedregister/index.html.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1830; or in the Washington, DC, area at (202) 512–0000.

Note: 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 on GPO Access at: *www.gpoaccess.gov/nara/index.html.*

Deborah S. Delisle,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2013–01175 Filed 1–18–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[FE Docket No. 12–161–LNG]

Eni USA Gas Marketing LLC; Application for Blanket Authorization To Export Previously Imported Liquefied Natural Gas on a Short-Term Basis

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy (DOE) gives notice of receipt of an application (Application), filed on November 8, 2012, by Eni USA Gas Marketing LLC (Eni USA Gas Marketing), requesting blanket authorization to export liquefied natural gas (LNG) that previously had been imported into the United States from foreign sources in an amount up to the equivalent of 100 billion cubic feet (Bcf) of natural gas on a short-term or spot market basis for a two-year period commencing on March 3, 2013.[1] The LNG would be exported from the Cameron LNG Terminal (Cameron Terminal) owned by Cameron LNG, LLC, in Cameron Parish, Louisiana to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by U.S. law or policy. Eni USA Gas Marketing is requesting this authorization both on its own behalf and as agent for other parties who hold title to the LNG at the time of export. The Application was filed under section 3 of the Natural Gas Act (NGA). Protests, motions to intervene, notices of intervention, and written comments are invited.

DATES: Protests, motions to intervene or notices of intervention, as applicable, requests for additional procedures, and written comments are to be filed using procedures detailed in the Public Comment Procedures section no later than 4:30 p.m., eastern time, February 21, 2013.

ADDRESSES: U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT:

Larine Moore or Beverly Howard, U.S. Department of Energy (FE–34), Office of Oil and Gas Global Security and Supply, Office of Fossil Energy, Forrestal Building, Room 3E–042, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478; (202) 586–9387.

Edward Myers, U.S. Department of Energy, Office of the Assistant General Counsel for Electricity and Fossil Energy, Forrestal Building, Room 6B–256, 1000 Independence Ave. SW., Washington, DC 20585, (202) 586–3397.

SUPPLEMENTARY INFORMATION:

Background

Eni USA Gas Marketing, a Delaware limited liability company with its principal place of business in Houston, Texas, is a wholly-owned subsidiary of Eni Petroleum Co. Inc, a Delaware corporation.

Eni USA Gas Marketing states that it is engaged in the business of purchasing and marketing supplies of LNG, and is a customer of the Cameron Terminal. On April 30, 2012, FE issued DOE/FE Order No. 3092, which granted Eni USA Gas Marketing blanket authorization to import LNG up to the equivalent of 400 Bcf of natural gas from various international sources for a two year period beginning on May 12, 2012. On March 3, 2011, FE issued an opinion and order (Order No. 2923) that granted Eni USA Gas Marketing authority to export a cumulative total of 100 Bcf of previously imported LNG from the Cameron Terminal to any country with which trade is not prohibited by U.S. law or policy. The export authorization granted by that authorization is effective for a two year period that commenced on March 3, 2011.

Current Application

In the instant Application, Eni USA Gas Marketing requests blanket authorization to export LNG from the Cameron Terminal that has been previously imported into the United States from foreign sources. Eni USA Gas Marketing requests this authority over a two-year period in an amount up to the equivalent of 100 Bcf of natural gas, on a cumulative basis, over a two-year period beginning on the date that such authorization is granted, but in any event no later than March 2, 2013, the date of the expiration of Order No. 2923. Eni USA Gas Marketing is seeking such authorization to export previously imported LNG to any country with the capacity to import LNG via ocean-going carrier and with which trade is not prohibited by Federal law or policy. Eni USA Gas Marketing states that it does not seek authorization to export domestically-produced natural gas or LNG.

Eni USA Gas Marketing noted that since Order No. 2923 was issued, DOE/FE adopted new standards authorizing export certificate holders to act as agents for third-parties. Eni USA Gas Marketing states that if this Application is approved, Eni USA Gas marketing will abide by these standards when acting as an agent for third-parties.

Eni USA Gas Marketing states that its requested blanket authorization would provide for the export of foreign-sourced LNG that is not needed to service the domestic market. Eni USA Gas Marketing states that it is not proposing, and is not seeking authorization to export any domestically produced natural gas or LNG. This application seeks authorization only to export LNG that has been previously imported into the United States.

Public Interest Considerations

Eni USA Gas Marketing states that the requested blanket authorization will allow it to sell foreign-sourced, imported LNG in the most competitive market, either by regassifying the imported LNG and selling it in domestic markets where demand warrants, or by storing imported LNG and later selling it in other world markets where demand is higher. Eni USA Gas Marketing states that it will thus be able to better contribute to the efficient allocation of natural gas supplies. Eni USA Gas Marketing states that when gas supplies are in balance with domestic demand, LNG will be imported and used to supplement domestic gas supplies. When there is a surplus of domestic gas supplies, as at the present time, there will be the opportunity to continue to import LNG to the United States, which will contribute supplies to the domestic market once demand rises.

In support of its application, Eni USA Gas Marketing states that section 3 of the NGA provides that application to export natural gas to foreign countries will be authorized unless there is a finding that they ''will not be consistent with the public interest.[2] Eni USA Gas Marketing states that in reviewing an export application, FE applies the principles set forth in DOE Delegation Order No. 0204–111, which focuses primarily on the domestic need for the gas to be exported and the Secretary of Energy's natural gas policy guidelines.[3]

Eni USA Gas Marketing states that DOE/FE has issued a number of blanket authorizations, including the blanket authorization recently granted to The Dow Chemical Company (DOE/FE Order No. 3162) on October 11, 2012, which allows the export of previously-imported LNG, finding that such LNG is

[1] *Eni USA Gas Marketing LLC,* DOE/FE Order No. 2923 (March 3, 2011) extends through March 2, 2013 (FE Docket No. 10–152–LNG).

[2] 15 U.S.C. 717b.(a). Natural gas is defined to include LNG in 10 CFR 590.102(i).

[3] Eni USA Gas Marketing referenced 49 FR 6684, February 22, 1984.

not needed to meet domestic demand for natural gas.[4]

Eni USA Gas Marketing states that in its existing authorization to export foreign-sourced LNG granted in DOE/FE Order No. 2923, FE noted that the ''U.S. consumers presently have access to substantial quantities of natural gas sufficient to meet domestic demand from multiple other sources at competitive prices without drawing on the LNG which Eni USA Gas Marketing seeks to export.'' [5] Eni USA Gas Marketing asserts that the relevant circumstances have not changed in the nearly two years since that finding and provides a detailed discussion of the public interest standard in the Application and states that the requested authorization is consistent with the public interest and the Application should be granted.

Environmental Impact

Eni USA Gas Marketing states that no new facilities or modifications to any existing facilities at the Cameron Terminal would be required in order for Eni USA Gas Marketing to export LNG from that facility. Eni USA Gas Marketing asserts that exports of LNG from the Cameron Terminal also would not increase the number of LNG carriers that the Cameron Terminal is designed and authorized to accommodate. Finally, Eni USA Gas Marketing states that granting this application will not constitute a federal action significantly affecting the human environment within the meaning of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* and accordingly, approval of this Application would not require an environmental impact statement or environmental assessment.

DOE/FE Evaluation

This export Application will be reviewed pursuant to section 3 of the NGA, as amended, and the authority contained in DOE Delegation Order No. 00–002.00L (April 29, 2011) and DOE Redelegation Order No. 00–002.04E (April 29, 2011). In reviewing this LNG export Application, DOE will consider domestic need for the natural gas, as well as any other issues determined to be appropriate, including whether the arrangement is consistent with DOE's policy of promoting competition in the marketplace by allowing commercial parties to freely negotiate their own trade arrangements. Persons that may oppose this Application should comment in their responses on these issues.

The National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.,* requires DOE to give appropriate consideration to the environmental effects of its proposed decisions. No final decision will be issued in this proceeding until DOE has met its NEPA responsibilities.

Public Comment Procedures

In response to this notice, any person may file a protest, comments, or a motion to intervene or notice of intervention, as applicable. Any person wishing to become a party to the proceeding must file a motion to intervene or notice of intervention, as applicable. The filing of comments or a protest with respect to the Application will not serve to make the commenter or protestant a party to the proceeding, although protests and comments received from persons who are not parties will be considered in determining the appropriate action to be taken on the Application. All protests, comments, motions to intervene or notices of intervention must meet the requirements specified by the regulations in 10 CFR part 590. The information contained in any filing will not be held confidential and will be posted to DOE's public Web site except to the extent confidential treatment is requested and granted.

Filings may be submitted using one of the following methods: (1) Emailing the filing to *fergas@hq.doe.gov,* with FE Docket No. 12–161–LNG in the title line; (2) mailing an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**; or (3) hand delivering an original and three paper copies of the filing to the Office of Oil and Gas Global Security and Supply at the address listed in **ADDRESSES**.

A decisional record on the Application will be developed through responses to this notice by parties, including the parties' written comments and replies thereto. Additional procedures will be used as necessary to achieve a complete understanding of the facts and issues. A party seeking intervention may request that additional procedures be provided, such as additional written comments, an oral presentation, a conference, or trial-type hearing. Any request to file additional written comments should explain why they are necessary. Any request for an oral presentation should identify the substantial question of fact, law, or policy at issue, show that it is material and relevant to a decision in the proceeding, and demonstrate why an oral presentation is needed. Any request for a conference should demonstrate why the conference would materially advance the proceeding. Any request for a trial-type hearing must show that there are factual issues genuinely in dispute that are relevant and material to a decision and that a trial-type hearing is necessary for a full and true disclosure of the facts.

If an additional procedure is scheduled, notice will be provided to all parties. If no party requests additional procedures, a final Opinion and Order may be issued based on the official record, including the Application and responses filed by parties pursuant to this notice, in accordance with 10 CFR 590.316.

The Application filed by Eni USA Gas Marketing is available for inspection and copying in the Office of Natural Gas Regulatory Activities docket room, 3E–042, 1000 Independence Avenue SW., Washington, DC 20585. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. The Application and any filed protests, motions to intervene or notice of interventions, and comments will also be available electronically by going to the following DOE/FE web address: *http://www.fe.doe.gov/programs/gasregulation/index.html.*

Issued in Washington, DC, on January 15, 2013.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

[FR Doc. 2013–01144 Filed 1–18–13; 8:45 am]

BILLING CODE 6450–01–P

[4] *The Dow Chemical Company,* DOE/FE Order No. 3162 (October 11, 2012).

[5] DOE/FE Order No. 2923 at 5.

DEPARTMENT OF ENERGY

Orders Granting Authority To Import and Export Natural Gas, To Import and Export Liquefied Natural Gas, and Granting Rehearing During October 2012

	FE Docket Nos.
SABINE PASS LIQUEFACTION, LLC	10–111–LNG
GULF COAST LNG EXPORT, LLC	12–05–LNG
THE DOW CHEMICAL COMPANY	12–76–LNG
BOISE WHITE PAPER	12–84–NG
IMPERIAL IRRIGATION DISTRICT	12–87–NG
TRANSCANADA PIPELINES LIMITED	12–90–NG
TRANSCANADA PIPELINES LIMITED	12–91–NG
TRANSCANADA PIPELINES LIMITED	12–92–NG
CHENIERE MARKETING, LLC	12–99–LNG
PETROCHINA INTERNATIONAL (CANADA) TRADING LTD	12–104–NG
PEMEX GAS Y PETROQUIMICA BASICA	12–110–NG
NORTH WESTERN CORPORATION d/b/a NORTHWESTERN ENERGY	12–111–NG
REGENT RESOURCES LTD	12–112–NG
FREEPORT LNG EXPANSION, L.P	12–115–LNG
UNITED STATES GYPSUM COMPANY	12–116–NG
TRANSCANADA GAS STORAGE USA, INC	12–117–NG
TERMOELECTRICA DE MEXICALI, S. DE R.L. DE C.V	12–120–NG
FORTUNA (US) L.P	12–121–NG
UGI ENERGY SERVICES INC	12–122–NG
FAMILY ENERGY INC	12–124–NG
GLACIAL NATURAL GAS, INC	12–125–NG
YANKEE GAS SERVICES COMPANY	12–129–NG
NATIONAL FUEL GAS DISTRIBUTION CORPORATION	12–130–NG
CENTRAL HUDSON GAS & ELECTRIC	12–131–NG
NORTHERN UTILITIES, INC	12–132–NG
CONNECTICUT NATURAL GAS CORPORATION	12–133–NG
THE SOUTHERN CONNECTICUT GAS COMPANY	12–134–NG
ENERGYNORTH NATURAL GAS, INC. d/b/a LIBERTY UTILITIES	12–135–NG
BAY STATE GAS COMPANY d/b/a COLUMBIA GAS OF MASSACHUSETTS	12–136–NG
BOSTON GAS COMPANY	12–137–NG
THE BROOKLYN UNION GAS COMPANY d/b/a NATIONAL GRID	12–138–NG
COLONIAL GAS COMPANY d/b/a NATIONAL GRID	12–139–NG
KEYSPAN GAS EAST CORPORATION d/b/a NATIONAL GRID	12–140–NG
THE NARRANGANSETT ELECTRIC COMPANY d/b/a NATIONAL GRID	12–141–NG
NIAGARA MOHAWK POWER CORPORATION d/b/a NATIONAL GRID	12–142–NG
ALBERTA NORTHEAST GAS, LIMITED	12–143–NG
NORTHEAST GAS MARKETS LLC	12–144–NG
MC GLOBAL GAS CORPORATION	12–150–NG

AGENCY: Office of Fossil Energy, Department of Energy (DOE).

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during October 2012, it issued orders granting authority to import and export natural gas and liquefied natural gas. These orders are summarized in the attached appendix and may be found on the FE Web site at *http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders-2012.html.* They are also available for inspection and copying in the Office of Fossil Energy, Office of Natural Gas Regulatory Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on January 15, 2013.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

Appendix—DOE/FE Orders Granting Import/Export Authorizations

Order No.	Date issued	FE Docket No.	Authorization holder	Description of action
3148	10/04/12	12–84–NG	Boise White Paper L.L.C	Order granting blanket authority to import natural gas from Canada.
3149	10/04/12	12–87–NG	Imperial Irrigation District	Order granting blanket authority to import/export natural gas from/to Mexico.
3150	10/04/12	12–90–NG	TransCanada PipeLines Limited.	Order granting blanket authority to import/export natural gas from/to Canada.
3151	10/04/12	12–91–NG	TransCanada PipeLines Limited.	Order granting blanket authority to import/export natural gas from/to Canada.
3152	10/04/12	12–92–NG	TransCanada PipeLines Limited.	Order granting blanket authority to import/export natural gas from/to Canada.
3153	10/04/12	12–104–NG	PetroChina International (Canada) Trading Ltd.	Order granting blanket authority to import/export natural gas from/to Canada.
3154	10/04/12	12–110–NG	Pemex Gas y Petroquimica Basica.	Order granting blanket authority to import/export natural gas from/to Canada/Mexico, and to import LNG from various international sources by vessel.
3155	10/04/12	12–111–NG	NorthWestern Corporation d/b/a NorthWestern Energy.	Order granting blanket authority to import/export natural gas from/to Canada.

Order No.	Date issued	FE Docket No.	Authorization holder	Description of action
3156	10/04/12	12–112–NG	Regent Resources Ltd	Order granting blanket authority to import natural gas from Canada.
3157	10/05/12	12–116–NG	United States Gypsum Company.	Order granting blanket authority to import natural gas from Canada.
3158	10/05/12	12–117–NG	TransCanada Gas Storage USA, Inc.	Order granting blanket authority to import/export natural gas from/to Canada/Mexico.
3159	10/05/12	12–120–NG	Termoelectrica de Mexicali, S. de R.L. de C.V.	Order granting blanket authority to import/export natural gas from/to Mexico.
3160	10/05/12	12–121–NG	Fortuna (US) L.P	Order granting blanket authority to import/export natural gas from/to Canada.
3161	10/05/12	12–122–NG	UGI Energy Services, Inc	Order granting blanket authority to import natural gas from Canada.
N/A	10/05/12	10–111–LNG	Sabine Pass Liquefaction, LLC.	Order granting rehearing for further consideration.
3162	10/11/12	12–76–LNG	The Dow Chemical Company	Order granting blanket authority to export previously imported LNG by vessel.
3163	10/16/12	12–05–LNG	Gulf Coast LNG Export, LLC	Order granting long-term multi-contract authority to export LNG by vessel from proposed Brownsville Terminal to free trade agreement nations.
3164	10/16/12	12–99–LNG	Cheniere Marketing, LLC	Order granting long-term multi-contract authority to export LNG by vessel from proposed Corpus Christi Liquefaction Project to free trade agreement nations.
3165	10/18/12	12–115–LNG	Freeport LNG Expansion, L.P.	Order granting blanket authority to export LNG by vessel to Canada/Mexico.
3166	10/18/12	12–124–NG	Family Energy Inc	Order granting blanket authority to import natural gas from Canada.
3167	10/18/12	12–133–NG	Connecticut Natural Gas Corporation.	Order granting blanket authority to import/export natural gas from/to Canada.
3168	10/18/12	12–134–NG	The Southern Connecticut Gas Company.	Order granting blanket authority to import/export natural gas from/to Canada.
3169	10/18/12	12–135–NG	EnergyNorth Natural Gas, Inc. d/b/a Liberty Utilities.	Order granting blanket authority to import/export natural gas from/to Canada.
3170	10/18/12	12–136–NG	Bay State Gas company d/b/a Columbia Gas of Massachusetts.	Order granting blanket authority to import/export natural gas from/to Canada.
3171	10/18/12	12–137–NG	Boston Gas Company	Order granting blanket authority to import/export natural gas from/to Canada.
3172	10/18/12	12–138–NG	The Brooklyn Union Gas Company d/b/a National Grid NY.	Order granting blanket authority to import/export natural gas from/to Canada.
3173	10/18/12	12–139–NG	Colonial Gas Company d/b/a National Grid.	Order granting blanket authority to import/export natural gas from/to Canada.
3174	10/18/12	12–140–NG	Keyspan Gas East Corporation d/b/a National Grid.	Order granting blanket authority to import/export natural gas from/to Canada.
3175	10/18/12	12–141–NG	The Narragansett Electric Company d/b/a National Grid.	Order granting blanket authority to import/export natural gas from/to Canada.
3176	10/18/12	12–142–NG	Niagara Mohawk Power Corporation d/b/a National Grid.	Order granting blanket authority to import/export natural gas from/to Canada.
3177	10/18/12	12–143–NG	Alberta Northeast Gas, Limited.	Order granting blanket authority to import/export natural gas from/to Canada.
3178	10/18/12	12–144–NG	Northeast Gas Markets LLC	Order granting blanket authority to import/export natural gas from/to Canada.
3179	10/24/12	12–125–NG	Glacial Natural Gas, Inc	Order granting blanket authority to import natural gas from Canada.
3180	10/24/12	12–129–NG	Yankee Gas Services Company.	Order granting blanket authority to import/export natural gas from/to Canada.
3181	10/24/12	12–130–NG	National Fuel Gas Distribution Corporation.	Order granting blanket authority to import/export natural gas from/to Canada.
3182	10/24/12	12–131–NG	Central Hudson Gas & Electric Corporation.	Order granting blanket authority to import/export natural gas from/to Canada.
3183	10/24/12	12–132–NG	Northern Utilities, Inc	Order granting blanket authority to import/export natural gas from/to Canada.
3184	10/24/12	12–150–LNG	MC Global Gas Corporation	Order granting blanket authority to import LNG from various international sources by vessel.

[FR Doc. 2013–01140 Filed 1–18–13; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

DOE Response to Recommendation 2012–2 of the Defense Nuclear Facilities Safety Board, *Hanford Tank Farms Flammable Gas Safety Strategy*

AGENCY: Department of Energy.

ACTION: Notice.

SUMMARY: On September 28, 2012 the Defense Nuclear Facilities Safety Board submitted Recommendation 2012–2, concerning *Hanford Tank Farms Flammable Gas Safety Strategy,* to the Department of Energy. In accordance with section 315(b) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2286d(b), the following represents the Secretary of Energy's response to the Recommendation.

ADDRESSES: Send comments, data, views, or arguments concerning the Secretary's response to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Mr. Steven Petras, Nuclear Engineer, Departmental Representative to the Defense Nuclear Facilities Safety Board, Office of Health, Safety and Security, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585.

Issued in Washington, DC, on January 9, 2013.

Mari-Josette Campagnone,

Departmental Representative to the Defense Nuclear Facilities Safety Board, Office of Health, Safety and Security.

January 7, 2013

The Honorable Peter S. Winokur
Chairman
Defense Nuclear Facilities Safety Board
625 Indiana Avenue NW, Suite 700
Washington, DC 20004

Dear Mr. Chairman:

The Department of Energy (DOE) acknowledges receipt of Defense Nuclear Facilities Safety Board (Board) Recommendation 2012–2, *Hanford Tank Farms Flammable Gas Safety Strategy,* issued on September 28, 2012, published in the Federal Register on October 12, 2012, and accepts the Recommendation.

The Board acknowledged in its Recommendation that some improvements had been made to the specific administrative controls used for flammable gas monitoring, but noted that more work was needed to make the ventilation system a credited safety control. DOE agrees. In developing an Implementation Plan (IP), DOE will take the pragmatic and graded approach detailed below to address the sub recommendations that will significantly improve the robustness of flammable gas controls in the near term. DOE is confident this is the most expeditious approach to implement a more robust safety control for Double Shell Tank (DST) ventilation monitoring consistent with the intent of Recommendation 2012–2.

DOE's approach to addressing sub recommendations 1 and 2 will be divided into the following 3 phases:

- Phase 1 will be to complete implementing the DOE-approved Documented Safety Analysis by January 2013. This will include supplementing the flammable gas monitoring control with a new control that will measure ventilation flow through each tank on a periodic basis. This Documented Safety Analysis will establish priorities for DST primary tank ventilation system maintenance, commensurate with the importance of maintaining active ventilation on these tanks.
- Phase 2 will be to install initial safety-significant instrumentation for real-time monitoring of the ventilation exhaust flow from each DST that will not involve confined-space, radiological pit entry for data collection as is currently required. At this point, a robust safety-significant engineered control will be in place to provide exact flow measurement through each tank in real-time.
- Phase 3 will be to refine the tank flow real-time monitoring to make the monitoring data available at remote locations.

Remaining actions associated with sub recommendations 3 through 5 to reduce the potential hazards posed by gas release events will also be identified in the IP and will address:

- Restoring and upgrading existing installed non-safety-related equipment being used to fulfill safety functions at the Hanford Tank Farms to the appropriate safety classification.
- Implementing compensatory measures in the event of DST ventilation systems become unavailable.
- Evaluating the means to reduce flammable gases retained in the DST waste.

DOE is committed to the safe operation of its nuclear facilities consistent with the principles of Integrated Safety Management and the Department's nuclear safety requirements. DOE values the Board's input on how the Department can improve its activities. We look forward to working with the Board and its staff on preparing DOE's IP for Recommendation 2012–2. I have assigned the Manager, Office of River Protection, to be the Department's responsible manager for this Recommendation. He can be reached at (509) 376–8830.

If you have any questions, please contact me or Mr. David Huizenga, Senior Advisor for Environmental Management, at (202) 586–7709.

Sincerely,
Steven Chu

[FR Doc. 2013–01132 Filed 1–18–13; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12690–005]

Public Utility District No. 1 of Snohomish County, WA; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission or FERC's) regulations, 18 CFR part 380 (Order No. 486, 52 FR 47897), the Office of Energy Projects reviewed the Public Utility District No. 1 of Snohomish County, Washington's (Snohomish PUD) application for a 10-year pilot license for the proposed Admiralty Inlet Tidal Project No. 12690, which would be located in Admiralty Inlet in Puget Sound, near the City of Port Townsend, in Island County, Washington, and has prepared an environmental assessment (EA) in cooperation with the U.S. Department of Energy (DOE/EA–1949). In the EA, Commission staff analyzed the potential environmental effects of constructing and operating the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

A copy of the EA is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, 202–502–8659. A copy of the EA can also be found on DOE's Public Reading

Room Web site at *http://www.eere.energy.gov/golden/NEPA_DEA.aspx.* Please reference DOE/EA–1949 in the National Environmental Policy Act, Draft Documents section.

You may also register online at *www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 30 days from the date of this notice. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filings, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please affix Project No. 12711–005 to all comments.

For further information, contact David Turner by telephone at 202–502–6091 or by email at *david.turner@ferc.gov.*

Dated: January 15, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01138 Filed 1–18–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2232–596]

Duke Energy Carolinas, LLC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Non-project use of project lands and waters.

b. *Project No.:* 2232–596.

c. *Date Filed:* November 21, 2012.

d. *Applicant:* Duke Energy Carolinas, LLC.

e. *Name of Project:* Catawba-Wateree Hydroelectric Project.

f. *Location:* Lake Norman in Lincoln County, North Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Dennis Whitaker, Duke Energy—Lake Services, 526 S. Church St., Charlotte, NC 28202, (704) 382–1594.

i. *FERC Contact:* Mark Carter, (678) 245–3083, *mark.carter@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* February 13, 2012.

All documents may be filed electronically via the Internet. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–2232–596) on any comments or motions filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Application:* Duke Energy Carolinas, LLC (licensee) requests Commission approval to authorize changes to the layout of the existing Westport Marina on Lake Norman. The licensee originally notified the Commission of its intent to permit Westport Marina in 1984. The marina layout has changed over time, and the licensee now seeks to incorporate those changes as well as authorize the following proposed changes: (1) Replacing a portion of existing seawall approximately 400 feet long and adding a portion of new seawall approximately 50 feet long; (2) moving an existing wooden dock to be adjacent to an existing seawall along the shoreline; (3) reorienting three boat slips; (4) dredging 1,300 cubic yards of sediment from three separate areas within the footprint of the area; (5) permit an additional 11 slips for personal watercraft; and (6) allow a specified area of this marina to be used as a staging area for businesses conducting shoreline work.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field (P–2232) to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001

through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: January 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01137 Filed 1–18–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866)208–3676, or for TTY, contact (202)502–8659.

Docket No.	File date	Presenter or requester
Exempt:		
1. P–2662–012	11–30–12	Richard Laudenat.[1]
2. P–516–000	12–11–12	Hon. Joe Wilson.
3. CP08–431–000	12–17–12	Hon. Sherrod Brown.
4. P–13417–000	12–17–12	Hon. Ron Kind.
5. ER13–185–000	12–17–12	Hons. Richard Blumenthal & Joseph I. Lieberman.
6. P–12690–005	12–31–12	Kimberly Ordon.
7. CP12–72–000	1–2–13	Hon. Chris Van Hollen.
8. P–405–106	1–13–13	John Dawes.

[1] Email record.

Dated: January 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01134 Filed 1–18–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission (Commission) hereby gives notice that members of the Commission's staff may attend the following meeting related to the transmission planning activities of the South Carolina Regional Transmission Planning (SCRTP) group:

SCRTP Stakeholder Group

January 15, 2013

The above-referenced meeting is open to stakeholders and will be held at: SCE&G—Lake Murray Training Center, Lexington, SC.

For additional information, see *www.scrtp.com.*

The discussions at the meeting described above may address matters at issue in the following proceedings:

Docket No. ER13–107–000, *South Carolina Electric & Gas Company*

For more information, contact Michael Lee, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–8658 or *Michael.Lee@ferc.gov.*

Dated: January 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01136 Filed 1–18–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Commission Staff Attendance

The Federal Energy Regulatory Commission hereby gives notice that members of the Commission's staff may attend the following meetings related to the transmission planning activities of the PJM Interconnection, L.L.C. (PJM):

Inter-Regional Planning Stakeholder Advisory Committee—New York/New England

January 28, 2013, 9:00 a.m.–12:00 p.m., Local Time

Midwest ISO–PJM Interregional Coordination Workshop

January 16, 2013, 9:00 a.m.–5:00 p.m., Local Time
February 13, 2013, 9:00 a.m.–5:00 p.m., Local Time

PJM Regional Transmission Planning Task Force

January 24, 2013, 9:30 a.m.–3:00 p.m., Local Time
February 14, 2013, 9:30 a.m.–3:00 p.m., Local Time
March 14, 2013, 9:30 a.m.–3:00 p.m., Local Time
April 18, 2013, 9:30 a.m.–3:00 p.m., Local Time

The above-referenced meeting will be held over conference call or at:
The PJM Conference & Training Center, Norristown, PA,

or

Midwest ISO, Carmel, IN.

The above-referenced meetings are open to stakeholders.

Further information may be found at *www.pjm.com.*

The discussions at the meetings described above may address matters at issue in the following proceedings:

Docket No. EL07–58, *Organization of PJM States, Inc., et al.,* v. *PJM Interconnection,* L.L.C.
Docket No. EL08–14, *Black Oak Energy LLC, et al.,* v. *FERC*
Docket No. EL10–52, *Central Transmission, LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–45, *PJM Interconnection, L.L.C.*
Docket No. EL12–50, *First Energy Solutions Corporation et al* v. *PJM Interconnection,* L.L.C.
Docket No. EL12–54, *Viridity Energy, Inc.* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–69, *Primary Power LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–8, *DC Energy, L.L.C. and DC Energy Mid-Atlantic, L.L.C. vs. PJM Interconnection, L.L.C.*
Docket No. AD12–1 and ER11–4081, *Midwest Independent Transmission System Operator, Inc.*
Docket No. AD12–16, *Capacity Deliverability Across the Midwest Independent Transmission System Operator, Inc./PJM Interconnection, L.L.C. Seam*
Docket No. EL13–10, *North American Natural Resources, Inc. v. PJM Interconnection, L.L.C. et. al.*
Docket No. ER08–194–000, *et al., Duquesne Light Company et al.*
Docket No. ER09–1063, *PJM Interconnection, L.L.C.*
Docket No. ER09–1148, *PPL Electric Utilities Corporation*
Docket No. ER09–1256, *Potomac-Appalachian Transmission Highline, L.L.C.*
Docket Nos. ER09–1589 and EL10–6, *FirstEnergy Service Company*
Docket No. EL05–121, *PJM Interconnection, L.L.C.*
Docket No. EL07–56, *Allegheny Electric Cooperative, Inc., et a., v PJM Interconnection,* L.L.C.
Docket No. EL07–58, *Organization of PJM States, Inc., et al.,* v. *PJM Interconnection,* L.L.C.
Docket No. EL08–14, *Black Oak Energy LLC, et al.,* v. *FERC*
Docket No. EL10–52, *Central Transmission, LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–45, *PJM Interconnection, L.L.C.*
Docket No. EL12–50, *First Energy Solutions Corporation et al* v. *PJM Interconnection,* L.L.C.
Docket No. EL12–54, *Viridity Energy, Inc.* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–69, *Primary Power LLC* v. *PJM Interconnection, L.L.C.*
Docket No. EL12–8, *DC Energy, L.L.C. and DC Energy Mid-Atlantic, L.L.C. vs. PJM Interconnection, L.L.C.*
Docket No. AD12–1 and ER11–4081, *Midwest Independent Transmission System* Operator, Inc.
Docket No. AD12–16, *Capacity Deliverability Across the Midwest Independent Transmission System Operator, Inc./PJM Interconnection, L.L.C. Seam*
Docket No. EL13–10, *North American Natural Resources, Inc. v. PJM Interconnection, L.L.C. et. al.*
Docket No. ER08–194–000, *et al., Duquesne Light Company et al.*
Docket No. ER09–1063, *PJM Interconnection, L.L.C.*
Docket No. ER09–1148, *PPL Electric Utilities Corporation*
Docket No. ER09–1256, *Potomac-Appalachian Transmission Highline, L.L.C.*
Docket Nos. ER09–1589 and EL10–6, *FirstEnergy Service Company*
Docket No. ER10–253 and EL10–14, *Primary Power, L.L.C.*
Docket No. ER10–549, *PJM Interconnection, L.L.C.*
Docket No. ER11–1844, *Midwest Independent Transmission System Operator, Inc.*
Docket Nos. ER11–2814 and ER11–2815, *PJM Interconnection, L.L.C. and American* Transmission Systems, Inc.
Docket No. ER11–2875 and EL11–20, *PJM Interconnection, L.L.C.*
Docket No. ER11–4106, *PJM Interconnection, L.L.C.*
Docket No. ER11–4628, *PJM Interconnection, L.L.C.*
Docket No. ER12–92, *PJM Interconnection, L.L.C., et. al*
Docket No. ER12–1173, *PJM Interconnection, L.L.C., et. al.*
Docket No. ER12–1178, *PJM Interconnection, L.L.C.*
Docket No. ER12–1204, *PJM Interconnection, L.L.C.*
Docket No. ER12–1761, *PJM Interconnection, L.L.C.*
Docket No. ER12–2080, *GenOn Power Midwest, LP*
Docket No. ER12–2260, *New York Independent System Operator, Inc*
Docket No. ER12–2262, *PJM Interconnection, L.L.C.*
Docket No. ER12–2274, *Public Service Electric and Gas Company*
Docket No. ER12–2391, *PJM Interconnection, L.L.C.*
Docket No. ER12–2399, *PJM Interconnection, L.L.C.*
Docket No. ER12–2417, *PJM Interconnection, L.L.C.*
Docket No. ER12–2440, *PJM Interconnection, L.L.C.*
Docket No. ER12–2442, *PJM Interconnection, L.L.C.*
Docket No. ER12–2469, *PJM Interconnection, L.L.C.*
Docket No. ER12–2486, *PJM Interconnection, L.L.C.*
Docket No. ER12–2518, *PJM Interconnection, L.L.C.*
Docket No. ER12–2527, *PJM Interconnection, L.L.C.*
Docket No. ER12–2550, *PJM Interconnection, L.L.C.*
Docket No. ER12–2574, *PJM Interconnection, L.L.C.*
Docket No. ER12–2594, *PJM Interconnection, L.L.C.*
Docket No. ER12–2599, *PJM Interconnection, L.L.C.*
Docket No. ER12–2604, *PJM Interconnection, L.L.C.*
Docket No. ER12–2606, *PJM Interconnection, L.L.C.*
Docket No. ER12–2610, *PJM Interconnection, L.L.C.*
Docket No. ER12–2616, *PJM Interconnection, L.L.C.*
Docket No. ER12–2624, *PJM Interconnection, L.L.C.*
Docket No. ER12–2661, *PJM Interconnection, L.L.C.*
Docket No. ER12–2663, *PJM Interconnection, L.L.C.*
Docket No. ER12–2664, *PJM Interconnection, L.L.C.*
Docket No. ER12–2671, *PJM Interconnection, L.L.C.*
Docket No. ER12–2688, *PJM Interconnection, L.L.C.*
Docket No. ER12–2815, *PJM Interconnection, L.L.C.*

Docket No. ER12–469, *PJM Interconnection, L.L.C.*
Docket No. ER12–513, *PJM Interconnection, L.L.C.*
Docket No. ER12–718, *New York Independent System Operator, Inc.*
Docket No. ER12–91, *PJM Interconnection, L.L.C.*
Docket No. ER12–92, *PJM Interconnection, L.L.C.*
Docket No. ER12–469, *PJM Interconnection, L.L.C.,*
Docket Nos. ER11–2183 and EL11–32, *American Electric Power Service Corporation*
Docket No. ER12–2085, *PJM Interconnection, L.L.C.*
Docket No. ER12–2707, *PJM Interconnection, L.L.C.*
Docket No. ER12–2708, *PJM Interconnection, L.L.C.*
Docket No. ER12–2085, *PJM Interconnection, L.L.C.*
Docket No. ER12–2707, *PJM Interconnection, L.L.C.*
Docket No. ER13–27, *PJM Interconnection, L.L.C.*
Docket No. ER13–51, *PJM Interconnection, L.L.C.*
Docket No. ER13–52, *PJM Interconnection, L.L.C.*
Docket No. ER13–53, *PJM Interconnection, L.L.C.*
Docket No. ER13–66, *PJM Interconnection, L.L.C.*
Docket No. ER13–74, *PJM Interconnection, L.L.C.*
Docket No. ER13–90, *Public Service Electric and Gas Company and PJM Interconnection, L.L.C.*
Docket No. ER13–116, *PJM Interconnection, L.L.C.*
Docket No. ER13–124, *PJM Interconnection, L.L.C.*
Docket No. ER13–126, *PJM Interconnection, L.L.C.*
Docket No. ER13–195, *Indicated PJM Transmission Owners*
Docket No. ER13–198, *PJM Interconnection, L.L.C*
Docket No. ER13–232, *American Electric Power Service Corporation*
Docket No. ER13–233, *American Electric Power Service Corporation*
Docket No. ER13–234, *American Electric Power Service Corporation*
Docket No. ER13–235, *American Electric Power Service Corporation*
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Docket No. ER13–237, *American Electric Power Service Corporation*
Docket No. ER13–238, *American Electric Power Service Corporation*
Docket No. ER13–239, *American Electric Power Service Corporation*
Docket No. ER13–240, *American Electric Power Service Corporation*
Docket No. ER13–397, *PJM Interconnection, L.L.C.*
Docket No. ER13–703, *PJM Interconnection, L.L.C.*

For more information, contact Jonathan Fernandez, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (202) 502–6604 or *jonathan.fernandez@ferc.gov.*

Dated: January 14, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–01135 Filed 1–18–13; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Privacy Act of 1974, as Amended; System of Records

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of New System of Records.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) proposes to add one new system of records to its existing inventory of systems subject to the Privacy Act of 1974, as amended. This new system of records is entitled FDIC 30–64–0035, Identity, Credential and Access Management Records. We hereby publish this notice for comment on the proposed system of records.

DATES: Comments on the proposed system of records must be received on or before February 21, 2013. The proposed system of records will become effective 45 days following publication in the **Federal Register**, unless a superseding notice to the contrary is published before that date.

ADDRESSES: You may submit written comments by any of the following methods:

- *Agency Web site:* Located at *www.fdic.gov/regulations/laws/federal/propose.html.* Follow instructions for submitting comments on this Web site.
- *Email:* Send to *comments@fdic.gov.* Include ''Notice of New FDIC System of Records'' in the subject line.
- *Mail:* Send to Gary Jackson, Counsel, Attention: Comments, FDIC System of Records, 550 17th Street NW., Washington, DC 20429.

All submissions should refer to ''Notice of New FDIC System of Records.'' By prior appointment, comments may also be inspected and photocopied in the FDIC Public Information Center, 3501 North Fairfax Drive, Room E–1005, Arlington, Virginia 22226, between 9:00 a.m. and 4:00 p.m. (EST), Monday to Friday.

FOR FURTHER INFORMATION CONTACT: Gary Jackson, Counsel, FDIC, 550 17th Street NW., Washington, DC 20429, (703) 562–2677.

SUPPLEMENTARY INFORMATION: In accordance with the Privacy Act of 1974, as amended, the FDIC has conducted a review of its Privacy Act systems of records and has determined that it needs to add one new system of records. The FDIC's system notices were last published in the **Federal Register** on December 13, 2011, Volume 76, Number 239 (76 FR 77626); this last publication may be viewed at *http://www.fdic.gov/about/privacy/* on the FDIC's Privacy Web page.

The Identity, Credential and Access Management Records system will contain records collected or generated in the process of producing Personal Identity Verification (PIV) cards issued by the FDIC. PIV cards are required for granting and controlling access to FDIC and other federal facilities.

A Report of New Systems of Records has been submitted to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget pursuant to Appendix I to OMB Circular A–130, ''Federal Agency Responsibilities for Maintaining Records About Individuals,'' dated November 30, 2000, and the Privacy Act, 5 U.S.C. 552a(r).

More detailed information on the proposed new system of records may be viewed in the complete text below.

FDIC–30–64–0035

SYSTEM NAME:

Identity, Credential and Access Management Records.

SECURITY CLASSIFICATION:

Unclassified but sensitive.

SYSTEM LOCATION:

The Division of Administration, FDIC, 550 17th Street NW., Washington, DC 20429, and the FDIC regional or area offices. (See *Appendix A* for a list of the FDIC regional offices and their addresses.) Duplicate systems may exist, in whole or in part, at secure sites and on secure servers maintained by third-party service providers for the FDIC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system covers all FDIC employees, contractors, and other individuals who have applied for, been issued, and/or used a Personal Identity Verification (PIV) card for access to FDIC or other federal facilities.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system includes all information submitted during application for the PIV card and any resulting investigative and adjudicative documentation required to establish and verify the identity and background of each individual issued a PIV card. The system includes, but is not limited to, the applicant's name, social security number, date and place of birth, hair and eye color, height, weight, ethnicity, status as Federal or contractor employee, organization and office of assignment, company name, employee ID number, telephone number(s), email, biometric identifiers including fingerprints, digital color photograph, signature, data from source documents used to positively identify the applicant, including Form I–9 documents and OPM Forms SF–85 or SF–86, network user name, user access rights, and PIV cardholder history and transaction reports.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 9 of the Federal Deposit Insurance Act (12 U.S.C. 1819); Executive Order 9397; Section 5113 of the Federal Information Security Act (Pub. L. 104–106, sec. 5113); Section 203 of the Electronic Government Act (Pub. L. 104–347, sec. 203); and Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors.

PURPOSE:

The primary purpose of the system is to manage the safety and security of FDIC and other federal facilities, as well as the occupants of those facilities.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under the Privacy Act, 5 U.S.C. 552a(b), all or a portion of the records or information contained in this system may be disclosed outside the FDIC as a routine use as follows:

(1) To appropriate Federal, State, and local authorities responsible for investigating or prosecuting a violation of, or for enforcing or implementing a statute, rule, regulation, or order issued, when the information indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto;

(2) To a court, magistrate, or other administrative body in the course of presenting evidence, including disclosures to counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal proceedings, when the FDIC is a party to the proceeding or has a significant interest in the proceeding, to the extent that the information is determined to be relevant and necessary;

(3) To a congressional office in response to an inquiry made by the congressional office at the request of the individual who is the subject of the record;

(4) To appropriate Federal, State, and local authorities, and other entities when (a) it is suspected or confirmed that the security or confidentiality of information in the system has been compromised; (b) there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information; and (c) the disclosure is made to such agencies, entities, and persons who are reasonably necessary to assist in efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm;

(5) To appropriate Federal, State, and local authorities in connection with hiring or retaining an individual, conducting a background security or suitability investigation, adjudication of liability, or eligibility for a license, contract, grant, or other benefit;

(6) To appropriate Federal, State, and local authorities, agencies, arbitrators, and other parties responsible for processing any personnel actions or conducting administrative hearings or corrective actions or grievances or appeals, or if needed in the performance of other authorized duties;

(7) To appropriate Federal agencies and other public authorities for use in records management inspections;

(8) To officials of a labor organization when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions;

(9) To contractors, grantees, volunteers, and others performing or working on a contract, service, grant, cooperative agreement, or project for the Federal Government;

(10) To notify another Federal agency when, or verify whether, a PIV card is no longer valid.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

Storage: Records are stored in electronic media or in paper format within individual file folders.

Retrievability: Records are indexed and retrieved by name, social security number, other ID number, PIV card serial number, and/or by any other unique individual identifier.

Safeguards: Electronic records are password protected and accessible only by authorized personnel. Paper format records maintained in individual file folders are stored in lockable file cabinets and/or in secured vaults or warehouses and are accessible only by authorized personnel.

Retention and Disposal: Records are retained in accordance with National Archives and Records Administration and FDIC Records Retention and Disposition Schedules. Disposal is by shredding or other appropriate disposal systems. PIV cards are deactivated within 18 hours of cardholder separation, loss of card, or expiration. PIV cards are destroyed by shredding no later than 90 days after deactivation.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Director, Corporate Services Branch, Division of Administration, FDIC, 3501 North Fairfax Drive, Arlington, VA 22226.

NOTIFICATION PROCEDURE:

Individuals wishing to determine if they are named in this system of records or who are seeking access or amendment to records maintained in this system of records must submit their request in writing to the Legal Division, FOIA & Privacy Act Group, FDIC, 550 17th Street, NW., Washington, DC 20429, in accordance with FDIC regulations at 12 CFR Part 310. Individuals requesting their records must provide their name, address and a notarized statement attesting to their identity.

RECORD ACCESS PROCEDURES:

See ''Notification Procedure'' above.

CONTESTING RECORD PROCEDURES:

See ''Notification Procedure'' above. Individuals wishing to contest or amend information maintained in this system of records should specify the information being contested, their reasons for contesting it, and the proposed amendment to such information in accordance with FDIC regulations at 12 CFR Part 310.

RECORD SOURCE CATEGORIES:

Information is provided by the individual to whom the record pertains, those authorized by the subject individuals to furnish information, and the FDIC's personnel records. Information regarding entry and egress from FDIC facilities or access to

information technology systems is obtained from use of the PIV card.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Appendix A

Appendix A

FDIC Atlanta Regional Office, 10 Tenth Street, NE., Suite 800, Atlanta, GA 30309–3906.	FDIC Boston Area Office, 15 Braintree Hill Office Park, Suite 100, Braintree, MA 02184–8701.
FDIC Chicago Regional Office, 420 W. VanBuren, Suite 1700, Chicago, IL 60606.	FDIC Dallas Regional Office, 1601 Bryan Street, Dallas, TX 75201.
FDIC Kansas City Regional Office, 1100 Walnut Street, Suite 2100, Kansas City, MO 64106.	FDIC Memphis Area Office, 6060 Primacy Parkway, Suite 300, Memphis, TN 38139.
FDIC New York Regional Office, 350 Fifth Avenue, Suite 1200, New York, NY 10118–0110.	FDIC San Francisco Regional Office, 25 Jessie Street at Ecker Square, Suite 2300, San Francisco, CA 94105–2780.

Dated at Washington, DC, this 15th day of January, 2013.

Federal Deposit Insurance Corporation.

By order of the Board of Directors.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–01079 Filed 1–18–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as ''of record'' notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: January 14, 2013.

Federal Deposit Insurance Corporation.

Pamela Johnson,

Regulatory Editing Specialist.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10468	Westside Community Bank	University Place	WA	1/11/2013

[FR Doc. 2013–01123 Filed 1–18–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

SUMMARY: *Background.* On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act (PRA), pursuant to 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR Part 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the Paperwork Reduction Act Submission, supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before March 25, 2013.

ADDRESSES: You may submit comments, identified by FR 4031, or Reg H–1, by any of the following methods:

- *Agency Web Site: http://www.federalreserve.gov.* Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm.*
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email: regs.comments@federalreserve.gov.* Include OMB number in the subject line of the message.
- *FAX:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue NW., Washington, DC 20551.

All public comments are available from the Board's web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper form in Room MP–500 of the Board's Martin Building (20th and C

Streets NW.) between 9:00 a.m. and 5:00 p.m. on weekdays.

Additionally, commenters may send a copy of their comments to the OMB Desk Officer—Shagufta Ahmed —Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235 725 17th Street NW., Washington, DC 20503 or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of the PRA OMB submission, including the proposed reporting form and instructions, supporting statement, and other documentation will be placed into OMB's public docket files, once approved. These documents will also be made available on the Federal Reserve Board's public Web site at: *http://www.federalreserve.gov/apps/reportforms/review.aspx* or may be requested from the agency clearance officer, whose name appears below.

Federal Reserve Board Clearance Officer —Cynthia Ayouch—Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551 (202) 452–3829.

Telecommunications Device for the Deaf (TDD) users may contact (202) 263–4869, Board of Governors of the Federal Reserve System, Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

Request for Comment on Information Collection Proposals

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, 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 information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

Proposal To Approve Under OMB Delegated Authority the Extension for Three Years, Without Revision, of the Following Reports

1. *Report title:* Notice of Branch Closure.

Agency form number: FR 4031.

OMB control number: 7100–0264.

Frequency: On occasion.

Reporters: State member banks.

Estimated annual reporting hours: 224 hours.

Estimated average hours per response: Reporting requirements, 2 hours; Disclosure requirements, customer mailing, 0.75 hours and posted notice, 0.25 hours; and Recordkeeping requirements, 8 hours.

Number of respondents: Reporting requirements, 72; Disclosure requirements, customer mailing, 72 and posted notice, 72; and Recordkeeping requirements, 1.

General description of report: This information collection is mandatory pursuant to Section 42(a)(1) of the Federal Deposit Insurance Act (FDI Act) (12 U.S.C. 1831r–l(a)(1)). The Federal Reserve does not consider individual respondent data to be confidential. However, a state member bank may request confidential treatment pursuant to exemption b(4) of the Freedom of Information Act (5 U.S.C.552(b)(4)).

Abstract: The mandatory reporting, recordkeeping, and disclosure requirements regarding the closing of any branch of an insured depository institution are imposed by section 228 of the FDI Act of 1991. There is no reporting form associated with the reporting portion of this information collection; state member banks notify the Federal Reserve by letter prior to closing a branch. The Federal Reserve uses the information to fulfill its statutory obligation to supervise state member banks

2. *Report title:* Reports Related to Securities Issued by State Member Banks as Required by Regulation H.

Agency form number: Reg H–1.

OMB control number: 7100–0091.

Frequency: Annually, Quarterly, and on occasion.

Reporters: State member banks.

Estimated annual reporting hours: 352 hours.

Estimated average hours per response: 5.17 hours.

Number of respondents: 4.

General description of report: This information collection is mandatory pursuant to sections 12(i) and 23(a)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 781(i) and 78w (a)(1)) and Regulation H (12 CFR 208.36). The information collected is not given confidential treatment. However, a state member bank make request that a report or document not be disclosed to the public and be held confidential by the Federal Reserve, (12 CFR 208.36(d). All such requests for confidential treatment will be determined on an *ad hoc* basis.

Abstract: The Federal Reserve's Regulation H requires certain state member banks to submit information relating to their securities to the Federal Reserve on the same forms that bank holding companies and nonbank entities use to submit similar information to the Securities and Exchange Commission. The information is primarily used for public disclosure and is available to the public upon request.

Board of Governors of the Federal Reserve System, January 15, 2013.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2013–01072 Filed 1–18–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–13–12RP]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Assessment of the Psychosocial Impact of Newborn Screening for Congenital Cytomegalovirus (CMV) Infection—New—National Center for Immunization and Respiratory Diseases (NCIRD) and National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

Each year in the United States, more than 30,000 children are born with congenital CMV infection. Approximately 80% develop normally, while the remaining 20% are born with or subsequently develop disabilities such as hearing loss or mental retardation. A similar number of children are affected by serious CMV-related disabilities than by several better-known childhood conditions, including Down Syndrome and Spina Bifida.

The birth prevalence of congenital CMV infection is several times higher than the combined birth prevalence of all metabolic or endocrine disorders in the core U.S. newborn screening panel. Because newborn CMV screening is rarely performed, and because a definitive diagnosis of congenital CMV requires access to urine, saliva, or blood collected soon after birth, most infected children are never diagnosed. Newborn CMV screening offers some clear potential benefits, but few studies have assessed the potential for harm (e.g., increased parental anxiety, ''fragile child syndrome'').

CDC is requesting OMB approval for one year to collect information about newborn CMV screening. The purpose of this information collection is to understand the psychosocial impact of newborn screening on parents whose infants underwent CMV screening as part of a routine infant CMV screening program in Houston, Texas. The potential study population includes approximately 70 CMV-infected children who were symptomatic at birth, 100 CMV-infected children who were asymptomatic at birth (20 of whom developed sequelae), and 50 controls that were CMV-uninfected. The goals of this information collection are to: (1) Document the positive and negative psychosocial impacts of newborn CMV screening on parents and their children; (2) identify modifiable factors that might increase positive psychosocial impacts and decrease negative psychosocial impacts of newborn CMV screening; (3) use what is learned about psychosocial impacts to identify key messages that parents need relative to newborn CMV screening and follow-up; and (4) to learn what challenges are associated with obtaining a congenital CMV diagnosis in the absence of CMV newborn screening.

Much of the potential study population is unique in that their children experienced newborn CMV screening as part of a previous research study. Universal CMV screening has not been recommended by medical associations or state or federal governments and as a result newborn CMV screening is not typically performed. The parents' experience with CMV screening and follow-up will help inform decisions about whether newborn CMV screening would be good public health policy. This study represents the first assessment of the experiences of parents whose children were screened for CMV at birth.

Respondents fall into four categories depending on the past experiences of their child who was screened for CMV:

- Parent Group 1 (PG1)—Child screened positive for congenital CMV at birth, asymptomatic at birth, but *did not* develop sequelae
- Parent Group 2 (PG2)—Child screened positive for congenital CMV at birth, asymptomatic at birth, but *did* subsequently develop sequelae (e.g., hearing loss)
- Parent Group 3 (PG3)—Child was diagnosed with congenital CMV and had symptoms at birth
- Parent Group 4 (PG4)—Child screened negative for congenital CMV at birth

Information will be collected from PG1 via focus groups, from PG2 and PG3 via interviews, and from all four parent groups via a mail survey. The focus group, interview and survey respondents will be asked to participate only once. It is estimated that 71 parents will participate in either individual interviews or focus groups and that 230 will participate in the mail survey. The interviews are planned to take 60 minutes while the focus groups will be held for 90 minutes. The survey is estimated to take 10 minutes per respondent to complete and mail based on previous administrations reported in the literature. Reading and responding to the focus group and interview recruitment letters is estimated to take 5 minutes each. There is no cost to respondents other than their time. The annualized estimated burden hours are 135.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Responses per respondent	Average burden per response (in hours)
Parent Group 1	Focus Group Guide	36	1	1.5
	Focus group recruitment letter	50	1	5/60
Parent Groups 2 and 3	Interviewer guide	35	1	1
	Interview recruitment letter	50	1	5/60
Parent Groups 1,2,3, and 4	Survey	230	1	10/60

Dated: January 14, 2013.

Ron A. Otten,

Director, Office of Scientific Integrity (OSI), Office of the Associate Director for Science (OADS), Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2013–01163 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10191]

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:* Revision of a currently approved collection. *Title of Information Collection:* Medicare Parts C and D Universal Audit Guide. *Use:* Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 and implementing regulations under 42 CFR parts 422 and 423, Medicare Part D plan sponsors and Medicare Advantage organizations are required to comply with all Medicare Parts C and D program requirements. In 2010 the explosive growth of these sponsoring organizations forced CMS to develop an audit strategy to ensure we continue to obtain meaningful audit results. As a result, CMS' audit strategy reflected a move to a more targeted, data-driven and risk-based audit approach that focused on high-risk areas having the greatest potential for beneficiary harm.

To accomplish this we have combined all Part C and Part D audit elements into one universal guide which will also promote consistency, effectiveness and reduce financial and time burdens for both CMS and Medicare-contracting entities. The combined Medicare Part C & D Universal Audit Guide received OMB approval in 2010. The Health Plan Management System (HPMS) is the current conduit by which organizations submit many sources of audit materials such as bids and other ongoing updates to CMS. Please note the guide is very comprehensive in that it describes all areas that could be audited. Due to limited resources, CMS is unable to audit all areas for any particular sponsor. Some areas could be monitored by the account manager, etc. Other areas could be audited in the program audits.

To maximize resources, CMS will focus on assisting the industry to improve their operations to ensure beneficiaries receive access to care. One way to accomplish this is CMS will develop an annual audit strategy which describes how sponsors will be selected for audit and the areas that will be audited. The audit strategy will be shared with the industry via the CMS Web site, HPMS memo, the Part C & D user call, and other conferences. Once the audit areas are defined, CMS will design audit protocols describing in detail the focus of the audit, the data required for the audit, etc. The Engagement Letter and Protocols will be sent to all sponsors selected for audit 4 weeks prior to starting the audit. In addition, the protocols will be released to the industry at the beginning of each calendar year via the same manner as the audit strategy. To assist in improving the audit process, CMS sends the plan sponsors a survey at the end of each audit to complete in order to obtain the sponsor's feedback. The sponsor is not required to complete the survey.

Form Number: CMS–10191 (OCN 0938–1000). *Frequency:* Yearly. *Affected Public:* Private Sector (business or other for-profit and not-for-profit institutions). *Number of Respondents:* 195. *Total Annual Responses:* 195. *Total Annual Hours:* 24,180. (For policy questions regarding this collection contact Tracey Roberts at 410–786–8643. 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 March 25, 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: January 16, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–01167 Filed 1–18–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier CMS–10453]

Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB); Extension of Comment Period

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Agency information collection activities: Proposed collection; comment request; extension of comment period.

SUMMARY: This notice extends the comment period for a 60-day notice request for proposed information collection request associated with the notice [Document Identifier: CMS–10453] entitled ''The Medicare Advantage and Prescription Drug Program: Part C Explanation of Benefits CFR 422.111(b)(12)'' that was published in the November 26, 2012 (77 FR 70445) **Federal Register**. The comment period for the information collection request, which would have ended on January 25, 2013, is extended to February 1, 2013.

DATES: The comment period for the information collection request published in the January 25, 2013, **Federal Register** (77 FR 70445) is extended to February 1, 2013.

FOR FURTHER INFORMATION CONTACT: William Parham, (410) 786–4669.

SUPPLEMENTARY INFORMATION:

I. Background

In the FR Doc. 2012–28570 of November 26, 2012 (77 FR 70445), we published a Paperwork Reduction Act notice requesting a 60-day public comment period for the document entitled ''The Medicare Advantage and Prescription Drug Program: Part C Explanation of Benefits CFR 422.111(b)(12).''

There were technical delays with making the information collection request publicly available; therefore, in this notice we are extending the comment period from the date originally listed in the November 26, 2012, notice.

II. Extension of Comment Period

We are extending the comment period for the notice [Document Identifier: CMS–10453] in FR Doc. 2012–28570 published on November 26, 2012 (77 FR 70445).

The date listed on page 70445, third column, second full paragraph, on the fifth line in the paragraph beginning with ''To be assured consideration,

comments and recommendations must be submitted in one of the following ways by January 25, 2013.'' has been extended to February 1, 2013.''

Dated: January 16, 2013.

Martique Jones,

Deputy Director, Regulations Development Group, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2013–01172 Filed 1–18–13; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Procedures for Requests from Tribal Lead Agencies to use Child Care and Development Fund (CCDF) Funds for Construction or Major Renovation of Child Care Facilities.

OMB No.: 0970–0160.

Description: The Child Care and Development Block Grant Act, as amended, allows Indian Tribes to use Child Care and Development Fund (CCDF) grant awards for construction and renovation of child care facilities. A tribal grantee must first request and receive approval from the Administration for Children and Families (ACF) before using CCDF funds for construction or major renovation. This information collection contains the statutorily-mandated uniform procedures for the solicitation and consideration of requests, including instructions for preparation of environmental assessments in conjunction with the National Environmental Policy Act. The proposed draft procedures update the procedures that were originally issued in August 1997 and last updated in April 2010. Respondents will be CCDF tribal grantees requesting to use CCDF funds for construction or major renovation.

Respondents: Tribal Child Care Lead Agencies acting on behalf of Tribal Governments.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Construction or Major Renovation of Tribal Child Care Facilities	5	1	20	100

Estimated Total Annual Burden Hours: 100.

Additional Information: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Fax: 202–395–7285, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2013–01117 Filed 1–18–13; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0065]

Agency Information Collection Activities; Proposed Collection; Comment Request; Registration of Food Facilities Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection provisions of the Agency's regulations that require registration for domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States.

DATES: Submit either electronic or written comments on the collection of information by March 25, 2013.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400T, Rockville, MD 20850, *domini.bean@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44

U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Registration of Food Facilities Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002—21 CFR 1.230–1.235 (OMB Control Number 0910–0502)—Extension

The Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (the Bioterrorism Act) (Pub. L. 107–188) added section 415 to the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 350d), which requires domestic and foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States to register with FDA. Sections 1.230–1.235 of FDA's regulations (21 CFR 1.230–1.235) set forth the procedures for registration of food facilities. Information provided to FDA under these regulations helps the Agency to notify quickly the facilities that might be affected by a deliberate or accidental contamination of the food supply. In addition, data collected through registration is used to support FDA enforcement activities and to screen imported food shipments. Advance notice of imported food allows FDA, with the support of the Bureau of Customs and Border Protection, to target import inspections more effectively and help protect the nation's food supply against terrorist acts and other public health emergencies. If a facility is not registered or the registration for a facility is not updated when necessary, FDA may not be able to contact the facility and may not be able to target import inspections effectively in case of a known or potential threat to the food supply or other food-related emergency, putting consumers at risk of consuming hazardous food products that could cause serious adverse health consequences or death.

FDA's regulations require that each facility that manufactures, processes, packs, or holds food for human or animal consumption in the United States register with FDA using Form FDA 3537 (§ 1.231). The term ''Form FDA 3537'' refers to both the paper version of the form and the electronic system known as the Food Facility Registration Module, which is available at *http://www.access.fda.gov.* Domestic facilities are required to register whether or not food from the facility enters interstate commerce. Foreign facilities that manufacture, process, pack, or hold food also are required to register unless food from that facility undergoes further processing (including packaging) by another foreign facility before the food is exported to the United States. However, if the subsequent foreign facility performs only a minimal activity, such as putting on a label, both facilities are required to register.

Information FDA requires on the registration form includes the name and full address of the facility; emergency contact information; all trade names the facility uses; applicable food product categories; and a certification statement that includes the name of the individual authorized to submit the registration form. Additionally, facilities are encouraged to submit their preferred mailing address; type of activity conducted at the facility; type of storage, if the facility is primarily a holding facility; and approximate dates of operation if the facility's business is seasonal.

In addition to registering, a facility is required to submit timely updates within 60 days of a change to any required information on its registration form, using Form FDA 3537 (§ 1.234), and to cancel its registration when the facility ceases to operate or is sold to new owners or ceases to manufacture, process, pack, or hold food for consumption in the United States, using Form FDA 3537a (§ 1.235).

The FDA Food Safety Modernization Act (FSMA) (Public Law 111–353), enacted on January 4, 2011, amended section 415 of the FD&C Act in relevant part to require registrants for food facilities to submit additional registration information to FDA, and to require facilities required to register with FDA to renew such registrations biennially. Section 415(a)(2) of the FD&C Act (21 U.S.C. 350d(a)(2)), as amended by FSMA, also provides that, when determined necessary by FDA ''through guidance,'' a food facility is required to submit to FDA information about the general food category of a food manufactured, processed, packed or held at such facility, as determined appropriate by FDA, including by guidance. These amendments took effect October 1, 2012. To comply with this statutory deadline, FDA initially obtained OMB approval of the following additional collection of information requirements under the emergency processing provisions of the PRA:

- Modification of food facility registration forms to include the following mandatory fields: The email address for the contact person of a domestic facility and the email address of the U.S. agent for a foreign facility, an assurance that FDA will be permitted to inspect the facility, and specific food categories as identified in the guidance document entitled, ''Guidance for Industry: Necessity of the Use of Food Product Categories in Food Facility Registrations and Updates to Food Product Categories'' (77 FR 64999, October 24, 2012) (section 415(a)(2) of the FD&C Act); and
- The requirement that registered facilities submit registration renewals to FDA biennially (section 415(a)(3) of the FD&C Act (21 U.S.C. 350d(a)(3)).

Food Facility Registration, in conjunction with advance notice of imported food, helps FDA act quickly in responding to a threatened or actual bioterrorist attack on the U.S. food supply or to other food-related emergencies. Food Facility Registration provides FDA with information about facilities that manufacture, process, pack, or hold food for consumption in the United States. In the event of an outbreak of foodborne illness, such information helps FDA and other authorities determine the source and cause of the event. In addition, the registration information enables FDA to notify more quickly the facilities that might be affected by the outbreak. See Interim Final Rule entitled, ''Registration of Food Facilities Under the Public Health Security and Bioterrorism Preparedness and Response Act of 2002'' (68 FR 58894, at 58895; October 10, 2003).

Implementation of the new FSMA requirements described previously helps enable FDA to quickly identify and remove from commerce an article of food for which there is a reasonable probability that the use of, or exposure to, such article of food will cause

serious adverse health consequences or death to humans or animals. FDA uses the information collected under these provisions to help ensure that such food products are quickly and efficiently removed from the market.

Description of Respondents: Respondents to this collection of information are owners, operators, or agents in charge of domestic or foreign facilities that manufacture, process, pack, or hold food for human or animal consumption in the United States.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR Section and/or section of FD&C Act	Form FDA No.	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
New Facilities						
Domestic						
§ 1.230–1.233 and section 415 of the FD&C Act.	FDA 3537 [2].	11,080	1	11,080	2.7	29,916
Foreign						
§ 1.230–1.233 and section 415 of the FD&C Act.	FDA 3537	19,900	1	19,900	8.9	177,110
New Facility Registration Subtotal	.....	.....	.....	.....		207,026
Previously Registered Facilities						
Updates under § 1.234 and section 415 of the FD&C Act.	FDA 3537	118,530	1	118,530	1.2	142,236
Cancellations under § 1.235	FDA 3537a.	6,390	1	6,390	1	6,390
Biennial renewal of registration required by section 415 of the FD&C Act.	FDA 3537	224,930	1	224,930	0.5 (30 mins.)	112,465
Updates, Cancellations or Biennial Renewals Subtotal.	.....	.....	.....	.....		261,091
Total Hours Annually	.....	.....	.....	.....		468,117

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] The term "Form FDA 3537" refers to both the paper version of the form and the electronic system known as the Food Facility Registration Module, which is available at *http://www.access.fda.gov*.

This estimate is based on FDA's experience and the average number of new facility registrations, updates and cancellations received in the past 3 years. FDA received 12,011 new domestic facility registrations during 2010, 10,646 during 2011, and 10,584 during 2012. Based on this experience, FDA estimates the annual number of new domestic facility registrations will be 11,080. FDA estimates that listing the information required by the Bioterrorism Act and presenting it in a format that will meet the Agency's registration regulations will require a burden of approximately 2.5 hours per average domestic facility registration. We estimate that the FSMA-required additional information for new facility registrations will require an additional 12 minutes (0.2 hour) per response for domestic facilities. The average domestic facility burden hour estimate of 2.7 hours takes into account that some respondents completing the registration may not have readily available Internet access. Thus, the total annual burden for new domestic facility registrations is estimated to be 29,916 hours (11,080 × 2.7 hours).

FDA received 20,598 new foreign facility registrations during 2010; 20,009 during 2011 and 19,092 during 2012. Based on this experience, FDA estimates the annual number of new foreign facility registrations will be 19,900. FDA estimates that listing the information required by the Bioterrorism Act and presenting it in a format that will meet the Agency's registration regulations will require a burden of approximately 8.5 hours per average foreign facility registration. We estimate that the FSMA-required additional information for new facility registrations will require an additional 24 minutes (0.4 hour) per response for foreign facilities. The average foreign facility burden hour estimate of 8.9 hours includes an estimate of the additional burden on a foreign facility to obtain a U.S. agent, and takes into account that for some foreign facilities the respondent completing the registration may not be fluent in English and/or not have readily available Internet access. Thus, the total annual burden for new foreign facility registrations is estimated to be 177,110 hours (19,900 × 8.9 hours).

Based on its experience, FDA estimates that the average annual number of updates to facility registrations will remain unchanged at 118,530 updates annually over the next 3 years. FDA also estimates that updating a registration will, on average, require a burden of approximately 1 hour, taking into account fluency in English and Internet access. We estimate that the FSMA-required additional information for updates will require an additional 12 minutes (0.2 hour) per response. Thus, the total annual burden of submitting updates to facility registrations is estimated to be 142,236 hours (118,530 × 1.2 hours).

Based on its experience, FDA estimates that the average annual number of cancellations of facility registrations will remain unchanged at 6,390 cancellations annually over the next 3 years. FDA also estimates that cancelling a registration will, on average, require a burden of approximately 1 hour, taking into account fluency in English and Internet

access. FSMA did not change the required information for cancellations. Thus, the total annual burden for cancelling registrations is estimated to be 6,390 hours.

We estimate that the new biennial registration required by FSMA, which will require the submission of certain new data elements and the verification and possible updating of other information rather than re-entering all information, will require 30 minutes (0.5 hour) per response, including time for the new FSMA-required information. FDA estimates that, on an annualized basis, the number of biennial registrations submitted over the next 3 years will be 224,930. This estimate is based on the number of currently registered firms (449,860) divided by two. Thus, the total annual burden for biennial registration is estimated to be 112,465 hours (224,930 x 0.5 hours).

Dated: January 16, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–01157 Filed 1–18–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–D–1240]

Draft Guidance for Industry and Food and Drug Administration Staff; Submissions for Postapproval Modifications to a Combination Product Approved Under Certain Marketing Applications; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance for industry and FDA staff entitled ''Submissions for Postapproval Modifications to a Combination Product Approved Under a BLA, NDA, or PMA.'' This draft guidance intends to provide the underlying principles to determine the type of marketing submission that may be required for postapproval changes to a combination product that is approved under one marketing application, i.e., a biologics license application (BLA), a new drug application (NDA), or a device premarket approval application (PMA).

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by April 22, 2013.

ADDRESSES: Submit written requests for single copies of the draft guidance to the Office of Combination Products, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, rm. 5129, Silver Spring, MD 20993. Send one self-addressed adhesive label to assist the office in processing your request. The draft guidance may also be obtained by mail by calling the Office of Combination Products at 301–796–8930. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance document.

Submit electronic comments on the draft guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Patricia Y. Love, Office of Combination Products, Food and Drug Administration, Bldg. 32, rm. 5129, 10903 New Hampshire Ave., Silver Spring, MD 20993.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry and FDA staff entitled ''Submissions for Postapproval Modifications to a Combination Product Approved Under a BLA, NDA, or PMA.'' This document provides guidance to industry and FDA staff on the underlying principles to determine the type of marketing submission that may be required for postapproval changes to a combination product, as defined in 21 CFR 3.2(e), that is approved under one marketing application, i.e., a BLA, an NDA, or a device PMA.

The regulatory standards for when to provide a postmarket submission for a change to an approved, stand-alone drug, device, or biological product or its manufacturing process are described in the Federal Food, Drug, and Cosmetic Act (FD&C Act) (sections 505, 506A, and 515 of the FD&C Act), the Public Health Service Act (PHS Act) (section 351 of the PHS Act), and FDA's associated regulations (21 CFR 314.70, 601.12, and 814.39). As a general matter, these provisions set forth similar criteria for when a submission for a changed article is required, but do not expressly address submissions for changes to an approved combination product.

This draft guidance intends to provide clarity in the postapproval change requirements and consistency in the type of postmarket submission to provide for a change to a combination product approved under one marketing application (BLA, NDA, or PMA). In particular, the draft guidance document provides tables that may be helpful in determining what type of submission to provide for a postmarket change to a constituent part of a combination product where the regulatory identity of the modified constituent part differs from the application type under which the combination product is approved.

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the Agency's current thinking on ''Submissions for Postapproval Modifications to a Combination Product Approved Under a BLA, NDA, or PMA.'' It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

II. Comments

Interested persons may submit either electronic comments to *http://www.regulations.gov* or written comments regarding this document to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. Electronic Access

Persons with access to the Internet may obtain the document at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 314 for NDAs have been approved under OMB control number 0910–0001. The collections of information in 21 CFR part 601 for BLAs have been approved

under OMB control number 0910–0338. The collections of information in 21 CFR part 814, subpart B for PMAs have been approved under OMB control number 0910–0231.

Dated: January 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–01069 Filed 1–18–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1255]

Electronic Submission Process for Requesting Export Certificates From the Center for Devices and Radiological Health; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of an electronic submission process for requesting export certificates for products regulated by FDA's Center for Devices and Radiological Health (CDRH). The electronic process will help fulfill both the legislative and application time processing requirements set out by the FDA Export Reform and Enhancement Act of 1996 and the terms of clearance of the Office of Management and Budget approval (OMB control number 0910–0498) of the Form FDA 3613 series. The new eSubmitter process will complement the current paper-based process.

FOR FURTHER INFORMATION CONTACT: Leila Lawrence, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 2668, Silver Spring, MD 20993–0002, 301–796–5786, email: *Leila.Lawrence@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. How eSubmitter Impacts FDA's Current Process

FDA currently accepts requests for export certificates submitted by mail. This process will remain in place and would be augmented by the new eSubmitter process.

For general user assistance, contact the Center for Devices and Radiological Health (CDRH), Division of Small Manufacturers, International and Consumer Assistance (DSMICA) by telephone: 1–800–638–2041 or 301–796–7100; or by email: *dsmica@fda.hhs.gov.*

You can find information about FDA's Electronic Submissions Gateway online at: *http://www.fda.gov/ForIndustry/ElectronicSubmissionsGateway/default.htm.* Email questions about the system to FDA's Electronic Submissions Gateway Help Desk: *esgreg@gnsi.com.*

II. Background on the Electronic Submission of Requests for Export Certificates

FDA introduces an electronic option for submitting requests for export certificates of devices regulated by CDRH as a voluntary alternative to paper submissions. With electronic submissions, CDRH can more readily receive and process the export requests.

The electronic process will be introduced in two phases. In the first phase of operation, the CDRH Export Certification Application and Tracking System (CECATS) will be made available to industry for the electronic submission of requests for export certificates.

CECATS is a Web-based application used by FDA's CDRH to process, manage, and administer certificates for the export of medical devices. CDRH will be implementing the electronic submission and review process. Industry will have an option to submit electronically or via the paper process. CECATS will be accessible through the FDA Unified Registration and Listing System (FURLS). A firm must have a FURLS account to access CECATS.

The CECATS module is a part of the FURLS application within the FDA Industry Systems Portal utilized to automatically issue the certificate to U.S. medical device manufacturers/distributors who wish to export their medical devices to foreign countries.

CECATS will help fulfill both the legislative and application time processing requirements set out by the FDA Export Reform and Enhancement Act of 1996 (Public Law 104–134) and the terms of clearance of the OMB approval of the Form FDA 3613 series.

CECATS will provide industry the option of submitting export requests electronically. Electronic submission will automate many of the steps that both industry and CDRH must perform to submit and process export certificates. The advantages to industry will be:

- Certificate processing time will be greatly reduced;
- Automated real-time validation will eliminate the need to return submissions; and
- Industry will receive real-time updates on the status of their requests via the Web.

In early 2013, FDA will implement phase two for the remainder of the export certification, notification, and permit requests listed as follows:

- Certificates of Exportability (sections 801(e)(1) and 802 of the FD&C Act);
- Non-Clinical Research Use Only Certificate;
- Simple Notifications (section 802(g) of the FD&C Act); and
- Export Permit Letter (section 801(e)(2) of the FD&C Act).

Upon full implementation in 2013, industry will be able to submit all export requests electronically. This is a ''win'' for both industry and CDRH as it will allow us to process all export requests more efficiently and expeditiously. CDRH is developing webinars and will hold online training sessions with industry on how to access and use CECATS. A schedule and detailed instructions will be sent to industry and posted to our Web site at: *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/ImportingandExportingDevices/ucm050521.htm#ref* when they become available.

Evaluation of the electronic submission process will be conducted periodically to further enhance both user interface and data collection needs as they become known to FDA. Electronic submissions of requests for export certificates will remain voluntary at this time.

The printable forms can be viewed at the following links:

- Form FDA 3613: Supplementary Information Certificate for Foreign Government Requests: *http://inside.fda.gov:9003/ucm/groups/insidefda-public/@inside-adm-forms/documents/form/ucm012794.pdf;*
- Form FDA 3613a: Supplementary Information Certificate of Exportability Requests: *http://inside.fda.gov:9003/ucm/groups/insidefda-public/@inside-adm-forms/documents/form/ucm012795.pdf;*
- Form FDA 3613c: Supplementary Information Non-Clinical Research Use Only Certificate: *http://inside.fda.gov:9003/ucm/groups/insidefda-public/@inside-adm-forms/documents/form/ucm012797.pdf.*

III. What happens when the new eSubmitter process for requesting export certificates is implemented?

Implementation of the eSubmitter process will supplement the ability to request export certificates from CDRH via paper. The new Web-based application (available at: *https://www.access.fda.gov/oaa/index.jsp*) uses your existing FURLS account

information. The Web site provides an alternative to the paper request process by enabling online submission of export certificate applications.

IV. Paperwork Reduction Act of 1995

This document refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in CECATS and Forms FDA 3613, 3613a, and 3613c have been approved under OMB control number 0910–0498.

Dated: January 15, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–01164 Filed 1–18–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Cardiovascular Sciences.

Date: February 7–8, 2013.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–10–244, Structure and Function of Opioid Receptors.

Date: February 11–12, 2013.

Time: 8:00 a.m. to 12:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4150, MSC 7806, Bethesda, MD 20892, (301) 435–1722, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Biomedical Imaging and Engineering Area Review.

Date: February 12, 2013.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Jan Li, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, Bethesda, MD 20892, 301–435–1049, *lij21@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group, Hypertension and Microcirculation Study Section.

Date: February 14, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Dallas Marriott Suites Medical—Market Center, 2493 North Stemmons Freeway, Dallas, TX 75207.

Contact Person: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9497, *zouai@csr.nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group, Bacterial Pathogenesis Study Section.

Date: February 19, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Richard G Kostriken, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3192, MSC 7808, Bethesda, MD 20892, 301–402–4454, *kostrikr@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group, Molecular and Cellular Hematology Study Section.

Date: February 19–20, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Luis Espinoza, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6183, MSC 7804, Bethesda, MD 20892, 301–495–1213, *espinozala@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Integrative Neuroscience.

Date: February 19, 2013.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Nicholas Gaiano, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5178, MSC 7844, Bethesda, MD 20892–7844, 301–435–1033, *gaianonr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Nanotechnology and Molecular Substrates in Brain and Retinal Disorders.

Date: February 19, 2013.

Time: 12:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Yvonne Bennett, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5199, MSC 7846, Bethesda, MD 20892, 301–379–3793, *bennetty@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 15, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01096 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Draft Report on Carcinogens Monographs for 1-Bromopropane and Cumene; Availability of Documents; Request for Comments; Notice of Meeting

SUMMARY: Peer review meeting of the Draft Report on Carcinogens (RoC) Monographs for 1-Bromopropane and Cumene. These documents were prepared by the Office of the Report on Carcinogens (ORoC), Division of the National Toxicology Program (DNTP), National Institute of Environmental Health Sciences (NIEHS).

DATES: *Meeting:* March 21, 2013, 1:00 p.m. to approximately 5:00 p.m. Eastern Daylight Time (EDT) and March 22, 2013, from 8:30 a.m. until adjournment, approximately 2:00 p.m. EDT.

Document Availability: Draft monographs will be available by January

23, 2013, at *http://ntp.niehs.nih.gov/go/36639.*

Public Comments Submissions: Deadline is March 7, 2013.

Pre-Registration for Meeting and/or Oral Comments: Deadline is March 19, 2013.

ADDRESSES: *Meeting Location:* NIEHS, Keystone Building, Room 1003AB, 530 Davis Drive, Morrisville, NC 27560.

Agency Meeting Web page: The draft monographs, draft agenda, registration and other meeting materials are at *http://ntp.niehs.nih.gov/go/36639.*

Webcast: The meeting will be available via webcast at *http://www.niehs.nih.gov/news/video/index.cfm.*

FOR FURTHER INFORMATION CONTACT: Dr. Lori D. White, NTP Designated Federal Official, Office of Liaison, Policy and Review, DNTP, NIEHS, P.O. Box 12233, MD K2–03, Research Triangle Park, NC 27709. Phone: (919) 541–9834, Fax: (301) 480–3272, Email: *whiteld@niehs.nih.gov.* Hand Delivery/Courier: 530 Davis Drive, Room 2136, Morrisville, NC 27560.

SUPPLEMENTARY INFORMATION:

Background: The Report on Carcinogens (RoC) is a congressionally mandated, science-based, public health report that identifies agents, substances, mixtures, or exposures (collectively called ''substances'') in our environment that may put people in the United States at increased risk for cancer. The NTP prepares the RoC on behalf of the Secretary of Health and Human Services.

The NTP follows an established, four-part process for preparation of the RoC (*http://ntp.niehs.nih.gov/go/rocprocess*). A RoC Monograph is prepared for each candidate substance selected for review for the RoC. 1-Bromopropane and cumene were selected as candidate substances following solicitation of public comment and review by the NTP Board of Scientific Counselors review on June 21–22, 2012 (*http://ntp.niehs.nih.gov/go/9741*). A draft RoC monograph consists of a (1) cancer evaluation component that reviews all information that may bear on a listing decision, assesses its quality and sufficiency for reaching a listing decision, applies the RoC listing criteria to the relevant scientific information, and recommends a listing status for the candidate substance in the RoC and (2) a substance profile that contains the NTP's preliminary listing recommendation and a summary of the scientific evidence considered key to reaching that recommendation. This meeting is planned for peer review of the draft RoC Monographs for 1-bromopropane and cumene.

1-Bromopropane (CASRN 106–94–5) is a brominated hydrocarbon that is currently used as a solvent in a variety of industrial and commercial applications. It is used as a solvent cleaner to degrease electronics, precision optics, and metals, as a solvent vehicle in industries that use aerosolized adhesives (e.g., foam cushion manufacturing), as a spot remover in the textile industry, and as a solvent in the dry cleaning industry. Additional information about the review of 1-bromopropane for the RoC is available at *http://ntp.niehs.nih.gov/go/37896.*

Cumene (CASRN 98–82–8, isopropylbenzene) is an alkylated benzene found in fossil fuels, such as blended gasoline and kerosene, and products of incomplete combustion. It is a high production volume chemical in the United States with the majority of its use in the synthesis of acetone and phenol. Additional information about the review of cumene for the RoC is available at *http://ntp.niehs.nih.gov/go/37895.*

Meeting and Registration: The meeting is open to the public with time set aside for oral public comment; attendance at the NIEHS is limited only by the space available. The meeting is scheduled for March 21, 2013, 1:00 p.m. to approximately 5:00 p.m. EDT and March 22, 2013, from 8:30 a.m. until adjournment, approximately 2:00 p.m. EDT. Two days are set aside for the meeting; however, it may adjourn sooner if the panel completes its peer review of the draft monographs. Pre-registration to attend the meeting and/or provide oral comments is by March 19, 2013, at *http://ntp.niehs.nih.gov/go/36639.* Visitor and security information is available at *http://www.niehs.nih.gov/about/visiting/index.cfm.* Individuals with disabilities who need accommodation to participate in this event should contact Danica Andrews at phone: (919) 541–2595 or email: *andrewsda@niehs.nih.gov.* TTY users should contact the Federal TTY Relay Service at (800) 877–8339. Requests should be made at least five business days in advance of the event.

The preliminary agenda and draft monographs should be posted on the NTP Web site (*http://ntp.niehs.nih.gov/go/36639*) by January 23, 2013. Additional information will be posted when available or may be requested in hardcopy, see **FOR FURTHER INFORMATION CONTACT**. Following the meeting, a report of the peer review will be prepared and made available on the NTP Web site. Registered attendees are encouraged to access the meeting Web page to stay abreast of the most current information regarding the meeting.

Request for Comments: The NTP invites written and oral public comments on the draft monographs. The deadline for submission of written comments is March 7, 2013, to enable review by the peer review panel and NTP staff prior to the meeting. Pre-registration to provide oral comments is by March 19, 2013, at *http://ntp.niehs.nih.gov/go/36639.* Public comments and any other correspondence on the draft monographs should be sent to the **FOR FURTHER INFORMATION CONTACT.** Persons submitting written comments should include their name, affiliation, mailing address, phone, email, and sponsoring organization (if any) with the document. Written comments received in response to this notice will be posted on the NTP Web site, and the submitter will be identified by name, affiliation, and/or sponsoring organization.

Public comment at this meeting is welcome, with time set aside for the presentation of oral comments on the draft monographs. In addition to in-person oral comments at the meeting at the NIEHS, public comments can be presented by teleconference line. There will be 50 lines for this call; availability will be on a first-come, first-served basis. The lines will be open from 1:00 p.m. until approximately 5:00 p.m. EDT on March 21 and from 8:30 a.m. EDT until adjournment on March 22, although oral comments will be received only during the formal public comment periods indicated on the preliminary agenda. Each organization is allowed one time slot. At least 7 minutes will be allotted to each speaker, and if time permits, may be extended to 10 minutes at the discretion of the chair. Persons wishing to make an oral presentation are asked to register online at *http://ntp.niehs.nih.gov/go/36639* by March 19, 2013, and if possible, to send a copy of their slides and/or statement or talking points at that time. Written statements can supplement and may expand the oral presentation. Registration for oral comments will also be available at the meeting, although time allowed for presentation by on-site registrants may be less than that for pre-registered speakers and will be determined by the number of speakers who register on-site.

Background Information on the RoC: Published biennially, each edition of the RoC is cumulative and consists of substances newly reviewed in addition to those listed in previous editions. The 12th RoC, the latest edition, was published on June 10, 2011 (available at

http://ntp.niehs.nih.gov/go/roc12). The 13th RoC is under development. For each listed substance, the RoC contains a substance profile, which provides information on: Cancer studies that support the listing—including those in humans, animals, and studies on possible mechanisms of action—information about potential sources of exposure to humans, and current Federal regulations to limit exposures.

Background Information on NTP Peer Review Panels: NTP panels are technical, scientific advisory bodies established on an ''as needed'' basis to provide independent scientific peer review and advise the NTP on agents of public health concern, new/revised toxicological test methods, or other issues. These panels help ensure transparent, unbiased, and scientifically rigorous input to the program for its use in making credible decisions about human hazard, setting research and testing priorities, and providing information to regulatory agencies about alternative methods for toxicity screening. The NTP welcomes nominations of scientific experts for upcoming panels. Scientists interested in serving on an NTP panel should provide a current *curriculum vitae* to the **FOR FURTHER INFORMATION CONTACT.** The authority for NTP panels is provided by 42 U.S.C. 217a; section 222 of the Public Health Service (PHS) Act, as amended. The panel is governed by the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), which sets forth standards for the formation and use of advisory committees.

Dated: January 16, 2013.

John R. Bucher,

Associate Director, National Toxicology Program.

[FR Doc. 2013–01242 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Development of Predictive In vivo Screening Systems for Phenotypic Drug Discovery (7786).

Date: January 25, 2013.

Time: 1:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Gerald L. McLaughlin, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, 6001 Executive Blvd., Room 4238, MSC 9550, Bethesda, MD 20892–9550, 301–402–6626, *gm145a@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.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; SBIR Topic 148 Review Meeting (4418)

Date: January 30, 2013.

Time: 8:30 a.m. to 3:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852,

Contact Person: Jose F. Ruiz, Ph.D., Scientific Review Officer, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, Room 4228, MSC 9550, 6001 Executive Blvd., Bethesda, MD 20892–9550, (301) 451–3086, *ruizjf@nida.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.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: January 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01100 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract and grant 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 Center for Advancing Translational Sciences Special Emphasis Panel; Therapeutics Discovery.

Date: February 13–14, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health/NCATS/OR, Democracy 1, Room 1080, 6701 Democracy Blvd., Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Barbara J. Nelson, Ph.D., Scientific Review Officer, Office of Grants Management & Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Room 1080, 1 Dem. Plaza, Bethesda, MD 20892–4874, 301–435–0806, *nelsonbj@mail.nih.gov*.

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; TRND–1.

Date: February 28–March 1, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: Bethesda North Marriott Hotel & Conference Center, Montgomery County Conference Center Facility, 5701 Marinelli Road, North Bethesda, MD 20852.

Contact Person: Guo He Zhang, Ph.D., MPH, Scientific Review Officer, Office of Grants Management & Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1064, Bethesda, MD 20892–4874, 301–435–0812, *zhanggu@mail.nih.gov.*

Name of Committee: National Center for Advancing Translational Sciences Special Emphasis Panel; TRND–3.

Date: March 13–14, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Gaithersburg Marriott Washingtonian Center, 9751 Washingtonian Boulevard, Gaithersburg, MD 20878.

Contact Person: Sheri A. Hild, Scientific Review Officer, Office of Grants Management & Scientific Review, National Center for Advancing Translational Sciences (NCATS), National Institutes of Health, 6701 Democracy Blvd., Democracy 1, Room 1082, Bethesda, MD 20892–4874, 301–435–0811, *hildsa@mail.nih.gov.*

Dated: January 15, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01101 Filed 1–18–13; 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 Special Emphasis Panel; The Role of Microbial Metabolites in Cancer Prevention and Etiology.

Date: February 27, 2013.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6116 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Gerald G. Lovinger, Ph.D., Scientific Review Administrator, Special Review and Logistics Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Blvd., Room 8101, Bethesda, MD 20892–8329, 301/496–7987, *lovingeg@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/sep/sep.htm,* where an agenda and any additional information for the meeting will be posted when available.

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.

(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: January 15, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01098 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Hypertension and Microcirculation A.

Date: February 14, 2013.

Time: 6:00 p.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Larry Pinkus, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4132, MSC 7802, Bethesda, MD 20892, (301) 435–1214, *pinkusl@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Clinical and Integrative Cardiovascular Sciences Special Panel.

Date: February 15, 2013.

Time: 12:00 p.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Lawrence E Boerboom, Ph.D., Chief, CVRS IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, (301) 435–8367, *boerboom@nih.gov.*

Name of Committee: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Oral, Dental and Craniofacial Sciences Study Section.

Date: February 20–21, 2013.

Time: 8:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Sir Francis Drake Hotel, 450 Powell Street at Sutter, San Francisco, CA 94102.

Contact Person: Yi-Hsin Liu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, 301–435–1781, *liuyh@csr.nih.gov.*

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Neural Basis of Psychopathology, Addictions and Sleep Disorders Study Section.

Date: February 20–21, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Boris P Sokolov, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5217A, MSC 7846, Bethesda, MD 20892, 301–408–9115, *bsokolov@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry B Study Section.

Date: February 20–21, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Westin St. Francis, 335 Powell Street, San Francisco, CA 94102.

Contact Person: Kathryn M Koeller, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–2681, *koellerk@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function E Study Section.

Date: February 20–21, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel San Francisco, 950 Mason Street, San Francisco, CA 94108.

Contact Person: Nitsa Rosenzweig, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4152, MSC 7760, Bethesda, MD 20892, (301) 435–1747, *rosenzweign@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Respiratory Integrative Biology and Translational Research Study Section.

Date: February 20–21, 2013.

Time: 8:30 a.m. to 1:00 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: Lawrence E Boerboom, Ph.D., Chief, CVRS IRG, Center for Scientific

Review, National Institutes of Health, 6701 Rockledge Drive, Room 4130, MSC 7814, Bethesda, MD 20892, (301) 435–8367, *boerboom@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 15, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01099 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, 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: Neurological Sciences Training Initial Review Group; NST–1 Subcommittee.

Date: February 11–12, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Palomar Hotel, 2121 P Street NW., Washington, DC 20037.

Contact Person: Raul A. Saavedra, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3204, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders B.

Date: February 21–22, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hotel Monaco Alexandria, 480 King Street, Alexandria, VA 22314.

Contact Person: Birgit Neuhuber, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, *neuhuber@ninds.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders C.

Date: February 28–March 1, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Amalfi Hotel, 20 West Kinzie Street, Chicago, IL 60654.

Contact Person: William C. Benzing, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–0660, *benzingw@mail.nih.gov*.

Name of Committee: National Institute of Neurological Disorders and Stroke Initial Review Group; Neurological Sciences and Disorders A.

Date: March 6–7, 2013.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites Santa Monica, 1707 Fourth Street, Santa Monica, CA 90401.

Contact Person: Natalia Strunnikova, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–402–0288, *Natalia.Strunnikova@nih.gov*.

Name of Committee: Neurological Sciences Training Initial Review Group; NST–2 Subcommittee.

Date: March 11–12, 2013.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The Fairmont Washington, DC, 2401 M Street NW., Washington, DC 20037.

Contact Person: JoAnn McConnell, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS, NIH, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–5324, *McConnej@ninds.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 15, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01095 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Worm Intervention Study.

Date: February 20, 2013.

Time: 12:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, Suite 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Bita Nakhai, Ph.D., Scientific Review Officer, National Institute on Aging, Gateway Building, 2C212, 7201 Wisconsin Avenue, Bethesda, MD 20814, 301–402–7701, *nakhaib@nia.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 15, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01097 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed 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: Allergy, Immunology, and Transplantation Research Committee.

Date: February 12–14, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Zhuqing Li, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–402–9523, *zhuqing.li@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 15, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01102 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Mental Health.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended, for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Mental Health, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Mental Health.

Date: February 11–12, 2013.

Time: 5:00 p.m.–5:00 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Rebecca C. Steiner, Ph.D., Executive Secretary, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9606, Bethesda, MD 20892–9606, 301–443–4525, *steinerr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: January 15, 2013.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–01094 Filed 1–18–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–08]

Notice of Proposed Information Collection: Comment Request; Advance of Escrow Funds

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The information collected on the ''Request for Approval of Advance of Escrow Funds'' form is to ensure that escrowed funds are disposed of correctly for completion of offsite facilities, construction changes, construction cost not paid at final endorsement, noncritical repairs and capital needs assessment. The mortgagor must request withdrawal of escrowed funds through a depository (mortgagee). The HUD staff, Mortgage Credit Examiner, Inspector, and Architect, must use information collected to approve the withdrawal of escrowed funds for each item.

DATES: *Comments Due Date:* February 21, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0018) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposed: Advance of Escrow Funds.

OMB Approval Number: 252–0018.

Form Numbers: HUD–92464.

Description of the Need for the Information and Proposed Use

The information collected on the ''Request for Approval of Advance of Escrow Funds'' form is to ensure that escrowed funds are disposed of correctly for completion of offsite facilities, construction changes, construction cost not paid at final endorsement, noncritical repairs and capital needs assessment. The mortgagor must request withdrawal of escrowed funds through a depository (mortgagee). The HUD staff, Mortgage Credit Examiner, Inspector, and Architect, must use information collected to approve the withdrawal of escrowed funds for each item. 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 2,448. The number of respondents is 2,480, the number of responses is 1,224, the frequency of response is monthly, and the burden hour per response is 2.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 16, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–01188 Filed 1–18–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–09]

Notice of Proposed Information Collection: Comment Request; Multifamily Contractor's Mortgagor's Cost Breakdowns and Certifications

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Contractors use the form HUD–2328 to establish a schedule of values of construction items on which the monthly advances or mortgage proceeds are based. Contractors use the form HUD–92330–A to convey actual construction costs in a standardized format of cost certification. In addition to assuring that the mortgage proceeds have not been used for purposes other than construction costs, HUD–92330–A further protects the interest of the Department by directly monitoring the accuracy of the itemized trades on form HUD–2328. This form also serves as project data to keep Field Office cost data banks and cost estimates current and accurate. HUD–92205A is used to certify the actual costs of acquisition or refinancing of projects insured under Section 223(f) program.

DATES: *Comments Due Date:* February 21, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0044) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov,* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposed: Multifamily Contractor's Mortgagor's Cost Breakdowns and Certifications

OMB Approval Number: 2502–0044.

Form Numbers: HUD–2328, HUD–92330–A, and HUD–92205–A.

Description of the need for the information and proposed use:

Contractors use the form HUD–2328 to establish a schedule of values of construction items on which the monthly advances or mortgage proceeds are based. Contractors use the form HUD–92330–A to convey actual construction costs in a standardized format of cost certification. In addition to assuring that the mortgage proceeds have not been used for purposes other than construction costs, HUD–92330–A further protects the interest of the Department by directly monitoring the accuracy of the itemized trades on form HUD–2328. This form also serves as project data to keep Field Office cost data banks and cost estimates current and accurate. HUD–92205A is used to certify the actual costs of acquisition or refinancing of projects insured under Section 223(f) program.

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 5,840. The number of respondents is 350, the number of responses is 780, the frequency of response is on occasion, and the burden hour per responses is 5.

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 16, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–01181 Filed 1–18–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–07]

Notice of Proposed Information Collection: Comment Request; Debt Resolution Program

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

HUD is required to collect debt owed to the agency. As part of the collection process, demand for repayment is made on the debtor(s). In response, debtors opt to ignore the debt, pay the debt or dispute the debt. Disputes and offers to repay the debt result in information collections. Borrowers who wish to pay less than the full amount due must submit a Personal Financial Statement and Settlement Offer. HUD uses the information to analyze debtors' financial positions and then approve settlements and repayment agreements. Borrowers who wish to dispute must provide information to support their position.

DATES: *Comments Due Date:* February 21, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0483) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov,* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposed: Debt Resolution Program.

OMB Approval Number: 2502–0483.

Form Numbers: HUD–56141, HUD–56142, HUD–56146, HUD–92090.

Description of the Need for the Information and Proposed Use

HUD is required to collect debt owed to the agency. As part of the collection process, demand for repayment is made on the debtor(s). In response, debtors opt to ignore the debt, pay the debt or dispute the debt. Disputes and offers to repay the debt result in information collections. Borrowers who wish to pay less than the full amount due must submit a Personal Financial Statement and Settlement Offer. HUD uses the information to analyze debtors' financial positions and then approve settlements and repayment agreements. Borrowers who wish to dispute must provide information to support their position.

Number of Respondents	194,000.
Estimate Responses per Respondent.	1 every 2 years.
Time (minutes) per respondent.	45.
Total hours to respond	145,500.

Respondent's Obligation: Voluntary.

Status of the proposed information collection: Pending OMB approval.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 16, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–01192 Filed 1–18–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–10]

Notice of Proposed Information Collection: Comment Request; Revitalization Area Designation and Management

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The Department accepts requests from local governments or interested nonprofit organizations to designate specified geographic areas as revitalization areas. A request must describe the nominated area in terms of census block groups.

DATES: *Comments Due Date:* February 21, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0566) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposed: Revitalization Area Designation and Management.

OMB Approval Number: 2502–0566.

Form Numbers: None.

Description of the need for the information and proposed use:

The Department accepts requests from local governments or interested nonprofit organizations to designate specified geographic areas as revitalization areas. A request must describe the nominated area in terms of census block groups.

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 84. The number of respondents is 42, the number of responses is 12, the frequency of response is on occasion, and the burden hour per response is 2.

Status of the proposed information

Status: Extension without change of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 16, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–01178 Filed 1–18–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5694–N–01]

Mortgage and Loan Insurance Programs Under the National Housing Act—Debenture Interest Rates

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

ACTION: Notice.

SUMMARY: This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Administration under the provisions of the National Housing Act (the Act). The interest rate for debentures issued under section 221(g)(4) of the Act during the 6-month period beginning January 1, 2013, is 1⅜ percent. The interest rate for debentures issued under any other provision of the Act is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the 6-month period beginning January 1, 2013, is 2½ percent. However, as a result of an amendment to section 224 of the Act, if an insurance claim relating to a mortgage insured under sections 203 or 234 of the Act and endorsed for insurance after January 23, 2004, is paid in cash, the debenture interest rate for purposes of calculating a claim shall be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years.

FOR FURTHER INFORMATION CONTACT: Yong Sun, Department of Housing and Urban Development, 451 Seventh Street SW., Room 5148, Washington, DC 20410–8000; telephone (202) 402–4778 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section 224 of the National Housing Act (12 U.S.C. 1715o) provides that debentures issued under the Act with respect to an insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4) of the Act) will bear interest at the rate in effect on the date the commitment to insure the loan or mortgage was issued, or the date the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. This provision is implemented in HUD's regulations at 24 CFR 203.405, 203.479, 207.259(e)(6), and 220.830. These regulatory provisions state that the applicable rates of interest will be published twice each year as a notice in the **Federal Register**.

Section 224 further provides that the interest rate on these debentures will be set from time to time by the Secretary of HUD, with the approval of the Secretary of the Treasury, in an amount not in excess of the annual interest rate determined by the Secretary of the Treasury pursuant to a statutory formula based on the average yield of all outstanding marketable Treasury obligations of maturities of 15 or more years.

The Secretary of the Treasury (1) has determined, in accordance with the provisions of section 224, that the statutory maximum interest rate for the period beginning January 1, 2013, is 2½ percent; and (2) has approved the establishment of the debenture interest rate by the Secretary of HUD at 2½ percent for the 6-month period beginning January 1, 2013. This interest rate will be the rate borne by debentures issued with respect to any insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4)) with insurance commitment or endorsement date (as applicable) within the first 6 months of 2013.

For convenience of reference, HUD is publishing the following chart of debenture interest rates applicable to mortgages committed or endorsed since January 1, 1980:

Effective interest rate	On or after	Prior to
9½	Jan. 1, 1980	July 1, 1980
9⅞	July 1, 1980	Jan. 1, 1981
11¾	Jan. 1, 1981	July 1, 1981
12⅞	July 1, 1981	Jan. 1, 1982
12¾	Jan. 1, 1982	Jan. 1, 1983
10¼	Jan. 1, 1983	July 1, 1983
10⅜	July 1, 1983	Jan. 1, 1984
11½	Jan. 1, 1984	July 1, 1984
13⅜	July 1, 1984	Jan. 1, 1985
11⅝	Jan. 1, 1985	July 1, 1985
11⅛	July 1, 1985	Jan. 1, 1986
10¼	Jan. 1, 1986	July 1, 1986
8¼	July 1, 1986	Jan. 1. 1987
8	Jan. 1, 1987	July 1, 1987
9	July 1, 1987	Jan. 1, 1988
9⅛	Jan. 1, 1988	July 1, 1988
9⅜	July 1, 1988	Jan. 1, 1989
9¼	Jan. 1, 1989	July 1, 1989
9	July 1, 1989	Jan. 1, 1990
8⅛	Jan. 1, 1990	July 1, 1990
9	July 1, 1990	Jan. 1, 1991
8¾	Jan. 1, 1991	July 1, 1991
8½	July 1, 1991	Jan. 1, 1992
8	Jan. 1, 1992	July 1, 1992
8	July 1, 1992	Jan. 1, 1993

Effective interest rate	On or after	Prior to
7¾	Jan. 1, 1993	July 1, 1993
7	July 1, 1993	Jan. 1, 1994
6⅝	Jan. 1, 1994	July 1, 1994
7¾	July 1, 1994	Jan. 1, 1995
8⅜	Jan. 1, 1995	July 1, 1995
7¼	July 1, 1995	Jan. 1, 1996
6½	Jan. 1, 1996	July 1, 1996
7¼	July 1, 1996	Jan. 1, 1997
6¾	Jan. 1, 1997	July 1, 1997
7⅛	July 1, 1997	Jan. 1, 1998
6⅜	Jan. 1, 1998	July 1, 1998
6⅛	July 1, 1998	Jan. 1, 1999
5½	Jan. 1, 1999	July 1, 1999
6⅛	July 1, 1999	Jan. 1, 2000
6½	Jan. 1, 2000	July 1, 2000
6½	July 1, 2000	Jan. 1, 2001
6	Jan. 1, 2001	July 1, 2001
5⅞	July 1, 2001	Jan. 1, 2002
5¼	Jan. 1, 2002	July 1, 2002
5¾	July 1, 2002	Jan. 1, 2003
5	Jan. 1, 2003	July 1, 2003
4½	July 1, 2003	Jan. 1, 2004
5⅛	Jan. 1, 2004	July 1, 2004
5½	July 1, 2004	Jan. 1, 2005
4⅞	Jan. 1, 2005	July 1, 2005
4½	July 1, 2005	Jan. 1, 2006
4⅞	Jan. 1, 2006	July 1, 2006
5⅜	July 1, 2006	Jan. 1, 2007
4¾	Jan. 1, 2007	July 1, 2007
5	July 1, 2007	Jan. 1, 2008
4½	Jan. 1, 2008	July 1, 2008
4⅝	July 1, 2008	Jan. 1, 2009
4⅛	Jan. 1, 2009	July 1, 2009
4⅛	July 1, 2009	Jan. 1, 2010
4¼	Jan. 1, 2010	July 1, 2010
4⅛	July 1, 2010	Jan. 1, 2011
3⅞	Jan. 1, 2011	July 1, 2011
4⅛	July 1, 2011	Jan. 1, 2012
2⅞	Jan. 1, 2012	July 1, 2012
2¾	July 1, 2012	Jan. 1, 2013
2½	Jan. 1, 2013	July 1, 2013

Section 215 of Division G, Title II of Public Law 108–199, enacted January 23, 2004 (HUD's 2004 Appropriations Act) amended section 224 of the Act, to change the debenture interest rate for purposes of calculating certain insurance claim payments made in cash. Therefore, for all claims paid in cash on mortgages insured under section 203 or 234 of the National Housing Act and endorsed for insurance after January 23, 2004, the debenture interest rate will be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years, as found in Federal Reserve Statistical Release H–15. The Federal Housing Administration has codified this provision in HUD regulations at 24 CFR 203.405(b) and 24 CFR 203.479(b).

Section 221(g)(4) of the Act provides that debentures issued pursuant to that paragraph (with respect to the assignment of an insured mortgage to the Secretary) will bear interest at the ''going Federal rate'' in effect at the time the debentures are issued. The term ''going Federal rate'' is defined to mean the interest rate that the Secretary of the Treasury determines, pursuant to a statutory formula based on the average yield on all outstanding marketable Treasury obligations of 8- to 12-year maturities, for the 6-month periods of January through June and July through December of each year. Section 221(g)(4) is implemented in the HUD regulations at 24 CFR 221.255 and 24 CFR 221.790.

The Secretary of the Treasury has determined that the interest rate to be borne by debentures issued pursuant to section 221(g)(4) during the 6-month period beginning January 1, 2013, is 1⅜ percent.

The subject matter of this notice falls within the categorical exemption from HUD's environmental clearance procedures set forth in 24 CFR 50.19(c)(6). For that reason, no environmental finding has been prepared for this notice.

Authority: Sections 211, 221, 224, National Housing Act, 12 U.S.C. 1715b, 1715l, 1715o; Section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).)

Dated: January 8, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–01187 Filed 1–18–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–ES–2012–N290; FXES11120400000–134–FF04EF2000]

Endangered and Threatened Wildlife and Plants; Receipt of an Application for an Incidental Take Permit; Availability of Proposed Low-Effect Habitat Conservation Plan; Polk County, FL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comment/information.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of an incidental take permit (ITP) application and a Habitat Conservation Plan (HCP). Palmetto Lake Hamilton–Highway 17, LLC (the applicant) requests an ITP under the Endangered Species Act of 1973, as amended (Act). The applicant anticipates taking about 1.71 acres of sand skink (*Neopseps reynoldsi*) and bluetail mole skink (*Eumeces egregius lividus*) (skinks) foraging, breeding, and sheltering habitat incidental to land preparation and construction of a Dollar General Store, including a storm water retention area and parking lot, in Polk County, Florida (project). The applicant's HCP describes the mitigation and minimization measures proposed to address the effects of the project on the skinks.

DATES: We must receive your written comments on the ITP application and HCP on or before February 21, 2013.

ADDRESSES: See the **SUPPLEMENTARY INFORMATION** section below for information on how to submit your comments on the ITP application and HCP. You may obtain a copy of the ITP application and HCP by writing the South Florida Ecological Services Office, Attn: Permit number TE92046A–0, U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, FL 32960–3559. In addition, we will make the ITP application and HCP available for public inspection by appointment during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth Landrum, Fish and Wildlife Biologist, South Florida Ecological Services Office (see **ADDRESSES**); telephone: 772–469 –4304.

SUPPLEMENTARY INFORMATION:

Submitting Comments

If you wish to comment on the ITP application and HCP, you may submit comments by any one of the following methods:

Email: Elizabeth_Landrum@fws.gov. Use Attn: Permit number ''TE92046A–0'' as your message subject line.

Fax: Elizabeth Landrum, 772–562–4288, Attn.: Permit number ''TE92046A–0.''

U.S. mail: Elizabeth Landrum, South Florida Ecological Services Field Office, Attn: Permit number ''TE92046A–0'', U.S. Fish and Wildlife Service, 1339 20th Street, Vero Beach, FL 32960–3559.

In-person drop-off: You may drop off information during regular business hours at the above office address.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comments, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Applicant's Proposed Project

We received an application from Palmetto Lake Hamilton—Highway 17, LLC (the applicant) for an incidental take permit along with a proposed habitat conservation plan. The applicant requests a 2-year permit under section 10(a)(1)(B) of the Act (87 Stat. 884; 16 U.S.C. 1531 *et seq.*). If we approve the permit, the applicant anticipates taking a total of approximately 1.71 acres (0.69 hectares (ha)) of sand and blue-tailed mole skink breeding, feeding, and sheltering habitat incidental to land preparation and construction of a Dollar General Store, including a storm water retention area and parking lot, in Polk County, Florida. Construction activities associated with the Dollar General Store will take place within Section 21, Township 28S, Range 27E, Polk County, Florida.

The applicant proposes to mitigate for impacts by purchasing approximately 3.42 mitigation bank credits at the Scrub Conservation Bank in Highlands County, Florida, a Bank within the service area of skinks. The Service listed this species as threatened in 1987 (January 21, 1987; 52 FR 2242). The listing became effective December 7, 1987.

Our Preliminary Determination

The Service has made a preliminary determination that the applicant's project, including the mitigation measures, will individually and cumulatively have a minor or negligible effect on the species covered in the HCP. Therefore, issuance of the ITP is a ''low-effect'' project and qualifies as a categorical exclusion under the National Environmental Policy Act (NEPA), as provided by the Department of the Interior Manual (516 DM 2 Appendix 1 and 516 DM 6 Appendix 1). We base our preliminary determination that issuance of the ITP qualifies as a low-effect action on the following three criteria: (1) Implementation of the project would result in minor or negligible effects on federally listed, proposed, and candidate species and their habitats; (2) Implementation of the project would result in minor or negligible effects on other environmental values or resources; and (3) Impacts of the project, considered together with the impacts of other past, present, and reasonably foreseeable similarly situated projects, would not result, over time, in cumulative effects to environmental values or resources that would be considered significant. This preliminary determination may be revised based on our review of public comments that we receive in response to this notice.

Next Steps

The Service will evaluate the HCP and comments submitted thereon to determine whether the applications meet the requirements of section 10(a) of the Act. The Service will also evaluate whether issuance of the section 10(a)(1)(B) ITP complies with section 7 of the Act by conducting an intra-Service section 7 consultation. The results of this consultation, in combination with the above findings, will be used in the final analysis to determine whether or not to issue the ITP. If it is determined that the requirements of the Act are met, the ITP will be issued.

Authority

We provide this notice under Section 10 of the Endangered Species Act (16 U.S.C. 1531 et seq.) and NEPA regulations (40 CFR 1506.6).

Dated: January 15, 2013.

Larry Williams,

Field Supervisor, South Florida Ecological Services Office.

[FR Doc. 2013–01168 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2013–N003; FXES11130600000D2–123–FF06E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species

unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by February 21, 2013.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. Alternatively, you may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (e.g., Permit No. TE–123456).

- *Email: permitsR6ES@fws.gov*. Please refer to the respective permit number (e.g., Permit No. TE–123456) in the subject line of the message.
- *U.S. Mail:* Kris Olsen, Permit Coordinator, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.
- *In-Person Drop-off, Viewing, or Pickup:* Call (303) 236–4256 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kris Olsen, Permit Coordinator Ecological Services, (303) 236–4256 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 et seq.) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and 50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (e.g., Permit No. TE–123456) for the application when submitting comments.

Documents and other information the applicants have submitted with these applications are available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number: TE–89150A

Applicant: Philip Balch, Wildhorse Riverworks, Topeka, Kansas.

The applicant requests a new permit to take (capture, handle, and release) Arkansas River darter (*Notropis girardi*), Neosho madtom (*Noturus placidus*), and Topeka shiner (*Notropis topeka*), in conjunction with habitat restoration activities throughout the range of each species in Kansas, for the purpose of enhancing the species' survival.

Permit Application Number: TE–038527

Applicant: Scott Campbell, University of Kansas, Kansas Biological Survey, Lawrence, Kansas.

The applicant requests a new permit to take (hold, propagate, and reintroduce) Topeka shiner (*Notropis topeka*), in conjunction with recovery activities in Kansas for the purpose of enhancing the species' survival.

Permit Application Number: TE–94140A

Applicant: Shawn Silliman, Chaplin Nature Center, Arkansas City, Kansas.

The applicant requests a new permit to take (survey, capture, and tag) American burying beetle (*Nicrophorus americanus*) in conjunction with surveys and population monitoring activities in Kansas for the purpose of enhancing the species' survival.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*)

Dated: January 4, 2013.

Michael G. Thabault,

Assistant Regional Director, Mountain-Prairie Region.

[FR Doc. 2013–01170 Filed 1–18–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2012–N187; FXRS12650400000S3–123–FF04R02000]

Chassahowitzka National Wildlife Refuge, FL; Final Comprehensive Conservation Plan and Finding of No Significant Impact for the Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of the final comprehensive conservation plan (CCP) and finding of no significant impact for the environmental assessment for Chassahowitzka National Wildlife Refuge (NWR) in Citrus and Hernando Counties, Florida. In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: You may obtain a copy of the CCP by writing to: Mr. Michael Lusk via U.S. mail at Chassahowitzka National Wildlife Refuge, 1502 SE. Kings Bay Drive, Crystal River, FL 34429. Alternatively, you may download the document from our Internet Site, *http://southeast.fws.gov/planning,* under ''Final Documents.''

FOR FURTHER INFORMATION CONTACT: Ms. Mary Morris, at 850–567–6202 (telephone), or *crystalriverCCP@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Chassahowitzka NWR. We

started the process through a notice in the **Federal Register** on June 8, 2009 (74 FR 27173). For more about the refuge and our planning process, please see that notice.

Located about 60 miles north of Tampa, the 30,843-acre Chassahowitzka NWR was established for wintering waterfowl and other migratory birds. In 1976, Congress designated 23,579 acres of the refuge as ''Wilderness.'' Chassahowitzka NWR is managed as a part of the Crystal River National Wildlife Refuge Complex (Complex).

The refuge's diverse ecosystems, including prime estuarine habitat, hosts a myriad and abundance of flora and fauna. The marshlands, swamplands, shallow bays, and tidal streams provide the quantity and quality of aquatic plant and animal life required to support thousands of wintering waterfowl, marsh birds and waterbirds, shorebirds, fishes, and a variety of animal species that depend on a marine environment. The refuge also has 2,560 acres of hardwood swamplands and 250 acres of upland forest. Notable imperiled species include Florida manatees and an experimental population of whooping cranes introduced to the marsh habitats over a decade ago by means of a partnership.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Comments

We made copies of the Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA) available for a 30-day public review and comment period via a **Federal Register** notice on May 11, 2012 (77 FR 27792). We provided over 125 copies of the Draft CCP/EA to individuals or organizations requesting copies. A total of 22 individuals, organizations, and government agencies provided comments on the Draft CCP/EA by U.S. mail or email. Comments were received from many organizations, including Save the Manatee Club, Inc.; United Waterfowlers of Florida, Inc.; Citrus County Airboat Alliance; Southwest Florida Water Management District; Citrus County Planning; City of Crystal River; National Park Service, Planning and Compliance Division, Southeast Region; U.S. Geological Survey; Florida Fish and Wildlife Conservation Commission; Florida Department of State; and the Florida Clearinghouse.

CCP Alternatives, Including our Preferred Alternative

We developed three alternatives for managing the refuge (Alternatives A, B, and C), with Alternative C selected for implementation. This alternative relies on our extensive partnerships and promotes some new ones. We will hire a volunteer coordinator to recruit and train a volunteer corps for every program area. This alternative proposes additional staffing (a total of eight new positions for the Complex) to provide optimal resource protection and management capability. Research will include a broader suite of species, as well as habitat studies to adaptively manage for wildlife populations. The impacts of commercial and visitor use and external threats to the refuge will be studied and the results of those studies applied to refuge management and public use. Upland uses will be promoted though the development of improved facilities and access, and an observation platform and kayak landing will be added to the Dog Island facility.

The addition of key positions, such as a law enforcement officer, the volunteer coordinator, and the biological and computer-mapping technicians, will allow for greater resource study, mapping, data analysis, and enforcement. The hiring of a wildlife specialist and office assistant will support staff and provide a dedicated outreach coordinator. Refuge facilities will be improved for both visitor services and personnel. The existing house that serves as the Complex headquarters will be demolished, and a new headquarters and visitor contact station will be built. We will also construct a pole barn near the maintenance shop in which to store equipment, and will make improvements to the maintenance area and shop. All alternatives provide for ''green'' options, materials, and energy efficiency in the design and construction of new facilities and in equipment replacement.

Authority

This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd et seq.).

Dated: August 17, 2012.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2013–01171 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Santee Sioux Nation—Title XXI—Alcohol, Chapter 1.—Santee Sioux Nation Liquor Control Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Title XXI—Alcohol, Chapter 1.—Santee Sioux Nation Liquor Control Ordinance. The Ordinance regulates and controls the possession, sale and consumption of liquor within the Indian Country of the Santee Sioux Nation. The land is trust land and this Ordinance allows for the possession and sale of alcoholic beverages within the jurisdiction of the Santee Sioux Nation. This Ordinance will increase the ability of the tribal government to control the distribution and possession of liquor within their jurisdiction, and at the same time will provide an important source of revenue, the strengthening of the tribal government and the delivery of tribal services.

DATES: *Effective Date:* This Ordinance is effective January 22, 2013.

FOR FURTHER INFORMATION CONTACT: Danelle Daugherty, Tribal Government Officer, Great Plains Regional Office, Bureau of Indian Affairs, 115 4th Avenue SE., Aberdeen, South Dakota 57401, Phone: (605) 226–7376; Fax: (605) 226–7379: or De Springer, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street NW., MS–4513–MIB, Washington, DC 20240; Telephone (202) 513–7640.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713

(1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transactions in Indian country. The Santee Sioux Tribal Council adopted this Ordinance by Resolution No. FY2013–12 on December 17, 2012.

This notice is published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs. I certify that the Santee Sioux Tribal Council duly adopted Title XXI—Alcohol, Chapter 1.—Santee Sioux Nation Liquor Control Ordinance by Resolution No. FY2013–12 on December 17, 2012.

Dated: January 16, 2013.

Kevin K. Washburn

Assistant Secretary—Indian Affairs.

The Santee Sioux Nation's Title XXI—Alcohol, Chapter 1—Santee Sioux Nation Liquor Control Ordinance shall read as follows:

Section 1. Title

This Chapter of Title XXI of the Santee Sioux Nation Law and Order Code shall be known as the ''Santee Sioux Nation Liquor Control Ordinance.''

Section 2. Authority

This Ordinance is enacted pursuant to the Act of August 15, 1953, 67 Stat. 586, codified at 18 U.S.C. Sec. 1161, by the authority of the Santee Sioux Tribal Council under the Constitution and Bylaws of the Santee Sioux Nation, Article IV, Sections 1(i) and (q).

Section 3. Revocation of Prior Ordinance

All ordinances and resolutions of the Santee Sioux Nation regulating, authorizing, prohibiting, or in any wise dealing with the sale of liquor heretofore enacted or now in effect, including but not limited to all prior versions of the Santee Sioux Nation Liquor Control Ordinance, are hereby repealed and of no further force and effect.

Section 4. General Purpose

The purpose of this Ordinance is to provide civil laws for the Tribal regulation and control of liquor within the Santee Sioux Nation Reservation. This law is enacted to regulate the sale and distribution of liquor and beer products on all properties within the limits of the Santee Sioux Nation Reservation, and to generate revenue needed for Tribal programs and services. It is the legislative intent of the Tribal Council that all violations of this Ordinance, whether committed by Tribal members, non-member Indians, or non-Indians be considered civil in nature rather than criminal.

Section 5. Declaration of Public Policy and Purposes

A. The introduction, possession, and sale of liquor on the Santee Sioux Nation Reservation are matters of special concern to the Santee Sioux Nation.

B. Federal law prohibits the introduction of liquor into Indian Country (18 U.S.C. Sec. 1154 and other statutes), except as provided therein, and expressly affirms and delegates to Tribes the governmental authority to regulate and control liquor on Indian Reservations. (18 U.S.C. Sec. 1161)

C. It is in the best interests of the Nation to enact a Tribal Ordinance governing liquor sales on the Reservation which provides for exclusive purchase, distribution, and sale of liquor only on Tribal lands within the exterior boundaries of the Reservation. Further, the Nation has determined and hereby requires that said purchase, distribution, and sale shall take place only at Tribally-owned gaming facility complexes and other Tribally-owned enterprises.

Section 6. Definitions

A. As used in the title, these words shall have the following meanings unless the context clearly requires otherwise.

1. ''Alcohol'' means that substance known as ethyl alcohol, hydrated oxide of ethyl, alcohol, ethanol, or spirits of wine, from whatever source or by whatever process produced.

2. ''Bar'' means any establishment with special space and accommodations for the sale of liquor by the glass and for consumption on the premises.

3. ''Beer'' means any alcoholic beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain or cereal in water.

4. ''Liquor'' includes all fermented, spirituous, vinous, or malt liquor or combinations thereof, and mixed liquor a part of which is fermented, and every liquid or solid or semisolid or other substance, patented or not, containing distilled or rectified spirits, potable alcohol, beer, wine, brandy, whiskey, rum, gin, aromatic bitters, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption and any liquid, semisolid, solid, or other substances, which contain alcohol.

5. ''Liquor Store'' means any store at which liquor is sold and, for the purpose of this Ordinance, including stores only a portion of which are devoted to sale of liquor.

6. ''Malt Liquor'' means beer, strong beer, ale, stout and porter.

7. ''Nation'' means the Santee Sioux Nation.

8. ''Package'' means any container or receptacle used for holding liquor.

9. ''Person'' means any natural person, firm, partnership, joint venture association, corporation, municipal corporation, estate, trust, business receiver, or any group or combination acting as a unit and the plural as well as the singular in number.

10. ''Public Place'' includes State, County, Tribal or Federal highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; soft drink establishments, public buildings, public meeting halls, lobbies, halls and dining room of hotels, restaurants, theaters, gaming facilities, entertainment centers, stores, garages, and filling stations which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access; public conveyances of all kinds and character; and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the public.

11. ''Reservation'' means all territory within the exterior boundaries of the area recognized as the Santee Sioux Nation's Reservation and all current land and future acquired land which is located outside of said boundaries over which it is possible to extend the Nation's jurisdiction or authority, including, without limitation, fee lands, territory consisting of Indian country of the Nation or of its members, and all property held by the United States in trust for the Nation or for a member of the Nation.

12. ''Sale'' and ''Sell'' include exchange, barter and traffic, and also include the selling or supplying or distributing of liquor, by any means whatsoever, by any person to any person.

13. ''Spirits'' means any beverage which contains alcohol obtained by distillation, including wines exceeding seventeen percent of alcohol by weight.

14. ''Tribal Council'' means the governing body of the Santee Sioux Nation.

15. ''Tribal Court'' means the Santee Sioux Nation Tribal Court.

16. ''Wine'' means any alcoholic beverage obtained by fermentation of the natural contents of fruits, vegetables,

honey, milk or other products containing sugar, whether or not other ingredients are added during or after fermentation, and containing not more than seventeen percent of alcohol by weight, including sweet wines fortified with wine spirits, such as port, sherry, muscatel and angelica, not exceeding seventeen percent of alcohol by weight.

Section 7. Rules, Regulations and Enforcement

A. It shall be a violation of this Ordinance for any person:

1. To in any manner introduce, sell, offer for sale, distribute, transport, consume, use or possess liquor on the Reservation except as expressly permitted by this Ordinance;

2. To buy liquor on the Reservation from any person other than a Tribally-licensed and Tribally-owned gaming facility complex or other Tribally-licensed and Tribally-owned enterprise;

3. Engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant, or employee of such person, to permit any person to drink liquor in any public conveyance or for any person to consume liquor in a public conveyance;

4. Under the age of 21 years to consume, acquire or have in possession any liquor. No person owning or controlling a premises shall permit any other person under the age of 21 to consume liquor on such premises except as expressly exempted by this Ordinance;

5. To sell or provide any liquor to any person under the age of 21 years;

6. To transfer in any manner an identification of age to a person under the age of 21 years for the purpose of permitting such person to obtain liquor; provided, that there is corroborative testimony of a witness other than the underage person;

7. To attempt to purchase liquor through the use of false or altered identification which falsely purports to show the individual as being over the age of 21 years; or

8. To possess, introduce or consume liquor at a place or premises that is or would be considered a public, common or other nuisance under any Tribal, State or Federal statutory or common law.

B. Any person who promotes any activity or owns or controls land on which there is any activity that is a violation of this Ordinance shall be liable for and subject to the same penalties and proceedings as the person who directly commits the violation.

C. Any person who commits a violation of this Ordinance shall be liable to pay the Nation up to $5,000 per violation as civil penalties.

D. When requested by the provider of liquor, every person shall be required to present official documentation of the bearer's age, signature, and photograph. Official documentation includes one of the following:

1. Driver's license or identification card;

2. United States Active Duty Military card; or

3. Passport.

E. Liquor which is possessed contrary to the terms of this Ordinance is declared to be contraband. Any Tribal agent, employee, or officer who is authorized by the Tribal Council to enforce this Ordinance shall seize all contraband and preserve it in accordance with the provisions established for the preservation of impounded property. Upon being found in violation of the Ordinance, the party shall forfeit all right, title and interest in the items seized which shall become the property of the Nation.

Section 8. Abatement

A. Any room, house, building, vehicle, structure, land, or other place where liquor is sold, manufactured, bartered, exchanged, given away, furnished, consumed or possessed or otherwise disposed of in violation of the provisions of this Ordinance or of any other Tribal law, and all property kept in and used in maintaining such place, is hereby declared to be a nuisance.

B. The Chairman of the Tribal Council or, if the Chairman fails or refuses to do so, by a majority vote, the Tribal Council may institute and maintain an action in the Tribal Court in the name of the Nation to abate and perpetually enjoin any nuisance declared under this Article. In addition to other remedies at Tribal law, depending upon the severity of past offenses, the risk of offenses in the future, the effect of the violator's activity on public health, safety or welfare and any other appropriate criteria, the Tribal Court may order the room, house, building, vehicle, structure, land, or place closed or it may require the owner, lessee, tenant, or occupant thereof to give bond payable to the Nation, of sufficient sum and conditioned that liquor will not be thereafter manufactured, kept, sold, bartered, exchanged, given away, furnished, possessed, consumed, or otherwise disposed of in violation of the provisions of this Ordinance or of any other applicable Tribal law and that such person will pay all penalties, fees, costs, and damages assessed against him for any violation of this Ordinance or other Tribal laws. If any conditions of the bond be violated, the bond may be applied to satisfy any amounts due to the Nation. No order or injunction closing any business for a violation of this Ordinance shall be issued without granting the opportunity to have a full evidentiary and adversary hearing.

C. In all cases where any person has been found in violation of this Ordinance, an action may be brought to abate as a nuisance any real estate or other property involved in the violation of the Ordinance, and violation of this Ordinance shall be prima facie evidence that the room, house, building, vehicle, structure, land or place against which such action is brought is a public nuisance.

Section 9. Powers of Enforcement

A. In furtherance of this Ordinance, the Tribal Council shall have the following powers and duties:

1. To publish and enforce rules and regulations governing liquor on the Reservation;

2. To employ managers, accountants, security personnel, inspectors and such other persons as shall be reasonably necessary to allow the Tribal Council to perform its functions;

3. To issue licenses permitting the sale, manufacture or distribution of liquor on the Reservation;

4. To bring proceedings in the Tribal Court or other appropriate forum to enforce this Ordinance as necessary;

5. To seek penalties, taxes, damages, fees, and other appropriate remedies, orders and injunctions for the violation of this Ordinance;

6. To make such reports as may be required; and

7. To collect taxes and fees levied or set by the Tribal Council and to keep accurate records, books, and accounts.

B. In the exercise of its powers and duties under this Ordinance, the Tribal Council and its individual members shall not:

1. Accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor or from any licensee;

2. Waive the immunity of the Nation from suit without the express written consent and resolution of the Tribal Council.

C. *Inspection Rights.* All premises on which liquor is sold, consumed, possessed, or distributed shall be open for inspection by the Tribal Council or its designee at all reasonable times for the purpose of ascertaining whether the rules and regulations of the Tribal Council and this Ordinance are being complied with.

D. *Hearings and Appeals.* Violations of this Ordinance shall be deemed a

civil offense against the Nation. Civil actions by the Nation against violators may proceed in hearings initiated and held by the Nation's Tax Commissioner or other hearing officer designated by Tribal Council. Any such civil proceeding shall comply with all due process requirements of the Indian Civil Rights Act. The Tax Commissioner or the designee may impose penalties, damages, costs, taxes and attorneys' fees and take any other actions reasonably necessary to carry out this Ordinance. Liabilities imposed under this Ordinance shall be a lien upon the violator's property located on the Reservation until paid and may be enforced and executed upon through the Tribal Court. Orders issued hereunder may be appealed to Tribal Court and considered under the arbitrary and capricious standard of review.

Section 10. Sales of Liquor

A. *License Required.* Sales of liquor on the Reservation may only be made at businesses which hold a Santee Sioux Nation Liquor License.

B. *Sales for Cash.* All liquor sales on the Reservation shall be on a cash only basis and no credit shall be extended to any person, organization, or entity, except that the provision does not prevent the payment for purchases with use of credit cards such as Visa, MasterCard, American Express, etc.

C. *Sale for Personal Consumption.* All sales shall be for the personal use and consumption of the purchaser. Resale of any liquor on the Reservation is prohibited. Any person (including but not limited to any Tribally-owned enterprise) who is not licensed pursuant to this Ordinance and who purchases liquor on the Reservation and sells it, whether in the original container or not, shall violate this Ordinance.

Section 11. Licensing

A. *Procedure.* In order to control the consumption of liquor and the proliferation of establishments on the Reservation which sell or serve liquor by the bottle or by the drink, all Tribally-owned enterprises which desire to sell liquor on the Reservation must apply to the Nation for a license.

B. *Application.* Any Tribally-owned enterprise applying for a license to sell or serve liquor on the Reservation must fill in the application provided for this purpose by the Nation and pay such application fee as may be set from time to time by the Tribal Council for this purpose. Said application must be filled out completely in order to be considered.

C. *Issuance of License.* The Tribal Council may issue a license if it believes that such issuance is in the best interests of the Nation. This Ordinance permits Tribally-licensed liquor sales and consumption at gaming facility complexes and other Tribally-owned enterprises on the Reservation. Issuance of a license for any other purposes will not be considered to be in the best interests of the Nation.

D. *Period of License.* Each license may be issued for a period not to exceed two (2) years from the date of issuance.

E. *Renewal of License.* A licensee may renew its license if the licensee has complied in full with this Ordinance, provided however that the Tribal Council may refuse to renew a license if it finds that doing so would not be in the best interests of the health and safety of the Nation.

F. *Revocation of License.* The Tribal Council may suspend or revoke a license due to one or more violations of this Ordinance upon notice and hearing at which the licensee is given an opportunity to respond to any charges against it and to demonstrate why the license should not be suspended or revoked.

G. *Hearings.* Within 15 days after a licensee is mailed written notice of a proposed suspension or revocation of the license, of the imposition of penalties or of other adverse action proposed by the Tribal Council under this Ordinance, the licensee may deliver to the Tribal Council a written request for hearing on whether the proposed action should be taken. A hearing on the issues shall be held before a person or persons appointed by the Tribal Council and a written decision will be issued. Such decisions will be considered final unless an appeal is filed exclusively with the Tribal Court within 15 days of the date of mailing the decision to the licensee. The Tribal Court will then conduct a hearing and will issue an order using an arbitrary and capricious standard of review. All proceedings conducted under this and any other sections of this Ordinance shall be in accordance with due process of law. The responsibility, duty, and burden shall be on the licensee to keep its address for receiving adverse actions or decisions updated and available to the Tribal Council and to accept any certified mail from the Tribe or its designee for the purposes of communicating such adverse actions or decisions.

H. *Non-transferability of Licenses.* Licenses issued by the Tribal Council shall not be transferable and may only be utilized by the person or entity in whose name it was issued.

Section 12. Taxes

A. *Sales Tax.* The Tribal Council shall have the authority, as may subsequently be specified under Tribal law, to levy and to collect a tax on each retail sale of liquor on the Reservation based upon a percent of the retail sales price. All taxes from the sale of liquor on the Reservation shall be paid over to the General Treasury of the Nation.

B. *Taxes Due.* All taxes for the sale of liquor on the Reservation are due on the 15th day of the month following the end of the calendar quarter for which the taxes are due or on such other dates as specified by Tribal regulation.

C. *Delinquent Taxes.* Past due taxes shall accrue interest at 2% per month.

D. *Reports.* Along with payment of the taxes imposed herein, the taxpayer shall submit a quarterly accounting of all income from the sale or distribution of liquor, as well as for the taxes collected.

E. *Audit.* As a condition of obtaining a license, the licensee must agree to the review or audit of its book and records relating to the sale of liquor on the Reservation. Said review or audit may be done periodically by the Nation or through its agents or employees whenever, in the opinion of the Tribal Council, such a review or audit is necessary to verify the accuracy of reports.

Section 13. Revenue

Revenue collected under this Ordinance, from whatever source, shall be expended for administrative costs incurred in the enforcement of this Ordinance. Excess funds shall be subject to appropriation by the Tribal Council for governmental and social services, including, but not limited to, education, prevention and treatment programs to fight alcohol abuse on the Reservation.

Section 14. Exceptions

A. The introduction, distribution, transport, consumption, sale, offer for sale, use, consumption and possession of liquor is permitted:

1. For consumption at a gaming facility complex or other Tribally-owned enterprise;

2. For scientific research or manufacturing products other than liquor;

3. For medical use under the direction of a physician, medical or dental clinic, or hospital;

4. For preparations not fit for human consumption such as cleaning compounds and toilet products, and for flavoring extracts; or

5. For sacramental use such as wines delivered to priests, rabbis, and ministers.

B. The introduction, distribution, transport, consumption, use and possession of liquor for personal consumption by a person legally present on private, non-commercial property are permitted, subject to applicable Tribal law.

C. These exceptions shall be narrowly construed.

Section 15. Compliance with 18 U.S.C. 1161

The Nation will comply with Nebraska liquor laws to the extent required by 18 U.S.C. 1161.

Section 16. Severability and Effective Date

A. If any provision or application of this Ordinance is determined by review to be invalid, such determination shall not be held to render ineffectual the remaining portions of this Ordinance or to render such provisions inapplicable to other persons or circumstances.

B. This Ordinance is effective immediately upon publication in the **Federal Register**.

Section 17. Amendment and Construction

A. This Ordinance may only be amended by a vote of the Tribal Council or as otherwise allowed by Tribal law and all such amendments shall not be effective until thirty days after the date of publication in the **Federal Register**.

B. Nothing in this Ordinance shall be construed to diminish or impair in any way the rights or sovereign powers of the Nation or Tribal government.

[FR Doc. 2013–01268 Filed 1–18–13; 8:45 am]

BILLING CODE 4310–4J–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZ910000.L13400000.DT0000. LXSS058A0000]

Notice of Availability of the Restoration Design Energy Project Record of Decision/Approved Resource Management Plan Amendments, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM) announces the availability of the Restoration Design Energy Project (RDEP) Record of Decision (ROD)/approved Resource Management Plan (RMP) amendments for BLM-administered lands in Arizona. The Arizona State Director signed the ROD on January 18, 2013, which constitutes the BLM's final decision and makes the approved RMP amendments effective immediately.

ADDRESSES: Copies of the ROD/approved RMP amendments are available upon request from the BLM, Arizona State Office, One North Central Avenue, Suite 800, Phoenix, AZ 85004–4427 or via the Internet at *http://www.blm.gov/az/st/en/prog/energy/arra_solar.htm.* Copies of the ROD/approved RMP amendments are also available for public inspection at the Arizona State Office.

FOR FURTHER INFORMATION CONTACT: Kathy Pedrick, BLM Project Manager; telephone: 602–417–9235; mail: One North Central Avenue, Suite 800, Phoenix, AZ 85004–4427; or email: *az_arra_rdep@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The RDEP supports the Secretary of the Interior's goals to build America's new energy future and to protect and restore treasured landscapes. The purpose of the RDEP was to conduct statewide planning that fosters environmentally responsible development of renewable energy and allows the permitting of future renewable energy development projects to proceed in a more efficient and standardized manner. The RDEP ROD identifies geographic areas best suited for renewable energy development and establishes a baseline set of environmental protection measures for such projects. A total of 192,100 acres are identified as Renewable Energy Development Areas (REDAs) in the ROD/approved RMP amendments.

The following BLM RMPs are amended through the RDEP ROD to incorporate the identification of REDAs and environmental protection measures, as appropriate: Bradshaw-Harquahala RMP (2010); Arizona Strip Field Office RMP (2008); Kingman Resource Area RMP (1995); Lake Havasu Field Office RMP (2007); Lower Sonoran RMP (2012); Phoenix RMP (1988); Safford District RMP (1991); and Yuma Field Office RMP (2010). Additionally, the BLM is amending the Yuma Field Office RMP through this ROD to designate the Agua Caliente Solar Energy Zone (SEZ), identify SEZ-specific design features, change the Visual Resource Management (VRM) class from VRM class III to VRM class IV for lands within the 2,550-acre SEZ, and remove the Special Recreation Management Area designation and Wildlife Habitat Management Area allocations from within the SEZ.

The preferred alternative as described in the RDEP Draft Environmental Impact Statement (EIS) was carried forward with some modifications into the Final EIS/proposed RMP amendments, published in the **Federal Register** on October 26, 2012 (77 FR 65401) and November 2, 2012 (77 FR 66183). There are no appealable decisions within the ROD/approved RMP amendments.

The BLM did not receive any protest letters on the RDEP Final EIS/proposed RMP amendments. However, the BLM Arizona State Director did receive four comment letters on the RDEP Final EIS; the comments were reviewed for content, and the ROD includes a discussion of the clarifications made as a result of the comment letters.

No inconsistencies with State or local plans, policies, or programs were identified during the Governor's consistency review of the RDEP Final EIS/proposed RMP amendments. The approved RMP amendments are the same as Alternative 6 described in the RDEP Final EIS/proposed RMP amendments with only minor editorial modifications made in preparing the ROD/approved RMP amendments. The ROD/approved RMP amendments can be accessed at the RDEP Web site: *http://www.blm.gov/az/st/en/prog/energy/arra_solar.htm.*

Authority: 40 CFR 1505.2 and 43 CFR 1610.5–1.

Raymond Suazo,

Arizona State Director.

[FR Doc. 2013–01193 Filed 1–18–13; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAK930000 L16100000.DU0000.12XL]

BLM Director's Response to the Alaska Governor's Appeal of the BLM Alaska State Director's Governor's Consistency Review Determination

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) is publishing this notice to explain why the BLM Director is rejecting the Alaska Governor's recommendations regarding the Environmental Assessment and Finding

of No Significant Impact for the Delta River Special Recreation Management Area (SRMA) Plan and East Alaska Resource Management Plan (EARMP) Amendment.

FOR FURTHER INFORMATION CONTACT: Joe Stout, Division Chief for Decision Support, Planning and NEPA, telephone 202–912–7275; address 1849 C Street NW., Room 2134LM, Washington, DC 20240; email *j2stout@blm.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours. A copy of the Delta River SRMA Plan and EARMP are available on the BLM-Alaska Web site at: *www.blm.gov/ak.*

SUPPLEMENTARY INFORMATION: On July 25, 2011, the BLM released the Environmental Assessment (EA) and Finding of No Significant Impact for the Delta River SRMA Plan and the EARMP Amendment. On September 20, 2011, the Governor of Alaska submitted a Governor's Consistency Review Finding of Inconsistency for the EA and Finding of No Significant Impact for the Delta River SRMA Plan and EARMP Amendment (Finding) to the BLM Alaska State Director. The State Director determined the Governor's Finding was outside the scope of the Governor's Consistency Review process and did not accept the Governor's recommendations. A written response was sent to the Governor on March 28, 2012, addressing issues raised in the Governor's Finding, and informing him of clarifications made to the BLM's Decision Record for the project.

On April 27, 2012, the Governor appealed the State Director's decision not to accept his recommendations to the BLM Director. The BLM Director issued a final response to the Governor affirming the State Director's decision and made minor revisions to the final decision record for the project to address some of the Governor's concerns. Pursuant to 43 CFR 1610.3–2, the substantive portions of the Director's response to the Governor are printed as follows.

''Your letter contained an April 27, 2012, appeal of the BLM Alaska State Director's response to your Finding of Inconsistency for the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the Delta River Special Recreation Management Area (SRMA) Plan and East Alaska Resource Management Plan Amendment Plan (EARMP). Your letter also responded to the Director's Protest Resolution Report, dated December 9, 2011. I have carefully considered your appeal and response, and associated recommendations. A detailed response to the issues raised is enclosed; you will note that we have adopted several of your recommendations as part of the Protest Resolution Process.

In response to your appeal, under the Federal Land Policy and Management Act (FLPMA) and its implementing regulations, the scope of the appeal process is narrow, as is the Governor's Consistency Review process. Pursuant to 43 CFR 1610.3–2(e), in reviewing your appeal, I must first consider whether you have raised actual inconsistencies with State or local plans, policies, or programs. If such inconsistencies are raised, I would then consider whether your recommendations address the inconsistencies and provide for a reasonable balance between the national interest and the State of Alaska's interest.

Your appeal states that the Plan does not comply with the requirement of 43 CFR 1610.3–2(a) and (b) for BLM land use plans to be consistent with the purposes, policies and programs of Federal laws and regulations applicable to public lands. The appeal maintains your position that the Plan does not meet this standard because it is inconsistent with various provisions of the Alaska National Interest Lands Conservation Act (ANILCA) and its implementing regulations, as well as the Wild and Scenic Rivers Act. The consistency review and appeal process, as set forth in 43 CFR 1610.3–2(d) and (e) applies to the identification of known inconsistencies with State or local plans, policies, or programs. After carefully considering the points raised in the appeal, I have concluded that the appeal has not identified any known inconsistencies with State or local plans, policies, or programs. Therefore, I affirm the BLM Alaska State Director's response to your Finding of Inconsistency.

Also, please note that BLM Assistant Director Edwin Roberson, on my behalf, gave due consideration to several of the State's concerns with the Plan in the December 9, 2011, Director's Protest Resolution Report, as reflected in his letter to the Alaska Attorney General's Office, dated March 28, 2012. I refer you to the findings in the Director's Protest Resolution Report for the BLM response to these concerns. The Report can be found at: *http://www.blm.gov/wo/st/en/prog/planning/planning_overview/protest_resolution/protestreports.html.*''

The following attachment also was provided as part of the response:

BLM Response to Issues Raised by Governor Sean Parnell

1. *Recommending the public refrain from legally allowed activities is inconsistent with ANILCA Section 1110 and Department of the Interior implementing regulations at 36 CFR 36.11.*

While the BLM intends to manage certain segments of the Delta River Special Recreation Management Area to afford opportunities for nonmotorized user experiences, your concerns regarding the BLM recommending that the public refrain from motorized boating and airplane landings are duly noted. As described in the Director's Protest Resolution Report, the BLM has decided to remove motorized boating and airplane landings as ''outcomes to be avoided'' for the Tangle Lakes Zone 1 RMZ and the Delta River Zone 4 RMZ. If in the future the BLM finds that such use would be detrimental to the resource values of the area, the BLM will take action under 43 CFR 36.11(h) or other applicable law to restrict such activities.

2. *Group size limitations must be implemented by regulation consistent with ANILCA Section 1110(a) and Department of the Interior implementing regulation at 43 CFR 36.11.*

Camp group size limits do not fall within the scope of Section 1110(a) of ANILCA. Section 1110(a) and its implementing regulation 43 CFR 36.11 solely pertain to methods of transportation. The BLM's establishment of the group size limit allows the BLM authorized officer to permit exceptions for larger groups where appropriate, and is consistent with Section 302(b) of FLPMA, which provides the Secretary of the Interior with authority to regulate such uses through published rules or other instruments as the Secretary deems appropriate.

3. *Following the direction in ANILCA Section 810 to determine whether subsistence access restrictions need to be implemented by regulation pursuant to ANILCA Section 811 is a misinterpretation of ANILCA and is inconsistent with the regulatory process followed by other Department of the Interior land management agencies.*

I agree that the BLM Alaska State Director's response did not clearly differentiate between Sections 810 and 811 of ANILCA. The BLM will clarify that the standard found in 810 does not apply to 811 in the Decision Record and the Final Special Recreation Management Area Plan/Plan Amendment. Furthermore, while there is no need at this time to issue regulations implementing ANILCA Section 811, the BLM will continue to strive to be consistent with other Federal land management agencies in this regard.

4. *The Plan did not follow the cited Interagency Wild and Scenic Rivers Coordinating Council process to determine outstandingly remarkable values for the Delta Wild and Scenic River.*

As noted in Section 2.2.1 of the Plan, the BLM followed the Interagency Wild and

Scenic River Coordinating Council process and other relevant guidance in determining the River's outstandingly remarkable values. For each value considered, the BLM determined that the entire State of Alaska was the geographic region for which the value was evaluated and compared for purposes of determining its significance.

Authority: 43 CFR 1610.3–2(e).

Janine Velasco,

Acting Deputy Director, Operations.

[FR Doc. 2013–01200 Filed 1–18–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed collection authority for the exemption of coal extraction incidental to the extraction of other minerals. This information collection activity was previously approved by the Office of Management and Budget (OMB), and assigned clearance number 1029–0089.

DATES: Comments on the proposed information collection must be received by March 25, 2013, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave. NW., Room 203—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov*.

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request and explanatory information contact John Trelease at (202) 208–2783 or email at *jtrelease@osmre.gov*.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies an information collection that OSM will be submitting to OMB for approval. This collection is contained in 30 CFR Part 702—Exemption for Coal Extraction Incidental to the Extraction of Other Minerals. The information submitted by respondents is required to obtain a benefit. OSM will request a 3-year term of approval for this information collection activity.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany OSM's submission of the information collection request to OMB.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Title: 30 CFR Part 702—Exemption for Coal Extraction Incidental to the Extraction of Other Minerals.

OMB Control Number: 1029–0089.

Summary: This Part implements the requirement in Section 701(28) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which grants an exemption from the requirements of SMCRA to operators extracting not more than 16⅔ percentage tonnage of coal incidental to the extraction of other minerals. This information will be used by the regulatory authorities to make that determination.

Bureau Form Number: None.

Frequency of Collection: Once and annually thereafter.

Description of Respondents: Producers of coal and other minerals and State regulatory authorities.

Total Annual Responses: 120.

Total Annual Burden Hours: 586.

Total Non-wage Costs: $1,200.

Dated: January 14, 2013.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2013–01149 Filed 1–18–13; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–929–931 (Second Review)]

Silicomanganese From India, Kazakhstan, Venezuela: Notice of Commission Determination To Conduct Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on silicomanganese from India, Kazakhstan, and Venezuela would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* January 4, 2013.

FOR FURTHER INFORMATION CONTACT: Angela M.W. Newell (202–708–5409), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this review may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On January 4, 2013, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that the domestic interested party group response to its notice of institution (77 FR 59970, October 1, 2012) was adequate and that the respondent interested party group response with respect to the review on subject imports from Venezuela was adequate, and

decided to conduct a full review of the antidumping duty order on imports of silicomanganese from Venezuela. The Commission found that the respondent interested party group responses with respect to the reviews on subject imports from India and Kazakhstan were inadequate. Notwithstanding this, the Commission determined to conduct full reviews of the antidumping duty orders on imports of silicomanganese from India and Kazakhstan to promote administrative efficiency in light of its decision to conduct a full review with respect to the order on subject imports from Venezuela. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: January 15, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–01089 Filed 1–18–13; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–813]

Investigations: Terminations, Modifications and Rulings: Certain Electronic Devices With Graphics Data Processing Systems, Components Thereof, and Associated Software

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (Order No. 32) terminating the above-captioned investigation in its entirety based upon a settlement agreement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone 202–205–2661. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on November 14, 2011, based on a complaint filed by S3 Graphics Co., Ltd., of Grand Cayman Islands, British West Indies, and S3 Graphics, Inc., of Fremont, California (collectively, ''S3G''). 76 FR 70490 (Nov. 14, 2011). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices with graphics data processing systems, components thereof, and associated software, by reason of infringement of various claims of four United States patents. The notice of investigation named Apple Inc. of Cupertino, California (''Apple''), as the only respondent.

On November 19, 2012, S3G and Apple filed a joint motion to terminate the investigation based upon a settlement agreement. On December 7, 2012, S3G and Apple supplemented their motion. On December 12, 2012, the Commission investigative attorney filed a response supporting the motion to terminate.

On December 13, 2012, the ALJ granted the motion and issued an initial determination (''ID'') terminating the investigation in its entirety. The ALJ found that termination of the investigation based upon an alternative method of dispute resolution is generally in the public interest. The ALJ further found that granting the motion would not be contrary to the public interest. No petitions for review of the ID were filed.

The Commission has determined not to review the ID. The investigation is terminated.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

Issued: January 15, 2013.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–01090 Filed 1–18–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Resource Conservation and Recovery Act and Clean Air Act

On January 14, 2013, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of the Virgin Islands in the lawsuit entitled *United States* v. *Government of the Virgin Islands, et al.,* Civil Action No. 3:10–cv–48.

In this action the United States seeks, among other things, injunctive relief and civil penalties for the failure by the Government of the Virgin Islands (''GVI'') and the Virgin Islands Waste Management Authority (''WMA'') to operate the Anguilla Landfill on St. Croix in compliance with the Resource Conservation and Recovery Act (''RCRA'') and the Clean Air Act (''CAA''). The proposed Consent Decree provides for the GVI and WMA to: (a) Operate and maintain the landfill in accordance with RCRA; (b) construct and operate a landfill gas collection and combustion system (GCCS); (c) construct and operate a storm water collection system; (d) install groundwater monitoring wells; (e) implement closure of the landfill in phases beginning in 2014; (f) remove and dispose of off-site used tires remaining at the landfill; (g) remove and dispose of off-site scrap metal remaining at the landfill; (h) remediate the soils in the former scrap metal storage area; (i) construct and operate a scrap metal management facility; (j) implement a waste diversion/recycling program; and (k) pay a civil penalty of $50,000.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Government of the Virgin Islands, et al.,* D.J. Ref. No. 90–5–2–1–08776. All comments must be submitted no later than 30 days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments—	Send them to—
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $11.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Ronald G. Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–01103 Filed 1–18–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. *Oklahoma State Chiropractic Independent Physicians Association and Larry M. Bridges;* Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the Northern District of Oklahoma in *United States of America* v. *Oklahoma State Chiropractic Independent Physicians Association and Larry M. Bridges,* Civil Case No. 13–CV–21–TCK–TLW. On January 10, 2013, the United States filed a Complaint alleging that the Defendants and other competing chiropractors in Oklahoma formed a conspiracy to gain more favorable fees and other contractual terms by agreeing to coordinate their actions, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, filed at the same time as the Complaint, enjoins the Defendants from establishing prices or terms for chiropractic services.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the Northern District of Oklahoma. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Peter J. Mucchetti, Chief, Litigation I Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530 (telephone: 202–307–0001).

Patricia A. Brink,

Director of Civil Enforcement.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) UNITED STATES OF AMERICA,

Plaintiff,

v.

(1) OKLAHOMA STATE CHIROPRACTIC INDEPENDENT PHYSICIANS ASSOCIATION and (2) LARRY M. BRIDGES,

Defendants.

Case No 13–CV–21–TCK–TLW

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants Oklahoma State Chiropractic Independent Physicians Association (''OSCIPA'') and Larry M. Bridges to obtain equitable and other relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiff alleges:

I. NATURE OF THE ACTION

1. Defendant OSCIPA is an association of approximately 350 chiropractors who compete with each other in the sale of chiropractic services. OSCIPA's members comprise approximately 45 percent of all chiropractors practicing in Oklahoma. Defendant Bridges is OSCIPA's executive director and manages all of OSCIPA's activities, including OSCIPA's contracting with health insurers, health-care provider rental networks, and other payers (collectively ''payers''), and handles many of OSCIPA's communications with its members.

2. Since at least 1997, all of OSCIPA's members have entered into membership agreements with OSCIPA that give OSCIPA the right to collectively negotiate rates on its members' behalf with payers. Since at least 2004, OSCIPA's membership agreements require its members to suspend all of their pre-existing contracts with those payers with which OSCIPA negotiates contracts.

3. From 2004 to 2011, on behalf of all OSCIPA's members, Defendants negotiated contracts with at least seven payers that set the prices and price-related terms between OSCIPA's members and those payers. Defendants' conduct has raised the prices of chiropractic services and decreased the availability of chiropractic services in Oklahoma.

4. The United States, through this suit, asks this Court to declare Defendants' conduct illegal and to enter injunctive relief to prevent further injury to consumers of chiropractic services.

II. DEFENDANTS

5. OSCIPA is a corporation organized and doing business under the laws of the State of Oklahoma, with its principal place of business in Tulsa.

6. Larry M. Bridges has been employed by OSCIPA as its executive director since at least 1999. As alleged below, Bridges negotiated on behalf of OSCIPA's members at least seven contracts with payers, and Bridges signed several of those contracts on OSCIPA's behalf.

III. JURISDICTION, VENUE, AND INTERSTATE COMMERCE

7. Plaintiff brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. § 4, to obtain equitable and other relief to prevent and restrain Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

8. The Court has subject-matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

9. Defendants have consented to personal jurisdiction and venue in this District. The Court also has personal jurisdiction over each Defendant, and venue is proper in the Northern District of Oklahoma under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b), because Defendants are found, have transacted business, and committed acts in furtherance of the alleged violations in this District. A substantial part of the events giving rise to Plaintiff's claims occurred in this District.

10. Defendants engage in interstate commerce, and their activities—including the conduct alleged in this Complaint—substantially affect interstate commerce. Defendants' conduct increased prices for chiropractic services that some non-Oklahoma residents traveled to Oklahoma to purchase and consume, and which a number of payers paid for across state lines.

IV. OTHER CONSPIRATORS

11. Various persons not named as defendants in this action have participated as conspirators with Defendants in the offenses alleged and have performed acts and made statements in furtherance of the alleged conspiracies.

V. DEFENDANTS' ILLEGAL CONDUCT

12. Since at least 2004, OSCIPA has required that chiropractors joining the association enter into a membership agreement (called a ''Participating Provider Agreement'') that (a) designates OSCIPA as the party who will ''[c]ontract with [the] Third-Party Payor or Network;'' (b) ''suspends any existing agreement to which the [chiropractor] is a party with any Third-Party Payor or Network;'' (c) specifies a reimbursement floor that the chiropractor must accept; and (d) prohibits member chiropractors from offering payers incentives or rebates, such as waiving deductibles or co-pays.

13. For years, OSCIPA's stated goal has been to leverage its contracts with a large share of Oklahoma chiropractors in contract negotiations with payers to increase payments to its member chiropractors. Until shortly after the Department of Justice started to investigate the Defendants' conduct, OSCIPA's Web site stated that ''OSCIPA concentrates the power of [its] state chiropractic physicians into one group. Through OSCIPA, a chiropractor can maintain an individual practice while associating with other chiropractors to increase contract-negotiating power.''

14. From 2004 to 2011, Defendants OSCIPA and Bridges negotiated at least seven contracts with payers that fix the prices and other price-related terms for all OSCIPA members dealing with those payers. The payers are: Aetna, Ancillary Care Services, Community Care, Coventry, FirstHealth, Global Health, and Preferred Community Choice. In these negotiations, Defendants, acting on behalf of OSCIPA's members, made proposals and counterproposals on price and price-related terms, accepted and rejected offers, and entered into payer contracts that contractually bound all of OSCIPA members.

15. Defendants' practice of negotiating contracts on behalf of OSCIPA's members has increased prices for chiropractic services in Oklahoma.

VI. NO INTEGRATION

16. Defendants' negotiation of contracts on behalf of OSCIPA's members is not ancillary to any procompetitive purpose of OSCIPA or reasonably necessary to achieve any efficiencies. Other than OSCIPA members who are part of the same practice groups, OSCIPA members do not share any financial risk in providing chiropractic services, do not significantly collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, do not integrate their delivery of care to patients, and do not otherwise integrate their activities to produce significant efficiencies.

VII. VIOLATION ALLEGED

17. Plaintiff reiterates the allegations contained in paragraphs 1 to 16. Each of the contracts that Defendants negotiated with payers from 2004 to 2011 on behalf of competing chiropractors violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Defendants' actions raised prices for the sale of chiropractic services and decreased the availability of chiropractic services.

VIII. REQUEST FOR RELIEF

18. To remedy these illegal acts, the United States of America asks that the Court:

(a) adjudge and decree that Defendants entered into unlawful contracts, combinations, or conspiracies in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1;

(b) enjoin Defendants; their successors, assigns, subsidiaries, divisions, groups, partnerships, joint ventures, and each entity over which they have control; their directors, officers, managers, agents, representatives, and employees; and all other persons acting or claiming to act in active concert or participation with one or more of them, from

i. continuing, maintaining, or renewing in any manner, directly or indirectly, the conduct alleged herein or from engaging in any other conduct, combination, conspiracy, agreement, or other arrangement having the same effect as the alleged violations or that otherwise violates Section 1 of the Sherman Act, 15 U.S.C. § 1, through price fixing of chiropractic services, or collective negotiation on behalf of competing independent chiropractors or chiropractor groups; and

ii. directly or indirectly communicating with any chiropractor or payer about any actual or proposed payer contract;

(c) award the United States its costs in this action; and

(d) award such other and further relief, including equitable monetary relief, as may be appropriate and the Court deems just and proper.

DATE: January 10, 2013

For Plaintiff United States of America:

_____/s/

Willaim J. Baer
Assistant Attorney General Antitrust Division

_____/s/

Leslie C. Overton
Deputy Assistant Attorney General Antitrust Division

_____/s/

Patricia A. Brink
Director of Civil Enforcement Antitrust Division

_____/s/

Peter J. Mucchetti
Chief, Litigation I Section Antitrust Division

_____/s/

Ryan M. Kantor
Assistant Chief, Litigation I Section Antitrust Division

_____/s/

Cathryn D. McClanahan,
OBA No. 14853, Assistant United States Attorney, 110 West 7th Street, Suite 300, Tulsa, Oklahoma 74119–1013, Telephone (918) 382–2700, Facsimile (918) 560–7939, cathy.mcclanahan@usdoj.gov

_____/s/

Richard Mosier, Julie Tenney, Kevin Yeh,
Attorneys for the United States, Antitrust Division, Litigation I Section, United States Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530, Telephone: (202) 307–0585, Facsimile: (202) 307–5802, Richard.Mosier@usdoj.gov

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OKLAHOMA STATE CHIROPRACTIC INDEPENDENT PHYSICIANS ASSOCIATION and LARRY BRIDGES,

Defendants.

CASE NO. 13–CV–21–TCK–TLW

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. § 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States has filed a civil antitrust Complaint, alleging that the Oklahoma State Chiropractic Independent Physicians Association (''OSCIPA'') and its executive director, Larry Bridges, violated Section 1 of the Sherman Act, 15 U.S.C. § 1. OSCIPA and Bridges negotiated at least seven contracts with payers [1] that set prices for chiropractic services on behalf of OSCIPA's members. This conduct caused consumers to pay higher fees for chiropractic services.

At the same time the United States filed the Complaint, the United States filed a Stipulation and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the Defendants' conduct. Under the proposed Final Judgment, which is explained more fully below, Defendants are enjoined from contracting with payers on behalf of chiropractors and from facilitating joint contracting among chiropractors.

The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF ANTITRUST LAWS

A. The Defendants

OSCIPA is an association of approximately 350 chiropractors many of whom compete

[1] A ''payer'' is a person or entity that purchases or pays for all or part of a physician's services for itself or any other person and includes, but is not limited to, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers.

with each other in the sale of chiropractic services. OSCIPA's members comprise approximately 45 percent of all chiropractors practicing in Oklahoma. *Defendant Larry Bridges is the Executive Director of OSCIPA.*

B. The Alleged Violations

OSCIPA and Bridges negotiated contracts with payers on behalf of competing chiropractors that raised prices to consumers. *Indeed, OSCIPA stated that one of its purposes was to ''concentrate[] the power of [its] state chiropractic physicians into one group. Through OSCIPA, a chiropractor can maintain an individual practice while associating with other chiropractors to increase contract-negotiating power.''*

From 2004 to 2011, OSCIPA and Bridges negotiated at least seven contracts with payers that set the prices and other terms for all of OSCIPA's members dealing with those payers. As executive director, Bridges negotiated these contracts with payers on behalf of OSCIPA's members, and Bridges signed several of those contracts on OSCIPA's behalf. *Those payers are: Aetna, Ancillary Care Services, Community Care, Coventry, FirstHealth, Global Health, and Preferred Community Choice. In these negotiations, Defendants made proposals and counterproposals to payers, and accepted and rejected offers, without consulting OSCIPA's physician members regarding the prices that they would accept. Additionally, OSCIPA entered into contracts with payers on behalf of all members.*

Since at least 2004, OSCIPA has required that each chiropractor joining the association enter into a membership agreement that specifies a reimbursement floor that the chiropractor must accept; prohibits the chiropractor from offering payers incentives or rebates such as waiving deductibles or co-pays; designates OSCIPA as the party who will contract with payers; and suspends any existing agreement with a payer to which the chiropractor is a party. Upon joining OSCIPA, therefore, a chiropractor explicitly gives contracting authority to OSCIPA and immediately charges the price set by the association for its several contracts, even if the chiropractor already had an individually negotiated contract with that payer. Defendants' practice of negotiating contracts on behalf of OSCIPA's members increased prices for chiropractic services in Oklahoma.

Antitrust law treats naked agreements among competitors that set prices as per se illegal.[2] Where competitors economically integrate in a joint venture, however, such agreements, if reasonably necessary to accomplish the procompetitive benefits of the integration, are analyzed under the rule of reason.[3] *Defendants' negotiation of contracts on behalf of OSCIPA's members was not ancillary to any procompetitive purpose of OSCIPA or reasonably necessary to achieve any efficiencies. Other than OSCIPA members who are part of the same practice groups, OSCIPA members do not share any financial risk in providing chiropractic services, do not significantly collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, do not integrate their delivery of care to patients, and do not otherwise integrate their activities to produce significant efficiencies.*

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will prevent the recurrence of the violations alleged in the Complaint and restore competition in the sale of chiropractic services in Oklahoma. Section IV of the proposed Final Judgment would enjoin Defendants from:

(A) providing, or attempting to provide, any services to any physician regarding such physician's actual, possible, or contemplated negotiation or contracting with any payer, or other dealings with any payer, except that Defendants may provide credentialing services[4] and utilization review services[5];

(B) acting, or attempting to act, in a representative capacity, including as a messenger or in dispute resolution (such as arbitration), for any physician with any payer, except that Defendants may provide credentialing services and utilization review services;

(C) communicating, reviewing, or analyzing, or attempting to communicate, review, or analyze with or for any physician, except as otherwise allowed, about (1) that physician's, or any other physician's, negotiating, contracting, or participating status with any payer; (2) that physician's, or any other physician's, fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any physician and any payer;

(D) facilitating communication or attempting to facilitate communication, among or between physicians, regarding any proposed, contemplated, or actual contract or contractual term with any payer, including the acceptability of any proposed, contemplated, or actual contractual term, between such physicians and any payer;

(E) entering into or enforcing any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any payers or physicians to raise, stabilize, fix, set, or coordinate prices for physician services, or fixing, setting, or coordinating any term or condition relating to the provision of physician services;

(F) requiring that OSCIPA physician members negotiate with any payer through OSCIPA or otherwise restricting, influencing, or attempting to influence in any way how OSCIPA physician members negotiate with payers;

(G) coordinating or communicating, or attempting to coordinate or communicate, with any physician, about any refusal to contract, threatened refusal to contract, recommendation not to participate or contract with any payer, or recommendation to boycott, on any proposed or actual contract or contract term between such physician and any payer;

(H) responding, or attempting to respond, to any question or request initiated by any payer or physician relating to (1) a physician's negotiating, contracting, or participating status with any payer, except that Defendants may provide credentialing services and utilization review services; (2) a physician's fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any physician and any payer, except to refer a payer to a third-party messenger[6] and otherwise to state that the Final Judgment prohibits any additional response; and

(I) training or educating, or attempting to train or educate, any physician in any aspect of contracting or negotiating with any payer, including, but not limited to, contractual language and interpretation thereof, methodologies of payment or reimbursement by any payer for such physician's services, and dispute resolution such as arbitration, except that the Defendants may, provided they do not violate other prohibitions of the Final Judgment, (1) speak on general topics (including contracting), but only when invited to do so as part of a regularly scheduled medical educational seminar offering continuing medical education credit; (2) publish articles on general topics (including contracting) in a regularly disseminated newsletter; and (3) provide education to physicians regarding the regulatory structure (including legislative developments) of workers' compensation, Medicaid, and Medicare, except Medicare Advantage.

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[2] *See* Statement 8(B)(1) of the 1996 Statements of Antitrust Enforcement Policy in Health Care *available at http://www.justice.gov/atr/public/guidelines/1791.htm.*

[3] *Id.* (further explaining that ''In accord with general antitrust principles, physician network joint ventures will be analyzed under the rule of reason, and will not be viewed as per se illegal, if the physicians' integration through the network is likely to produce significant efficiencies that benefit consumers, and any price agreements (or other agreements that would otherwise be per se illegal) by the network physicians are reasonably necessary to realize those efficiencies.''

[4] The proposed Final Judgment defines ''credentialing services'' to means a service that recognizes and attests that a physician is both qualified and competent, and that verifies that a physician meets standards as determined by an organization by reviewing such items as the individual's license, experience, certification, education, training, malpractice and adverse clinical occurrences, clinical judgment, and character by investigation and observation.

[5] The proposed Final Judgment defines ''Utilization Review Services'' to mean a service that a Defendant provides to a Payer that establishes mechanisms to monitor and control utilization of health care services and that is designed to control costs and assure quality of care by monitoring over-utilization of health care services, provided that such mechanisms are not used or designed to increase costs or utilization of health care services.

[6] A messenger is a person or entity that operates a messenger model, which is an arrangement designed to minimize the costs associated with the contracting process between payers and health-care providers. Messenger models can operate in a variety of ways. For example, network providers may use an agent or third party to convey to purchasers information obtained individually from providers about the prices or price-related terms that the providers are willing to accept. In some cases, the agent may convey to the providers all contract offers made by purchasers, and each provider then makes an independent, unilateral decision to accept or reject the contract offers. *See* Statement 9(C) of the 1996 Statements of Antitrust Enforcement Policy in Health Care *available at http://www.justice.gov/atr/public/guidelines/1791.htm.*

As noted above, Section IV of the Final Judgment would permit Defendants to provide credentialing services and utilization review services. Credentialing services can provide an efficient and cost-effective way to credential physicians. Utilization review services can provide a mechanism to monitor and control utilization of health care services, control costs, and assure quality of care. Consequently, the provision of these services could potentially benefit consumers.

With limited exceptions, Section V of the proposed Final Judgment requires Defendants terminate all payer contracts at the earlier of (1) OSCIPA's receipt of a payer's written request to terminate its contract, (2) the earliest termination date, renewal date (including automatic renewal date), or the anniversary date of such payer contract, or (3) three months from the date the Final Judgment is entered. Furthermore, the Final Judgment immediately makes void any clause in a provider agreement that disallows a physician from contracting individually with a Payer.

Section VI of the proposed Final Judgment permits Defendants to engage in activities that fall within the safety zone set forth in Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CC) ¶ 13,153. Moreover, nothing in the proposed Final Judgment prohibits the Defendants or OSCIPA's members from advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961) and its progeny, legislative, judicial, or regulatory actions, or other governmental policies or actions.

To promote compliance with the decree, Section VII of the proposed Final Judgment requires that Defendants provide to their members, directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of services to physicians, copies of the Final Judgment and this Competitive Impact Statement and to institute mechanisms to facilitate compliance. For a period of ten years following the date of entry of the Final Judgment, the Defendants separately must certify annually to the United States whether they have complied with the provisions of the Final Judgment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's Internet website, and, under certain circumstances, published in the **Federal Register**. Written comments should be submitted to: Peter J. Mucchetti, Chief, Litigation I Section, Antitrust Division, United States Department of Justice, 450 Fifth Street, NW., Suite 4100, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States is satisfied, however, that the relief in the proposed Final Judgment will prevent the recurrence of violations alleged in the Complaint and preserve competition for payers and consumers of chiropractic services in Oklahoma. Thus, the proposed Final Judgment would achieve all or substantially all of the relief that the United States would have obtained through litigation, while avoiding the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States v. Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. InBev N.V./S.A.,* 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08–1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.'').[7]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court considers under the APPA, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States v. BNS Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3; *United States v. Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Courts have held that:

[7] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[8] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States v. Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' ''prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case'').

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States v. Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As the United States District Court for the District of Columbia confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of using consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974. As Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[9]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: January 10, 2013

Respectfully submitted,

RICHARD MOSIER,

(D.C. Bar No. 492489), Antitrust Division, United States Department of Justice, 450 Fifth Street NW., Suite 4100, Washington, DC 20530, Telephone: (202) 307–0585, Facsimile: (202) 307–5802, Email: Richard.Mosier@usdoj.gov.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

OKLAHOMA STATE CHIROPRACTIC INDEPENDENT PHYSICIANS ASSOCIATION and LARRY M. BRIDGES,

Defendants.

CASE NO. 13–CV–21–TCK–TLW

FINAL JUDGMENT

WHEREAS, Plaintiff, the United States of America, filed its Complaint on January 10, 2013, alleging that Defendants Oklahoma State Chiropractors Independent Physician's Association (''Defendant OSCIPA'' or ''OSCIPA'') and Larry M. Bridges (''Defendant Bridges'') (collectively ''Defendants'' and each individually a ''Defendant'') participated in conduct in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Defendants have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by the Defendants that the law has been violated or of any issue of fact or law, other than the jurisdictional facts alleged in the Complaint are true;

AND WHEREAS, the essence of this Final Judgment is to restore competition, as alleged in the Complaint, and to restrain the Defendants from participating in any unlawful conspiracy to increase fees for Physician services or boycott Payers;

AND WHEREAS, the United States requires the Defendants to be enjoined from rendering services to, or representing, any Physician pertaining to such Physician's dealing with any Payer, for the purpose of preventing future violations of Section 1 of the Sherman Act;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that they will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of law or fact, and upon consent of Plaintiff and the Defendants, it is ORDERED, ADJUDGED AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of, and each of the parties to, this

[8] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States v. Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''); *see generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' '').

[9] *See United States v. Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States v. Mid-Am. Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298 at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

action. The Complaint states a claim upon which relief may be granted against the Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

(A) ''Communicate'' means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, directly or indirectly, in any manner;

(B) ''Credentialing Services'' means a service that recognizes and attests that a physician is both qualified and competent, and that verifies that a physician meets standards as determined by an organization by reviewing such items as the individual's license, experience, certification, education, training, malpractice and adverse clinical occurrences, clinical judgment, and character by investigation and observation;

(C) ''Defendant OSCIPA'' or ''OSCIPA'' means the Oklahoma State Chiropractors Independent Physicians Association, a corporation under the laws of Oklahoma; its successors, assigns, subsidiaries, divisions, groups, partnerships, joint ventures, and each entity over which it has control; and their directors, officers, managers, agents, representatives, and employees;

(D) ''Defendant Bridges'' means Larry M. Bridges, Defendant OSCIPA's executive director;

(E) ''Defendants'' mean Defendant OSCIPA and Defendant Bridges;

(F) ''Messenger'' means, in relation to the Defendants, Communicating to a Payer any information the Defendants have received from a Physician, or Communicating to any Physician any information the Defendants receive from any Payer;

(G) ''Participating Provider Agreement'' means a contract entered into by a Physician with OSCIPA allowing the Physician to participate in OSCIPA's Independent Physicians Association;

(H) ''Payer'' means any Person that purchases or pays for all or part of a Physician's services for itself or any other Person and includes, but is not limited to, individuals, health insurance companies, health maintenance organizations, preferred provider organizations, and employers;

(I) ''Payer Contract'' means a contract entered into by a Payer with OSCIPA that sets the prices and price-related terms between OSCIPA's Physician members and the Payer;

(J) ''Person'' means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity;

(K) ''Physician'' means a doctor of chiropractic medicine (D.C.), a doctor of allopathic medicine (M.D.), or any other practitioner of chiropractic, allopathic, or other medicine;

(L) ''Third-Party Messenger'' means a Person other than Defendants that uses a ''messenger model'' as set forth in Statement 9(C) of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep (CC) ¶ 13,153, provided that the messenger model does not create or facilitate an agreement among competitors on prices or price-related terms;

(M) ''Utilization Review Services'' means a service that a Defendant provides to a Payer that establishes mechanisms to monitor and control utilization of health care services and that is designed to control costs and assure quality of care by monitoring over-utilization of health care services, provided that such mechanisms are not used or designed to increase costs or utilization of health care services.

III. APPLICABILITY

This Final Judgment applies to the Defendants and to any Person, including any Physician, in active concert or participation with the Defendants, who receives actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

The Defendants are enjoined from, in any manner, directly or indirectly:

(A) providing, or attempting to provide, any services to any Physician regarding such Physician's actual, possible, or contemplated negotiation or contracting with any Payer, or other dealings with any Payer, except that Defendants may provide Credentialing Services and Utilization Review Services;

(B) acting, or attempting to act, in a representative capacity, including as a Messenger or in dispute resolution (such as arbitration), for any Physician with any Payer, except that Defendants may provide Credentialing Services and Utilization Review Services;

(C) Communicating, reviewing, or analyzing, or attempting to Communicate, review, or analyze with or for any Physician, except as consistent with Section VI(A), about (1) that Physician's, or any other Physician's, negotiating, contracting, or participating status with any Payer; (2) that Physician's, or any other Physician's, fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any Physician and any Payer;

(D) facilitating Communication or attempting to facilitate Communication, among or between Physicians, regarding any proposed, contemplated, or actual contract or contractual term with any Payer, including the acceptability of any proposed, contemplated, or actual contractual term, between such Physicians and any Payer;

(E) entering into or enforcing any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any Payers or Physicians to raise, stabilize, fix, set, or coordinate prices for Physician services, or fixing, setting, or coordinating any term or condition relating to the provision of Physician services;

(F) requiring that OSCIPA Physician members negotiate with any Payer through OSCIPA or otherwise restricting, influencing, or attempting to influence in any way how OSCIPA Physician members negotiate with Payers;

(G) coordinating or Communicating, or attempting to coordinate or Communicate, with any Physician, about any refusal to contract, threatened refusal to contract, recommendation not to participate or contract with any Payer, or recommendation to boycott, on any proposed or actual contract or contract term between such Physician and any Payer;

(H) responding, or attempting to respond, to any question or request initiated by any Payer or Physician relating to (1) a Physician's negotiating, contracting, or participating status with any Payer, except that Defendants may provide Credentialing Services and Utilization Review Services; (2) a Physician's fees or reimbursement rates; or (3) any proposed or actual contract or contract term between any Physician and any Payer, except to refer a Payer to a Third-Party Messenger and otherwise to state that this Final Judgment prohibits any additional response; and

(I) training or educating, or attempting to train or educate, any Physician in any aspect of contracting or negotiating with any Payer, including, but not limited to, contractual language and interpretation thereof, methodologies of payment or reimbursement by any Payer for such Physician's services, and dispute resolution such as arbitration, except that the Defendants may, provided they do not violate Sections IV(A) through IV(H) of this Final Judgment, (1) speak on general topics (including contracting), but only when invited to do so as part of a regularly scheduled medical educational seminar offering continuing medical education credit; (2) publish articles on general topics (including contracting) in a regularly disseminated newsletter; and (3) provide education to physicians regarding the regulatory structure (including legislative developments) of workers' compensation, Medicaid, and Medicare, except Medicare Advantage.

V. REQUIRED CONDUCT

(A) Defendants must terminate, without penalty or charge, and in compliance with any applicable laws, any Payer Contracts at the earlier of (1) receipt by Defendant OSCIPA of a Payer's written request to terminate such Payer Contract, (2) the earliest termination date, renewal date (including automatic renewal date), or the anniversary date of such Payer Contract, or (3) three months from the date the Final Judgment is entered.

PROVIDED HOWEVER, a Payer Contract to be terminated pursuant to Section V(A)(2) of this Final Judgment may extend beyond any such termination, renewal, or anniversary date, by up to three months from the date the Final Judgment is entered, if:

(a) the Payer submits to Defendant OSCIPA a written request to extend such Payer Contract to a specific date no later than three months from the date that this Final Judgment is entered; and

(b) Defendant OSCIPA had determined not to exercise any right to terminate.

PROVIDED FURTHER, that any Payer making such request to extend a Payer Contract retains the right, pursuant to Section V(A) of this Final Judgment, to terminate the Payer Contract at any time.

(B) Defendant OSCIPA may distribute a revised membership agreement to its Physician members that omits any reference to collectively contracting with Payers or

other services prohibited by Section IV, and that otherwise does not violate this Final Judgment. Defendants must terminate, without penalty or charge, and in compliance with any applicable laws, any Participating Provider Agreement and all other contracts relating to Payers with any OSCIPA members at the earlier of (1) receipt by Defendant OSCIPA of any Physician member's executed revised member agreement referenced in the preceding sentence, (2) receipt by Defendant OSCIPA of any Physician member's written request to terminate such Participating Provider Agreement, (3) the date all Payer Contracts applicable to a Physician member are terminated pursuant to Section V(A), or (4) three months from the date the Final Judgment is entered.

PROVIDED HOWEVER, that any clause in a Participating Provider Agreement disallowing the Physician member from contracting individually with a Payer is immediately void.

VI. PERMITTED CONDUCT

(A) The Defendants may engage in activities that fall within the safety zone set forth in Statement 6 of the 1996 Statements of Antitrust Enforcement Policy in Health Care, 4 Trade Reg. Rep. (CC) ¶ 13,153.

(B) Nothing in this Final Judgment shall prohibit the Defendants, or any one or more of Defendant OSCIPA's members, from advocating or discussing, in accordance with the doctrine established in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), and their progeny, legislative, judicial, or regulatory actions, or other governmental policies or actions.

VII. COMPLIANCE

To facilitate compliance with this Final Judgment, Defendant OSCIPA shall:

(A) distribute by first-class mail within 30 days from the entry of this Final Judgment a copy of the Final Judgment; the Competitive Impact Statement; and a cover letter that is identical in content to Exhibit A to:

(1) all of Defendant OSCIPA's directors, officers, managers, agents, employees, and representatives, who provide or have provided, or supervise or have supervised the provision of, services to Physicians; and

(2) all of Defendant OSCIPA's Physician members;

(B) distribute by first-class mail within 30 days from the entry of this Final Judgment a copy of the Final Judgment; the Competitive Impact Statement; and a cover letter that is identical in content to Exhibit B to the chief executive officer of each Payer with whom Defendants have contracted since January 1, 2002, regarding contracts for the provision of Physician services;

(C) distribute a copy of this Final Judgment and the Competitive Impact Statement to:

(1) any Person who succeeds to a position with Defendant OSCIPA described in Section VII(A)(1), in no event shall such distribution occur more than 15 days later than such a Person assumes such a position; and

(2) any Physician who becomes a member of Defendant OSCIPA, in no event shall such distribution occur more than 15 days later than such Physician becomes a member;

(D) conduct an annual seminar explaining to all of Defendant OSCIPA's directors, officers, managers, agents, employees, and representatives, the restrictions contained in this Final Judgment and the implications of violating the Final Judgment;

(E) maintain an internal mechanism by which questions about the application of the antitrust laws and this Final Judgment from any of Defendant OSCIPA's directors, officers, managers, agents, employees, and representatives can be answered by counsel as the need arises;

(F) within ten days of receiving a Payer's written request to terminate a Payer Contract pursuant to Section V(A) of this Final Judgment, distribute, by first-class mail, return receipt requested, a copy of that request to each Physician in such Payer Contract as of the date that Defendant OSCIPA receives such request to terminate; and

(G) maintain for inspection by Plaintiff a record of recipients to whom this Final Judgment and Competitive Impact Statement have been distributed.

VIII. CERTIFICATION

(A) Within 30 days after entry of this Final Judgment, Defendant OSCIPA shall certify to the Chief of Litigation I, Antitrust Division, that it has provided a copy of this Final Judgment to all Persons described in Sections VII(A) and VII(B) of this Final Judgment.

(B) For a period of ten years following the date of entry of this Final Judgment, the Defendants shall separately certify to the Chief of Litigation I, Antitrust Division, annually on the anniversary date of the entry of this Final Judgment that each, respectively, and all of Defendant OSCIPA's directors, officers, managers, agents, employees, and representatives, if applicable, have complied with the provisions of this Final Judgment.

IX. COMPLIANCE INSPECTION

(A) For the purposes of determining or securing compliance with this Final Judgment or determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, authorized representatives of the United States Department of Justice, including consultants and other Persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division and upon five days notice to the Defendants, be permitted:

(1) access during the Defendants' regular business hours to inspect and copy, or, at the United States' option, to require that the Defendants provide copies of all books, ledgers, accounts, records and documents in their possession, custody, or control, relating to any matters contained in this Final Judgment;

(2) to interview, either informally or on the record, Defendant Bridges or any of Defendant OSCIPA's officers, directors, employees, agents, managers, and representatives, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the Defendants; and

(3) to obtain from the Defendants written reports or responses to written interrogatories, under oath if requested, relating to any matters contained in this Final Judgment.

(B) No information or documents obtained by the means provided in this Section shall be divulged by Plaintiff to any Person other than authorized representatives of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

(C) If at any time a Defendant furnishes information or documents to the United States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give the Defendant ten calendar days' notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which such Defendant is not a party.

X. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and responses to comments filed with the Court, entry of this Final Judgment is in the public interest. Dated:

_____

UNITED STATES DISTRICT JUDGE

[FR Doc. 2013–01084 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–361]

Exempt Chemical Preparations Under the Controlled Substances Act

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Order with opportunity for comment.

SUMMARY: The applications for exempt chemical preparations received by DEA between June 12, 2011, and June 30, 2012, as listed below, were accepted for filing and have been approved or denied as indicated.

DATES: Electronic comments must be submitted and written comments must be postmarked on or before March 25, 2013. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–361'' on all electronic and written correspondence. DEA encourages that all comments be submitted electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site for easy reference. Paper comments that duplicate the electronic submission are not necessary as all comments submitted to *www.regulations.gov* will be posted for public review and are part of the official docket record. Written comments submitted via regular or express mail should be sent to the Drug Enforcement Administration, Attention: DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, Virginia 22152.

FOR FURTHER INFORMATION CONTACT: John W. Partridge, Executive Assistant, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152. Telephone: (202) 307–7165.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the DEA's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted, and the comment, in redacted form, will be posted online and placed in DEA's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, please see the **FOR FURTHER INFORMATION CONTACT** paragraph.

SUPPLEMENTARY INFORMATION:

Legal Authority

DEA implements and enforces Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act and the Controlled Substances Import and Export Act (codified at Title 21, Chapter 13 of the U.S.C.), as amended (hereinafter, ''CSA''). DEA drafts and publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations (CFR), parts 1300 to 1321. The CSA and its implementing regulations are designed to prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while providing for a sufficient supply of controlled substances and listed chemicals for legitimate medical, scientific, research, and industrial purposes. Controlled substances have the potential for abuse and dependence and are controlled to protect the public health and safety.

Section 201 of the CSA (21 U.S.C. 811) authorizes the Attorney General, by regulation, to exempt from certain provisions of the CSA certain compounds, mixtures, or preparations containing a controlled substance, if he finds that such compounds, mixtures, or preparations meet the requirements detailed in 21 U.S.C. 811(g)(3)(B).[1] DEA regulations at 21 CFR 1308.23 and 1308.24 further detail the criteria by which the DEA Deputy Assistant Administrator may exempt a chemical preparation or mixture from the application of certain provisions of the CSA. The Deputy Assistant Administrator may, pursuant to 21 CFR 1308.23(f), modify or revoke the criteria by which exemptions are granted and modify the scope of exemptions at any time.

Exempt Chemical Preparation Applications Submitted Between June 12, 2011, and June 30, 2012

The Deputy Assistant Administrator received applications between June 12, 2011, and June 30, 2012, requesting exempt chemical preparation status pursuant to 21 CFR 1308.23. Pursuant to the criteria stated in 21 U.S.C. 811(g)(3)(B) and in 21 CFR 1308.23, the Deputy Assistant Administrator has found that each of the compounds, mixtures, and preparations described in Chart I below is intended for laboratory, industrial, educational, or special research purposes and not for general administration to a human being or other animal and either: (1) Contains no narcotic controlled substance and is packaged in such a form or concentration that the packaged quantity does not present any significant potential for abuse; or (2) contains either a narcotic or non-narcotic controlled substance and one or more adulterating or denaturing agents in such a manner, combination, quantity, proportion, or concentration that the preparation or mixture does not present any potential for abuse; if the preparation or mixture contains a narcotic controlled substance, it must be formulated in such a manner that it incorporates methods of denaturing or other means so that the preparation or mixture is not liable to be abused or have ill effects if abused, and so that the

[1] This authority has been delegated from the Attorney General to the Administrator of the DEA by 28 CFR 0.100 and subsequently redelegated to the Deputy Assistant Administrator pursuant to the Appendix to Subpart R of 28 CFR 0.104.

narcotic substance cannot in practice be removed.

Accordingly, pursuant to 21 U.S.C. 811(g)(3)(B), 21 CFR 1308.23, and 21 CFR 1308.24, the Deputy Assistant Administrator has determined that each of the chemical preparations or mixtures generally described in Chart I below and specifically described in the application materials received by DEA, are exempt from application of sections 302, 303, 305, 306, 307, 308, 309, 1002, 1003, and 1004 (21 U.S.C. 822–823, 825–829, and 952–954) of the CSA and from application of 21 CFR 1301.74, to the extent described in 21 CFR 1308.24, as of the date listed below that was provided in the approval letters to the individual requesters.

CHART I

Supplier	Product name	Form	Exemption date
Abbott Laboratories	ARCHITECT 2nd Generation Testosterone Calibrators (B,C,D,E,F).	Bottle: 4 mL; Box: 6 bottles	12/22/2011
Abbott Laboratories	ARCHITECT 2nd Generation Testosterone Controls (L,M,H).	Bottle: 8 mL; Box: 3 bottles	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Assay Diluent, No. 2K25J	Bag-in-box: 18–200 L; Flask/Carboy: 1–50 L; Bottle/Vial: 0.5 mL–1 L; Box: 1–50 bottles.	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Assay Diluent, No. 7K72J	Bottle: 5.9 mL	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Reagent Kit, No. 07K72–20.	Bottle: 5.9 mL; Kit: 16 bottles	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Reagent Kit, No. 07K72–25.	Bottle: 5.9 mL; Kit: 4 bottles	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Reagent Kit, No. 2K25–20	Bottle: 5.9 mL; Kit: 16 bottles	12/22/2011
Abbott Laboratories	ARCHITECT Estradiol Reagent Kit, No. 2K25–25	Bottle: 5.9 mL; Kit: 4 bottles	12/22/2011
Abbott Laboratories	AxSYM Estradiol Buffer	Flask/Carboy: 1–50 L; Bottle/Vial: 0.5 mL–1 L; Box: 1–50 bottles.	12/22/2011
Abbott Laboratories	AxSYM Estradiol Reagent Pack	Bottle: 5.5 mL, Pack: 4 bottles	12/22/2011
Agilent Technologies	Special Order Standard TOXI-LAB DISCS; 1, 2, or 3 drugs.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: Benzodiazepines: Hydrolysis Procedure.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: Benzoylecgonine.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: MDMA, MDA, MDEA.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: Morphine and Hydromorphone: Differentiation.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: Opiate.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Procedure Standard TOXI-LAB DISCS: Sympathomimetic amines: Differentiation.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	Special Standard TOXI-LAB DISCS LTD-Opiate: 1, 2, or 3 drugs.	Plastic Vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB Chromatograms A	Glass jar: 100 Chromatograms	12/22/2011
Agilent Technologies	TOXI-LAB Chromatograms B	Glass jar: 100 Chromatograms	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL LTD FM	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL No. 19	Plastic bottle: 2 oz	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL No. 2	Plastic bottle: 2 oz.	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL No. 3	Plastic bottle: 2 oz	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL No. 5	Plastic bottle: 2 oz	12/22/2011
Agilent Technologies	TOXI-LAB CONTROL THC	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS A–1	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS A–2	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS A–3	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS A–4	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS B–1	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS B–2	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS B–3	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS B–4	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS LTD HD	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS LTD OP	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS LTD OPI	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB DISCS THC	Plastic vial: 50 discs	12/22/2011
Agilent Technologies	TOXI-LAB Proficiency Sample	Plastic bottle: 2 oz	12/22/2011
American Radiolabeled Chemicals, Inc.	(+)-iodo-Lysergic Acid diethylamide [125I]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	(+)-Pentazocine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	(+)-Pentazocine [ring-1,3-3H]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	(±)-Ketamine [N-methyl-3H] hydrochloride	Vial: 1 mL	12/22/2011

CHART I—Continued

Supplier	Product name	Form	Exemption date
American Radiolabeled Chemicals, Inc.	(±)-Ketamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	1,1-Dimethyltryptamine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	1,1-Dimethyltryptamine [a,β-3H] as TFA salt	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Amobarbital (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Amphetamine, D-[ring-2,3,5-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Amphetamine, DL-[ring-2,3,5-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Amphetamine, L-[ring-2,3,5-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Buprenorphine [ring-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Buprenorphine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Cocaine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Cocaine [methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Cocaine, levo-[benzoyl-3,4-3H(N)]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Codeine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	D-Amphetamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Dextropropoxyphene (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Diazepam (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Dihydrocodeine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Dihydromorphine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Diprenorphine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	DL-Amphetamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	D-Methamphetamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Ecgonine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Fentanyl (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Fentanyl [3H(G)] as TFA salt	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Fludiazepam (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Flunitrazepam (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Flunitrazepam [methyl-3H]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Flurazepam (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Flurazepam [N-methyl-3H]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Heroin (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Heroin [methyl-14C]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Heroin [methyl-3H]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Hydrocodone (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Hydromorphone (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Hydromorphone [N-methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011

CHART I—Continued

Supplier	Product name	Form	Exemption date
American Radiolabeled Chemicals, Inc.	Ibogaine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	L-Amphetamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	L-Methamphetamine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Lysergic Acid (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Lysergic acid diethylamide [N-methyl-3H]	Vial: 1 mL	3/22/2012
American Radiolabeled Chemicals, Inc.	Mazindol (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Meperidine Hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Metazocine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Metazocine [ring-1,3-3H]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Methamphetamine, D-[methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Methamphetamine, L-[methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Midazolam (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Midazolam [3H(G)]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Morphine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Morphine [N-methyl-14C]	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Normorphine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Oripavine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Oxycodone [N-methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Oxycodone hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Oxymorphone (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Phenazocine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Phencyclidine hydrochloride (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Phenylacetone (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Tetrahydrocannabidinol (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Thebaine (1 mg/mL)	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Thebaine [N-methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Thebaine [N-methyl-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Thebaine [O-methyl-14C] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	Thebaine [O-methyl-3H] hydrochloride	Vial: 1 mL	12/22/2011
American Radiolabeled Chemicals, Inc.	γ-Hydroxybutyric acid sodium salt (1 mg/mL)	Vial: 1 mL	12/22/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF10.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF11.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF12.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF13.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF14.	Glass vials: 1 ml–200 mL	7/5/2012

CHART I—Continued

Supplier	Product name	Form	Exemption date
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF15.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF16.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF17.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF18.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF19.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF20.	Glass vials: 1 ml–200 mL	7/31/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF21.	Glass vials: 1 ml–200 mL	7/31/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF4.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF5.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF6.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF8.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Oral Fluid, OF9.	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC134	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC135	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC136	Glass vials: 1 ml–100 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC137	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC138	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC139	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC140	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC141	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC143	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC144	Glass vials: 1 ml–200 mL	3/8/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC145	Glass vials: 1 ml–200 mL	3/8/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC146	Glass vials: 1 ml–200 mL	3/8/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC147	Glass vials: 1 ml–200 mL	3/8/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC148	Glass vials: 1 ml–200 mL	3/8/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC149	Glass vials: 1 ml–200 mL	3/22/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC150	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC151	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC152	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC153	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC154	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC155	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC156	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC157	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC158	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC159	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC160	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC161	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC162	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC163	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC164	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC165	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC166	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC167	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC168	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC169	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC170	Glass vials: 1 ml–200 mL	8/20/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC171	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC172	Glass vials: 1 ml–200 mL	7/31/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, MC173	Glass vials: 1 ml–200 mL	7/31/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD10	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD11	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD12	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD13	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD14	Glass vials: 1 ml–200 mL	2/1/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD15	Glass vials: 1 ml–200 mL	7/5/2012
Biochemical Diagnostics, Inc	Detectabuse Custom Liquid Control Urine, SD16	Glass vials: 1 ml–200 mL	7/5/2012

CHART I—Continued

Supplier	Product name	Form	Exemption date
Bio-Rad Laboratories	Liquichek Immunoassay Plus Control Levels 1, 2, and 3.	Amber Vial: 10 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Liquichek Immunoassay Plus Control Trilevel	Amber Vial: 10 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Liquichek Immunoassay Plus Control Trilevel Minipak.	Amber Vial: 5 mL; Box: 3 vials	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S10	Box: 10 vials, 10 mL each	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S10 Low Opiate.	Box: 10 vials, 10 mL each	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S10 Low Opiate Minipak.	Amber vial: 10 mL	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S10 Minipak	Amber vial: 10 mL	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S20	Box: 10 vials, 10 mL each	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S20 Low Opiate.	Box: 10 vials, 10 mL each	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S20 Low Opiate Minipak.	Amber vial: 10 mL	5/31/2012
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S20 Minipak	Amber vial: 10 mL	5/31/2012
Bio-Rad Laboratories	Liquid Assayed Multiqual Levels 1–3	Amber Vial: 2.5 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Liquid Assayed Multiqual Trilevel MiniPak	Amber Vial: 2.5 mL; Box: 3 vials	12/22/2011
Bio-Rad Laboratories	Liquid Unassayed Multiqual Levels 1–3	Amber Vial: 2.5 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Liquid Unassayed Multiqual Trilevel MiniPak	Amber Vial: 2.5 mL; Box: 3 vials	12/22/2011
Bio-Rad Laboratories	Lyphochek Assayed Chemistry Control Bilevel MiniPak.	Box 2 vials; 5 mL each	12/22/2011
Bio-Rad Laboratories	Lyphochek Assayed Chemistry Control Levels 1–2.	Amber Vial: 5 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Lyphochek Immunoassay Plus Control Levels 1, 2, and 3.	Amber Vial: 10 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Lyphochek Immunoassay Plus Control Trilevel	Amber Vial: 10 mL; Box: 12 vials	12/22/2011
Bio-Rad Laboratories	Lyphochek Immunoassay Plus Control Trilevel Minipak.	Amber Vial: 5 mL; Box: 3 vials	12/22/2011
Bio-Rad Laboratories	Lyphochek Unassayed Chemistry Control (Human) Bilevel MiniPak.	Box 2 vials; 5 mL each	12/22/2011
Bio-Rad Laboratories	Lyphochek Unassayed Chemistry Control (Human) Levels 1–2.	Amber Vial: 5 mL; Box: 25 vials	12/22/2011
Cerilliant Corporation	(±) Pentazocine-13C3 (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	(±)-cis-11-Nor-9-carboxy-delta9-THC-D3 glucuronide (0.1 mg/mL).	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	3,4-Methylenedioxypyrovalerone HCl (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	3,4-Methylenedioxypyrovalerone-D8 HCl (0.1 mg/mL).	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	3-Desmethylprodine (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	3-Desmethylprodine HCl (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	6-alpha/beta-Hydroxyoxymorphone (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	6-alpha/beta-Hydroxyoxymorphone-D3 (0.1 mg/mL).	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Buprenorphine N-oxide (1 mg/mL)	Glass Ampule: 1 mL	12/22/2011
Cerilliant Corporation	Cannabinol-D3 (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Carisoprodol (1 mg/mL)	Glass Ampule: 2 mL	12/22/2012
Cerilliant Corporation	Carisoprodol-D7 (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2012
Cerilliant Corporation	Carisoprodol-D7 (1 mg/mL)	Glass Ampule: 2 mL	7/31/2012
Cerilliant Corporation	Cocaine N-oxide HCl (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Cocaine N-oxide HCl (1 mg/mL)	Glass Ampule: 2 mL	3/8/2012
Cerilliant Corporation	Cocaine N-oxide-D3 HCl (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Cocaine N-oxide-D3 HCl (0.1 mg/mL)	Glass Ampule: 2 mL	3/8/2012
Cerilliant Corporation	Drug Solution # 15	Screw-cap Vial: 50 mL	6/5/2012
Cerilliant Corporation	Lacosamide (1 mg/mL)	Glass Ampule: 2 mL	5/31/2012
Cerilliant Corporation	Lacosamide-13C, D3 (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Lacosamide-13C, D3 (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	Lisdexamfetamine dimesylate (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Lisdexamfetamine-D4 dimesylate (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Mephedrone HCl (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Mephedrone-D3 HCl (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Methylone HCl (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Methylone-D3 HCl (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Morphine (8 µg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Naloxone N-oxide (0.1 mg/mL)	Glass Ampule: 2 mL	6/5/2012
Cerilliant Corporation	Norcodeine-D3 (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	Normeperidine-D4 (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	Noroxycodone and Norhydrocodone Mix (0.5 mg/mL).	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Opiate Internal Standard Mix-15	Glass Ampule: 2 mL	12/22/2011

CHART I—Continued

Supplier	Product name	Form	Exemption date
Cerilliant Corporation	Pseudobuprenorphine dihydrochloride (1.0mg/mL)	Glass Ampule: 1 mL	2/1/2012
Cerilliant Corporation	Pyrovalerone HCl (1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
Cerilliant Corporation	Secobarbital-D5 (1 mg/mL)	Glass Ampule: 1 mL	7/31/2012
Cerilliant Corporation	Zolpidem-D7 (0.1 mg/mL)	Glass Ampule: 2 mL	12/22/2011
ElSohly Laboratories, Inc	ELI Drug Standards Δ9-Tetrahydrocannabinol-glucoronide (10 μg/mL in MeOH).	Glass vial: 1 ml	5/31/2012
ElSohly Laboratories, Inc	ELI Drug Standards Δ9-Tetrahydrocannabinol-glucoronide (100 μg/mL in MeOH).	Glass vial: 1 ml	5/31/2012
Environmental Resource Associates (ERA).	Chloral Hydrate, Proficiency Testing Material, Catalog No. 853.	Glass Ampule: 2 mL	3/8/2012
Environmental Resource Associates (ERA).	Chloral Hydrate, Reference Material, Catalog No. 676.	Glass Ampule: 2 mL	3/8/2012
Environmental Resource Associates (ERA).	Waters Steroid Test Mix, Part No. 07364	Glass Ampule: 2 mL	3/8/2012
Immunalysis Corporation	Methadone Calibrator Levels 1–4	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Methadone High Control	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Methadone Low Control	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Oral Fluid Cutoff Calibrator Pain Management Prediluted in Extraction Buffer.	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Oral Fluid High Positive Control Pain Management Prediluted in Extration Buffer.	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Oral Fluid Low Positive Control Pain Management Prediluted in Extraction Buffer.	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Zolpidem Calibrator	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Zolpidem High Control	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Zolpidem Low Control	Glass vial: 10 mL	6/19/2012
Insys Therapeutics, Inc.	(-)-delta9-Tetrahydrocannabinol (1.0 mg/mL)	Glass Ampule: 1 mL	5/9/2012
Microgenics Corporation	CEDIA Amphetamine OFT Assay, Catalog Number: 10014947.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA Cannabinoids OFT Assay, Catalog Number: 10014910.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA Cocaine OFT Assay, Catalog Number: 10014764.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA Methamphetamine OFT Assay, Catalog Number: 10014949.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA Methamphetamine OFT Control Set (Low and High) , Catalog #10014953.	Vial: 10 mL Box: 2 vials	12/22/2011
Microgenics Corporation	CEDIA Methamphetamine OFT Cutoff Calibrator, Catalog #10014951.	Vial: 5 mL Box: 1 vial	12/22/2011
Microgenics Corporation	CEDIA Methamphetamine OFT High Calibrator, Catalog #10014952.	Vial: 5 mL Box: 1 vial	12/22/2011
Microgenics Corporation	CEDIA Multi-Drug OFT Control Set (Low and High), Catalog #10014957.	Vial: 15 mL Box: 2 vials	12/22/2011
Microgenics Corporation	CEDIA Multi-Drug OFT Cutoff Calibrator, Catalog #10014955.	Vial: 10 mL Box: 1 vial	12/22/2011
Microgenics Corporation	CEDIA Multi-Drug OFT High Calibrator, Catalog #10014956.	Vial: 10 mL Box: 1 vial	12/22/2011
Microgenics Corporation	CEDIA Opiate OFT Assay, Catalog Number: 10014873.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA PCP OFT Assay, Catalog Number: 10014888.	Box: 4 bottles; 65 mL each	12/22/2011
Microgenics Corporation	CEDIA THC OFT Control Set (Low and High), Catalog #10014925.	Vial: 10 mL Box: 2 vials	12/22/2011
Microgenics Corporation	CEDIA THC OFT Cutoff Calibrator, Catalog #10014923.	Vial: 5 mL Box: 1 vial	12/22/2011
Microgenics Corporation	CEDIA THC OFT High Calibrator, Catalog #10014924.	Vial: 5 mL Box: 1 vial	12/22/2011
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 1, Catalog Number: 10016345.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 1, Catalog Number: 10016362.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 2, Catalog Number: 10016346.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 2, Catalog Number: 10016363.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 3, Catalog Number: 10016347.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 3, Catalog Number: 10016364.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Calibrator 4, Catalog Number: 10016348.	Vial: 5 mL Box: 1 vial	7/5/2012

CHART I—Continued

Supplier	Product name	Form	Exemption date
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Control Set (Low and High), Catalog Number: 10016349.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Control Set (Low and High), Catalog Number: 10016365.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Control Set (Low and High), Catalog Number: 10016808.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Methamphetamine OFT Cutoff Calibrator, Catalog Number: 10016807.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 1, Catalog Number: 10016865.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 1, Catalog Number: 10016882.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 2, Catalog Number: 10016866.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 2, Catalog Number: 10016883.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 3, Catalog Number: 10016867.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 3, Catalog Number: 10016884.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Calibrator 4, Catalog Number: 10016868.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Control Set (Low and High), Catalog Number: 10016869.	Vial: 15 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Control Set (Low and High), Catalog Number: 10016885.	Vial: 15 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Control Set (Low and High), Catalog Number: 10016895.	Vial: 15 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA Multi-Drug OFT Cutoff Calibrator, Catalog Number: 10016894.	Vial: 10 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 1 Catalog Number: 10016644.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 1 Catalog Number: 10016700.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 2 Catalog Number: 10016646.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 2 Catalog Number: 10016701.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 3 Catalog Number: 10016647.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 3 Catalog Number: 10016702.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Calibrator 4 Catalog Number: 10016648.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Control Set (Low and High), Catalog Number: 10016649.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Control Set (Low and High), Catalog Number: 10016703.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Control Set (Low and High), Catalog Number: 10016731.	Vial: 10 mL Box: 2 vials	7/5/2012
Microgenics Corporation	Thermo Scientific CEDIA THC OFT Cutoff Calibrator Catalog Number: 10016730.	Vial: 5 mL Box: 1 vial	7/5/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl Assay Catalog Number: 10016005.	Vials: 500 mL	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl Assay Catalog Number: 10016006.	3 vials, 18 mL each	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl Assay Catalog Number: 10016437.	3 vials, 18 mL each	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl Calibrator 2 ng/mL Catalog Number: 10016023.	Vials: 10 mL	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl High Control 1 ng/mL Catalog Number: 10016484.	Box: 1 vial; 25 mL	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl High Control 2 ng/mL Catalog Number: 10016485.	Box: 1 vial; 10 mL	5/31/2012

CHART I—Continued

Supplier	Product name	Form	Exemption date
Microgenics Corporation	Thermo Scientific DRI Fentanyl High Control 3 ng/mL Catalog Number: 10016024.	Vials: 25 mL	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl High Control 3 ng/mL Catalog Number: 10016486.	Box: 1 vial; 25 mL	5/31/2012
Microgenics Corporation	Thermo Scientific DRI Fentanyl Low Control 1 ng/mL Catalog Number: 10016022.	Vials: 25 mL	5/31/2012
Microgenics Corporation	Thermo Scientific MAS Omni•CORE Liquid Assayed Integrated Chemistry Control Levels 1–3.	Vial 5 mL; Box: 6 vials	12/22/2011
Microgenics Corporation	Thermo Scientific MAS Omni•CORE Liquid Assayed Integrated Chemistry Control Sample Pack.	Box: 6 vials; 5 mL each	12/22/2011
Microgenics Corporation	Thermo Scientific MAS Omni•IMMUNE Liquid Assayed Integrated Chemistry Control Levels 1–3.	Vial 5 mL; Box: 6 vials	12/22/2011
Microgenics Corporation	Thermo Scientific MAS Omni•IMMUNE Liquid Assayed Integrated Chemistry Control Sample Pack.	Box: 6 vials; 5 mL each	12/22/2011
Microgenics Corporation	Thermo Scientific MAS Omni•IMMUNE PRO Liquid Assayed Integrated Chemistry Control Levels 1–3.	Vial 5 mL; Box: 6 vials	12/22/2011
Microgenics Corporation	Thermo Scientific MAS Omni•IMMUNE PRO Liquid Assayed Integrated Chemistry Control Sample Pack.	Box: 6 vials; 5 mL each	12/22/2011
Restek Corporation	Appendix IX Mix #1, Revised	Ampule: 2 mL	12/22/2011
Restek Corporation	Custom a,a-Dimethylphenethylamine Standard	Ampule: 2 mL	12/22/2011
Restek Corporation	Custom Chloral Hydrate Standard	Ampule: 2 mL	12/22/2011
Restek Corporation	Custom LS4434 Standard 1	Ampule: 2 mL	7/5/2012
Restek Corporation	Metabolomic Standard Mix #1	Ampule: 2 mL	2/1/2012
Restek Corporation	UCMR3 Method 539 Calibration Standard	Ampule: 2 mL	12/22/2011
Restek Corporation	UCMR3 Method Calibration Standard	Ampule: 2 mL	5/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT Cal A Levels 1–5	Glass vial: 5 mL	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT Cal B Levels 1–5	Glass vial: 5 mL	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT Control Set A Material No. 05473390190.	Box of 6 vials, 10 mL each	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT Control Set B Material No. 05473411190.	Box of 6 vials, 10 mL each	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT Qual Cal Material No. 05475929190.	Box of 4 vials, 5 mL each	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT SQ Cal A Material No. 05475872190.	Box of 6 vials, 5 mL each	7/31/2012
Roche Diagnostics Operations, Inc	Oral Fluid DAT SQ Cal B Material No. 05475899190.	Box of 6 vials, 5 mL each	7/31/2012
SAFC Biosciences	HH–4 Cell Culture Medium	Bag: 1L, 200L, 500L; Bottle: 1L, 2L	2/3/2012
SAFC Biosciences	HH–4 Cell Culture Medium	Bag: 20 L, 100L, 1,000 L	3/22/2012
Siemens Healthcare Diagnostics Inc	ADVIA Chemistry Drug CAL 1	Carton: 10 vials; 3 ml each	11/5/2012
Siemens Healthcare Diagnostics Inc	ADVIA Chemistry Drug CAL 1, Level 2	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	ADVIA Chemistry Drug CAL 1, Level 3	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	ADVIA Chemistry Drug CAL 1, Level 4	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	ADVIA Chemistry Drug CAL 1, Level 5	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC CAL 2 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC CAL 3 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC CAL 4 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC CAL 5 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 1 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 2 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 3 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 4 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 5 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Bulk EII Plus THC Control 6 ML	Bulk Container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	Dimension Drug Calibrator, Level 2	Vial: 2.5 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Drug Calibrator, Level 3	Vial: 2.5 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Drug Calibrator, Level 4	Vial: 2.5 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Drug Calibrator, Level 5	Vial: 2.5 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Clinical Chemistry System DRUG Calibrator.	Carton: 10 vials; 2.5 ml each	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista DRUG 1 CAL, B	Vial: 2.5 mL	7/31/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista Drug 4 CAL, Level B	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista Drug 4 CAL, Level C	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista Drug 4 CAL, Level D	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista Drug 4 CAL, Level E	Vial: 3 mL	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista LOCI 8 CAL	Box of 10 vials; Vial: 2.5 mL	3/22/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista LOCI 9 CAL Levels A–E	Vial: 1.5 mL	12/22/2011

CHART I—Continued

Supplier	Product name	Form	Exemption date
Siemens Healthcare Diagnostics Inc	Dimension Vista System DRUG 1 CAL	Carton: 6 vials; 2.5 mL each	7/31/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista System Drug 4 CAL	Carton: 10 vials; 3 ml each	11/5/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista System LOCI 9 Calibrator	Box of 10 vials; Vial: 1.5 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	Dimension Vista UDAT CAL	Glass vial: 3 mL; Carton: 6 vials	12/22/2011
Siemens Healthcare Diagnostics Inc	Dimension Vista UDAT CAL Bulk, Level B	Bulk Container: 20 L–25 L	5/31/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista UDAT CAL Pilot, Level B	Pilot Container: 2 mL–125 mL	5/31/2012
Siemens Healthcare Diagnostics Inc	Dimension Vista UDAT CAL, Level B	Glass vial: 3 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC CAL 2 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC CAL 3 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC CAL 4 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC CAL 5 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 1 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 2 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 3 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 4 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 5 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	FC EII Plus THC Control 6 ML	Plastic vial: 15 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	MP LOCI 9 TTST Cal Lvl 1–7 FC	Vial: 1–5 mL	12/22/2011
Siemens Healthcare Diagnostics Inc	MP LOCI 9 TTST Lvl 1–7 Bulk	Bulk container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	VS Drug 1 Cal Bulk Soln, Level B	Bulk container: 2 mL–1 L	7/31/2012
Siemens Healthcare Diagnostics Inc	VS LOCI 9 CAL BULK SOLN Levels 1–5	Bulk container: 4 mL–100 L	12/22/2011
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 BULK SOLN Level 2	Bulk container: 4 mL–100 L	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 BULK SOLN Level 3	Bulk container: 4 mL–100 L	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 BULK SOLN Level 4	Bulk container: 4 mL–100 L	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 BULK SOLN Level 5	Bulk container: 4 mL–100 L	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 Vial Level E	Vial: 2.5 mL	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 Vial Level B	Vial: 2.5 mL	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 Vial Level C	Vial: 2.5 mL	3/22/2012
Siemens Healthcare Diagnostics Inc	VS LOCI CAL 8 Vial Level D	Vial: 2.5 mL	3/22/2012
Supelco, Inc	Custom Mix, 0.2–163.2 µg/mL in methanol	Glass ampule: 1 mL	7/31/2012
Ultra Scientific, Inc	DSA Detection Cocaine HCl Standard	Amber ampule: 1 mL	12/22/2011
Ultra Scientific, Inc	DSA Detection Cocaine HCl StandardPhenobarbital (625 µg/mL).	Amber ampule: 1 mL	12/22/2011
Ultra Scientific, Inc	DSA Detection Cocaine HCl StandardPhenobarbital (6400 µg/mL).	Amber ampule: 1 mL	12/22/2011
Ultra Scientific, Inc	GE-Ion Track 100 ng/µL TNT/Cocaine HCl Standard Rev. 1.	Amber ampule: 10 mL	12/22/2011
Ultra Scientific, Inc	GE-Ion Track 100 ng/µL TNT/Cocaine HCl Standard Rev. 1.	Glass bottle: 100 mL	12/22/2011
Ultra Scientific, Inc	Phenobarbital (625 µg/mL)	Amber ampule: 1 mL	5/31/2012
Ultra Scientific, Inc	Phenobarbital (6400 µg/mL)	Amber ampule: 1 mL	5/31/2012
Ultra Scientific, Inc	Ultracheck WS Chloral Hydrate Sample	Glass ampule: 2 mL	12/22/2011

The Deputy Assistant Administrator has found that each of the compounds, mixtures, and preparations described in Chart II below is not consistent with the criteria stated in 21 U.S.C. 811(g)(3)(B) and in 21 CFR 1308.23. Accordingly, the Deputy Assistant Administrator has determined that the chemical preparations or mixtures generally described in Chart II below and specifically described in the application materials received by DEA, are not exempt from application of the CSA or from application of the CFR, with regard to the requested exemption pursuant to 21 CFR 1308.23, as of the date listed below that was provided in the determination letters to the individual requesters.

CHART II

Supplier	Product name	Form	Denial date
Abbott Laboratories	ARCHITECT Estradiol Assay Diluent, No. 2K25J	Tank: 50–500 L	12/22/2011
Abbott Laboratories	AxSYM Estradiol Buffer	Bulk Tank: 50–500 L; Bag-in-box: 18–200 L.	12/22/2011
American Radiolabeled Chemicals, Inc..	Lysergic acid diethylamide	Vial: 1 mL	12/22/2011
Biochemical Diagnostics, Inc.	Benzoylecgonine Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Cocaine Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Codeine Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	d-Amphetamine Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC134	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC135	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC136	Glass vials: 200 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC137	Glass vials: 500 ml–2 L	11/15/2011

CHART II—Continued

Supplier	Product name	Form	Denial date
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC138	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC139	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC140	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC141	Glass vials: 500 ml–2 L	11/15/2011
Biochemical Diagnostics, Inc.	Detectabuse Custom Liquid Control Urine, MC142	Glass vials: 1 ml–200 mL	11/15/2011
Biochemical Diagnostics, Inc.	d-Methamphetamine Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	d-Propoxyphene Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Hydrocodone Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Hydromorphone Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	MDA Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	MDEA Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	MDMA Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Methadone Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Methaqualone Bulk Solution(5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Morphine Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Oxazepam Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Biochemical Diagnostics, Inc.	Secobarbital Bulk Solution (5 mg/mL)	Bottle: 1 ml–1 L	11/15/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control C1 Minipak	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control C2 Minipak	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control C3 Minipak	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control C4 Minipak	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control Low Opiate Level C2 Minipak.	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control Low Opiate Level C3 Minipak.	Amber Vial: 20mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S1 Minipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S1E Low Opiate Minipak.	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S1E Minipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S1S Minipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S2 Minipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S2E Low Opiate Minipak.	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S2E Minipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S2SMinipak	Amber Vial: 10mL	12/22/2011
Bio-Rad Laboratories	Liquichek Urine Toxicology Control S3 Minipak	Amber Vial: 10mL	12/22/2011
Cayman Chemical Company	4-Methylmethcathinone (hydrochloride), 10 mg in 1 mL Methanol.	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	4-Methylmethcathinone (hydrochloride), 25 mg in 2.5 mL Methanol.	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	4-Methylmethcathinone (hydrochloride), 5 mg in 500 µL Methanol.	Glass vial: 500 µL	7/31/2012
Cayman Chemical Company	5-methoxy DMT, 10 mg in 1 mL Methanol	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	5-methoxy DMT, 25 mg in 2.5 mL Methanol	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	5-methoxy DMT, 5 mg in 500 µL Methanol	Glass vial: 500 µL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone (hydrochloride), 10 mg in 1 mL Methanol.	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone (hydrochloride), 25 mg in 2.5 mL Methanol.	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone (hydrochloride), 5 mg in 500 µL Methanol.	Glass vial: 500 µL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone, 10 mg in 1 mL Methanol.	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone, 25 mg in 2.5 mL Methanol.	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone, 5 mg in 500 µL Methanol.	Glass vial: 500 µL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone-d8 (hydrochloride), 10 mg in 1 mL Methanol.	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone-d8 (hydrochloride), 25 mg in 2.5 mL Methanol.	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	Methylenedioxy Pyrovalerone-d8 (hydrochloride), 5 mg in 500 µL Methanol.	Glass vial: 500 µL	7/31/2012
Cayman Chemical Company	Methylone (hydrochloride), 10 mg in 1 mL Methanol.	Glass vial: 1 mL	7/31/2012
Cayman Chemical Company	Methylone (hydrochloride), 25 mg in 2.5 mL Methanol.	Glass vial: 2.5 mL	7/31/2012
Cayman Chemical Company	Methylone (hydrochloride), 5 mg in 500 µL Methanol.	Glass vial: 500 µL	7/31/2012
Cerilliant Corporation	Codeine (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Codeine-D3 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Drug Solution # 16	Screw-cap Vial: 50 mL	6/5/2012

CHART II—Continued

Supplier	Product name	Form	Denial date
Cerilliant Corporation	Drug Solution # 17	Screw-cap Vial: 50 mL	6/5/2012
Cerilliant Corporation	Drug Solution # 18	Screw-cap Vial: 50 mL	6/5/2012
Cerilliant Corporation	Drug Solution # 19	Screw-cap Vial: 50 mL	6/5/2012
Cerilliant Corporation	Drug Solution # 20	Screw-cap Vial: 50 mL	6/5/2012
Cerilliant Corporation	Hydrocodone (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Hydrocodone-D6 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Hydromorphone (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Hydromorphone-D3 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Morphine (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Morphine-D3 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Noroxycodone HCl (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Noroxycodone-D3 HCl (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Oxycodone (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Oxycodone-D3 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Oxymorphone (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Cerilliant Corporation	Oxymorphone-D3 (1 mg/mL)	Glass ampule: 5 mL	7/31/2012
Environmental Resource Associates (ERA).	USGS BQS LS4434 Mix 1	Glass Ampule: 1–2 mL	7/31/2012
Environmental Resource Associates (ERA).	USGS BQS LS4434 Mix 2	Glass Ampule: 1–2 mL	7/31/2012
Immunalysis Corporation	Tapentadol Calibrator Levels 1–4	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Tapentadol High Control	Glass vial: 10 mL	6/19/2012
Immunalysis Corporation	Tapentadol Low Control	Glass vial: 10 mL	6/19/2012
Restek Corporation	Custom Cannabinoids Standard	Ampule: 2 mL	5/31/2012
Restek Corporation	Custom Paraldehyde Standard (10 mg/mL)	Ampule: 2 mL	7/5/2012
Siemens Healthcare Diagnostics Inc.	Dimension Vista UDAT CAL Bulk, Level B	Bulk Container: 4mL–100L	12/22/2011
Siemens Healthcare Diagnostics Inc.	Dimension Vista UDAT CAL Bulk, Level B	Bulk Container: 26 L–50L	5/31/2012
Siemens Healthcare Diagnostics Inc.	Drug CAL BULK SOLN, Level 2	Bulk container: 2 L–100 L	11/5/2012
Siemens Healthcare Diagnostics Inc.	Drug CAL BULK SOLN, Level 3	Bulk container: 2 mL–100 L	11/5/2012
Siemens Healthcare Diagnostics Inc.	Drug CAL BULK SOLN, Level 4	Bulk container: 2 mL–100 L	11/5/2012
Siemens Healthcare Diagnostics Inc.	Drug CAL BULK SOLN, Level 5	Bulk container: 2m L–100 L	11/5/2012
Siemens Healthcare Diagnostics Inc.	VS Drug 1 Cal Bulk Soln, Level B	Bulk container: 2 mL–100 L	7/31/2012

Scope of Approval

The exemptions are applicable only to the precise preparation or mixture described in the application submitted to DEA in the form(s) listed in this order. Pursuant to 21 CFR 1308.24(h), any change in the quantitative or qualitative composition of the preparation or mixture or change in the trade name or other designation of the preparation or mixture after the date of application requires a new application. Pursuant to 21 CFR 1308.24(g), DEA may prescribe requirements other than those set forth in 1308.24(b)–(e) on a case-by-case basis for materials exempted in bulk quantities. Accordingly, in order to limit opportunity for diversion from the larger bulk quantities, DEA has determined that each of the exempted bulk products listed in this order may only be used in-house and may not be transported to other facilities.

Additional exempt chemical preparation requests received between June 12, 2011, and June 30, 2012, and not otherwise referenced in this order may remain pending until DEA receives additional information required, pursuant to 21 CFR 1308.23(d), as detailed in separate correspondence to individual requesters. DEA's order on such requests will be published in a future **Federal Register**.

Chemical Preparations Containing Newly Controlled Substances

The statutory authority for exempt chemical preparations is based on the control status of substances contained within a preparation, the intended administration of a preparation, and the packaged form of a preparation. DEA conducts a case-by-case analysis of each application for exemption to determine whether exemption of a preparation from certain provisions of the CSA is appropriate pursuant to the specified statutory and regulatory requirements.

Most exempt chemical preparations have remained effective indefinitely unless the holder of a specific exempt chemical preparation specifically requested that the exemption be terminated. The CSA allows for modifications to the controlled substances schedules to add, remove, or change the schedule of substances thus resulting in periodic modifications to the control status of various substances. 21 U.S.C. 811(a). Since the CSA was enacted in 1970, DEA has on several occasions added to, removed from, or modified the schedules of controlled substances in accordance with the CSA. Such changes may result in the non-compliance of exempt chemical preparations with current statutes or regulations if chemical preparations that have already obtained exempt status contain newly controlled substances. For example, although an exempt chemical preparation may continue to be packaged in the same manner as when it was approved, non-controlled substances in the preparation may become controlled, thus prompting the need for a new application for exemption of the chemical preparation to ensure continued compliance. Other preparations that previously contained no controlled substances may contain newly controlled substances and thus would require an application for exemption.

DEA reviews applications for chemical preparation exemptions based on the statutes and regulations that are in place at the time of the application, including the control status of substances included in the preparation. DEA must remain vigilant to ensure that exempt chemical preparations remain consistent with the standards set forth in the CSA and its implementing regulations. As such, DEA reminds the public that any chemical preparation, regardless of whether it was previously

exempt, that contains a newly controlled substance will require a new application for exemption pursuant to 21 U.S.C. 811(g)(3)(B) and 21 CFR 1308.23–1308.24.

Review of Exemptions Pursuant to 21 U.S.C. 811(g)(3)

Based on inquiries received from industry, DEA is conducting a comprehensive review of the exempt chemical preparation regulations. DEA's regulations at 21 CFR 1308.24(a) state that approved chemical preparations are exempt from certain provisions of both Subchapter I and Subchapter II of the CSA: ''The chemical preparations and mixtures approved pursuant to 1308.23 are exempt from application of sections 302, 303, 305, 306, 307, 308, 309, 1002, 1003 and 1004 of the Act (21 U.S.C. 822–823, 825–829, 952–954) and 1301.74 of this chapter, to the extent described in paragraphs (b) to (h) of this section.'' Pursuant to its regulations, DEA has provided exemptions from the application of section 302, 303, 305, 306, 307, 308, 309, 1002, 1003, and 1004 of the Act (21 U.S.C. 822–823, 825–829, 952–954) and 21 CFR 1301.74 since the implementation of the regulations in the early 1970s. Until DEA's analysis of the exemption regulations is complete, DEA will continue to review and provide exemptions to chemical preparations consistent with the implementing regulations, when warranted. DEA will publish a future notice regarding the outcome of DEA's review of its regulations with respect to the exemption of chemical preparations.

Request for Comment

Pursuant to 21 CFR 1308.23, any interested person may submit written comments on or objections to any chemical preparation in this order that has been approved or denied as exempt. If any comments or objections raise significant issues regarding any finding of fact or conclusion of law upon which this order is based, the Deputy Assistant Administrator will immediately suspend the effectiveness of any applicable part of this order until he may reconsider the application in light of the comments and objections filed.

Approved Exempt Chemical Preparations Are Posted on DEA's Web site

A list of all current exemptions, including those listed in this order, is available on DEA's Web site at *http://www.deadiversion.usdoj.gov/schedules/exempt/exempt_chemlist.pdf.* The dates of applications of all current exemptions are posted for easy reference.

Dated: January 14, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator.

[FR Doc. 2013–01133 Filed 1–18–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Proposed Information Collection Request Submitted for Public Comment; Survey Regarding Pension Benefit Statements

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (the Department), in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. The Employee Benefits Security Administration (EBSA) is soliciting comments on the proposed information collection request (ICR) described below. A copy of the ICRs may be obtained by contacting the office listed in the **ADDRESSES** section of this notice. ICRs also are available at reginfo.gov (*http://www.reginfo.gov/public/do/PRAMain*).

DATES: Written comments must be submitted to the office shown in the Addresses section on or before March 25, 2013.

ADDRESSES: G. Christopher Cosby, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., N–5718, Washington, DC 20210, (202) 693–8410, FAX (202) 693–4745 (these are not toll-free numbers).

I. Supplementary Information

This notice requests public comment on the Department's proposed collection of information regarding a survey and focus groups that will ask respondents to answer questions related to information presented in benefit statements received from their retirement plans. A summary of the ICR and the current burden estimates follows:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Household survey questions and experiments related to pension benefit statements.

Type of Review: New collection of information.

OMB Number: 1210–NEW.

Respondents: 2,950.

Number of Annual Responses: 2,950.

Total Burden Hours: 945 hours.

Total Annualized Capital/Startup Costs: $0.

Total Annual Costs: $244,800.

Description: The Department is planning to survey participants in an existing household Internet panel called the American Life Panel (ALP) and conduct four focus groups consisting of non-panel members to explore whether information presented in retirement plan benefit statements can be presented in a manner that is understandable for participants and beneficiaries and makes them better prepared for retirement. Topics probed in the survey include participants' current allocations to their retirement accounts, their expectations for how long they will need to keep working, their financial goals for retirement, the basis for calculating those goals, how frequently they view their current benefits statement, whether they receive benefit statements in paper or electronic format, and what information from the statements do they primarily focus on. Survey participants will then be provided with two different benefits statements that provide slightly different information and will be asked to answer several questions based on those statements to better assess what they understand about the statements.

The study results will be used to support the Department's rulemaking pursuant to section 105(a) of the Employee Retirement Income Security Act of 1974 as amended by the Pension Protection Act of 2006, which requires administrators of ERISA-covered individual account plans to furnish periodic benefit statements to participants and beneficiaries and the Department to develop model benefits statements.

II. Focus of Comments

The Department is particularly interested in comments that:

- Evaluate whether the collections of information are 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 collections 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., by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICRs for OMB approval of the extension of the information collection; they will also become a matter of public record.

Joseph S. Piacentini,

Director, Office of Policy and Research, Employee Benefits Security Administration.

[FR Doc. 2013–01156 Filed 1–18–13; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Availability of Funds and Solicitation for Grant Applications for YouthBuild Grants

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice of Solicitation for Grant Applications (SGA).

Funding Opportunity Number: SGA/DFA PY–12–02.

SUMMARY: The Employment and Training Administration (ETA), U.S. Department of Labor (DOL), announces the availability of approximately $75 million in grant funds authorized by the YouthBuild provisions of the Workforce Investment Act [29 U.S.C. 2918a]. The final amount available depends on the amount of funds appropriated for YouthBuild in Fiscal Year (FY) 2013.

YouthBuild grants will be awarded through a competitive process. Under this solicitation, DOL will award grants to organizations to oversee the provision of education, occupational skills training, and employment services to disadvantaged youth in their communities while performing meaningful work and service to their communities.

The complete SGA and any subsequent SGA amendments in connection with this solicitation are described in further detail on ETA's Web site at *http://www.doleta.gov/grants/* or on *http://www.grants.gov.* The Web sites provide application information, eligibility requirements, review and selection procedures, and other program requirements governing this solicitation.

DATES: The closing date for receipt of applications under this announcement is March 19, 2013. Applications must be received no later than 4:00:00 p.m. Eastern Time.

FOR FURTHER INFORMATION CONTACT: Kia Mason, 200 Constitution Avenue NW., Room N–4716, Washington, DC 20210; Telephone: 202–693–2606.

Signed January 14, 2013, in Washington, DC.

Eric D. Luetkenhaus,

Grant Officer, Employment and Training Administration.

[FR Doc. 2013–01141 Filed 1–18–13; 8:45 am]

BILLING CODE 4510–FT–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of January 1, 2013 through January 4, 2013.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,183	AGC Flat Glass North America, Inc.	Kingsport, TN	November 15, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,174	The Times-Standard, California Newspaper Partnership, Creative Services.	Eureka, CA	November 3, 2011.
82,182	Aramark Uniform Services (AUS), IT Support Center, B2B Staffing, iSpace Agency, Odesus.	Burbank, CA	November 27, 2011.
82,190	Manitowoc FSG Operations, McCann's Division, Manitowoc Company, Inc.	Los Angeles, CA	November 28, 2011.
82,191	Knoxville Glove Company	Knoxville, TN	November 28, 2011.
82,204	Allegheny Millwork PBT, Drafting Department	Lawrence, PA	December 3, 2011.
82,223	Sumitomo Electric Wiring Systems, Inc., Design Engineering Dept., Sumitomo Electric, Sumitomo Wiring.	Bowling Green, KY	December 6, 2011.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
82,092	General Mills Services, Inc., General Mills, Inc., Manpower, Certes, Salo, etc.	Golden Valley, MN	

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
81,935	ING Institutional Plan Services, LLC, Lion Connecticut, Atos IT Solutions and Services.	Lewiston, ME	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
82,179	Assembly Services and Packaging, Inc.	Hudson, WI	

The following determinations terminating investigations were issued in cases where these petitions were not filed in accordance with the requirements of 29 CFR 90.11. Every petition filed by workers must be signed by at least three individuals of the petitioning worker group. Petitioners separated more than one year prior to the date of the petition cannot be covered under a certification of a petition under Section 223(b), and therefore, may not be part of a petitioning worker group. For one or more of these reasons, these petitions were deemed invalid.

TA–W No.	Subject firm	Location	Impact date
82,299	Barclay Elementary—Middle	Baltimore, MD	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
82,262	Cequent Performance Products, Inc.	Goshen, IN	

I hereby certify that the aforementioned determinations were issued during the period of January 1, 2013 through January 4, 2013. These determinations are available on the Department's Web site *tradeact/taa/taa search_form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: January 8, 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–01147 Filed 1–18–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 1, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 1, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 9th of January 2013.

Elliott S. Kushner,

Certifying Officer, Office of

Trade Adjustment Assistance.

APPENDIX

[12 TAA Petitions instituted between 1/1/13 and 1/4/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82303	O. Mustad & Son, Inc. (Workers)	Auburn, NY	01/02/13	12/26/12
82304	TE Connectivity—Formerly Tyco (State/One-Stop)	Shakopee, MN	01/02/13	12/31/12
82305	YP Holdings, LLC (Workers)	New Haven, CT	01/02/13	01/02/13
82306	Houghton Mifflin Harcourt—Riverside Publishing Division (Workers).	Rolling Meadows, IL	01/03/13	01/02/13
82307	Thomas Jefferson University Hospital (From Home) (State/One-Stop).	Savannah, GA	01/03/13	12/21/12
82308	TE Connectivity—Relay Products Business Unit (Company).	Middletown, PA	01/04/13	12/21/12
82309	Plumas Bank (State/One-Stop)	Quincy, CA	01/04/13	01/03/13
82310	HCL America (Workers)	Winsonville, OR	01/04/13	01/03/13
82311	SFI Holding, LLC (Workers)	Forest City, NC	01/04/13	01/03/13
82312	Eaton Corporation (Union)	Auburn, IN	01/04/13	01/04/13
82313	Arch Coal Inc. (Workers)	St. Louis, MO	01/04/13	01/03/13
82314	Hostess Defiance Plt #21 (Workers)	Defiance, OH	01/04/13	01/03/13

[FR Doc. 2013–01146 Filed 1–18–13; 8:45 am]

BILLING CODE 4510–FN–P

LEGAL SERVICES CORPORATION

Sunshine Act; Meeting Notice

DATE AND TIME: The Legal Services Corporation's Board of Directors and its six committees will meet January 25–26, 2013. On Friday, January 25, the first meeting will commence at 3:45 p.m., Central Standard Time (CST), with each meeting thereafter commencing promptly upon adjournment of the immediately preceding meeting. On Saturday, January 26, the first meeting will commence at 8:30 a.m., CST, with each meeting thereafter commencing promptly upon adjournment of the immediately preceding meeting. The exception will be the Finance Committee meeting, which in part will run concurrently with the Audit Committee meeting.

LOCATION: Hyatt French Quarter New Orleans, 800 Iberville Street, New Orleans, Louisiana 70113.

PUBLIC OBSERVATION: Unless otherwise noted herein, the Board and all committee meetings will be open to public observation. Members of the public who are unable to attend in person but wish to listen to the public proceedings may do so by following the telephone call-in directions provided below.

CALL-IN DIRECTIONS FOR OPEN SESSIONS:

- *Call toll-free number:* 1–866–451–4981;
- *When prompted, enter the following numeric pass code:* 5907707348 (or 2755431953 to access the Finance Committee meeting)
- When connected to the call, please immediately ''MUTE'' your telephone.

Members of the public are asked to keep their telephones muted to eliminate background noises. To avoid disrupting the meeting, please refrain from placing the call on hold if doing so will trigger recorded music or other sound. From time to time, the presiding Chair may solicit comments from the public.

MEETING SCHEDULE

Friday, January 25, 2013	Time [1]
1. Promotion & Provision for the Delivery of Legal Services Committee.	3:45 p.m.
2. Operations & Regulations Committee.	
3. Institutional Advancement Committee.	
Saturday, January 26, 2013	
1. Governance & Performance Committee.	8:30 a.m.
2. Audit Committee [2].	
3. Finance Committee [2].	
4. Board of Directors.	

STATUS OF MEETING: Open, except as noted below.

Board of Directors—Open, except that, upon a vote of the Board of Directors, a portion of the meeting may be closed to the public to hear briefings by management and LSC's Inspector General, and to consider and act on the General Counsel's report on potential and pending litigation involving LSC.[3]

Institutional Advancement Committee—Open, except that, upon a vote of the Board of Directors, the meeting may be closed to the public to discuss prospective funders for LSC's development activities and prospective funders for implementing the recently-issued Pro Bono Task Force report.

A verbatim written transcript will be made of the closed session of the Board and Institutional Advancement Committee meetings. The transcript of any portions of the closed session falling within the relevant provisions of the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(9) and (10), and the corresponding provisions of the Legal Services Corporation's implementing regulations, will not be available for public inspection. A copy of the General Counsel's Certification that, in his opinion, the closing is authorized by law will be available upon request.

Matters To Be Considered

January 25, 2013

Promotion and Provision for the Delivery of Legal Services Committee

1. Approval of Agenda
2. Approval of minutes of the Committee's meeting of October 1, 2012
3. Discussion of preservation and distribution of Committee presentations
4. Discussion of Committee's evaluations for 2012 and the Committee's goals for 2013
5. Panel presentation and discussion on Succession Planning and Leadership Development for LSC funded programs
   - Jon Asher, Executive Director, Colorado Legal Services
   - David Pantos, Executive Director, Legal Aid of Nebraska

[1] Please note that all times in this notice are in the *Central Standard Time.*

[2] The meeting of the Finance Committee will commence prior to the adjournment of and run concurrently in part with the Audit Committee.

[3] Any portion of the closed session consisting solely of briefings does not fall within the Sunshine Act's definition of the term ''meeting'' and, therefore, the requirements of the Sunshine Act do not apply to such portion of the closed session. 5 U.S.C. 552b(a)(2) and (b). *See also* 45 CFR § 1622.2 & 1622.3.

- Patricia Pap, Executive Director, Management Information Exchange
- Rhodia Thomas, Executive Director, MidPenn Legal Services

6. Public comment
7. Consider and act on other business
8. Consider and act on motion to adjourn the meeting

Operations & Regulations Committee

1. Approval of agenda
2. Approval of minutes of the Committee's meeting September 30, 2012
3. Consider and act on rulemaking on enforcement mechanisms
   - Mark Freedman, Senior Assistant General Counsel
   - Matthew Glover, Associate Counsel to the Inspector General
   - Public comment on this rulemaking
4. Consider and act on initiating rulemaking on representation of criminal defendants in tribal courts
   - Mark Freedman, Senior Assistant General Counsel
   - Public comment on this request to initiate rulemaking
5. Consider and act on initiating rulemaking on the findings and recommendations of the Pro Bono Task Force with respect to the Private Attorney Involvement requirement
   - Mark Freedman, Senior Assistant General Counsel
   - Public comment on this request to initiate rulemaking
6. Discussion of Committee's evaluations for 2012 and the Committee's goals for 2013
7. Public comment
8. Consider and act on other business
9. Consider and act on adjournment of meeting

Institutional Advancement Committee

Open Session

1. Approval of agenda
2. Approval of minutes of the Committee's open session meeting of September 30, 2012
3. Report on the status of recruitment of a Chief Development Officer
4. Discussion of Committee's evaluations for 2012 and the Committee's goals for 2013
5. Discussion of plans for LSC's 40th anniversary celebration
6. Public comment
7. Consider and act on other business

Closed Session

8. Approval of minutes of the Committee's closed session meeting of September 30, 2012
9. Discussion of prospective funders for LSC's development activities
10. Discussion of prospective funders for implementing the Pro Bono Task Force report
11. Consider and act on adjournment of meeting

January 26, 2013

Governance and Performance Review Committee

1. Approval of agenda
2. Approval of minutes of the Committee's meeting of September 30, 2012
3. Staff Reports on
   - 2012 Board and Board Member self-evaluations
   - 2012 Committee evaluations
   - Staff report on progress in implementing GAO recommendations
4. Report on Public Welfare Foundation grant
   - Presentation by Jim Sandman
5. Discussion of President's evaluation for 2012
6. Discussion of the Inspector General's evaluation for 2012
7. Consider and act on other business
8. Public comment
9. Consider and act on motion to adjourn meeting

Audit Committee

Open Session

1. Approval of agenda
2. Approval of minutes of the Committee's meeting of September 30, 2012
3. Presentation of the Fiscal Year (FY) 2012 Annual Financial Audit
   - Ronald ''Dutch'' Merryman, Assistant Inspector General for Audits
   - Nancy Davis, WithumSmith+Brown
4. Review of LSC's Form 990 for FY 2012
5. Briefing by Office of Inspector General
   - Jeffrey Schanz, Inspector General
6. Discussion of Committee's evaluations for 2012 and the Committee's goals for 2013
7. Public comment
8. Consider and act on other business
9. Consider and act on adjournment of meeting

Closed Briefing

10. Communication by Corporate Auditor with those charged with governance under Statement on Auditing Standard 114
    - Jeffrey Schanz, Inspector General
    - Ronald ''Dutch'' Merryman, Assistant Inspector General for Audits
    - Nancy Davis, WithumSmith+Brown

Finance Committee

1. Approval of agenda
2. Approval of minutes of the Committee's meeting of October 1, 2012
3. Presentation of LSC's Financial Report for FY 2012
4. Consider and act on Revised Temporary Operating Budget for FY 2013, Resolution 2013–0XX
   - Presentation by David Richardson, Treasurer & Comptroller
5. Presentation of LSC's Financial Report for the first two months of FY 2013
   - Presentation by David Richardson, Treasurer & Comptroller
6. Report of the Selection of Accounts and Depositories for LSC Funds
   - Presentation by David Richardson, Treasurer & Comptroller
7. Consider and Act on submission of LSC's FY 2014 budget request
   - Presentation Carol Bergman, Director, Office of Government Relations & Public Affairs
8. Discussion of Committee's evaluation for 2012 and the Committee's goals for 2013
9. Public comment
10. Consider and act on other business
11. Consider and act on adjournment of meeting

Board of Directors

Open Session

1. Pledge of Allegiance
2. Approval of agenda
3. Approval of minutes of the Board's Open Session telephonic meeting of November 29, 2012
4. Consider and act on nominations for the Chairman of the Board of Directors
5. Consider and act on nominations for the Vice Chairman of the Board of Directors
6. Consider and act on delegation to the Chairman of authority to make committee appointments, including the appointment of committee Chairs and non-director members
7. Chairman's Report
8. Members' Reports
9. President's Report
10. Inspector General's Report
11. Consider and act on the report of the Promotion and Provision for the Delivery of Legal Services Committee
12. Consider and act on the report of the Finance Committee
13. Consider and act on the report of the Audit Committee
14. Consider and act on the report of the Operations and Regulations Committee
15. Consider and act on the report of the Governance and Performance Review Committee

16. Consider and act on the report of the Institutional Advancement Committee
17. Consider and act on Resolution 2013–XXX thanking the Members of the *Pro Bono* Task Force for their service on the Task Force
18. Consider and act on a request of a corporate officer for permission to accept compensation for outside employment
19. Public comment
20. Consider and act on other business
21. Consider and act on whether to authorize an executive session of the Board to address items listed below, under Closed Session

Closed Session

22. Approval of minutes of the Institutional Advancement Committee Closed Session of September 30, 2012
23. Approval of minutes of the Board's Closed Session of October 2, 2012
24. Management Briefing
25. Inspector General Briefing
26. Consider and act on General Counsel's report on potential and pending litigation involving LSC
27. Consider and act on motion to adjourn meeting

CONTACT PERSON FOR INFORMATION: Atitaya Rok, Staff Attorney, at (202) 295–1628. Questions may be sent by electronic mail to *FR_NOTICE_QUESTIONS@lsc.gov.*

NON-CONFIDENTIAL MEETING MATERIALS: Non-confidential meeting materials will be made available in electronic format at least 24 hours in advance of the meeting on the LSC Web site, at *http://www.lsc.gov/board-directors/meetings/board-meeting-notices/non-confidential-materials-be-considered-open-session.*

ACCESSIBILITY: LSC complies with the American's with Disabilities Act and Section 504 of the 1973 Rehabilitation Act. Upon request, meeting notices and materials will be made available in alternative formats to accommodate individuals with disabilities. Individuals who need other accommodations due to disability in order to attend the meeting in person or telephonically should contact Atitaya Rok, at (202) 295–1500 or *FR_NOTICE_QUESTIONS@lsc.gov*, at least 2 business days in advance of the meeting. If a request is made without advance notice, LSC will make every effort to accommodate the request but cannot guarantee that all requests can be fulfilled.

Dated: January 16, 2013.

Victor M. Fortuno,

Vice President & General Counsel.

[FR Doc. 2013–01211 Filed 1–17–13; 4:15 pm]

BILLING CODE 7050–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Materials Research; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463 as amended), the National Science Foundation announces the following meeting:

Name: Site visit review of the Cornell Energy Recovery Linac (ERL) technology development program at Cornell University by the Division of Materials Research, #1203.

Dates & Times: February 11, 2013; 7:30 a.m.–9:00 p.m., February 12, 2013; 7:30 a.m.–4:00 p.m.

Place: Cornell University, Ithaca, NY.

Type of Meeting: Part open.

Contact Person: Dr. Thomas Rieker, Program Director, Materials Research Science and Engineering Centers Program, Division of Materials Research, Room 1065, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Telephone (703) 292–4914.

Purpose of Meeting: To provide advice and recommendations concerning the progress of ERL technology development, plans for the remainder of the award, and continued support.

Agenda

Monday, February 11, 2013

7:30 a.m.–9:00 a.m. Closed—Executive session
9:00 a.m.–4:00 p.m. Open—Review of ERL
4:00 p.m.–5:30 p.m. Closed—Executive session
5:30 p.m.–9:00 p.m. Open—Poster session and dinner

Tuesday, February 12, 2013

8:00 a.m.–9:10 a.m. Open—Review of the ERL
9:10 a.m.–4:00 p.m. Closed—Executive session, Draft and Review Site visit report

Reason for Closing: The work being reviewed may include information of a proprietary or confidential nature, including technical information; financial data, such as salaries and personal information concerning individuals associated with the MRSEC. These matters are exempt under 5 U.S.C. 552b(c), (4) and (6) of the Government in the Sunshine Act.

Dated: January 16, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–01116 Filed 1–18–13; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Proposal Review Panel for Chemistry; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: CCI Phase I Cyber Review Panel (1191).

Date and Time:
February 12, 2013 10:30 a.m.–6:30 p.m.,
February 13, 2013 9:00 a.m.–5:30 p.m.

Place: Videoconferencing. National Science Foundation, 4201 Wilson Blvd., Arlington, Virginia 22230.

Type of Meeting: Part-open.

Contact Person: Suk-Wah Tam-Chang, Program Director, Centers for Chemical Innovation Program, Division of Chemistry, Room 1055, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, (703) 292–8684.

Purpose of Meeting: To conduct an in depth evaluation of performance, to assess progress towards goals, and to provide recommendations.

Agenda

Tuesday, Feb 12, 2013 (all times Eastern)

10:30 a.m.–11:30 a.m. Charge to Panel, instructions and discussion (Closed)
11:30 a.m.–12:30 p.m. Lunch
12:30 p.m.–2:15 p.m. Presentation from ''Center for Multiscale Theory and Simulation'' (Open)
2:15 p.m.–2:30 p.m. Break
2:30 p.m.–3:00 p.m. Panel—Center Q&A (Open)
3:00 p.m.–6:30 p.m. Panel discusses and prepares report (Closed)

Wednesday, Feb 13, 2013 (all times Eastern)

9:00 a.m.–9:30 a.m. Panel discussions (Closed)
9:30 a.m.–11:15 a.m. Presentation from ''Center for Sustainable Polymer'' (Open)
11:15 a.m.–11:30 a.m. Break
11:30 a.m.–12:00 p.m. Panel—Center Q&A (Open)
12:00 noon–1:00 p.m. Lunch
1:00 p.m.–5:30 p.m. Panel discusses and prepares reports (Closed)

Reason for Closing: The meeting is partially closed to the public because the Panel will be reviewing proposal actions that will include privileged intellectual property and personal information that could harm individuals if they were disclosed. If discussions were open to the public, these matters that are exempt under 5 U.S.C. 552b(c) (4) and (6) of the Government Sunshine Act would be improperly disclosed.

Dated: January 15, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–01088 Filed 1–18–13; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–039; NRC–2008–0603]

PPL Bell Bend, LLC; Combined License Application for Bell Bend Nuclear Power Plant; Exemption

1.0 Background

PPL Bell Bend, LLC, submitted to the U.S. Nuclear Regulatory Commission (NRC) a combined license application (COL) for a single unit of AREVA NP's U.S. EPR in accordance with the requirements of Title 10 of the *Code of Federal Regulations* (10 CFR), Subpart C of Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' This reactor is to be identified as Bell Bend Nuclear Power Plant (BBNPP), in Salem County, Pennsylvania. The NRC docketed the BBNPP COL application on October 10, 2008. The BBNPP COL application incorporates by reference AREVA NP's application for a standard design certification for the U.S. EPR. Additionally, the BBNPP COL application is based upon the U.S. EPR reference COL (RCOL) application for UniStar's Calvert Cliffs Nuclear Power Plant, Unit 3 (CCNPP3). The NRC is currently performing the detailed reviews of the CCNPP3 RCOL application, and AREVA NP's application for design certification of the U.S. EPR. PPL Bell Bend, LLC previously requested an exemption on October 21, 2011, pursuant to 10 CFR 50.71(e)(3)(iii) to allow for late filing of their mandatory application revision for calendar year 2011. The NRC granted the exemption as described in **Federal Register** notice (FRN) 76 FR 81992 (December 29, 2011).

2.0 Request/Action

The regulations specified in 10 CFR 50.71(e)(3)(iii), require that an applicant for a combined license under 10 CFR part 52 shall, during the period from docketing of a COL application until the Commission makes a finding under 10 CFR 52.103(g) pertaining to facility operation, submit an annual update to the application's Final Safety Analysis Report (FSAR).

On March 30, 2012, PPL Bell Bend, LLC submitted Revision 3 to the COL application, including updates to the FSAR. Since this submittal was provided to satisfy their approved exemption of December 29, 2011, the next annual update is due by the end of calendar year 2012. PPL Bell Bend, LLC has again requested a one-time exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the scheduled 2012 update, and proposed a new submittal deadline of April 15, 2013, for the next FSAR update.

In summary, the 2012 requested exemption is a one-time schedule change from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow PPL Bell Bend, LLC to submit the next FSAR update at a later date. The current FSAR update schedule could not be changed, absent the exemption. PPL Bell Bend, LLC requested the exemption by letter dated November 2, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12321A037). Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access ADAMS, which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are ML12325A753 and ML12325A841.

3.0 Discussion

Pursuant to 10 CFR 50.12, the NRC may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, including Section 50.71(e)(3)(iii) when: (1) The exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present. As relevant to the requested exemption, special circumstances exist if: (1) ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)); or (2) ''The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation'' (10 CFR 50.12(a)(2)(v)).

PPL Bell Bend, LLC, commits to submit the next COL FSAR update by April 15, 2013, and would need to identify all changes to the U.S. EPR FSAR in order to prepare a COL application FSAR revision that accurately and completely reflects the changes to the U.S. EPR FSAR.

The requested one-time schedule exemption to defer submittal of the next update to the BBNPP COL application FSAR would provide only temporary relief from the regulations of 10 CFR 50.71(e)(3)(iii).

Authorized by Law

The exemption is a one-time schedule exemption from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow PPL Bell Bend, LLC to submit the next BBNPP COL application FSAR update on or before April 15, 2013. Pursuant to 10 CFR 50.12, the NRC staff has determined that granting PPL Bell Bend, LLC, the requested one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) will provide only temporary relief from this regulation and will not result in a violation of the Atomic Energy Act of 1954, as amended, or the NRC's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for a timely and comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by the NRC staff and issuance of the NRC staff's safety evaluation report (SER). The requested exemption is solely administrative in nature, in that it pertains to the schedule for submittal to the NRC of revisions to an application under 10 CFR part 52, for which a license has not been granted. Based on the nature of the requested exemption as described above, no new accident precursors are created by the exemption; thus, neither the probability, nor the consequences of postulated accidents are increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The requested exemption would allow PPL Bell Bend, LLC to submit the next FSAR update on or before April 15, 2013. This schedule change has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2), are present whenever: (1) ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)); or (2) ''The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation'' (10 CFR 50.12(a)(2)(v)).

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for a timely and comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by the NRC staff and issuance of the NRC staff's SER. As discussed above, the requested one-time exemption is solely administrative in nature, in that it pertains to a one-time schedule change for submittal of revisions to an application under 10 CFR part 52, for which a license has not been granted. The requested one-time exemption will permit PPL Bell Bend, LLC, time to carefully review the most recent revisions of the U.S. EPR FSAR, and fully incorporate these revisions into a comprehensive update of the FSAR associated with the BBNPP COL application. This one-time exemption will support the NRC staff's effective and efficient review of the COL application when resumed, as well as issuance of the SER. For this reason, application of 10 CFR 50.71(e)(3)(iii) in the particular circumstances is not necessary to achieve the underlying purpose of that rule. Therefore, special circumstances exist under 10 CFR 50.12(a)(2)(ii). In addition, special circumstances are also present under 10 CFR 50.12(a)(2)(v), because granting a one-time exemption from 10 CFR 50.71(e)(3)(iii) would provide only temporary relief, and PPL Bell Bend, LLC, has made good faith efforts to comply with the regulation by submitting Revision 3 to the COL application on March 30, 2012. That revision incorporated changes resulting from Revisions 2 and 3 of the U.S. EPR FSAR and COLA changes resulting from relocation of the plant footprint within the existing project boundary. For the above reasons, the special circumstances required by 10 CFR 50.12(a)(2) for the granting of an exemption from 10 CFR 50.71(e)(3)(iii) exist.

Eligibility for Categorical Exclusion From Environmental Review

With respect to the exemption's impact on the human environment, the NRC has determined that this specific exemption request is eligible for categorical exclusion as identified in 10 CFR 51.22(c)(25). Under 10 CFR 51.22(c)(25), granting of an exemption from the requirements of any regulation of 10 CFR Chapter 1 [which includes 10 CFR 50.71(e)(3)(iii)] is an action that is a categorical exclusion, provided that:

(i) There is no significant hazards consideration;

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

(iv) There is no significant construction impact;

(v) There is no significant increase in the potential for or consequences from radiological accidents; and

(vi) The requirements from which an exemption is sought involve:

(A) Recordkeeping requirements;

(B) Reporting requirements;

(C) Inspection or surveillance requirements;

(D) Equipment servicing or maintenance scheduling requirements;

(E) Education, training, experience, qualification, requalification or other employment suitability requirements;

(F) Safeguard plans, and materials control and accounting inventory scheduling requirements;

(G) Scheduling requirements;

(H) Surety, insurance or indemnity requirements; or

(I) Other requirements of an administrative, managerial, or organizational nature.

The requirements from which this exemption is sought involve only (B) Reporting requirements; or (G) Scheduling requirements of those required by 10 CFR 51.22(c)(25)(vi).

The NRC staff's determination that each of the applicable criteria for this categorical exclusion is met is justified as follows:

I. 10 CFR 51.22(c)(25)(i) There is no significant hazards consideration;

Staff Analysis: The criteria for determining if the exemption involves a significant hazards consideration are found in 10 CFR 50.92. The proposed action involves only a schedule change regarding the submission of an update to the application for which the licensing review is currently underway. Therefore, there are no significant hazard considerations because granting the proposed exemption would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or

(3) Involve a significant reduction in a margin of safety.

II. 10 CFR 51.22(c)(25)(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

Staff Analysis: The proposed action involves only a schedule change which is administrative in nature, and does not involve any changes to be made in the types or significant increase in the amounts of effluents that may be released offsite.

III. 10 CFR 51.22(c)(25)(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

Staff Analysis: Since the proposed action involves only a schedule change, which is administrative in nature, it does not contribute to any significant increase in occupational or public radiation exposure.

IV. 10 CFR 51.22(c)(25)(iv) There is no significant construction impact;

Staff Analysis: The proposed action involves only a schedule change, which is administrative in nature. The application review is underway and no license will be issued prior to receipt of the afore-mentioned application's April 15, 2013, submittal of the revised FSAR, therefore, the proposed action does not involve any construction impact.

V. 10 CFR 51.22(c)(25)(v) There is no significant increase in the potential for or consequences from radiological accidents;

Staff Analysis: The proposed action involves only a schedule change which is administrative in nature and does not impact the probability or consequences of accidents.

VI. 10 CFR 51.22(c)(25)(vi) The requirements from which this exemption is sought involve only (B) Reporting requirements; or (G) Scheduling requirements of those required by this regulation.

(B) Reporting requirements; or (G) Scheduling requirements

Staff Analysis: The exemption request involves requirements in both of these categories (reporting requirements and scheduling requirements) because it involves submitting an updated FSAR by PPL Bell Bend, LLC and also relates to the schedule for submitting FSAR updates to the NRC.

4.0 Conclusion

Accordingly, the NRC has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the NRC hereby grants PPL Bell Bend, LLC a one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) pertaining to the BBNPP COL application to allow submittal of the next FSAR update, no later than April 15, 2013.

Pursuant to 10 CFR 51.22, the NRC has determined that the exemption request meets the applicable categorical exclusion criteria set forth in 10 CFR

51.22(c)(25), and the granting of this exemption will not have a significant impact on the human environment.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 8th day of January 2013.

For the Nuclear Regulatory Commission.

John Segala,

Chief, Licensing Branch1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2013–01148 Filed 1–18–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–016; NRC–2008–0250]

UniStar Nuclear Energy, Combined License Application for Calvert Cliffs Power Plant, Unit 3, Exemption

1.0 Background

UniStar Nuclear Energy (UNE), on behalf of Calvert Cliffs Nuclear Project, LLC and UniStar Nuclear Operating Services, LLC, submitted to the U.S. Nuclear Regulatory Commission (NRC) a combined license (COL) application for a single unit of AREVA NP's U.S. EPR in accordance with the requirements of Title 10 of the *Code of Federal Regulations* (10 CFR), Subpart C of Part 52, ''Licenses, Certifications, and Approvals for Nuclear Power Plants.'' This reactor is to be identified as Calvert Cliffs Nuclear Power Plant, Unit 3 (CCNPP Unit 3), and is to be located in Calvert County, MD. The NRC docketed Part 2 of the CCNPP Unit 3 COL application on June 3, 2008. The CCNPP Unit 3 COL application incorporates by reference AREVA NP's application for a standard design certification for the U.S. EPR. The NRC is currently performing concurrent reviews of the CCNPP Unit 3 COL application, as well as AREVA NP's application for design certification of the U.S. EPR. UNE previously requested an exemption on November 8, 2011, pursuant to 10 CFR 50.71(e)(iii) to submit the scheduled 2011 update, and proposed, for approval, a new submittal deadline of March 30, 2012. The NRC granted the exemption as described in **Federal Register** notice (FR) 76 FR 81994 (December 29, 2011).

2.0 Request/Action

The regulations specified in 10 CFR 50.71(e)(3)(iii), require that an applicant for a combined license under 10 CFR Part 52 shall, during the period from docketing of a COL application until the Commission makes a finding under 10 CFR 52.103(g) pertaining to facility operation, submit an annual update to the application's Final Safety Analysis Report (FSAR), which is a part of the COL application.

On March 27, 2012, UNE submitted Revision 8 to the COL application, including updates to the FSAR. Since this submittal was provided to satisfy their requested exemption of November 8, 2011, pursuant to 10 CFR 50.71(e)(3)(iii), the next annual update is due by the end of December 2012. UNE has again requested a one-time exemption from the 10 CFR 50.71(e)(3)(iii) requirements to submit the scheduled 2012 update, and proposed for approval, a new submittal deadline of March 29, 2013, for the next FSAR update.

In summary, the requested exemption is a one-time schedule change from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow UNE to submit the next FSAR update at a later date. The current FSAR update schedule could not be changed, absent the exemption. UNE requested the exemption by letter dated November 2, 2012 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12311A270). Documents related to this action, including the application for amendment and supporting documentation, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, you can access the NRC's ADAMS, which provides text and image files of NRC's public documents. The ADAMS accession numbers for the documents related to this notice are ML12341A189 and ML12341A262.

3.0 Discussion

Pursuant to 10 CFR 50.12, the NRC may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR part 50, including Section 50.71(e)(3)(iii) when: (1) The exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) special circumstances are present. As relevant to the requested exemption, special circumstances exist if: (1) ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)); or (2) ''The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation'' (10 CFR 50.12(a)(2)(v)).

UNE commits to submit the next COL FSAR update by March 29, 2013, and would need to identify all changes to the U.S. EPR FSAR in order to prepare a COL application FSAR revision that accurately and completely reflects the changes to the U.S. EPR FSAR.

The requested one-time schedule exemption to defer submittal of the next update to the CCNPP Unit 3 COL application FSAR would provide only temporary relief from the regulations of 10 CFR 50.71(e)(3)(iii).

Authorized by Law

The exemption is a one-time schedule exemption from the requirements of 10 CFR 50.71(e)(3)(iii). The exemption would allow UNE to submit the next CCNPP Unit 3 COL application FSAR update on or before March 29, 2013. Per 10 CFR 50.12. the NRC staff has determined that granting UNE the requested one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) will provide only temporary relief from this regulation and will not result in a violation of the Atomic Energy Act of 1954, as amended, or the NRC's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for a timely and comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by the NRC staff and issuance of the NRC staff's safety evaluation report. The requested exemption is solely administrative in nature, in that it pertains to the schedule for submittal to the NRC of revisions to an application under 10 CFR Part 52, for which a license has not been granted. Based on the nature of the requested exemption as described above, no new accident precursors are created by the exemption; thus, neither the probability, nor the consequences of postulated accidents are increased. Therefore, there is no undue risk to public health and safety.

Consistent With Common Defense and Security

The requested exemption would allow UNE to submit the next FSAR update on or before March 29, 2013. This schedule change has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2), are present

whenever: (1) ''Application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule'' (10 CFR 50.12(a)(2)(ii)); or (2) ''The exemption would provide only temporary relief from the applicable regulation and the licensee or applicant has made good faith efforts to comply with the regulation'' (10 CFR 50.12(a)(2)(v)).

The underlying purpose of 10 CFR 50.71(e)(3)(iii) is to provide for a timely and comprehensive update of the FSAR associated with a COL application in order to support an effective and efficient review by the NRC staff and issuance of the NRC staff's safety evaluation report. As discussed above, the requested one-time exemption is solely administrative in nature, in that it pertains to a one-time schedule change for submittal of revisions to an application under 10 CFR part 52, for which a license has not been granted. The requested one-time exemption will permit UNE time to carefully review the most recent revisions of the U.S. EPR FSAR, and fully incorporate these revisions into a comprehensive update of the FSAR associated with the CCNPP Unit 3 COL application. This one-time exemption will support the NRC staff's effective and efficient review of the COL application when resumed, as well as issuance of the safety evaluation report. For this reason, application of 10 CFR 50.71(e)(3)(iii) in the particular circumstances is not necessary to achieve the underlying purpose of that rule. Therefore, special circumstances exist under 10 CFR 50.12(a)(2)(ii). In addition, special circumstances are also present under 10 CFR 50.12(a)(2)(v) because granting a one-time exemption from 10 CFR 50.71(e)(3)(iii) would provide only temporary relief, and UNE has made good faith efforts to comply with the regulation by submitting Revision 8 to the COL application on March 27, 2012. This COLA revision incorporated changes resulting from Revision 3 of the U.S. EPR FSAR and COLA changes resulting from UNE's responses to the NRC requests for additional information submitted through February 12, 2012. For the above reasons, the special circumstances required by 10 CFR 50.12(a)(2) for the granting of an exemption from 10 CFR 50.71(e)(3)(iii) exist.

Eligibility for Categorical Exclusion From Environmental Review

With respect to the exemption's impact on the quality of the human environment, the NRC has determined that this specific exemption request is eligible for categorical exclusion as identified in 10 CFR 51.22(c)(25). Under 10 CFR 51.22(c)(25), granting of an exemption from the requirements of any regulation of 10 CFR Chapter 1 [which includes 10 CFR 50.71(e)(3)(iii)] is an action that is a categorical exclusion, provided that:

(i) There is no significant hazards consideration;

(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

(iv) There is no significant construction impact;

(v) There is no significant increase in the potential for or consequences from radiological accidents; and

(vi) The requirements from which an exemption is sought involve:

(A) Recordkeeping requirements;

(B) Reporting requirements;

(C) Inspection or surveillance requirements;

(D) Equipment servicing or maintenance scheduling requirements;

(E) Education, training, experience, qualification, requalification or other employment suitability requirements;

(F) Safeguard plans, and materials control and accounting inventory scheduling requirements;

(G) Scheduling requirements;

(H) Surety, insurance or indemnity requirements; or

(I) Other requirements of an administrative, managerial, or organizational nature.

The requirements from which this exemption is sought involve only (B) Reporting requirements; or (G) Scheduling requirements of those required by 10 CFR 51.22(c)(25)(vi).

The NRC staff's determination that each of the applicable criteria for this categorical exclusion is met is justified as follows:

I. 10 CFR 51.22(c)(25)(i) There is no significant hazards consideration;

Staff Analysis: The criteria for determining if an exemption involves a significant hazards consideration are found in 10 CFR 50.92. The proposed action involves only a schedule change regarding the submission of an update to the application for which the licensing review is currently underway. Therefore, there are no significant hazard considerations because granting the proposed exemption would not:

(1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or

(2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or

(3) Involve a significant reduction in a margin of safety.

II. 10 CFR 51.22(c)(25)(ii) There is no significant change in the types or significant increase in the amounts of any effluents that may be released offsite;

Staff Analysis: The proposed action involves only a schedule change, which is administrative in nature, and does not involve any changes to be made in the types or significant increase in the amounts of effluents that may be released offsite;

III. 10 CFR 51.22(c)(25)(iii) There is no significant increase in individual or cumulative public or occupational radiation exposure;

Staff Analysis: Since the proposed action involves only a schedule change, which is administrative in nature, it does not contribute to any significant increase in occupational or public radiation exposure.

IV. 10 CFR 51.22(c)(25)(iv) There is no significant construction impact;

Staff Analysis: The proposed action involves only a schedule change which is administrative in nature. The application review is underway and no license will be issued prior to receipt of the aforementioned application's March 29, 2013, submittal of the revised FSAR, therefore, the proposed action does not involve any construction impact.

V. 10 CFR 51.22(c)(25)(v) There is no significant increase in the potential for or consequences from radiological accidents;

Staff Analysis: The proposed action involves only a schedule change which is administrative in nature and does not impact the probability or consequences of accidents.

VI. 10 CFR 51.22(c)(25)(vi) The requirements from which this exemption is sought involve only (B) Reporting requirements; or (G) Scheduling requirements of those required this regulation.

Staff Analysis: The exemption request involves requirements in both of these categories because it involves submitting an updated COL FSAR by JUNE and also relates to the schedule for submitting COL FSAR updates to the NRC.

4.0 Conclusion

Accordingly, the NRC has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present.

Therefore, the NRC hereby grants UNE a one-time exemption from the requirements of 10 CFR 50.71(e)(3)(iii) pertaining to the CCNPP Unit 3 COL application to allow submittal of the next FSAR update, no later than March 29, 2013.

Pursuant to 10 CFR 51.22, the NRC has determined that the exemption request meets the applicable categorical exclusion criteria set forth in 10 CFR 51.22(c)(25), and the granting of this exemption will not have a significant impact on the human environment.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 8th day of January 2013.

For the Nuclear Regulatory Commission.

John Segala,

Chief, Licensing Branch 1, Division of New Reactor Licensing, Office of New Reactors.

[FR Doc. 2013–01145 Filed 1–18–13; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[NRC–2013–0012]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (the Commission or NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from December 27, 2012 to January 9, 2013. The last biweekly notice was published on January 8, 2013 (78 FR 1267).

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–2013–0012. 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–2013–0012. 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.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0012 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–2013–0012.
- *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.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.
- *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–2013–0012 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 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.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances

change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of the Secretary by email at *hearing.docket@nrc.gov*, or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html*. System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in,

is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*.

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html*. A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html*, by email at *MSHD.Resource@nrc.gov*, or by a toll-free call at 1–866 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/*, unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*.

Detroit Edision, Docket No. 50–341, Fermi 2, Monroe County, Michigan

Date of amendment request: November 13, 2012.

Description of amendment request: The proposed amendment would modify Technical Specification requirements to operate ventilation systems with charcoal filters for 10 hours each in accordance with Technical Specifications Task Force (TSTF)–522, Revision 0, ''Revise Ventilation System Surveillance Requirements to Operate for 10 hours per Month.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change replaces an existing Surveillance Requirement to operate the SGT System and CREF System equipped with electric heaters for a continuous 10 hour period every 31 days with a requirement to operate the systems for 15 continuous minutes with heaters operating.

These systems are not accident initiators and therefore, these changes do not involve a significant increase in the probability of an accident. The proposed system and filter testing changes are consistent with current regulatory guidance for these systems and will continue to assure that these systems perform their design function which may include mitigating accidents. Thus the change does not involve a significant increase in the consequences of an accident.

Therefore, it is concluded that this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change replaces an existing Surveillance Requirement to operate the SGT System and CREF System equipped with electric heaters for a continuous 10 hour period every 31 days with a requirement to operate the systems for 15 continuous minutes with heaters operating.

The change proposed for these ventilation systems does not change any system operations or maintenance activities. Testing requirements will be revised and will continue to demonstrate that the Limiting Conditions for Operation are met and the system components are capable of performing their intended safety functions. The change does not create new failure modes or mechanisms and no new accident precursors are generated.

Therefore, it is concluded that this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change replaces an existing Surveillance Requirement to operate the SGT System and CREF System equipped with electric heaters for a continuous 10 hour period every 31 days with a requirement to operate the systems for 15 continuous minutes with heaters operating.

The design basis for the ventilation systems' heaters is to heat the incoming air which reduces the relative humidity. The heater testing change proposed will continue to demonstrate that the heaters are capable of heating the air and will perform their design function. The proposed change is consistent with regulatory guidance.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bruce R. Masters, DTE Energy, General Counsel—Regulatory, 688 WCB, One Energy Plaza, Detroit, MI 48226–1279.

NRC Branch Chief: Robert D. Carlson.

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit 2, New London County, Connecticut

Date of amendment request: December 17, 2012.

Description of amendment request: The proposed amendment would revise the Millstone Power Station, Unit 2 (MPS2) Technical Specification (TS) Surveillance Requirement 4.4.3.2 to remove the requirement to perform the quarterly surveillance for a pressurizer power-operated relief valve (PORV) block valve that is being maintained closed in accordance with TS 3.4.3 Action a. The proposed change is consistent with the requirements of the standard Technical Specification for Combustion Engineering plants (NUREG–1432).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), of Title 10 of the *Code of Federal Regulations* (10 CFR), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

Will operation of the facility in accordance with the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The block valve for the pressurizer PORV is not a potential accident initiator. Therefore, not requiring a surveillance of the block valve while it is being used to isolate its associated PORV will not increase the probability of an accident previously evaluated. Not requiring the surveillance of the block valve may slightly reduce the probability of a loss of coolant accident from a stuck open PORV since it will eliminate the challenge to the PORV from the pressure transient that results from cycling the block valve.

The PORVs or the PORV block valves are not credited in the MPS2 Final Safety Analysis Report (FSAR), Chapter 14, ''Safety Analysis,'' for event mitigation. If pressurizer spray is not available or is not effective, either one or the two pressurizer PORVs may be manually actuated to depressurize the RCS in response to certain transients. Not performing the surveillance on the block valve is not relevant to the primary system for depressurizing the RCS (pressurizer spray). The block valves have been demonstrated by operating experience to be reliable and are also subject to the motor-operated valve testing program. Consequently, the proposed change does not significantly reduce the confidence that the block valve can be opened to permit manual actuation of the PORV to depressurize the RCS.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2

Will operation of the facility in accordance with the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change only affects the performance of the surveillance test for the block valve and does not involve any physical alteration of plant equipment or introduce any operating configurations not previously evaluated. The pressurizer PORV block valves provide isolation for a postulated stuck-open or leaking PORV. Isolation is satisfied with the block valve closed in accordance with SR 4.4.3.2. PORV block valve closure is not credited in FSAR Chapter 14 for inadvertent opening of the PORV event mitigation.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3

Will operation of the facility in accordance with the proposed change involve a significant reduction in the margin of safety?

Response: No.

Margin of safety is related to the confidence in the ability of the fission product barriers to perform their design functions during and following an accident. These barriers include the fuel cladding, the reactor coolant system, and the containment system. These barriers are not significantly affected by the changes proposed herein. The margin of safety is established through the design of the plant structures, systems, and components, the parameters within which the plant is operated, and the establishment of setpoints for the actuation of equipment relied upon to respond to an event, and thereby protect the fission product barriers. The proposed change to the surveillance requirement for the presurrizer PORV block valve does not affect the assumptions in any accident analysis.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Branch Chief: George A. Wilson.

Luminant Generation Company LLC, Docket Nos. 50–445 and 50–446, Comanche Peak Nuclear Power Plant, Units 1 and 2, Somervell County, Texas

Date of amendment request: October 2, 2012.

Brief description of amendments: The amendments would revise Technical Specification (TS) 3.3.1, ''Reactor Trip System (RTS) Instrumentation,'' and TS 3.3.2, ''Engineered Safety Feature Actuation System (ESFAS) Instrumentation,'' to relocate the TS requirements for the following instruments to the Technical Requirements Manual (TRM), a licensee-controlled document, under 10 CFR 50.59:

- Pressurizer Water level—High (RTS Function No. 9)
- Trip of all Main Feedwater Pumps (ESFAS Function No. 6.g)
- ESFAS Interlock, Reactor Trip, P–4 (ESFAS Function No. 8.a)

The proposed changes would relocate the TS requirements in their entirety and not result in deletion or alteration of any RTS or ESFAS requirements. The proposed relocation of the TS requirements for these RTS and ESFAS instrument Functions is based on the

application of the TS criteria of 10 CFR 50.36(c)(2)(ii).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Do the proposed changes involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change to the TS does not affect the initiators of any analyzed accident. In addition, operation in accordance with the proposed TS change will continue to ensure that the previously evaluated accidents will be mitigated as analyzed. Thus, the proposed change does not adversely affect the design function or operation of any structures, systems, and components important to safety.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Do the proposed changes create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed). The proposed change does not create any new failure modes for existing equipment or any new limiting single failures. Additionally the proposed change does not involve a change in the methods governing normal plant operation and all safety functions will continue to perform as previously assumed in accident analyses. Thus, the proposed change does not adversely affect the design function or operation of any structures, systems, and components important to safety.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Do the proposed changes involve a significant reduction in a margin of safety?

Response: No.

The proposed change will not adversely affect the operation of plant equipment or the function of equipment assumed in the accident analyses. The proposed changes to the RTS and ESFAS TS requirements do not change the RTS or ESFAS design and capability to perform the required safety functions consistent with the assumptions of the applicable safety analyses. In addition, operation in accordance with the proposed TS change will continue to ensure that the previously evaluated accidents will be mitigated as analyzed.

Therefore, the proposed change does not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Timothy P. Matthews, Esq., Morgan, Lewis and Bockius, 1111 Pennsylvania Avenue NW., Washington, DC 20004.

NRC Branch Chief: Michael T. Markley.

NextEra Energy Seabrook, LLC Docket No. 50–443, Seabrook Station, Unit 1, Rockingham County, New Hampshire

Date of amendment request: December 20, 2012.

Description of amendment request: The proposed amendment will revise the Seabrook Technical Specifications (TS) TS 6.7.6.m, ''Reactor Coolant Pump Flywheel Inspection Program.'' The proposed amendment will extend the reactor coolant pump (RCP) motor flywheel examination frequency from the currently approved 10-year inspection interval, to an interval not to exceed 20 years. The changes are consistent with Industry/Technical Specification Task Force (TSTF) Standard Technical Specification Change Traveler, TSTF–421, ''Revision to RCP Flywheel Inspection Program (WCAP–15666).'' The availability of this TS improvement was announced in the **Federal Register** on October 22, 2003, as part of the consolidated line item improvement process (CLIIP).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration (NSHC) through incorporation by reference of the NSHC published in the **Federal Register** Notice dated June 24, 2003 (68 FR 37590), which is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change to the RCP flywheel examination frequency does not change the response of the plant to any accidents. The RCP will remain highly reliable and the proposed change will not result in a significant increase in the risk of plant operation. Given the extremely low failure probabilities for the RCP motor flywheel during normal and accident conditions, the extremely low probability of a loss-of-coolant accident (LOCA) with loss of offsite power (LOOP), and assuming a conditional core damage probability (CCDP) of 1.0 (complete failure of safety systems), the core damage frequency (CDF) and change in risk would still not exceed the NRC's acceptance guidelines contained in RG 1.174 (<1.0E–6 per year). Moreover, considering the uncertainties involved in this evaluation, the risk associated with the postulated failure of an RCP motor flywheel is significantly low. Even if all four RCP motor flywheels are considered in the bounding plant configuration case, the risk is still acceptably low.

The proposed change does not adversely affect accident initiators or precursors, nor alter the design assumptions, conditions, or configuration of the facility, or the manner in which the plant is operated and maintained; alter or prevent the ability of structures, systems, components (SSCs) from performing their intended function to mitigate the consequences of an initiating event within the assumed acceptance limits; or affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of an accident previously evaluated. Further, the proposed change does not increase the type or amount of radioactive effluent that may be released offsite, nor significantly increase individual or cumulative occupational/public radiation exposure. The proposed change is consistent with the safety analysis assumptions and resultant consequences.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Accident Previously

The proposed change in flywheel inspection frequency does not involve any change in the design or operation of the RCP. Nor does the change to examination frequency affect any existing accident scenarios, or create any new or different accident scenarios. Further, the change does not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed) or alter the methods governing normal plant operation. In addition, the change does not impose any new or different requirements or eliminate any existing requirements, and does not alter any assumptions made in the safety analysis. The proposed change is consistent with the safety analysis assumptions and current plant operating practice. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in a Margin of Safety

The proposed change does not alter the manner in which safety limits, limiting safety system settings, or limiting conditions for operation are determined. The safety analysis acceptance criteria are not impacted by this change. The proposed change will not result in plant operation in a configuration outside of the design basis. The calculated impact on risk is insignificant and meets the acceptance criteria contained in RG 1.174. There are no significant mechanisms for inservice degradation of the RCP flywheel. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the analysis and, based on this review, it appears that the three standards of

50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: James Petro, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Branch Chief: Meena Khanna.

PSEG Nuclear LLC, Docket No. 50–272, Salem Nuclear Generating Station, Unit 1, Salem County, New Jersey

Date of amendment request: May 8, 2012.

Description of amendment request: The proposed amendment would revise Salem Unit 1 Technical Specification (TS) 6.8.4.i, ''Steam Generator (SG) Program,'' to permanently exclude portions of the tube below the top of the steam generator tubesheet from periodic steam generator tube inspections. In addition, this amendment proposes to revise TS 6.9.1.10, ''Steam Generator Tube Inspection Report,'' to provide permanent reporting requirements that have been previously established on an interim basis.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below, with the NRC staff edits in square brackets:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The previously analyzed accidents are initiated by the failure of plant structures, systems, or components. The proposed change that alters the steam generator inspection criteria does not have a detrimental impact on the integrity of any plant structure, system, or component that initiates an analyzed event. The proposed change will not alter the operation of, or otherwise increase the failure probability of any plant equipment that initiates an analyzed accident.

Of the applicable accidents previously evaluated, the limiting transients with consideration to the proposed change to the steam generator tube inspection and repair criteria are the steam generator tube rupture (SGTR) event, the steam line break (SLB) and the feedline break (FLB) postulated accidents.

Addressing the SGTR event, the required structural integrity margins of the steam generator tubes and the tube-to-tubesheet joint over the H* distance will be maintained. Tube rupture in tubes with cracks within the tubesheet is precluded by the presence of the tubesheet and constraint provided by the tube-to-tubesheet joint. Tube burst cannot occur within the thickness of the tubesheet. The tube-to-tubesheet joint constraint results from the hydraulic expansion process, thermal expansion mismatch between the tube and tubesheet, from the differential pressure between the primary and secondary side, and tubesheet deflection. The structural margins against burst, as discussed in Regulatory Guide (RG) 1.121, ''Bases for Plugging Degraded PWR [pressurized-water reactor] Steam Generator Tubes,'' and TS 6.8.4.i are maintained for both normal and postulated accident conditions.

The proposed change has no impact on the structural or leakage integrity of the portion of the tube outside of the tubesheet. The proposed change maintains structural and leakage integrity of the steam generator tubes consistent with the performance criteria in TS 6.8.4.i. Therefore, the proposed change results in no significant increase in the probability of the occurrence of a SGTR accident.

At normal operating pressures, leakage from tube degradation below the proposed limited inspection depth is limited by the tube-to-tubesheet joint. Consequently, negligible normal operating leakage is expected from degradation below the inspected depth within the tubesheet region. The consequences of an SGTR event are not affected by the primary to secondary leakage flow during the event as primary to secondary leakage flow through a postulated tube that has been pulled out of the tubesheet is essentially equivalent to a severed tube. Therefore, the proposed changes do not result in a significant increase in the consequences of a SGTR.

The consequences of a SLB or FLB are also not significantly affected by the proposed changes. The leakage analysis shows that the primary-to-secondary leakage during a SLB/FLB event would be less than or equal to that assumed in the Updated Safety Analysis Report.

Primary-to-secondary leakage from tube degradation in the tubesheet area during the limiting accidents (i.e., SLB/FLB) is limited by flow restrictions. These restrictions result from the crack and tube-to-tubesheet contact pressures that provide a restricted leakage path above the indications and also limit the degree of potential crack face opening as compared to free span indications.

The leakage factor for Salem Unit 1, for a postulated SLB/FLB, has been calculated as 2.16. Specifically, for the condition monitoring (CM) assessment, the component of leakage from the prior cycle from below the H* distance will be multiplied by a factor of 2.16 and added to the total leakage from any other source and compared to the allowable accident induced leakage limit. For the operational assessment (OA), the difference in the leakage between the allowable leakage and the accident induced leakage from sources other than the tubesheet expansion region will be divided by 2.16 and compared to the observed operational leakage.

The probability of an SLB/FLB is unaffected by the potential failure of a steam generator tube as the failure of the tube is not an initiator for an SLB/FLB event. SLB/FLB leakage is limited by leakage flow restrictions resulting from the leakage path above potential cracks through the tube-to-tubesheet crevice. The leak rate during all postulated accident conditions that model primary-to-secondary leakage (including locked rotor and control rod ejection) has been shown to remain within the accident analysis assumptions for all axial and or circumferentially orientated cracks occurring 15.21 inches below the top of the tubesheet. The accident analysis calculations have an assumption of 0.6 gpm [gallons per minute] at room temperature (gpmRT) primary-to-secondary leakage in a single SG and 1 gpm at room temperature (gpmRT) total primary-to-secondary leakage for all SGs. This apportioned primary-to-secondary leakage is used in the Main Steam Line Break and Locked Rotor accidents. Primary-to-secondary leakage of 1 gpm at room temperature (gpmRT) from all SGs, conservatively modeled to be released from a single location to maximize control room dose consequences, is used in the Control Rod Ejection (CRE) accident. The TS operational leak rate limit is 150 gallons per day (gpd) (0.104 gpmRT). The maximum accident leak rate ratio for Salem Unit 1 is 2.16 (Revised Table 9–7, Reference 15, [of the licensee's amendment request dated May 8, 2012]). Consequently, this results in significant margin between the conservatively estimated accident leakage and the allowable accident leakage.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change alters the steam generator inspection and reporting criteria. It does not introduce any new equipment, create new failure modes for existing equipment, or create any new limiting single failures. Plant operation will not be altered, and safety functions will continue to perform as previously assumed in accident analyses.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

Response: No.

The proposed change alters the steam generator inspection and reporting criteria. It maintains the required structural margins of the steam generator tubes for both normal and accident conditions. NEI 97–06 and RG 1.121, are used as the bases in the development of the limited tubesheet inspection depth methodology for determining that steam generator tube integrity considerations are maintained within acceptable limits. RG 1.121 describes a method acceptable to the NRC for meeting GDC [General Design Criteria] 14, ''Reactor Coolant Pressure Boundary,'' GDC 15, ''Reactor Coolant System Design,'' GDC 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary,'' and GDC 32, ''Inspection of Reactor Coolant Pressure Boundary,'' by reducing the probability and consequences of a SGTR. RG 1.121 concludes that by determining the limiting safe conditions for tube wall degradation, the probability and consequences of a SGTR are

reduced. This RG uses safety factors on loads for tube burst that are consistent with the requirements of Section III of the American Society of Mechanical Engineers (ASME) Code.

For axially-oriented cracking located within the tubesheet, tube burst is precluded due to the presence of the tubesheet. For circumferentially-oriented cracking, the H* Analysis documented in Section 3, [of the licensee's amendment request dated May 8, 2012,] defines a length of degradation-free expanded tubing that provides the necessary resistance to tube pullout due to the pressure induced forces, with applicable safety factors applied. Application of the limited hot and cold leg tubesheet inspection criteria will preclude unacceptable primary to secondary leakage during all plant conditions. The methodology for determining leakage provides for large margins between calculated and actual leakage values in the proposed limited tubesheet inspection depth criteria.

Therefore, the proposed change does not involve a significant reduction in any margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, and with the changes noted above in square brackets, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Meena K. Khanna.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit 2, New London County, Connecticut

Date of amendment request: July 31, 2012.

Description of amendment request: The proposed amendment would revise the Millstone Power Station, Unit 2 Technical Specification requirements regarding steam generator tube inspections and reporting as described in TSTF–510, Revision 2, ''Revision to Steam Generator Program Inspection Frequencies and Tube Sample Selection;'' however, Dominion Nuclear Connecticut, Inc. is proposing minor variations and deviations from TSTF–510.

Date of issuance: January 4, 2013.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 312.

Renewed Facility Operating License No. DPR–65: Amendment revised the License and Technical Specifications.

Date of initial notice in ***Federal Register:*** September 4, 2012 (77 FR 53926).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated January 4, 2013.

No significant hazards consideration comments received: No.

Entergy Gulf States Louisiana, LLC, and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1 (RBS), West Feliciana Parish, Louisiana

Entergy Nuclear Operations, Inc., Docket Nos. 50–155 and 72–043 (ISFSI), Big Rock Point Plant (Big Rock), Charlevoix County, Michigan

Entergy Nuclear Operations, Inc., Docket Nos. 50–003, 50–247 and 50–286, Indian Point Nuclear Generating Units 1, 2 and 3 (IP1, IP2, and IP3), Westchester County, New York

Entergy Nuclear Operations, Inc., Docket No. 50–333, James A. FitzPatrick Nuclear Power Plant (FitzPatrick), Oswego County, New York

Entergy Nuclear Operations, Inc., Docket No. 50–255, Palisades Nuclear Plant (Palisades), Van Buren County, Michigan

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station (Pilgrim), Plymouth County, Massachusetts

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., Docket No. 50–271, Vermont Yankee Nuclear Power Station (VY), Vernon, Vermont

Entergy Operations, Inc., Docket Nos. 50–313 and 50–368, Arkansas Nuclear One, Units 1 and 2 (ANO1 and ANO2), Pope County, Arkansas

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1 (GGNS), Claiborne County, Mississippi

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3 (Waterford), St. Charles Parish, Louisiana

Date of application for amendment: December 13, 2011, as supplemented by letters dated May 21, and November 20, 2012.

Brief description of amendment: The amendments approved changes to the Quality Assurance Program Manual (QAPM) and Technical Specifications (TSs) for the above specified plants. The proposed changes standardize unit staff qualification requirements for the Entergy fleet. Certain changes to the QAPM are a reduction in commitment and, in accordance with 10 CFR 50.54(a)(4), NRC approval is required prior to implementation.

Date of issuance: December 28, 2012.

Effective date: As of the date of issuance and shall be implemented 120 days from the date of issuance.

Amendment Nos.: ANO1—248; ANO2—296; FitzPatrick—304; GGNS—193; IP2—271; IP3—248; Palisades—

249; Pilgrim—239; RBS—178; VY—253; and Waterford—240.

Facility Operating License Nos. DPR–51, NPF–6, NPF–29, NPF–47, NPF–38, DPR–59, DPR–35, DPR–26, DPR–64, DPR–20, and DPR–28: The amendments revise the Facility Operating Licenses and Technical Specifications.

Date of initial notice in ***Federal Register:*** March 20, 2012 (77 FR 16274). The supplemental letters dated May 21 and November 20, 2012, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 28, 2012.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit 1, Washington County, Nebraska

Date of amendment request: December 23, 2011, as supplement by letter dated June 18, 2012.

Brief description of amendment: The amendment revised the Technical Specifications (TSs) to incorporate a new Radial Peaking Factor definition and to clarify Limiting Condition for Operation 2.10.2(6), ''Shutdown CEA [Control Element Assembly] Insertion Limit During Power Operation.'' Specifically, the amendment removed requirements for, and references to, the ''Unrodded Integrated Radial Peaking Factor.'' The amendment also added a definition of, and references to, the ''Maximum Radial Peaking Factor ($F_R{}^T$).'' Additional clarifications and editorial changes were made to TS 2.10, ''Reactor Core.''

Date of issuance: December 31, 2012.

Effective date: As of the date of issuance and shall be implemented within 120 days of issuance.

Amendment No.: 269.

Renewed Facility Operating License No. DPR–40: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 17, 2012 (74 FR 22816). The supplemental letter dated June 18, 2012, provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the staff's original proposed no significant hazards consideration determination as published in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a safety evaluation dated December 31, 2012.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket Nos. 50–275 and 50–323, Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2, San Luis Obispo County, California

Date of application for amendment: January 5, 2012.

Brief description of amendment: The amendments revised the Diablo Canyon Power Plant, Units 1 and 2, Final Safety Analysis Report Update Section 4.3.2.2, ''Power Distribution,'' to allow the use of the Westinghouse Electric Company LLC's Best Estimate Analyzer for the Core Operations-Nuclear (BEACON) Power Distribution Monitoring System methodology as described in WCAP–12472–P–A, Addendum 1–A, ''BEACON Core Monitoring and Operation Support System,'' January 2000.

Date of issuance: January 9, 2013.

Effective date: As of its date of issuance and shall be implemented within 120 days from the date of issuance. Implementation of the amendments shall also include revision of the Final Safety Analysis Report Update as described in the licensee's letter dated January 5, 2012.

Amendment Nos.: Unit 1—214; Unit 2—216.

Facility Operating License Nos. DPR–80 and DPR–82: The amendments revised the Facility Operating Licenses.

Date of initial notice in ***Federal Register:*** May 15, 2012 (77 FR 28633).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated January 9, 2013.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc., Docket Nos. 50–348 and 50–364, Joseph M. Farley Nuclear Plant, Units 1 and 2, Houston County, Alabama

Date of amendment request: January 18, 2012.

Brief description of amendment request: The amendment revises Technical Specification (TS) Surveillance Requirements 3.4.11.1 and 3.4.11.4 by removing requirements no longer applicable to Joseph M. Farley Nuclear Plant, Unit 2.

Date of issuance: December 27, 2012.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 186.

Facility Operating License No. NPF–8:

Date of initial notice in ***Federal Register:*** October 2, 2012 (77 FR 60152).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated December 27, 2012.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 11th day of January 2013.

For the Nuclear Regulatory Commission.

Michele G. Evans,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–01010 Filed 1–18–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act; Meeting Notice

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission, [NRC–2013–0001].

DATES: Weeks of January 21, 28, February 4, 11, 18, 25, 2013.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Week of January 21, 2013

There are no meetings scheduled for the week of January 21, 2013.

Week of January 28, 2013—Tentative

Thursday, January 31, 2013

8:55 a.m. Affirmation Session (Public Meeting) (Tentative)

Enforcement Orders Directed to All Operating Boiling Water Reactor Licensees with Mark I and Mark II Containments and All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status (EA–12–050 and EA–12–051); Pilgrim Watch Appeal of LBP–12–14 (Tentative).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

9:00 a.m. Briefing on Public Participation in NRC Regulatory Decision-Making (Public Meeting) (Contact: Lance Rakovan, 301–415–2589).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Friday, February 1, 2013

9:30 a.m. Briefing on Equal Employment Opportunity (EEO) and Small Business Programs (Public Meeting) (Contact: Sandra Talley, 301–415–8059).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Week of February 4, 2013—Tentative

Thursday, February 7, 2013

1:00 p.m. Briefing on Steam Generator Tube Degradation (Public Meeting) (Contact: Ken Karwoski, 301–415–2752).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Week of February 11, 2013—Tentative

There are no meetings scheduled for the week of February 11, 2013.

Week of February 18, 2013—Tentative

Wednesday, February 20, 2013

1:00 p.m. Briefing on Uranium Recovery (Public Meeting) (Contact: Bill von Till, 301–415–0598).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Thursday, February 21, 2013

9:30 a.m. Briefing on the Threat Environment Assessment (Closed—Ex. 1)

Week of February 25, 2013—Tentative

There are no meetings scheduled for the week of February 25, 2013.

* * * * *

*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html*.

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *kimberly.meyer-chambers@nrc.gov*. Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov*.

Dated: January 16, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–01276 Filed 1–17–13; 4:15 pm]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0268]

Review of Safety Analysis Reports for Nuclear Power Plants, Introduction

AGENCY: Nuclear Regulatory Commission.

ACTION: Standard review plan-draft section revision; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is soliciting public comment on the addition of a new subsection to NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition.'' The new subsection is the Standard Review Plan (SRP), ''Introduction—Part 2, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: Integral Pressurized Water Reactor (iPWR) Edition.''

DATES: Comments must be filed by March 25, 2013. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

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–2012–0268. 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–2012–0268. 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: Amy E. Cubbage, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone at 301–415–2875 or email at *Amy.Cubbage@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0268 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–2012–0268.
- *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. The SRP, subsection Introduction—Part 2 is under ADAMS Accession No. ML12142A237.
- *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.

B. Submitting Comments

Please include Docket ID NRC–2012–0268 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. Further Information

The NRC seeks public comment on a proposed new SRP subsection entitled ''Introduction—Part 2, Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: Integral Pressurized Water (iPWR) Edition.'' This subsection has been developed to assist NRC staff with the review of certain iPWR applications for Design Certifications or Combined Licenses made under part 52 of Title 10 of the *Code of Federal Regulations* (10 CFR), and to inform new reactor applicants and other affected entities of proposed SRP guidance for an acceptable method of implementation of a risk-informed and integrated review framework for iPWRs.

Following NRC staff evaluation of public comments, the NRC intends to incorporate the final approved guidance into the next revision of NUREG 0800.

Dated at Rockville, Maryland, this 9th day of January 2013.

For the U.S. Nuclear Regulatory Commission.

Amy E. Cubbage,

Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2013–01143 Filed 1–18–13; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Employees Dental and Vision Insurance Program: Application Process for Contract Awards

AGENCY: U.S. Office of Personnel Management.

ACTION: Notice of Application Process for Federal Employees Dental and Vision Insurance Program Contract Awards.

SUMMARY: The U. S. Office of Personnel Management (OPM) is changing its contract awards process from a full solicitation to an application process for the Federal Employees Dental and Vision Insurance Program (FEDVIP). This process is being changed to be in line with the process used for the Federal Employees Health Benefits Program. The application is on Federal Business Opportunities (*FedBizOpps.gov*).

FOR FURTHER INFORMATION CONTACT: Sylvia V. Pulley, 202–606–1938.

SUPPLEMENTARY INFORMATION: The FEDVIP law, sections 8953 and 8983 of title 5, United States Code, (enhanced dental and vision benefits, respectively) requires OPM to contract with a reasonable number of qualified companies for a policy or policies of benefits described in the law, without regard to section 5 of title 41, United States Code, or any other statute requiring competitive bidding. OPM shall ensure that each resulting contract is awarded on the basis of contractor qualifications, price, and reasonable competitions. And, each contract entered must be for a uniform term of 7 years and may not be renewed automatically.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2013–01162 Filed 1–18–13; 8:45 am]

BILLING CODE 6325–63–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–42; Order No. 1623]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning an additional Global Plus 2C contract. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* January 24, 2013.

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

Notice of filing. On January 11, 2013, the Postal Service filed a notice announcing that it is entering into an additional Global Plus 2C contract (Agreement).[1] The Postal Service seeks to have the Agreement included within the Global Plus 2C product on the grounds of functional equivalence to previously approved baseline agreements. *Id.* at 2.

Background. The Commission added Global Plus 2 to the competitive product list, based on Governors' Decision No. 08–10, by operation of Order No. 112. *Id.* at 1. It later approved the addition of Global Plus 2C contracts to the competitive product list as a result of Docket No. MC2012–5.[2] The Commission designated the contracts filed in companion Docket Nos. CP2012–10 and CP2012–11 as the baseline agreements for purposes of establishing the functional equivalency of other agreements proposed for inclusion with the Global Plus 2C product. Notice at 2.

Customers for Global Plus 2C contracts are Postal Qualified Wholesalers (PQWs) and other large businesses that offer mailing services to end users for shipping articles via Global Direct and/or International Business Reply Service. *Id.* at 5.

II. Contents of Filing

The filing includes the Notice, along with the following attachments:

- Attachment 1—a redacted copy of the Agreement;
- Attachment 2—a redacted copy of the certification required under 39 CFR 3015.5(c)(2);
- Attachment 3—a redacted copy of Governors' Decision No. 11–6; and
- Attachment 4—an application for non-public treatment of material filed under seal.

The material filed under seal consists of unredacted copies of the Agreement and supporting financial documents. *Id.* at 2. The Postal Service filed redacted versions of the sealed financial documents in public Excel spreadsheets. *Id.* at 3.

Functional equivalency. The Postal Service asserts that the instant Agreement and the baseline agreements

[1] Notice of the United States Postal Service of Filing a Functionally Equivalent Global Plus 2C Contract Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, January 11, 2013 (Notice). The Notice was filed in accordance with 39 CFR 3015.5. *Id.* at 1.

[2] *See* Docket Nos. MC2012–5, CP2012–10, and CP2012–11, Order No. 1135, Order Adding Global Plus 2C to the Competitive Product List and Approving Functionally Equivalent Global Plus 2C Agreements, January 13, 2012.

are functionally equivalent because they share similar cost and market characteristics. *Id.* at 4. It notes that the pricing formula and classification established in Governors' Decision No. 08–10 ensure that each Global Plus 2C contract meets the criteria of 39 U.S.C. 3633 and related regulations. *Id.* The Postal Service also indicates that the pricing formula relied on for Global Plus 2C contracts is included in Governors' Decision No. 11–6. *Id.* The Postal Service further asserts that the functional terms of the two agreements are the same and the benefits are comparable. *Id.* at 4.

The Postal Service states that prices may differ, depending on when an agreement is signed, due to updated costing information. *Id.* at 5. It also identifies other differences in contractual terms, but asserts that the differences do not affect either the fundamental service being offered or the fundamental structure of the Agreement.[3] *Id.* at 7.

Effective date; term. The Agreement includes a scheduled effective date of January 14, 2013, however, given its filing date (January 11, 2013) and advance notice requirements,[4] the Agreement can take effect no sooner than January 26, 2013, assuming regulatory approval.

The Agreement is expected to be in effect for approximately 1 year. Termination is linked to either the date prior to the date in January 2014 that Canada Post Corporation takes action on price changes for certain domestic products[5] or, in the event of inaction, January 31, 2014. *Id.*

III. Commission Action

The Commission establishes Docket No. CP2013–42 for consideration of matters raised in the Notice. Interested persons may submit comments on whether the Agreement is consistent with the requirements of 39 CFR 3015.5 and the policies of sections 3632, 3633, and 3642. Comments are due no later than January 24, 2013. The public portions of the Postal Service's filing can be accessed via the Commission's Web site at *http://www.prc.gov.* Information on how to obtain access to nonpublic material appears at 39 CFR 3007.40.

The Commission appoints Allison J. Levy to represent the interests of the general public (Public Representative) in this case.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket No. CP2013–42 for consideration of matters raised in the Postal Service's Notice.

2. Pursuant to 39 U.S.C. 505, the Commission designates Allison J. Levy to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in this proceeding.

3. Comments are due no later than January 24, 2013.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–01086 Filed 1–18–13; 8:45 am]

BILLING CODE 7710–FW–P

[3] The list includes, among other things, the non-inclusion of a particular service, the addition and revision of articles, and related renumbering of articles. *See id.* at 5–8.

[4] Pursuant to 39 CFR 3015.5.

[5] The products are domestic Lettermail, Incentive Lettermail, Admail, and/or Publications Mail products. Notice, Attachment 1 at 9.

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–0017, OMB Control No. 3235–0017]

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rules 6a–1 and 6a–2, Form 1.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 6a–1 (17 CFR 240.6a–1), Rule 6a–2 (17 CFR 240.6a–2), and Form 1 (17 CFR 249.1) under The Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'' or Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

The Exchange Act sets forth a regulatory scheme for national securities exchanges. Rule 6a–1 under the Act generally requires an applicant for initial registration as a national securities exchange to file an application with the Commission on Form 1. An exchange that seeks an exemption from registration based on limited trading volume also must apply for such exemption on Form 1. Rule 6a–2 under the Act requires registered and exempt exchanges: (1) To amend the Form 1 if there are any material changes to the information provided in the initial Form 1; and (2) to submit periodic updates of certain information provided in the initial Form 1, whether such information has changed or not. The information required pursuant to Rules 6a–1 and 6a–2 is necessary to enable the Commission to maintain accurate files regarding the exchange and to exercise its statutory oversight functions. Without the information submitted pursuant to Rule 6a–1 on Form 1, the Commission would not be able to determine whether the respondent met the criteria for registration or exemption set forth in Sections 6 and 19 of the Act. Without the amendments and periodic updates of information submitted pursuant to Rule 6a–2, the Commission would have substantial difficulty determining whether a national securities exchange or exempt exchange was continuing to operate in compliance with the Act.

Initial filings on Form 1 by new exchanges are made on a one-time basis. The Commission estimates that it will receive approximately three initial Form 1 filings per year and that each respondent would incur an average burden of 47 hours to file an initial Form 1 at an average internal labor cost per response of approximately $13,105. Therefore, the Commission estimates that the annual burden for all respondents to file the initial Form 1 would be 141 hours (one response/respondent × three respondents × 47 hours/response) and an internal labor cost of $39,315 (one response/respondent × three respondents × $13,105/response).

There currently are seventeen entities registered as national securities exchanges and two exempt exchanges, for a total of 19 exchanges. The Commission estimates that each registered or exempt exchange files four amendments or periodic update to Form 1 per year, incurring an average burden of 25 hours to comply with Rule 6a–2. The Commission estimates that the annual burden for all respondents to file amendments and periodic updates to the Form 1 pursuant to Rule 6a–2 is 1900 hours (19 respondents × 25 hours/response × four responses/respondent per year) and an internal labor cost of $510,720 (19 respondents × $6,720/response × four responses/respondent per year).

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the

Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 15, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01111 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–7, OMB Control No. 3235–0010]

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 15a–4.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 15a–4 (17 CFR 240.15a–4) under the Securities and Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 15a–4 permits a natural person member of a securities exchange who terminates his or her association with a registered broker-dealer to continue to transact business on the exchange while the Commission reviews his or her application for registration as a broker-dealer filed on Form BD if the exchange files a statement (''Statement'') indicating that there do not appear to be any grounds for disapproving the application.

The total annual hourly burden imposed by Rule 15a–4 is approximately 8.46 hours, based on approximately 2 responses (2 Respondents × 1 Statement/Respondent), each requiring approximately 4.23 hours to complete.

The Commission uses the information disclosed by applicants in Form BD: (1) To determine whether the applicant meets the standards for registration set forth in the provisions of the Exchange Act; (2) to develop a central information resource where members of the public may obtain relevant, up-to-date information about broker-dealers, municipal securities dealers and government securities broker-dealers, and where the Commission, other regulators and SROs may obtain information for investigatory purposes in connection with securities litigation; and (3) to develop statistical information about broker-dealers, municipal securities dealers and government securities broker-dealers. Without the information disclosed in Form BD, the Commission could not effectively implement policy objectives of the Exchange Act with respect to its investor protection function. The Statement submitted by the exchange assures the Commission that the applicant, in the opinion of the exchange, is qualified to transact business on the exchange during the time that the applications are reviewed.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 15, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01112 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No 270–488, OMB Control No. 3235–0542]

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0123.

Extension:

Rule 605 of Regulation NMS.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the existing collection of information provided for in Rule 605 of Regulation NMS (''Rule 605'') (17 CFR 242.605),[1] under the Securities Exchange Act of 1934 (15 U.S.C. 78a, *et seq.*) (''Exchange Act''). The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval. Rule 605, formerly known as, Rule 11Ac1–5, requires market centers to make available to the public monthly order execution reports in electronic form. The Commission believes that many market centers retain most, if not all, of the underlying raw data necessary to generate these reports in electronic format. Once the necessary data is

[1] Regulation NMS, adopted by the Commission in June 2005, redesignated the national market system rules previously adopted under Section 11A of the Exchange Act. Rule 11Ac1–5 under the Exchange Act was redesignated Rule 605 of Regulation NMS. No substantive amendments were made to Rule 605 of Regulation NMS. *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

collected, market centers could either program their systems to generate the statistics and reports, or transfer the data to a service provider (such as an independent company in the business of preparing such reports or a self-regulatory organization) that would generate the statistics and reports.

The collection of information obligations of Rule 605 apply to all market centers that receive covered orders in national market system securities. The Commission estimates that approximately 366 market centers are subject to the collection of information obligations of Rule 605. Each of these respondents is required to respond to the collection of information on a monthly basis.

The Commission staff estimates that, on average, Rule 605 causes respondents to spend 6 hours per month to collect the data necessary to generate the reports, or 72 hours per year. With an estimated 366 market centers subject to Rule 605, the total data collection time burden to comply with the monthly reporting requirement is estimated to be 26,352 hours per year.

Based on discussions with industry sources, the Commission staff estimates that an individual market center could retain a service provider to prepare a monthly report using the data collected for approximately $2978 per month. This per-respondent estimate is based on the rate that a market center could expect to obtain if it negotiated on an individual basis. Based on the $2978 estimate, the monthly cost to the 366 market centers to retain service providers to prepare reports would be $1,089,948, or an annual cost of approximately $13,079,376 million.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (b) the accuracy of the Commission'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.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: January 15, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01113 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [78 FR 3923, January 17, 2013].

STATUS: Closed Meeting.

PLACE: 100 F Street NW., Washington, DC.

DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING: January 17, 2013.

CHANGE IN THE MEETING: Deletion of Item.

The following item will not be considered during the Closed Meeting on Thursday, January 17, 2013: Consideration of amicus participation.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: January 17, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–01270 Filed 1–17–13; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, January 24, 2013 at 1:45 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Paredes, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and

Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: January 17, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–01271 Filed 1–17–13; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Order of Suspension of Trading; in the Matter of Medex, Inc.

January 17, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Medex, Inc. (''Medex'') because of questions regarding the accuracy of assertions by Medex, and by others, in press releases and other public statements to investors, and in promotional emails, concerning, among other things: (i) The company's operations; and (ii) the company's outstanding shares.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of the above-listed company is suspended for the period from 9:30 a.m. EST, on January 17, 2013 through 11:59 p.m. EST, on January 31, 2013.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–01247 Filed 1–17–13; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68641; File No. SR–BX–2012–063]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing of Amendment No. 1, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Listing Rules for Compensation Committees To Comply With Rule 10C–1 Under the Act and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, NASDAQ OMX BX, Inc. (''BX'' 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. The proposed rule change was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received no comment letters on the proposed rule change.[5] On January 8, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change, as modified by Amendment No. 1 thereto, on an accelerated basis.

II. Description of Proposed Rule Change

A. Background: Rule 10C–1 Under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[7] the Commission proposed Rule 10C–1 under the Act,[8] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[9]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee [10] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[11] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[12]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[13] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[14] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[15] as well as any other

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68018 (October 9, 2012), 77 FR 62547 (''Notice'').

[4] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] The Commission received eight comments on a substantially similar proposal by The Nasdaq Stock Market, LLC (''Nasdaq'') by parties that did not specifically comment on the BX filing, and received a response letter from Nasdaq on these comment letters. *See* Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of File No. SR–NASDAQ–2012–109) (''Nasdaq Proposal'') and comment letters relating to the Nasdaq Proposal. *See also* Securities Exchange Act Release No. 68640 (January 11, 2013) (''Nasdaq Approval Order''). The Nasdaq Approval Order contains a discussion of the comments received on the Nasdaq Proposal and Nasdaq's response. *See also* Securities Exchange Act Release No. 68639 (January 11, 2013) (File No. SR–NYSE–2012–49) (''NYSE Approval Order'').

[6] In Amendment No. 1, BX: (a) Added language to proposed Rule 5605(d)(3) to set forth in detail the requirements of Rule 10C–1(b)(2)–(4) regarding the authority of a compensation committee to retain compensation advisers, the requirement that a listed company fund such advisers, and the independence assessment required to be made before selecting or receiving advice from such advisers, rather than incorporating these details by reference as in the original proposal, *see infra* notes 51–58 and accompanying text; (b) revised the dates by which companies currently listed on BX will be required to comply with the new rules, *see infra* notes 76–82 and accompanying text; (c) revised the phase-in schedule for companies that cease to be Smaller Reporting Companies to comply with the full range of the new requirements, *see infra* notes 89–92 and accompanying text; (d) added a preamble to the new rules clarifying that, during the transition periods until the new rules apply, a company must continue to comply with the corresponding provisions, if any, in the current rules, *see infra* note 76; and (e) revised the proposed rules to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S–K. *See infra* notes 59–60 and accompanying text.

In Amendment No. 1 the Exchange also made conforming changes to the Purpose section of the proposal, provided explanations for the revisions, and clarified certain matters, *see, e.g., infra* notes 58, 114, and 119 and accompanying text; and also added, as Exhibit 3 to the proposal, the form that it will provide for companies to certify their compliance with the rules. The Exchange states that, while no comments were submitted regarding its proposed rule change, some of the changes contained in Amendment No. 1 were made in response to comments submitted on Nasdaq's substantially similar proposal. *See supra* note 5 and *infra* note 123.

[7] Public Law 111–203, 124 Stat. 1900 (2010).

[8] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[9] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[10] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[11] *See* Rule 10C–1(a) and (b)(1).

[12] *See id. See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[13] *See* Rule 10C–1(b)(2).

[14] *See* Rule 10C–1(b)(3).

[15] *See* Rule 10C–1(b)(4). The six factors, which BX proposes to set forth explicitly in its rules, are specified in the text accompanying note 55, *infra.*

factors identified by the relevant exchange in its listing standards.[16]

B. BX's Proposed Rule Change, as Amended

To comply with Rule 10C–1, BX proposes to amend two sections of its rules [17] concerning corporate governance requirements for companies listed on the Exchange: BX Venture Market Rule 5605, ''Boards of Directors and Committees,'' and Rule 5615, ''Exemptions from Certain Corporate Governance Requirements.'' In addition, BX proposes to make some other changes to its rules regarding compensation committees.[18]

To accomplish these changes, the Exchange proposes to replace current paragraph (d) of Rule 5605, entitled ''Independent Director Oversight of Executive Officer Compensation,'' with a new paragraph (d) entitled ''Compensation Committee Requirements.'' Current paragraph (d) provides that compensation of the executive officers of a listed company must be determined, or recommended to the company's board for determination, either by a compensation committee comprised solely of ''Independent Directors'' [19]; or, as an alternative to a formal committee, by a majority of the board's Independent Directors in a vote in which only Independent Directors participate (''Alternative Option'').[20]

1. Compensation Committee Composition and Independence Standards

First, BX proposes that each listed company be required to have a compensation committee.[21] The Alternative Option described above would be eliminated. In addition, BX proposes that the compensation committee be required to be composed of at least two members, each of whom must be an Independent Director as defined in BX's rules and also meet the additional independence requirements described below.[22]

In discussing the proposed elimination of the Alternative Option, BX stated that it had considered whether the Alternative Option remains appropriate, ''given the heightened importance of compensation decisions in today's corporate governance environment.'' The Exchange concluded that ''there are benefits from a board having a standing committee dedicated solely to oversight of executive compensation.'' [23] BX added that, since it does not currently have any listed companies, it does not believe that eliminating the Alternative would be unduly burdensome. In discussing the proposed requirement that the committee have at least two members, the Exchange stated that ''[g]iven the importance of compensation decisions to stockholders, BX believes that it is appropriate to have more than one director responsible for these decisions.'' [24]

BX also proposes that a compensation committee must have a formal written charter.[25] Under this provision, a listed company must certify that it has adopted such a charter and that its compensation committee will review and reassess the adequacy of that charter on an annual basis.[26]

The charter must specify the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, processes, and membership requirements.[27] It must specify the committee's responsibility for determining or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company, and provide that the CEO may not be present during voting or deliberations on his or her compensation.[28] In addition, the charter must specify the committee's responsibilities and authority set forth in the Exchange's rules with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting advisers; and receiving funding from the company to engage them, which are discussed in detail below.[29]

BX's rules currently require each member of a listed company's compensation committee to be an Independent Director as defined in BX Rule 5605(a)(2).[30] Rule 10C–1, as discussed above, provides that exchange standards must require compensation committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, BX discussed its consideration of these factors,[31] and proposed the following [32]:

With respect to the Fees Factor, BX proposes to adopt a provision stating that each member of a compensation committee of a listed company must not accept directly or indirectly any consulting, advisory or other compensatory fee from the listed

[16] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[17] References in this filing to BX Rules refer to the listing rules for the Exchange's BX Venture Market.

[18] While BX does not presently list any securities, its rules for the BX Venture Market have been approved by the Commission. BX is proposing to modify its compensation-related listing rules for this market, as required by Rule 10C–1.

[19] ''Independent Directors,'' as defined in BX Rule 5605(a)(2) and used herein, includes a two-part test for independence. The rule sets forth seven specific categories of directors who cannot be considered independent because of certain discrete relationships (''the bright-line tests''); and also provides that a listed company's board must make an affirmative determination that each independent director has no relationship that, in the opinion of the board, ''would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.'' *Id*. *See also* the Interpretive Material to Rule 5605.

[20] The current rule also provides that the chief executive officer (''CEO'') may not be present during voting or deliberations regarding the CEO's own compensation. *See* Rule 5605(d)(1).

[21] *See* proposed Rule 5605(d)(2).

[22] *Id*. For the definition of ''Independent Director, *see supra* note 19.

[23] *See* Notice, *supra* note 3, for the Exchange's more complete explanation of its reasons for the proposed change, including a discussion of whether eliminating the Alternative Option would pose an undue hardship on companies to be listed on the Exchange.

[24] *See id*. for the Exchange's more complete discussion of the proposed size requirement.

[25] *See* proposed BX Rule 5605(d)(1). As discussed further in Section II.B.3., a Smaller Reporting Company may adopt either a formal written compensation committee charter or a board resolution that specifies the committee's responsibilities and authority.

[26] The Commission notes that Rule 10C–1 does not require a listed issuer specifically to have a charter. As noted above, however, *see supra* notes 13–15 and accompanying text, Rule 10C–1 does require a compensation committee to have certain specified authority and responsibilities. Often, listed issuers will specify authority and responsibilities of this kind in a charter in any case. The proposed rule requires them to have a charter, and to include this authority and set of responsibilities in addition to the required content discussed *infra* at text accompanying notes 27–29.

[27] Proposed Rule 5605(d)(1)(A). BX states that this requirement is copied from the Exchange's similar listing rule relating to audit committee charters, Rule 5605(c)(1), except that the annual review and reassessment requirement is written prospectively, rather than retrospectively. The proposed rule change includes a conforming revision to make the audit committee review and reassessment prospective, as well. *See* Notice.

[28] Proposed Rule 5605(d)(1)(B)–(C). BX states that these provisions are based upon BX's current compensation-related listing rules, except that the Alternative Option discussed above is not available under the proposed rule change. *See supra* note 21 and accompanying text.

[29] *See* proposed Rule 5605(d)(1)(D) and *infra* notes 49–58 and accompanying text. Because Smaller Reporting Companies are not required to comply with the provisions relating to compensation advisers in proposed BX Rule 5605(d)(3), *see infra* notes 62–67, their charters or board resolutions are not required to reflect these responsibilities.

[30] *See supra* note 19.

[31] Notice, *supra* note 3.

[32] These additional factors would not apply to the selection of members of the compensation committee of a Smaller Reporting Company. *See infra* note 64.

company or any of its subsidiaries.[33] In discussing its review of its current listing rules and the Fees Factor, BX noted that its rules for audit committees of listed companies, in meeting the criteria of Rule 10A–3 under the Act, prohibit an audit committee member from accepting such fees. The Exchange concluded that ''there is no compelling justification to have different standards for audit and compensation committee members'' with respect to the Fees Factor.[34]

As currently permitted under BX's rules for audit committee members, however, the proposed rule would permit a compensation committee member to receive fees for his or her membership on the committee, on the company's board, or on any other board committee.[35] In addition, a compensation committee member would be permitted to receive fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company, provided that such compensation is not contingent in any way on continued service.[36]

With respect to the Affiliation Factor, BX proposes that, in determining whether a director is eligible to serve on the compensation committee, the company's board also must consider whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company to determine whether such affiliation would impair the director's judgment as a member of the compensation committee.[37] In discussing its review of its current rules and its consideration of the Rule 10C–1 requirement in this area,[38] the Exchange noted that its rules for audit committees of listed companies, in meeting the criteria of Rule 10A–3 under the Act, prohibit an audit committee member from being an affiliated person of the issuer or any subsidiary thereof. The Exchange said that it concluded, however, that ''such a blanket prohibition would be inappropriate for compensation committees.'' [39] BX believes that ''it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.'' [40]

Although Rule 10C–1 requires that exchanges consider ''relevant factors'' not limited to the Fees and Affiliation Factors, BX states that, after reviewing its current and proposed listing rules, it concluded that these rules are sufficient to ensure the independence of compensation committee members. The Exchange therefore determined not to propose further independence requirements.[41]

BX proposes a cure period for a failure of a listed company to meet its committee composition requirements. The proposed cure period is the same as the cure period currently provided in BX's rules for noncompliance with the requirement to have a majority independent board.[42] Under the provision, if a listed company fails to comply with the compensation committee composition requirements due to one vacancy, or if one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the noncompliance.[43] The proposed rule also requires a company relying on this provision to provide notice to BX immediately upon learning of the event or circumstance that caused the noncompliance.

However, if the annual shareholders meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. As explained by BX, this provides a company at least 180 days to cure noncompliance and would typically allow a company to regain compliance in connection with its next annual meeting.[44]

BX's current rules relating to compensation committees include an exception that allows a director who is not an Independent Director to be appointed to such a committee under exceptional and limited circumstances, as long as that director is not a current officer, an employee, or the family member of an officer or employee.[45] The exception applies, however, only if the committee is comprised of at least three members and the company's board determines that the individual's membership on the committee is required by the best interests of the company and its shareholders.[46] A compensation committee member may not serve longer than two years under this exception, and a company relying on the exception must make certain disclosures on its Web site or in its proxy statement regarding the nature of the relationship and the reasons for the determination.

BX proposes to retain the exception under the proposed rule change, and to permit a listed company to avail itself of the allowance even for a director who fails the new requirements regarding the Fees and Affiliation Factors,[47] with an additional change pertaining to the exception, generally. Nasdaq recently amended an identical provision for exceptional and limited circumstances in its rules to allow a company to rely on the exception for a non-Independent Director who is a family member of a non-executive employee of the company, and BX proposes to make the same revision.[48]

The Exchange believes that this exception is an important means to allow companies flexibility as to board and committee membership and composition in unusual circumstances. The Exchange further believes that the exception may be particularly important for smaller companies.

2. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, as modified by Amendment No. 1,[49] BX proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act by setting forth those requirements in full in its own rules.[50]

[33] *See* proposed Rule 5605(d)(2)(A).

[34] *See* Notice.

[35] *See supra* note 33.

[36] *Id.*

[37] *See* proposed Rule 5605(d)(2)(A).

[38] *See* Notice.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* Rule 5605(b)(1)(A) regarding the majority board requirement.

[43] *See* proposed Rule 5605(d)(4).

[44] *See* Notice.

[45] *See* current Rule 5605(d)(3).

[46] *See id.*

[47] *See* proposed Rule 5605(d)(2)(b).

[48] *See* Securities Exchange Act Release No. 67468 (July 19, 2012), 77 FR 43618 (July 25, 2012) (File No. SR–NASDAQ–2012–062). Nasdaq made the same change to its exceptional and limited circumstances exception for audit committee members, and BX also proposes, in its filing, to make a conforming change to its identical exception for audit committee members. BX notes that under both the current and proposed versions of the exception for audit committee members, a company could not rely on the exception for a director who does not meet the criteria set forth in Section 10A(m)(3) of the Exchange Act and the rules thereunder to allow a director to serve on the audit committee. *See* 15 U.S.C. 78j–1(m)(3) and 17 CFR. 240.10A–3(b)(1).

[49] *See supra* note 6. BX's proposal as submitted originally incorporated the requirements of Rule 10C–1(b)(2)–(4) by reference. The Exchange amended the proposal to set forth those requirements explicitly.

[50] Rule 10C–1(b)(4) does not include the word ''independent'' before ''legal counsel'' and requires

Thus, proposed BX Rule 5605(d)(3), as amended, provides that the compensation committee of a listed company may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel or other adviser.[51] Further, the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel and other adviser retained by the compensation committee.[52] In addition, the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the compensation committee.[53]

Proposed BX Rule 5605(d)(3), as amended, also sets forth explicitly, in accordance with Rule 10C–1, that the compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C–1 regarding independence assessments of compensation advisers.[54]

The six factors, which are set forth in full in the proposed rule, are: (i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (v) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the issuer.[55]

Proposed Rule 5605(d)(3), as amended, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting, or receiving advice from, a compensation adviser.[56] It further clarifies that compensation committees may select, or receive advice from, any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in the rule.[57] In Amendment No. 1, BX emphasizes that a compensation committee is not required to retain an independent compensation adviser; rather, a compensation committee is required only to conduct the independence analysis described in Rule 10C–1 before selecting a compensation adviser.[58]

In Amendment No. 1, BX also added language to the provision regarding the independence assessment of compensation advisers [59] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice.

BX states that this exception copies language from Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[60] The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S–K.[61]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[62] Consistent with this Rule 10C–1 provision, BX, as a general matter, proposes that a smaller reporting company, as defined in Rule 12b–2 under the Act (hereinafter, a ''Smaller Reporting Company''), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C–1.[63] Thus, BX proposes not to require Smaller Reporting Companies to comply with the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation.[64]

In addition, a Smaller Reporting Company will not be required to include in its compensation committee charter (or, as discussed below, in a board resolution) a grant of authority to the committee to retain compensation advisers, a requirement that the company fund such advisers, and a requirement that the committee consider independence factors before selecting such advisers. As stated by BX, the exception for Smaller Reporting Companies also means that the compensation committees of such companies are not required to review and reassess the adequacy of their charters on an annual basis.[65] The

an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In setting forth the requirements of Rule 10C–1(b)(2) and (3), BX has deleted the word ''independent'' prior to ''legal counsel'' so as to avoid confusion.

[51] *See* Item 9 of Amendment No. 1.

[52] *See id.* The proposal, as amended, also includes a provision, derived from Rule 10C–1, stating that nothing in these rules may be construed: (i) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, legal counsel or other adviser to the compensation committee; or (ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee. *Id.*

[53] *See id.*

[54] *See* Rule 10C–1(b)(4).

[55] Rule 10C–1(b)(4)(i)–(vi).

[56] See id.

[57] *See id.*

[58] *See* Item 2 of Amendment No. 1.

[59] *See* proposed Rule 5605(d)(3), as amended by Amendment No. 1.

[60] *See* 17 CFR 229.407(e)(3)(iii).

[61] *See* Amendment No. 1.

[62] *See supra* Section II.A.

[63] *See* proposed Rule 5605(d)(5).

[64] *See supra* text accompanying notes 33 and 37.

[65] *See* Notice. In addition, a Smaller Reporting Company, like other listed companies, will be required to certify that it has adopted a formal written compensation committee charter (or, if it so chooses, a board resolution) that specifies the scope of the committee's responsibilities and its responsibility for determining or recommending to the board for determination the compensation of the

Continued

Exchange believes that this approach will minimize new costs imposed on Smaller Reporting Companies and allow them some flexibility not allowed for larger companies.

BX proposes not to exclude a Smaller Reporting Company, however, from its proposal to require a listed company to have, and to certify that it has and will continue to have, a compensation committee of at least two members, each of whom must be an Independent Director as defined in the Exchange's Rule 5605(a)(2).[66] In its discussion of the rules from which Smaller Reporting Companies are not exempt, BX notes that its current listing rules regarding compensation committees do not provide any exemptions for Smaller Reporting Companies.[67]

4. Exemptions

BX proposes that its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in BX Rule 5615, apply also to the new requirements of the proposed rule change. These include exemptions for asset-backed issuers and other passive issuers, limited partnerships, management investment companies registered under the Investment Company Act of 1940 (''registered management investment companies'').[68] BX states that each of these categories has ''traditionally been exempt from BX's compensation-related listing rules,'' and believes that the reasons for the exemptions apply to the new requirements, as well.[69]

Asset-backed issuers and other passive issuers have been exempted, according to the Exchange, because they do not have a board of directors or persons acting in a similar capacity and their activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) assets on behalf of or for the benefit of the holders of the listed securities. BX further states that the structure of limited partnerships requires that public investors have limited rights and the general partners make all significant decisions about the operation of the limited partnership, and, as such, limited partners do not expect to have a voice in the operations of the partnership. Registered management investment companies, the Exchange states, are already subject to a pervasive system of federal regulation in certain areas of corporate governance.

Finally, BX proposes to add exemptions to its compensation committee rules for cooperatives and controlled companies, which BX proposes to define as companies ''of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company.'' Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members, and BX believes that because of their unique structure and the fact that they do not have a publicly traded class of common stock, they should be exempt from its compensation committee rules.[70] The proposed exemption for controlled companies, BX states, recognizes that majority shareholders, including parent companies, have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights.[71] The Exchange further states that the proposed exemptions for cooperatives and controlled companies are modeled after the similar exemptions in Nasdaq's rules.[72]

Concerning foreign private issuers, BX's current rules permit any such issuer to follow its home country practice in lieu of many of BX's corporate governance listing standards, including the Exchange's compensation-related listing rules.[73] This allowance is granted on condition that the issuer discloses in its annual report filed with the Commission each requirement that it does not follow and describes the home country practice followed by the issuer in lieu of such requirement.[74] BX proposes that this allowance continue to apply generally to the Exchange's compensation committee rules as revised by the instant proposal on the same condition, namely that the issuer discloses each requirement it does not follow and describes the home country practice it follows in lieu of such requirement. However, with respect, specifically, to the enhanced standards of independence for compensation committees (concerning fees received by members and their affiliations) BX proposes that, if a listed company follows its home country practice, it must additionally disclose in its annual report filed with the Commission the reasons why it does not have an independent compensation committee as set forth in these standards.[75]

5. Transition to the New Rules for Companies Listed as of the Effective Date[76]

The proposed rule change, as amended, provides that certain of the new requirements for listed companies will be effective on July 1, 2013.[77] Specifically, as of that date, listed companies will be required to comply with the provisions of the proposed rule change relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting such advisers.[78] To the extent a company does not yet have a compensation committee by that

CEO and other executive officers. *See supra* notes 27–28.

[66] *See* proposed Rule 5605(d)(5). *See also* proposed interpretive material IM–5605–6. As noted above, listed companies other than Smaller Reporting Companies and other exempted issuers must comply with the additional independence requirements for compensation committee members set forth in proposed BX Rule 5605(d)(2)(A). *See* discussion in Section II.B.1., *supra.*

[67] *See* Notice.

[68] *See* Rule 5615(a)(1), (4), and (5).

[69] *See* Notice. *See also* discussion below at note 79, *infra,* for transition periods for companies that currently use the Alternative Option and do not have compensation committees.

[70] *See* Notice.

[71] *See id.* BX further notes that controlled companies also are exempt from all of the requirements of Rule 10C–1. *See* Rule 10C–1(b)(5)(ii).

[72] See Nasdaq Listing Rule 5615(a)(2), Nasdaq IM–5615–2, Nasdaq Listing Rule 5615(c) and Nasdaq IM–5615–5.

[73] *See* Rule 5615(a)(3). Under BX's listing rules, ''foreign private issuer'' has the same meaning as under Rule 3b–4 under the Exchange Act. *See* Rule 5005(a)(18). BX's listing rules have traditionally provided qualified exemptions for foreign private issuers so that such issuers are not required to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile, except to the extent such exemptions would be contrary to the public securities laws. *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154, 64165 (November 12, 2003) (SR–NASD–2002–138).

[74] A Foreign Private Issuer that is not required to file its annual report with the Commission on Form 20–F may make this disclosure only on its Web site.

[75] As stated by BX, this proposed condition adopts the requirements of Rule 10C–1(b)(1)(iii)(A)(4), which provides an exemption from the independence requirements of Rule 10C–1 for a ''foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.''

[76] During the transition periods described herein, until a company is required to comply with a particular provision of the new rules, the company must continue to comply with the corresponding provision, if any, in the current rules, which are re-designated as Rule 5605A(d) and IM–5605A–6 (''Sunsetting Provisions). *See* Amendment No. 1, which added this clarification as a preamble to the new Rule 5605(d). The addition mirrors a similar statement already included in the original proposal as a preamble to the Sunsetting Provisions.

[77] *See* proposed Rule 5605(d)(6), as modified by Amendment No. 1 to the proposed rule change. The original proposal provided that these provisions were to be effective immediately.

[78] *Id.*

date,[79] these provisions will apply to the Independent Directors who determine, or recommend to the board for determination, the compensation of the CEO and all other executive officers of the company.[80]

Regarding the remaining new provisions for compensation committees, the proposed rule change, as amended, provides that, in order to allow listed companies to make necessary adjustments in the course of their regular annual meeting schedule, they will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014,[81] to comply with these remaining provisions.[82] A listed company must certify to BX, no later than 30 days after the final implementation deadline applicable to it, that it has complied with Rule 5605(d).

6. Phase-In Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring From Other Markets

BX's existing rules permit a company listing in connection with its initial public offering (''IPO'') to phase in its compliance with the Exchange's independence requirements for compensation and nominations committees,[83] as follows: Each such committee must have one independent member at the time of listing; a majority of members must be independent within 90 days of listing; and all members of such committees must be independent within one year of listing. The same phase-in schedule is permitted for companies emerging from bankruptcy.[84] BX proposes that this schedule continue to apply and that it remain the same with respect to the new compensation committee composition requirements set forth in the proposed rule change.[85]

As stated by BX, this would mean that a company listing on the Exchange in connection with its IPO or a company emerging from bankruptcy would be permitted to phase in its compliance with the requirements that a compensation committee have at least two members, that these members be Independent Directors as defined in BX's rules, and that they meet the enhanced standards of independence for compensation committees (concerning fees received by members and their affiliations) adopted pursuant to Rule 10C–1.[86]

Since BX is proposing to add to its rules an exemption for controlled companies, as discussed above, BX also proposes to add a phase-in schedule for companies ceasing to be controlled companies. This proposed phase-in schedule is modeled after the similar phase-in schedule in Nasdaq's rules.[87]

In addition, BX proposes minor clarifying changes to the phase-in schedule in its current listing rules for companies transferring from other markets, which will now applied to the new compensation-related rules under the proposal.[88] Under this schedule, companies transferring from another national securities exchange with a substantially similar requirement shall be immediately subject to the compensation committee requirement, provided that such companies will be afforded the balance of any grace period afforded by the other market. Companies that are not subject to a substantially similar requirement at the time of listing on BX, such as a company quoted in the over-the-counter market, will be permitted to phase in compliance with the compensation committee composition requirements in Rule 5605(d)(2)(A), including the requirement that compensation committee members be Independent Directors, the minimum size requirement and the additional eligibility requirements adopted pursuant to Rule 10C–1, on the same schedule as companies listing in connection with an initial public offering.

For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 1, establishes a phase-in schedule based on certain dates relating to the company's change in status.[89] Pursuant to Rule 12b–2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the ''Determination Date''). A company with a public float of $75 million or more as of the Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Determination Date. Under BX's proposal, the day of this change in status is the beginning of the phase-in period (''Start Date'').[90]

By six months from the Start Date, the company will be required to comply with Rule 5605(d)(3), which sets forth the provisions described above relating to authority of a compensation committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers. By six months from the Start Date, the company will also be required to certify to BX (i) that it has complied with the requirement in Rule 5605(d)(1) to adopt a formal written compensation committee charter including the content specified in Rule 5605(d)(1)(A)–(D);[91] and (ii) that it has complied, or within the applicable phase-in schedule will comply, with the additional requirements in Rule

[79] A listed company that does not currently have a compensation committee is not required to meet the requirement to have such a committee until the earlier of its first annual meeting after January 15, 2014, or October 31, 2014. *See infra* note 81 and accompanying text.

[80] While the provisions of the proposed rule change relating to the authority of a compensation committee to retain compensation advisers, the company's obligation to fund such advisers, and the responsibility of the committee to consider independence factors before selecting such advisers must be assigned to the committee or Independent Directors acting in lieu of a committee by July 1, 2013, the requirement that they be included in a written committee charter does not apply until a later date, as it is one of the remaining provisions of the new compensation committee rule subject to the transition period discussed below. Rule 5605(d)(6) states that companies should consider under state corporate law whether to grant the specific responsibilities and authority referenced through a charter, resolution or other board action.

[81] *See* proposed Rule 5605(d)(6), as modified by Amendment No. 1 to the proposed rule change. The original proposal had required these provisions to be implemented by the company's second annual meeting after the proposal was approved, but no later than December 31, 2014.

[82] The remaining provisions subject to this schedule include IM–5605–6, which is new interpretive material to be included in the text of BX's rules that elaborates on the compensation committee requirements.

[83] *See* Rule 5615(b)(1).

[84] *See* Rule 5615(b)(2).

[85] Specifically, the phase-in schedule would apply to proposed Rule 5605(d)(2).

[86] *See* Notice for an illustration provided by BX of how the compensation committee composition requirement will interact with the minimum size requirement.

[87] *See* Nasdaq Rule 5615(c)(3).

[88] *See* Rule 5615(b)(3). For example, BX proposes to delete the sentence in this provision stating that companies may choose not to adopt a compensation committee and may instead rely upon a majority of the Independent Directors to discharge these responsibilities, as BX has eliminated the Alternative Option.

[89] *See* proposed Rule 5605(d)(4), as amended. In the proposal as originally submitted, the phase-in schedule was to be the same as the phase-in schedule for a company listing in conjunction with an IPO, and was to start to run on the due date of the filing with the Commission in which the company is required to report that it is an issuer other than a Smaller Reporting Company. In Amendment No. 1, BX states that while the revised phase-in schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences.

[90] *See* Amendment No. 1.

[91] *See supra* notes 26–29. This includes the provisions with which the company is now required to comply relating to authority of a compensation committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers.

5605(d)(2)(A) regarding compensation committee composition.

Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) One member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.[92]

However, because a Smaller Reporting Company is required to have a compensation committee and such committee is required to be comprised of at least two Independent Directors, a company that has ceased to be a Smaller Reporting Company will not be permitted to use the phase-in schedule for these requirements.

7. Conforming Changes and Correction of Typographical Errors

Finally, BX proposes to make minor conforming changes to its requirements relating to audit and nominations committees and to correct certain typographical errors in its current corporate governance requirements.[93]

III. Discussion

After careful review, the Commission finds that the BX proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[94] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[95] as well as with Section 10C of the Act[96] and Rule 10C–1 thereunder.[97] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[98] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the BX proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[99] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [100] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, BX submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change, as amended, satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices, for the following reasons:

A. Compensation Committee Composition and Charter

The Commission believes that it is reasonable for BX to require each company listed on its market to have a compensation committee. Although the Alternative Option to a formal committee in the Exchange's current rules could be useful to a small number of companies, the Commission agrees that the heightened importance of compensation decisions and oversight of executive compensation in today's environment, as well as the benefits that can result for investors of having a standing committee overseeing compensation matters, makes it appropriate and consistent with investor protection and the public interest under Section 6(b)(5) of the Act for BX to raise its standards in this regard. In making this determination the Commission is aware that Rule 10C–1 does not require listed companies of national securities exchanges to have a committee dedicated to compensation matters. Nevertheless, it is consistent with Section 6(b)(5) of the Act for BX to require all its listed companies to have an independent compensation committee overseeing executive compensation matters because of the importance and accountability to investors that such a formal structure can provide.[101] The Commission also notes that some of the other requirements of Rule 10C–1 apply only when a company has a committee overseeing compensation matters.[102] Thus, the requirement to have a compensation committee will trigger the additional protections for shareholders created by these requirements.

Similarly, the Commission believes that it is appropriate for BX to raise its standards to require the compensation committee of each issuer to have at least two members, instead of permitting a sole individual to be responsible for compensation policy, and that this furthers investor protection and the public interest in accordance with Section 6(b)(5). In light of the importance of compensation matters, the added thought and objectivity that is

[92] During the phase-in schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

[93] *See* Exhibit 5 of the proposed rule change.

[94] In approving the BX proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[95] 15 U.S.C. 78f(b).

[96] 15 U.S.C. 78j–3.

[97] 17 CFR 240.10C–1.

[98] 15 U.S.C. 78f(b)(5).

[99] *See supra* note 7.

[100] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[101] *See, e.g.,* Section 303A.05 of the New York Stock Exchange (''NYSE'') Listed Company Manual, which does not provide for an Alternative Option as is currently allowed under BX rules.

[102] Under Rule 10C–1, the provisions of Rule 10C–1(b)(2)(i) (concerning the authority to retain or obtain the advice of a compensation adviser) and Rule 10C–1(b)(3) (concerning funding for compensation advisers) do not apply to members of the board of directors who oversee executive compensation matters on behalf of the board of directors outside a committee structure.

likely to result when two or more individuals deliberate over how much a listed company should pay its executives, and what form such compensation should take, is consistent with the goal of promoting more accountability to shareholders on executive compensation matters. Moreover, given the complexity of executive compensation packages for corporate executives, it is reasonable for BX to require listed companies to have the input of more than one committee member on such matters. The Commission believes that the two-member requirement will not be an onerous burden for companies and should actually strengthen their review of compensation matters.

The proposal by the Exchange to require a compensation committee to have a written charter detailing the committee's authority and responsibility is also consistent with Section 6(b)(5) of the Act and will help listed companies to comply with the rules being adopted by BX to fulfill its mandate under Rule 10C–1. For example, as noted above, under BX's proposal the charter must set forth the compensation committee's responsibilities as well as the specific authority concerning compensation advisers as required under Rule 10C–1.[103] A written charter will also provide added transparency for shareholders regarding how a company determines compensation and may clarify and improve the process itself. In this regard, the Commission notes that BX's requirement that listed companies review and reassess the adequacy of the compensation's committee charter on an annual basis will also help to ensure accountability and transparency on an on-going basis. The Commission also notes that several exchanges already require their compensation committees to have written charters.[104]

As discussed above, under Rule 10C–1 the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes, however, that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).'' [105] This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets, consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, BX has determined to adopt a definition that prohibits a director who receives compensation or fees from a listed company (other than, among other things, director compensation) from serving on the company's compensation committee.[106]

As the Exchange noted in its proposal, under the bright-line tests of its general rules for director independence, directors can still be considered independent and serve on listed companies' compensation committees if they receive fees that do not exceed certain thresholds.[107] This is in contrast to BX's requirements to serve on a listed company's audit committee, which bar a director who receives any compensatory fees from the company. In considering the Fees Factor under Rule 10C–1, BX stated that it did not see any compelling justification to set a different standard with respect to the acceptance of compensatory fees for members of the compensation committee than for members of audit committees.

The Commission believes that the Exchange has complied with Rule 10C–1 and Section 10C and that the proposed compensatory fee restriction, which is designed to protect investors and the public interest, is consistent with the requirements of Section 6(b)(5) of the Act. The Commission notes that the compensatory fee restriction will help to ensure that compensation committee members cannot receive directly or indirectly fees that could potentially influence their decisions on compensation matters.[108]

With respect to the Affiliation Factor of Rule 10C–1, BX has concluded that an outright bar from service on a company's compensation committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for compensation committees. BX's existing independence standards will also continue to apply to those directors serving on the compensation committee. BX maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees ''since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.'' The Commission believes that BX's approach of requiring boards only to consider such affiliations, rather than an outright ban on them, is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [109] In determining that BX's

[103] The Commission notes that the provision that is required in the charter regarding the authority of the committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers does not apply under the BX proposal to Smaller Reporting Companies. *See supra* notes 62–65 and accompanying text.

[104] *See, e.g.,* NYSE Listed Company Manual, Section 303A.05.

[105] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

[106] *See supra* note 33–36 and accompanying text.

[107] *See* BX Listing Rules 5605(a)(2)(B) and (D).

[108] *See* Nasdaq Approval Order, *supra* note 5, for a discussion of the comments received on Nasdaq's substantially similar proposal on compensatory fees for compensation committee members.

[109] Rule 10C–1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations ''impair the director's judgment'' as a member of the committee.

affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that BX's proposal requires a company's board, in selecting compensation committee members, to consider whether any such affiliation would impair a director's judgment as a member of the compensation committee. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company's compensation committee, depending on the director's particular affiliations with the company.

As to consideration by BX of whether it should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in the light of Rule 10C–1, but concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for compensation committee members.

The Commission notes that BX discussed in its proposal why it did not include, specifically, personal and business relationships as a factor. BX cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no relationship that, in the opinion of the board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[110] All compensation committee members must meet the general independence standards under BX's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the compensation committee. The Commission further notes that compliance with BX's rules and the provision noted above would demand that a board consider personal and business relationships and related party transactions, among other factors that may be relevant, when evaluating the independence of compensation committee members and, for that matter, all Independent Directors on the board.

BX proposes that the ''Exceptional and Limited Circumstances'' provision in its current rules, which allows one director who fails to meet the Exchange's Independent Director definition to serve on a compensation committee under certain conditions, apply to the enhanced independence standards discussed above that the Exchange is adopting to comply with Rule 10C–1. The Commission believes that the discretion granted to each exchange by Rule 10C–1, generally, to determine the independence standards it adopts to comply with the Rule includes the leeway to carve out exceptions to those standards, as long as they are consistent with the Act. BX also cites, in justifying the exception, the provision of Rule 10C–1 that permits an exchange to exempt a particular relationship with respect to members of the compensation committee as the exchange determines is appropriate, taking into consideration the size of an issuer and any other relevant factors. In this respect, BX states that the flexibility afforded by the exception is particularly important for a smaller company.

Moreover, the Commission approved as consistent with the Act the same exception and concept in the context of BX's current rules requiring each member of a compensation committee to be an Independent Director under Exchange Rule 5605(a)(2), as well in the context of the independence requirements for nominations committees and audit committees. Although the additional independence standards required by Rule 10A–3 for audit committees are not subject to this exception, the Commission notes that Rule 10C–1 grants exchanges more discretion than Rule 10A–3 when considering independence standards for compensation committee membership. The Commission also notes that a member appointed under the Exceptional and Limited Circumstances provision may not serve longer than two years. As BX notes, the additional change to allow a company to rely on the exception for a non-Independent Director who is a family member of a non-executive employee of the company—which the Exchange is proposing to adopt with respect to the Exceptional and Limited Circumstances provisions in both its compensation and audit committee rules—has already been approved by the Commission for the Nasdaq market as an allowance in the corporate governance listing standards of that exchange for both types of committees.[111] The Commission therefore finds that applying this additional change in the BX rules for both committees is consistent with Section 6(b)(5).

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

As discussed above, BX proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee.[112] As such, the Commission believes these provisions meet the mandate of Rule 10C–1 and are consistent with the Act.

As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than

[110] *See* BX Rule 5605(a)(2).

[111] Nasdaq's rules regarding the independence of audit, nominations, and compensation committee members have included an allowance for Exceptional and Limited Circumstances when a member ceases to be independent since 2003. *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003). (The allowance did not apply to the audit committee standards required by Rule 10A–3. *See id.*) In June 2012, when Nasdaq amended its rules to allow the provision to be used when a family member of the director is an employee of the company, as long as the family member is not an executive officer, *see supra* note 48, the change was made to the rules for compensation committees in tandem with the similar change for the other two committees and the Commission found these changes consistent with Section 6(b)(5) of the Act. The Commission notes that, when Nasdaq recently proposed additional independence standards for compensation committees to comply with Rule 10C–1, it proposed to extend the Exceptional and Limited Circumstances allowance, including the change regarding family members of non-executive officers, to the new requirements.

[112] The Commission notes that, in Amendment No. 1, BX revised its proposed rule text to set forth these requirements in full.

in-house counsel,'' [113] and thus requires an independence assessment with respect to regular outside legal counsel. To avoid any confusion, BX, in Amendment No. 1, added rule text that reflects this instruction in its own rules.[114]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, BX has proposed, in Amendment No. 1, to add language to the provision regarding the independence assessment of compensation advisers [115] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. BX states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[116]

The Commission views BX's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[117] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters on other filings regarding the scope of the independence assessment requirement.[118] Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

As already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, the Commission notes that, in Amendment No. 1, BX added specific rule language to clarify, among other things, that the rule does not require a compensation adviser to be independent, only that the compensation committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.[119]

As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.[120] The changes to BX's rules on compensation advisers should therefore benefit investors in BX listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

Finally, one commenter on the substantially similar proposal relating to the Rule 10C–1 requirements submitted by Nasdaq [121] requested guidance ''on how often the required independence assessment should occur.'' [122] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each compensation committee meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.[123]

C. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors, with at least two members is reasonable and consistent with the protection of investors. The Commission notes that BX's rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the Exchange has decided not to require Smaller Reporting Companies to meet its proposed new independence requirements as to compensatory fees and affiliation as well as the requirements concerning compensation advisers.

BX will also require a Smaller Reporting Company to adopt a formal written compensation committee charter or board resolution that specifies the compensation committee's responsibilities and authority, but the company will not be required to review and reassess the adequacy of the charter or board resolution on an annual basis. This is different from the rules for other listed companies, which will be required to include the committee's responsibilities and authority specifically in a formal written charter and to review the charter's adequacy on an annual basis.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for BX to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further, because a Smaller Reporting Company does not need to include in its charter or board resolution the additional provisions regarding compensation advisers that BX is requiring all other listed companies to

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[113] *See* Instruction to paragraph (b)(4) of Rule 10C–1.

[114] *See supra* note 54 and accompanying text.

[115] *See* proposed Rule 5605(d)(3), as amended by Amendment No. 1.

[116] *See* 17 CFR 229.407(e)(3)(iii).

[117] *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

[118] *See* Nasdaq Approval Order and NYSE Approval Order, *supra* note 5.

[119] *See supra* notes 56–58 and accompanying text.

[120] *See* Rule 10C–1 Adopting Release, *supra* note 9.

[121] *See* Nasdaq Approval Order, *supra* note 5.

[122] *See id.*

[123] *See id.*

include to comply with Rule 10C–1,[124] and in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.

D. Opportunity to Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that BX proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is not exactly the same as the cure period that the Rule sets forth as an option.[125] The BX proposal adds the proviso that, if the annual shareholders meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance.

The Commission believes that, although the cure period proposed by BX gives a company more leeway in certain circumstances than the cure period suggested under Rule 10C–1, the accommodation is fair and reasonable. As a general matter, it allows all companies at least 180 days to cure noncompliance. To give a specific example, the proposal would afford a company additional time to comply, than the Rule 10C–1 option, where a member of the compensation committee ceases to be independent two weeks before the company's next annual meeting. The Commission further notes BX already has a similar cure period with respect to other BX corporate governance requirements.[126]

The Commission notes that Rule 10C–1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements. The Commission believes that BX's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement.[127] In particular, BX's rules provide that, unless continued listing of the company raises a public interest concern, when a company is deficient in compliance with, among other rules, Rule 5605, which includes the Exchange's standards for compensation committees, the listed company may submit a plan for compliance. The rules permit the Exchange's staff to extend the deadline for regaining compliance, under established parameters, and, if the company does not regain compliance within the time period provided by all applicable staff extensions—at which point the staff will immediately issue a determination indicating the date on which the company's securities will be suspended—a company can still request review by a hearings panel.

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.

E. Exemptions

As discussed above, asset-backed issuers and other passive issuers, limited partnerships, and registered management investment companies are exempt from BX's existing rules relating to compensation, and BX proposes to extend the exemptions for these entities to the new requirements of the proposed rule change. The Commission notes that Rule 10C–1 allows exchanges to exempt from the listing rules adopted pursuant to Rule 10C–1 certain categories of issuers, as the national securities exchange determines is appropriate.[128] The Commission believes that, given the specific characteristics of the aforementioned types of issuers,[129] it is reasonable and consistent with Section 6(b)(5) of the Act for the Exchange to exempt them from the new requirements. Similarly, the specific characteristics of cooperatives and controlled companies make it reasonable for BX to adopt the proposed exemptions for these entities.[130] The Commission notes, in addition, that other exchanges already have exemptions for these kinds of issuers.[131]

Specifically with regard to BX's proposed exemption for registered management investment companies, the Commission notes that, although Rule 10C–1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it does not explicitly exempt other types of registered management investment companies, including closed-end funds, from any of the requirements of Rule 10C–1. Under the BX proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule.

The Commission believes that it is reasonable to extend its exemption to all registered investment companies, including closed-end funds, because the Investment Company Act of 1940 already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from BX's existing compensation committee requirements. The Commission notes that almost all registered investment companies do not employ executives or employees or have compensation committees.

The Commission notes that BX proposes, however, to amend its current rule for foreign private issuers, which allows such issuers to follow their home country practice in lieu of the

[124] As discussed *supra* notes 64–65 and accompanying text, the charter or board resolution of a Smaller Reporting Company will not be required to include, like the charters of other listed companies, a grant of authority to the committee to retain compensation advisers, a requirement that the company fund such advisers, and a requirement that the committee consider independence factors before selecting such advisers, because Smaller Reporting Companies are not subject to these requirements.

[125] *See supra* notes 42–44 and accompanying text.

[126] *See supra* note 42. The existing and proposed cure provisions in BX's rules mirror similar accommodations in Nasdaq's rules for issuers that lose an independent director or audit committee member. *See* Securities Exchange Act Release No. 54421 (September 11, 2006), 71 FR 54698 (September 18, 2006) (Commission approval of File No. SR–NASDAQ–2006–011).

[127] *See, generally,* BX Rule 5810.

[128] The Commission notes, moreover, that, in the case of limited partnerships and open-end registered management investment companies, Rule 10C–1 itself provides exemptions from the independence requirements of the Rule.

[129] *See supra* Section II.B.4.

[130] The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5). The additional BX provisions requiring listed companies to have a two-member compensation committee and a written committee charter, will, of course, not apply to the exempted entities, which are currently required to have neither a compensation committee nor the Alternative Option.

[131] *See supra* note 72.

Exchange's standards regarding a company's compensation decision-making process. The current rule includes the proviso that the issuer must disclose its reliance on the exemption. BX proposes to conform its rules in this regard with the provision of Rule 10C–1 permitting a foreign private issuer to follow home country practice only when it meets the additional condition that the issuer disclose the reasons why it does not have an independent compensation committee.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford companies that may be listed on BX as of the effective date adequate time to make the changes, if any, necessary to meet the new standards. The Commission notes that the provision in the original proposal requiring companies to comply with certain of the requirements immediately has been revised in Amendment No. 1 to allow companies until July 1, 2013 to satisfy these requirements.[132] The Commission also believes that the revised deadline proposed in Amendment No. 1, which gives companies until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the remaining provisions is more clear-cut than the deadline in the original proposal and also matches the deadline set forth by the New York Stock Exchange in its proposed rule change to comply with Rule 10C–1.[133]

G. Phase-In Schedules: IPOs; Companies That Lose Their Exemptions; Companies Transferring From Other Markets

The Commission believes that it is reasonable for BX to allow, with respect to IPOs, companies emerging from bankruptcy, companies ceasing to be controlled companies, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules.

The Commission also believes that the phase-in schedule for companies that cease to be Smaller Reporting Companies, as revised in Amendment No. 1, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining when they will be subject to the heightened requirements.

IV. Accelerated Approval of Amendment No. 1 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[134] for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. The change made to the proposal by Amendment No. 1 to set forth in detail the requirements of Rule 10C–1(b)(2)–(4) explicitly in the Exchange's rules, rather than incorporating these details by reference as in the original proposal,[135] is not a substantive one and merely codifies the original intent of that provision. Moreover, the change improves the proposal because it brings together the full set of the Exchange's rules on compensation committees in one place, thereby easing compliance for listed companies and benefiting investors seeking an understanding of an issuer's obligations with regard to determining executive compensation.

The change made by Amendment No. 1 to require companies listed on BX as of the effective date of the proposal to comply with certain of the new rules by July 1, 2013 rather than immediately, as originally proposed,[136] reasonably affords companies more time to take the steps necessary for compliance. The change to require such companies to comply with the remaining provisions by the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, rather than by the deadline originally proposed,[137] still allows ample time for companies to adjust to the new rules, and accords with the deadline set by NYSE in its proposed rule change to comply with Rule 10C–1, which was published at the same time as the BX proposal.[138]

The revision made by Amendment No. 1 to the phase-in rules for companies that cease to be Smaller Reporting Companies [139] establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance. The Commission notes that the Start Date of the phase-in period for such a company is six months after the Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. Moreover, with respect to the enhanced independence standards for compensation committee members (relating to fees and affiliation with the company), only one member must meet these standards within six months after the Start Date. The company is given nine months from the Start Date (*i.e.,* fifteen months from the Determination Date) to have a majority of committee members meeting the standards, and a full year from the Start Date (*i.e.,* eighteen months from the Determination Date) to fully comply with the standards.

The addition by Amendment No. 1 of a preamble to proposed Rule 5605(d) to set forth the obligations of a company during the transition period until the new rules apply introduces no substantive change.[140] It merely mirrors the instructions in the preamble to the Sunsetting Provisions, providing clarity for listed companies.

The inclusion in Amendment No. 1 of language in BX's rules that requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel'' merely reflects an instruction in Rule 10C–1 itself.[141] The addition of further guidance by Amendment No. 1 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser,[142] and is not a substantive change.

Amendment No. 1 also excluded advisers that provide certain types of services from the independence assessment.[143] As discussed above, the Commission has already determined to exclude such advisers from the

[132] *See supra* notes 73–74 for the provisions to which the new transition date applies.

[133] *See* Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (Notice of File No. SR–NYSE–2012–49).

[134] 15 U.S.C. 78s(b)(2).

[135] *See supra* note 49 and accompanying text.

[136] *See supra* note 77 and accompanying text.

[137] *See supra* note 81 and accompanying text.

[138] The Commission received one comment letter relating to this provision in the NYSE proposal, in which the commenter supported this transition period for compliance with the new compensation committee independence standards but believed that a longer period should be provided to implement the other listing standards that NYSE proposed. *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, concerning File No. SR–NYSE–2012–49, dated December 7, 2012.

[139] *See supra* note 89 and accompanying text.

[140] *See supra* note 76.

[141] *See supra* note 113 and accompanying text.

[142] *See supra* note 56 and accompanying text.

[143] *See supra* notes 59–60 and accompanying text.

disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise conflict of interest concerns. For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment No. 1.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment No. 1 are 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–BX–2012–063 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–BX–2012–063. 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 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 BX. 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–BX–2012–063, and should be submitted on or before February 12, 2013.

VI. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by BX, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. BX's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

BX's rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of BX-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of BX's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[144]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[145] that the proposed rule change, SR–BX–2012–063, as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[146]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01108 Filed 1–18–13; 8:45 am]

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[144] 15 U.S.C. 78f(b)(5).

[145] 15 U.S.C. 78s(b)(2).

[146] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68643; File No. SR–BATS–2012–039]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Amendment Nos. 2 and 3, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1, 2 and 3, To Amend the Listing Rules for Compensation Committees To Comply With Securities Exchange Act Rule 10C–1 and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, BATS Exchange, Inc. (''Exchange'' or ''BATS'') 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. On October 9, 2012, BATS filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on October 15, 2012.[4] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[5] The Commission received no comment letters on the proposed rule change.[6] On January 10, 2013, the Exchange filed Amendment No. 2 to the proposed rule change.[7] On

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaced the proposed rule change in full.

[4] *See* Securities Exchange Act Release No. 68022 (October 9, 2012), 77 FR 62572 (''Notice'').

[5] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[6] The Commission notes that comments were received on substantially similar proposals filed by New York Stock Exchange, LLC and Nasdaq Stock Market LLC. For a synopsis of these comments *see* Securities Exchange Act Release Nos. 68011 (October 9, 2012) (''NYSE Notice) (File No. SR–NYSE–2012–49); 68013 (October 9, 2012) (''Nasdaq Notice'') (File No. SR–NASDAQ–2012–109); 68639 (January 11, 2013), (''NYSE Approval Order''); 68640 (January 11, 2013), (''Nasdaq Approval Order'').

[7] In Amendment No. 2 to SR–BATS–2012–039, BATS proposes to: (1) Add additional language to further outline the responsibilities of the compensation committee, as well as to make certain clarifying changes to the compensation committee's

January 11, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.[8] This order approves the proposed rule change, as modified by Amendment Nos. 1, 2, and 3 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C–1 Under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[9] the Commission proposed Rule 10C–1 under the Act,[10] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[11]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee[12] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[13] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[14]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[15] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[16] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[17] as well as any other factors identified by the relevant exchange in its listing standards.[18]

B. BATS Proposed Rule Change, as Amended

To comply with Rule 10C–1, BATS proposes to amend several provisions of Exchange BATS Rule 14.10, ''Corporate Governance Requirements.'' Specifically, BATS proposes to amend BATS Rule 14.10(c)(4), ''Independent Director Oversight of Executive Officer Compensation,'' and BATS Rule 14.10(e), ''Exemptions from Certain Corporate Governance Requirements.''

1. Compensation Committee Composition and Independence Standards

Current BATS Rule 14.10(c)(4) provides that compensation of the executive officers of a listed company must be determined, or recommended to the company's board for determination, either by a compensation committee comprised solely of ''Independent Directors,'' as defined in the Exchange's rules,[19] or, as an alternative, by a vote of such Independent Directors constituting a majority of the board's Independent Directors in a vote in which only Independent Directors participate (''Alternative Option'').[20]

BATS is retaining the requirement that executive compensation be determined by individuals who qualify as Independent Directors, but, in compliance with Rule 10C–1, is proposing to require the board to consider two additional factors in evaluating the independence of these individuals. Specifically, the Exchange proposes to amend BATS Rule 14.10(c)(4) to require the board to consider: (i) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the company

responsibilities and authority; (2) increase the cure period for meeting compensation committee requirements where the annual shareholders meeting occurs no later than 180 days following the event that cause the failure to comply, as well as make several clarifying changes to the cure period rule; (3) amend language from the proposal in order to create full exemptions from Rule 14.10(c)(4) for limited partnerships, management investment companies, and companies in bankruptcy proceedings; (4) move the effective date of the proposal from June 1, 2013 to July 1, 2013; and (5) make several non-substantive clarifying changes, as well as correcting certain rule references within the proposal.

[8] In Amendment No. 3 to SR–BATS–2012–039, BATS added language to make clear that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing, as BATS is only exempting Smaller Reporting Companies from the newly proposed enhanced independence standards as well as the new compensation adviser standards. Therefore, the Exchange amended its exemption for Smaller Reporting Companies to state that executive compensation must be determined either by a compensation committee comprised of Independent Directors meeting the definition of independent in Rule 14.10(c)(1)(B), or by a majority of the Board's Independent Directors in a vote in which only Independent Directors meeting the definition of Independent Director in Rule 14.10(c)(1)(B) participate.

[9] Public Law 111–203, 124 Stat. 1900 (2010).

[10] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[11] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[12] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[13] *See* Rule 10C–1(a) and (b)(1).

[14] *See* Rule 10C–1(b)(1)(ii). *See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[15] *See* Rule 10C–1(b)(2).

[16] *See* Rule 10C–1(b)(3).

[17] *See* Rule 10C–1(b)(4). The six factors, which BATS proposes to set forth explicitly in its rules, are specified in the text accompanying note 34, *infra.*

[18] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[19] ''Independent Directors,'' as defined in BATS Rule 14.10(c)(1)(B) and used herein, includes a two-part test for independence. The definition sets forth seven specific categories of directors who cannot be considered independent because of certain discrete relationships (''the bright-line tests''). In addition, an Independent Director may not have a relationship which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities. The board must make an affirmative determination that an individual serving as an Independent Director does not have a relationship with the company that would impair the individual's independence. *See* Interpretation and Policy .01 to BATS Rule 14.10(c)(1)(B).

[20] Current BATS Rule 14.10(c)(4)(A) sets forth the two alternatives (formal committee or majority of Independent Directors) with respect to determining compensation of the chief executive officer (''CEO'') of the company, and provides that the CEO may not be present during voting or deliberations regarding the CEO's own compensation. Current BATS Rule 14.10(c)(4)(B) sets forth the same two alternatives with respect to determining compensation of all other executive officers. Under the proposed rule change, these provisions will be renumbered. *See infra* note 21.

to such director; and (ii) whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company.[21]

In discussing the proposed rule change, BATS stated that the adoption of this new requirement, along with its existing bright-line tests for director independence, will bring the Exchange into compliance with Rule 10C–1(b)(1).[22] The Exchange stated that, after reviewing its current and proposed listing rules, it concluded that these rules are sufficient to ensure the independence of a company's directors who determine or recommend to the board for determination executive compensation. The Exchange believes that its existing bright-line standards are ''sufficiently broad to encompass the types of relationships which would generally be material to a director's independence'' for these purposes, and therefore determined not to propose independence requirements in addition to the specific ones it is proposing.[23]

After considering the factors set forth in Rule 10C–1(b)(1)(ii) and evaluating how the factors could impact the ability of a director to act independently in determining executive compensation, the Exchange further stated, it believes that it can best comply with Rule 10C–1 by adopting those factors in its rules.[24]

The Exchange is also proposing to delete existing BATS Rule 14.10(c)(4)(C). Current BATS Rule 14.10(c)(4)(C) provides that, notwithstanding the Exchanges independence requirements for compensation committees, if such a committee is comprised of at least three members, one director who is not independent and is not a current officer or employee or a family member of an officer or employee may be appointed to the committee if the board, under exceptional and limited circumstances, determines that such individual's membership is required by the best interest of the company and its shareholders.[25] The Exchange notes that no such exception exists under Rule 10C–1, and states that, after considering the factors relevant to compensation committee independence under Rule 10C–1, it believes that the deletion of the exception under its rules would comply with Rule 10C–1.

BATS further proposes to add a cure period provision for a failure of a listed company to meet its compensation committee composition requirements.[26] Under the provision, a company that fails to comply with the compensation committee independence requirements due to one committee member ceasing to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of its next annual shareholders meeting or one year from the occurrence of the event that caused the failure to comply.[27] However, if the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply, the company will be allowed 180 days from the event to regain compliance.[28] A company relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstances that caused the noncompliance. BATS's proposal expressly limits the availability of this cure period to companies with formal compensation committees.[29]

2. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, BATS proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act—regarding the authority of compensation committees to retain compensation advisers, the funding of such advisers, and assessment of their independence—by setting forth those requirements in its own rules. Thus, proposed BATS Rule 14.10(c)(4)(C), as amended by Amendment Nos. 1, 2 and 3, sets forth the following requirements relating to compensation committees of listed companies, which, for these purposes, includes Independent Directors overseeing compensation pursuant to the Alternative Option:

- The committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, legal counsel,[30] or other adviser; [31]
- The committee shall be directly responsible for the appointment, compensation and oversight of the work of any retained compensation consultant, legal counsel, or other adviser retained by the compensation committee; [32] and
- The company must provide for appropriate funding, as determined by

[21] *See* Notice, *supra* note 4. Under the proposal, the new requirement to consider the additional independence factors will be set forth as BATS Rule 14.10(c)(4)(A), and current BATS Rule 14.10(c)(4)(A) and (B) will be renumbered as BATS Rule 14.10(c)(B)(i) and (ii), respectively.

[22] *See* Notice, *supra* note 4 and *supra* note 12 and accompanying text.

[23] *See* BATS Rule 14.10(c)(1)(b) specifying the bright line tests: The following persons shall not be considered independent: (i) A director who is, or at any time during the past three years was, employed by the Company; (ii) a director who accepted or who has a Family Member who accepted any compensation from the Company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (a) Compensation for board or board committee service; (b) compensation paid to a Family Member who is an employee (other than an Executive Officer) of the Company; or (c) benefits under a tax-qualified retirement plan, or non-discretionary compensation. Provided, however, that in addition to the requirements contained in this paragraph (ii), audit committee members are also subject to additional, more stringent requirements under Rule 14.10(c)(3)(B). (iii) a director who is a Family Member of an individual who is, or at any time during the past three years was, employed by the company as an Executive Officer; (iv) a director who is, or has a Family Member who is, a partner in, or a controlling Shareholder or an Executive Officer of, any organization to which the Company made, or from which the Company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than the following: (a) Payments arising solely from investments in the Company's securities; or (b) payments under non-discretionary charitable contribution matching programs; (v) a director of the Company who is, or has a Family Member who is, employed as an Executive Officer of another entity where at any time during the past three years any of the Executive Officers of the Company serve on the compensation committee of such other entity; or (vi) a director who is, or has a Family Member who is, a current partner of the Company's outside auditor, or was a partner or employee of the Company's outside auditor who worked on the Company's audit at any time during any of the past three years. (vii) in the case of an investment company, in lieu of paragraphs (i)–(vi), a director who is an ''interested person'' of the Company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

[24] *See id.*

[25] *See* current BATS Rule 14.10(c)(4)(C).

[26] *See* proposed BATS Rule 14.10(c)(4)(D).

[27] *See* Proposed BATS Rule 14.10(c)(4)(D). If the annual shareholders meeting occurs no later than 180 days following the event that caused the failure to comply with this requirement, the company shall instead have 180 days from such event to regain compliance. *Id.*

[28] *See* Amendment No. 2 to the proposed rule change.

[29] BATS does not otherwise propose any new procedures for an issuer to have an opportunity to cure defects with respect to its proposed requirements, but BATS does have existing delisting procedures that provide issuers with notice, opportunity for a hearing, opportunity for appeals, and an opportunity to cure defects before an issuer's securities are delisted. *See* Rules of BATS Exchange, Rule 14.12 Failure to Meet Listing Standards. For example, Rule 14.12(c) provides procedures for providing deficient companies with notice, Rule 14.12(h) provides procedures for an issuer to request the review of a hearing panel, and Rule 14.12(i) provides procedures for issuers to appeal to BATS' Listing Council.

[30] Rule 10C–1(b)(4) does not include the word ''independent'' before ''legal counsel'' and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In setting forth the requirements of Rule 10C–1(b)(2) and (3), BATS has deleted the word ''independent'' prior to ''legal counsel'' so as to avoid confusion.

[31] *See* proposed BATS Rule 14.10(c)(4)(C)(i).

[32] *See* proposed BATS Rule 14.10(c)(4)(C)(ii).

the compensation committee, for payment of reasonable compensation to a compensation consultant, legal counsel, or any other adviser retained by the compensation committee.[33]

The committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C–1(b)(4) regarding independence assessments of compensation advisers.[34] The six factors, which are set forth in full in the proposed rule, are: (i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (v) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the issuer. The Exchange stated that it believes this list of factors is comprehensive. Therefore, the Exchange did not include any specific additional factors for consideration by compensation committees in making the required independence assessment.

The amended proposed rule change also states that nothing in the rule shall be construed to require the compensation committee to implement or act consistently with the advice or recommendations of the retained compensation adviser or to affect the ability or obligation of the committee to exercise its own judgment in fulfilling its duties.[35] In Amendment No. 2, the Exchange modified the proposed rule change to state that the committee is required to conduct the independence assessment outlined in the rule with respect to any compensation consultant, legal counsel or other adviser that provides advice to the committee, other than in-house counsel.[36] Amendment No. 2 also provides that a compensation committee is not required to conduct the independence assessment with respect to any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S–K, including: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.[37]

Proposed BATS Rule 14.10(c)(4)(C)(iv), as amended, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.[38] It further clarifies that compensation committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth above.[39]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[40] Consistent with this Rule 10C–1 provision, BATS proposes that a smaller reporting company, as defined in Rule 12b–2 under the Act (hereinafter, a ''Smaller Reporting Company''), be exempt from the compensation-related rules added by the proposed rule change. Thus, Smaller Reporting Companies will not be required to comply with the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation and the requirements relating to compensation advisers.[41]

4. Exemptions

Rule 10C–1 permits the national securities exchanges to exempt from the listing rules adopted pursuant to Rule 10C–1 certain categories of issuers, as the national securities exchange determines is appropriate, taking into consideration, among other relevant factors, the potential impact of the listing rules on smaller reporting issuers.[42] As modified by Amendment No. 2, the proposed rule change would leave the existing exemptions from the compensation-related listing standards in the Exchange's current rules generally unchanged. These include exemptions for asset-backed issuers and other passive issuers,[43] cooperatives,[44] limited partnerships,[45] and management investment companies.[46] For the same

[33] *See* proposed BATS Rule 14.10(c)(4)(C)(iii).

[34] *See* proposed BATS Rule 14.10(c)(4)(C)(iv), setting forth the factors listed in Rule 10C–1(b)(4)(i)–(vi) under the Act.

[35] *See id,* based on Rule 10C–1(b)(2)(iii).

[36] *See id,* based on Instruction to paragraph (b)(4) of Rule 10C–1.

[37] *See* proposed BATS Rule 14.10(c)(4)(C)(iv) and Amendment Nos. 2 and 3, *supra* notes 7 and 8, respectively.

[38] *See id.*

[39] *See id.*

[40] *See supra* Section II.A; *see also* Rule 10C–1(b)(5)(ii).

[41] *See* proposed BATS Rule 14.10(e)(1)(F), as amended by Amendment No. 3 which makes clear that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing. Therefore, the Exchange amended its exemption for Smaller Reporting Companies to state that executive compensation must be determined either by a compensation committee comprised of Independent Directors meeting the definition of independent in Rule 14.10(c)(1)(B), or by a majority of the Board's Independent Directors in a vote in which only Independent Directors meeting the definition of Independent Director in Rule 14.10(c)(1)(B) participate.

[42] *See* 17 CFR 240.10C–1(b)(5).

[43] *See* BATS Rule 14.10(e)(1)(A). Asset-backed issuers and other passive issuers have traditionally been exempt from the Exchange's compensation-related listing rules because these issuers do not have a board of directors or persons acting in a similar capacity and their activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) securities, rights, collateral, or other assets on behalf of or for the benefit of the holders of the listed securities.

[44] *See* BATS Rule 14.10(e)(1)(B). Certain member-owned cooperatives that list their preferred stock are required to have their common stock owned by their members. As BATS stated in its proposal, these entities have traditionally been exempt from the Exchange's compensation-related listing rules because of their unique structure and the fact that they do not have a publicly traded class of common stock.

[45] *See* BATS Rule 14.10(e)(1)(D). The Exchange's compensation-related listing rules historically have not been applied to limited partnerships because, according to the Exchange, the structure of these entities requires that public investors have limited rights and that the general partners make all significant decisions about the operation of the limited partnership. As such, BATS notes that limited partners do not expect to have a voice in the operations of the partnership.

[46] *See* BATS Rule 14.10(e)(1)(E). According to BATS, management investment companies registered under the Investment Company Act of 1940 are already subject to a pervasive system of federal regulation in certain areas of corporate governance, and, as a result, these entities have traditionally been exempt from the Exchange's compensation-related listing rules.

reasons that these categories of companies have traditionally been exempt from the Exchange's compensation-related listing rules, the Exchange proposes that they continue to be exempt from its revised listing rules relating to compensation committees.

In addition, the Exchange's current listing rules provide that a foreign private issuer may follow its home country practice in lieu of the Exchange's compensation-related listing rules if the foreign private issuer discloses in its annual reports filed with the Commission each requirement that it does not follow and describes the home country practice followed by the company in lieu of such requirements.[47] Under the proposed rule change as modified by Amendment No. 2, this allowance will continue to apply generally to the Exchange's compensation committee rules as revised, on the same condition, namely that the issuer discloses each requirement it does not follow and describes the home country practice it follows in lieu of such requirement. However, with respect, specifically, to the enhanced standards of independence for compensation committees (concerning the Fees and Affiliation Factors), if a listed company follows its home country practice, it will be required additionally disclose in its annual report filed with the Commission the reasons why it does not have an independent compensation committee as set forth in these standards.[48]

Lastly, in Amendment No. 2, the Exchange proposes to leave the requirements relating to compensation committee composition for companies in bankruptcy proceeding generally unchanged. Because companies in bankruptcy proceedings are not currently required to have a compensation committee, the Exchange is proposing to continue to rely on the existing schedule to phase in compliance with the compensation committee composition requirement for companies emerging from bankruptcy.[49]

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change, as amended, provides that certain of the new requirements for companies listed prior to July 1, 2013. A company listed on the Exchange prior to July 1, 2013 will be permitted, commencing on July 1, to phase-in compliance with the Independent Director Oversight of Executive Officer Compensation requirements on the same schedule as Companies listing in conjunction with their initial public offering.[50] The phase-in period for companies listing in conjunction with the initial public offering is discussed in section II.B.6 below.

6. Phase-In Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

BATS proposes to amend BATS Rule 14.10(e)(2)(A) to allow a company listing in connection with its initial public offering to phase-in the compensation committee independence rules, as revised, as follows: (1) One independent member at the time of listing; (2) a majority of independent members within 90 days of listing; and (3) all independent members within one year of listing.[51] Since companies listing in connection with an initial public offering may not have previously had an independent compensation committee, the Exchange believes that allowing such companies to phase in compliance with these requirements will reasonably provide these companies with a window identical to the phase-in schedule for the Exchange's rules regarding Independent Director Oversight of Director Nominations under BATS Rule 14.10(c)(4) and the independent audit committee requirements of Rule 10A–3(b)(1)(iv)(A) under the Act. The Exchange states that, as noted above, the proposed rule would require that the company have at least one independent member at the time of listing, meaning that even though it is described as a ''phase-in period,'' the company would never actually be without at least one independent member.

7. Conforming Changes and Correction of Typographical Errors

The Exchange is also proposing to amend BATS Rule 14.10(c)(4)(B) to add a title to and adjust the numbering of the Rule. The changes are being proposed in order to remain consistent with existing rule structure and to ensure that the rules are well-organized and understandable.

III. Discussion

After careful review, the Commission finds that the BATS proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[52] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[53] as well as with Section 10C of the Act [54] and Rule 10C–1 thereunder.[55] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[56] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the BATS proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-

[47] *See* BATS Rule 14.10(e)(1)(C). Alternatively, a foreign private issuer that is not required to file its annual report with the Commission on Form 20–F may make this disclosure only on its Web site. *Id.* The Exchange's listing rules have traditionally provided qualified exemptions for Foreign Private Issuers so that such issuers are not required to do any act that is contrary to a law, rule, or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile.

[48] As explained by the Exchange, Amendment No. 2 adopts the requirements of Rule 10C–1(b)(1)(iii)(A)(4), which provides an exemption from the independence requirements of Rule 10C–1 for foreign private issuers.

[49] *See* BATS Rule 14.10(e)(2)(C).

[50] *See* BATS Rule 14.10(e)(2)(D).

[51] *See* Proposed BATS Rule 14.10(e)(2)(A); Exhibit 5 to Amendment No. 2, *supra* note 6.

[52] In approving the BATS proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[53] 15 U.S.C. 78f(b).

[54] 15 U.S.C. 78j–3.

[55] 17 CFR 240.10C–1.

[56] 15 U.S.C. 78f(b)(5).

making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[57] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [58] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, BATS submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission believes that the proposed rule change, as modified by Amendment Nos. 1, 2, and 3, appropriately revises BATS's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C–1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting advisory or other compensatory fee paid by the issuer to the director as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).'' [59]

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, BATS has enhanced its listing requirements regarding compensation committees. Under BATS's current rules, each member of a listed issuer's compensation committee—or each individual participating under the Alternative Option—must be a member of the board and independent. The enhanced listing requirements proposed by BATS specifically require that when evaluating the independence of a director responsible for determining executive compensation, a company's board of directors consider the following factors: (i) The source of compensation of the director, including consulting, advisory or other compensatory fee paid by the company to the director; and (ii) whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company, in accordance with the requirements of Rule 10C–1(b)(1).

The Commission believes that by incorporating these independence standards, the Exchange has complied with the independence requirements of Rule 10C–1(b)(1), and that the proposed independence requirements, which are designed to protect investors and the public interest, are consistent with the requirements of Section 6(b)(5) of the Act. The Commission believes that the enhanced standards, in conjunction with the Exchange's existing ''bright line'' independence standards set forth in BATS Rule 14.10(c)(1)(B), are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for determining executive compensation.

As to whether BATS should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in the light of Rule 10C–1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence.[60] Further, BATS stated it believes it can best comply with Rule 10C–1 by adopting in its Rules the factors set forth in Rule 10C–1(b)(1)(ii).[61] The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to the fees and affiliation factors in determining its definition of independence for compensation committee members. The Commission notes that Rule 10C–1 requires each exchange to consider relevant factors, but does not require the exchange's proposal to reflect any such additional factors.

B. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

As discussed above, BATS proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C–1 and are consistent with the Act.

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, BATS has proposed, in Amendment No. 2, to add language to the provision regarding the independence assessment of compensation advisers [62] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item

[57] *See supra* note 9.

[58] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[59] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

[60] *See* Notice, *supra* note 4.

[61] *See id.*

[62] *See* proposed Rule 14.10(c)(4)(C)(iv), as amended by Amendment No. 2.

407(e)(3)(iii) of Regulation S–K: (a) consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. BATS states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[63]

The Commission views BATS' proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[64] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters to other filings regarding the scope of the independence assessment requirement.[65] Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

C. Compensation Adviser Independence Factors

As noted above, the compensation committee may select, or receive advice from, a compensation consultant, legal counsel, or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C–1[66] regarding independence assessments of compensation advisers, which will be set forth in BATS Rule 14.10(c)(4)(C)(ii). Codifying the comprehensive list of factors, as set forth in Rule 10C–1, into its own Rules will ensure that issuers adequately assess the independence of potential compensation advisers.

BATS Rules require an independence assessment to be performed on every potential compensation adviser, other than in-house counsel.[67] The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.'' To avoid any confusion, BATS, in Amendment No. 2, added rule text that reflects this instruction in its own rules.[68]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. Finally, one commenter on the New York Stock Exchange's proposal requested guidance ''on how often the required independence assessment should occur.''[69] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each compensation committee meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independent assessment at least annually.[70]

D. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other BATS-listed companies, to have a compensation committee, composed solely of independent directors or compensation determined by a majority of the independent directors, is reasonable and consistent with the protection of investors. The Commission notes that BATS' rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the Exchange has decided not to require Smaller Reporting Companies to meet its proposed new independence requirements as to compensatory fees and affiliation as well as the requirements concerning compensation advisers.[71]

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for BATS to provide some flexibility to Smaller Reporting Companies. Further, in view of the potential additional costs, it is reasonable not to require a Smaller Reporting Company to comply with these additional compensation adviser requirements.[72]

E. Opportunity To Cure Defects

The Commission notes that the cure period that BATS proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is not exactly the same as the cure period suggested under Rule 10C–1.[73] The BATS proposal adds the proviso that, if the annual shareholders meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. The Commission believes that, although the cure period proposed by BATS gives a company more leeway in certain circumstances than the cure period suggested under Rule 10C–1, the accommodation is fair and reasonable. As a general matter, it allows all companies at least 180 days to cure

[63] *See* 17 CFR 229.407(e)(3)(iii).

[64] *See* Proxy Disclosure Enhancements, Release No. 33–9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

[65] *See* NYSE Approval Order and Nasdaq Approval Order, *supra* note 6.

[66] *See* Rule 10C–1(b)(4).

[67] *See* BATS Rule 14.10(c)(4)(C)(iv).

[68] *See supra* note 38 and accompanying text.

[69] *See* Comment to NYSE Notice by Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter'').

[70] *See* NYSE Approval Order and Nasdaq Approval Order, *supra* note 6, for a discussion of comments.

[71] *See* Amendment No. 3, *supra* note 8, regarding proposed BATS Rule 14.10(e)(i).

[72] As discussed supra notes 40–41 and accompanying text, under BATS' proposal, Smaller Reporting Companies are exempted from all of the compensation adviser requirements, including the requirement that specified independence factors be considered before selecting such advisers.

[73] Rule 10C–1 allows a cure period of until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent. The BATS proposal adds that, if the annual shareholders' meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. As explained by BATS, this provides a company at least 180 days to cure noncompliance and would typically allow a company to regain compliance in connection with its next annual meeting. *See supra* notes 28–29 and accompanying text.

noncompliance. To give a specific example, the proposal would afford a company additional time to comply, than the Rule 10C–1 option, where a member of the compensation committee ceases to be independent two weeks before the company's next annual meeting.

The Commission believes that it is reasonable for BATS not to provide this cure period when the listed company has no formal compensation committee and executive compensation is determined under the Alternative Option. The Commission notes that under this option, only a majority—not all—of the board's Independent Directors who also meet the enhanced requirements are required for determining, or recommending to the board for determination, executive compensation. In addition, as the Exchange notes, its general rules include delisting procedures that provide issuers with notice, opportunity for a hearing, opportunity for appeals, and an opportunity to cure defects before an issuer's securities are delisted.

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for compensation committees failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.

F. Exemptions

As discussed above, asset-backed issuers and other passive issuers, cooperatives, limited partnerships, registered management investment companies, and controlled companies are exempt from BATS's existing rules relating to compensation, and BATS proposes to extend the exemptions for these entities to the new requirements of the proposed rule change. The Commission notes that Rule 10C–1 allows exchanges to exempt from the listing rules adopted pursuant to Rule 10C–1 certain categories of issuers, as the national securities exchange determines is appropriate.[74] The Commission believes that, given the specific characteristics of the aforementioned types of issuers,[75] it is reasonable and consistent with Section 6(b)(5) of the Act for the Exchange to exempt them from the new requirements.

The Commission notes that BATS proposes, however, to amend its current rule for foreign private issuers, which allows such issuers to follow their home country practice in lieu of the Exchange's standards regarding a company's compensation decision-making process. The current rule includes the proviso that the issuer must disclose its reliance on the exemption. BATS proposes to conform its rules in this regard with the provision of Rule 10C–1 permitting a foreign private issuer to follow home country practice only when it meets the additional condition that the issuer disclose the reasons why it does not have an independent compensation committee.

G. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut and matches the NYSE deadline and the revised deadline set forth by The NASDAQ Stock Market.[76] Additionally, the Commission believes that the BATS compliance dates and transition periods associated with the new independence standards relating to the compensation committee are consistent with Rule 10C–1 and provide for ease of implementation. Accordingly, issuers will be expected to begin complying with the new compensation committee independence standards commencing on July 1, 2013, from which time issuers will be required to have one independent compensation committee member at that time, a majority of independent members within 90 days from July 1, 2013, and all independent members within one year of July 1, 2013.

H. Phase-In Schedules: IPOs; Companies That Lose Their Exemptions; Companies Transferring From Other Markets

The Commission believes that it is reasonable for BATS to allow, with respect to IPOs, companies listing in conjunction with a carve-out or spin-off transaction, companies emerging from bankruptcy, companies ceasing to be controlled companies, companies ceasing to qualify as a foreign private issuer, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules. In the Commission's view, the implementation schedule offers such companies clarity in determining when they will be subject to the heightened requirements.

IV. Accelerated Approval of Amendment Nos. 2 and 3 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[77] for approving the proposed rule change, as modified by Amendment Nos. 1, 2 and 3, prior to the 30th day after the date of publication of notice in the **Federal Register**.

The changes made to the proposal by Amendment No. 2 that clarified the responsibilities and authority of Independent Directors responsible for determining executive compensation and the requirement that listed companies provide appropriate funding for compensation advisers merely set forth in detail the relevant requirements of Rule 10C–1(b)(2)–(4) explicitly in the Exchange's rules. Moreover, the changes improve the proposal because they bring together the full set of the Exchange's rules on compensation committees in one place, thereby easing compliance for listed companies and benefiting investors seeking an understanding of an issuer's obligations with regard to determining executive compensation.

The inclusion in Amendment No. 2 of language in BATS's rules that requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel'' merely reflects an instruction in Rule 10C–1 itself. The addition of further guidance by Amendment No. 2 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser,[78] and is not a substantive

[74] The Commission notes, moreover, that, in the case of limited partnerships and open-end registered management investment companies, Rule 10C–1 itself provides exemptions from the independence requirements of the Rule. The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5).

[75] *See supra* Section II.B.4.

[76] *See* NYSE Approval Order and Nasdaq Approval Order, *supra* note 6.

[77] 15 U.S.C. 78s(b)(2).

[78] *See supra* note 38 and accompanying text.

change. Regarding the provision added by Amendment No. 2 to exclude advisers that provide certain types of services from the independence assessment, as discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise conflict of interest concerns.

The change made by Amendment No. 1 to require companies currently listed on BATS to comply with certain of the new rules by July 1, 2013 brings BATS's effective date in line with that of other exchanges.[79] The addition of exemptions that were not originally proposed for specific types of entities, including limited partnerships, cooperatives, foreign private issuers, management investment companies registered under the Investment company Act of 1940 continue exemptions available under the current rules and are appropriate exercises of BATS's exemptive authority under Rule 10C–1. The revision in Amendment No. 2 to adopt a cure period for companies to comply with the rule's requirements in the event a director ceases to be independent for reasons outside his or her control is suggested by Rule 10C–1 itself, and the additional proviso to allow companies at least 180 days has been approved by the Commission in other contexts.

The change made by Amendment No. 3 regarding the exemption for Smaller Reporting Companies merely clarifies that for Smaller Reporting Companies the current standards for independent oversight of executive compensation are not changing, as BATS is only exempting Smaller Reporting Companies from the newly proposed enhanced independence standards, not all the independence standards. Thus, Smaller reporting Companies will continue to be required to comply with existing oversight of executive compensation rules.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes as made by Amendment Nos. 2 and 3.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment Nos. 2 and 3 are 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–BATS–2012–039 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–BATS–2012–039. 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 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 BATS. 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–BATS–2012–039, and should be submitted on or before February 12, 2013.

VI. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by BATS, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. BATS' new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

BATS' rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of BATS-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of BATS' standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR–BATS–2012–039, as modified by Amendment Nos. 1, 2 and 3, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[80]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[81] that the proposed rule change, SR–BATS–2012–039, as amended, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[82]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01110 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68659; File No. SR–BATS–2013–002]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

January 15, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

[79] *See* NYSE Approval Order and Nasdaq Approval Order, *supra* note 6.

[80] 15 U.S.C. 78f(b)(5).

[81] 15 U.S.C. 78s(b)(2).

[82] 17 CFR 200.30–3(a)(12).

''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 7, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change 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 Exchange proposes to amend the fee schedule applicable to Members [5] and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant 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 adopt pricing for orders routed by the Exchange to a new options market, the MIAX Options Exchange (''MIAX''), and to modify pricing for orders routed by the Exchange to NASDAQ OMX PHLX LLC (''PHLX'') and NASDAQ OMX BX, Inc. (''BX Options''), as further described below.

The Exchange currently charges certain flat rates for routing to other options exchanges that have been placed into groups based on the approximate cost of routing to such venues. The grouping of away options exchanges is based on the cost of transaction fees assessed by each venue as well as costs to the Exchange for routing (*i.e.,* clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, ''Routing Costs'').

Based on applicable Routing Costs, the Exchange currently charges $0.11 per contract for Customer orders executed at NYSE MKT LLC (''AMEX''), BOX Options Exchange LLC (''BOX''), Chicago Board Options Exchange, Inc. (''CBOE''), BX Options, International Securities Exchange, LLC (''ISE'') (Classic issues), and PHLX (Classic issues). The Exchange currently charges $0.57 per contract for Professional, Firm, and Market Maker orders executed at AMEX, BOX, CBOE, BX Options, ISE (Classic issues), and PHLX (Classic issues).

Based on fees at MIAX, the Exchange believes that MIAX would be appropriately grouped with the Exchanges listed above, as MIAX now has fees that are approximately the same as these markets. Accordingly, the Exchange proposes to charge $0.11 per contract for Customer orders executed at MIAX and $0.57 per contract for Professional, Firm, and Market Maker orders executed at MIAX.

As noted above, the Exchange currently charges $0.11 per contract for Customer orders and $0.57 per contract for Professional, Firm, and Market Maker orders executed at BX Options. Based on changes to pricing at BX Options that differentiates between options classes subject to the penny pilot program (''Penny Pilot Securities'') and those that are not (''Non-Penny Pilot Securities''), the Exchange proposes to add additional pricing for executions of Non-Penny Pilot Securities resulting from orders routed to BX Options. The Exchange will maintain the current pricing structure for Penny Pilot Securities. The Exchange proposes to provide executions of Customer orders in Non-Penny Pilot Securities without imposing a fee and to charge $0.95 per contract for Professional, Firm and Market Maker orders.

As noted above, the Exchange currently charges $0.11 per contract for Customer orders executed at PHLX in Classic issues and $0.52 per contract for Customer orders executed at PHLX in Make/Take issues.[6] The differentiation between Classic and Make/Take issues was based on divergent pricing at PHLX for Customer orders between such types of options. Specifically, PHLX has previously charged increased rates to remove liquidity in specified symbols identified by the Exchange as Make/Take issues (identified as ''Select Symbols'' at PHLX). With changes to Select Symbol pricing that became effective on January 2, 2013, PHLX no longer assesses a higher fee for executions of Customer orders in Select Symbols. Accordingly, the Exchange believes that the pricing applicable to Make/Take issues at PHLX is no longer necessary, and that all Customer executions resulting from orders routed to PHLX should be charged $0.11 per contract. Despite identical fees, the Exchange is maintaining separate references to Make/Take and Classic pricing for orders routed to and executed [sic] PHLX because it believes that participants that are accustomed to this distinction will be less confused if it continues to separately list each category.

2. Statutory Basis

The Exchange believes that the proposed rule change 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 of the Act.[7] Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive.

As explained above, the Exchange generally attempts to approximate the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[6] As defined on the fee schedule, Make/Take pricing refers to executions at the identified exchange under which ''Post Liquidity'' or ''Maker'' rebates (''Make'') are credited by that exchange and ''Take Liquidity'' or ''Taker'' fees (''Take'') are charged by that exchange. ''Classic'' issues includes all executions not subject to Make/Take pricing at the identified exchange.

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(4).

cost of routing to other options exchanges, including other applicable costs to the Exchange for routing. The Exchange believes that a pricing model based on approximate Routing Costs is a reasonable, fair and equitable approach to pricing. Specifically, the Exchange believes that its proposal to adopt routing fees to MIAX and modify fees to PHLX and BX Options is fair, equitable and reasonable because the fees are generally an approximation of the cost to the Exchange for routing orders to such exchanges. The Exchange believes that its flat fee structure for orders routed to various venues is a fair and equitable approach to pricing, as it provides certainty with respect to execution fees at groups of away options exchanges. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for orders routed to and executed at MIAX, PHLX and BX Options. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to such exchanges. The Exchange also believes that the proposed fee structure for orders routed to and executed at these away options exchanges is fair and equitable and not unreasonably discriminatory in that it applies equally to all Members.

The Exchange notes that under its new pricing model, BX Options will provide rebates for Customer orders in Non-Penny Pilot Securities that the Exchange is not proposing to pass on to the entering Member; instead, the Exchange proposes to provide such executions free of charge. The Exchange specifically believes that its pricing structure for Customer orders in Non-Penny Pilot Securities routed to BX Options is reasonable because, although not an approximation of the cost of routing per se, Customer orders will still receive executions free of charge, whereas all other routed orders are charged a fee that includes applicable Routing Costs. The Exchange believes that pricing for Customer orders in Non-Penny Pilot Securities is fair and equitable and non-discriminatory because it will apply equally to all Members, and because Members can and will likely route directly to BX Options to the extent they are specifically seeking the rebate provided for such orders. The Exchange reiterates that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive. Finally, the Exchange notes that it constantly evaluates its routing fees, including profit and loss attributable to routing, as applicable, in connection with the operation of a flat fee routing service, and would consider future adjustments to the proposed pricing structure to the extent it was recouping a significant profit from routing to another options exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed changes will assist the Exchange in recouping costs for routing orders to other options exchanges on behalf of its participants. The Exchange also notes that Members may choose to mark their orders as ineligible for routing to avoid incurring routing fees.[9] As stated above, the Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels to be excessive or providers of routing services if they deem fee levels to be excessive.

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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A)(ii) of the Act[10] and Rule 19b–4(f)(2) thereunder,[11] the Exchange has designated this proposal as establishing or changing a due, fee, or other charge applicable to the Exchange's Members and non-members, which renders the proposed rule change effective upon filing.

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] *See* BATS Rule 21.1(d)(8) (describing ''BATS Only'' orders for BATS Options) and BATS Rule 21.9(a)(1) (describing the BATS Options routing process, which requires orders to be designated as available for routing).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 240.19b–4(f)(2).

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–BATS–2013–002 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–BATS–2013–002. 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–BATS–2013–002 and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01114 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68655; File No. SR–OPRA–2012–07]

Options Price Reporting Authority; Notice of Filing of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Amend Section 3.5 of the OPRA Plan

January 15, 2013.

Pursuant to Section 11A of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 608 thereunder,[2] notice is hereby given that on December 21, 2012, the Options Price Reporting Authority (''OPRA'') submitted to the Securities and Exchange Commission (''Commission'') an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan'').[3] The proposed amendment revises a provision that describes certain circumstances in which a national securities exchange must cease to be a Member of OPRA. The Commission is publishing this notice to solicit comments from interested persons on the proposed OPRA Plan amendment.

I. Description and Purpose of the Plan Amendment

The purpose of this amendment is to revise language in Section 3.5 of the OPRA Plan that currently states that ''The membership status [in OPRA] of a Member shall terminate effective as of * * * the last day of the calendar quarter in which the Member has ceased maintaining a market for the trading of securities option contracts.''[4] Under this language, a Member that ceases to maintain a market for the trading of securities option contracts late in a calendar quarter would have little or no time in which to resume maintaining such a market if it wants to remain a Member of OPRA.

OPRA is proposing to amend Section 3.5 so that a national securities exchange that ceases to maintain a market for the trading of options may remain a Member of OPRA for an additional calendar quarter. The amendment would provide an exchange that ceases to maintain a market for the trading of options but wants to remain a Member of OPRA with additional flexibility with respect to the date by which it must resume maintaining a market for the trading of options.

The text of the proposed amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, *http://opradata.com*, and on the Commission's Web site at *www.sec.gov*.

II. Implementation of the OPRA Plan Amendment

OPRA will implement the proposed amendment to the OPRA Plan after this filing has been approved by the Commission in accordance with paragraph (b)(1) of Rule 608 of Regulation NMS under the Act.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed OPRA Plan amendment is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. SR–OPRA–2012–07 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–OPRA–2012–07. 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 plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of OPRA. 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–OPRA–2012–07 and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01077 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

[3] The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (formerly Rule 11Aa3–2). *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at *http://www.opradata.com*.

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The eleven participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, International Securities Exchange, LLC, Miami International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, NASDAQ Stock Market LLC, NYSE MKT LLC, and NYSE Arca, Inc.

[4] OPRA is organized as a limited liability company, and the OPRA Plan is the Limited Liability Company Agreement of OPRA. The OPRA Plan therefore uses the vocabulary typically used in Limited Liability Company Agreements, and therefore refers to the national security exchanges that are participants in OPRA as ''Members,'' and to their participation in OPRA as ''membership.''

[5] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68647; File No. SR–CHX–2013–01]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Amending Its Price With Respect to Regulatory Fees Related to the Continuing Education Regulatory Element, Certain Examinations and Central Registration Depository, Which Are Collected By the Financial Industry Regulatory Authority, Inc.

January 14, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on January 2, 2013, the Chicago Stock Exchange, Inc. (''CHX'' or the ''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 CHX.[3] CHX has filed this proposal pursuant to Exchange Act Rule 19b–4(f)(6) [4] which makes it 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 the Substance of the Proposed Rule Change

CHX proposes to amend its Schedule of Fees and Assessments (the ''Fee Schedule''), effective January 2, 2013, relating to certain fees for services provided by the Financial Industry Regulatory Authority, Inc. (''FINRA'') to Exchange Participants who are not members of FINRA (''Non-FINRA Participants''). The text of this proposed rule change is available on the Exchange's Web site at (*www.chx.com*) and in the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Section J.5 of the Fee Schedule to update certain fees for education, examination and Web Central Registration Depository (''CRD'') system [5] services that are offered by FINRA to Non-FINRA Participants. In doing so, the Exchange initially proposes to clarify that the fees enumerated under Section J.5 apply to Participants that are not FINRA members and that all fees under Section J.5 fall under two categories. Specifically, the Exchange proposes to amend the title to Section J.5 to read, ''Fees for FINRA-provided services (paid directly to FINRA) for Participants that are not FINRA members.'' [6] Moreover the Exchange proposes to reorganize all such fees under two new subsections entitled ''Education and Examination Fees'' and ''Central Registration Depository (''CRD'') Fees.''

Education and Examination Fees

The Exchange proposes to amend Section J.5 of the Fee Schedule to update certain fees for education and examination services provided by FINRA to non-FINRA Participants, so as to mirror the corresponding fees listed under the current Schedule A to the FINRA By-Laws. The most recent updates to these fees by FINRA are not currently reflected in the Fee Schedule.[7] There is no distinction in the cost incurred by FINRA for providing such education and examination services if the Participant is a FINRA member or a Non-FINRA Participant. The proposed changes are as follows:[8]

- $100 for the Continuing Education Regulatory Element registration fee; [9]
- Deletion of reference to the Series 7A Examination and its corresponding registration fee of $250; [10]
- $290 for the Series 7 Examination registration fee; [11]
- $115 for the Series 27 Examination registration fee; [12] and

The Exchange notes that the proposed changes are not otherwise intended to address any other issues surrounding regulatory fees and that the Exchange is not aware of any problems that Participants would have in complying with the proposed changes.

As for implementation of the proposed education and examination fees, the Exchange has filed the proposed rule change for immediate effectiveness and proposes an implementation date of January 2, 2013. This date is the same as FINRA's implementation date for its proposed Web CRD system fees, as discussed below.[13]

Central Registration Depository (''CRD'') Fees

The Exchange further proposes to amend Section J.5 of the Fee Schedule with respect to certain fees related to the CRD system which are collected by FINRA. These fees have not been updated since the Exchange required its Participants to register certain associated persons through the Web CRD System.[14]

FINRA collects and retains certain regulatory fees via the CRD system for the registration of employees of non-FINRA Participants. FINRA recently amended some of the fees assessed for use of the CRD system and those amendments will become effective January 2, 2013.[15]

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] CHX submitted two amendments to the filing. This Notice reflects those amendments.

[4] 17 CFR 240.19b–4(f)(6).

[5] The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

[6] The Exchange notes that Participants who are FINRA members are already subject to the same fees per FINRA rules.

[7] *See* Securities Exchange Act Release No. 66465 (February 24, 2012), 77 FR 12635 (March 1, 2012) (SR–FINRA–2012–09) [sic]; *see also* Securities Exchange Act Release No. 60963 (November 6, 2009), 74 FR 59334 (November 17, 2009) (SR–FINRA–2009–071).

[8] [sic]

[9] *See* Section 4(f) of Schedule A to the FINRA By-Laws. The current corresponding CHX fee is $75. Participation in the Regulatory Element is mandatory for CHX Participants pursuant to CHX Article 6, Rule 11(a).

[10] Since the Exchange has retired it [sic] trading floor, the Series 7A Examination has become obsolete.

[11] *See* Section 4(c) of Schedule A to the FINRA By-Laws. The current corresponding CHX fee is $250.

[12] *See* Section 4(c) of Schedule A to the FINRA By-Laws. The current corresponding CHX fee is $85.

[13] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030).

[14] *See* Securities Exchange Act Release No. 57587 (March 31, 2008), 73 FR 18598 (April 4, 2008) (SR–CHX–2007–21).

[15] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030).

The CRD system fees are user-based and there is no distinction in the cost incurred by FINRA if the user is a FINRA member or a Non-FINRA Participant. Accordingly, the Exchange is proposing to amend Section J.5 of the Fee Schedule to mirror the fees assessed by FINRA, which will be implemented concurrently with the amended FINRA fees on January 2, 2013.[16] The proposed changes are as follows: [17]

- $100 for each initial Form U4 filed for the registration of a representative or principal; [18]
- $110 for additional processing of each initial or amended Form U4, Form U5 or Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings; [19]
- $15 for processing and posting to the CRD system each set of fingerprints submitted electronically to FINRA, plus any other charge that may be imposed by the U.S. Department of Justice for processing each set of fingerprints; [20]
- $30 for processing and posting to the CRD system each set of fingerprint cards submitted in non-electronic format to FINRA, plus any other charge that may be imposed by the U.S. Department of Justice for processing each set of fingerprints; [21]
- $45 annually for system processing for each registered representative and principal.[22]

The Exchange again notes that the proposed changes are not otherwise intended to address any other issues surrounding regulatory fees and that the Exchange is not aware of any problems that Participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [23] in general, and, in particular, furthers the objectives of Section 6(b)(4) of the Act,[24] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities and Section 6(b)(5) of the Act,[25] in that it does not unfairly discriminate between customers, issuers, brokers or dealers. In sum, the Exchange believes that the fee changes are reasonable because the proposed fees are identical to those adopted by FINRA for its members and that the proposed fees are equitably allocated because they apply to all similarly situated Non-FINRA Participants.

As FINRA noted in amending its Continuing Education Regulatory Element fee, the fee increase is reasonable because it is consistent with the overall costs associated with the program and that the increase is necessary to ''cover the full costs associated with the [Continuing Education] program, including costs associated with the redesign of the Regulatory Element and to maintain an adequate reserve for the program.'' [26] In addition, as FINRA noted in amending its fees for the Series 7 and 27 examinations, the fees increase is necessary ''to better align the examination fee structure with the costs associated with the programs.'' [27]

Moreover, as FINRA noted in amending its CRD system fees, the fees increase is reasonable based on the increased costs associated with operating and maintaining the CRD system and due to enhancements made by FINRA since the last fees increase, including (1) incorporation of various uniform registration form changes; (2) electronic fingerprint processing; (3) Web EFT ™, which allows subscribing firms to submit batch filings to the CRD system; and (4) increases in the number and types of reports available through the CRD system.[28] These increased costs are similarly borne by FINRA when a Non-FINRA Participants uses the CRD system. FINRA further noted its belief that the proposed fees are reasonable because they help to ensure the integrity of the information in the CRD system, which is very important because the Securities and Exchange Commission (''Commission''), FINRA, other self-regulatory organizations and state securities regulators use the CRD system to make licensing and registration decisions, among other things.

The Exchange also believes that the change is reasonable because it will provide greater specificity regarding the CRD system fees that are applicable to Non-FINRA Participants. All similarly situated Participants are subject to the same fee structure and every Participant must use the CRD system for registration and disclosure.[29] Accordingly, the Exchange believes that the fees collected for such use should likewise increase in lockstep with the fees assessed to FINRA members, as proposed by the Exchange. The proposed change, like FINRA's proposal, is equitable and not unfairly discriminatory because it will result in the same regulatory fees being charged to all Participants required to report information to the CRD system and for services performed by FINRA,

[16] The Exchange notes that it has only adopted the CRD system fees charged by FINRA to Non-FINRA Participants when such fees are applicable. In this regard, certain FINRA CRD system fees and requirements are specific to FINRA members, but do not apply to non-FINRA Participants.

[17] Non-FINRA Participants have been charged CRD system fees since 2008. *See* Securities Exchange Act Release No. 57587 (March 31, 2008), 73 FR 18598 (April 4, 2008) (SR–CHX–2007–21).

[18] *See* Section 4(b)(1) of Schedule A to the FINRA By-laws effective on January 2, 2013. This fee is assessed when a Non-FINRA Participant submits its first Initial, Transfer, Relicense, or Dual Registration Form U4 filing on behalf of a registered person. The current corresponding CHX fee is $85.

[19] *See* Section (4)(b)(3) of Schedule A to the FINRA By-laws effective on January 2, 2013. The current corresponding CHX fee is $95 related to Form U4 and Form U5. The fee related to Form BD is a new fee charged by FINRA. Broker-dealers use Form BD to, among other things, report disclosure matters in which they or a control affiliate have been involved. Prior to the adoption of the new fee, FINRA did not have a fee designed to cover the costs associated with the review of Form BD, notwithstanding that the review is similar to that performed of broker-dealers' Forms U4 and U5. Such reviews include confirming that the matter is properly reported, reviewing any documentation submitted and determining whether additional documentation is required, conducting any necessary independent research and, depending on the matter reported, analyzing whether the event or proceeding subjects the individual or firm to a statutory disqualification pursuant to Section 3(a)(39) of the Act (15 U.S.C. 78c(a)(39)). FINRA adopted a $110 fee for the review of a Form BD, which mirrors the increased fee adopted for the review of Forms U4 and U5. As such, the Exchange is adopting the identical fee for FINRA's review of a Form BD submitted by Non-FINRA Participants.

[20] *See* Section (4)(b)(4) of Schedule A to the FINRA By-laws effective on January 2, 2013. After subtracting the U.S. Department of Justice fingerprint processing fee, which was $17.25 at the time the Fee Schedule was last amended, the current corresponding CHX fee is $13. *See* Revised User Fee Schedule, 76 FR 78950 (December 20, 2011) (prior to March 19, 2012, the U.S. Department of Justice fingerprint processing fee was $17.25 and since March 19, 2012, the fee was decreased to $14.50 per card).

[21] *See* Section (4)(b)(5) of Schedule A to the FINRA By-laws effective on January 2, 2013. After subtracting the U.S. Department of Justice fingerprint processing fee, which was $17.25 at the time the Fee Schedule was last amended, the current corresponding CHX fee is $13. *See* Revised User Fee Schedule, 76 FR 78950 (December 20, 2011) (prior to March 19, 2012, the U.S. Department of Justice fingerprint processing fee was $17.25 and since March 19, 2012, the fee was decreased to $14.50 per card).

[22] *See* Section (4)(b)(7) of Schedule A to the FINRA By-Laws effective on January 2, 2013. The current corresponding CHX fee is $30. The proposed system processing fee would become effective for the 2013 Renewal Program. In this regard, as part of FINRA's 2013 Renewal Program, Preliminary Renewal Statements reflecting the proposed $45 system processing fee will be made available in the fourth quarter of 2012.

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(4).

[25] 15 U.S.C. 78f(b)(5).

[26] *See* Securities Exchange Act Release No. 60963 (November 6, 2009), 74 FR 59334 (November 17, 2009) (SR–FINRA–2009–071).

[27] *See* Securities Exchange Act Release No. 66465 (February 24, 2012), 77 FR 12635 (March 1, 2012) (SR–FINRA–2012–09) [sic].

[28] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030).

[29] Participation in the Regulatory Element is mandatory for CHX Participants pursuant to CHX Article 6, Rule 11(a).

regardless of whether or not such Participants are FINRA members.

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. Specifically, the Exchange believes that the proposed change will result in the same regulatory fees being charged to all Participants who are required to report information to the CRD system and for services performed by FINRA, regardless of whether or not such Participants are FINRA members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change is to effect upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act [30] and subparagraph (f)(2) of Rule 19b–4 thereunder [31] because it establishes or changes a due, fee or other charge imposed by the Exchange.

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CHX–2013–01 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–CHX–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CHX–2013–01, and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01075 Filed 1–18–13; 8:45 am]

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[30] 15 U.S.C. 78s(b)(3)(A)(ii).

[31] 17 CFR 240.19b–4(f)(2).

[32] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68638; File No. SR–NYSEArca–2012–105]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 2, and Order Granting Accelerated Approval for Proposed Rule Change, as Modified by Amendment No. 2, To Amend the Listing Rules for Compensation Comply With Securities Exchange Act Rule 10C–1 and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, NYSE Arca, Inc. (''NYSE Arca'' 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. The proposed rule change was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received one comment letter on the proposed rule change,[5] as well as a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (''Notice'').

[4] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] *See* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012 (''CII Letter'').

In addition, the Commission received seven comments on a substantially similar proposal by New York Stock Exchange LLC (''NYSE'') by parties that did not specifically comment on the NYSE Arca filing. *See* Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (SR–NYSE–2012–49). The comment letters received on the NYSE filing were letters to Elizabeth M. Murphy, Secretary, Commission, from: Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer, Ameriprise Financial, Inc., dated October 18, 2012 (''Ameriprise Letter''); J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law, dated October 30, 3012 (''Brown Letter''); Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, dated November 1, 2012 (''ICI Letter''); Brandon J. Rees, Acting Director, Office of

response to the comment letter from NYSE Euronext, Inc. regarding the NYSE Arca proposal.[6] On December 4, 2012, the Exchange filed Amendment No. 1 to the proposed rule change, which was later withdrawn.[7] On January 8, 2013, the Exchange filed Amendment No. 2 to the proposed rule change.[8]

This order approves the proposed rule change, as modified by Amendment No. 2 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C–1 under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[9] the Commission proposed Rule 10C–1 under the Act,[10] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[11]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee [12] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[13] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[14]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[15] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[16] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[17] as well as any other factors identified by the relevant exchange in its listing standards.[18]

B. NYSE Arca's Proposed Rule Change, as Amended

To comply with Rule 10C–1, NYSE Arca, through its wholly-owned corporation, NYSE Arca Equities, proposes to amend two of its rules concerning corporate governance requirements for companies listed on the Exchange: NYSE Arca Equities Rule (''Equities Rule'') 5.3(k), ''Independent Directors/Board Committees;'' and Equities Rule 5.3(n), ''Listed Foreign Private Issuers.'' In addition, NYSE Arca proposes to make some other changes to its rules regarding compensation committees. To accomplish these changes, the Exchange proposes to replace current Equities Rules 5.3(k)(4) and 5.3(n) with new operative text that will be effective on July 1, 2013.

Current Equities Rule 5.3(k)(4) provides that each listed company have a compensation committee, and that such compensation committee be composed entirely of ''Independent Directors'' [19] and have a written charter.[20]

Under its proposal, NYSE Arca will retain its existing requirement that each listed company be required to have a compensation committee composed entirely of Independent Directors, as defined in NYSE Arca's Equities Rules.[21] Under the proposed

Investment, AFL–CIO, dated November 5, 2012 (''AFL–CIO Letter''); Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters, dated November 5, 2012 (''Teamsters Letter''); Wilson Sonsini Goodrich & Rosati, Professional Corporation, dated November 14, 2012 (''Wilson Sonsini Letter''); and Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter''). Since the comment letters received on the NYSE filing discuss issues directly related to the NYSE Arca filing, the Commission has included them in its discussion of this filing.

[6] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, Inc., dated January 10, 2013 (''NYSE Response Letter''). In the NYSE Response Letter, NYSE Euronext, Inc., the parent company of NYSE Arca, states that, as the comments made by the letters submitted on the NYSE and NYSE Arca proposals are applicable in substance to NYSE, NYSE Arca and NYSE MKT LLC, its response will address the comments on behalf of all three exchanges.

[7] Amendment No. 1, dated December 4, 2012, was withdrawn on January 8, 2013.

[8] In Amendment No. 2 to SR–NYSEArca–2012–105, NYSE Arca: (a) Revised the transition period for companies that cease to be Smaller Reporting Companies to comply with the full range of new requirements, *see infra* notes 73–76 and accompanying text; (b) changed references in the rule text from Regulation S–K, Item 10(f)(1) to Exchange Act Rule 12b–2 and made other non-substantive revisions to proposed rule text; (c) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the compensation adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S–K, *see infra* notes 49–52 and accompanying text; (d) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not require the adviser to be independent, only that the compensation committee consider the enumerated factors before selecting or receiving advice from the adviser, *see infra* notes 53–55 and accompanying text; and (e) clarified that a foreign private issuer is required to provide a reason why it does not have an independent compensation committee. *See infra* note 70.

[9] Public Law 111–203, 124 Stat. 1900 (2010).

[10] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[11] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[12] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[13] *See* Rule 10C–1(a) and (b)(1).

[14] *See id. See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[15] *See* Rule 10C–1(b)(2).

[16] *See* Rule 10C–1(b)(3).

[17] *See* Rule 10C–1(b)(4). The six factors, which NYSE Arca proposes to set forth in its rules, are specified in the text accompanying note 47, *infra.*

[18] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[19] ''Independent Directors'', as defined in Equities Rule 5.3(k)(1) and used herein, includes a two-part test for independence. The rule sets forth specific categories of directors who cannot be considered independent because of certain discrete relationships (''bright-line tests''); and also provides that a listed company's board make an affirmative determination that each independent director has no material relationship that, in the opinion of the board, would raise concerns about independence from management. *Id.*

[20] *See* Equities Rule 5.3(k)(4).

[21] *See* Equities Rules 5.3(k)(1) and 5.3(k)(4). Proposed Equities Rule 5.3(k)(4)(i)(a) reflects a

Continued

amendment, however, each compensation committee member must also satisfy additional independence requirements, as described in Section II.B.1 below.[22]

NYSE Arca will also retain the existing requirement that a listed issuer adopt a formal written compensation committee charter [23] that specifies the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, operations and membership requirements.[24] The proposed amendment to the rule, which continues to require a charter to address the committee's duties and responsibilities, requires the issuer to specify additional responsibilities and authority for the compensation committee with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting and receiving advice from advisers; and receiving funding from the company to engage them, which are discussed in detail in Section II.B.2 below and set forth in proposed Equities Rule 5.3(k)(4).[25]

1. Compensation Committee Composition and Independence Standards

NYSE Arca proposes to retain Equities Rule 5.3(k)(1), which would continue to provide that no director qualifies as ''independent'' unless the board of directors of the listed company affirmatively determines that the director has no material relationship with the listed company. As noted above, NYSE Arca's rules currently require each member of a listed company's compensation committee to be an Independent Director, as defined in Equities Rule 5.3(k)(1).[26] Rule 10C–1, as discussed above, provides that exchange standards must require compensation committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, NYSE Arca discussed its consideration of these factors,[27] and proposed the following: [28]

With respect to the Fees and Affiliation Factors, NYSE Arca proposes to adopt a provision stating that the board of directors of the listed company would be required, in affirmatively determining the independence of any director who will serve on the compensation committee of the board, to consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (A) The source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.[29]

With respect to the Fees Factor, NYSE Arca also proposes to amend the rule to provide that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation.[30]

With respect to the Affiliation Factor, NYSE Arca proposes, similarly, to amend the commentary to provide that the board should consider whether an affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, '' * * * in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.'' [31]

Although Rule 10C–1 requires that exchanges consider ''relevant factors'' not limited to the Fees and Affiliation Factors, NYSE Arca states that, after reviewing its current and proposed listing rules, it concluded not to propose any specific numerical tests with respect to the factors specified in proposed Equities Rule 5.3(k)(4)(ii) or to adopt a requirement to consider any other specific factors. In its proposal, NYSE Arca stated that it did not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company.[32] Further, as stated in its filing, NYSE Arca believes that its existing ''bright-line'' independence standards, as set forth in Equities Rule 5.3(k)(1), are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service.[33] Additionally,

renumbering of the existing requirement of Equities Rule 5.3(k)(4).

[22] *See* proposed Equities Rule 5.3(k)(4)(ii) (concerning the consideration of director compensation and affiliation).

[23] *See* proposed Equities Rule 5.3(k)(4)(iii). Rule 10C–1 requires a compensation committee to have certain specified authority and responsibilities. *See supra* notes 15–17 and accompanying text. The existing NYSE Arca Equities rule already requires compensation committees of listed companies to have a charter setting forth specified responsibilities, and the proposed rule updates the language concerning this authority and set of responsibilities and adds the required content discussed *infra* at text accompanying notes 44–46.

[24] *See* current Equities Rule 5.3(k)(4)(A)–(E). Existing Equities Rule 5.3(k)(4)(E), which NYSE Arca proposed to replace in relevant part with a comparable provision in proposed Equities Rule 5.3(k)(4)(iv)(I)–(III), currently provides that a written charter must address ''[t]he committee's authority to retain and terminate a consultant to assist in the evaluation of a director, CEO or senior executive compensation. The committee shall have the sole authority to approve the consultant's fees and other retention items.'' *See* discussion *infra* at text accompanying notes 43–45.

[25] *See* proposed NYSE Arca Equities Rule 5.3(k)(4)(iv)–(v). Because smaller reporting companies are not required to comply with the new compensation adviser independence considerations in proposed NYSE Arca Equities Rule 5.3(k)(4)(v), *see infra* notes 56–62 and accompanying text, such issuers would not be required to specify this consideration. *See also* proposed Commentary .02 to NYSE Arca Equities Rule 5.3(k)(4).

[26] *See supra* note 19.

[27] *See* Notice, *supra* note 3.

[28] *See* Notice, *supra* note 3, for the Exchange's explanation of its reasons for the proposed change. *See infra* Sections II.B.3 and II.B.4 concerning entities that would be exempt from this requirement.

[29] *See* proposed Equities Rule 5.3(k)(4)(ii). *See also* Notice, *supra* note 3.

[30] *See* proposed Equities Rule 5.3(k)(4)(ii).

[31] *See id.*

[32] *See* Notice, *supra* note 3.

[33] *See* Notice, *supra* note 3. The following are the ''bright-line'' tests set forth in Equities Rule 5.3(k)(1): (A) A director who is or has been within the last three years, an employee of the listed company, or whose immediate family member is or has been within the last three years an executive officer of the listed company; (B) (i) A director or a director who has an immediate family member who is a current partner of a firm that is the company's internal or external auditor; (ii) A director who is a current employee of such a firm; (iii) A director who has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or (iv) A director or a director who has an immediate family member who was within the last three years (but is no longer) a partner or employee of such a firm and personally worked on the listed company's audit within that time; (C) A director or a director who has an immediate family member who is, or in the past three years has been, part of an interlocking directorate in which an executive officer of the listed company serves or served on the compensation committee of another company that concurrently employs or employed the director; (D) A director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of $200,000 or 5% of such other company's consolidated gross revenues, is not ''independent'' until three years after falling below such threshold; (E) A director who received, or whose immediate

NYSE Arca stated that Equities Rule 5.3(k)(1) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of ''bright-line'' tests from Equities Rule 5.3(k)(1)(A)–(F).[34] NYSE Arca believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Equities Rule 5.3(k)(4)(ii), represent an appropriate standard for compensation committee independence.[35]

NYSE Arca proposes a cure period for a failure of a listed company to meet its committee composition requirements for independence. Under the provision, if a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, only so long as a majority of the members of the compensation committee continue to be independent, may remain a member of the compensation committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.[36] The proposed rule also requires a company relying on this provision to provide notice to NYSE Arca promptly.[37]

NYSE Arca modified the suggested cure period language contained in Rule 10C–1(a)(3) by limiting the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE Arca believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors.[38]

NYSE Arca's current rules relating to compensation committees include an exception that allows a director who is not an Independent Director to be appointed to such a committee under exceptional and limited circumstances, as long as that director is not currently an executive officer, an employee, or the family member of an executive officer.[39] The exception applies, however, only if the committee is comprised of at least three members and the board determines that the individual's membership on the committee is required by the best interests of the company and its shareholders.[40]

NYSE Arca proposes to amend Equities Rule 5.3(k)(4) to remove, except for smaller reporting companies, the availability of this exception for a director who fails the current requirements or the new enhanced director independence requirements proposed by NYSE Arca.[41] In effect, NYSE Arca proposes to retain the exception only for smaller reporting companies. Under the exception, a compensation committee member of a smaller reporting company may not serve longer than two years with this exception. In addition, a smaller reporting company relying on the exception must make certain disclosures in its proxy statement regarding the nature of the relationship and the reasons for the determination.[42]

2. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, NYSE Arca proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act concerning compensation advisers by setting forth those requirements in its own rules and requiring issuers to provide these new rights and responsibilities to their compensation committees.[43] Thus, proposed Equities Rule 5.3(k)(4)(iv) proposes to adopt the requirements that NYSE Arca believes are required by Rule 10C–1(b)(2)–(3) that: (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; (ii) the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the compensation committee; [44] and (iii) the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.[45]

Proposed Equities Rule 5.3(k)(4)(v), as amended, also sets forth explicitly, in accordance with Rule 10C–1, that the compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration all factors relevant to that person's independence from management, including the following six factors set forth in Rule 10C–1 regarding independence assessments of compensation advisers.[46]

The six factors, which are set forth in full in the proposed rule, are: (I) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser; (II) the amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (III) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (IV) any business or personal relationship of the compensation

family member is an executive officer who received, during any twelve-month period within the last three years, more than $100,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); (F) In the case of an investment company, in lieu of paragraphs (A)–(E) above, a director who is an ''interested person'' of the company as defined in section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

[34] *See* Notice, *supra* note 3.

[35] *See id.*

[36] *See* proposed Equities Rule 5.3(k)(4)(ii).

[37] *See id.*

[38] *See* Notice, *supra* note 3. The Commission notes that while NYSE Arca does not provide any new procedures for an issuer to have an opportunity to cure any other defects with respect to its proposed compensation committee requirements, current NYSE Arca Equities rules provide issuers with an opportunity to cure defects, and appeal, before their securities are delisted for rule violations. *See* Equities Rule 5.5(a) (''Maintenance Requirements and Delisting Procedures'') and Equities Rule 5.5(m) (''Delisting Procedures'').

[39] *See* current Equities Rule 5.3(k)(4).

[40] *See id.*

[41] *See* proposed Equities Rule 5.3(k)(4)(i)(b). As noted below, smaller reporting companies are not subject to enhanced director independence requirements.

[42] *See id. See also* Notice, *supra* note 3.

[43] Rule 10C–1(b)(4), does not include the word ''independent'' before ''legal counsel'' and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In providing Commentary .05 to proposed Equities Rule 5.3(k)(4), as modified by Amendment No. 2, NYSE Arca provides for two limited exceptions. *See infra* notes 49–52 and accompanying text.

[44] The proposal also includes a provision, derived from Rule 10C–1, stating that nothing in the rule may be construed: (A) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee. *See* Commentary .06 to Equities Rule 5.3(k)(4).

[45] *See* Notice, *supra* note 3.

[46] Rule 10C–1(b)(4).

consultant, legal counsel or other adviser with a member of the compensation committee; (V) any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and (VI) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.[47]

As proposed, Equities Rule 5.3(k)(4)(v) would not include any specific additional factors for consideration, as NYSE Arca stated that it believes the list included in Rule 10C–1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.[48]

Proposed Commentary .05 to Equities Rule 5.3(k)(4), as modified by Amendment No. 2,[49] further states that, as provided in Rule 10C–1, a compensation committee is required to conduct the independence assessment outlined in proposed Equities Rule 5.3(k)(4)(v) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than (i) in-house legal counsel[50] and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S–K: Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.[51] NYSE Arca noted that this second exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation advisers in determining or recommending the amount or form of a registrant's executive and director compensation.[52]

Proposed Commentary .06 to Equities Rule 5.3(k)(4), as modified by Amendment No. 2, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.[53] It further clarifies that compensation committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in Equities Rule 5.3(k)(4)(v)(I)–(VI).[54] The Exchange clarified that, while the compensation committee is required to consider the independence of compensation advisers, the compensation committee is not precluded from selecting or receiving advice from compensation advisers that are not independent.[55]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[56] Consistent with this Rule 10C–1 provision, NYSE Arca, as a general matter, proposes that a smaller reporting company, as defined in Rule 12b–2[57] under the Act (hereinafter, a ''Smaller Reporting Company''), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C–1.[58] Thus, NYSE Arca proposes not to require Smaller Reporting Companies to comply with either the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation or the compensation adviser independence considerations.[59]

NYSE Arca proposes in Commentary .02 to Equities Rule 5.3(k)(4) that Smaller Reporting Companies are not required to comply with Equities Rule 5.3(k)(4)(ii) concerning the additional independence factors for members serving on the compensation committee.[60] A Smaller Reporting Company will be required to comply with proposed Equities Rule 5.3(k)(4)(iv) regarding the requirements concerning the compensation committee's authority, responsibility and funding of compensation advisers.[61] However, NYSE Arca proposes an exception from the proposed Equities Rule 5.3(k)(4)(v) that would otherwise require the Smaller Reporting Company's compensation committee to consider independence factors before selecting such advisers, which goes beyond NYSE Arca's existing requirements.[62] Finally, as noted above, NYSE Arca proposes to amend Equities Rule 5.3(k)(4)(i)(b) to clarify that only Smaller Reporting Companies will be eligible to continue to avail themselves of the ability of the board, under exceptional and limited circumstances, to appoint a non-independent director to the compensation committee.

4. Exemptions

NYSE Arca proposes that its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in Equities Rules 5.3 and 5.3(k), apply also to the new requirements of the proposed rule change and thereby will continue to provide a general exemption from all of the compensation committee requirements of Equities Rule 5.3(k)(4).[63] These include exemptions to the following issuers: any listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company (in other words, a controlled company); limited partnerships; companies in bankruptcy; closed-end and open-end management investment companies that are

[47] *See also* Rule 10C–1(b)(4)(i)–(vi).

[48] *See* Notice, *supra* note 3.

[49] *See supra* note 8. NYSE Arca's proposal as submitted originally only contained an exception for in-house legal counsel. As described below, the Exchange amended its proposal to add an exception for advisers whose role is limited to certain broad-based plans or to providing non-customized information.

[50] *See* proposed Commentary .02 to Equities Rule 5.3(k)(4).

[51] *See* Exhibit 5 to Amendment No. 2 (amending, in part, the proposed Commentary .02).

[52] *See* Amendment No. 2; *see also* 17 CFR 229.407(e)(3)(iii). The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S–K.

[53] *See* Exhibit 5 to Amendment No. 2, *supra* note 8.

[54] *See id.*

[55] *See* Amendment No. 2, *supra* note 8.

[56] *See supra* Section II.A; *see also* Rule 10C–1(b)(5)(ii).

[57] 17 CFR 240.12b–2.

[58] *See* proposed Commentary .02 to Equities Rule 5.3(k)(4).

[59] *See supra* text accompanying notes 29 and 47.

[60] *See* Notice, *supra* note 3.

[61] *See id.*

[62] *See id.* As noted above, NYSE Arca currently requires such authority, responsibility and funding be provided by all listed companies to compensation committees, including by Smaller Reporting Companies. *See supra* text accompanying note 24. As Smaller Reporting Companies will not be required to comply with the consideration of certain independence factors when selecting an adviser, such issuers will not be required to specify this provision.

[63] *See* Notice, *supra* note 3. In addition, such exempt companies would also thereby be exempt from the enhanced independence requirements for compensation committee composition described in proposed Equities Rule 5.3(k)(4)(ii).

registered under the Investment Company Act of 1940; passive business organizations in the form of trusts (such as royalty trusts) or derivatives and special purpose securities; and issuers whose only listed equity stock is a preferred stock.[64] NYSE Arca states that these categories of issuers typically: (i) Are externally managed and do not directly employ executives; (ii) do not by their nature have employees; or (iii) have executive compensation policy set by a body other than the board.[65] In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.[66]

Concerning foreign private issuers,[67] NYSE Arca's current Equities Rule 5.3(n) permit any such issuer to follow its home country practice in lieu of many of NYSE Arca's corporate governance listing standards, including the Exchange's compensation-related listing rules. Rule 5.3(n) currently provides that listed companies that are foreign private issuers are permitted to follow home country practice in lieu of the provisions of Equities Rule 5.3, but this allowance is granted on condition that the issuer discloses in its annual report any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE Arca listing standards.[68] NYSE Arca proposes that this allowance continue to apply, generally, to the Exchange's compensation committee rules as revised by the instant proposal on the same condition, namely that the issuer discloses any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE Arca listing standards in its annual report.[69] NYSE Arca also proposes an additional requirement to the disclosure requirement applicable to foreign private issuers—that the foreign private issuer explain the reason as to why the company does not comply with the compensation committee rules.[70]

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change provides that certain of the new requirements for listed companies will be effective on July 1, 2013.[71] NYSE Arca does not propose to provide any other transition periods by which listed companies would be required to comply with the new Equities Rule 5.3(k)(4)(ii) compensation committee director independence standards. NYSE Arca proposes that all proposed sections of the proposal would become effective on July 1, 2013 for purposes of compliance by currently listed issuers that are not otherwise exempted.[72]

6. Compliance Schedule: Companies That Cease To Qualify as Smaller Reporting Companies

NYSE Arca's existing rules do not permit companies listing on the Exchange to phase-in compliance with all of the Exchange's applicable independence requirements for compensation committees after the date that the company's securities first trade on NYSE Arca. NYSE Arca proposes to create a compliance schedule for companies that cease to be a Smaller Reporting Company. For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 2, establishes a compliance schedule based on certain dates relating to the company's change in status.[73] Pursuant to Rule 12b–2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the ''Smaller Reporting Company Determination Date''). A company with a public float of $75 million or more as of the Smaller Reporting Company Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. Under NYSE Arca's proposal, the day of this change in status is the beginning of the compliance period (''Start Date'').[74]

By six months from the Start Date, the company will be required to comply with Equities Rule 5.3(k)(4)(v), which sets forth the provision described above relating to the requirement that the committee consider independence factors before selecting compensation advisers.[75] Six months from the Start Date, the company will begin to comply with the additional requirements in Equities Rule 5.3(k)(4)(ii) regarding member independence on the compensation committee. Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) One member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.[76]

III. Comments on the Proposed Rule Change and NYSE Arca's Response

As stated previously, the Commission received one comment letter on the NYSE Arca proposal,[77] and seven comment letters on a related NYSE proposal.[78] The Commission is treating the comment letter submitted on the NYSE filing, for which a comparable letter was not submitted on the NYSE Arca filing, as also being applicable to

[64] *See* Equities Rules 5.3 and 5.3(k).

[65] *See* Notice, *supra* note 3.

[66] *See id.*

[67] Under NYSE Arca's listing rules, ''foreign private issuer'' has the same meaning and is defined in accordance with the SEC's definition of foreign private issuer set out in Rule 3b–4(c) (17 CFR 240.3b–4). *See* Equities Rule 5.1(b)(3).

[68] *See* Equities Rule 5.3(n). A foreign private issuer may provide this disclosure either on its Web site and/or in its annual report as distributed in shareholders to the United States.

[69] *See* Notice, *supra* note 3.

[70] *See* Exhibit 5 to the Notice, *supra* note 3 and Amendment No. 2, *supra* note 8; *see also* Commentary .03 to Equities Rule 5.3(k)(4).

[71] Existing compensation committee independence standards would continue to apply until that time.

[72] As noted above, current NYSE Arca Equities rules require that the compensation committee charter give that committee sole authority to retain and terminate a consultant to assist in the evaluation of director, CEO or executive officer compensation, including sole authority to approve the firm's fees and other retention terms.

[73] *See* proposed Commentary .02 to Equities Rule 5.3(k)(4), as amended. In the proposal as originally submitted, the compliance schedule was to require compliance with the enhanced standards for director independence six months after the company ceases to be a Smaller Reporting Company, but immediate compliance with all other requirements. In Amendment No. 2, NYSE Arca states that while the revised compliance schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences, as many companies will likely not become aware of their change in status until significantly after the determination date and would therefore not utilize the transition period as originally proposed to bring themselves into compliance with the enhanced requirements, and that such companies would have significant difficulty in becoming compliant within the transition period as originally proposed.

[74] *See* Amendment No. 2.

[75] In addition, this will require the company to act in order to reflect this additional requirement for the compensation committee. *See* proposed Equities Rule 5.3(k)(4)(iii).

[76] During the compliance schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

[77] *See supra* note 5.

[78] *See id.*

the NYSE Arca filing since the NYSE and NYSE Arca filings address the same substantive issues. NYSE Euronext, Inc., on behalf of NYSE Arca, responds to these comment letters for the NYSE Arca proposal.[79]

Three commenters expressed general support for the proposal, although two believed that it needed to be amended before being approved.[80] Some commenters supported specific provisions of the proposal,[81] some opposed specific provisions,[82] and some sought clarification of certain aspects of the proposal.[83] Some commenters believed that the proposal fell short of meeting the requirements of Rule 10C–1 and believed that it should have been more stringent.[84] These and other comments, as well as NYSE Arca's responses to some of the comments that raised issues with the proposal, are summarized below.

A. Definition of Independence

1. Consideration of Director Compensation

Three commenters believed that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[85] Two of these commenters, after noting that the proposal did not require boards of directors to also consider the compensation paid to the directors for their service on the board in determining the independence of directors serving on the compensation committee, argued that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[86] The other commenter argued that the language of Section 10C of the Act itself, as well as its legislative history, indicates Congress's intent that such fees be considered.[87] These commenters believed that compensation for board service can result in ''the impairment of independence as a result of excessive fees,'' [88] because ''[h]igh director fees relative to other sources of income can compromise director objectivity,'' [89] and ''[h]ighly paid directors also may be inclined to approve large executive pay packages.'' [90] One of these commenters believed that the requirement of Section 10C of the Act and Rule 10C–1 to consider the source of compensation of a director goes further, and applies to all types of compensation that a director may receive, including compensation paid by any person, including non-issuers.[91]

In its response to comments, NYSE Arca stated that, as all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, NYSE Arca does not believe that it is likely that director compensation would be a relevant consideration for compensation committee independence.[92] NYSE Arca noted that, however, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations.[93] Therefore, NYSE Arca believes that, to the extent that excessive board compensation might affect a director's independence, the proposed rules would require the board to consider that factor in its determination.[94]

2. Personal or Business Relationships Between Directors and Officers

Some commenters believed that the proposed rules should explicitly require the board of a listed company, when considering affiliations of a director in determining eligibility for compensation committee membership, to consider personal or business relationships between the director and the company's executive officers.[95] As expressed by two of these commenters, ''too many corporate directors have significant personal, financial or business ties to the senior executives that they are responsible for compensating.'' [96]

Some commenters believed that related party transactions should explicitly be included as a relevant factor in determining independence for members of compensation committees.[97] The additional requirements Disclosure suggested by commenters also included, for example, disqualification of a director from membership on the compensation committee if an immediate family member of the director received compensation in excess of $120,000 a year from the company even if that family member was not an executive officer of the company; [98] or if the director has, or in the past five years has had, a personal contract with the company, with an executive officer of the company, or with any affiliate of the company.[99]

One commenter acknowledged that the proposal would require consideration of all factors specifically relevant to determining whether a director has a relationship which is material to that director's ability to be independent from management, but argued that such requirement is not sufficient to ensure that boards weigh personal or business relationships between directors and executive officers.[100] In support, the commenter argued that: (1) Such relationships were not technically with the ''listed company'' and therefore would at least create confusion as to whether it should be considered; (2) the omission of an explicit reference to this relationship was inconsistent with other approaches taken in the proposal that made reference to certain other relationships; and (3) legislative history makes it clear that Congress expected these

[79] *See supra* note 6. NYSE Euronext, Inc.'s response addresses comments received on both the NYSE and NYSE Arca proposals.

[80] *See* Ameriprise Letter, which supported the proposal but believed that certain aspects were not sufficiently clear such that the proposal needed to be amended to provide additional clarity; ICI Letter, which urged approval of the proposal; and Corporate Secretaries Letter, which generally supported the proposal, but believed that certain of its aspects were unnecessarily burdensome or not sufficiently clear such that the proposal needed to be amended before being approved by the Commission.

[81] *See* Brown Letter, CII Letter, and ICI Letter.

[82] *See* AFL–CIO Letter, Brown Letter, and Wilson Sonsini Letter. *See also* CII Letter, which stated that it believed that specific aspects of the proposal were lacking.

[83] *See* Ameriprise Letter and Corporate Secretaries Letter.

[84] *See* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

[85] *See* Brown Letter; AFL–CIO Letter; and Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[86] *See* AFL–CIO Letter and Teamsters Letter, noting that Rule 10C–1 requires the exchanges to consider a director's ''source of compensation,'' and arguing that this phrase includes director fees.

[87] *See* Brown Letter.

[88] *Id.*

[89] *See* AFL–CIO Letter and eamsters Letter

[90] *Id.*

[91] *See* Brown Letter.

[92] *See* NYSE Response Letter.

[93] *See id.*

[94] *See id.*

[95] *See* AFL–CIO Letter, Brown Letter, CII Letter, Teamsters Letter. As noted above, several of these comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[96] AFL–CIO Letter and Teamsters Letter.

[97] *See* AFL–CIO Letter and Teamsters Letter.

[98] *See id.*. NYSE's definition of Independent Director already disqualifies a director from membership on the compensation committee if an immediate family member of the director receives in excess of $120,000 from the company or was an executive officer of the company.

[99] *See* CII Letter. The commenter acknowledged, however, that NYSE Arca's existing director requirements implicitly require this consideration, but similarly recommended that the importance of the factor requires it be explicit in the proposal. Outside the scope of this proposal, the commenter also suggested NYSE Arca consider, at some future date, developing a more comprehensive and robust definition of independent directors that could be applicable to all board committees and provided a proposed definition for NYSE Arca's consideration.

[100] *See* Brown Letter.

relationships to be explicitly considered in determining director independence.[101]

In response, NYSE Arca noted that the existing independence standards of NYSE Arca require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence.[102] NYSE Arca further stated that commentary to Section 303A.02(a) of the NYSE Listed Company Manual explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT LLC and NYSE Arca have always interpreted their respective director independence requirements in the same way.[103] Consequently, NYSE Arca stated that it did not believe that any further clarification of this requirement is necessary.[104]

As to a requirement to consider related party transactions, NYSE Arca responded that it believes that this is unnecessary as the existing director independence standards require boards to consider all material factors relevant to an independence determination, as do the specific compensation committee independence requirements of the proposed rules.[105]

3. Sufficiency of Single Factor and Additional Comments on Independence

Two commenters explicitly sought clarification that a single factor can result in the loss of independence.[106] In its response letter, NYSE Arca confirmed that it has interpreted the existing general board independence standards as providing that a single relationship could be sufficiently material that it would render a director non-independent. NYSE Arca stated it was not aware that there has been any confusion with respect to this interpretation.[107] Consequently, NYSE Arca did not believe it is necessary to include in the proposed rules a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the rules as drafted.[108]

Some of the above commenters expressed the belief, in general, that the definition of an independent director should be more narrowly drawn, that the bright-line tests of independence should be strengthened, and that the standards of independence should be uniform for all committees requiring independent directors.[109]

One commenter believed that the requirement that the board ''must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member'' was vague and unnecessary in light of the comprehensive factors already required.[110] In responding to this commenter, NYSE Arca disagreed, noting that the requirement to consider all material relationships, not just those enumerated, was essential, as it is impossible to foresee all relationships that may be material.[111]

B. Compensation Adviser Independence Factors

The Commission received letters from four commenters relating to the provision of the proposed rule change that requires a compensation committee to take into consideration the factors set forth in the proposal in the selection of a compensation consultant, legal counsel, or other adviser to the committee.[112]

1. Additional Factors for Consideration

One commenter generally supported the proposal's requirement that a board consider six independence factors before engaging an adviser, but believed that at least one additional factor should be considered: ''Whether the compensation committee consultants, legal counsel or other advisers require that their clients contractually agree to indemnify or limit their liability.'' [113] The commenter believed that such contractual provisions, which the commenter indicated have become standard practice for many consultants, ''raise conflict of interest red flags'' that every compensation committee should consider in determining the independence of the consultant.[114]

In response, NYSE Arca stated that it did not believe that this is an appropriate addition because a relationship would affect an adviser's independence from management only if it gave rise to a concern that it would subject the adviser to influence by management.[115] It was not apparent to NYSE Arca why the existence of contractual indemnification and limitation of liability provisions would subject an adviser to any influence by management and, therefore, it is not clear how they are relevant to an independence determination.[116] NYSE Arca expressed no view on the desirability of such agreements.[117]

2. Non-Independent Consultants

One commenter suggested that, although the portion of the proposal which relates to the compensation committee's use of a compensation consultant was thoughtfully drafted and accurately reflects the substance of Rule 10C–1, there was a possibility that a reader may not properly interpret the intended meaning of proposed Section 303A.05(c) of the NYSE Listed Company Manual concerning the use of compensation consultants, legal counsel and advisers that are not independent.[118] First, the commenter suggested the use of the example ''independent legal counsel'' might be read to require the compensation committee to only use independent legal counsel, when Rule 10C–1 would otherwise permit a compensation committee to receive advice from non-independent counsel, such as in-house counsel or outside counsel retained by management.[119] Second, the commenter suggested that the proposal could be revised to emphasize that a compensation committee is not responsible for advisers retained by management or other parties.[120] Third, the commenter suggested that the section addressing the funding of consultants should be revised to make clear that: (a) Retained legal counsel need not be independent: And (b) expenses of an adviser, in addition to its compensation, would also be provided for by the issuer.[121] Fourth, the commenter suggested that the proposal be clarified to require a compensation committee to take into account the independence requirements only when selecting a consultant for matters related

[101] *See id.*

[102] *See* NYSE Response Letter.

[103] *See id.*

[104] *See id.*

[105] *See id.*

[106] *See* AFL–CIO Letter; Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[107] *See* NYSE Response Letter.

[108] *See id.*

[109] *See* CII Letter, AFL–CIO Letter, Teamsters Letter.

[110] *See* Corporate Secretaries Letter.

[111] *See* NYSE Response Letter.

[112] *See* Ameriprise Letter, Wilson Sonsini Letter, CII Letter, and Corporate Secretaries Letter. As noted above, several of these comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[113] *See* CII Letter.

[114] *See id.*

[115] *See* NYSE Response Letter.

[116] *See id.*

[117] *See id.*

[118] *See* Ameriprise Letter.

[119] *See id.*

[120] *See id.*

[121] *See id.*

to executive compensation, rather than for consultants selected to assist with any other responsibilities the committee may have in addition to executive compensation.[122] In response, NYSE Arca noted that Amendment No. 2 amended the proposed rule text to provide that: (i) Nothing in the proposed rules requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting a compensation adviser; and (ii) the compensation committee may select any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in the proposed rules.[123] In addition, NYSE Arca noted that Rule 10C–1 and the SEC's adopting release refer only to compensation advisers generally without carving out compensation advisers retained by the compensation committee with respect to matters other than executive compensation.[124]

One commenter believed that the proposed rule could be read as requiring a compensation committee to consider the independence factors set forth in Rule 10C–1 when selecting any consultant providing advice to the compensation committee, including any outside legal counsel that might provide legal advice to a compensation committee.[125] The commenter argued that outside legal counsel often provides advice to compensation committees on matters other than how much a company should pay an executive.[126] The commenter suggested it would not be ''necessary or a good use of resources for compensation committees to review independence factors for such attorneys providing advice to the compensation committee.'' [127] The commenter stated that no other rule requires a board committee to consider the independence of its regular legal counsel,[128] and noted that, while it may, at times, be appropriate for a board or a committee to consider independence factors, such a consideration should not be made part of a listing standard that singles out the compensation committee.[129] The commenter suggested that different language originally proposed by The NASDAQ Stock Market LLC reflected a more balanced rule that only required the compensation committee to consider the independence when selecting independent legal counsel, not every outside attorney that provides advice to the compensation committee.[130]

In response, NYSE Arca stated that it believes that its proposal is dictated by Rule 10C–1, which excludes only in-house legal counsel from the requirement to conduct an independence analysis with respect to any legal counsel consulted by the compensation committee, including the company's regular securities or tax counsel.[131] NYSE Arca noted that the Rule 10C–1 Adopting Release provides that ''[t]he exemption of in-house counsel from the independence analysis will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer.'' [132]

Another commenter, while generally supporting the proposal, maintained that the required independence assessment will be ''time-consuming and burdensome'' due to the scope of information that will need to be gathered in order to conduct the required independence assessment.[133] This commenter believed that uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee, and further identified a number of specific issues that it believed NYSE should address to provide greater clarity regarding the standard.[134]

In response, NYSE Arca disagreed with the commenter, arguing that it was impossible to specifically enumerate every category of relationship which might be material to a compensation committee adviser's independence.[135] NYSE Arca believes that it is therefore necessary for a compensation committee to conduct a more flexible analysis.[136] NYSE Arca believes that it would not be appropriate for it to identify additional relevant factors in the rule, as it would be impossible to predict every category of relationship that might be material.[137]

C. Opportunity To Cure Defects

One commenter supported the rule proposed to permit issuers a period of time, under specified conditions, to cure failures to comply with the independence requirements for compensation committee members.[138] The commenter was concerned, however, that the proposed rules did not specify a cure period for any other form of non-compliance with the new rules.[139] The commenter believed that a company should be allowed to take corrective action within a reasonable time after the company's senior executives learn of the non-compliance.

In response, NYSE Arca noted that it had existing policies and procedures that govern non-compliance with rules generally and that these provisions would apply to any events of non-compliance under the proposed rules.[140] NYSE Arca believes these provisions provide it with the ability to grant a discretionary period for an issuer to return to compliance, and noted that the determination of a reasonable cure period can only be made in light of specific facts and circumstances.[141]

D. Exemptions

The Commission received one comment letter supporting the proposal to exempt investment companies from the Rule 10C–1 requirements.[142] As the commenter noted, although Rule 10C–1 exempts certain entities, including

[122] *See id. See also* Corporate Secretaries Letter.

[123] *See* NYSE Response Letter.

[124] *See* NYSE Response Letter.

[125] *See* Wilson Sonsini Letter.

[126] *See id.*

[127] *See id.*

[128] *See id.*

[129] *See id.*

[130] *See id.* The Commission notes that The NASDAQ Stock Market LLC has since revised its proposed rule language and added commentary that makes clear its original intent that the compensation committee of an issuer listed on The NASDAQ Stock Market LLC, absent an exemption, must consider the independence of every adviser, other than in-house legal counsel, that provides advice to the compensation committee, including non-independent legal counsel. *See* SR–NASDAQ–2012–109, Amendment No. 1.

[131] *See* NYSE Response Letter.

[132] *See id.*

[133] *See* Corporate Secretaries Letter.

[134] The Commission notes that NYSE Arca addressed some of the commenter's concerns in Amendment No. 2.

[135] *See* NYSE Response Letter.

[136] *See id.*

[137] *See id.*

[138] *See* Corporate Secretaries Letter. As noted above, the comment letter refers specifically to NYSE, but applies equally to the NYSE Arca proposal.

[139] *See id.* The commenter mentioned, in particular, the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. The commenter believed that inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the commenter believed, the company would be in violation of the listing standard and have no recourse.

[140] *See* NYSE Response Letter.

[141] *See id.*

[142] *See* ICI Letter. As noted above, the comment letter refers specifically to NYSE, but applies equally to the NYSE Arca proposal.

registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of investment companies registered under the Investment Company Act of 1940 (''Investment Company Act''), including closed-end funds, from any of the requirements of Rule 10C–1. Under the proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule. The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or, by their nature, have employees. The commenter agreed with the proposal that it would be significantly and unnecessarily burdensome to require such entities to comply with the proposed requirements, and further noted that any conflicts with respect to compensation of investment advisers are governed by the Investment Company Act.[143]

E. Transition Period

As noted above, NYSE Arca does not propose a transition period. One commenter voiced support for the transition period proposed by NYSE for compliance with the new compensation committee independence standard, but believed that NYSE should provide a longer period for companies to satisfy proposed Section 303A.05 of the NYSE Listed Company Manual, relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting such advisers.[144]

IV. Discussion

After careful review, the Commission finds that the NYSE Arca proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[145] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[146] as well as with Section 10C of the Act[147] and Rule 10C–1 thereunder.[148] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[149] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the NYSE Arca proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[150] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [151] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, NYSE Arca submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission notes that a number of the commenters generally supported substantially similar proposed rule changes, although some commenters offered suggestions to clarify or improve various provisions NYSE Arca's proposal or NYSE's substantially similar proposal. The Commission believes that the proposed rule change, as modified by Amendment No. 2, appropriately revises NYSE Arca's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C–1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director, as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).'' [152] This discretion

[143] *See* ICI Letter.

[144] *See* Corporate Secretaries Letter. Here, the comment letter refers specifically to NYSE, and does not apply to the NYSE Arca filing, as NYSE Arca provides no transition period for currently listed companies.

[145] In approving the NYSE Arca proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[146] 15 U.S.C. 78f(b).

[147] 15 U.S.C. 78j–3.

[148] 17 CFR 240.10C–1.

[149] 15 U.S.C. 78f(b)(5).

[150] *See supra* note 9.

[151] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[152] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, NYSE Arca has enhanced its listing requirements regarding compensation committees by adopting additional standards for independence to comply with the Fees Factor and Affiliation Factor, as well as the other standards set forth in Rule 10C–1. The NYSE Arca's proposal also adopts the cure procedures required in Rule 10C–1(a)(3) for compensation committee members who cease to be independent for reasons outside their reasonable control, so long as the majority of the members of the compensation committee continue to be independent, and retains the requirement that listed issuers have a compensation committee composed entirely of independent directors as required by Rule 10C–1.

In addition, as noted above, NYSE Arca eliminates, for all companies other than Smaller Reporting Companies, the ability of the board under exceptional and limited circumstances to appoint a non independent director to the compensation committee.

Further, as discussed in more detail below, the NYSE Arca proposal retains the requirement that the compensation committee have a written charter that addresses the committee's purpose and responsibilities, and adds requirements to specify the compensation committee's authority and responsibilities as to compensation advisers as set forth under Rule 10C–1. Finally, to help in assuring that companies comply with these provisions, Exchange rules will continue to require that the compensation committee charter address an annual performance evaluation of the compensation committee. Taken as a whole, the Commission believes that these changes will strengthen the oversight of executive compensation in NYSE Arca-listed companies and further greater accountability, and will therefore further the protection of investors consistent with Section 6(b)(5) of the Act.

The Commission believes that the Exchange's proposal, which requires the consideration of the additional independence factors for compensation committee members, is designed to protect investors and the public interest and is consistent with the requirements of Sections 6(b)(5) and 10C of the Act and Rule 10C–1 thereunder.

With respect to the Fees Factor of Rule 10C–1, the Exchange rule text states when considering the source of a director's compensation in determining independence for compensation committee service, the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. In addition to the continued application of the NYSE Arca's current bright-line tests, NYSE Arca's new rules also require the board to consider all relevant factors in making independence determinations for compensation committee membership. The Exchange believes that these requirements of proposed NYSE Arca Equities Rule 5.3(k)(4)(ii), in addition to the general director independence requirements, represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C–1 and the Fees Factor.

The Commission believes that the provisions noted above to address the Fees Factor give a board broad flexibility to consider a wide variety of fees, including any consulting, advisory or other compensatory fee paid by the issuer or entity, when considering a director's independence for compensation committee service. While the Exchange does not bar all compensatory fees, the approach is consistent with Rule 10C–1 and provides a basis for a board to prohibit a director from being a member of the compensation committee, should the director receive compensation that impairs the ability to make independent decisions on executive compensation matters, even if that compensation does not exceed the threshold in the bright-line test.[153] The Commission, therefore, believes that the proposed compensatory fee requirements comply with Rule 10C–1 and are designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act. The Commission notes that the compensatory fee consideration may help ensure that compensation committee members are less likely to have received fees, from either the issuer or another entity, that could potentially influence their decisions on compensation matters.

The Commission recognizes that some commenters did not believe that the proposal went far enough because the NYSE Arca did not adequately consider the compensation that directors receive for board or committee service in formulating its standards of independence for service on the compensation committee, and, in particular, the levels to which such compensation may rise,[154] or otherwise favored additional requirements.[155] The Commission notes, however, that to the extent a conflict of interest exists because directors set their own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director compensation through this means. In addition, as NYSE Arca states, a company's board of directors must consider all relevant factors in making compensation committee independence determinations, and if director fees could, in the opinion of the board, impair the director's independent judgment with respect to compensation-related matters, the board could therefore consider director compensation in that context.[156] The Commission believes that, based on the NYSE Arca's argument and the disclosure requirements noted above, these arguments are sufficient to find that NYSE Arca has complied with the requirements of Rule 10C–1 in this regard.

With respect to the Affiliation Factor of Rule 10C–1, NYSE Arca has concluded that an outright bar from service on a company's compensation committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for compensation committees. NYSE Arca's existing independence standards will also continue to apply to those directors

[153] *See supra* note 33, setting forth the existing bright-line tests.

[154] *See* AFL–CIO Letter, Brown Letter, and Teamsters Letter, maintaining that NYSE's proposal ''falls short'' of the Rule 10C–1 provision requiring exchanges to consider a director's source of compensation. *See also supra* notes 95–99 and accompanying text. As stated by commenters, ''[h]igh director fees relative to other sources of income can compromise director objectivity'' and ''[h]ighly paid directors also may be more inclined to approve large executive pay packages.'' AFL–CIO Letter. *See also* Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[155] *See, e.g.,* CII Letter.

[156] *See* NYSE Response letter, *supra* note 6. The Commission also notes that in the NYSE Response Letter, the Exchange states that to the extent that excessive board compensation might affect a director's independence, the new rules would require the board to consider that factor in its independence determination.

serving on the compensation committee. NYSE Arca maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees as ''share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.'' In spite of the argument of two commenters in favor of an outright ban on affiliations with the company,[157] the Commission believes that NYSE Arca's approach of requiring boards only to consider such affiliations is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [158] In determining that NYSE Arca's affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that NYSE Arca's proposal requires a company's board, in selecting compensation committee members, to consider whether any such affiliation would impair a director's judgment as a member of the compensation committee. The NYSE Arca Equities rule further states that, in considering affiliate relationships, a board should consider whether such affiliate relationship places the director under the direct or indirect control of the listed company or its senior management such that it would impair the ability of the director to make independent judgments on executive compensation. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company's compensation committee, depending on the director's particular affiliations with the company or its senior management.[159]

As to whether NYSE Arca should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in light of Rule 10C–1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for compensation committee members. The Commission does not agree with the commenters who argued that the NYSE's substantially similar proposal falls short of ''the requirements or intent'' of Section 10C of the Act and Rule 10C–1. The Commission notes that Rule 10C–1 requires each exchange to consider relevant factors in determining independence requirements for members of a compensation committee, but does not require the exchange's proposal to reflect any such additional factors.

As noted above, several commenters argued that the proposal should require other ties between directors and the company, including business and personal relationships with executives of the company, be considered by boards in making independence determinations.[160] The Commission did emphasize in the Rule 10C–1 Adopting Release that ''it is important for exchanges to consider other ties between a listed issuer and a director * * * that might impair the director's judgment as a member of the compensation committee,'' [161] and noted that ''the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence.'' However, the Commission did not require exchanges to reach this conclusion and thus NYSE Arca's decision that such ties need not be included explicitly in its definition of independence does not render its proposal insufficient.

In explaining why it did not include, specifically, personal and business relationships as a factor, NYSE Arca cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no material relationship with the listed company with respect to their independence from management.[162] All compensation committee members must meet the general independence standards under NYSE Arca's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the compensation committee. Although personal and business relationships, related party transactions, and other matters suggested by commenters are not specified either as bright-line disqualifications or explicit factors that must be considered in evaluating a director's independence, the Commission believes that compliance with NYSE Arca's rules and the provision noted above would demand consideration of such factors with respect to compensation committee members, as well as to all Independent Directors on the board.

Notwithstanding the concern of some commenters, the Commission confirms that Rule 10C–1 does not mean that a director cannot be disqualified on the basis of one factor alone. Although NYSE Arca does not state this explicitly in its rules, in response to comments,

[157] *See* Teamsters Letter and AFL–CIO Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[158] Rule 10C–1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations ''impair his ability to make independent judgment'' as a member of the committee. *See also supra* notes 31–35 and accompanying text.

[159] The Commission notes that one commenter suggested there was ambiguity as to whether boards must consider business or personal relationships between directors and senior management. *See* Brown Letter. In response, NYSE Arca noted that its existing independence standards require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence. NYSE Arca noted that Commentary to Section 303A.02(a) of the NYSE Listed Company Manual explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE Arca has always interpreted their director independence requirements in the same way. Consequently, NYSE Arca does not believe that any further clarification of this requirement is necessary. *See* NYSE Response Letter.

[160] *See supra* notes 95–105 and accompanying text. As noted above, several of the comment letters refer specifically to NYSE, but apply equally to the NYSE Arca proposal.

[161] *See supra* note 11.

[162] *See* Equities Rule 5.3(k)(1). *See also* NYSE Response Letter.

the Exchange confirmed that they have interpreted their current rules as providing that a single relationship could be sufficiently material that it would render a director non-independent. The Commission believes that nothing in Rule 10C–1 or in NYSE Arca's current or proposed rules implies otherwise.

Finally, the Commission does not believe that NYSE Arca is required in the current proposed rule change to consider further revisions of its independence rules as suggested by some commenters, although it may wish to do so in the future after it has experience with its rules. The Commission notes that the NYSE Arca provision requires a board to further exercise appropriate discretion to consider all factors specifically relevant in determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member. The Commission notes that one commenter argues this provision is vague and unnecessary and should be deleted from the proposal.[163] The Commission does not agree with the commenter, however, that the consideration of the explicitly enumerated factors will be sufficient in all cases to achieve the objectives of Section 10C(a)(3), because it is not possible to foresee all possible kinds of relationships that might be material to a compensation committee member's independence. We therefore believe the flexibility provided in NYSE Arca's new compensation committee independence standards provides companies with guidance, while allowing them to identify those relationships that might raise questions of independence for service on the compensation committee. For these reasons, we believe the director independence standards are consistent with the investor protection provision of Section 6(b)(5) of the Act.

Under NYSE Arca's proposal, only Smaller Reporting Companies will be able to avail themselves of the ''Exceptional and Limited Circumstances'' provision that permits the board to appoint one non-independent director serve on a compensation committee under certain circumstances. Accordingly, all listed companies, except Smaller Reporting Companies, will be required to have a compensation committee comprised of members that all meet the existing and enhanced independence requirements. We note that this change will ensure that, for all NYSE Arca-listed companies that are not Smaller Reporting Companies, executive compensation will only be considered by independent directors, which should help to ensure impartial executive compensation decisions.

The Commission believes that the discretion granted to each exchange by Rule 10C–1, generally, to determine the independence standards it adopts to comply with the Rule includes the leeway to carve out exceptions to those standards, as long as they are consistent with the Act. Regarding the justification for retaining this exception only for Smaller Reporting Companies, the Commission notes that it long ago approved as consistent with the Act the broader exception and concept in the context of NYSE Arca's definition of Independent Director under Equities Rule 5.3(k)(1) with respect to compensation committees. For these reasons, the Commission believes that retaining this provision for Smaller Reporting Companies is reasonable and consistent with Section 6(b)(5) of the Act and with Rule 10C–1. We note that Smaller Reporting Companies are already exempted out of the enhanced independence standards under NYSE Arca's proposal and Rule 10C–1. The provision was previously approved by the Commission as consistent with the Act, and finally, the Commission notes that a member appointed to a Smaller Reporting Company's compensation committee under this Exceptional and Limited Circumstances provision may not serve longer than two years.

B. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

As discussed above, NYSE Arca proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C–1 [164] and are consistent with the Act.[165]

In addition, the Commission believes that requiring companies to specify the enhanced compensation committee responsibilities through official board action will help to assure that there is adequate transparency as to the rights and responsibilities of compensation committee members. As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

As noted above, one commenter believed that Rule 10C–1 could be read as not requiring a compensation committee to consider the enumerated independence factors with respect to regular outside legal counsel and sought to have NYSE revise its substantially similar proposal.[166] This reading is incorrect, and NYSE Arca's rule language reflects the appropriate reading. The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.'' [167] To avoid any confusion, NYSE Arca added rule text that reflects this instruction in its own rules.[168]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, NYSE Arca has proposed, in Amendment No. 2, to add language to the provision regarding the independence assessment of compensation advisers [169] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing

[163] *See* Corporate Secretaries Letter.

[164] 17 CFR 240.10C–1.

[165] 15 U.S.C. 78j–3.

[166] *See* Wilson Sonsini Letter and *supra* notes 125–130 and accompanying text.

[167] *See* Instruction to paragraph (b)(4) of Rule 10C–1.

[168] *See supra* note 50 and accompanying text.

[169] *See* proposed Commentary .05 to Equities Rule 5.3(k)(4), as amended by Amendment No. 2.

information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. NYSE Arca states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[170]

The Commission views NYSE Arca's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[171] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters regarding the scope of the independence assessment requirement. Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

Regarding the belief of another commenter that the independence assessment requirement could discourage compensation committees from obtaining the advice of advisers,[172] the Commission notes that, as already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, in Amendment No. 2, NYSE Arca added specific rule language stating, among other things, that nothing in its rule requires a compensation adviser to be independent, only that the compensation committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.[173] Regarding the commenter's concern over the burdens that the Exchange proposal imposes, the Commission notes that Rule 10C–1 explicitly requires exchanges to require consideration of these six factors.[174] Moreover, five of the six factors were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.[175]

Finally, one commenter requested guidance ''on how often the required independence assessment should occur.'' [176] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each such [compensation committee] meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.

The changes to NYSE Arca's rules on compensation advisers should therefore benefit investors in NYSE Arca-listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

C. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors is reasonable and consistent with the protection of investors.[177] The Commission notes that NYSE Arca's rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the NYSE Arca proposal would: (i) Exempt Smaller Reporting Companies from having to consider the additional independence requirements as to compensatory fees and affiliation; and (ii) exempt their compensation committees from having to consider the additional independence factors for compensation advisers. Under this approach, Smaller Reporting Companies will effectively be subject to the same requirements as is currently the case under the existing requirements of Equities Rule 5.3(k)(4) for all companies with respect to providing the compensation committee with the authority and funding for the retention of compensation advisers.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for NYSE Arca to provide some flexibility to Smaller Reporting Companies. Further, because a Smaller Reporting Company does not need to include the additional provision regarding the independence of compensation advisers that NYSE Arca is requiring all other listed companies to include to comply with Rule 10C–1,[178] and in view of the potential additional costs of such review, it is reasonable not to require a Smaller Reporting Company to conduct such analysis of compensation advisers.

D. Opportunity To Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the

[170] *See* 17 CFR 229.407(e)(3)(iii).

[171] *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

[172] *See* Corporate Secretaries Letter and *supra* note 133 and accompanying text.

[173] *See supra* notes 53–54 and accompanying text.

[174] The Commission also does not agree with the argument of one commenter that NYSE Arca's proposal must require compensation committees to specifically consider, among the independence factors relating to compensation advisers, whether such an adviser requires that clients contractually agree to indemnify or limit their liability. *See* CII Letter. The Commission views as reasonable the Exchange's belief that the six factors set forth in Rule 10C–1 are sufficient for the required independence assessment.

[175] *See* Rule 10C–1 Adopting Release, *supra* note 11.

[176] *See* Corporate Secretaries Letter.

[177] As discussed above, the Commission believes that providing an exception to this requirement for Smaller Reporting Companies in limited and exceptional circumstances is appropriate.

[178] As discussed *supra* note 62 and accompanying text, a Smaller Reporting Company will not be required to include, like other listed companies, a requirement that the committee consider independence factors before selecting such advisers, because Smaller Reporting Companies are not subject to that requirement.

listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that NYSE Arca proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is the same as the cure period suggested under Rule 10C–1, but NYSE Arca limits the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE Arca believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors. The Commission believes that the accommodation, including the proposed period and limitation, although it gives a company less leeway in certain circumstances than the cure period provided as an option by Rule 10C–1, is fair and reasonable and consistent with investor protection under Rule 6(b)(5) by ensuring that a compensation committee cannot take action without a majority of independent directors even when a member ceases to be independent and the committee is entitled to a period to cure that situation.

The Commission agrees with the understanding of the commenter who believed that Rule 10C–1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements. The Commission believes that NYSE Arca's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement. For example, NYSE Arca's rules provide that, unless continued listing of the company raises a public interest concern,[179] when a company is deficient in compliance with listing standards, the Exchange will request the issuer to take action to remedy any identified deficiency. If the issuer fails to remedy the deficiency, NYSE Arca will hold a meeting to hear any reasons why the issuer believes its security should not be delisted, including reviewing any written response. If, after such meeting, NYSE Arca determines that the security should be delisted, the issuer may appeal the decision to the Board of Directors and request a hearing.[180]

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest, since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.[181]

E. Exemptions

The Commission believes that it is appropriate for NYSE Arca to exempt from the new requirements established by the proposed rule change the same categories of issuers that are exempt from its existing standards for oversight of executive compensation for listed companies. Although Rule 10C–1 does not explicitly exempt some of these categories of issuers from its requirements, it does grant discretion to exchanges to provide additional exemptions. NYSE Arca states that the reasons it adopted the existing exemptions apply equally to the new requirements, and the Commission believes that this assertion is reasonable.

NYSE Arca proposed to exempt limited partnerships, companies in bankruptcy proceedings and open-end management investment companies that are registered under the Investment Company Act from all of the requirements of Rule 10C–1. The Commission believes such exemptions are reasonable, and notes that such entities, which were already generally exempt from NYSE Arca's existing compensation committee requirements, also are exempt from the compensation committee independence requirements specifically under Rule 10C–1. NYSE Arca also proposes to exempt closed-end management investment companies registered under the Investment Company Act from the requirements of Rule 10C–1. The Commission believes that this exemption is reasonable because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from NYSE Arca's existing compensation committee requirements. The Commission notes that, as one commenter stated, typically registered investment companies do not employ executives or employees or have compensation committees. The Commission notes that the existing language of these exemptive provisions is not changed, but that the provisions, which go beyond Rule 10C–1's exemptions, are consistent with Rule 10C–1.

The Commission further believes that other proposed exemption provisions relating to controlled companies,[182] asset-backed issuers and other passive issuers, and issuers whose only listed equity stock is a preferred stock are reasonable, given the specific characteristics of these entities. As noted by the Exchange, many of these issuers are externally managed and do not directly employ executives; do not, by their nature, have employees, or have executive compensation policy set by a body other than their board.

The NYSE Arca proposal would continue to permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, but would now require further disclosure from such entities regarding the reason why they do not have a compensation committee. The Commission believes that granting exemptions to foreign private issuers in deference to their home country practices with respect to compensation committee practices is appropriate, and believes that the existing and proposed disclosure requirements will help investors determine whether they are satisfied with the alternative standard. The Commission also notes that NYSE Arca's proposal conforms its rules to Rule 10C–1, which exempts foreign private issuers from the compensation committee independence requirements of Rule 10C–1 to the extent such entities disclose in their annual reports the reasons they do not have independent compensation committees.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the NYSE Arca's deadline for compliance with the proposal's provisions, July 1, 2013, is reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut.

G. Compliance Schedule: Companies That Cease To Be a Smaller Reporting Company

The Commission believes that the compliance schedule for companies that cease to be Smaller Reporting

[179] *See* Equities Rule 7.13 (Trading Suspensions).

[180] *See supra* text accompanying notes 140–141. *See also* NYSE Response Letter, *supra* note 6.

[181] The Commission notes that the general procedures to cure non-compliance adequately address the comments made in the Corporate Secretaries Letter.

[182] The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5).

Companies, as revised in Amendment No. 2, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining when they will be subject to the heightened requirements.

V. Accelerated Approval of Amendment No. 2 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[183] for approving the proposed rule change, as modified by Amendment No. 2, prior to the 30th day after the date of publication of notice in the **Federal Register**.

The change made to the proposal by Amendment No. 2 to change a reference from Item 10(f)(1) of Regulation S–K to a reference to Exchange Act Rule 12b–2 is not a substantive one and merely references an otherwise identical definition.

The revision made by Amendment No. 2 to the compliance rules for companies that cease to be Smaller Reporting Companies [184] establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance with the applicable requirements. The Commission notes that the Start Date of the compliance period for such a company is six months after the Smaller Reporting Company Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. As originally proposed a Smaller Reporting Company had to comply within six months of the Smaller Reporting Company Determination Date, and for the adviser assessment at the Smaller Reporting Company Determination Date. The Commission believes the amendments to the transitions for issuers that lose their status as a Smaller Reporting Company will afford such companies additional time to comply and avoid issues involving inadvertent non-compliance because of the provision that originally applied immediately on the Smaller Reporting Company Determination Date. The amendments also provide additional clarity on when the time frames commence, and as such the Commission believes good cause exists to accelerate approval.

The change to commentary made by Amendment No. 2 to exclude advisers that provide only certain types of services from the independence assessment is also appropriate. As discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise conflict of interest concerns. Finally, the addition of further guidance by Amendment No. 2 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser, and is not a substantive change, as it was the intent of the rule as originally proposed.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment No. 2.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment No. 2 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–2012–105 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–2012–105. 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 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 NYSE. 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–2012–105, and should be submitted on or before February 12, 2013.

VII. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by NYSE Arca, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. NYSE Arca's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

NYSE Arca's rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of NYSE Arca-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of NYSE Arca's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR–NYSEArca–2012–105, as modified by Amendment No. 2, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in

[183] 15 U.S.C. 78s(b)(2).

[184] *See supra* notes 73–76 and accompanying text.

particular, with Section 6(b)(5) of the Act.[185]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[186] that the proposed rule change, SR–NYSEArca–2012–105, as modified by Amendment No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[187]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01105 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68658; File No. SR–NYSE–2013–01]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Pilot Program That Provides an Exception to NYSE Rule 2B by Permitting the Exchange's Equity Ownership Interest in BIDS Holdings L.P.

January 15, 2013.

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 January 2, 2013, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II 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 extend for an additional 12 months the January 22, 2013 expiration date of the pilot program that provides an exception to NYSE Rule 2B by permitting the Exchange's equity ownership interest in BIDS Holdings L.P. (''BIDS Holdings''), which is the parent company of a member of the Exchange, and BIDS Holdings' affiliation with the New York Block Exchange LLC, an affiliate of the Exchange. 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, Proposed Rule Change

1. Purpose

On January 22, 2009, the Securities and Exchange Commission (the ''Commission'' or ''SEC'') approved the governance structure proposed by the Exchange with respect to the New York Block Exchange (''NYBX''), an electronic trading facility of the Exchange for NYSE-listed securities that was established by means of a joint venture between the Exchange and BIDS Holdings.[3] The governance structure that was approved is reflected in the Limited Liability Company Agreement of New York Block Exchange LLC (the ''Company''), the entity that owns and operates NYBX. Under the governance structure approved by the Commission, the Exchange and BIDS Holdings each own a 50% economic interest in the Company. In addition, the Exchange, through its wholly-owned subsidiary NYSE Market, Inc., owns less than 10% of the aggregate limited partnership interest in BIDS Holdings. BIDS Holdings is the parent company of BIDS Trading, L.P. (''BIDS Trading''), which became a member of the Exchange in connection with the establishment of NYBX.

The foregoing ownership arrangements would violate NYSE Rule 2B without an exception from the Commission.[4] First, the Exchange's indirect ownership interest in BIDS Trading violates the prohibition in Rule 2B against the Exchange maintaining an ownership interest in a member organization. Second, BIDS Trading is an affiliate of an affiliate of the Exchange,[5] which violates the prohibition in Rule 2B against a member of the Exchange having such status. Consequently, in the Approval Order, the Commission permitted an exception to these two potential violations of NYSE Rule 2B, subject to a number of limitations and conditions. One of the conditions for Commission approval was that the proposed exception from NYSE Rule 2B to permit NYSE's indirect ownership/interest in BIDS Trading and BIDS Trading's affiliation with the Company (which is an affiliate of NYSE) would be for a pilot period of 12 months.[6]

In discussing the pilot basis of the exception to NYSE Rule 2B, the Approval Order noted that the pilot period ''will provide NYSE and the Commission an opportunity to assess whether there might be any adverse consequences of the exception and whether a permanent exception is warranted.'' [7] The original 12-month pilot period expired on January 22, 2010 and was extended for three additional 12-month periods to January 22, 2013.[8] While the Exchange believes that the experience to date operating under the exception to Rule 2B fully justifies making the exception permanent, the Exchange now seeks to extend the ending date for the pilot program for an additional 12 months, to January 22, 2014, to allow additional time, if necessary, for the Commission to obtain and review the information it needs in order to make its determination regarding any adverse consequences of the exception and whether a permanent exception is warranted. During the proposed extension of the pilot program period, the Exchange's current indirect ownership interest in BIDS Trading [9]

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[185] 15 U.S.C. 78f(b)(5).

[186] 15 U.S.C. 78s(b)(2).

[187] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR–NYSE–2008–120) (the ''Approval Order'').

[4] NYSE Rule 2B provides, in relevant part, that ''[w]ithout prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, a member organization shall not be or become an affiliate of the Exchange, or an affiliate of any affiliate of the Exchange. * * * The term affiliate shall have the meaning specified in Rule 12b–2 under the Act.''

[5] Specifically, the Company is an affiliate of the Exchange, and BIDS Trading is an affiliate of the Company based on their common control by BIDS Holdings. The affiliation in each case is the result of the 50% ownership interest in the Company by each of the Exchange and BIDS Holdings.

[6] *See* Approval Order at 5018.

[7] *Id.* at 5019.

[8] *See* Securities Exchange Act Release Nos. 61409 (January 22, 2010), 75 FR 4889 (January 29, 2010) (SR–NYSE–2010–04); 63545 (December 14, 2010), 75 FR 80088 (December 21, 2010) (SR–NYSE–2010–82); and 66059 (December 27, 2011), 77 FR 145 (January 3, 2012) (SR–NYSE–2011–67).

[9] Another condition for the exception to NYSE Rule 2B specified in the Approval Order was that

and BIDS Trading's affiliation with the Company would continue to be permitted.

If the Commission should determine prior to the end of the extended pilot period that a permanent exception to NYSE Rule 2B is warranted, the Exchange would have the option of submitting a proposed rule change to accomplish this and simultaneously terminate the pilot program.

The proposed change is not otherwise intended to address any other matter, and the Exchange is not aware of any significant problem that the Exchange would have in complying with the proposed change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Section 6(b)(1) of the Act,[11] in particular, which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The proposed rule change is also consistent with, and furthers the objectives of, Section 6(b)(5) of the Act,[12] 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 mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

In the Approval Order, the Commission determined that the proposed exception from NYSE Rule 2B to permit NYSE's indirect ownership interest in BIDS Trading and BIDS Trading's affiliation with the Company was consistent with the Act, including Section 6(b)(5) thereof.[13] As the basis for its determination, the Commission cited the specific limitations and conditions listed in the Approval Order to which its approval of the exception to NYSE Rule 2B was subject,[14] stating that ''[t]hese conditions appear reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage,'' that ''[t]hese conditions appear reasonably designed to promote robust and independent regulation of BIDS [Trading],'' and that [t]he Commission believes that, taken together, these conditions are reasonably designed to mitigate potential conflicts between the Exchange's commercial interest in BIDS [Holdings] and its regulatory responsibilities with respect to BIDS [Trading].'' [15] The Exchange believes that the exception from NYSE Rule 2B described above will continue to be consistent with the Act during that extension because, other than the ending date of the pilot period and the aforementioned small increase in the ceiling on the Exchange's equity interest in BIDS Holdings, these same limitations and conditions will continue to be applicable during the additional extension of the pilot period.

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. Specifically, the proposed rule change is consistent with the Approval Order, the conditions of which are reasonably designed to mitigate concerns about potential conflicts of interest and unfair competitive advantage. In this regard, although BIDS Holdings and the Exchange are affiliated, NYSE and BIDS Holdings have established and maintained procedures and internal controls that are designed to prevent BIDS Holdings and its affiliates from deriving any unfair informational advantage resulting from its affiliation with the Exchange.

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 [16] and Rule 19b–4(f)(6) thereunder.[17] 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.[18]

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the benefits of the pilot program to operate without interruption after January 22, 2013. Therefore, the Commission designates the proposed rule change as operative upon filing.[19]

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–NYSE–2013–01 on the subject line.

the Exchange's equity interest in BIDS Holdings must remain less than 9%, absent prior Commission approval of any increase. *See* Approval Order at 5018. Subsequently, the Commission approved a proposal by the Exchange to slightly increase the ceiling on its equity ownership in BIDS Holdings to less than 10%, and that will be the applicable limitation during the extension of the pilot period. *See* Securities Exchange Act Release No. 61257 (December 30, 2009), 75 FR 500 (January 5, 2010) (SR–NYSE–2009–116).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(1).

[12] 15 U.S.C. 78f(b)(5).

[13] *See* Approval Order at 5018–5019.

[14] *Id.* at 5018.

[15] *Id.* at 5019.

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6).

[18] In addition, Rule 19–b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Paper Comments

• Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

All submissions should refer to File Number SR–NYSE–2013–01. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–01 and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01173 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

[20] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68656; File No. SR–CBOE–2013–001]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To List and Trade Option Contracts Overlying 10 Shares of Certain Securities

January 15, 2013.

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 January 4, 2013, Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II 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

CBOE proposes to list and trade option contracts overlying 10 shares of a security (''mini-option contracts''). The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposed rule change is to amend CBOE rules to enable the listing and trading of option contracts overlying 10 shares of a security (''mini-option contracts''). This is a competitive filing based on filings submitted by NYSE Arca, Inc. (''NYSE Arca'') and International Securities Exchange, LLC (''ISE''), which the Commission recently approved.[3]

Pursuant to CBOE Rule 5.5, the Exchange currently lists and trades standardized option contracts on a number of equities and exchange-traded fund shares (''ETFs'') (referred to as ''Units'' in Rule 5.3.06), each with a unit of trading of 100 shares. The purpose of this proposed rule change is to expand investors' choices by listing and trading option contracts on a select number of high-priced and actively traded securities, each with a unit of trading ten times lower than that of standard-sized option contracts, or 10 shares. Specifically, the Exchange proposes to list and trade mini-options overlying five (5) high-priced securities for which the standard contract overlying the same security has significant liquidity.[4] The Exchange believes that mini-options will appeal to retail investors who may not currently be able to participate in the trading of options on such high priced securities. The Exchange believes that investors would benefit from the availability of mini-options contracts by making options overlying high priced securities more readily available as an investing tool and at more affordable and realistic prices, most notably for the average retail investor.

For example, with AAPL trading at $638.17 on October 8, 2012, ($63,817 for 100 shares underlying a standard contract), the 640 level call expiring on October 19 was trading at $8.30. The cost of the standard contract overlying 100 shares would be $830, which is substantially higher in notional terms than the average equity option price of $255.02.[5] Proportionately equivalent mini-options contracts on AAPL would provide investors with the ability to manage and hedge their portfolio risk on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67948 (September 28, 2012) 77 FR 60735 (October 4, 2012) (Notice of Filing of Amendments No. 1 and Order Granting Accelerated Approval of Proposed Rule Changes as Modified by Amendments No. 1 to List and Trade Option Contracts Overlying 10 Shares of Certain Securities) (SR–NYSEArca–2012–64 and SR–ISE–2012–58).

[4] The Exchange proposes to list Mini Options on SPDR S&P 500 (''SPY''), Apple, Inc. (''AAPL''), SPDR Gold Trust (''GLD''), Google Inc. (''GOOG'') and Amazon.com Inc. (''AMZN''). The Exchange notes that any expansion of the program would require that a subsequent proposed rule change be submitted to the Commission.

[5] Year-to-date through September 28, 2012. A high priced underlying security may have relatively expensive options, because a low percentage move in the share price may mean a large movement in the options in terms of absolute dollars.

their underlying investment, at a price of $83.00 per contract. In addition, investors who hold a position in AAPL at less than the round lot size would still be able to avail themselves of options to manage their portfolio risk. For example, the holder of 50 shares of AAPL could write covered calls for five mini-options contracts. The table below demonstrates the proposed differences between a mini-options contract and a standard contract with a strike price of $125 per share and a bid or offer of $3.20 per share:

	Standard	Mini
Share Deliverable Upon Exercise	100 shares	10 shares
Strike Price	125	125
Bid/offer	3.20	3.20
Premium Multiplier	$100	$10
Total Value of Deliverable	$12,500	$1,250
Total Value of Contract	$320	$32

The Exchange believes that the proposal to list and trade mini-option contracts will not lead to investor confusion. There are two important distinctions between mini-options and standard options that are designed to ease the likelihood of any investor confusion. First, the premium multiplier for the proposed mini-options will be $10, rather than $100, to reflect the smaller unit of trading. To reflect this change, the Exchange proposes to add Rule 6.41(c) which notes that bids and offers for an option contract overlying 10 shares will be expressed in terms of dollars per 1/10th part of the total value of the contract. Thus, an offer of ''.50'' shall represent an offer $5.00 for an option contract having a unit of trading consisting of 10 shares. Additionally, the Exchange will designate mini-option contracts with different trading symbols than their related standard contract.[6] The Exchange believes that the clarity of this approach is appropriate and transparent and the Exchange believes that the terms of mini-option contracts are consistent with the terms of the Options Disclosure Document. The Exchange recognizes the need to differentiate mini-option contracts from standard options and therefore is proposing the following changes to its rules.

The Exchange proposes to add new Interpretation and Policy .22(a) to Rule 5.5 (Series of Option Contracts Open for Trading) to permit the listing of mini-options after an option class on a stock, ETF share, Trust Issued Receipt (TIR), exchange-traded note (ETN) and other Index Linked Security with a 100 share deliverable has been approved for listing and trading on the Exchange. This new subparagraph also identifies the five specific securities on which the Exchange may list mini-options.

The Exchange proposes to add new Interpretation and Policy .22(b) to Rule 5.5 to reflect that strike prices for mini-options shall be set at the same level as for standard options. For example, a call series strike price to deliver 10 shares of stock at $125 per share has a total deliverable value of $1250, and the strike price will be set at 125. Further, pursuant to proposed new Interpretation and Policy .22(c) to Rule 5.5, the Exchange proposes to not permit the listing of additional series of mini-options if the underlying is trading at $90 or less to limit the number of strikes once the underlying is no longer a high priced security. The Exchange proposes a $90.01 minimum for continued qualification so that additional series of mini-options that correspond to standard strikes may be added even though the underlying has fallen slightly below the initial qualification standard. In addition, the underlying security must be trading above $90 for five consecutive days before the listing of mini-option contracts in a new expiration month. This restriction will allow the Exchange to list strikes in mini-options without disruption when a new expiration month is added even if the underlying has had a minor decline in price.

The Exchange also proposes to add Interpretation and Policy .08 to Rule 4.11 (Position Limits) to reflect that, for purposes of compliance with the position limits set forth in Rule 4.11, ten mini-option contracts will equal one standard contract overlying 100 shares. The Exchange also proposes to add subparagraph (c) to Rule 6.41 (Meaning of Premium Bids and Offers) to extend the explanation of bids and offers with respect to mini-option contracts.

Mini-options with non-standard expiration dates (*e.g.,* weekly series, quarterly option series and LEAPs) will be permitted under this proposal and in accordance with relevant CBOE rules. CBOE may list mini-options on SPY, AAPL, GLD, GOOG and AMZN for all expirations applicable to 100-share options on the same underlying.[7]

The Exchange's rules that apply to the trading of standard options would apply to mini-options and the Exchange's market maker quoting obligations would apply to mini-options.[8] Intermarket trade-through protection would apply to mini-options; however, price protection would not apply across standard and mini-options on an intramarket basis, as these are separate products.[9]

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with the listing and trading of mini-option contracts. CBOE also understand that the OCC will be able to accommodate mini-option contracts.

The Exchange notes that the current CBOE Fees Schedule will not apply to the trading of mini-option contracts. The Exchange will not commence trading of mini-option contracts until specific fees for mini-option contracts trading have been filed with the Commission.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder, including the requirements of Section 6(b) of the Act.[10] In particular, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[11] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and to perfect

[6] The Options Clearing Corporation (''OCC'') symbology is structured for contracts with other than 100 shares to be designated with a numerical suffix to the standard trading symbol, *e.g.,* AAPL8.

[7] *See* 77 FR at 60737.

[8] *See* CBOE Rule 8.7 and 77 FR at 60738.

[9] *See* 77 FR at 60736 and 60738.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, the Exchange believes that investors would benefit from the availability of mini-options contracts by, making options on high priced securities more readily available as an investing tool and at more affordable and realistic prices, most notably for the average retail investor. As described above, the proposal contains a number of features designed to protect investors by reducing investor confusion, such as the mini-option contracts being designated by different trading symbols from their related standard contracts. Moreover, the proposal is designed to protect investors and the public interest by providing investors with an enhanced tool to reduce risk in high priced securities. In particular, the proposed contracts will provide retail customers who invest in high priced issues in lots of less than 100 shares with a means of protecting their investments that is presently only available to those who have positions of 100 shares or more. Further, the proposal currently is limited to five high priced securities for which there is already significant options liquidity, and therefore significant customer demand and trading volume.

B. Self-Regulatory Organization's Statement on Burden on Competition

This proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to recently approved NYSE Arca and ISE filings. CBOE believes this proposed rule change is necessary to permit fair competition among the options exchanges.

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 foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, 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[12] and Rule 19b–4(f)(6) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay so that it can list and trade the proposed mini-option contracts as soon as it is able.[14] The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[15] The Commission notes the proposal is substantively identical to proposals that were recently approved by the Commission, and does not raise any new regulatory issues.[16] For these reasons, the Commission designates the proposed rule change as operative upon filing.

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–2013–001 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–2013–001. 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–CBOE–2013–001 and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

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BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[14] The Commission notes that the Exchange's current Fees Schedule will not apply to the trading of mini-option contracts, and the Exchange will not commence trading of mini-option contracts until specific fees for mini-option contracts trading have been filed with the Commission.

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64 and SR–ISE–2012–58).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68642; File No. SR–CBOE–2012–094]

Self-Regulatory Organizations; Chicago Board Options Exchange, Inc.; Order Approving a Proposed Rule Change To Amend the Listing Rules for Compensation Committees To Comply with Securities Exchange Act Rule 10C–1 and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, Chicago Board Options Exchange, Inc. (''Exchange'' or ''CBOE'') 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 the Exchange's rules for compensation committees of listed issuers to comply with Commission Rule 10C–1 under the Act and make other related changes. The proposed rule change was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received no comment letters on the proposed rule change.[5] This order approves the CBOE proposed rule change.

II. Description of the Proposal

A. Background: Rule 10C–1 under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[6] the Commission proposed Rule 10C–1 under the Act,[7] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the Rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[8]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee[9] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[10] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[11]

In addition, Rule 10C–1 requires the listing rules of exchanges to address the authority of compensation committees to retain or obtain a compensation adviser, and its direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser it retains.[12] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[13] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[14] as well as any other factors identified by the relevant exchange in its listing standards.[15]

B. CBOE Proposal

To comply with Rule 10C–1, CBOE proposes to amend Exchange Rule 31.10 ''Corporate Governance.'' In particular, to accomplish these changes, the Exchange proposes to amend paragraph (c) of Rule 31.10, entitled ''Compensation of Officers.'' CBOE also proposes to amend the Interpretations and Policies section of Rule 31.10 by adding a new provision entitled Compensation Consultants, Independent Legal Counsel and Other Compensation Advisors. Current paragraph (c) of Rule 31.10 provides that compensation of the chief executive officers and all other executive officers of a listed company must be determined by a majority of independent directors,[16] or a compensation

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68020 (October 09, 2012), 77 FR 625558 (''Notice'').

[4] *See* Securities Exchange Act Release No. 34–68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] The Commission notes that comments were received on similar proposals filed by New York Stock Exchange, LLC and Nasdaq Stock Market LLC. For a synopsis of these comments *see* Securities Exchange Act Release Nos. 68011 (October 9, 2012) (''NYSE Notice) (File No. SR–NYSE–2012–49); 68013 (October 9, 2012) (''Nasdaq Notice'') (File No. SR–NASDAQ–2012–109); 68639 (January 11, 2013), (''NYSE Approval Order''); 68640 (January 11, 2013), (''Nasdaq Approval Order'').

[6] Public Law 111–203, 124 Stat. 1900 (2010).

[7] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[8] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[9] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[10] *See* Rule 10C–1(a) and (b)(1).

[11] *See id. See also* Rule 10C–1(b)(i)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. *See* Rule 10C–1(b)(1)(iii)(A). In addition, an exchange may exempt a particular relationship with respect to compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[12] *See* Rule 10C–1(b)(2).

[13] *See* Rule 10C–1(b)(3).

[14] *See* Rule 10C–1(b)(4). The six factors, which CBOE proposes to set forth explicitly in its rules, are specified in the text accompanying note 35, *infra.*

[15] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[16] ''Independent Director'' is defined in Rule 31.10(h)(2) as: A person other than an officer or employee of the company or its subsidiaries or any other individual having a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. The following persons shall not be considered independent: (A) A director who is, or at any time during the past three years was, employed by the company or by any parent or subsidiary of the company; (B) a director who accepted or who has a family member who accepted any payments from the company or any parent or subsidiary of the company in excess of $60,000 during the current or any of the past three fiscal years, other than the following: (i) Compensation for board or board committee service; (ii) payments arising solely from investments in the company's securities; (iii) compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company; (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; or (v) loans permitted under Exchange Act Section 13(k). Provided, however, that audit committee members are subject to additional, more stringent requirements under Exchange Act Rule 10A–3, which requirements are incorporated by reference in the Exchange rules pursuant to Rule 31.10(b); (C) a director who is a family member of an individual who is, or at any time during the past three years

Continued

committee comprised solely of independent directors.

1. Compensation Committee Composition and Independence Standards

First, the Exchange is proposing to amend text in Rule 31.10 to require that the compensation of all executive officers must be determined by, or recommended for determination by a compensation committee.[17] The Exchange proposes to define the term compensation committee as one of the following: (1) A committee of the board of directors that is designated as the compensation committee; (2) in the absence of a specifically designated committee, a committee of the board of directors that performs functions typically performed by a compensation committee, including oversight of executive compensation, even if it is not designated as the compensation committee or also performs other functions; or (3) in the absence of either of the immediately preceding definitions, the members of the board of directors who oversee executive compensation matters on behalf of the board of directors.[18]

The Exchange also proposes to amend Rule 31.10(c) to state that all members of a Compensation Committee must be ''Independent Directors'' as defined in Rule 31.10(h)(2).[19] In its proposal, the Exchange stated that it believes that its current definition of Independent Director meets the independence requirements of Rule 10C–1.[20] The Exchange notes that, as part of existing Rule 31.10(h)(2) defining independent director, the Exchange has requirements that a director is not considered ''independent'' if he or a family member has accepted any payments from the company or any parent or subsidiary of the company in excess of $60,000 during the current or any of the past three fiscal years, other than compensation for board or committee service, payments arising solely from investments in the company's securities, compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company, benefits under a tax-qualified retirement plan, or non-discretionary compensation, or loans permitted under Exchange Act Section 13(k).[21] The Exchange stated it believes that these requirements demonstrate that the definition of ''independent'' considers the sources of compensation of a member of the compensation committee.[22]

The Exchange stated that it believes that its current definition of Independent Director meets the requirement in Rule 10C–1 that the Exchange's rules must consider whether the director is affiliated with the issuer or a subsidiary or affiliate of a subsidiary of the issuer.[23] CBOE Rule 31.10(h)(2) states that a director is not ''independent'' if, in the opinion of the issuer's board of directors, the person has a relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. As the Exchange stated, ''any kind of affiliate relationship could be viewed as a conflict of interest that might interfere with the exercise of independent judgment in carrying out the responsibilities of a director.'' [24] In its proposal, the Exchange stated it believes that its requirement that a board of directors consider whether a director has a relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director in order to determine whether or not the director is ''independent'' requires consideration of whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.[25]

The Exchange also proposes to add in Rule 31.10(c)(2) language stating that if a member of a compensation committee ceases to be an Independent Director for reasons outside of that member's reasonable control, that person may remain a compensation committee member until the earlier of the next annual shareholders meeting of the issuer or one year from the occurrence of the event that caused the member to no longer be an Independent Director. The Exchange will require that an issuer relying on this provision must provide notice to the Exchange immediately upon learning of the event or circumstance that caused the member to cease to be an Independent Director.[26]

Exchange Rule 31.10(c) currently provides an exception to the independence requirement for compensation committee members. This exception states that, notwithstanding said independence requirements, if the compensation committee is comprised of at least three members, one director, who is not independent as defined in Rule 31.10(h)(2) and is not a current officer or employee or a family member of an officer or employee, may be appointed to the compensation committee if the board, under exceptional and limited circumstances, determines that such individual's membership on the committee is required by the best interests of the company and its shareholders, and the board discloses, in the proxy statement for the next annual meeting subsequent to such determination (or, if the issuer does not file a proxy, in its Form 10–K

was, employed by the company or by any parent or subsidiary of the company as an executive officer; (D) a director who is, or has a family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments for property or services in the current or any of the past three fiscal years that exceed 5% of the recipient's consolidated gross revenues for that year, or $200,000, whichever is more, other than the following: (i) Payments arising solely from investments in the company's securities; or (ii) payments under non-discretionary charitable contribution matching programs; (E) a director of the listed company who is, or has a family member who is, employed as an executive officer of another entity where at any time during the past three years any of the executive officers of the listed company serve on the compensation committee of such other entity; (F) a director who is, or has a family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years; or (G) in the case of an investment company, in lieu of Rules 31.10(h)(2)(A)–(F), a director who is an ''interested person'' of the company as defined in Section 2(a)(19) of the Investment Company Act of 1940, other than in his or her capacity as a member of the board of directors or any board committee.

[17] *See* Rule 31.10(c)(1).

[18] As CBOE does not require a formal compensation committee, the term ''Compensation Committee'' for purposes of the CBOE proposal and as discussed in this release, in addition to describing a formal compensation committee, also refers to the listed company's independent directors as a group when dealing with executive compensation matters. *See* proposed Rule 31.10(c)(1).

[19] *See* Rule 31.10(c)(2). For a definition of independent directors under Rule 31.10(h)(2) *see supra,* note 16.

[20] *See* Notice, *supra* note 3.

See Rule 10C–1(b)(1)(ii)(A) requiring that in determining the independence requirements for members of compensation committees, exchanges must consider all relevant factors, including, but not limited to, the source of compensation of that director (including any consulting, advisory, or other compensatory fee paid by the issuer to the director), and whether the director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.

[21] *See* Rule 31.10(h)(2), and *supra* note 16.

[22] *See* Notice, *supra* note 3.

[23] *See* Notice, *supra* note 3. *See also* Rule 10C–1(b)(1)(ii)(B) requiring that in determining the independence requirements for members of compensation committees, exchanges must consider all relevant factors, including, but not limited to whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

[24] The Commission notes that CBOE's rules provide a definition of affiliate that states an affiliate of or a person ''affiliated with'' another person means a person who, directly or indirectly, controls, is controlled by, or is under common control with, such other person. *See* CBOE Rule 1.1(j).

[25] *See* Notice, *supra* note 3.

[26] *See* Rule 31.10(c)(2).

or 20–F), the nature of the relationship and the reasons for the determination. A member appointed under this exception may not serve longer than two years.[27] CBOE notes that Rule 10C–1 is silent with respect to such exception to the independence requirements, and therefore is proposing to delete this exception. As the Exchange stated, it believes that independence of compensation committee members is important to ensure that there exist no undue influences in the compensation of executive officers.[28]

2. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

Rule 10C–1 also discusses the retention of compensation consultants, independent legal counsel and other compensation advisers to assist the compensation committee of an issuer in determining compensation for executives.[29] CBOE Rule 31.10 currently does not contain provisions regarding the authority to retain compensation advisers. Therefore, the Exchange proposes to adopt the provisions of Rule 10C–1 regarding this issue in a substantively identical manner to that in Rule 10C–1 in new Interpretation and Policy .11 to Rule 31.10.[30]

The new Interpretation and Policy would state that the Compensation Committee of an issuer, in its capacity as a committee of the board of directors, may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser.[31] The Interpretation and Policy states that the Compensation Committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel and other adviser retained by the Compensation Committee.[32] Further, the Interpretation and Policy states that ''nothing in this Interpretation and Policy .11 to Rule 31.10 shall be construed to require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, legal counsel or other adviser to the Compensation Committee, or to affect the ability or obligation of a Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee.'' [33] Under the new Interpretation and Policy .11 to Rule 31.10, each listed issuer must provide for appropriate funding, as determined by the Compensation Committee, in its capacity as a committee of the board of directors, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the Compensation Committee.[34]

Regarding the independence of compensation advisers, the new Interpretation and Policy .11 to Rule 31.10 states that the compensation committee of a listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration the following factors: (1) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser, (2) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser, (3) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest, (4) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee, (5) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser, and (6) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive office of the issuer.[35] Pursuant to the new Interpretation and Policy, a compensation committee must consider these factors with respect to any compensation consultant, legal counsel or other advisor that provides advice to the compensation committee other than in-house legal counsel.[36]

3. Exemptions

The Exchange proposes that the requirements of Interpretation and Policy .11 to Rule 31.10, concerning compensation advisers, discussed above at Section II(B)(2), shall not apply to any controlled company or to any smaller reporting company.[37] The Exchange notes that this exemption complies with exemptions stated in Rule 10C–1.[38] Under the new proposal, as the Exchange states, smaller reporting companies will still be subject to other corporate governance rules, as applicable.[39] The Commission notes that this includes the provisions described above concerning independent oversight of executive compensation.

The Exchange proposes that the requirements of Interpretation and Policy .11 to Rule 31.10, concerning compensation advisers, discussed above at Section II(B)(2), shall not apply to the listing of a security futures product cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q–1(b)(7)(A)) [40] or the listing of a standardized option, as defined in § 240.9b–1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1).[41] The Exchange stated that these exemptions comply with those stated in Rule 10C–1.[42]

Rule 10C–1 exempts from the independence requirements any limited partnership, company in bankruptcy proceedings, open end management investment company registered pursuant to the Investment Company Act of 1940, and foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.[43] CBOE thereby proposes to incorporate these exemptions into proposed Rule 31.10(f)(6) by reference by stating that the categories of issuers listed in Rule 10C–1(b)(1)(iii)(A) under the Securities Exchange Act of 1934 are also exempt from the requirements of Rule

[27] *See* Rule 31.10(c)(3).

[28] *See* Notice, *supra* note 3. CBOE is also proposing to extend to all executive officers the requirement that an executive officer not be present during the deliberations regarding his or her own compensation.

[29] *See* Rule 10C–1(b)(2).

[30] *See id.* and Interpretation and Policy .11 to Rule 31.10.

[31] *See* proposed Interpretation and Policy .11(a)(1) to Rule 31.10.

[32] *See* proposed Interpretation and Policy .11(a)(2) to Rule 31.10.

[33] *See* proposed Interpretation and Policy .11(a)(3)(A) and (B) to Rule 31.10.

[34] *See* proposed Interpretation and Policy .11(b) to Rule 31.10.

[35] *See* Interpretation and Policy .11(c)(1)–(6) to Rule 31.10.

[36] *Id.*

[37] *See* Interpretation and Policy .11(d)(1) to Rule 31.10. *See also* Notice, *supra* note 3.

[38] *See* Rule 10C–1(b)(5) which exempts such entities from the entire requirements of Rule 10C–1. *See also* Notice, *supra* note 3.

[39] *See* Notice, *supra* note 3.

[40] *See* Interpretation and Policy .11(d)(2) to Rule 31.10.

[41] *See* Interpretation and Policy .11(d)(3) to Rule 31.10.

[42] *See* Rule 10C–1(b)(5) which exempts such entities from the requirements of Rule 10C–1.

[43] *See* Rule 10C–1(b)(1)(iii)(A).

31.10(c)(2) regarding the independence of directors on an issuer's compensation committee. These entities are exempt from the independent director requirements of Rule 31.10(c)(2), discussed *supra* in Section II(B)(1).

Finally, as to exemptions, Rule 31.10(f) currently exempts a number of other categories of issuers from the executive compensation requirements of Rule 31.10(c).[44] These types of issuers are controlled companies, registered management investment companies (which are similar to open-end management investment companies), and asset-backed issuers and other passive issuers, cooperatives. The Exchange determined to exempt these categories of issuers from executive compensation requirements of Rule 31.10(c) due to their various unique attributes.[45] While the Rule 10C–1 changes some of the executive compensation requirements, CBOE believes that these categories of issuers should still be exempt from all executive compensation requirements in Rule 31.10(c) generally.[46] The Exchange has also proposed to add language to its rules to make clear that to the extent the proposed Rule 31.10(f)(6)'s exemption of open-end management investment companies registered under the Investment Company Act of 1940 from the Compensation Committee director independence requirements of Rule 31.10(c)(2) conflicts with the more general already-existing exemption of registered management investment companies from the requirements of Rule 31.10(c), the more general exemption of registered management investment companies from the requirements of Rule 31.10(c) shall be controlling.[47] As such, the exchange proposes to amend Rule 31.10(f)(2) to state that the exemption of management investment companies from the requirements of Rule 31.10(c) shall be controlling over any other potentially-conflicting exemptions that may arise under Rule 31.10(f)(6).[48]

[44] *See* Rule 31.10(f).

[45] *See* Notice, *supra* note 3.

[46] *See* Rule 10C–1(b)(1)(iii)(B) establishing that ''in addition to the issuer exemptions set forth in paragraph (b)(1)(iii)(A) of this section, a national securities exchange or a national securities association, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of paragraph (b)(1) of this section a particular relationship with respect to members of the compensation committee, as each national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors. *Id.*

[47] *See* Notice, *supra* note 3.

[48] *See* Rule 31.10(f)(2).

III. Discussion and Commission Findings

After careful review, the Commission finds that the CBOE proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[49] In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,[50] as well as with Section 10C of the Act [51] and Rule 10C–1 thereunder.[52] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[53] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the CBOE proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[54] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [55] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, CBOE submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission believes that the proposed rule change appropriately revises CBOE's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C–1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting advisory or other compensatory fee paid by the issuer to the director, as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in

[49] In approving the CBOE proposed rule change the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[50] 15 U.S.C. 78f(b).

[51] 15 U.S.C. 78j–3.

[52] 17 CFR 240.10C–1.

[53] 15 U.S.C. 78f(b)(5).

[54] *See supra* note 6.

[55] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

Rule 10C–1(b)(1).'' [56] This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in considering the Fees Factor and Affiliation Factor of Rule 10C–1 CBOE decided its existing independence standards that currently apply to board and compensation committee members, which include certain bright line tests, in Rule 31.10(h)(2), are sufficient.[57] The CBOE's proposal also adopts: (1) A requirement that listed issuers have a compensation committee composed entirely of Independent Directors as required by Rule 10C–1 and (2) the cure procedures set forth in Rule 10C–1(a)(3) for compensation committee members who cease to be independent for reasons outside their reasonable control.

The Commission notes that CBOE's proposal to require executive officer compensation to be determined only by Independent Directors, as defined in CBOE rules, is consistent with the requirements of Rule 10C–1 and Section 6(b)(5) of the Act. The Commission notes, compensation of executive officers must be determined only by Independent Directors even where the board oversees executive compensation without a formal committee. The Commission also believes that CBOE has met the requirements of Rule 10C–1 to consider relevant factors including the Fee Factor and Affiliation Factor. As noted above, after such consideration, CBOE has determined that its existing independence standards, including its bright line independence factors, adequately take into account the additional independence factors for compensation committee members contained in Rule 10C–1.[58]

With respect to the Fees Factors of Rule 10C–1,[59] the Exchange commentary states that as part of Rule 31.10(h)(2) defining independent director, the Exchange has requirements that a director is not considered ''independent'' if he or a family member has accepted any payments from the company or any parent or subsidiary of the company in excess of $60,000 during the current or any of the past three fiscal years, other than compensation for board or committee service, payments arising solely from investments in the company's securities, compensation paid to a family member who is a non-executive employee of the company or a parent or subsidiary of the company, benefits under a tax-qualified retirement plan, or non-discretionary compensation, or loans permitted under Exchange Act Section 13(k).[60] The Exchange stated it believes that this existing requirement demonstrates that the definition of ''independent'' considers the sources of compensation of a member of the compensation committee.[61]

The Commission believes that the provisions noted above to address the Fees Factor give clear guidance when considering a wide variety of fees, including any consulting, advisory or other compensatory fee paid by the issuer or entity, when considering a director's independence for Compensation Committee service. While the Exchange does not bar all compensatory fees, by providing an aggregate fee cap in their bright line tests, the approach is consistent with Rule 10C–1. The Exchange's general independence standards will also provide a basis for a board to prohibit a director from being a member of the compensation committee, should the director receive compensation to a degree that impairs the ability to make independent decisions on executive compensation matters, even if that compensation does not exceed the threshold in the bright line test. The Commission, therefore, believes that the proposed existing compensatory fee requirements comply with Rule 10C–1 and are designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act. The Commission notes that the compensatory fee consideration may help ensure that compensation committee members are less likely to have received fees, from either the issuer or another entity, which could potentially influence their decisions on compensation matters.

With respect to the Affiliation Factor of Rule 10C–1,[62] the Exchange concluded that it believes that the current definition of Independent Director meets the requirement in Rule 10C–1 that the Exchange's rules must consider whether the director is affiliated with the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer.[63] CBOE Rule 31.10(h)(2) states that a director is not ''independent'' if, in the opinion of the issuer's board of directors, the person has a relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[64] As the Exchange noted, ''any kind of affiliate relationship, under the Exchange's own definition of affiliate * * * could be viewed as a conflict of interest that might interfere with the exercise of independent judgment in carrying out the responsibilities of a director.'' [65]

In considering whether a has a relationship, which, in the opinion of the company's board of directors, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director, the board would necessarily have to consider whether the director is an affiliate of the issuer, a subsidiary of the issuer, or an affiliate of a subsidiary of the issuer, as those relationships necessarily could be relationships that interfere with the exercise of independent judgment in carrying out the responsibilities of a director, including the responsibilities as a member of the Compensation Committee.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [66] In determining that CBOE's

[56] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

[57] *See* Rule 31.10(h)(2) and *supra* footnotes 16–26 and accompanying text.

[58] *See* Rule 10C–1(b)(1)(ii).

[59] *See* Rule 10C–1(b)(1)(ii)(A)

[60] *See* Rule 31.10(h)(2).

[61] *See* Notice, *supra* note 3.

[62] *See* Rule 10C–1(b)(1)(ii)(B).

[63] *See* Notice, *supra* note 3. *See also* Rule 10C–1(b)(1)(ii)(B) requiring that in determining the independence requirements for members of compensation committees, exchanges must consider all relevant factors, including, but not limited to whether a member of the board of directors of an issuer is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer.

[64] *See* Rule 31.10(h)(2).

[65] *See* Notice, *supra* note 3.

[66] See Rule 10C–1 Adopting Release, *supra* note 8. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties

Continued

affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that CBOE's proposal requires a company's board, in selecting compensation committee members, to consider ''whether the person has a relationship which would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.'' [67] The Commission believes the Exchange has adequately considered the affiliation standard. As such, the Exchange's decision to retain its current definition of Independent Director is consistent with Sections 6(b)(5) and 10C under the Act.[68]

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

As discussed above, CBOE proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C–1 [69] and are consistent with the Act.[70]

C. Compensation Adviser Independence Factors

As discussed above, the proposed rule change requires the Compensation Committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee.[71] Of these factors, five of the six were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.[72] The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the Compensation Committee, and is not limited to advice concerning executive compensation. Finally, one commenter on the New York Stock Exchange LLC's proposal requested guidance ''on how often the required independence assessment should occur.[73] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each compensation committee meeting, the committee had to conduct a new assessment.'' The Commission anticipates that Compensation Committees will conduct such an independent assessment at least annually.[74]

The changes to CBOE's rules on compensation advisers should therefore benefit investors of companies, and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

D. Opportunity to Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period of until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that CBOE proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is the same as the cure period suggested under Rule 10C–1. The Commission believes that the accommodation is fair and reasonable and consistent with investor protection under Rule 6(b)(5) by ensuring that when a member ceases to be independent, the committee is entitled to a period to cure that situation. CBOE has delisting procedures that provide issuers with notice, opportunity for a hearing, opportunity for appeals, and delisting.[75]

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest, since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.

As noted above, CBOE is removing its exception that allows members of a Compensation Committee to not be independent in certain circumstances. The Commission agrees with CBOE's rationale for eliminating the exception. As the Exchange noted, independence of compensation committee members is important to ensure that no undue influences affect the compensation of executive officers. Given the heightened importance of executive compensation decisions, we think that this is consistent with the investor protection provisions of Section 6(b)(5) of the Act.

E. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors is reasonable and consistent with the protection of investors. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the CBOE proposal would exempt smaller reporting companies from the

between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations impair ''his ability to make independent judgment'' as a member of the compensation committee. *See also supra* notes 23–25 and accompanying text.

[67] *See* Interpretation and Policy .01 to Rule 31.10(h)(2) stating that ''[i]t is important for investors to have confidence that individuals serving as independent directors do not have a relationship with the listed company that would impair their independence. The board has a responsibility to make an affirmative determination that no such relationships exist through the application of Rule 31.10(h)(2).''

[68] The Commission also believes it is consistent with Section 6(b)(5) for CBOE to prohibit all executive officers, not just the chief executive officer as currently required, to be barred from all compensation committee deliberations regarding their own compensation. We agree this will help prohibit undue influence in the determination of executive officer compensation.

[69] 17 CFR 240.10C–1.

[70] 15 U.S.C. 78j–3.

[71] *See* note 35, *supra* and accompanying text.

[72] *See* Rule 10C–1 Adopting Release, *supra* note 8.

[73] *See* Comment to NYSE Notice by Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter'').

[74] *See* NYSE Approval Order and Nasdaq Approval Order, *supra* note 5 for a discussion of comments.

[75] *See* Rule 31.94(G).

requirements of Interpretation and Policy .11 to Rule 31.10 concerning compensation advisers, discussed *supra* at Section II(B)(2).[76] Under the new proposal, as the Exchange states, smaller reporting companies will still be subject to other corporate governance rules, as applicable, and are only exempted out of the compensation advisor provisions.[77]

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for CBOE to provide some flexibility to Smaller Reporting Companies. Further, regarding the exemption from having to consider additional factors regarding compensation advisers, in view of the potential additional costs of such review, it is reasonable not to require a Smaller Reporting Company to conduct such analysis of compensation advisers.

F. Additional Exemptions

The Commission believes that it is appropriate for CBOE to exempt from the new requirements established by the proposed rule change the same categories of issuers that are exempt from its existing standards for oversight of executive compensation for listed companies. Although Rule 10C–1 does not explicitly exempt some of these categories of issuers from its requirements, it does grant discretion to exchanges to provide additional exemptions. CBOE states that the reasons it adopted the existing exemptions apply equally to the new requirements, and the Commission believes that this assertion is reasonable.

The requirements of Interpretation and Policy .11 to Rule 31.10, concerning compensation advisers, discussed *supra* at Section II(B)(2), exempt security futures products cleared by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1) or that is exempt from the registration requirements of section 17A(b)(7)(A) (15 U.S.C. 78q–1(b)(7)(A))[78] and the listing of a standardized option, as defined in § 240.9b–1(a)(4), issued by a clearing agency that is registered pursuant to section 17A of the Act (15 U.S.C. 78q–1).[79] The Commission notes that these exemptions comply with those stated in the Rule 10C–1.[80]

Additionally, Rule 10C–1 exempts from the independence requirements Limited partnerships, companies in bankruptcy proceedings, and open-end management investment companies registered under the Investment Company Act of 1940.[81] The CBOE proposal incorporates these exemptions into proposed Rule 31.10(f)(6).[82] The Commission believes such exemptions are reasonable, and notes that such entities also are exempt from the compensation committee independence requirements specifically under Rule 10C–1.

The CBOE proposal would exempt any foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.[83] The Commission believes that granting exemptions to foreign private issuers in deference to their home country practices with respect to compensation committee practices is appropriate, and believes that the existing disclosure requirements will help investors determine whether they are satisfied with the alternative standard. The Commission notes that such entities are exempt from the compensation committee independence requirements of Rule 10C–1 to the extent such entities disclosure in annual reports the reasons it does not have an independent compensation committee.

The CBOE proposal would retain Rule 31.10(f), which currently exempts a number of other categories of issuers from all of the executive compensation requirements of Rule 31.10(c).[84] These types of issuers are controlled companies, registered management investment companies (which are similar to open-end management investment companies and include closed-end management investment companies), asset-backed issuers and other passive issuers, and cooperatives. The Exchange determined to exempt these categories of issuers from executive compensation requirements of Rule 31.10(c) due to their various unique attributes. The Commission believes that this exemption is reasonable because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to Independent Directors of closed end management investment companies. The Commission further believes that other proposed exemption provisions relating to controlled companies,[85] asset-backed issuers and other passive issuers, and cooperatives are reasonable given the specific characteristics of these entities, and as noted by the Exchange, their various unique attributes. The Commission believes that exemption of these entities from the requirements of Rule 10C–1 is consistent with the exemptive authority granted in Rule 10C–1.[86]

IV. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by CBOE, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. CBOE's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors that meet CBOE's requirements.

CBOE's rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of potential CBOE-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of CBOE's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help

[76] *See* Interpretation and Policy .11(d)(1) to Rule 31.10. *See also* Rule 10C–1(b)(5).

[77] *See* Notice, *supra* note 3.

[78] *See* Interpretation and Policy .11(d)(2) to Rule 31.10.

[79] *See* Interpretation and Policy .11(d)(3) to Rule 31.10.

[80] *See* Rule 10C–1(b)(5) which exempts such entities from all of the requirements of Rule 10C–1.

[81] *See* Rule 10C–1(b)(1)(iii)(A) and Rule 31.10(f)(6).

[82] The Commission notes that proposed Rule 31.10(f), open end management investment companies would also be exempt from all the requirements of Rule 31.10(c), not just the independence standards.

[83] Rule 10C–1(b)(1)(iii).

[84] *See* Rule 31.10(f).

[85] The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5).

[86] *See* Rule 10C–1(b)(1)(iii)(B) establishing that ''in addition to the issuer exemptions set forth in paragraph (b)(1)(iii)(A) of this section, a national securities exchange or a national securities association, pursuant to section 19(b) of the Act (15 U.S.C. 78s(b)) and the rules thereunder, may exempt from the requirements of paragraph (b)(1) of this section a particular relationship with respect to members of the compensation committee, as each national securities exchange or national securities association determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.'' *Id.*

to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR–CBOE–2012–094 is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Exchange Act.[87]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[88] that the proposed rule change, SR–CBOE–2012–094 be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[89]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01109 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68654; File No. SR–NASDAQ–2013–007]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend the Operative Date of Recent Changes Made to Rules 4613(a)(2)(F) and (G), and Rule 4751(f)(15)

January 15, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 14, 2013, The NASDAQ Stock Market LLC (the ''NASDAQ'' or the ''Exchange'') 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 extend the operative date of recent changes made to Rules 4613(a)(2)(F) and (G), and Rule 4751(f)(15) to February 25, 2013, thereby extending the retirement of the automated quotation refresh functionality from January 15, 2013 to February 25, 2013.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On December 17, 2012, the Exchange filed an immediately effective rule change to retire the automated quotation refresh functionality (''AQR'') provided to Exchange market makers under Rules 4613(a)(2)(F) and (G), and to make conforming changes to Rule 4751(f)(15).[4] The proposed changes are operative on January 15, 2013. The Exchange received one comment letter to the rule change, seeking an extension of the AQR retirement date to February 25, 2013.[5] The commenter, an industry association which represents a substantial number of NASDAQ members, noted it was concerned that the January 15, 2013 retirement date does not allow sufficient time for implementation of all functionality associated with the AQR system. The commenter explained that new functionality to automate quote movement after quote execution must be developed and incorporated into order management and trading systems. In support of its argument for an extension, the commenter noted that some firms require architectural reprogramming to mission critical systems that control trading operations, and that thorough testing of such changes must be done. The commenter further noted that year-end code freezes, which typically extend into the first week of January, will make it difficult for firms to adequately implement and test these significant changes to their systems by January 15, 2013. The Exchange has received similar telephonic comments from some of its member firms that are Exchange market makers.

In light of member firm and industry feedback received on the current retirement date, the Exchange believes that a brief extension is warranted to allow member firms adequate time to program and test their systems to use the Market Maker Peg Order[6] or develop alternative means of complying with their market maker obligations. Given that member firms may not be prepared to comply with their market making obligations on January 15, 2013 in the absence of AQR and the potential market disruption that may be caused by eliminating AQR on that date, the Exchange has determined to extend the retirement date of AQR to February 25, 2013, and likewise extend the related changes to Rules 4613(a)(2)(F) and (G), and Rule 4751(f)(15) filed with the Commission on December 21, 2012[7] to February 25, 2013.

The Exchange reminds member firms that AQR presents difficulties to market makers in meeting their obligations under Rule 15c3–5 under the Act (the ''Market Access Rule'')[8] and Regulation SHO under the Act.[9] The Exchange emphasizes that market makers using AQR remain obligated to monitor their quotes and are responsible for complying with all Exchange rules, the Market Access Rule, as well as Rule 610, Rule 611 of Regulation NMS and Rule 200(g) of Regulation SHO, even in the event that AQR is not functioning properly. Market makers must have policies and procedures to address such contingencies and systems in place to ensure that they can continuously meet their two-sided obligation.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[10] which requires the rules of an exchange to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in

[87] 15 U.S.C. 78f(b)(5).

[88] 15 U.S.C. 78s(b)(2).

[89] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Securities Exchange Act Release No. 68528 (December 21, 2012), 77 FR 77165 (December 31, 2012) (SR–NASDAQ–2012–140).

[5] *See* Letter from Manisha Kimmel, Executive Director, Financial Information Forum, to Elizabeth M. Murphy, Secretary, Commission, dated December 21, 2012.

[6] On August 2, 2012, the Commission approved the Exchange's new Market Maker Peg Order, which is designed to replace AQR. *See* Securities Exchange Act Release No. 67584 (August 2, 2012), 77 FR 47472 (August 8, 2012) (SR–NASDAQ–2012–066).

[7] *Supra* note 3.

[8] 17 CFR 240.15c3–5.

[9] 17 CFR 242.200 through 204.

[10] 15 U.S.C. 78f(b)(5).

general, to protect investors and the public interest. The Exchange believes that the proposed rule meets these requirements in that it provides a brief extension to the retirement date of AQR to allow member firms that are market makers to adequately test and implement changes to their systems. AQR is a duplicative function and has been replaced with a new order type that allows member firms to better meet their minimum market maker quotation requirements and also comply with regulatory requirements, such as the Market Access Rule and Regulation SHO. Given the feedback received from both member firms and others in the industry concerning the AQR retirement date, NASDAQ believes granting a short extension will minimize the potential that an inadequately-tested or -implemented member firm market making system will disrupt or otherwise harmfully impact the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to promote market making on the Exchange that complies with other regulatory obligations, such as the Market Access Rule and Regulation SHO. By extending the retirement date of AQR, member firms will be afforded additional time to test and implement new coding to their systems, thus avoiding the potential market disruption that may be caused by one or more market makers that are unable to meet their market maker obligations due to a system error.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6)[12] thereunder.

The Exchange has requested that the Commission waive the 30-day operative delay.[13] The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. Such waiver provides a brief extension of the AQR retirement date in response to concerns by market participants that the currently scheduled retirement date does not allow sufficient time for testing and implementation of changes to member firms' market making systems. Accordingly, the Commission designates the proposal operative upon filing.[14]

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–NASDAQ–2013–007 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–2013–007. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–007 and should be submitted on or before February 12, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

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[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement in this case.

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68637; File No. SR–NYSEMKT–2012–48]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval for Proposed Rule Change, as Modified by Amendment Nos. 1 and 3, To Amend the Listing Rules for Compensation Committees To Comply With Securities Exchange Act Rule 10C–1 and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, NYSE MKT LLC (''NYSE MKT'' 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. On October 1, 2012, NYSE MKT filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received no comments on the NYSE MKT proposal,[5] but received a response letter from NYSE Euronext, Inc. regarding the NYSE MKT proposal, based on comment letters received on related filings.[6] On December 4, 2012, the Exchange filed Amendment No. 2 to the proposed rule change, which was later withdrawn.[7] On January 8, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.[8]

This order approves the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C–1 Under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[9] the Commission proposed Rule 10C–1 under the Act,[10] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[11]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee[12] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[13] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[14]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[15] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[16] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[17] as well as any other

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68007 (October 9, 2012), 77 FR 62576 (''Notice'').

[4] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] However, the Commission received eight comments on two substantially similar proposals by New York Stock Exchange LLC (''NYSE'') and NYSE Arca, Inc. (''NYSE Arca'') by parties that did not specifically comment on the NYSE MKT filing. *See* Securities Exchange Act Release Nos. 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (SR–NYSEArca–2012–105) and 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (SR–NYSE–2012–49).

The Commission received seven letters on the NYSE proposal. *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from: Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer, Ameriprise Financial, Inc., dated October 18, 2012 (''Ameriprise Letter''); J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law, dated October 30, 3012 (''Brown Letter''); Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, dated November 1, 2012 (''ICI Letter''); Brandon J. Rees, Acting Director, Office of Investment, AFL–CIO, dated November 5, 2012 (''AFL–CIO Letter''); Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters, dated November 5, 2012 (''Teamsters Letter''); Wilson Sonsini Goodrich & Rosati, Professional Corporation, dated November 14, 2012 (''Wilson Sonsini Letter''); and Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter'').

In addition, the Commission received one comment on the NYSE Arca proposal. *See* Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012 (''CII Letter''). Since the comment letters received on the NYSE and NYSE Arca filings discuss issues directly related to the NYSE MKT filing, the Commission has included them in its discussion of this filing.

[6] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, Inc., dated January 10, 2013 (''NYSE Response Letter''). In the NYSE Response Letter, NYSE Euronext, Inc., the parent company of NYSE MKT, states that, as the comments made by the letters submitted on the NYSE and NYSE Arca proposals are applicable in substance to NYSE, NYSE Arca and NYSE MKT LLC, its response will address the comments on behalf of all three exchanges.

[7] Amendment No. 2, dated December 4, 2012, was withdrawn on January 7, 2013.

[8] In Amendment No. 3 to SR–NYSEMKT–2012–48, NYSE MKT: (a) Revised the transition period for companies that cease to be Smaller Reporting Companies to comply with the full range of new requirements, *see infra* notes 76–78 and accompanying text; (b) changed references in the rule text from Regulation S–K, Item 10(f)(1) to Exchange Act Rule 12b–2 and made other non-substantive revisions to proposed rule text; (c) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the compensation adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S–K, *see infra* notes 50–53 and accompanying text; and (d) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not require the adviser to be independent, only that the compensation committee consider the enumerated factors before selecting or receiving advice from the adviser. *See infra* notes 54–56 and accompanying text.

[9] Public Law 111–203, 124 Stat. 1900 (2010).

[10] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[11] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[12] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[13] *See* Rule 10C–1(a) and (b)(1).

[14] *See id. See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[15] *See* Rule 10C–1(b)(2).

[16] *See* Rule 10C–1(b)(3).

[17] *See* Rule 10C–1(b)(4). The six factors, which NYSE MKT proposes to set forth in its rules, are specified in the text accompanying note 48, *infra.*

factors identified by the relevant exchange in its listing standards.[18]

B. NYSE MKT's Proposed Rule Change, as Amended

To comply with Rule 10C–1, NYSE MKT proposes to amend four sections of its rules concerning corporate governance requirements for companies listed on the Exchange: NYSE MKT LLC Company Guide (''Guide'') Section 110, ''Securities of Foreign Companies;'' Section 801 ''General;'' Section 803, ''Independent Directors and Audit Committee;'' and Section 805, ''Executive Compensation.'' In addition, NYSE MKT proposes to make some other changes to its rules regarding compensation committees. To accomplish these changes, the Exchange proposes to replace current Sections 110, 801, 803 and 805 of the Guide with new operative text that will be effective on July 1, 2013.

Current Section 805(a) of the Guide provides that the compensation of the executive offers of a listed company must be determined, or recommended to the company's board for determination, either by a compensation committee comprised of ''Independent Directors'' [19]; or, as an alternative to a formal committee, by a majority of the independent directors on the board.[20]

Under its proposal, NYSE MKT rules will retain its existing requirement that each listed company determine the compensation of executive officers either by a compensation committee of Independent Directors or by a majority of the independent directors on the board,[21] each of whom must be an Independent Director, as defined in NYSE MKT's rules.[22] Under the proposed amendment, however, each Compensation Committee member must also satisfy additional independence requirements, as described in Section II.B.1 below.[23]

NYSE MKT does not require an issuer to adopt a formal written compensation committee charter,[24] nor does it require an issuer to have a formal compensation committee. NYSE MKT proposes, however, rules that would require listed issuers to provide for the Compensation Committee's responsibilities and how it carries out those responsibilities, including structure, operations and membership requirements.[25] The Compensation Committee of a listed issuer must have the responsibility and authority with respect to retaining its own advisers; appointing, compensating and overseeing such advisers; considering certain independence factors before selecting advisers; and receiving funding from the company to engage them, which are discussed in detail in Section II.B.2 below and set forth in proposed Section 805(c)(3)–(4) of the Guide.[26]

1. Compensation Committee Composition and Independence Standards

NYSE MKT proposes to amend Section 803(A)(2) of the Guide, which would continue to provide that no director qualifies as ''independent'' unless the issuer's board of directors affirmatively determines that the director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. As noted above, NYSE MKT's rules currently require each member of a listed company's Compensation Committee to be an Independent Director, as defined in Section 803(A)(2) of the Guide.[27] Rule 10C–1, as discussed above, provides that exchange standards must require Compensation Committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, NYSE MKT discussed its consideration of these factors,[28] and proposed the following: [29]

With respect to the Fees and Affiliation Factors, NYSE MKT proposes to adopt a provision stating that the board of directors of a listed company would be required, in affirmatively determining the independence of any director who will serve on the compensation committee of the listed company's board of directors, or, in the case of a company that does not have a compensation committee, in affirmatively determining the independence of all independent directors, to consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a Compensation Committee member, including, but not limited to: (A) The source of compensation of such director, including any consulting, advisory, or other compensatory fee paid by the listed company to such director; and (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.[30]

With respect to the Fees Factor, NYSE MKT also proposes new Commentary .03 to Section 805 to provide that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation.[31]

With respect to the Affiliation Factor, NYSE MKT proposes, similarly, to amend the commentary to provide that the board should consider whether an affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, ''* * * in each case of a nature that would impair his ability to make independent

[18] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[19] ''Independent Directors'', as defined in Section 803(A)(2) of the Guide and used herein, includes a two-part test for independence. The rule sets forth specific categories of directors who cannot be considered independent because of certain discrete relationships (''bright-line tests''); and also provides that a listed company's board make an affirmative determination that each independent director does not have a relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. *Id.*

[20] The current rule also provides that the chief executive officer (''CEO'') may not be present during voting or deliberations regarding the CEO's own compensation. *See* Section 805(a) of the Guide.

[21] As NYSE MKT does not require a formal compensation committee, the term ''Compensation Committee'' for purposes of the NYSE MKT proposal and as discussed in this release, in addition to describing a formal compensation committee, also refers to the listed company's independent directors as a group when dealing with executive compensation matters. *See* proposed Section 805(a) of the Guide.

[22] *See* Section 805(a) of the Guide.

[23] *See* proposed Section 805(c)(1) of the Guide (concerning the consideration of director compensation and affiliation).

[24] Rule 10C–1 requires a compensation committee to have certain specified authority and responsibilities. *See supra* notes 15–17 and accompanying text. NYSE MKT proposed rule sets forth language concerning this authority and set of responsibilities and adds the required content discussed *infra* at text accompanying notes 45–47.

[25] *See* proposed Section 805(c)(3)–(4) of the Guide.

[26] *See* proposed Section 805(c)(3)–(4) of the Guide. As discussed below, smaller reporting companies are not required to comply with the new compensation adviser independence considerations.

[27] *See supra* note 19.

[28] *See* Notice, *supra* note 3.

[29] *See* Notice, *supra* note 3, for the Exchange's explanation of its reasons for the proposed change. *See infra* Sections II.B.3 and II.B.4 concerning entities that would be exempt from this requirement.

[30] *See* proposed Section 805(c)(1) of the Guide. *See also* Notice, *supra* note 3.

[31] *See* proposed Commentary .03 to Section 805 of the Guide.

judgments about the listed company's executive compensation.'' [32]

Although Rule 10C–1 requires that exchanges consider ''relevant factors'' not limited to the Fees and Affiliation Factors, NYSE MKT states that, after reviewing its current and proposed listing rules, it concluded not to propose any specific numerical tests with respect to the factors specified in proposed Section 805(c)(1) or to adopt a requirement to consider any other specific factors. In its proposal, NYSE MKT stated that it did not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company.[33] Further, as stated in its filing, NYSE MKT believes that its existing ''bright-line'' independence standards, as set forth in Section 803(A)(2) of the Guide, are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for Compensation Committee service.[34] Additionally, NYSE MKT stated that Section 803(A)(2) already requires the board to consider any relationships that would interfere with the director's exercise of independent judgment in carrying out the responsibilities of a director that are not the subject of ''bright-line'' tests.[35] NYSE MKT believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 805(c)(1), represent an appropriate standard for Compensation Committee independence.[36]

NYSE MKT proposes a cure period for a failure of a listed company to meet its Compensation Committee composition requirements for independence. Under the provision, if a listed company fails to comply with the Compensation Committee composition requirements in Sections 805(a) or, if applicable Section 805(c), because a member of the Compensation Committee ceases to be independent for reasons outside the member's reasonable control, that person, only so long as a majority of the members of the Compensation Committee continue to be independent, may remain a member of the Compensation Committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.[37] The proposed rule also requires a company relying on this provision to provide notice to NYSE MKT promptly.[38]

NYSE MKT modified the suggested cure period language contained in Rule 10C–1(a)(3) by limiting the cure period's use to circumstances where the Committee Continues to have a majority of independent directors, as NYSE MKT believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors.[39]

NYSE MKT's current rules relating to Compensation Committees include an exception that allows a director who is not an Independent Director to be appointed to such a committee under exceptional and limited circumstances, as long as that director is not currently an executive officer, an employee, or the family member of an executive officer.[40] The exception applies, however, only if the committee is comprised of at least three members and the board determines that the individual's membership on the committee is required by the best interests of the company and its shareholders.[41]

NYSE MKT proposes to amend Section 805(b) of the Guide to remove, except for smaller reporting companies, the availability of this exception for a director who fails the current requirements or the new enhanced director independence requirements proposed by NYSE MKT.[42] In effect, NYSE MKT proposes to retain the exception only for smaller reporting companies. Under the exception, a Compensation Committee member of a smaller reporting company may not serve longer than two years with this exception. In addition, a smaller reporting company relying on the exception must make certain disclosures on its Web site or in its proxy statement regarding the nature of the relationship and the reasons for the determination.[43]

2. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, NYSE MKT proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act concerning compensation advisers by setting forth those requirements in its own rules and requiring compensation committees to have these new rights and responsibilities.[44] Thus, proposed Section 805(c)(3)(i)–(iii) of the Guide proposes to adopt the requirements that NYSE MKT believes are required by Rule 10C–1(b)(2)–(3) that: (i) The Compensation Committee may, in its sole discretion, retain or obtain the advice of a compensation consultant,

[32] *Id.*

[33] *See* Notice, *supra* note 3.

[34] *See* Notice, *supra* note 3. The following are the ''bright-line'' tests set forth in Section 803(A)(2): (a) A director who is, or during the past three years was, employed by the company, other than prior employment as an interim executive officer (provided the interim employment did not last longer than one year) (*See* Commentary .08); (b) a director who accepted or has an immediate family member who accepted any compensation from the company in excess of $120,000 during any period of twelve consecutive months within the three years preceding the determination of independence, other than the following: (i) Compensation for board or board committee service, (ii) compensation paid to an immediate family member who is an employee (other than an executive officer) of the company, (iii) compensation received for former service as an interim executive officer (provided the interim employment did not last longer than one year) (*See* Commentary .08), or (iv) benefits under a tax-qualified retirement plan, or non-discretionary compensation; (c) a director who is an immediate family member of an individual who is, or at any time during the past three years was, employed by the company as an executive officer; (d) a director who is, or has an immediate family member who is, a partner in, or a controlling shareholder or an executive officer of, any organization to which the company made, or from which the company received, payments (other than those arising solely from investments in the company's securities or payments under non-discretionary charitable contribution matching programs) that exceed 5% of the organization's consolidated gross revenues for that year, or $200,000, whichever is more, in any of the most recent three fiscal years; (e) a director who is, or has an immediate family member who is, employed as an executive officer of another entity where at any time during the most recent three fiscal years any of the issuer's executive officers serve on the compensation committee of such other entity; or (f) a director who is, or has an immediate family member who is, a current partner of the company's outside auditor, or was a partner or employee of the company's outside auditor who worked on the company's audit at any time during any of the past three years.

[35] *See* Notice, *supra* note 3.

[36] *See id.*

[37] *See* proposed Section 805(c)(2) of the Guide.

[38] *See id.*

[39] *See* Notice, *supra* note 3. The Commission notes that while NYSE MKT does not provide any new procedures for an issuer to have an opportunity to cure any other defects with respect to its proposed compensation committee requirements, current NYSE MKT rules provide issuers with an opportunity to cure defects, and appeal, before their securities are delisted for rule violations. *See* NYSE MKT Listed Company Guide, Sections 1009–1011 (''Suspension and Delisting Procedures Procedure for Delisting'').

[40] *See* current Section 805(b) of the Guide.

[41] *See id.*

[42] *See* proposed Section 805(b) of the Guide. As noted below, smaller reporting companies are not subject to enhanced director independence requirements.

[43] *See id. See also* Notice, *supra* note 3.

[44] Rule 10C–1(b)(4) does not include the word ''independent'' before ''legal counsel'' and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In providing Commentary .05 to proposed Section 805(c)(3)–(4), as modified by Amendment No. 3, NYSE MKT provides for two limited exceptions. *See infra* notes 50–53 and accompanying text.

independent legal counsel or other adviser; (ii) the Compensation Committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the Compensation Committee; [45] and (iii) the listed company must provide for appropriate funding, as determined by the Compensation Committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the Compensation Committee.[46]

Proposed Section 804(c)(4) of the Guide, as amended, also sets forth explicitly, in accordance with Rule 10C–1, that the Compensation Committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the Compensation Committee, other than in-house legal counsel, only after taking into consideration all factors relevant to that person's independence from management, including the following six factors set forth in Rule 10C–1 regarding independence assessments of compensation advisers.[47]

The six factors, which are set forth in full in the proposed rule, are (i) the provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the Compensation Committee; (v) any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.[48]

As proposed, Section 805(c)(4) of the Guide would not include any specific additional factors for consideration, as NYSE MKT stated that it believes the list included in Rule 10C–1(b)(4) is very comprehensive and the proposed listing standard would also require the Compensation Committee to consider any other factors that would be relevant to the adviser's independence from management.[49]

Proposed Commentary .05 to proposed Section 805 of the Guide, as modified by Amendment No. 3,[50] further states that, as provided in Rule 10C–1, a Compensation Committee is required to conduct the independence assessment outlined in proposed Section 805(c)(4) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the Compensation Committee, other than (i) in-house legal counsel [51] and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S–K: consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.[52] NYSE MKT noted that this second exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation advisers in determining or recommending the amount or form of a registrant's executive and director compensation.[53]

Proposed Commentary .06 to Section 805 of the Guide, as modified by Amendment No. 3, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the Compensation Committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.[54] It further clarifies that Compensation Committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in Section 805(c)(4)(i)–(vi).[55] The Exchange clarified that, while the Compensation Committee is required to consider the independence of compensation advisers, the Compensation Committee is not precluded from selecting or receiving advice from compensation advisers that are not independent.[56]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[57] Consistent with this Rule 10C–1 provision, NYSE MKT, as a general matter, proposes that a smaller reporting company, as defined in Rule 12b–2 [58] under the Act (hereinafter, a ''Smaller Reporting Company''), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C–1.[59] Thus, NYSE MKT proposes not to require Smaller Reporting Companies to comply with either the enhanced independence standards for members of Compensation Committees relating to compensatory fees and affiliation or the compensation adviser independence considerations.[60]

[45] The proposal also includes a provision, derived from Rule 10C–1, stating that nothing in the rule may be construed: (A) To require the Compensation Committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the Compensation Committee; or (B) to affect the ability or obligation of the Compensation Committee to exercise its own judgment in fulfillment of the duties of the Compensation Committee. *See* Commentary .04 to Section 805(c) of the Guide.

[46] *See* Notice, *supra* note 3.

[47] *See* Rule 10C–1(b)(4).

[48] *See also* Rule 10C–1(b)(4)(i)–(vi).

[49] *See* Notice, *supra* note 3.

[50] *See supra* note 8. NYSE MKT's proposal as submitted originally only contained an exception for in-house legal counsel. As described below, the Exchange amended its proposal to add an exception for advisers whose role is limited to certain broad-based plans or to providing non-customized information.

[51] *See* proposed Commentary .05 to Section 805 of the Guide.

[52] *See* Exhibit 5 to Amendment No. 3 (amending, in part, the proposed Commentary .05 to Section 805 of the Guide).

[53] *See* Amendment No. 3, *supra* note 8; *see also* 17 CFR 229.407(e)(3)(iii). The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S–K.

[54] *See* Exhibit 5 to Amendment No. 3, *supra* note 8.

[55] *See id.*

[56] *See* Amendment No. 3, *supra* note 8.

[57] *See supra* Section II.A; *see also* Rule 10C–1(b)(5)(ii).

[58] 17 CFR 240.12b–2.

[59] *See* proposed Section 801(h) of the Guide; *see also* proposed Commentary .01 to Section 805 of the Guide.

[60] *See supra* text accompanying notes 30 and 48.

NYSE MKT proposes in Section 801(h) of the Guide that Smaller Reporting Companies are not required to comply with Section 805(c)(1) concerning the additional independence factors for members serving on the Compensation Committee.[61] A Smaller Reporting Company will be required to comply with proposed Section 805(c)(3) of the Guide regarding the requirements concerning the Compensation Committee's authority, responsibility and funding of compensation advisers.[62] However, NYSE MKT proposes an exception from the proposed Section 805(c)(4) that would otherwise require the Smaller Reporting Company's Compensation Committee to consider independence factors before selecting such advisers.[63] Finally, as noted above, NYSE MKT proposes to amend Section 805(b) of the Guide to clarify that only Smaller Reporting Companies will be eligible to continue to avail themselves of the ability of the board, under exceptional and limited circumstances, to appoint a non-independent director to the Compensation Committee.

4. Exemptions

NYSE MKT proposes its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in Section 801(a)–(d) and (g) of the Guide, apply also to the new requirements of the proposed rule change and thereby will continue to provide a general exemption from all of the Compensation Committee requirements of Section 805 of the Guide.[64] These include exemptions to the following issuers: (a) Any listed company of which over 50% of the voting power is held by an individual, group or another company (in other words, a controlled company); (b) limited partnerships and companies in bankruptcy; (c) asset backed and other passive business organizations (such as royalty trusts) or derivatives and special purpose securities; (d) closed-end and open-end management investment companies registered under the Investment Company Act of 1940; and (g) companies listing only preferred or debt securities.[65] NYSE MKT states that these categories of issuers typically: (i) Are externally managed and do not directly employ executives; (ii) do not by their nature have employees; or (iii) have executive compensation policy set by a body other than the board.[66] In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.[67]

Concerning foreign private issuers,[68] NYSE MKT's current rules in Section 110 of the Guide permit any such issuer to apply for an exemption from existing Compensation Committee requirements. NYSE MKT proposes that this allowance continue to apply, generally, to the Exchange's Compensation Committee requirements to foreign private issuers that seek exemption on the basis that they follow home country practice.[69]

NYSE MKT notes that Section 110 will continue to require foreign private issuers to disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under NYSE MKT listing standards in their annual report.[70] As NYSE MKT no longer requires companies to distribute annual reports, except for its requirements in Section 610 with respect to the Web site posting and distribution of annual reports filed with the SEC, NYSE MKT proposes to modify Section 110 to provide that a company must either include this disclosure on its Web site or in its annual report it is required to file with the SEC. NYSE MKT does not propose to add any additional requirements to the disclosure requirement applicable to foreign private issuers, and argues that the explanation companies would likely provide for not having an independent compensation committee would simply be that they were not required to do so by home country law.[71]

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change provides that certain of the new requirements for listed companies will be effective on July 1, 2013 and others will be effective after that date.[72] Specifically, NYSE MKT proposes to amend Section 805(c)(5) to provide transition periods by which listed companies would be required to comply with the new Section 805(c)(1) Compensation Committee director independence standards. Pursuant to the proposal, listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new standards for Compensation Committee director independence. Existing Compensation Committee independence standards would continue to apply pending the transition to the new independence standards. NYSE MKT proposes that all other proposed sections of the proposal would become effective on July 1, 2013 for purposes of compliance by currently listed issuers that are not otherwise exempted. On July 1, 2013, such issuers will be required to comply with the provisions relating to the authority of a Compensation Committee to retain compensation consultants, legal counsel, and other compensation advisers, the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting or receiving advice from such advisers.

6. Compliance Schedules: IPOs; Companies That Lose their Exemptions; Companies Transferring From Other Markets

NYSE MKT's existing rules permit certain companies listing on the Exchange to phase-in compliance with all of the Exchange's applicable independence requirements for Compensation Committees after the date that the company's securities first trade on NYSE MKT.[73] NYSE MKT proposes to preserve its current compliance periods for those categories of issuers with respect to the enhanced independence standard for directors serving on the Compensation

[61] *See* Notice, *supra* note 3.

[62] *See id.*

[63] *See* Notice, *supra* note 3.

[64] *See id.* In addition, such exempt companies would also thereby be exempt from the enhanced independence requirements for Compensation Committee composition described in proposed Section 803(A)(2) of the Guide.

[65] *See* current Sections 801(a)–(d) and (g) of the Guide.

[66] *See* Notice, *supra* note 3.

[67] *See id.*

[68] Under NYSE MKT's listing rules, the term ''foreign private issuer'' used in Section 110 of the Guide is defined by SEC's definition of foreign private issuer set out in Rule 3b–4(c) (17 CFR 240.3b–4). *See* Section 110 of the Guide; *see also* Notice, *supra* note 3. The proposal also adds language to clarify that the exemption is not available to a foreign-based issuer that is not a foreign private issuer, as defined in Rule 3b–4(c) under the Act.

[69] *See* Notice, *supra* note 3.

[70] *See id. See also* Section 110 of the Guide. A foreign private issuer may provide this disclosure either on its Web site and/or in its annual report as distributed to shareholders in the United States.

[71] *See* Notice, *supra* note 3.

[72] During the transition periods described herein, existing Compensation Committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the Compensation Committee independence standards.

[73] *See* Section 809(a) of the Guide (''Effective Dates/Transitions'').

Committee, which means that companies listing in conjunction with their initial public offerings would continue to be entitled to a transition under which the company must have: At least one independent member that meets the enhanced standards (concerning fees received by members and their affiliations) on its compensation committee by the listing date; at least a majority of independent members that meet the enhanced standards on the compensation committee within 90 days of the listing date; and a fully independent compensation committee where all members meet the enhanced standards within one year of the listing date.[74] Alternatively, companies listing in conjunction with their IPO may choose, instead, not to establish a formal compensation committee, instead relying upon a majority of independent directors to discharge the responsibilities.[75]

Companies that cease to qualify as foreign private issuers would not have a transition period under the proposed rules.

Companies listing upon transfer from another market with a substantially similar requirement will continue to be afforded the balance of any grace period afforded by the other market under current Section 809(b) of the Guide. Companies transferring from other markets that do not have a substantially similar requirement would have one year from the date of listing to satisfy the requirements of Section 805.

For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 3, establishes a compliance schedule based on certain dates relating to the company's change in status.[76] Pursuant to Rule 12b–2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the ''Smaller Reporting Company Determination Date''). A company with a public float of $75 million or more as of the Smaller Reporting Company Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. Under NYSE MKT's proposal, the day of this change in status is the beginning of the compliance period (''Start Date'').[77]

By six months from the Start Date, the company will be required to comply with Section 805(c)(4) of the Guide, which sets forth the provision described above relating to the requirement that the committee consider independence factors before selecting compensation advisers. Six months from the Start Date, the company will begin to comply with the additional requirements in Section 805(c)(1) regarding member independence on the compensation committee. Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) One member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.[78] Alternatively, any such Smaller Reporting Company that does not have a formal compensation committee may comply with the transition requirements with respect to all of its independent directors as a group.

III. Comments on the Proposed Rule Change and NYSE MKT's Response

As stated previously, the Commission received no comments on the NYSE MKT Proposal. However, the Commission received a total of eight comment letters on the NYSE[79] and NYSE Arca proposals.[80] The Commission is treating the comment letters submitted on the NYSE and NYSE Arca filings, for which comparable letters were not submitted on the NYSE MKT filing, as also being applicable to the NYSE MKT filing since the NYSE, NYSE Arca and NYSE MKT filings address the same substantive issues. NYSE Euronext, Inc., on behalf of NYSE MKT, also responds to these comment letters for the NYSE MKT proposal.[81]

Three commenters expressed general support for the proposal, although two believed that it needed to be amended before being approved.[82] Some commenters supported specific provisions of the proposal,[83] some opposed specific provisions,[84] and some sought clarification of certain aspects of the proposal.[85] Some commenters believed that the proposal fell short of meeting the requirements of Rule 10C–1 and believed that it should have been more stringent.[86] These and other comments, as well as NYSE MKT's responses to some of the comments that raised issues with the proposal, are summarized below.

A. Definition of Independence

1. Consideration of Director Compensation

Three commenters believed that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[87] Two of these commenters,

[74] Currently, Section 809(a) of the Guide also provides that companies emerging from bankruptcy and companies which have ceased to be controlled companies are required to meet the majority independent board requirement within one year. Further, as with companies listing in conjunction with their IPOs, such companies may choose not to establish a compensation committee, instead relying upon a majority of independent directors to discharge the responsibilities of the committee. As NYSE MKT proposes no changes to this section, these companies would continue to be entitled to this transition period.

[75] *See* current Section 809(a) of the Guide (''Effective Dates/Transitions'').

[76] *See* proposed Section 805(c)(5) of the Guide (Transition Period), as amended. In the proposal as originally submitted, the compliance schedule was to require compliance with the enhanced standards for director independence six months after the company ceases to be a Smaller Reporting Company, but immediate compliance with all other requirements. In Amendment No. 3, NYSE MKT states that while the revised compliance schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences, as many companies will likely not become aware of their change in status until significantly after the determination date and would therefore not utilize the transition period as originally proposed to bring themselves into compliance with the enhanced requirements, and that such companies would have significant difficulty in becoming compliant within the transition period as originally proposed.

[77] *See* Amendment No. 3, *supra* note 8.

[78] During the compliance schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

[79] *See supra* note 5.

[80] *See id.*

[81] *See supra* note 6. NYSE Euronext, Inc.'s response addresses comments received on both the NYSE and NYSE Arca proposals.

[82] *See* Ameriprise Letter, which supported the proposal but believed that certain aspects were not sufficiently clear such that the proposal needed to be amended to provide additional clarity; ICI Letter, which urged approval of the proposal; and Corporate Secretaries Letter, which generally supported the proposal, but believed that certain of its aspects were unnecessarily burdensome or not sufficiently clear such that the proposal needed to be amended before being approved by the Commission.

[83] *See* Brown Letter, CII Letter, and ICI Letter.

[84] *See* AFL–CIO Letter, Brown Letter, and Wilson Sonsini Letter. *See also* CII Letter, which stated that it believed that specific aspects of the NYSE Arca proposal were lacking.

[85] *See* Ameriprise Letter and Corporate Secretaries Letter.

[86] *See* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

[87] *See* Brown Letter, AFL–CIO Letter, and Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

after noting that the proposal did not require boards of directors to also consider the compensation paid to the directors for their service on the board in determining the independence of directors serving on the compensation committee, argued that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[88] The other commenter argued that the language of Section 10C of the Act itself, as well as its legislative history, indicates Congress's intent that such fees be considered.[89] These commenters believed that compensation for board service can result in ''the impairment of independence as a result of excessive fees,'' [90] because ''[h]igh director fees relative to other sources of income can compromise director objectivity,'' [91] and ''[h]ighly paid directors also may be inclined to approve large executive pay packages.'' [92] One of these commenters believed that the requirement of Section 10C of the Act and Rule 10C–1 to consider the source of compensation of a director goes further, and applies to all types of compensation that a director may receive, including compensation paid by any person, including non-issuers.[93]

In its response to comments, NYSE MKT stated that, as all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, NYSE MKT does not believe that it is likely that director compensation would be a relevant consideration for compensation committee independence.[94] NYSE MKT noted that, however, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations.[95] Therefore, NYSE MKT believed that, to the extent that excessive board compensation might affect a director's independence, the proposed rules would require the board to consider that factor in its determination.[96]

2. Personal or Business Relationships Between Directors and Officers

Some commenters believed that the proposed rules should explicitly require the board of a listed company, when considering affiliations of a director in determining eligibility for compensation committee membership, to consider personal or business relationships between the director and the company's executive officers.[97] As expressed by two of these commenters, ''too many corporate directors have significant personal, financial or business ties to the senior executives that they are responsible for compensating.'' [98]

Some commenters believed that related party transactions should explicitly be included as a relevant factor in determining independence for members of compensation committees.[99] The additional requirements suggested by commenters also included, for example, disqualification of a director from membership on the compensation committee if an immediate family member of the director received compensation in excess of $120,000 a year from the company even if that family member was not an executive officer of the company; [100] or if the director has, or in the past five years has had, a personal contract with the company, with an executive officer of the company, or with any affiliate of the company.[101]

One commenter acknowledged that the proposal would require consideration of all factors specifically relevant to determining whether a director has a relationship which is material to that director's ability to be independent from management, but argued that such requirement is not sufficient to ensure that boards weigh personal or business relationships between directors and executive officers.[102] In support, the commenter argued that: (1) Such relationships were not technically with the ''listed company'' and therefore would at least create confusion as to whether it should be considered; (2) the omission of an explicit reference to this relationship was inconsistent with other approaches taken in the proposal that made reference to certain other relationships; and (3) legislative history makes it clear that Congress expected these relationships to be explicitly considered in determining director independence.[103]

In response, NYSE MKT noted that the existing independence standards of NYSE MKT require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence.[104] NYSE MKT further stated that commentary to Section 303A.02(a) of the NYSE Listed Company Manual explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT and NYSE Arca have always interpreted their respective director independence requirements in the same way.[105] Consequently, NYSE MKT stated that it did not believe that any further clarification of this requirement is necessary.[106]

As to a requirement to consider related party transactions, NYSE MKT responded that it believes that this is unnecessary as the existing director independence standards require boards to consider all material factors relevant to an independence determination, as do the specific compensation committee independence requirements of the proposed rules.[107]

3. Sufficiency of Single Factor and Additional Comments on Independence

Two commenters explicitly sought clarification that a single factor can result in the loss of independence.[108] In its response letter, NYSE MKT confirmed that it has interpreted the

[88] *See* AFL–CIO Letter and Teamsters Letter, noting that Rule 10C–1 requires the exchanges to consider a director's ''source of compensation,'' and arguing that this phrase includes director fees.

[89] *See* Brown Letter.

[90] *Id.*

[91] *See* AFL–CIO Letter and Teamsters Letter.

[92] *Id.*

[93] *See* Brown Letter.

[94] *See* NYSE Response Letter.

[95] *See id.*

[96] *See id.*

[97] *See* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter. As noted above, the comment letters refer specifically to NYSE and NYSE Arca, but apply equally to the NYSE MKT proposal.

[98] AFL–CIO Letter and Teamsters Letter.

[99] *See* AFL–CIO Letter and Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

[100] *See id.* NYSE MKT's definition of Independent Director already disqualifies a director from membership on the compensation committee if an immediate family member of the director receives in excess of $120,000 from the company or was an executive officer of the company.

[101] *See* CII Letter. The commenter acknowledged, however, that NYSE Arca's existing director requirements implicitly require this consideration, but similarly recommended that the importance of the factor requires it be explicit in the proposal. Outside the scope of this proposal, the commenter also suggested NYSE Arca consider, at some future date, developing a more comprehensive and robust definition of independent directors that could be applicable to all board committees and provided a proposed definition for NYSE Arca's consideration.

[102] *See* Brown Letter. As noted above, the comment letter refers specifically to NYSE, but applies equally to the NYSE MKT proposal.

[103] *See id.*

[104] *See* NYSE Response Letter.

[105] *See id.*

[106] *See id.*

[107] *See* NYSE Response Letter.

[108] *See* AFL–CIO Letter and Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

existing general board independence standards as providing that a single relationship could be sufficiently material that it would render a director non-independent. NYSE MKT stated it was not aware that there has been any confusion with respect to this interpretation.[109] Consequently, NYSE MKT did not believe it is necessary to include in the proposed rules a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the rules as drafted.[110]

Some of the above commenters expressed the belief, in general, that the definition of an independent director should be more narrowly drawn, that the bright-line tests of independence should be strengthened, and that the standards of independence should be uniform for all committees requiring independent directors.[111]

One commenter believed that the requirement that the board ''must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member'' was vague and unnecessary in light of the comprehensive factors already required.[112] In responding to this commenter, NYSE MKT disagreed, noting that the requirement to consider all material relationships, not just those enumerated, was essential, as it is impossible to foresee all relationships that may be material.[113]

B. Compensation Adviser Independence Factors

The Commission received letters from four commenters relating to the provision of the proposed rule change that requires a compensation committee to take into consideration the factors set forth in the proposal in the selection of a compensation consultant, legal counsel, or other adviser to the committee.[114]

1. Additional Factors for Consideration

One commenter generally supported the proposal's requirement that a board consider six independence factors before engaging an adviser, but believed that at least one additional factor should be considered: ''Whether the compensation committee consultants, legal counsel or other advisers require that their clients contractually agree to indemnify or limit their liability.'' [115] The commenter believed that such contractual provisions, which the commenter indicated have become standard practice for many consultants, ''raise conflict of interest red flags'' that every compensation committee should consider in determining the independence of the consultant.[116]

In response, NYSE MKT stated that it did not believe that this is an appropriate addition because a relationship would affect an adviser's independence from management only if it gave rise to a concern that it would subject the adviser to influence by management.[117] It was not apparent to NYSE MKT why the existence of contractual indemnification and limitation of liability provisions would subject an adviser to any influence by management and, therefore, it is not clear how they are relevant to an independence determination.[118] NYSE MKT expressed no view on the desirability of such agreements.[119]

2. Non-Independent Consultants

One commenter suggested that, although the portion of the proposal which relates to the compensation committee's use of a compensation consultant was thoughtfully drafted and accurately reflects the substance of Rule 10C–1, there was a possibility that a reader may not properly interpret the intended meaning of proposed Section 303A.05(c) of the NYSE Listed Company Manual concerning the use of compensation consultants, legal counsel and advisers that are not independent.[120] First, the commenter suggested the use of the example ''independent legal counsel'' might be read to require the compensation committee to only use independent legal counsel, when Rule 10C–1 would otherwise permit a compensation committee to receive advice from non-independent counsel, such as in-house counsel or outside counsel retained by management.[121] Second, the commenter suggested that the proposal could be revised to emphasize that a compensation committee is not responsible for advisers retained by management or other parties.[122] Third, the commenter suggested that the section addressing the funding of consultants should be revised to make clear that: (a) Retained legal counsel need not be independent: And (b) expenses of an adviser, in addition to its compensation, would also be provided for by the issuer.[123] Fourth, the commenter suggested that the proposal be clarified to require a compensation committee to take into account the independence requirements only when selecting a consultant for matters related to executive compensation, rather than for consultants selected to assist with any other responsibilities the committee may have in addition to executive compensation.[124] In response, NYSE MKT noted that Amendment No. 3 amended the proposed rule text to provide that: (i) Nothing in the proposed rules requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting a compensation adviser; and (ii) the compensation committee may select any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in the proposed rules.[125] In addition, NYSE MKT noted that Rule 10C–1 and the SEC's adopting release refer only to compensation advisers generally without carving out compensation advisers retained by the compensation committee with respect to matters other than executive compensation.[126]

One commenter believed that the proposed rule could be read as requiring a compensation committee to consider the independence factors set forth in Rule 10C–1 when selecting any consultant providing advice to the compensation committee, including any outside legal counsel that might provide legal advice to a compensation committee.[127] The commenter argued that outside legal counsel often provides advice to compensation committees on matters other than how much a

[109] *See* NYSE Response Letter.

[110] *See id.*

[111] *See* CII Letter, AFL–CIO Letter, and Teamsters Letter.

[112] *See* Corporate Secretaries Letter. As noted above, the comment letter refers specifically to NYSE, but applies equally to the NYSE MKT proposal.

[113] *See* NYSE Response Letter.

[114] *See* Ameriprise Letter, Wilson Sonsini Letter, CII Letter, and Corporate Secretaries Letter. As noted above, the comment letters refer specifically to NYSE and NYSE Arca, but apply equally to the NYSE MKT proposal.

[115] *See* CII Letter. As noted above, the comment letter refers specifically to NYSE Arca, but applies equally to the NYSE MKT proposal.

[116] *See* CII Letter.

[117] *See* NYSE Response Letter.

[118] *See id.*

[119] *See id.*

[120] *See* Ameriprise Letter.

[121] *See id.*

[122] *See id.*

[123] *See id.*

[124] *See id. See also* Corporate Secretaries Letter.

[125] *See* NYSE Response Letter.

[126] *See id.*

[127] *See* Wilson Sonsini Letter.

company should pay an executive.[128] The commenter suggested it would not be ''necessary or a good use of resources for compensation committees to review independence factors for such attorneys providing advice to the compensation committee.'' [129] The commenter stated that no other rule requires a board committee to consider the independence of its regular legal counsel,[130] and noted that, while it may, at times, be appropriate for a board or a committee to consider independence factors, such a consideration should not be made part of a listing standard that singles out the compensation committee.[131] The commenter suggested that different language originally proposed by The NASDAQ Stock Market LLC reflected a more balanced rule that only required the compensation committee to consider the independence when selecting independent legal counsel, not every outside attorney that provides advice to the compensation committee.[132]

In response, NYSE MKT stated that it believes that its proposal is dictated by Rule 10C–1, which excludes only in-house legal counsel from the requirement to conduct an independence analysis with respect to any legal counsel consulted by the compensation committee, including the company's regular securities or tax counsel.[133] NYSE MKT noted that the Rule 10C–1 Adopting Release provides that ''[t]he exemption of in-house counsel from the independence analysis will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer.'' [134]

Another commenter, while generally supporting the proposal, maintained that the required independence assessment will be ''time-consuming and burdensome'' due to the scope of information that will need to be gathered in order to conduct the required independence assessment.[135] This commenter believed that uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee, and further identified a number of specific issues that it believed NYSE should address to provide greater clarity regarding the standard.[136]

In response, NYSE MKT disagreed with the commenter, arguing that it was impossible to specifically enumerate every category of relationship which might be material to a compensation committee adviser's independence.[137] NYSE MKT believes that it is therefore necessary for a compensation committee to conduct a more flexible analysis.[138] NYSE MKT believes that it would not be appropriate for it to identify additional relevant factors in the rule, as it would be impossible to predict every category of relationship that might be material.[139]

C. Opportunity To Cure Defects

One commenter supported the rule proposed to permit issuers a period of time, under specified conditions, to cure failures to comply with the independence requirements for compensation committee members.[140] The commenter was concerned, however, that the proposed rules did not specify a cure period for any other form of non-compliance with the new rules.[141] The commenter believed that a company should be allowed to take corrective action within a reasonable time after the company's senior executives learn of the non-compliance.

In response, NYSE MKT noted that it had existing policies and procedures that govern non-compliance with rules generally and that these provisions would apply to any events of non-compliance under the proposed rules.[142] NYSE MKT believes these provisions provide it with the ability to grant a discretionary period for an issuer to return to compliance, and noted that the determination of a reasonable cure period can only be made in light of specific facts and circumstances.[143]

D. Exemptions

The Commission received one comment letter supporting the proposal to exempt investment companies from the Rule 10C–1 requirements.[144] As the commenter noted, although Rule 10C–1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of investment companies registered under the Investment Company Act of 1940 (''Investment Company Act''), including closed-end funds, from any of the requirements of Rule 10C–1. Under the proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule. The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or, by their nature, have employees. The commenter agreed with the proposal that it would be significantly and unnecessarily burdensome to require such entities to comply with the proposed requirements, and further noted that any conflicts with respect to compensation of investment advisers are governed by the Investment Company Act.[145]

E. Transition Period

One commenter voiced support for the transition period proposed for compliance with the new compensation committee independence standard, but believed that NYSE should provide a longer period for companies to satisfy proposed Section 303A.05 of the NYSE Listed Company Manual, relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the

[128] *See id.*

[129] *See id.*

[130] *See id.*

[131] *See id.*

[132] *See id.* The Commission notes that The NASDAQ Stock Market LLC has since revised its proposed rule language and added commentary that makes clear its original intent that the compensation committee of an issuer listed on The NASDAQ Stock Market LLC, absent an exemption, must consider the independence of every adviser, other than in-house legal counsel, that provides advice to the compensation committee, including non-independent legal counsel. *See* SR–NASDAQ–2012–109, Amendment No. 1.

[133] *See* NYSE Response Letter.

[134] *See id.*

[135] *See* Corporate Secretaries Letter.

[136] The Commission notes that NYSE MKT addressed some of the commenter's concerns in Amendment No. 3, *supra* note 8.

[137] *See* NYSE Response Letter.

[138] *See id.*

[139] *See id.*

[140] *See* Corporate Secretaries Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

[141] *See id.* The commenter mentioned, in particular, the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. The commenter believed that inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the commenter believed, the company would be in violation of the listing standard and have no recourse.

[142] *See* NYSE Response Letter.

[143] *See id.*

[144] *See* ICI Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

[145] *See* ICI Letter.

committee to consider independence factors before selecting such advisers.[146]

In response, the Exchange stated that it believed that the transition periods are sufficient to enable companies to become compliant on a timely basis in a manner that is not unduly burdensome.[147] The Exchange also noted that the proposed transition period was identical to that used at the time of the initial implementation of NYSE's current board and committee independence requirements and that NYSE MKT believes that the transition period was not unduly burdensome for companies at that time.[148]

IV. Discussion

After careful review, the Commission finds that the NYSE MKT proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[149] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[150] as well as with Section 10C of the Act [151] and Rule 10C–1 thereunder.[152] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[153] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the NYSE MKT proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their Compensation Committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[154] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [155] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, NYSE MKT submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission notes that a number of the commenters generally supported substantially similar proposed rule changes, although some commenters offered suggestions to clarify or improve various provisions of the proposals. The Commission believes that the proposed rule change, as modified by Amendment Nos. 1 and 3, appropriately revises NYSE MKT's rules for Compensation Committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C–1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director, as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).'' [156] This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and Compensation Committee members, which include certain bright-line tests, NYSE MKT has enhanced its listing requirements regarding Compensation Committees by adopting additional standards for independence to comply with the Fees Factor and Affiliation Factor, as well as the other standards set forth in Rule 10C–1. The NYSE MKT's proposal also adopts the cure procedures required in Rule 10C–1(a)(3) for Compensation Committee members who cease to be independent for reasons outside their reasonable control, so long as the majority of the members of the Compensation Committee continue to be independent, and proposes the requirement that executive

[146] *See* Corporate Secretaries Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

[147] *See* NYSE Response Letter.

[148] *See id.*

[149] In approving the NYSE MKT proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[150] 15 U.S.C. 78f(b).

[151] 15 U.S.C. 78j–3.

[152] 17 CFR 240.10C–1.

[153] 15 U.S.C. 78f(b)(5).

[154] *See supra* note 9.

[155] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[156] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Act.

compensation must be determined either by a compensation committee comprised of independent directors,[157] or by a majority of independent directors in the absence of a formal committee, as required by Rule 10C–1.

In addition, as noted above, NYSE MKT eliminates, for all companies other than Smaller Reporting Companies, the ability of the board under exceptional and limited circumstances to appoint a non-independent director to the Compensation Committee.

Further, as discussed in more detail below, the NYSE MKT proposal, while it does not require a formal charter, still includes requirements that the Compensation Committee must be afforded the authority and responsibilities as to compensation advisers as set forth under Rule 10C–1. Taken as a whole, the Commission believes that these changes will strengthen the oversight of executive compensation in NYSE MKT-listed companies and further greater accountability, and will therefore further the protection of investors consistent with Section 6(b)(5) of the Act.

The Commission believes that the Exchange's proposal, which requires the consideration of the additional independence factors for Compensation Committee members, is designed to protect investors and the public interest and is consistent with the requirements of Sections 6(b)(5) and 10C of the Act and Rule 10C–1 thereunder.

With respect to the Fees Factor of Rule 10C–1, the Exchange commentary states when considering the source of a director's compensation in determining independence for compensation committee service, the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. In addition to the continued application of the NYSE MKT's current bright-line tests, NYSE MKT's new rules also require the board to consider all relevant factors in making independence determinations for compensation committee membership. The Exchange believes that these requirements of proposed Section 805(c)(1) of the Guide, in addition to the general director independence requirements, represent an appropriate standard for Compensation Committee independence that is consistent with the requirements of Rule 10C–1 and the Fees Factor.

The Commission believes that the provisions noted above to address the Fees Factor give a board broad flexibility to consider a wide variety of fees, including any consulting, advisory or other compensatory fee paid by the issuer or entity, when considering a director's independence for Compensation Committee service. While the Exchange does not bar all compensatory fees, the approach is consistent with Rule 10C–1 and provides a basis for a board to prohibit a director from being a member of the Compensation Committee, should the director receive compensation that impairs the ability to make independent decisions on executive compensation matters, even if that compensation does not exceed the threshold in the bright-line test.[158] The Commission, therefore, believes that the proposed compensatory fee requirements comply with Rule 10C–1 and are designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act. The Commission notes that the compensatory fee consideration may help ensure that Compensation Committee members are less likely to have received fees, from either the issuer or another entity, that could potentially influence their decisions on compensation matters.

The Commission recognizes that some commenters did not believe that the proposal went far enough because NYSE MKT did not adequately consider the compensation that directors receive for board or committee service in formulating its standards of independence for service on the compensation committee, and, in particular, the levels to which such compensation may rise,[159] or otherwise favored additional requirements.[160] The Commission notes, however, that to the extent a conflict of interest exists because directors set their own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director compensation through this means. In addition, as NYSE MKT states, a company's board of directors must consider all relevant factors in making compensation committee independence determinations, and if director fees could, in the opinion of the board, impair the director's independent judgment with respect to compensation-related matters, the board could therefore consider director compensation in that context.[161] The Commission believes that, based on the NYSE MKT's argument and the disclosure requirements noted above, these arguments are sufficient to find that NYSE MKT has complied with the requirements of Rule 10C–1 in this regard.

With respect to the Affiliation Factor of Rule 10C–1, NYSE MKT has concluded that an outright bar from service on a company's Compensation Committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for Compensation Committees. NYSE MKT's existing independence standards will also continue to apply to those directors serving on the Compensation Committee. NYSE MKT maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on Compensation Committees as ''share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.'' In spite of the argument of two commenters in favor of an outright ban on affiliations with the company,[162] the Commission believes that NYSE MKT's approach of requiring boards only to consider such affiliations is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the

[157] Under the NYSE MKT proposal, Smaller Reporting Companies will retain the ability to appoint, under exceptional and limited circumstances, a non-independent director to a Compensation Committee, thereby allowing executive compensation to be determined by a compensation committee comprised of a majority of independent directors, rather than entirely by independent directors.

[158] *See supra* note 34, setting forth the existing bright-line tests.

[159] *See* AFL–CIO Letter, Brown Letter, and Teamsters Letter, maintaining that NYSE's proposal ''falls short'' of the Rule 10C–1 provision requiring exchanges to consider a director's source of compensation. *See also supra* notes 97–101 and accompanying text. As stated by commenters, ''[h]igh director fees relative to other sources of income can compromise director objectivity'' and ''[h]ighly paid directors also may be more inclined to approve large executive pay packages.'' AFL–CIO Letter. *See also* Teamsters Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

[160] *See, e.g.,* CII Letter.

[161] *See* NYSE Response letter, *supra* note 6. The Commission also notes that in the NYSE Response Letter, the Exchange states that to the extent that excessive board compensation might affect a director's independence, the new rules would require the board to consider that factor in its independence determination.

[162] *See* Teamsters Letter and AFL–CIO Letter. As noted above, the comment letters refer specifically to NYSE, but apply equally to the NYSE MKT proposal.

Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [163] In determining that NYSE MKT's affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that NYSE MKT's proposal requires a company's board, in selecting Compensation Committee members, to consider whether any such affiliation would impair a director's judgment as a member of the Compensation Committee. The NYSE MKT rule further states that, in considering affiliate relationships, a board should consider whether such affiliate relationship places the director under the direct or indirect control of the listed company or its senior management such that it would impair the ability of the director to make independent judgments on executive compensation. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company's Compensation Committee, depending on the director's particular affiliations with the company or its senior management.[164]

As to whether NYSE MKT should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in light of Rule 10C–1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for Compensation Committee members. The Commission does not agree with the commenters who argued that the NYSE's substantially similar proposal falls short of ''the requirements and/or intent'' of Section 10C of the Act and Rule 10C–1. The Commission notes that Rule 10C–1 requires each exchange to consider relevant factors in determining independence requirements for members of a compensation committee, but does not require the exchange's proposal to reflect any such additional factors.

As noted above, several commenters argued that the proposal should require that other ties between directors and the company, including business and personal relationships with executives of the company, be considered by boards in making independence determinations.[165] The Commission did emphasize in the Rule 10C–1 Adopting Release that ''it is important for exchanges to consider other ties between a listed issuer and a director * * * that might impair the director's judgment as a member of the compensation committee,'' [166] and noted that ''the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence.'' However, the Commission did not require exchanges to reach this conclusion and thus NYSE MKT's decision that such ties need not be included explicitly in its definition of independence does not render its proposal insufficient.

In explaining why it did not include, specifically, personal and business relationships as a factor, NYSE MKT cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no material relationship with the listed company with respect to their independence from management.[167] All Compensation Committee members must meet the general independence standards under NYSE MKT's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the Compensation Committee. Although personal and business relationships, related party transactions, and other matters suggested by commenters are not specified either as bright-line disqualifications or explicit factors that must be considered in evaluating a director's independence, the Commission believes that compliance with NYSE MKT's rules and the provision noted above would demand consideration of such factors with respect to Compensation Committee members, as well as to all Independent Directors on the board.

Notwithstanding the concern of some commenters, the Commission confirms that Rule 10C–1 does not mean that a director cannot be disqualified on the basis of one factor alone. Although NYSE MKT does not state this explicitly in its rules, in response to comments, the Exchange confirmed that they have interpreted their current rules as providing that a single relationship could be sufficiently material that it would render a director non-independent. The Commission believes that nothing in Rule 10C–1 or in NYSE MKT's current or proposed rules implies otherwise.

Finally, the Commission does not believe that NYSE MKT is required in the current proposed rule change to consider further revisions of its independence rules as suggested by some commenters, although it may wish to do so in the future after it has experience with its rules. The Commission notes that the NYSE MKT provision requires a board to further exercise appropriate discretion to consider all factors specifically relevant in determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a Compensation Committee member. The Commission notes that one commenter argues this provision is

[163] Rule 10C–1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations ''impair his ability to make independent judgment'' as a member of the committee. *See also supra* notes 32–36 and accompanying text.

[164] The Commission notes that one commenter suggested there was ambiguity as to whether boards must consider business or personal relationships between directors and senior management. *See* Brown Letter. In response, NYSE MKT noted that its existing independence standards require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence. NYSE MKT noted that Commentary to Section 303A.02(a) of the NYSE Listed Company Manual explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT has always interpreted its director independence requirements in the same way. Consequently, NYSE MKT did not believe that any further clarification of this requirement is necessary. *See* NYSE Response Letter.

[165] *See supra* notes 97–107 and accompanying text. As noted above, the comment letters refer specifically to NYSE and NYSE Arca, but apply equally to the NYSE MKT proposal.

[166] *See supra* note 11.

[167] *See* Section 803(A)(2) of the Guide. *See also* NYSE Response Letter.

vague and unnecessary and should be deleted from the proposal.[168] The Commission does not agree with the commenter, however, that the consideration of the explicitly enumerated factors will be sufficient in all cases to achieve the objectives of Section 10C(a)(3), because it is not possible to foresee all possible kinds of relationships that might be material to a Compensation Committee member's independence. We therefore believe the flexibility provided in NYSE MKT's new compensation committee independence standards provides companies with guidance, while allowing them to identify those relationships that might raise questions of independence for service on the compensation committee. For these reasons, we believe the director independence standards are consistent with the investor protection provision of Section 6(b)(5) of the Act.

Under NYSE MKT's proposal, only Smaller Reporting Companies will be able to avail themselves of the ''Exceptional and Limited Circumstances'' provision that permits the board to appoint one non-independent director to serve on a Compensation Committee under certain circumstances. Accordingly, all listed companies, except Smaller Reporting Companies, will be required to have a compensation committee comprised of members that all meet the existing and enhanced independence requirements, or in the case of a company that does not have a formal compensation committee, all of the independent directors must meet the existing and new independence requirements. We note that eliminating this exception for all issuers except Smaller Reporting Companies will ensure that, for most NYSE MKT-listed companies, executive compensation will only be considered by independent directors, which should help to ensure impartial executive compensation decisions.

The Commission believes that the discretion granted to each exchange by Rule 10C–1, generally, to determine the independence standards it adopts to comply with the Rule includes the leeway to carve out exceptions to those standards, as long as they are consistent with the Act. Regarding the justification for retaining this exception only for Smaller Reporting Companies, the Commission notes that it long ago approved as consistent with the Act the broader exception and concept in the context of NYSE MKT's definition of Independent Director under Section 803(A)(2) of the Guide with respect to Compensation Committees. For these reasons, the Commission believes that retaining this provision for Smaller Reporting Companies is reasonable and consistent with Section 6(b)(5) of the Act and with Rule 10C–1. We note that Smaller Reporting Companies are already exempted out of the enhanced independence standards under NYSE MKT's proposal and Rule 10C–1. The provision was previously approved by the Commission as consistent with the Act, and finally, the Commission notes that a member appointed to a Smaller Reporting Company's Compensation Committee under this Exceptional and Limited Circumstances provision may not serve longer than two years.

B. Authority of Committees To Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

As discussed above, NYSE MKT proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a Compensation Committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C–1 [169] and are consistent with the Act.[170]

In addition, the Commission believes that requiring companies to specify the enhanced compensation committee responsibilities through official board action will help to assure that there is adequate transparency as to the rights and responsibilities of compensation committee members. As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

As noted above, one commenter believed that Rule 10C–1 could be read as not requiring a compensation committee to consider the enumerated independence factors with respect to regular outside legal counsel and sought to have NYSE revise its substantially similar proposal.[171] This reading is incorrect, and NYSE MKT's rule language reflects the appropriate reading. The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.'' [172] To avoid any confusion, NYSE MKT added rule text that reflects this instruction in its own rules.[173]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, NYSE MKT has proposed, in Amendment No. 3, to add language to the provision regarding the independence assessment of compensation advisers[174] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. NYSE MKT states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[175]

The Commission views NYSE MKT's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item

[168] *See* Corporate Secretaries Letter.

[169] 17 CFR 240.10C–1.

[170] 15 U.S.C. 78j–3.

[171] *See* Wilson Sonsini Letter and *supra* notes 127–132 and accompanying text.

[172] *See* Instruction to paragraph (b)(4) of Rule 10C–1.

[173] *See supra* note 51 and accompanying text.

[174] *See* proposed Commentary .05 to Section 805, as amended by Amendment No. 3.

[175] *See* 17 CFR 229.407(e)(3)(iii).

407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[176] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters regarding the scope of the independence assessment requirement. Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

Regarding the belief of another commenter that the independence assessment requirement could discourage compensation committees from obtaining the advice of advisers,[177] the Commission notes that, as already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, in Amendment No. 3, NYSE MKT added specific rule language stating, among other things, that nothing in its rule requires a compensation adviser to be independent, only that the Compensation Committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.[178] Regarding the commenter's concern over the burdens that the NYSE's substantially similar proposal imposes, the Commission notes that Rule 10C–1 explicitly requires exchanges to require consideration of these six factors.[179] Moreover, five of the six factors were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.[180]

Finally, one commenter requested guidance ''on how often the required independence assessment should occur.'' [181] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each such [compensation committee] meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.

The changes to NYSE MKT's rules on compensation advisers should therefore benefit investors in NYSE MKT-listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

C. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a Compensation Committee composed solely of Independent Directors is reasonable and consistent with the protection of investors.[182] The Commission notes that NYSE MKT's rules for Compensation Committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the NYSE MKT proposal would: (i) Exempt Smaller Reporting Companies from having to consider the additional independence requirements as to compensatory fees and affiliation; and (ii) exempt their Compensation Committees from having to consider the additional independence factors for compensation advisers. Under this approach, Smaller Reporting Companies will now be required to comply with only the additional requirements to provide the Compensation Committee with the sole authority and funding for the retention of compensation advisers.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for NYSE MKT to provide some flexibility to Smaller Reporting Companies. Further, in view of the potential additional costs of a consideration of the independence of compensation advisers that NYSE MKT is requiring all other listed companies to include to comply with Rule 10C–1, it is reasonable not to require a Smaller Reporting Company to conduct such analysis of compensation advisers.

D. Opportunity To Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that NYSE MKT proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is the same as the cure period suggested under Rule 10C–1, but NYSE MKT limits the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE MKT believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors. The Commission believes that the accommodation, including the proposed period and limitation, although it gives a company less leeway in certain circumstances than the cure period provided as an option by Rule 10C–1, is fair and reasonable and consistent with investor protection under Rule 6(b)(5) by ensuring that a compensation committee cannot take action without a majority of independent directors even when a member ceases to be independent and the committee is

[176] *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

[177] *See* Corporate Secretaries Letter and *supra* note 135 and accompanying text.

[178] *See supra* notes 54–55 and accompanying text.

[179] The Commission also does not agree with the argument of one commenter that NYSE Arca's substantially similar proposal must require compensation committees to specifically consider, among the independence factors relating to compensation advisers, whether such an adviser requires that clients contractually agree to indemnify or limit their liability. *See* CII Letter. The Commission views as reasonable the Exchange's belief that the six factors set forth in Rule 10C–1 are sufficient for the required independence assessment.

[180] *See* Rule 10C–1 Adopting Release, *supra* note 11.

[181] *See* Corporate Secretaries Letter.

[182] As discussed above, the Commission believes that providing an exception to this requirement for Smaller Reporting Companies in limited and exceptional circumstances is appropriate.

entitled to a period to cure that situation.

The Commission agrees with the understanding of the commenter who believed that Rule 10C–1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements. The Commission believes that NYSE MKT's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement. For example, NYSE MKT's rules provide that, unless continued listing of the company raises a public interest concern, when a company is deficient in compliance with listing standards, the Exchange will provide the company with an opportunity to provide NYSE MKT with a plan of definitive action the company has taken, or is taking, that would bring it into conformity with continued listing standards within 18 months of receipt of a notice of a deficiency.[183]

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest, since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.[184]

E. Exemptions

The Commission believes that it is appropriate for NYSE MKT to exempt from the new requirements established by the proposed rule change the same categories of issuers that are exempt from its existing standards for oversight of executive compensation for listed companies. Although Rule 10C–1 does not explicitly exempt some of these categories of issuers from its requirements, it does grant discretion to exchanges to provide additional exemptions. NYSE MKT states that the reasons it adopted the existing exemptions apply equally to the new requirements, and the Commission believes that this assertion is reasonable.

NYSE MKT proposed to exempt limited partnerships, companies in bankruptcy proceedings and open-end management investment companies that are registered under the Investment Company Act from all of the requirements of Rule 10C–1. The Commission believes such exemptions are reasonable, and notes that such entities, which were already generally exempt from NYSE MKT's existing compensation committee requirements, also are exempt from the compensation committee independence requirements specifically under Rule 10C–1.

NYSE MKT also proposes to exempt closed-end management investment companies registered under the Investment Company Act from the requirements of Rule 10C–1. The Commission believes that this exemption is reasonable because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from NYSE MKT's existing compensation committee requirements. The Commission notes that, as one commenter stated, typically registered investment companies do not employ executives or employees or have compensation committees. The Commission notes that the existing language of these exemptive provisions is not changed, but that the provisions, which go beyond Rule 10C–1's exemptions, are consistent with Rule 10C–1.

The Commission further believes that other proposed exemption provisions relating to controlled companies,[185] asset-backed issuers and other passive issuers, and issuers whose only listed equity stock is a preferred stock are reasonable, given the specific characteristics of these entities. As noted by the Exchange, many of these issuers are externally managed and do not directly employ executives; do not, by their nature, have employees, or have executive compensation policy set by a body other than their board.

The NYSE MKT proposal would continue to permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, without requiring any further disclosure from such entities. The Commission believes that granting exemptions to foreign private issuers in deference to their home country practices with respect to compensation committee practices is appropriate, and believes that the existing disclosure requirements will help investors determine whether they are satisfied with the alternative standard. The Commission notes that such entities are exempt from the compensation committee independence requirements of Rule 10C–1 to the extent such entities disclose in their annual reports the reasons they do not have independent compensation committees.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut and matches the deadline set forth by NYSE and The NASDAQ Stock Market, as revised.[186] Accordingly, the deadline gives companies until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the remaining provisions.[187]

G. Compliance Schedules: IPOs; Companies That Lose Their Exemptions; Companies Transferring From Other Markets

The Commission believes that it is reasonable for NYSE MKT to allow, with respect to IPOs, companies emerging from bankruptcy, companies ceasing to be controlled companies, companies ceasing to qualify as a foreign private issuer, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules.

The Commission also believes that the compliance schedule for companies that cease to be Smaller Reporting Companies, as revised in Amendment No. 3, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining

[183] *See supra* text accompanying notes 142–143. *See also* NYSE Response Letter, *supra* note 6.

[184] The Commission notes that the general procedures to cure non-compliance adequately address the comments made in the Corporate Secretaries Letter.

[185] The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5).

[186] *See* Securities Exchange Act Release Nos. 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (Notice of File No. SR–NYSE–2012–49); 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of File No. SR–NASDAQ–2012–109); *see also* Amendment No. 1 to File No. SR–NASDAQ–2012–109.

[187] The proposal is, however, otherwise effective on July 1, 2013, and issuers will be required to comply with the new compensation committee charter and adviser requirements as of that date. As noted above, certain existing issuers, such as smaller reporting companies, are exempt from compliance with the new independence requirement with respect to compensation committee service.

when they will be subject to the heightened requirements.

V. Accelerated Approval of Amendment No. 3 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[188] for approving the proposed rule change, as modified by Amendment Nos. 1 and 3, prior to the 30th day after the date of publication of notice in the **Federal Register**.

The change made to the proposal by Amendment No. 3 to change a reference from Item 10(f)(1) of Regulation S–K to a reference to Exchange Act Rule 12b–2 is not a substantive one and merely references an otherwise identical definition.

The revision made by Amendment No. 3 to the compliance rules for companies that cease to be Smaller Reporting Companies [189] establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance with the applicable requirements. The Commission notes that the Start Date of the compliance period for such a company is six months after the Smaller Reporting Company Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. As originally proposed a Smaller Reporting Company had to comply within six months of the Smaller Reporting Company Determination Date, and for the adviser assessment at the Smaller Reporting Company Determination Date. The Commission believes the amendments to the transitions for issuers that lose their status as a Smaller Reporting Company will afford such companies additional time to comply and avoid issues involving inadvertent non-compliance because of the provision that originally applied immediately on the Smaller Reporting Company Determination Date. The amendments also provide additional clarity on when the time frames commence, and as such the Commission believes good cause exists to accelerate approval.

The change to commentary made by Amendment No. 3 to exclude advisers that provide only certain types of services from the independence assessment is also appropriate. As discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise conflict of interest concerns. Finally, the addition of further guidance by Amendment No. 3 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the Compensation Committee consider the independence factors before selecting or receiving advice from a compensation adviser, and is not a substantive change, as it was the intent of the rule as originally proposed.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment No. 3.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment No. 3 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–2012–48 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–2012–48. 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 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 NYSE. 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–2012–48, and should be submitted on or before February 12, 2013.

VII. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by NYSE MKT, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. NYSE MKT's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

NYSE MKT's rules also, consistent with Rule 10C–1, require Compensation Committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that Compensation Committees of NYSE MKT-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of NYSE MKT's standards that require Compensation Committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide Compensation Committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR–NYSEMKT–2012–48, as modified by Amendment Nos. 1 and 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[190]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[191] that the

[188] 15 U.S.C. 78s(b)(2).

[189] *See supra* notes 76–78 and accompanying text.

[190] 15 U.S.C. 78f(b)(5).

[191] 15 U.S.C. 78s(b)(2).

proposed rule change, SR–NYSEMKT–2012–48, as modified by Amendment Nos. 1 and 3, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[192]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01104 Filed 1–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68640; File No. SR–NASDAQ–2012–109]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment Nos. 1 and 2, and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment Nos. 1 and 2 To Amend the Listing Rules for Compensation Committees To Comply With Rule 10C–1 Under the Act and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. The proposed rule change was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received eight comment letters on the proposed rule change,[5] as well as a response to the comment letters from Nasdaq.[6] On December 12, 2012, the Exchange filed Amendment No. 1 to the proposed rule change.[7] On January 4, 2013, the Exchange filed Amendment No. 2 to the proposed rule change.[8] This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2 thereto, on an accelerated basis.

II. Description of Proposed Rule Change

A. Background: Rule 10C–1 Under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[9] the Commission proposed Rule 10C–1 under the Act,[10] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[11]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee [12] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[13] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[14]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[15] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of

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[192] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (''Notice'').

[4] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from: J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law, dated October 30, 2012 (''Brown Letter''); Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, dated November 1, 2012 (''ICI Letter''); Jeff Mahoney, General Counsel, Council of Institutional Investors, dated November 1, 2012 (''CII Letter''); Harold R. Carpenter, Chief Financial Officer, Pinnacle Financial Partners, Inc., dated November 5, 2012 (''Pinnacle Letter''); Brandon J. Rees, Acting Director, Office of Investment, AFL–CIO, dated November 5, 2012 (''AFL–CIO Letter''); Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters, dated November 5, 2012 (''Teamsters Letter''); Wilson Sonsini Goodrich & Rosati Professional Corporation, dated November 14, 2012 (''Wilson Sonsini Letter); and Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter'').

[6] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Erika J. Moore, Associate General Counsel, Nasdaq, dated December 12, 2012 (''Nasdaq Response Letter'').

[7] In Amendment No. 1, Nasdaq: (a) Added language to proposed Rule 5605(d)(3) to set forth in detail the requirements of Rule 10C–1(b)(2)–(4) regarding the authority of a compensation committee to retain compensation advisers, the requirement that a listed company fund such advisers, and the independence assessment required to be made before selecting or receiving advice from such advisers, rather than incorporating these details by reference as in the original proposal, *see infra* notes 51–58 and accompanying text; (b) revised the dates by which companies currently listed on Nasdaq will be required to comply with the new rules, *see infra* notes 73–79 and accompanying text; (c) revised the phase-in schedule for companies that cease to be Smaller Reporting Companies to comply with the full range of the new requirements, *see infra* notes 85–88 and accompanying text; and (d) added a preamble to the new rules clarifying that, during the transition periods until the new rules apply, a company must continue to comply with the corresponding provisions, if any, in the current rules, *see infra* note 73. In Amendment No. 1 the Exchange also made conforming changes to the Purpose section of the proposal, provided explanations for the revisions, and clarified certain matters, *see, e.g., infra* notes 58, 194, and 199 and accompanying text; and also added, as Exhibit 3 to the proposal, the form that it will provide for companies to certify their compliance with the rules.

[8] In Amendment No. 2, Nasdaq revised the proposed rules to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S–K. *See infra* notes 59–60 and accompanying text.

[9] Public Law 111–203, 124 Stat. 1900 (2010).

[10] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[11] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[12] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)-(iii).

[13] *See* Rule 10C–1(a) and (b)(1).

[14] *See id. See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[15] *See* Rule 10C–1(b)(2).

reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[16] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[17] as well as any other factors identified by the relevant exchange in its listing standards.[18]

B. Nasdaq's Proposed Rule Change, as Amended

To comply with Rule 10C–1, Nasdaq proposes to amend two sections of its rules concerning corporate governance requirements for companies listed on the Exchange: Rule 5605, ''Boards of Directors and Committees,'' and Rule 5615, ''Exemptions from Certain Corporate Governance Requirements.'' In addition, Nasdaq proposes to make some other changes to its rules regarding compensation committees.

To accomplish these changes, the Exchange proposes to replace current paragraph (d) of Rule 5605, entitled ''Independent Director Oversight of Executive Officer Compensation,'' with a new paragraph (d) entitled ''Compensation Committee Requirements.'' Current paragraph (d) provides that compensation of the executive officers of a listed company must be determined, or recommended to the company's board for determination, either by a compensation committee comprised solely of ''Independent Directors'' [19]; or, as an alternative to a formal committee, by a majority of the board's Independent Directors in a vote in which only Independent Directors participate (''Alternative Option'').[20]

1. Compensation Committee Composition and Independence Standards

First, Nasdaq proposes that each listed company be required to have a compensation committee.[21] The Alternative Option described above would be eliminated. In addition, Nasdaq proposes that the compensation committee be required to be composed of at least two members, each of whom must be an Independent Director as defined in Nasdaq's rules and also meet the additional independence requirements described below.[22]

In discussing the proposed elimination of the Alternative Option, Nasdaq stated that it had considered whether the Alternative Option remains appropriate, ''given the heightened importance of compensation decisions in today's corporate governance environment.'' The Exchange concluded that ''there are benefits from a board having a standing committee dedicated solely to oversight of executive compensation.'' [23] In discussing the proposed requirement that the committee have at least two members, the Exchange stated that ''[g]iven the importance of compensation decisions to stockholders, Nasdaq believes that it is appropriate to have more than one director responsible for these decisions.'' [24]

Nasdaq also proposes that a compensation committee must have a formal written charter.[25] Under this provision, a listed company must certify that it has adopted such a charter and that its compensation committee will review and reassess the adequacy of that charter on an annual basis.[26]

The charter must specify the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, processes, and membership requirements.[27] It must specify the committee's responsibility for determining or recommending to the board for determination, the compensation of the CEO and all other executive officers of the company, and provide that the CEO may not be present during voting or deliberations on his or her compensation.[28] In addition, the charter must specify the committee's responsibilities and authority set forth in the Exchange's rules with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting advisers; and receiving funding from the company to engage them, which are discussed in detail below.[29]

Nasdaq's rules currently require each member of a listed company's compensation committee to be an Independent Director as defined in Nasdaq Rule 5605(a)(2).[30] Rule 10C–1, as discussed above, provides that exchange standards must require compensation committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, Nasdaq discussed its consideration of these factors,[31] and proposed the following [32]:

[16] *See* Rule 10C–1(b)(3).

[17] *See* Rule 10C–1(b)(4). The six factors, which Nasdaq proposes to set forth explicitly in its rules, are specified in the text accompanying note 55, *infra*.

[18] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[19] ''Independent Directors,'' as defined in Nasdaq Rule 5605(a)(2) and used herein, includes a two-part test for independence. The rule sets forth seven specific categories of directors who cannot be considered independent because of certain discrete relationships (''the bright-line tests''); and also provides that a listed company's board must make an affirmative determination that each independent director has no relationship that, in the opinion of the board, ''would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.'' *Id*. *See also* the Interpretive Material to Rule 5605.

[20] The current rule also provides that the chief executive officer (''CEO'') may not be present during voting or deliberations regarding the CEO's own compensation. *See* Rule 5605(d)(1).

[21] *See* proposed Rule 5605(d)(2).

[22] *Id*. For the definition of ''Independent Director, *see supra* note 19.

[23] *See* Notice, *supra* note 3, for the Exchange's more complete explanation of its reasons for the proposed change, including a discussion of whether eliminating the Alternative Option would pose an undue hardship on Nasdaq-listed companies.

[24] *See id*. for the Exchange's more complete discussion of the proposed size requirement.

[25] *See* proposed Nasdaq Rule 5605(d)(1). As discussed further in Section II.B.3., a Smaller Reporting Company may adopt either a formal written compensation committee charter or a board resolution that specifies the committee's responsibilities and authority.

[26] The Commission notes that Rule 10C–1 does not require a listed issuer specifically to have a charter. As noted above, however, *see supra* notes 15–17 and accompanying text, Rule 10C–1 does require a compensation committee to have certain specified authority and responsibilities. Often, listed issuers will specify authority and responsibilities of this kind in a charter in any case. The proposed rule requires them to have a charter, and to include this authority and set of responsibilities in addition to the required content discussed *infra* at text accompanying notes 27–29.

[27] Proposed Rule 5605(d)(1)(A). Nasdaq states that this requirement is copied from the Exchange's similar listing rule relating to audit committee charters, Rule 5605(c)(1), except that the annual review and reassessment requirement is written prospectively, rather than retrospectively. The proposed rule change includes a conforming revision to make the audit committee review and reassessment prospective, as well. *See* Notice.

[28] Proposed Rule 5605(d)(1)(B)–(C). Nasdaq states that these provisions are based upon Nasdaq's current compensation-related listing rules, except that the Alternative Option discussed above is not available under the proposed rule change. *See supra* note 21 and accompanying text.

[29] *See* proposed Rule 5605(d)(1)(D) and *infra* notes 49–58 and accompanying text. Because Smaller Reporting Companies are not required to comply with the provisions relating to compensation advisers in proposed Nasdaq Rule 5605(d)(3), *see infra* notes 62–67, their charters or board resolutions are not required to reflect these responsibilities.

[30] *See supra* note 19.

[31] Notice, *supra* note 3.

[32] These additional factors would not apply to the selection of members of the compensation

Continued

With respect to the Fees Factor, Nasdaq proposes to adopt a provision stating that each member of a compensation committee of a listed company must not accept directly or indirectly any consulting, advisory or other compensatory fee from the listed company or any of its subsidiaries.[33] In discussing its review of its current listing rules and the Fees Factor, Nasdaq noted that its rules for audit committees of listed companies, in meeting the criteria of Rule 10A–3 under the Act, prohibit an audit committee member from accepting such fees. The Exchange concluded that ''there is no compelling justification to have different standards for audit and compensation committee members'' with respect to the Fees Factor.[34]

As currently permitted under Nasdaq's rules for audit committee members, however, the proposed rule would permit a compensation committee member to receive fees for his or her membership on the committee, on the company's board, or on any other board committee.[35] In addition, a compensation committee member would be permitted to receive fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the company, provided that such compensation is not contingent in any way on continued service.[36]

With respect to the Affiliation Factor, Nasdaq proposes that, in determining whether a director is eligible to serve on the compensation committee, the company's board also must consider whether the director is affiliated with the company, a subsidiary of the company, or an affiliate of a subsidiary of the company to determine whether such affiliation would impair the director's judgment as a member of the compensation committee.[37] In discussing its review of its current rules and its consideration of the Rule 10C–1 requirement in this area,[38] the Exchange noted that its rules for audit committees of listed companies, in meeting the criteria of Rule 10A–3 under the Act, prohibit an audit committee member from being an affiliated person of the issuer or any subsidiary thereof. The Exchange said that it concluded, however, that ''such a blanket prohibition would be inappropriate for compensation committees.'' [39] Nasdaq believes that ''it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.'' [40]

Although Rule 10C–1 requires that exchanges consider ''relevant factors'' not limited to the Fees and Affiliation Factors, Nasdaq states that, after reviewing its current and proposed listing rules, it concluded that these rules are sufficient to ensure the independence of compensation committee members. The Exchange therefore determined not to propose further independence requirements.[41]

Nasdaq proposes a cure period for a failure of a listed company to meet its committee composition requirements. The proposed cure period is the same as the cure period currently provided in Nasdaq's rules for noncompliance with the requirement to have a majority independent board.[42] Under the provision, if a listed company fails to comply with the compensation committee composition requirements due to one vacancy, or if one compensation committee member ceases to be independent due to circumstances beyond the member's reasonable control, the company must regain compliance by the earlier of the next annual shareholders meeting or one year from the occurrence of the event that caused the noncompliance.[43]

However, if the annual shareholders meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance. As explained by Nasdaq, this provides a company at least 180 days to cure noncompliance and would typically allow a company to regain compliance in connection with its next annual meeting.[44] The proposed rule also requires a company relying on this provision to provide notice to Nasdaq immediately upon learning of the event or circumstance that caused the noncompliance.

Nasdaq's current rules relating to compensation committees include an exception that allows a director who is not an Independent Director to be appointed to such a committee under exceptional and limited circumstances, as long as that director is not currently an executive officer, an employee, or the family member of an executive officer.[45] The exception applies, however, only if the committee is comprised of at least three members and the company's board determines that the individual's membership on the committee is required by the best interests of the company and its shareholders.[46] The exception is retained under the proposed rule change, and permits a listed company to avail itself of the allowance even for a director who fails the new requirements regarding the Fees and Affiliation Factors.[47] A compensation committee member may not serve longer than two years under this exception. In addition, a company relying on the exception must make certain disclosures on its Web site or in its proxy statement regarding the nature of the relationship and the reasons for the determination.

In its discussion of this provision,[48] Nasdaq notes that its rules for audit committees and nominations committees of listed companies also include such an exception. The Exchange states that, while these exceptions are used infrequently by its listed companies, it believes that they are an important means to allow companies flexibility as to board and committee membership and composition in unusual circumstances. The Exchange further believes that the exception may be particularly important for smaller companies.

2. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, as modified by Amendment No. 1,[49] Nasdaq proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act by setting forth those requirements in full in its own rules.[50] Thus, proposed Nasdaq Rule 5605(d)(3), as amended, provides that the compensation committee of a listed company may, in its sole discretion,

committee of a Smaller Reporting Company. *See infra* note 64.

[33] *See* proposed Rule 5605(d)(2)(A).

[34] *See* Notice.

[35] *See supra* note 33.

[36] *Id.*

[37] *See* proposed Rule 5605(d)(2)(A).

[38] *See* Notice.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *See* Rule 5605(b)(1)(A) regarding the majority board requirement.

[43] *See* proposed Rule 5605(d)(4).

[44] *See* Notice.

[45] *See* current Rule 5605(d)(3).

[46] *See id.*

[47] *See* proposed Rule 5605(d)(2)(b).

[48] *See* Notice.

[49] *See supra* note 7. Nasdaq's proposal as submitted originally incorporated the requirements of Rule 10C–1(b)(2)–(4) by reference. The Exchange amended the proposal to set forth those requirements explicitly.

[50] Rule 10C–1(b)(4) does not include the word ''independent'' before ''legal counsel'' and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In setting forth the requirements of Rule 10C–1(b)(2) and (3), Nasdaq has deleted the word ''independent'' prior to ''legal counsel'' so as to avoid confusion.

retain or obtain the advice of a compensation consultant, legal counsel or other adviser.[51] Further, the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, legal counsel and other adviser retained by the compensation committee.[52] In addition, the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, legal counsel or any other adviser retained by the compensation committee.[53]

Proposed Nasdaq Rule 5605(d)(3), as amended, also sets forth explicitly, in accordance with Rule 10C–1, that the compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration the six factors set forth in Rule 10C–1 regarding independence assessments of compensation advisers.[54]

The six factors, which are set forth in full in the proposed rule, are: (i) The provision of other services to the issuer by the person that employs the compensation consultant, legal counsel or other adviser; (ii) the amount of fees received from the issuer by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (iii) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (iv) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (v) any stock of the issuer owned by the compensation consultant, legal counsel or other adviser; and (vi) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the issuer.[55]

Proposed Rule 5605(d)(3), as amended, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting, or receiving advice from, a compensation adviser.[56] It further clarifies that compensation committees may select, or receive advice from, any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in the rule.[57] In Amendment No. 1, Nasdaq emphasizes that a compensation committee is not required to retain an independent compensation adviser; rather, a compensation committee is required only to conduct the independence analysis described in Rule 10C–1 before selecting a compensation adviser.[58]

In Amendment No. 2, Nasdaq added language to the provision regarding the independence assessment of compensation advisers[59] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice.

Nasdaq states that this exception copies language from Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[60] The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S–K.[61]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[62] Consistent with this Rule 10C–1 provision, Nasdaq, as a general matter, proposes that a smaller reporting company, as defined in Rule 12b–2 under the Act (hereinafter, a ''Smaller Reporting Company''), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C–1.[63] Thus, Nasdaq proposes not to require Smaller Reporting Companies to comply with the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation.[64]

In addition, a Smaller Reporting Company will not be required to include in its compensation committee charter (or, as discussed below, in a board resolution) a grant of authority to the committee to retain compensation advisers, a requirement that the company fund such advisers, and a requirement that the committee consider independence factors before selecting such advisers. As stated by Nasdaq, the exception for Smaller Reporting Companies also means that the compensation committees of such companies are not required to review and reassess the adequacy of their charters on an annual basis.[65] The Exchange believes that this approach will minimize new costs imposed on Smaller Reporting Companies and allow them some flexibility not allowed for larger companies.

Nasdaq proposes not to exclude a Smaller Reporting Company, however, from its proposal to require a listed

[51] *See* Item 9 of Amendment No. 1.

[52] *See id.* The proposal, as amended, also includes a provision, derived from Rule 10C–1, stating that nothing in these rules may be construed: (i) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, legal counsel or other adviser to the compensation committee; or (ii) to affect the ability or obligation of a compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee. *Id.*

[53] *Id.*

[54] *See* Rule 10C–1(b)(4).

[55] Rule 10C–1(b)(4)(i)–(vi).

[56] *See id.*

[57] *See id.*

[58] *See* Item 2 of Amendment No. 1.

[59] *See* proposed Rule 5605(d)(3), as amended by Amendment No. 2.

[60] *See* 17 CFR 229.407(e)(3)(iii).

[61] *See* Amendment No. 2.

[62] *See supra* Section II.A.

[63] *See* proposed Rule 5605(d)(5).

[64] *See supra* text accompanying notes 33 and 37.

[65] *See* Notice. In addition, a Smaller Reporting Company, like other listed companies, will be required to certify that it has adopted a formal written compensation committee charter (or, if it so chooses, a board resolution) that specifies the scope of the committee's responsibilities and its responsibility for determining or recommending to the board for determination the compensation of the CEO and other executive officers. *See supra* notes 27–28.

company to have, and to certify that it has and will continue to have, a compensation committee of at least two members, each of whom must be an Independent Director as defined in the Exchange's Rule 5605(a)(2).[66] In its discussion of the rules from which Smaller Reporting Companies are not exempt, Nasdaq notes that its current listing rules regarding compensation committees do not provide any exemptions for Smaller Reporting Companies.[67]

4. Exemptions

Nasdaq proposes that its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in Nasdaq Rule 5615, apply also to the new requirements of the proposed rule change. These include exemptions for asset-backed issuers and other passive issuers, cooperatives, limited partnerships, management investment companies registered under the Investment Company Act of 1940 (''registered management investment companies''), and controlled companies.[68] Nasdaq states that each of these categories has ''traditionally been exempt from Nasdaq's compensation-related listing rules,'' and believes that the reasons for the exemptions apply to the new requirements, as well.[69]

Asset-backed issuers and other passive issuers have been exempted, according to the Exchange, because they do not have a board of directors or persons acting in a similar capacity and their activities are limited to passively owning or holding (as well as administering and distributing amounts in respect of) assets on behalf of or for the benefit of the holders of the listed securities. Certain member-owned cooperatives have been exempt, the Exchange states, because they do not have a publicly traded class of common stock. Nasdaq further states that the structure of limited partnerships requires that public investors have limited rights and the general partners make all significant decisions about the operation of the limited partnership, and, as such, limited partners do not expect to have a voice in the operations of the partnership. Registered management investment companies, the Exchange states, are already subject to a pervasive system of federal regulation in certain areas of corporate governance. Controlled companies, by definition, are companies of which more than 50% of the voting power for the election of directors are held by an individual, a group or another company, and the exemption for such companies, as stated by Nasdaq, recognizes that majority shareholders have the right to select directors and control certain key decisions, such as executive officer compensation, by virtue of their ownership rights.

Concerning foreign private issuers, Nasdaq's current rules permit any such issuer to follow its home country practice in lieu of many of Nasdaq's corporate governance listing standards, including the Exchange's compensation-related listing rules.[70] This allowance is granted on condition that the issuer discloses in its annual report filed with the Commission each requirement that it does not follow and describes the home country practice followed by the issuer in lieu of such requirement.[71] Nasdaq proposes that this allowance continue to apply generally to the Exchange's compensation committee rules as revised by the instant proposal on the same condition, namely that the issuer discloses each requirement it does not follow and describes the home country practice it follows in lieu of such requirement. However, with respect, specifically, to the enhanced standards of independence for compensation committees (concerning fees received by members and their affiliations) Nasdaq proposes that, if a listed company follows its home country practice, it must additionally disclose in its annual report filed with the Commission the reasons why it does not have an independent compensation committee as set forth in these standards.[72]

5. Transition to the New Rules for Companies Listed as of the Effective Date[73]

The proposed rule change, as amended, provides that certain of the new requirements for listed companies will be effective on July 1, 2013.[74] Specifically, as of that date, listed companies will be required to comply with the provisions of the proposed rule change relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting such advisers.[75] To the extent a company does not yet have a compensation committee by that date,[76] these provisions will apply to the Independent Directors who determine, or recommend to the board for determination, the compensation of the CEO and all other executive officers of the company.[77]

[66] *See* proposed Rule 5605(d)(5). *See also* proposed interpretive material IM–5605–6. As noted above, listed companies other than Smaller Reporting Companies and other exempted issuers must comply with the additional independence requirements for compensation committee members set forth in proposed Nasdaq Rule 5605(d)(2)(A). *See* discussion in Section II.B.1., *supra.*

[67] *See* Notice.

[68] *See* Rule 5615(a)(1), (2), (4), and (5).

[69] *See* Notice. *See also* discussion below at note 76, *infra,* for transition periods for companies that currently use the Alternative Option and do not have compensation committees.

[70] *See* Rule 5615(a)(3). Under Nasdaq's listing rules, ''foreign private issuer'' has the same meaning as under Rule 3b–4 under the Exchange Act. *See* Rule 5005(a)(18). Nasdaq's listing rules have traditionally provided qualified exemptions for foreign private issuers so that such issuers are not required to do any act that is contrary to a law, rule or regulation of any public authority exercising jurisdiction over such issuer or that is contrary to generally accepted business practices in the issuer's country of domicile, except to the extent such exemptions would be contrary to the public securities laws. *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154, 64165 (November 12, 2003) (SR–NASD–2002–138).

[71] A Foreign Private Issuer that is not required to file its annual report with the Commission on Form 20–F may make this disclosure only on its Web site.

[72] As stated by Nasdaq, this proposed condition adopts the requirements of Rule 10C–1(b)(1)(iii)(A)(4), which provides an exemption from the independence requirements of Rule 10C–1 for a ''foreign private issuer that discloses in its annual report the reasons that the foreign private issuer does not have an independent compensation committee.''

[73] During the transition periods described herein, until a company is required to comply with a particular provision of the new rules, the company must continue to comply with the corresponding provision, if any, in the current rules, which are re-designated as Rule 5605A(d) and IM–5605A–6 (''Sunsetting Provisions). *See* Amendment No. 1, which added this clarification as a preamble to the new Rule 5605(d). The addition mirrors a similar statement already included in the original proposal as a preamble to the Sunsetting Provisions.

[74] *See* proposed Rule 5605(d)(6), as modified by Amendment No. 1 to the proposed rule change. The original proposal provided that these provisions were to be effective immediately.

[75] *Id.*

[76] A listed company that does not currently have a compensation committee is not required to meet the requirement to have such a committee until the earlier of its first annual meeting after January 15, 2014, or October 31, 2014. *See infra* note 78 and accompanying text.

[77] While the provisions of the proposed rule change relating to the authority of a compensation committee to retain compensation advisers, the company's obligation to fund such advisers, and the responsibility of the committee to consider independence factors before selecting such advisers must be assigned to the committee or Independent Directors acting in lieu of a committee by July 1, 2013, the requirement that they be included in a written committee charter does not apply until a later date, as it is one of the remaining provisions of the new compensation committee rule subject to the transition period discussed below. Rule 5605(d)(6) states that companies should consider under state corporate law whether to grant the specific responsibilities and authority referenced through a charter, resolution or other board action.

Regarding the remaining new provisions for compensation committees, the proposed rule change, as amended, provides that, in order to allow listed companies to make necessary adjustments in the course of their regular annual meeting schedule, they will have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014,[78] to comply with these remaining provisions.[79] A listed company must certify to Nasdaq, no later than 30 days after the final implementation deadline applicable to it, that it has complied with Rule 5605(d).

6. Phase-In Schedules: IPOs; Companies That Lose Their Exemptions; Companies Transferring From Other Markets

Nasdaq's existing rules permit a company listing in connection with its initial public offering (''IPO'') to phase in its compliance with the Exchange's independence requirements for compensation and nominations committees,[80] as follows: Each such committee must have one independent member at the time of listing; a majority of members must be independent within 90 days of listing; and all members of such committees must be independent within one year of listing. The same phase-in schedule is permitted for companies emerging from bankruptcy[81] and companies ceasing to be controlled companies.[82] Nasdaq proposes that this schedule continue to apply and that it remain the same with respect to the new compensation committee composition requirements set forth in the proposed rule change.[83]

As stated by Nasdaq, this would mean that a company listing on the Exchange in connection with its IPO, a company emerging from bankruptcy, or a company ceasing to be a controlled company would be permitted to phase in its compliance with the requirements that a compensation committee have at least two members, that these members be Independent Directors as defined in Nasdaq's rules, and that they meet the enhanced standards of independence for compensation committees (concerning fees received by members and their affiliations) adopted pursuant to Rule 10C–1.[84]

For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 1, establishes a phase-in schedule based on certain dates relating to the company's change in status.[85] Pursuant to Rule 12b–2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the ''Determination Date''). A company with a public float of $75 million or more as of the Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Determination Date. Under Nasdaq's proposal, the day of this change in status is the beginning of the phase-in period (''Start Date'').[86]

By six months from the Start Date, the company will be required to comply with Rule 5605(d)(3), which sets forth the provisions described above relating to authority of a compensation committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers. By six months from the Start Date, the company will also be required to certify to Nasdaq (i) that it has complied with the requirement in Rule 5605(d)(1) to adopt a formal written compensation committee charter including the content specified in Rule 5605(d)(1)(A)–(D)[87]; and (ii) that it has complied, or within the applicable phase-in schedule will comply, with the additional requirements in Rule 5605(d)(2)(A) regarding compensation committee composition.

Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) One member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.[88]

However, because a Smaller Reporting Company is required to have a compensation committee and such committee is required to be comprised of at least two Independent Directors, a company that has ceased to be a Smaller Reporting Company will not be permitted to use the phase-in schedule for these requirements.

Nasdaq proposes no changes to the phase-in schedule in its current listing rules for companies transferring to Nasdaq from other markets.[89]

7. Conforming Changes and Correction of Typographical Errors

Finally, Nasdaq proposes to make minor conforming changes to its requirements relating to audit and nominations committees and to correct certain typographical errors in its current corporate governance requirements.[90]

III. Comments on the Proposed Rule Change and Nasdaq's Response

As stated previously, the Commission received a total of eight comment letters on the proposed rule change.[91] Three commenters expressed general support for the proposal, although one of these commenters found it wanting in some respects and another believed that it needed to be amended before being approved.[92] Some commenters

[78] *See* proposed Rule 5605(d)(6), as modified by Amendment No. 1 to the proposed rule change. The original proposal had required these provisions to be implemented by the company's second annual meeting after the proposal was approved, but no later than December 31, 2014.

[79] The remaining provisions subject to this schedule include IM–5605–6, which is new interpretive material to be included in the text of Nasdaq's rules that elaborates on the compensation committee requirements.

[80] *See* Rule 5615(b)(1).

[81] *See* Nasdaq Listing Rule 5615(b)(2).

[82] *See* Nasdaq Listing Rule 5615(c)(3).

[83] Specifically, the phase-in schedule would apply to proposed Rule 5605(d)(2).

[84] *See* Notice for an illustration provided by Nasdaq of how the compensation committee composition requirement will interact with the minimum size requirement.

[85] *See* proposed Rule 5605(d)(4), as amended. In the proposal as originally submitted, the phase-in schedule was to be the same as the phase-in schedule for a company listing in conjunction with an IPO, and was to start to run on the due date of the filing with the Commission in which the company is required to report that it is an issuer other than a Smaller Reporting Company. In Amendment No. 1, Nasdaq states that while the revised phase-in schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences.

[86] *See* Amendment No. 1.

[87] *See supra* notes 26–29. This includes the provisions with which the company is now required to comply relating to authority of a compensation committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers.

[88] During the phase-in schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

[89] *See* Rule 5615(b)(3).

[90] *See* Exhibit 5 of the proposed rule change.

[91] *See supra* note 5.

[92] *See* ICI Letter, which urged approval of the proposal; Teamsters Letter, which strongly supported the proposal while believing that it did not fully satisfy the requirements of Rule 10C–1 and that it did not go far enough in certain respects; and Corporate Secretaries Letter, which generally supported the proposal, but believed that certain of its aspects were unnecessarily burdensome or not sufficiently clear such that the proposal needed to

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supported specific provisions of the proposal,[93] some opposed specific provisions,[94] and some sought clarification of certain aspects of the proposal.[95] Some commenters believed that the proposal fell short of meeting the requirements of Rule 10C–1 and believed that it should have been more stringent.[96] These and other comments, as well as Nasdaq's responses to some of the comments that raised issues with the proposal, are summarized below.

A. Compensation Committee Composition

Three commenters expressed support for Nasdaq's proposal to require all listed companies to have standing compensation committees,[97] and two further supported the proposal that such committees have at least two members.[98] Three commenters supported the provision that requires compensation committees to adopt a written charter.[99]

Two commenters opposed the proposal's absolute prohibition barring a compensation committee member from receiving any fees from the company.[100] One of these commenters argued, for example, that such a prohibition is ''unnecessarily prescriptive and effectively precludes certain professionals, particularly attorneys, from compensation committee service.'' [101] In addition, this commenter argued, because most Nasdaq companies have three committees that require Independent Directors (audit, compensation, and nominations committees) and audit committee members are already subject to a ''no compensatory fee'' restriction, adding the same restriction for compensation committee membership would impose it ''on a very high percentage of the independent directors.'' [102] This commenter suggested that the Commission reject the proposed rule and that, if Nasdaq determined to maintain a prohibition, the prohibition should not be absolute. Rather, this commenter argued, ''some level below a de minimus amount'' of fees should be permitted and fees for service that have no relationship to the work of the compensation committee should be excluded.[103]

In a similar vein, the other commenter opposing an absolute bar believed that it is important to companies that seek to maximize the contributions of their directors not to be restricted by such a prohibition, and expressed concern that the proposal would ''disproportionately impact small- and mid-cap companies, whose boards tend to be smaller and who have fewer resources to engage non-employee advisers and consultants.'' [104] This commenter believed that a better approach would be to have a company's board of directors consider such consulting or advisory fees in making its determination as to whether the member's receipt of such compensation would interfere with the member's exercise of independent judgment.[105]

In response, Nasdaq stated that it had carefully weighed the potential benefits of the prohibition, and had determined that the payment of direct or indirect fees from a company to a compensation committee member ''could influence, or create the appearance of influencing, the member's judgment and therefore render the member unwilling or unable to provide a truly independent voice on executive compensation decisions.'' [106] Nasdaq acknowledged that the prohibition will preclude certain professionals from service on compensation committees, but stated that, ''given the heightened importance of executive compensation decisions in today's business environment,'' it believes that ''the goal of ensuring independent compensation decisions outweighs the potential negative impact of excluding a small group of individuals'' from such service.[107]

Three commenters generally supported Nasdaq's proposal that members of compensation committees must not accept any consulting, advisory or other compensatory fees,[108] despite their own belief, generally, that additional requirements or prohibitions should be imposed.[109] Two of these commenters believed, however, that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[110] Another commenter argued that the language of Section 10C of the Act itself, as well as its legislative history, indicates Congress's intent that such fees be considered.[111] These commenters believed that compensation for board service ''can, in certain circumstances, impair independence,'' [112] because ''high director fees relative to other sources of income can compromise director objectivity,'' [113] and ''highly paid directors also may be more inclined to approve large executive pay packages.'' [114] One commenter believed that the requirement of Section 10C of the Act and Rule 10C–1 to consider the source of compensation of a director goes further, and applies to all types of compensation that a director may receive, including compensation paid by any person, including non-issuers.[115]

In its response to comments, Nasdaq stated that companies typically adopt a uniform compensation policy that applies to all directors, not only those who serve on compensation committees, such that ''a requirement to determine eligibility for compensation committee service based on director fees would lead to no meaningful distinction among directors.'' [116] In addition, Nasdaq stated, ''directors should be adequately compensated to ensure that they devote appropriate time and attention to their roles and responsibilities.'' Nasdaq also observed that, to the extent a conflict of interest exists because directors set their own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director

be amended before being approved by the Commission.

[93] *See* AFL–CIO Letter, Brown Letter, CII Letter, ICI Letter, and Teamsters Letter.

[94] *See* AFL–CIO Letter, Brown Letter, and Pinnacle Letter. *See also* CII Letter, which stated that it did not support certain specific aspects of the proposal.

[95] *See* Pinnacle Letter and Corporate Secretaries Letter.

[96] *See, e.g.,* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

[97] *See* AFL–CIO Letter, CII Letter, and Teamsters Letter.

[98] *See* AFL–CIO Letter, Teamsters Letter.

[99] *See* AFL–CIO Letter, CII Letter, and Teamsters Letter.

[100] *See* Pinnacle Letter and Corporate Secretaries Letter.

[101] Pinnacle Letter. The commenter observed that the rule would disqualify, for instance, a knowledgeable employment attorney whose firm provides only a limited amount of real estate closing or non-employment litigation services, and neither he nor his firm provided employment or compensation advice to the company. *Id.*

[102] *Id.*

[103] *Id.*

[104] Corporate Secretaries Letter.

[105] *Id.*

[106] *See* Nasdaq Response Letter.

[107] *Id. See also infra* text accompanying note 143.

[108] *See* AFL–CIO Letter, CII Letter, and Teamsters Letter.

[109] For a discussion of the additional kinds of rules these comments favored relating to payments made to members of compensation committees, and Nasdaq's response to their arguments, *see infra* notes 123–127 and accompanying text.

[110] *See* AFL–CIO Letter and Teamsters Letter, noting that Rule 10C–1 requires the exchanges to consider a director's ''source of compensation,'' and arguing that this phrase includes director fees. In the proposal, Nasdaq stated that it does not believe that the intent of the Dodd-Frank Act or Rule 10C–1 was to limit independence based on director compensation. *See* Notice.

[111] *See* Brown Letter.

[112] *Id.*

[113] AFL–CIO Letter. *See also* Teamsters Letter, arguing that directors who are highly paid ''may be more inclined to approve large executive pay packages.''

[114] AFL–CIO Letter.

[115] *See* Brown Letter.

[116] Nasdaq Response Letter.

compensation through this means.[117] The Exchange further cited to the requirement in its rules that a company board make an affirmative determination that each Independent Director has no relationship that, in the opinion of the board, would interfere with his or her independent judgment in carrying out director responsibilities, and that a board could therefore consider director fees in this context.[118]

With respect to the other prong of Nasdaq's independence standard for compensation committee members, one commenter stated that it did not object to the Exchange's proposal to require the board of a listed company to consider whether a director is affiliated with the company or any of its subsidiaries and their affiliates in determining eligibility for compensation committee membership.[119] Another commenter, on the other hand, expressed disappointment that the Exchange did not propose a ban on such affiliations, maintaining that ''affiliated persons—such as a large shareholder seeking a change in control of the company—may have interests or investment time horizons that differ from shareholders generally.'' [120]

In response to the latter commenter, Nasdaq stated that it had considered whether to adopt such a prohibition, but concluded that ''such a blanket prohibition would be inappropriate for compensation committee members.'' [121] The Exchange believed that it may be desirable for representatives of significant stockholders in a listed company to serve on its compensation committee ''since their interests are aligned with other stockholders in seeking a rational compensation program.'' [122]

Some commenters believed that the proposed rule should explicitly require the board of a listed company, when considering affiliations of a director in determining eligibility for the compensation committee, to consider personal or business relationships between the director and the company's executive officers.[123] As expressed by one commenter, ''too many corporate directors have significant personal, financial or business ties to the senior executives that they are responsible for compensating.'' [124]

Some commenters believed that related party transactions should explicitly be included as a relevant factor in determining independence for members of compensation committees.[125] The additional requirements suggested by commenters also included disqualification of a director from membership on the compensation committee if an immediate family member of the director received compensation in excess of $120,000 a year from the company even if that family member was not an executive officer of the company; [126] or if the director has, or in the past five years has had, a personal contract with the company, an executive officer of the company, or any affiliate of the company.[127]

Nasdaq responded that its definition of Independent Directors, in addition to the bright-line tests of independence that it imposes,[128] requires a company's board to make an affirmative determination that each such director has no relationship that, in the opinion of the board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[129] ''This bifurcation,'' Nasdaq stated, ''recognizes that [Nasdaq] cannot in its rules legislate every possible relationship between a [company] and its directors and therefore empowers the board, which must be comprised of a majority of Independent Directors, to assess the relevant relationships.''

Several commenters read a statement made by the Commission in adopting Rule 10C–1 as indicating that no single factor could determine a director's independence,[130] and believed that such a position undermines the intent of the rule.[131] Two commenters explicitly sought clarification from Nasdaq that a single factor can result in the loss of independence.[132]

In its response letter, Nasdaq confirmed that a director cannot be independent if he or she fails any of the bright-line prohibitions in the definition of Independent Director or accepts directly or indirectly any consulting, advisory, or other fee from the company or any of its subsidiaries. The Exchange stated that its proposals ''operate to exclude directors who fail these tests from serving on the compensation committee.'' [133]

Some of the above commenters expressed the belief, in general, that the definition of an independent director should be more narrowly drawn, that the bright-line tests of independence should be strengthened, and that the standards of independence should be uniform for all committees requiring Independent Directors.[134]

Several commenters did not support the exception proposed by Nasdaq [135] to allow a director who fails to meet the enhanced independence standards for compensation committees to be appointed to such a committee under exceptional and limited circumstances, provided that the director is not currently an executive officer, an employee, or the family member of an executive officer.[136] These commenters noted that, while providing a cure period when an independent director loses his or her independent status, Section 10C of the Act does not provide an exception to allow the appointment of a non-independent director in the first instance.[137] One commenter expressed the belief that the cure period provides sufficient flexibility for companies when a director ceases to be independent, such that this additional exception is not necessary.[138] One commenter added that the standard set by the proposed rule for permitting the exception to be used—when the appointment is in ''the best interests of the Company and its Shareholders''—is ''vague and ill-defined.'' [139]

Nasdaq responded that its proposal is consistent with Rule 10C–1, which permits an exchange to exempt from the enhanced independence requirements ''a particular relationship with respect to members of the compensation committee, as each national securities exchange * * * determines is appropriate, taking into consideration the size of an issuer and any other relevant factors.'' [140] Nasdaq noted that the exception for exceptional and limited circumstances has been included in its rules for oversight of executive compensation committees

[117] *Id.*

[118] *Id.*

[119] *See* CII Letter.

[120] *See* Teamsters Letter.

[121] Nasdaq Response Letter.

[122] *Id.*

[123] *See* AFL–CIO Letter, Brown Letter, CII Letter, Teamsters Letter.

[124] AFL–CIO Letter. *See also* Teamsters Letter.

[125] *See* AFL–CIO Letter and Teamsters Letter.

[126] *See* AFL–CIO Letter and Teamsters Letter. Nasdaq's definition of Independent Director already disqualifies a director from membership on the compensation committee if an immediate family member of the director received in excess of $120,000 from the company and also was an executive officer of the company.

[127] *See* CII Letter.

[128] *See supra* note 19.

[129] *See* Nasdaq Response Letter.

[130] *See* AFL–CIO Letter, Brown Letter, Teamsters Letter.

[131] *See, e.g.,* Teamsters Letter.

[132] *See* AFL–CIO Letter, Brown Letter.

[133] Nasdaq Response Letter.

[134] *See* CII Letter, AFL–CIO Letter, Teamsters Letter.

[135] *See supra* note 47.

[136] *See* AFL–CIO Letter, Brown Letter, CII Letter.

[137] *See, e.g.,* CII Letter.

[138] *See* AFL–CIO Letter.

[139] Brown Letter.

[140] Rule 10C–1(b)(1)(iii)(B).

since they were implemented.[141] The Exchange stated that the exception has been used throughout its life—albeit infrequently—and that the Exchange therefore believes that it adds value to its rules.[142] The Exchange added that it believed that it is appropriate to allow a listed company the flexibility afforded by the provision and that it is particularly important for a smaller company ''that may have relationships that require such flexibility,'' and that, in this way, the exception also addresses concerns raised by some commenters that the proposal to prohibit a compensation committee member from accepting directly or indirectly any consulting, advisory or other compensatory fee from the company is overly prescriptive.[143]

B. Compensation Adviser Independence Factors

The Commission received letters from three commenters relating to the provision of the proposed rule change that requires a compensation committee to take into consideration the factors set forth in the proposal in the selection of a compensation consultant, legal counsel, or other adviser to the committee.[144]

One commenter believed that Nasdaq's proposed rule could be read as requiring a compensation committee to consider the independence factors set forth in Rule 10C–1 only when selecting independent counsel, rather than any outside legal counsel that might provide legal advice to a compensation committee.[145] The commenter sought an explicit statement from Nasdaq that a compensation committee is not required to consider the enumerated independence factors with respect to any outside legal counsel, ''other than in circumstances where the compensation committee has determined it is advisable to retain independent legal counsel, such as in the case of an investigation or litigation.'' [146] Otherwise, the commenter believed, the proposed rule ''may cause an unnecessary expenditure of resources by companies that feel compelled to conduct an independent analysis of all counsel providing advice to the Committee.'' [147]

In its response letter, Nasdaq disagreed with this commenter's reading of Rule 10C–1, stating that, while a compensation committee is not required to retain an independent compensation adviser, the compensation committee is required to conduct the independence analysis set forth in Rule 10C–1 before selecting any compensation adviser other than in-house legal counsel.[148]

A second commenter believed that at least one additional factor should be considered: ''whether the compensation committee consultants, legal counsel, or other advisers require that their clients contractually agree to indemnify or limit their liability.'' [149] The commenter believed that such contractual provisions ''raise conflict of interest red flags'' that every compensation committee should consider in determining the independence of the consultant.[150]

Another commenter, while generally supporting the Nasdaq proposal, maintained that the required independence assessment will be ''time-consuming and burdensome'' due to the scope of information that will need to be gathered in order to conduct the required independence assessment.[151] This commenter believed that uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee, and further identified a number of specific issues that it believed the Exchange should address to provide greater clarity regarding the standard.[152]

C. Opportunity to Cure Defects

One commenter supported the rule proposed by the Exchange to permit issuers a period of time, under specified conditions, to cure failures to comply with the independence requirements for compensation committee members.[153] The commenter was concerned, however, that the proposed rules did not specify a cure period for any other form of non-compliance with the new rules.[154] The commenter believed that a company should be allowed to take corrective action within a reasonable time after the company's senior executives learn of the non-compliance.

D. Exemptions

The Commission received one comment letter supporting the Exchange's proposal to exempt investment companies from the Rule 10C–1 requirements.[155] As the commenter noted, although Rule 10C–1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of registered management investment companies, including closed-end funds, from any of the requirements of Rule 10C–1. Under the Nasdaq proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule.

The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or by their nature have employees. The commenter believed that such funds are adequately governed by other federal regulation with respect to corporate governance matters, generally, and compensation matters, specifically.[156]

E. Transition Period

One commenter voiced support for the transition period proposed by Nasdaq for compliance with the new compensation committee independence standard, but believed that the Exchange should provide a longer period for companies to satisfy proposed Rule 5605(d)(3), relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the

[141] Nasdaq Response Letter. In response to the concern that a board could use a non-independent director indefinitely, Nasdaq noted that it tracks the use of the exception and can exercise its discretionary authority to apply additional or more stringent criteria for the initial or continued listing of particular securities and deny use of the exception to any company that the Exchange believes is abusing it. *See id.*

[142] *Id.*

[143] *Id.*

[144] *See* Wilson Sonsini Letter, CII Letter, and Corporate Secretaries Letter.

[145] *See* Wilson Sonsini Letter.

[146] *Id.*

[147] *Id.*

[148] *See* Nasdaq Response Letter.

[149] CII Letter.

[150] *Id.*

[151] Corporate Secretaries Letter.

[152] The Commission notes that Nasdaq addressed some of the commenter's concerns in Amendment No. 2.

[153] *See* Corporate Secretaries Letter.

[154] *See id.* The commenter mentioned, in particular, the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. The commenter believed that inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the commenter believed, the company would be in violation of the listing standard and have no recourse.

[155] *See* ICI Letter.

[156] *Id.*

committee to consider independence factors before selecting such advisers.[157]

IV. Discussion

After careful review, the Commission finds that the Nasdaq proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[158] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[159] as well as with Section 10C of the Act [160] and Rule 10C–1 thereunder.[161] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[162] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the Nasdaq proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[163] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [164] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, Nasdaq submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission notes that a number of the commenters generally supported the proposed rule change, although some commenters offered suggestions to clarify or improve various provisions of Nasdaq's proposal. The Commission believes that the proposed rule change, as modified by Amendment Nos. 1 and 2, appropriately revises Nasdaq's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition and Charter

The Commission believes that it is reasonable for Nasdaq to require each company listed on its market to have a compensation committee. Although the Alternative Option to a formal committee in the Exchange's current rules may have been useful to a small number of companies,[165] the Commission agrees that the heightened importance of compensation decisions and oversight of executive compensation in today's environment, as well as the benefits that can result for investors of having a standing committee overseeing compensation matters, makes it appropriate and consistent with investor protection and the public interest under Section 6(b)(5) of the Act for Nasdaq to raise its standards in this regard. In making this determination the Commission is aware that Rule 10C–1 does not require listed companies of national securities exchanges to have a committee dedicated to compensation matters. Nevertheless, it is consistent with Section 6(b)(5) of the Act for Nasdaq to require all its listed companies to have an independent compensation committee overseeing executive compensation matters because of the importance and accountability to investors that such a formal structure can provide.[166] The Commission also notes that some of the other requirements of Rule 10C–1 apply only when a company has a committee overseeing compensation matters.[167] Thus, the requirement to have a compensation committee will trigger the additional protections for shareholders created by these requirements.

Similarly, the Commission believes that it is appropriate for Nasdaq to raise its standards to require the compensation committee of each issuer to have at least two members, instead of permitting a sole individual to be responsible for compensation policy, and that this furthers investor protection and the public interest in accordance with Section 6(b)(5). In light of the importance of compensation matters, the added thought and objectivity that is likely to result when two or more individuals deliberate over how much a listed company should pay its executives, and what form such compensation should take, is consistent with the goal of promoting more accountability to shareholders on executive compensation matters. Moreover, given the complexity of executive compensation packages for corporate executives, it is reasonable for Nasdaq to require listed companies to have the input of more than one committee member on such matters. Finally, we note that, as Nasdaq stated in its filing, only a small number of

[157] *See* Corporate Secretaries Letter. The Commission notes that the commenter's letter was submitted prior to Nasdaq's submission of Amendment No. 1, in which the Exchange revised the proposed transition period for compliance with Rule 5605(d)(3).

[158] In approving the Nasdaq proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[159] 15 U.S.C. 78f(b).

[160] 15 U.S.C. 78j–3.

[161] 17 CFR 240.10C–1.

[162] 15 U.S.C. 78f(b)(5).

[163] *See supra* note 9.

[164] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[165] As stated by Nasdaq, as of June 30, 2012, only 25 of its 2,636 listed companies relied on the Alternative Option in lieu of having a standing compensation committee. *See* Notice.

[166] *See, e.g.,* Section 303A.05 of the New York Stock Exchange (''NYSE'') Listed Company Manual, which does not provide for an Alternative Option as is currently allowed under Nasdaq rules.

[167] Under Rule 10C–1, the provisions of Rule 10C–1(b)(2)(i) (concerning the authority to retain or obtain the advice of a compensation adviser) and Rule 10C–1(b)(3) (concerning funding for compensation advisers) do not apply to members of the board of directors who oversee executive compensation matters on behalf of the board of directors outside a committee structure.

currently listed companies have a compensation committee of only one member. The Commission believes that, with the transition period proposed by Nasdaq for such companies to add an additional member, the two-member requirement will not be an onerous burden for such companies and should actually strengthen their review of compensation matters.

The proposal by the Exchange to require a compensation committee to have a written charter detailing the committee's authority and responsibility is also consistent with Section 6(b)(5) of the Act and will help listed companies to comply with the rules being adopted by Nasdaq to fulfill its mandate under Rule 10C–1. For example, as noted above, under Nasdaq's proposal the charter must set forth the compensation committee's responsibilities as well as the specific authority concerning compensation advisers as required under Rule 10C–1.[168] A written charter will also provide added transparency for shareholders regarding how a company determines compensation and may clarify and improve the process itself. In this regard, the Commission notes that Nasdaq's requirement that listed companies review and reassess the adequacy of the compensation's committee charter on an annual basis will also help to ensure accountability and transparency on an on-going basis. The Commission also notes that several exchanges already require their compensation committees to have written charters.[169]

As discussed above, under Rule 10C–1 the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes, however, that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).''[170] This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets, consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, Nasdaq has determined to adopt a definition that prohibits a director who receives compensation or fees from a listed company (other than, among other things, director compensation) from serving on the company's compensation committee.[171]

As the Exchange noted in its proposal, under the bright-line tests of its general rules for director independence, directors can still be considered independent and serve on listed companies' compensation committees if they receive fees that do not exceed certain thresholds.[172] This is in contrast to Nasdaq's requirements to serve on a listed company's audit committee, which bar a director who receives any compensatory fees from the company. In considering the Fees Factor under Rule 10C–1, Nasdaq stated that it did not see any compelling justification to set a different standard with respect to the acceptance of compensatory fees for members of the compensation committee than for members of audit committees.

The Commission notes that, while two commenters opposed Nasdaq's proposed outright bar on the receipt of these fees,[173] other commenters believed that the Exchange's proposal relating to compensatory fees fell short of Rule 10C–1's requirements[174] or otherwise proposed additional requirements.[175] In response to the commenters opposing the fee prohibition, the Exchange stated that it carefully weighed the benefits and burdens of its proposal and concluded that a director's receipt of compensatory fees from a company (other than compensation for board and board committee service or compensation under a retirement plan for prior service with the company as described above[176]) could render the member unwilling or unable to provide a truly independent voice on executive compensation decisions.[177] The Exchange further stated that, although certain individuals may be excluded from the compensation committee because of the proposal's fee restriction, the restriction was warranted given the heightened importance of executive compensation decisions in today's business environment.

The Commission believes that the Exchange has complied with Rule 10C–1 and Section 10C and that the proposed compensatory fee restriction, which is designed to protect investors and the public interest, is consistent with the requirements of Section 6(b)(5) of the Act. The Commission notes that the compensatory fee restriction will help to ensure that compensation committee members cannot receive directly or indirectly fees that could potentially influence their decisions on compensation matters.

The Commission recognizes that some commenters did not believe that the Nasdaq proposal went far enough because the Exchange did not adequately consider the compensation that directors receive for board or committee service in formulating its standards of independence for service on the compensation committee, and, in particular, the levels to which such compensation may rise.[178] The Commission notes, however, that, as Nasdaq stated, to the extent a conflict of interest exists because directors set their

[168] The Commission notes that the provision that is required in the charter regarding the authority of the committee to retain compensation advisers, the requirement that the company fund such advisers, and the requirement that the committee consider independence factors before selecting such advisers does not apply under the Nasdaq proposal to Smaller Reporting Companies. *See supra* notes 62–65 and accompanying text.

[169] *See, e.g.,* NYSE Listed Company Manual, Section 303A.05.

[170] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Exchange Act.

[171] *See supra* note 33–36 and accompanying text.

[172] *See* Nasdaq Listing Rules 5605(a)(2)(B) and (D).

[173] *See* Corporate Secretaries Letter and Pinnacle Letter and *supra* notes 100–105 and accompanying text.

[174] *See* AFL–CIO Letter, Brown Letter, and Teamsters Letter, maintaining that Nasdaq's proposal ''falls short'' of the Rule 10C–1 provision requiring exchanges to consider a director's source of compensation. *See also supra* notes 123–127 and accompanying text.

[175] *See, e.g.,* CII Letter (''the Council's policies on independence relating to the acceptance of compensatory fees are clearly more narrowly drawn than those of [Nasdaq's proposal]'').

[176] *See supra* notes 35–36 and accompanying text.

[177] *See* Nasdaq Response Letter, *supra* note 6.

[178] As stated by commenters, ''[h]igh director fees relative to other sources of income can compromise director objectivity'' and ''[h[ighly paid directors also may be more inclined to approve large executive pay packages.'' AFL–CIO Letter. *See also* Teamsters Letter.

own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director compensation through this means.[179] In addition, a company board must make an affirmative determination that each Independent Director has no relationship that, in the opinion of the board, would interfere with his or her independent judgment in carrying out director responsibilities, and a board could therefore consider director compensation in that context. The Commission believes that these arguments are sufficient to find that Nasdaq has complied with the requirements of Rule 10C–1 in this regard.

With respect to the Affiliation Factor of Rule 10C–1, Nasdaq has concluded that an outright bar from service on a company's compensation committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for compensation committees. Nasdaq's existing independence standards will also continue to apply to those directors serving on the compensation committee. Nasdaq maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees ''since their interests are likely aligned with those of other stockholders in seeking an appropriate executive compensation program.'' In spite of the argument of one commenter in favor of an outright ban on affiliations with the company,[180] the Commission believes that Nasdaq's approach of requiring boards only to consider such affiliations is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees, such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [181] In determining that Nasdaq's affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that Nasdaq's proposal requires a company's board, in selecting compensation committee members, to consider whether any such affiliation would impair a director's judgment as a member of the compensation committee. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company's compensation committee, depending on the director's particular affiliations with the company.

As to consideration by Nasdaq of whether it should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in the light of Rule 10C–1, but concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for compensation committee members. The Commission does not agree with the commenters who argued that the Exchange's proposal falls short of the requirements and/or intent of Section 10C of the Act and Rule 10C–1.[182] The Commission notes that Rule 10C–1 requires each exchange to consider relevant factors in determining independence requirements for members of a compensation committee, but does not require the final definition and the rules imposed on listed companies to reflect any such additional factors.

As noted above, several commenters argued that Nasdaq should require other ties between directors and the company, including business and personal relationships with executives of the company, to be considered by boards in making independence determinations.[183] The Commission did emphasize in the Rule 10C–1 Adopting Release that ''it is important for exchanges to consider other ties between a listed issuer and a director * * * that might impair the director's judgment as a member of the compensation committee,'' [184] and noted that ''the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence.'' However, the Commission did not require exchanges to reach this conclusion and thus Nasdaq's decision that such ties need not be included explicitly in its definition of independence does not render its proposal insufficient.

In explaining why it did not include, specifically, personal and business relationships as a factor, Nasdaq cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no relationship that, in the opinion of the board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director.[185] All compensation committee members must meet the general independence standards under Nasdaq's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the compensation committee. Although personal and business relationships, related party transactions, and other matters suggested by commenters are not specified either as bright-line disqualifications or explicit factors that must be considered in evaluating a director's independence, the Commission believes that compliance with Nasdaq's rules and the provision noted above would demand consideration of such factors with respect to compensation committee members, as well as to all Independent Directors on the board.

The Commission does not believe that Nasdaq is required in the current proposed rule change to consider further revisions of its independence rules as suggested by some commenters,[186] although it may wish to do so in the future. Finally, notwithstanding the concern of some

[179] *See* Nasdaq Response Letter.

[180] *See* Teamsters Letter and *supra* note 120 and accompanying text.

[181] Rule 10C–1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations ''impair the director's judgment'' as a member of the committee. *See also infra* notes 183–184.

[182] *See supra* notes 110–111 and accompanying text.

[183] *See supra* notes 123–124 and accompanying text.

[184] *Id.*

[185] *See* Nasdaq Rule 5605(a)(2).

[186] *See supra* note 134 and accompanying text.

commenters,[187] the Commission confirms that Rule 10C–1 does not mean that a director cannot be disqualified on the basis of one factor alone. Although Nasdaq does not state this explicitly, the Commission believes that nothing in Rule 10C–1 or in Nasdaq's current or proposed rules implies otherwise.

Nasdaq proposes that the ''Exceptional and Limited Circumstances'' provision in its current rules, which allows one director who fails to meet the Exchange's Independent Director definition to serve on a compensation committee under certain conditions, apply to the enhanced independence standards discussed above that the Exchange is adopting to comply with Rule 10C–1. The Commission believes that the discretion granted to each exchange by Rule 10C–1, generally, to determine the independence standards it adopts to comply with the Rule includes the leeway to carve out exceptions to those standards, as long as they are consistent with the Act. Nasdaq also cites, in justifying the exception, the provision of Rule 10C–1 that permits an exchange to exempt a particular relationship with respect to members of the compensation committee as the exchange determines is appropriate, taking into consideration the size of an issuer and any other relevant factors. In this respect, Nasdaq states that the exception, although infrequently used, has been valuable, and states that the flexibility afforded by the exception is particularly important for a smaller company.

Regarding the justification for such an exception, the Commission notes that it long ago approved as consistent with the Act the same exception and concept in the context of Nasdaq's definition of Independent Director under Exchange Rule 5605(a)(2),[188] with respect to compensation committees, as well as for nominations committees and audit committees. Although the additional independence standards required by Rule 10A–3 for audit committees are not subject to this exception, the Commission notes that Rule 10C–1 grants exchanges more discretion than Rule 10A–3 when considering independence standards for compensation committee membership. One commenter was also concerned that the board could include a non-independent director indefinitely on its compensation committee by using the exception.[189] The Commission notes that a member appointed under the Exceptional and Limited Circumstances provision may not serve longer than two years. Further, in the Nasdaq Response Letter, the Exchange stated that it tracks the use of the exception by listed companies and would have discretion in its rules to deny the use of the exception if it thought a company was abusing it.[190]

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

As discussed above, Nasdaq proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee.[191] As such, the Commission believes these provisions meet the mandate of Rule 10C–1 and are consistent with the Act.

As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

As noted above, one commenter believed that Rule 10C–1 could be read as not requiring a compensation committee to consider the enumerated independence factors with respect to regular outside legal counsel and sought confirmation of this reading from Nasdaq.[192] This reading is incorrect and Nasdaq has amended its rule language to clarify this issue. The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.'' [193] To avoid any confusion, Nasdaq, in Amendment No. 1, added rule text that reflects this instruction in its own rules.[194]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, Nasdaq has proposed, in Amendment No. 2, to add language to the provision regarding the independence assessment of compensation advisers [195] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. Nasdaq states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[196]

The Commission views Nasdaq's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[197] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section

[187] *See supra* notes 130–132 and accompanying text.

[188] *See supra* note 19.

[189] *See* Brown Letter.

[190] *See supra* note 141.

[191] The Commission notes that, in Amendment No. 1, Nasdaq revised its proposed rule text to set forth these requirements in full.

[192] *See supra* notes 145–146 and accompanying text.

[193] *See* Instruction to paragraph (b)(4) of Rule 10C–1.

[194] *See supra* note 54 and accompanying text.

[195] *See* proposed Rule 5605(d)(3), as amended by Amendment No. 2.

[196] *See* 17 CFR 229.407(e)(3)(iii).

[197] *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters regarding the scope of the independence assessment requirement. Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

Regarding the belief of another commenter that the independence assessment requirement could discourage compensation committees from obtaining the advice of advisers,[198] the Commission notes that, as already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, in Amendment No. 1 Nasdaq added specific rule language stating, among other things, that nothing in its rule requires a compensation adviser to be independent, only that the compensation committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.[199]

Regarding the commenter's concern over the burdens that the Exchange proposal imposes,[200] the Commission notes that Rule 10C–1 explicitly requires exchanges to require consideration of these six factors.[201] Moreover, five of the six factors were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that they are unknowingly influenced by conflicted compensation advisers.[202] The changes to Nasdaq's rules on compensation advisers should therefore benefit investors in Nasdaq listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

Finally, one commenter requested guidance ''on how often the required independence assessment should occur.'' [203] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each such [compensation committee] meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.

C. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors, with at least two members is reasonable and consistent with the protection of investors. The Commission notes that Nasdaq's rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the Exchange has decided not to require Smaller Reporting Companies to meet its proposed new independence requirements as to compensatory fees and affiliation as well as the requirements concerning compensation advisers.

Nasdaq will also require a Smaller Reporting Company to adopt a formal written compensation committee charter or board resolution that specifies the compensation committee's responsibilities and authority, but the company will not be required to review and reassess the adequacy of the charter or board resolution on an annual basis. This is different from other Nasdaq listed companies, which must include the committee's responsibilities and authority specifically in a formal written charter and must review the charter's adequacy on an annual basis.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for Nasdaq to provide some flexibility to Smaller Reporting Companies regarding whether the compensation committee's responsibilities should be set forth in a formal charter or through board resolution. Further, because a Smaller Reporting Company does not need to include in its charter or board resolution the additional provisions regarding compensation advisers that Nasdaq is requiring all other listed companies to include to comply with Rule 10C–1,[204] and in view of the potential additional costs of an annual review, it is reasonable not to require a Smaller Reporting Company to conduct an annual assessment of its charter or board resolution.

D. Opportunity To Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that Nasdaq proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is not exactly the same as the cure period that the Rule sets forth as an option.[205] The Nasdaq proposal adds the proviso that, if the annual shareholders meeting occurs no later than 180 days following the event that caused the noncompliance, the company instead has 180 days from the event to regain compliance.

The Commission believes that, although the cure period proposed by Nasdaq gives a company more leeway in certain circumstances than the cure period suggested under Rule 10C–1, the accommodation is fair and reasonable. As a general matter, it allows all companies at least 180 days to cure noncompliance. To give a specific example, the proposal would afford a company additional time to comply,

[198] *See* Corporate Secretaries Letter and *supra* note 151 and accompanying text.

[199] *See supra* notes 56–58 and accompanying text.

[200] *See supra* note 151 and accompanying text.

[201] The Commission also does not agree with the argument of one commenter that Nasdaq must require compensation committees to specifically consider, among the independence factors relating to compensation advisers, whether such an adviser requires that clients contractually agree to indemnify or limit their liability. *See* CII Letter. The Commission views as reasonable the Exchange's belief that the six factors set forth in Rule 10C–1 are sufficient for the required independence assessment.

[202] *See* Rule 10C–1 Adopting Release, *supra* note 11.

[203] *See* Corporate Secretaries Letter.

[204] As discussed *supra* notes 64–65 and accompanying text, the charter or board resolution of a Smaller Reporting Company will not be required to include, like the charters of other listed companies, a grant of authority to the committee to retain compensation advisers, a requirement that the company fund such advisers, and a requirement that the committee consider independence factors before selecting such advisers, because Smaller Reporting Companies are not subject to these requirements.

[205] *See supra* notes 42–44 and accompanying text.

than the Rule 10C–1 option, where a member of the compensation committee ceases to be independent two weeks before the company's next annual meeting. The Commission further notes that it has approved a similar cure period in the context of other Nasdaq corporate governance requirements.[206]

The Commission agrees with the understanding of the commenter who believed that Rule 10C–1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements.[207] The Commission believes that Nasdaq's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement.[208] In particular, Nasdaq's rules provide that, unless continued listing of the company raises a public interest concern, when a company is deficient in compliance with, among other rules, Rule 5605, which includes the Exchange's standards for compensation committees, the listed company may submit a plan for compliance. The rules permit the Exchange's staff to extend the deadline for regaining compliance, under established parameters, and, if the company does not regain compliance within the time period provided by all applicable staff extensions—at which point the staff will immediately issue a determination indicating the date on which the company's securities will be suspended—a company can still request review by a hearings panel.

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.

E. Exemptions

As discussed above, asset-backed issuers and other passive issuers, cooperatives, limited partnerships, registered management investment companies, and controlled companies are exempt from Nasdaq's existing rules relating to compensation, and Nasdaq proposes to extend the exemptions for these entities to the new requirements of the proposed rule change. The Commission notes that Rule 10C–1 allows exchanges to exempt from the listing rules adopted pursuant to Rule 10C–1 certain categories of issuers, as the national securities exchange determines is appropriate.[209] The Commission believes that, given the specific characteristics of the aforementioned types of issuers,[210] it is reasonable and consistent with Section 6(b)(5) of the Act for the Exchange to exempt them from the new requirements.

Specifically with regard to investment companies, the Commission received one comment letter supporting the Exchange's proposal to exempt such companies from the Rule 10C–1 requirements.[211] As the commenter noted, although Rule 10C–1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of registered management investment companies, including closed-end funds, from any of the requirements of Rule 10C–1. Under the Nasdaq proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule.

The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or by their nature have employees. The commenter believed that such funds are adequately governed by other federal regulation with respect to corporate governance matters, generally, and compensation matters, specifically.[212] The Commission believes that this exemption is reasonable because the Investment Company Act of 1940 already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from Nasdaq's existing compensation committee requirements. The Commission notes that, as the commenter stated, that almost all registered investment companies do not employ executives or employees or have compensation committees.

The Commission notes that Nasdaq proposes, however, to amend its current rule for foreign private issuers, which allows such issuers to follow their home country practice in lieu of the Exchange's standards regarding a company's compensation decision-making process. The current rule includes the proviso that the issuer must disclose its reliance on the exemption. Nasdaq proposes to conform its rules in this regard with the provision of Rule 10C–1 permitting a foreign private issuer to follow home country practice only when it meets the additional condition that the issuer disclose the reasons why it does not have an independent compensation committee.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission notes that the provision in the original proposal requiring companies to comply with certain of the requirements immediately has been revised in Amendment No. 1 to allow companies until July 1, 2013 to satisfy these requirements.[213] The Commission also believes that the revised deadline proposed in Amendment No. 1, which gives companies until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the remaining provisions is more clear-cut than the deadline in the original proposal and also matches the deadline set forth by the New York Stock Exchange in its proposed rule change to comply with Rule 10C–1.[214]

G. Phase-In Schedules: IPOs; Companies That Lose their Exemptions; Companies Transferring From Other Markets

The Commission believes that it is reasonable for Nasdaq to allow, with

[206] *See* Securities Exchange Act Release No. 54421 (September 11, 2006), 71 FR 54698 (September 18, 2006) (approval of File No. NASDAQ–2006–011, modifying the cure period available to an issuer that loses an independent director or audit committee member).

[207] *See supra* note 154 and accompanying text.

[208] *See, generally,* Nasdaq Rule 5810.

[209] The Commission notes, moreover, that, in the case of limited partnerships and open-end registered management investment companies, Rule 10C–1 itself provides exemptions from the independence requirements of the Rule. The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5). The additional Nasdaq provisions requiring listed companies to have a two-member compensation committee and a written committee charter, will, of course, not apply to the exempted entities, which are currently required to have neither a compensation committee nor the Alternative Option.

[210] *See supra* Section II.B.4.

[211] *See* ICI Letter.

[212] *Id.*

[213] *See supra* notes 73–74 for the provisions to which the new transition date applies.

[214] *See* Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (October 15, 2012) (Notice of File No. SR–NYSE–2012–49).

respect to IPOs, companies emerging from bankruptcy, companies ceasing to be controlled companies, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules.

The Commission also believes that the phase-in schedule for companies that cease to be Smaller Reporting Companies, as revised in Amendment No. 1, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining when they will be subject to the heightened requirements.

V. Accelerated Approval of Amendment Nos. 1 and 2 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[215] for approving the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after the date of publication of notice in the **Federal Register**. The change made to the proposal by Amendment No. 1 to set forth in detail the requirements of Rule 10C–1(b)(2)–(4) explicitly in the Exchange's rules, rather than incorporating these details by reference as in the original proposal,[216] is not a substantive one and merely codifies the original intent of that provision. Moreover, the change improves the proposal because it brings together the full set of the Exchange's rules on compensation committees in one place, thereby easing compliance for listed companies and benefiting investors seeking an understanding of an issuer's obligations with regard to determining executive compensation.

The change made by Amendment No. 1 to require companies currently listed on Nasdaq to comply with certain of the new rules by July 1, 2013 rather than immediately, as originally proposed,[217] reasonably affords companies more time to take the steps necessary for compliance. The change to require such companies to comply with the remaining provisions by the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, rather than by the deadline originally proposed,[218] still allows ample time for companies to adjust to the new rules, and accords with the deadline set by NYSE in its proposed rule change to comply with Rule 10C–1, which was published at the same time as the Nasdaq proposal.[219]

The revision made by Amendment No. 1 to the phase-in rules for companies that cease to be Smaller Reporting Companies [220] establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance. The Commission notes that the Start Date of the phase-in period for such a company is six months after the Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. Moreover, with respect to the enhanced independence standards for compensation committee members (relating to fees and affiliation with the company), only one member must meet these standards within six months after the Start Date. The company is given nine months from the Start Date (*i.e.,* fifteen months from the Determination Date) to have a majority of committee members meeting the standards, and a full year from the Start Date (*i.e.,* eighteen months from the Determination Date) to fully comply with the standards.

The addition by Amendment No. 1 of a preamble to proposed Rule 5605(d) to set forth the obligations of a company during the transition period until the new rules apply introduces no substantive change.[221] It merely mirrors the instructions in the preamble to the Sunsetting Provisions, providing clarity for listed companies. The inclusion in Amendment No. 1 of language in Nasdaq's rules that requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel'' merely reflects an instruction in Rule 10C–1 itself.[222] Finally, the addition of further guidance by Amendment No. 1 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser,[223] and is not a substantive change.

Amendment No. 2 excluded advisers that provide certain types of services from the independence assessment.[224] As discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise conflict of interest concerns. For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment Nos. 1 and 2.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment Nos. 1 and 2 are 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–2012–109 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–2012–109. 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

[215] 15 U.S.C. 78s(b)(2).

[216] *See supra* note 49 and accompanying text.

[217] *See supra* note 74 and accompanying text.

[218] *See supra* note 78 and accompanying text.

[219] The Commission received one comment letter relating to this provision in the NYSE proposal, in which the commenter supported this transition period for compliance with the new compensation committee independence standards but believed that a longer period should be provided to implement the other listing standards that NYSE proposed. *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, concerning File No. SR–NYSE–2012–49, dated December 7, 2012.

[220] *See supra* note 85 and accompanying text.

[221] *See supra* note 73.

[222] *See supra* note 194 and accompanying text.

[223] *See supra* note 56 and accompanying text.

[224] *See supra* notes 59–60 and accompanying text.

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 on official business days between the hours of 10:00 a.m. and 3 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 available publicly. All submissions should refer to File Number SR–NASDAQ–2012–109, and should be submitted on or before February 12, 2013.

VII. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by Nasdaq, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. Nasdaq's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

Nasdaq's rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of Nasdaq-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of Nasdaq's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[225]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[226] that the proposed rule change, SR–NASDAQ–2012–109, as modified by Amendment Nos. 1 and 2, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[227]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01107 Filed 1–18–13; 8:45 am]

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[225] 15 U.S.C. 78f(b)(5).

[226] 15 U.S.C. 78s(b)(2).

[227] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68639; File No. SR–NYSE–2012–49]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval for Proposed Rule Change, as Modified by Amendment Nos. 1 and 3, To Amend the Listing Rules for Compensation Committees To Comply With Securities Exchange Act Rule 10C–1 and Make Other Related Changes

January 11, 2013.

I. Introduction

On September 25, 2012, New York Stock Exchange LLC (''NYSE'' 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 the Exchange's rules for compensation committees of listed issuers to comply with Rule 10C–1 under the Act and make other related changes. On October 1, 2012, NYSE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1 thereto, was published for comment in the **Federal Register** on October 15, 2012.[3] The Commission subsequently extended the time period in which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change, to January 13, 2013.[4] The Commission received seven comment letters on the proposed rule change,[5] as well as a response to the comment letters from NYSE Euronext, Inc. regarding the NYSE proposal.[6] On December 4, 2012, the Exchange filed Amendment No. 2 to the proposed rule change, which was later withdrawn.[7] On January 8, 2013, the Exchange filed Amendment No. 3 to the proposed rule change.[8]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68011 (October 9, 2012), 77 FR 62541 (''Notice'').

[4] *See* Securities Exchange Act Release No. 68313 (November 28, 2012), 77 FR 71853 (December 4, 2012).

[5] *See* Letters to Elizabeth M. Murphy, Secretary, Commission, from: Thomas R. Moore, Vice President, Corporate Secretary and Chief Governance Officer, Ameriprise Financial, Inc., dated October 18, 2012 (''Ameriprise Letter''); J. Robert Brown, Jr., Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law, dated October 30, 3012 (''Brown Letter''); Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, dated November 1, 2012 (''ICI Letter''); Brandon J. Rees, Acting Director, Office of Investment, AFL–CIO, dated November 5, 2012 (''AFL–CIO Letter''); Carin Zelenko, Director, Capital Strategies Department, International Brotherhood of Teamsters, dated November 5, 2012 (''Teamsters Letter''); Wilson Sonsini Goodrich & Rosati, Professional Corporation, dated November 14, 2012 (''Wilson Sonsini Letter''); and Robert B. Lamm, Chair, Securities Law Committee, The Society of Corporate Secretaries & Governance Professionals, dated December 7, 2012 (''Corporate Secretaries Letter'').

In addition, the Commission received one comment on a substantially similar proposal by NYSE Arca, Inc. (''NYSE Arca'') by a party that did not specifically comment on the NYSE filing. *See* Securities Exchange Act Release No. 68006 (October 9, 2012), 77 FR 62587 (October 15, 2012) (SR–NYSEArca–2012–105). The comment letter received on the NYSE Arca filing is a letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Elizabeth M. Murphy, Secretary, Commission, dated November 1, 2012 (''CII Letter''). Since the comment letter received on the NYSE Arca filing discusses issues directly related to the NYSE filing, the Commission has included it in its discussion of this filing.

[6] *See* Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, Inc., dated January 10, 2013 (''NYSE Response Letter''). In the NYSE Response Letter, NYSE Euronext, Inc., the parent company of NYSE, states that, as the comments made by the letters submitted on the NYSE and NYSE Arca proposals are applicable in substance to NYSE, NYSE Arca and NYSE MKT LLC, its response will address the comments on behalf of all three exchanges.

[7] Amendment No. 2, dated December 4, 2012, was withdrawn on January 7, 2013.

[8] In Amendment No. 3 to SR–NYSE–2012–49, NYSE: (a) Revised the transition period for companies that cease to be Smaller Reporting Companies to comply with the full range of new requirements, *see infra* notes 70–73 and accompanying text; (b) changed references in the rule text from Regulation S–K, Item 10(f)(1) to Exchange Act Rule 12b–2; (c) added commentary to state that the independence assessment of compensation advisers required of compensation committees does not need to be conducted for advisers whose roles are limited to those entitled to an exception from the compensation adviser disclosure rules under Item 407(e)(3)(iii) of Regulation S–K, *see infra* notes 45–48 and accompanying text; and (d) added commentary to

This order approves the proposed rule change, as modified by Amendment Nos. 1 and 3 thereto, on an accelerated basis.

II. Description of the Proposed Rule Change

A. Background: Rule 10C–1 Under the Act

On March 30, 2011, to implement Section 10C of the Act, as added by Section 952 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''),[9] the Commission proposed Rule 10C–1 under the Act,[10] which directs each national securities exchange (hereinafter, ''exchange'') to prohibit the listing of any equity security of any issuer, with certain exceptions, that does not comply with the rule's requirements regarding compensation committees of listed issuers and related requirements regarding compensation advisers. On June 20, 2012, the Commission adopted Rule 10C–1.[11]

Rule 10C–1 requires, among other things, each exchange to adopt rules providing that each member of the compensation committee [12] of a listed issuer must be a member of the board of directors of the issuer, and must otherwise be independent.[13] In determining the independence standards for members of compensation committees of listed issuers, Rule 10C–1 requires the exchanges to consider relevant factors, including, but not limited to: (a) The source of compensation of the director, including any consulting, advisory or other compensatory fee paid by the issuer to the director (hereinafter, the ''Fees Factor''); and (b) whether the director is affiliated with the issuer, a subsidiary of the issuer or an affiliate of a subsidiary of the issuer (hereinafter, the ''Affiliation Factor'').[14]

In addition, Rule 10C–1 requires the listing rules of exchanges to mandate that compensation committees be given the authority to retain or obtain the advice of a compensation adviser, and have direct responsibility for the appointment, compensation and oversight of the work of any compensation adviser they retain.[15] The exchange rules must also provide that each listed issuer provide for appropriate funding for the payment of reasonable compensation, as determined by the compensation committee, to any compensation adviser retained by the compensation committee.[16] Finally, among other things, Rule 10C–1 requires each exchange to provide in its rules that the compensation committee of each listed issuer may select a compensation consultant, legal counsel or other adviser to the compensation committee only after taking into consideration six factors specified in Rule 10C–1,[17] as well as any other factors identified by the relevant exchange in its listing standards.[18]

B. NYSE's Proposed Rule Change, as Amended

To comply with Rule 10C–1, NYSE proposes to amend three sections of its rules concerning corporate governance requirements for companies listed on the Exchange: NYSE Listed Company Manual (''Manual'') Section 303A.00, ''Corporate Governance Standards;'' Section 303A.02, ''Independence Tests;'' and Section 303A.05, ''Compensation Committee.'' In addition, NYSE proposes to make some other changes to its rules regarding compensation committees. To accomplish these changes, the Exchange proposes to replace current Sections 303A.00, 303A.02 and 303A.05 of the Manual with new operative text that will be effective on July 1, 2013.

Current Section 303A.05 of the Manual provides that each listed company have a compensation committee, and that such compensation committee be composed entirely of ''Independent Directors'' [19] and have a written charter.[20]

Under its proposal, NYSE will retain its existing requirement that each listed company be required to have a compensation committee composed entirely of Independent Directors, as defined in NYSE's rules.[21] Under the proposed amendment, however, each compensation committee member must also satisfy additional independence requirements, as described in Section II.B.1 below.[22]

NYSE will also retain the existing requirement that a listed issuer adopt a formal written compensation committee charter [23] that specifies the scope of the committee's responsibilities and how it carries out those responsibilities, including structure, operations and membership requirements.[24] The proposed amendment to the rule would require the charter to specify additional responsibilities and authority with respect to retaining its own advisers; appointing, compensating, and overseeing such advisers; considering certain independence factors before selecting and receiving advice from advisers; and receiving funding from the company to engage them, which are discussed in detail in Section II.B.2

state that the independence assessment of compensation advisers required of compensation committees does not require the adviser to be independent, only that the compensation committee consider the enumerated factors before selecting or receiving advice from the adviser. *See infra* notes 49–51 and accompanying text.

[9] Public Law 111–203, 124 Stat. 1900 (2010).

[10] *See* Securities Act Release No. 9199, Securities Exchange Act Release No. 64149 (March 30, 2011), 76 FR 18966 (April 6, 2011) (''Rule 10C–1 Proposing Release'').

[11] *See* Securities Act Release No. 9330, Securities Exchange Act Release No. 67220 (June 20, 2012), 77 FR 38422 (June 27, 2012) (''Rule 10C–1 Adopting Release'').

[12] For a definition of the term ''compensation committee'' for purposes of Rule 10C–1, *see* Rule 10C–1(c)(2)(i)–(iii).

[13] *See* Rule 10C–1(a) and (b)(1).

[14] *See id. See also* Rule 10C–1(b)(1)(iii)(A), which sets forth exemptions from the independence requirements for certain categories of issuers. In addition, an exchange may exempt a particular relationship with respect to members of a compensation committee from these requirements as it deems appropriate, taking into consideration the size of an issuer and any other relevant factors. *See* Rule 10C–1(b)(1)(iii)(B).

[15] *See* Rule 10C–1(b)(2).

[16] *See* Rule 10C–1(b)(3).

[17] *See* Rule 10C–1(b)(4). The six factors, which NYSE proposes to set forth in its rules, are specified in the text accompanying note 43, *infra.*

[18] Other provisions in Rule 10C–1 relate to exemptions from the rule and a requirement that each exchange provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing.

[19] ''Independent Directors'', as defined in Section 303A.02(a)–(b) of the Manual and used herein, includes a two-part test for independence. The rule sets forth specific categories of directors who cannot be considered independent because of certain discrete relationships (''bright-line tests''); and also provides that a listed company's board make an affirmative determination that each independent director has no material relationship that, in the opinion of the board, would raise concerns about independence from management. *Id. See also* the Commentary to Section 303A.02(a) of the Manual.

[20] *See* Section 303A.05(b) of the Manual.

[21] *See id.*

[22] *See* proposed Section 303A.02(a)(ii) of the Manual (concerning the consideration of director compensation and affiliation).

[23] Rule 10C–1 requires a compensation committee to have certain specified authority and responsibilities. *See supra* notes 15–17 and accompanying text. The existing NYSE rule already requires compensation committees of listed companies to have a charter setting forth specified responsibilities, and the proposed rule updates the language concerning this authority and set of responsibilities and adds the required content discussed *infra* at text accompanying notes 40–42.

[24] *See* Section 303A.05(b) of the Manual. The existing Commentary to Section 303A.05, which NYSE proposed to replace with a comparable provision, currently provides that ''if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.'' *See* discussion *infra* at text accompanying notes 39–41.

below and set forth in proposed Section 303A.05(c) of the Manual.[25]

1. Compensation Committee Composition and Independence Standards

NYSE proposes to amend Section 303A.02(a) of the Manual, which would continue to provide that no director qualifies as ''independent'' unless the board of directors of the listed company affirmatively determines that the director has no material relationship with the listed company. As noted above, NYSE's rules currently require each member of a listed company's compensation committee to be an Independent Director, as defined in Section 303A.02(a) of the Manual.[26] Rule 10C–1, as discussed above, provides that exchange standards must require compensation committee members to be independent, and further provides that each exchange, in determining independence for this purpose, must consider relevant factors, including the Fees Factor and Affiliation Factor described above. In its proposal, NYSE discussed its consideration of these factors,[27] and proposed the following:[28]

With respect to the Fees and Affiliation Factors, NYSE proposes to adopt a provision stating that the board of directors of the listed company would be required, in affirmatively determining the independence of any director who will serve on the compensation committee of the board, to consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member, including, but not limited to: (A) The source of compensation of such director, including any consulting, advisory or other compensatory fee paid by the listed company to such director; and (B) whether such director is affiliated with the listed company, a subsidiary of the listed company or an affiliate of a subsidiary of the listed company.[29]

With respect to the Fees Factor, NYSE also proposes to amend the commentary to provide that the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation.[30]

With respect to the Affiliation Factor, NYSE proposes, similarly, to amend the commentary to provide that the board should consider whether an affiliate relationship places the director under the direct or indirect control of the listed company or its senior management, or creates a direct relationship between the director and members of senior management, ''* * * in each case of a nature that would impair his ability to make independent judgments about the listed company's executive compensation.''[31]

Although Rule 10C–1 requires that exchanges consider ''relevant factors'' not limited to the Fees and Affiliation Factors, NYSE states that, after reviewing its current and proposed listing rules, it concluded not to propose any specific numerical tests with respect to the factors specified in proposed Section 303A.02(a)(ii) or to adopt a requirement to consider any other specific factors. In its proposal, NYSE stated that it did not intend to adopt an absolute prohibition on a board making an affirmative finding that a director is independent solely on the basis that the director or any of the director's affiliates are shareholders owning more than some specified percentage of the listed company.[32] Further, as stated in its filing, NYSE believes that its existing ''bright-line'' independence standards, as set forth in Section 303A.02(b) of the Manual, are sufficiently broad to encompass the types of relationships which would generally be material to a director's independence for compensation committee service.[33] Additionally, NYSE stated that Section 303A.02(a) already requires the board to consider any other material relationships between the director and the listed company or its management that are not the subject of ''bright-line'' tests from Section 303A.02(b) of the Manual.[34] NYSE believes that these requirements with respect to general director independence, when combined with the specific considerations required by proposed Section 303A.02(a)(ii), represent an appropriate standard for compensation committee independence.[35]

NYSE proposes a cure period for a failure of a listed company to meet its committee composition requirements for independence. Under the provision, if a listed company fails to comply with the compensation committee composition requirements because a member of the compensation committee ceases to be independent for reasons outside the member's reasonable control, that person, only so long as a majority of the members of the compensation committee continue to be independent, may remain a member of the compensation committee until the earlier of the next annual shareholders' meeting of the listed company or one year from the occurrence of the event that caused the member to be no longer independent.[36] The proposed rule also requires a company relying on this provision to provide notice to NYSE promptly.[37]

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[25] *See* proposed Section 303A.05(b) of the Manual. Because smaller reporting companies are not required to comply with the new compensation adviser independence considerations in proposed Section 303A.05(c)(iv), *see infra* notes 52–56 and accompanying text, their charters are not required to reflect this requirement. *See also* proposed Section 303A.00 (Smaller Reporting Companies) of the Manual.

[26] *See supra* note 19.

[27] *See* Notice, *supra* note 3.

[28] *See* Notice, *supra* note 3, for the Exchange's explanation of its reasons for the proposed change. *See infra* Sections II.B.3 and II.B.4 concerning entities that would be exempt from this requirement.

[29] *See* proposed Section 303A.02(a)(ii) of the Manual. *See also* Notice, *supra* note 3.

[30] *See* proposed Commentary to Section 303A.02(a)(ii) of the Manual.

[31] *See id.*

[32] *See* Notice, *supra* note 3.

[33] *See id.* The following are the ''bright-line'' tests set forth in Section 303A.02(b): (i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company; (ii) The director has received, or has an immediate family member who has received, during any twelve month period within the last three years, more than $120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service); (iii) (A) The director is a current partner or employee of a firm that is the listed company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time; (iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee; (v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues. For purposes of Sections 303A.01, 303A.03, 303A.04, 303A.05 and 303A.09, a director of a business development company is considered to be independent if he or she is not an ''interested person'' of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

[34] *See* Notice, *supra* note 3.

[35] *See id.*

[36] *See* proposed Section 303A.00 ''Cure Period for Compensation Committee Independence Non-Compliance'' of the Manual.

[37] *See id.*

NYSE modified the suggested cure period language contained in Rule 10C–1(a)(3) by limiting the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors.[38]

2. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers

In its proposed rule change, NYSE proposes to fulfill the requirements imposed by Rule 10C–1(b)(2)–(4) under the Act concerning compensation advisers by setting forth those requirements in its own rules and requiring these new rights and responsibilities to be included in the compensation committee's charter.[39] Thus, proposed Section 303A.05(c)(i)–(iii) of the Manual proposes to adopt the requirements that NYSE believes are required by Rule 10C–1(b)(2)–(3) that: (i) The compensation committee may, in its sole discretion, retain or obtain the advice of a compensation consultant, independent legal counsel or other adviser; (ii) the compensation committee shall be directly responsible for the appointment, compensation and oversight of the work of any compensation consultant, independent legal counsel or other adviser retained by the compensation committee;[40] and (iii) the listed company must provide for appropriate funding, as determined by the compensation committee, for payment of reasonable compensation to a compensation consultant, independent legal counsel or any other adviser retained by the compensation committee.[41]

Proposed Section 303A.05(c)(iv) of the Manual, as amended, also sets forth explicitly, in accordance with Rule 10C–1, that the compensation committee may select, or receive advice from, a compensation consultant, legal counsel or other adviser to the compensation committee, other than in-house legal counsel, only after taking into consideration all factors relevant to that person's independence from management, including the following six factors set forth in Rule 10C–1 regarding independence assessments of compensation advisers.[42]

The six factors, which are set forth in full in the proposed rule, are: (A) The provision of other services to the listed company by the person that employs the compensation consultant, legal counsel or other adviser; (B) the amount of fees received from the listed company by the person that employs the compensation consultant, legal counsel or other adviser, as a percentage of the total revenue of the person that employs the compensation consultant, legal counsel or other adviser; (C) the policies and procedures of the person that employs the compensation consultant, legal counsel or other adviser that are designed to prevent conflicts of interest; (D) any business or personal relationship of the compensation consultant, legal counsel or other adviser with a member of the compensation committee; (E) any stock of the listed company owned by the compensation consultant, legal counsel or other adviser; and (F) any business or personal relationship of the compensation consultant, legal counsel, other adviser or the person employing the adviser with an executive officer of the listed company.[43]

As proposed, Section 303A.05(c)(iv) of the Manual would not include any specific additional factors for consideration, as NYSE stated that it believes the list included in Rule 10C–1(b)(4) is very comprehensive and the proposed listing standard would also require the compensation committee to consider any other factors that would be relevant to the adviser's independence from management.[44]

The proposed commentary to proposed Section 303A.05 of the Manual, as modified by Amendment No. 3,[45] further states that, as provided in Rule 10C–1, a compensation committee is required to conduct the independence assessment outlined in proposed Section 303A.05(c)(iv) with respect to any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than (i) in-house legal counsel[46] and (ii) any compensation consultant, legal counsel or other adviser whose role is limited to the following activities for which no disclosure would be required under Item 407(e)(3)(iii) of Regulation S–K: Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the listed company, and that is available generally to all salaried employees; or providing information that either is not customized for a particular company or that is customized based on parameters that are not developed by the compensation consultant, and about which the compensation consultant does not provide advice.[47] NYSE noted that this second exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation advisers in determining or recommending the amount or form of a registrant's executive and director compensation.[48]

The proposed commentary to Section 303A.05 of the Manual, as modified by Amendment No. 3, also clarifies that nothing in the rule requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting or receiving advice from a compensation adviser.[49] It further

[38] *See* Notice, *supra* note 3. The Commission notes that while NYSE does not provide any new procedures for an issuer to have an opportunity to cure any other defects with respect to its proposed compensation committee requirements, current NYSE rules provide issuers with an opportunity to cure defects, and appeal, before their securities are delisted for rule violations. *See* NYSE Listed Company Manual, Sections 802.02 (''Continued Listing—Evaluation and Follow-up Procedures for Domestic Companies'') and 804.00 (''Procedure for Delisting'').

[39] Rule 10C–1(b)(4), does not include the word ''independent'' before ''legal counsel'' and requires an independence assessment for any legal counsel to a compensation committee, other than in-house counsel. In providing commentary to proposed Section 303A.05(b)(iii), as modified by Amendment No. 3, NYSE provides for two limited exceptions. *See infra* notes 45–48 and accompanying text.

[40] The proposal also includes a provision, derived from Rule 10C–1, stating that nothing in the rule may be construed: (A) To require the compensation committee to implement or act consistently with the advice or recommendations of the compensation consultant, independent legal counsel or other adviser to the compensation committee; or (B) to affect the ability or obligation of the compensation committee to exercise its own judgment in fulfillment of the duties of the compensation committee. *See* Commentary to Section 303A.05 to the Manual.

[41] *See* Notice, *supra* note 3.

[42] *See* Rule 10C–1(b)(4).

[43] *See also* Rule 10C–1(b)(4)(i)–(vi).

[44] *See* Notice, *supra* note 3.

[45] *See supra* note 8. NYSE's proposal as submitted originally only contained an exception for in-house legal counsel. As described below, the Exchange amended its proposal to add an exception for advisers whose role is limited to certain broad-based plans or to providing non-customized information.

[46] *See* proposed Commentary to Section 303A.05 of the Manual.

[47] *See* Exhibit 5 to Amendment No. 3 (amending, in part, the proposed Commentary to Section 303A.05 of the Manual).

[48] *See* Amendment No. 3; *see also* 17 CFR 229.407(e)(3)(iii). The Exchange believes that its proposed exception from the independence assessment requirement is appropriate because the types of services excepted do not raise conflict of interest concerns, and noted that this is the same reason for which the Commission excluded these types of services from the disclosure requirement in Item 407(e)(3)(iii) of Regulation S–K.

[49] *See* Exhibit 5 to Amendment No. 3, *supra* note 8.

clarifies that compensation committees may select or receive advice from any compensation adviser they prefer, including ones that are not independent, after considering the six independence factors set forth in Section 303A.05(c)(iv)(A)–(F) of the Manual.[50] The Exchange clarified that, while the compensation committee is required to consider the independence of compensation advisers, the compensation committee is not precluded from selecting or receiving advice from compensation advisers that are not independent.[51]

3. Application to Smaller Reporting Companies

Rule 10C–1 includes an exemption for smaller reporting companies from all the requirements included within the rule.[52] Consistent with this Rule 10C–1 provision, NYSE, as a general matter, proposes that a smaller reporting company, as defined in Rule 12b–2 [53] under the Act (hereinafter, a ''Smaller Reporting Company''), not be subject to the new requirements set forth in its proposal specifically to comply with Rule 10C–1.[54] Thus, NYSE proposes not to require Smaller Reporting Companies to comply with either the enhanced independence standards for members of compensation committees relating to compensatory fees and affiliation or the compensation adviser independence considerations.[55]

NYSE proposes in Section 303A.00 of the Manual that Smaller Reporting Companies are not required to comply with Section 303A.02(a)(ii) concerning the additional independence factors for members serving on the compensation committee. A Smaller Reporting Company will be required to continue to comply with the pre-existing portions of proposed Section 303A.05 of the Manual, including the requirements of Section 303A.05(c) concerning the compensation committee's authority, responsibility and funding of compensation advisers. However, NYSE proposes an exception from the new portion of proposed Section 303A.05(c)(iv) that would otherwise require the Smaller Reporting Company's compensation committee to consider independence factors before selecting such advisers, which goes beyond NYSE's existing requirements.[56] NYSE argues that, under this approach, Smaller Reporting Companies will effectively be subject to the same requirements as is currently the case under the existing requirements of the Manual, but they will not be subject to any of the new requirements of proposed Sections 303A.02(a)(ii) and 303A.05(c)(iv).[57]

4. Exemptions

NYSE proposes that its existing exemptions from the Exchange's compensation-related listing rules currently in place, which are set forth in Section 303A.00 of the Manual, apply also to the new requirements of the proposed rule change and thereby will continue to provide a general exemption from all of the compensation committee requirements of Section 303A.05 of the Manual.[58] These include exemptions to the following issuers: Any listed company of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company (in other words, a controlled company); limited partnerships; companies in bankruptcy; closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940; passive business organizations in the form of trusts (such as royalty trusts) or derivatives and special purpose securities; and issuers whose only listed equity stock is a preferred stock.[59] NYSE states that these categories of issuers typically: (i) Are externally managed and do not directly employ executives; (ii) do not by their nature have employees; or (iii) have executive compensation policy set by a body other than the board.[60] In light of these structural reasons why these categories of issuers generally do not have compensation committees, the Exchange believes that it would be a significant and unnecessarily burdensome alteration in their governance structures to require them to comply with the proposed new requirements and that it is appropriate to grant them an exemption.[61]

Concerning foreign private issuers,[62] NYSE's current rules in Section 303A.11 of the Manual permit any such issuer to follow its home country practice in lieu of many of NYSE's corporate governance listing standards, including the Exchange's compensation-related listing rules. Section 303A.00 of the Manual currently provides that listed companies that are foreign private issuers are permitted to follow home country practice in lieu of the provisions of Section 303A, but this allowance is granted on condition that the issuer discloses in its annual report filed with the Commission any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE listing standards.[63] NYSE proposes that this allowance continue to apply, generally, to the Exchange's compensation committee rules as revised by the instant proposal on the same condition, namely that the issuer discloses any significant ways in which its corporate governance practices differ from those followed by domestic companies under NYSE listing standards in its annual report.[64] NYSE does not propose to add any additional requirements to this disclosure requirement applicable to foreign private issuers, and argues that an additional statement as to why the company does not comply would likely simply be that the foreign private issuer was not required to do so by home country law.[65]

5. Transition to the New Rules for Companies Listed as of the Effective Date

The proposed rule change provides that certain of the new requirements for listed companies will be effective on July 1, 2013 and others will be effective after that date.[66] Specifically, NYSE proposes to amend Section 303A.00 to

[50] *See id.*

[51] *See* Amendment No. 3, *supra* note 8.

[52] *See supra* Section II.A; *see also* Rule 10C–1(b)(5)(ii).

[53] 17 CFR 240.12b–2.

[54] *See* proposed Section 303A.00 of the Manual.

[55] *See supra* text accompanying notes 29 and 43.

[56] As noted above, NYSE currently requires such authority, responsibility and funding be provided by all listed companies to compensation committees, including by Smaller Reporting Companies. *See supra* text accompanying note 24. As Smaller Reporting Companies will not be required to comply with the consideration of certain independence factors when selecting an adviser, their charters will not be required to reflect this provision.

[57] *See* Notice, *supra* note 3.

[58] *See id.* In addition, such exempt companies would also thereby be exempt from the enhanced independence requirements for compensation committee composition described in proposed Section 303A.02 of the Manual.

[59] *See* Section 303A.00 of the Manual.

[60] *See* Notice, *supra* note 3.

[61] *See id.*

[62] Under NYSE's listing rules, ''foreign private issuer'' has the same meaning and is defined in accordance with the SEC's definition of foreign private issuer set out in Rule 3b–4(c) (17 CFR 240.3b–4). *See* Section 103.00 of the Manual.

[63] *See* Section 303A.11 of the Manual. If a foreign private issuer is not required to file its annual report with the Commission on Form 20–F, it may either make this disclosure in another annual report filed with the Commission or make this disclosure available on or through its Web site.

[64] *See* Notice, *supra* note 3.

[65] *See id.; see also* Commentary to Section 303A.11 of the Manual.

[66] During the transition periods described herein, existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. The Exchange believes that its prior use of a similar transition period was satisfactory and that it is reasonable to follow the same approach in connection with the proposed changes to the compensation committee independence standards.

provide transition periods by which listed companies would be required to comply with the new Section 303A.02(a)(ii) compensation committee director independence standards. Pursuant to the proposal, listed companies would have until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the new standards for compensation committee director independence. Existing compensation committee independence standards would continue to apply pending the transition to the new independence standards. NYSE proposes that all other proposed sections of the proposal would become effective on July 1, 2013 for purposes of compliance by currently listed issuers that are not otherwise exempted. On July 1, 2013, such issuers will be required to comply with the provisions relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting or receiving advice from such advisers.[67]

6. Compliance Schedules: IPOs; Companies that Lose their Exemptions; Companies Transferring from Other Markets

NYSE's existing rules permit certain companies listing on the Exchange to phase-in compliance with all of the Exchange's applicable independence requirements for compensation committees after the date that the company's securities first trade on NYSE.[68] NYSE proposes to preserve its current compliance periods for those categories of issuers with respect to the enhanced independence standard for directors serving on the compensation committee, which means that companies listing in conjunction with their initial public offerings,[69] companies listing in connection with a spin-off or carve-out, companies listing upon emergence from bankruptcy, and companies that cease to qualify as a controlled company would continue to be entitled to a transition period under which the company must have: At least one independent member that meets the enhanced standards (concerning fees received by members and their affiliations) on its compensation committee by the listing date; at least a majority of independent members that meet the enhanced standards on the compensation committee within 90 days of the listing date; and a fully independent compensation committee where all members meet the enhanced standards within one year of the listing date.

Companies that cease to qualify as foreign private issuers would continue to have a transition period under which they must have a fully independent compensation committee where all members meet the enhanced standards within six months of that determination.

Companies listing upon transfer from another market would have one year from the listing date to satisfy all the requirements of Section 303A to the extent the national securities exchange on which they were listed did not have the same requirement.

For a company that was, but has ceased to be, a Smaller Reporting Company, the proposed rule change, as modified by Amendment No. 3, establishes a compliance schedule based on certain dates relating to the company's change in status.[70] Pursuant to Rule 12b–2 under the Act, a company tests its status as a Smaller Reporting Company on an annual basis as of the last business day of its most recently completed second fiscal quarter (the ''Smaller Reporting Company Determination Date''). A company with a public float of $75 million or more as of the Smaller Reporting Company Determination Date will cease to be a Smaller Reporting Company as of the beginning of the fiscal year following the Smaller Reporting Company Determination Date. Under NYSE's proposal, the day of this change in status is the beginning of the compliance period (''Start Date'').[71]

By six months from the Start Date, the company will be required to comply with Section 303A.05(c)(iv) of the Manual, which sets forth the provision described above relating to the requirement that the committee consider independence factors before selecting compensation advisers.[72] Six months from the Start Date, the company will begin to comply with the additional requirements in Section 303A.02(ii) regarding member independence on the compensation committee. Under the proposal, as amended, a company that has ceased to be a Smaller Reporting Company will be permitted to phase in its compliance with the enhanced independence requirements for compensation committee members (relating to compensatory fees and affiliation) as follows: (i) One member must satisfy the requirements by six months from the Start Date; (ii) a majority of members must satisfy the requirements by nine months from the Start Date; and (iii) all members must satisfy the requirements by one year from the Start Date.[73]

III. Comments on the Proposed Rule Change and NYSE's Response

As stated previously, the Commission received a total of seven comment letters on the NYSE proposal,[74] and one comment letter on a related proposal by NYSE Arca.[75] The Commission is treating the comment letter submitted on the NYSE Arca filing, for which a comparable letter was not submitted on the NYSE filing, as also being applicable to the NYSE filing since the NYSE and NYSE Arca filings address the same substantive issues. NYSE Euronext, Inc., on behalf of NYSE, responds to these comment letters for the NYSE proposal.[76]

Three commenters expressed general support for the proposal, although two believed that it needed to be amended before being approved.[77] Some

[67] As noted above, NYSE already requires that, if a compensation consultant is to assist in the evaluation of director, CEO or executive officer compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.

[68] *See* Section 303A.00 of the Manual (Compliance Dates).

[69] NYSE notes that, for purposes of Section 303A other than Sections 303A.06 and 303A.12(b), a company is considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Act.

[70] *See* proposed Section 303A.00 (Compliance Dates), as amended. In the proposal as originally submitted, the compliance schedule was to require compliance with the enhanced standards for director independence six months after the company ceases to be a Smaller Reporting Company, but immediate compliance with all other requirements. In Amendment No. 3, NYSE states that while the revised compliance schedule is different from what it originally proposed, the amended version will allow companies sufficient time to adjust to the differences, as many companies will likely not become aware of their change in status until significantly after the determination date and would therefore not utilize the transition period as originally proposed to bring themselves into compliance with the enhanced requirements, and that such companies would have significant difficulty in becoming compliant within the transition period as originally proposed.

[71] *See* Amendment No. 3, supra note 8.

[72] In addition, this will require the company to update its charter to reflect this additional responsibility of the compensation committee. *See* Section 303A.05(b)(iii) of the Manual.

[73] During the compliance schedule, a company that has ceased to be a Smaller Reporting Company will be required to continue to comply with the rules previously applicable to it.

[74] *See supra* note 5.

[75] *See id.*

[76] *See supra* note 6.

[77] *See* Ameriprise Letter, which supported the proposal but believed that certain aspects were not sufficiently clear such that the proposal needed to be amended to provide additional clarity; ICI Letter, which urged approval of the proposal; and Corporate Secretaries Letter, which generally

Continued

commenters supported specific provisions of the proposal,[78] some opposed specific provisions,[79] and some sought clarification of certain aspects of the proposal.[80] Some commenters believed that the proposal fell short of meeting the requirements of Rule 10C–1 and believed that it should have been more stringent.[81] These and other comments, as well as NYSE's responses to some of the comments that raised issues with the proposal, are summarized below.

A. Definition of Independence

1. Consideration of Director Compensation

Three commenters believed that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[82] Two of these commenters, after noting that the proposal did not require boards of directors to also consider the compensation paid to the directors for their service on the board in determining the independence of directors serving on the compensation committee, argued that the proposal falls short of the requirements of Rule 10C–1, which, in their view, requires that fees paid to a director for service on the company's board also be considered.[83] The other commenter argued that the language of Section 10C of the Act itself, as well as its legislative history, indicates Congress's intent that such fees be considered.[84] These commenters believed that compensation for board service can result in ''the impairment of independence as a result of excessive fees,'' [85] because ''[h]igh director fees relative to other sources of income can compromise director objectivity,'' [86] and ''[h]ighly paid directors also may be more inclined to approve large executive pay packages.'' [87] One of these commenters believed that the requirement of Section 10C of the Act and Rule 10C–1 to consider the source of compensation of a director goes further, and applies to all types of compensation that a director may receive, including compensation paid by any person, including non-issuers.[88]

In its response to comments, NYSE stated that, as all non-management directors of a listed company are eligible to receive the same fees for service as a director or board committee member, NYSE does not believe that it is likely that director compensation would be a relevant consideration for compensation committee independence.[89] NYSE noted that, however, the proposed rules require the board to consider all relevant factors in making compensation committee independence determinations.[90] Therefore, NYSE believes that, to the extent that excessive board compensation might affect a director's independence, the proposed rules would require the board to consider that factor in its determination.[91]

2. Personal or Business Relationships Between Directors and Officers

Some commenters believed that the proposed rules should explicitly require the board of a listed company, when considering affiliations of a director in determining eligibility for compensation committee membership, to consider personal or business relationships between the director and the company's executive officers.[92] As expressed by two of these commenters, ''too many corporate directors have significant personal, financial or business ties to the senior executives that they are responsible for compensating.'' [93]

Some commenters believed that related party transactions should explicitly be included as a relevant factor in determining independence for members of compensation committees.[94] The additional requirements suggested by commenters also included, for example, disqualification of a director from membership on the compensation committee if an immediate family member of the director received compensation in excess of $120,000 a year from the company even if that family member was not an executive officer of the company; [95] or if the director has, or in the past five years has had, a personal contract with the company, with an executive officer of the company, or with any affiliate of the company.[96]

One commenter acknowledged that the proposal would require consideration of all factors specifically relevant to determining whether a director has a relationship which is material to that director's ability to be independent from management, but argued that such requirement is not sufficient to ensure that boards weigh personal or business relationships between directors and executive officers.[97] In support, the commenter argued that: (1) Such relationships were not technically with the ''listed company'' and therefore would at least create confusion as to whether it should be considered; (2) the omission of an explicit reference to this relationship was inconsistent with other approaches taken in the proposal that made reference to certain other relationships; and (3) legislative history makes it clear that Congress expected these relationships to be explicitly considered in determining director independence.[98]

In response, NYSE noted that the existing independence standards of NYSE require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence.[99] NYSE further stated that commentary to Section 303A.02(a) explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management, and NYSE MKT LLC and NYSE Arca have always interpreted their respective director independence requirements in

supported the proposal, but believed that certain of its aspects were unnecessarily burdensome or not sufficiently clear such that the proposal needed to be amended before being approved by the Commission.

[78] *See* Brown Letter, CII Letter, and ICI Letter.

[79] *See* AFL–CIO Letter, Brown Letter, and Wilson Sonsini Letter. *See also* CII Letter, which stated that it believed that specific aspects of the NYSE Arca proposal were lacking.

[80] *See* Ameriprise Letter and Corporate Secretaries Letter.

[81] *See* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

[82] *See* Brown Letter, AFL–CIO Letter, and Teamsters Letter.

[83] *See* AFL–CIO Letter and Teamsters Letter, noting that Rule 10C–1 requires the exchanges to consider a director's ''source of compensation,'' and arguing that this phrase includes director fees.

[84] *See* Brown Letter.

[85] *Id.*

[86] *See* AFL–CIO Letter and Teamsters Letter.

[87] *Id.*

[88] *See* Brown Letter.

[89] *See* NYSE Response Letter.

[90] *See id.*

[91] *See id.*

[92] *See* AFL–CIO Letter, Brown Letter, CII Letter, and Teamsters Letter.

[93] AFL–CIO Letter and Teamsters Letter.

[94] *See* AFL–CIO Letter and Teamsters Letter.

[95] *See* AFL–CIO Letter and Teamsters Letter. NYSE's definition of Independent Director already disqualifies a director from membership on the compensation committee if an immediate family member of the director receives in excess of $120,000 from the company or was an executive officer of the company.

[96] *See* CII Letter. The commenter acknowledged, however, that existing director requirements implicitly require this consideration, but similarly recommended that the importance of the factor requires it be explicit in the NYSE Arca's proposal. Outside the scope of this proposal, the commenter also suggested NYSE Arca consider, at some future date, developing a more comprehensive and robust definition of independent directors that could be applicable to all board committees and provided a proposed definition for NYSE Arca's consideration. As noted above, the comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

[97] *See* Brown Letter.

[98] *See id.*

[99] *See* NYSE Response Letter.

the same way.[100] Consequently, NYSE stated that it did not believe that any further clarification of this requirement is necessary.[101]

As to a requirement to consider related party transactions, NYSE responded that it believes that this is unnecessary as the existing director independence standards require boards to consider all material factors relevant to an independence determination, as do the specific compensation committee independence requirements of the proposed rules.[102]

3. Sufficiency of Single Factor and Additional Comments on Independence

Two commenters explicitly sought clarification that a single factor can result in the loss of independence.[103] In its response letter, NYSE confirmed that it has interpreted the existing general board independence standards as providing that a single relationship could be sufficiently material that it would render a director non-independent. NYSE stated it was not aware that there has been any confusion with respect to this interpretation.[104] Consequently, NYSE did not believe it is necessary to include in the proposed rules a statement that a single factor may be sufficiently material to render a director non-independent, as this is clearly the intention of the rules as drafted.[105]

Some of the above commenters expressed the belief, in general, that the definition of an independent director should be more narrowly drawn, that the bright-line tests of independence should be strengthened, and that the standards of independence should be uniform for all committees requiring independent directors.[106]

One commenter believed that the requirement that the board ''must consider all factors specifically relevant to determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member'' was vague and unnecessary in light of the comprehensive factors already required.[107] In responding to this commenter, NYSE disagreed, noting that the requirement to consider all material relationships, not just those enumerated, was essential, as it is impossible to foresee all relationships that may be material.[108]

B. Compensation Adviser Independence Factors

The Commission received letters from four commenters relating to the provision of the proposed rule change that requires a compensation committee to take into consideration the factors set forth in the proposal in the selection of a compensation consultant, legal counsel, or other adviser to the committee.[109]

1. Additional Factors for Consideration

One commenter generally supported the proposal's requirement that a board consider six independence factors before engaging an adviser, but believed that at least one additional factor should be considered: ''whether the compensation committee consultants, legal counsel or other advisers require that their clients contractually agree to indemnify or limit their liability.'' [110] The commenter believed that such contractual provisions, which the commenter indicated have become standard practice for many consultants, ''raise conflict of interest red flags'' that every compensation committee should consider in determining the independence of the consultant.[111]

In response, NYSE stated that it did not believe that this is an appropriate addition because a relationship would affect an adviser's independence from management only if it gave rise to a concern that it would subject the adviser to influence by management.[112] It was not apparent to NYSE why the existence of contractual indemnification and limitation of liability provisions would subject an adviser to any influence by management and, therefore, it is not clear how they are relevant to an independence determination.[113] NYSE expressed no view on the desirability of such agreements.[114]

2. Non-Independent Consultants

One commenter suggested that, although the portion of the proposal which relates to the compensation committee's use of a compensation consultant was thoughtfully drafted and accurately reflects the substance of Rule 10C–1, there was a possibility that a reader may not properly interpret the intended meaning of proposed Section 303A.05(c) of the Manual concerning the use of compensation consultants, legal counsel and advisers that are not independent.[115] First, the commenter suggested the use of the example ''independent legal counsel'' might be read to require the compensation committee to only use independent legal counsel, when Rule 10C–1 would otherwise permit a compensation committee to receive advice from non-independent counsel, such as in-house counsel or outside counsel retained by management.[116] Second, the commenter suggested that the proposal could be revised to emphasize that a compensation committee is not responsible for advisers retained by management or other parties.[117] Third, the commenter suggested that the section addressing the funding of consultants should be revised to make clear that: (a) Retained legal counsel need not be independent: and (b) expenses of an adviser, in addition to its compensation, would also be provided for by the issuer.[118] Fourth, the commenter suggested that the proposal be clarified to require a compensation committee to take into account the independence requirements only when selecting a consultant for matters related to executive compensation, rather than for consultants selected to assist with any other responsibilities the committee may have in addition to executive compensation.[119] In response, NYSE noted that Amendment No. 3 amended the proposed rule text to provide that: (i) Nothing in the proposed rules requires a compensation consultant, legal counsel or other compensation adviser to be independent, only that the compensation committee consider the enumerated independence factors before selecting a compensation adviser; and (ii) the compensation committee may select any compensation adviser they prefer including ones that are not independent, after considering the six independence factors outlined in the proposed rules.[120] In addition, NYSE noted that Rule 10C–1 and the SEC's adopting release refer only to compensation advisers generally without carving out compensation advisers retained by the compensation

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See* AFL–CIO Letter and Teamsters Letter.

[104] *See* NYSE Response Letter.

[105] *See id.*

[106] *See* CII Letter, AFL–CIO Letter, and Teamsters Letter.

[107] *See* Corporate Secretaries Letter.

[108] *See* NYSE Response Letter.

[109] *See* Ameriprise Letter, Wilson Sonsini Letter, CII Letter, and Corporate Secretaries Letter.

[110] *See* CII Letter. As noted above, the comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

[111] *See* CII Letter.

[112] *See* NYSE Response Letter.

[113] *See id.*

[114] *See id.*

[115] *See* Ameriprise Letter.

[116] *See id.*

[117] *See id.*

[118] *See id.*

[119] *See id. See also* Corporate Secretaries Letter.

[120] *See* NYSE Response Letter.

committee with respect to matters other than executive compensation.[121]

One commenter believed that the proposed rule could be read as requiring a compensation committee to consider the independence factors set forth in Rule 10C–1 when selecting any consultant providing advice to the compensation committee, including any outside legal counsel that might provide legal advice to a compensation committee.[122] The commenter argued that outside legal counsel often provides advice to compensation committees on matters other than how much a company should pay an executive.[123] The commenter suggested it would not be ''necessary or a good use of resources for compensation committees to review independence factors for such attorneys providing advice to the compensation committee.'' [124] The commenter stated that no other rule requires a board committee to consider the independence of its regular legal counsel,[125] and noted that, while it may, at times, be appropriate for a board or a committee to consider independence factors, such a consideration should not be made part of a listing standard that singles out the compensation committee.[126] The commenter suggested that different language originally proposed by The NASDAQ Stock Market LLC reflected a more balanced rule that only required the compensation committee to consider the independence when selecting independent legal counsel, not every outside attorney that provides advice to the compensation committee.[127]

In response, NYSE stated that it believes that its proposal is dictated by Rule 10C–1, which excludes only in-house legal counsel from the requirement to conduct an independence analysis with respect to any legal counsel consulted by the compensation committee, including the company's regular securities or tax counsel.[128] NYSE noted that the Rule 10C–1 Adopting Release provides that ''[t]he exemption of in-house counsel from the independence analysis will not affect the obligation of a compensation committee to consider the independence of outside legal counsel or compensation consultants or other advisers retained by management or by the issuer.'' [129]

Another commenter, while generally supporting the proposal, maintained that the required independence assessment will be ''time-consuming and burdensome'' due to the scope of information that will need to be gathered in order to conduct the required independence assessment.[130] This commenter believed that uncertainty over the scope of the requirement could have a counterproductive effect of discouraging compensation committees from obtaining the advice of advisers subject to the rule, particularly in situations where quick action is required of the compensation committee, and further identified a number of specific issues that it believed the Exchange should address to provide greater clarity regarding the standard.[131]

In response, NYSE disagreed with the commenter, arguing that it was impossible to specifically enumerate every category of relationship which might be material to a compensation committee adviser's independence.[132] NYSE believes that it is therefore necessary for a compensation committee to conduct a more flexible analysis.[133] NYSE believes that it would not be appropriate for it to identify additional relevant factors in the rule, as it would be impossible to predict every category of relationship that might be material.[134]

C. Opportunity to Cure Defects

One commenter supported the rule proposed by the Exchange to permit issuers a period of time, under specified conditions, to cure failures to comply with the independence requirements for compensation committee members.[135] The commenter was concerned, however, that the proposed rules did not specify a cure period for any other form of non-compliance with the new rules.[136] The commenter believed that a company should be allowed to take corrective action within a reasonable time after the company's senior executives learn of the non-compliance.

In response, NYSE noted that it had existing policies and procedures that govern non-compliance with rules generally and that these provisions would apply to any events of non-compliance under the proposed rules.[137] NYSE believes these provisions provide it with the ability to grant a discretionary period for an issuer to return to compliance, and noted that the determination of a reasonable cure period can only be made in light of specific facts and circumstances.[138]

D. Exemptions

The Commission received one comment letter supporting the Exchange's proposal to exempt investment companies from the Rule 10C–1 requirements.[139] As the commenter noted, although Rule 10C–1 exempts certain entities, including registered open-end management investment companies, from the enhanced independence requirements for members of compensation committees, it did not explicitly exempt other types of investment companies registered under the Investment Company Act of 1940 (''Investment Company Act''), including closed-end funds, from any of the requirements of Rule 10C–1. Under the proposal, both closed-end and open-end funds would be exempt from all the requirements of the rule. The commenter supported this aspect of the proposal, stating that both open-end and closed-end funds typically are externally managed and do not employ executives or, by their nature, have employees. The commenter agreed with the proposal that it would be significantly and unnecessarily burdensome to require such entities to comply with the proposed requirements, and further noted that any conflicts with respect to compensation of investment advisers are governed by the Investment Company Act.[140]

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[121] *See id.*

[122] *See* Wilson Sonsini Letter.

[123] *See id.*

[124] *See id.*

[125] *See id.*

[126] *See id.*

[127] *See id.* The Commission notes that The NASDAQ Stock Market LLC has since revised its proposed rule language and added commentary that makes clear its original intent that the compensation committee of an issuer listed on The NASDAQ Stock Market LLC, absent an exemption, must consider the independence of every adviser, other than in-house legal counsel, that provides advice to the compensation committee, including non-independent legal counsel. *See* SR–NASDAQ–2012–109, Amendment No. 1.

[128] *See* NYSE Response Letter.

[129] *See id.*

[130] *See* Corporate Secretaries Letter.

[131] The Commission notes that NYSE addressed some of the commenter's concerns in Amendment No. 3.

[132] *See* NYSE Response Letter.

[133] *See id.*

[134] *See id.*

[135] *See* Corporate Secretaries Letter.

[136] *See id.* The commenter mentioned, in particular, the requirement that the committee may obtain advice from a consultant or adviser only after assessing that individual's independence. The commenter believed that inadvertent violations of this requirement could arise, for example, if a person is appearing before a compensation committee solely to provide information or other services, and the individual then on a solicited or unsolicited basis makes a statement that could be viewed as providing advice on executive compensation. In the absence of a cure mechanism, the commenter believed, the company would be in violation of the listing standard and have no recourse.

[137] *See* NYSE Response Letter.

[138] *See id.*

[139] *See* ICI Letter.

[140] *See* ICI Letter.

E. Transition Period

One commenter voiced support for the transition period proposed for compliance with the new compensation committee independence standard, but believed that the Exchange should provide a longer period for companies to satisfy proposed Section 303A.05 of the Manual, relating to the authority of a compensation committee to retain compensation consultants, legal counsel, and other compensation advisers; the authority to fund such advisers; and the responsibility of the committee to consider independence factors before selecting such advisers.[141]

In response, the Exchange stated that it believes that the transition periods are sufficient to enable companies to become compliant on a timely basis in a manner that is not unduly burdensome.[142] The Exchange also noted that the proposed transition period was identical to that used at the time of the initial implementation of NYSE's current board and committee independence requirements and that NYSE believes that the transition period was not unduly burdensome for companies at that time.[143]

IV. Discussion

After careful review, the Commission finds that the NYSE proposal, as amended, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[144] In particular, the Commission finds that the amended proposed rule change is consistent with the requirements of Section 6(b) of the Act,[145] as well as with Section 10C of the Act [146] and Rule 10C–1 thereunder.[147] Specifically, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act,[148] which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and not be designed to permit, among other things, unfair discrimination between issuers.

The development and enforcement of meaningful listing standards for a national securities exchange is of substantial importance to financial markets and the investing public. Meaningful listing standards are especially important given investor expectations regarding the nature of companies that have achieved an exchange listing for their securities. The corporate governance standards embodied in the listing rules of national securities exchanges, in particular, play an important role in assuring that companies listed for trading on the exchanges' markets observe good governance practices, including a reasoned, fair, and impartial approach for determining the compensation of corporate executives. The Commission believes that the NYSE proposal will foster greater transparency, accountability, and objectivity in the oversight of compensation practices of listed issuers and in the decision-making processes of their compensation committees.

In enacting Section 10C of the Act as one of the reforms of the Dodd-Frank Act,[149] Congress resolved to require that ''board committees that set compensation policy will consist only of directors who are independent.'' [150] In June 2012, as required by this legislation, the Commission adopted Rule 10C–1 under the Act, which directs the national securities exchanges to prohibit, by rule, the initial or continued listing of any equity security of an issuer (with certain exceptions) that is not in compliance with the rule's requirements regarding issuer compensation committees and compensation advisers.

In response, NYSE submitted the proposed rule change, which includes rules intended to comply with the requirements of Rule 10C–1 and additional provisions designed to strengthen the Exchange's listing standards relating to compensation committees. The Commission believes that the proposed rule change satisfies the mandate of Rule 10C–1 and otherwise will promote effective oversight of its listed issuers' executive compensation practices.

The Commission notes that a number of the commenters generally supported the proposed rule change, although some commenters offered suggestions to clarify or improve various provisions of NYSE's proposal or NYSE Arca's substantially similar proposal. The Commission believes that the proposed rule change, as modified by Amendment Nos. 1 and 3, appropriately revises NYSE's rules for compensation committees of listed companies, for the following reasons:

A. Compensation Committee Composition

As discussed above, under Rule 10C–1, the exchanges must adopt listing standards that require each member of a compensation committee to be independent, and to develop a definition of independence after considering, among other relevant factors, the source of compensation of a director, including any consulting, advisory or other compensatory fee paid by the issuer to the director, as well as whether the director is affiliated with the issuer or any of its subsidiaries or their affiliates.

The Commission notes that Rule 10C–1 leaves it to each exchange to formulate a final definition of independence for these purposes, subject to review and final Commission approval pursuant to Section 19(b) of the Act. As the Commission stated in the Rule 10C–1 Adopting Release, ''given the wide variety of issuers that are listed on exchanges, we believe that the exchanges should be provided with flexibility to develop independence requirements appropriate for the issuers listed on each exchange and consistent with the requirements of the independence standards set forth in Rule 10C–1(b)(1).'' [151] This discretion comports with the Act, which gives the exchanges the authority, as self-regulatory organizations, to propose the standards they wish to set for companies that seek to be listed on their markets consistent with the Act and the rules and regulations thereunder, and, in particular, Section 6(b)(5) of the Act.

As noted above, in addition to retaining its existing independence standards that currently apply to board and compensation committee members, which include certain bright-line tests, NYSE has enhanced its listing requirements regarding compensation committees by adopting additional standards for independence to comply with the Fees Factor and Affiliation Factor, as well as the other standards set forth in Rule 10C–1. The NYSE's

[141] *See* Corporate Secretaries Letter.

[142] *See* NYSE Response Letter.

[143] *See* NYSE Response Letter.

[144] In approving the NYSE proposed rule change, as amended, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[145] 15 U.S.C. 78f(b).

[146] 15 U.S.C. 78j–3.

[147] 17 CFR 240.10C–1.

[148] 15 U.S.C. 78f(b)(5).

[149] *See supra* note 9.

[150] *See* H.R. Rep. No. 111–517, Joint Explanatory Statement of the Committee of Conference, Title IX, Subtitle E ''Accountability and Executive Compensation,'' at 872–873 (Conf. Rep.) (June 29, 2010).

[151] As explained further in the Rule 10C–1 Adopting Release, prior to final approval, the Commission will consider whether the exchanges' proposed rule changes are consistent with the requirements of Section 6(b) and Section 10C of the Act.

proposal also adopts the cure procedures required in Rule 10C–1(a)(3) for compensation committee members who cease to be independent for reasons outside their reasonable control, so long as the majority of the members of the compensation committee continue to be independent, and retains the requirement that listed issuers have a compensation committee composed entirely of independent directors as required by Rule 10C–1.

Further, as discussed in more detail below, the NYSE proposal retains the requirement that the compensation committee have a written charter that addresses the committee's purpose and responsibilities, and adds requirements to specify the compensation committee's authority and responsibilities as to compensation advisers as set forth under Rule 10C–1. Finally, to help in assuring that companies comply with these provisions, Exchange rules will continue to require that the compensation committee charter address an annual performance evaluation of the compensation committee. Taken as a whole, the Commission believes that these changes will strengthen the oversight of executive compensation in NYSE-listed companies and further greater accountability, and will therefore further the protection of investors consistent with Section 6(b)(5) of the Act.

The Commission believes that the Exchange's proposal, which requires the consideration of the additional independence factors for compensation committee members, is designed to protect investors and the public interest and is consistent with the requirements of Sections 6(b)(5) and 10C of the Act and Rule 10C–1 thereunder.

With respect to the Fees Factor of Rule 10C–1, the Exchange commentary states when considering the source of a director's compensation in determining independence for compensation committee service, the board should consider whether the director receives compensation from any person or entity that would impair his ability to make independent judgments about the listed company's executive compensation. In addition to the continued application of the NYSE's current bright-line tests, NYSE's new rules also require the board to consider all relevant factors in making independence determinations for compensation committee membership. The Exchange believes that these requirements of proposed Section 303A.02(a)(ii) of the Manual, in addition to the general director independence requirements, represent an appropriate standard for compensation committee independence that is consistent with the requirements of Rule 10C–1 and the Fees Factor.

The Commission believes that the provisions noted above to address the Fees Factor give a board broad flexibility to consider a wide variety of fees, including any consulting, advisory or other compensatory fee paid by the issuer or entity, when considering a director's independence for compensation committee service. While the Exchange does not bar all compensatory fees, the approach is consistent with Rule 10C–1 and provides a basis for a board to prohibit a director from being a member of the compensation committee, should the director receive compensation that impairs the ability to make independent decisions on executive compensation matters, even if that compensation does not exceed the threshold in the bright-line test.[152] The Commission, therefore, believes that the proposed compensatory fee requirements comply with Rule 10C–1 and are designed to protect investors and the public interest, consistent with Section 6(b)(5) of the Act. The Commission notes that the compensatory fee consideration may help ensure that compensation committee members are less likely to have received fees, from either the issuer or another entity, that could potentially influence their decisions on compensation matters.

The Commission recognizes that some commenters did not believe that the proposal went far enough because the Exchange did not adequately consider the compensation that directors receive for board or committee service in formulating its standards of independence for service on the compensation committee, and, in particular, the levels to which such compensation may rise,[153] or otherwise favored additional requirements.[154] The Commission notes, however, that to the extent a conflict of interest exists because directors set their own compensation, companies must disclose director compensation, and investors will become aware of excessive or non-customary director compensation through this means. In addition, as NYSE states, a company's board of directors must consider all relevant factors in making compensation committee independence determinations, and if director fees could, in the opinion of the board, impair the director's independent judgment with respect to compensation-related matters, the board could therefore consider director compensation in that context.[155] The Commission believes that, based on the NYSE's argument and the disclosure requirements noted above, these arguments are sufficient to find that NYSE has complied with the requirements of Rule 10C–1 in this regard.

With respect to the Affiliation Factor of Rule 10C–1, NYSE has concluded that an outright bar from service on a company's compensation committee of any director with an affiliation with the company, its subsidiaries, and their affiliates is inappropriate for compensation committees. NYSE's existing independence standards will also continue to apply to those directors serving on the compensation committee. NYSE maintains that it may be appropriate for certain affiliates, such as representatives of significant stockholders, to serve on compensation committees as ''share ownership in the listed company aligns the director's interests with those of unaffiliated shareholders, as their stock ownership gives them the same economic interest in ensuring that the listed company's executive compensation is not excessive.'' In spite of the argument of two commenters in favor of an outright ban on affiliations with the company,[156] the Commission believes that NYSE's approach of requiring boards only to consider such affiliations is reasonable and consistent with the requirements of the Act.

The Commission notes that Congress, in requiring the Commission to direct the exchanges to consider the Affiliation Factor, did not declare that an absolute bar was necessary. Moreover, as the Commission stated in the Rule 10C–1 Adopting Release, ''In establishing their independence requirements, the exchanges may determine that, even though affiliated directors are not allowed to serve on audit committees,

[152] *See supra* note 33, setting forth the existing bright-line tests.

[153] *See* AFL–CIO Letter, Brown Letter, and Teamsters Letter, maintaining that NYSE's proposal ''falls short'' of the Rule 10C–1 provision requiring exchanges to consider a director's source of compensation. *See also supra* notes 92–96 and accompanying text. As stated by commenters, ''[h]igh director fees relative to other sources of income can compromise director objectivity'' and ''[h]ighly paid directors also may be more inclined to approve large executive pay packages.'' AFL–CIO Letter. *See also* Teamsters Letter.

[154] *See, e.g.,* CII Letter.

[155] *See* NYSE Response letter, *supra* note 6. The Commission also notes that in the NYSE Response Letter, the Exchange states that to the extent that excessive board compensation might affect a director's independence, the new rules would require the board to consider that factor in its independence determination.

[156] *See* Teamsters Letter and AFL–CIO Letter.

such a blanket prohibition would be inappropriate for compensation committees, and certain affiliates, such as representatives of significant shareholders, should be permitted to serve.'' [157] In determining that NYSE's affiliation standard is consistent with Sections 6(b)(5) and 10C under the Act, the Commission notes that NYSE's proposal requires a company's board, in selecting compensation committee members, to consider whether any such affiliation would impair a director's judgment as a member of the compensation committee. The NYSE rule further states that, in considering affiliate relationships, a board should consider whether such affiliate relationship places the director under the direct or indirect control of the listed company or its senior management such that it would impair the ability of the director to make independent judgments on executive compensation. We believe that this should give companies the flexibility to assess whether a director who is an affiliate, including a significant shareholder, should or should not serve on the company's compensation committee, depending on the director's particular affiliations with the company or its senior management.[158]

As to whether NYSE should adopt any additional relevant independence factors, the Exchange stated that it reviewed its rules in light of Rule 10C–1, and concluded that its existing rules together with its proposed rules are sufficient to ensure committee member independence. The Commission believes that, through this review, the Exchange has complied with the requirement that it consider relevant factors, including, but not limited to, the Fees and Affiliation Factors in determining its definition of independence for compensation committee members. The Commission does not agree with the commenters who argued that the Exchange's proposal falls short of ''the requirements and/or intent'' of Section 10C of the Act and Rule 10C–1. The Commission notes that Rule 10C–1 requires each exchange to consider relevant factors in determining independence requirements for members of a compensation committee, but does not require the exchange's proposal to reflect any such additional factors.

As noted above, several commenters argued that the proposal should require that other ties between directors and the company, including business and personal relationships with executives of the company, be considered by boards in making independence determinations.[159] The Commission did emphasize in the Rule 10C–1 Adopting Release that ''it is important for exchanges to consider other ties between a listed issuer and a director * * * that might impair the director's judgment as a member of the compensation committee,'' [160] and noted that ''the exchanges might conclude that personal or business relationships between members of the compensation committee and the listed issuer's executive officers should be addressed in the definition of independence.'' However, the Commission did not require exchanges to reach this conclusion and thus NYSE's decision that such ties need not be included explicitly in its definition of independence does not render its proposal insufficient.

In explaining why it did not include, specifically, personal and business relationships as a factor, NYSE cites its standards for Independent Directors, generally, which require the board of directors of a listed issuer to make an affirmative determination that each such director has no material relationship with the listed company with respect to their independence from management.[161] All compensation committee members must meet the general independence standards under NYSE's rules in addition to the two new criteria being adopted herein. The Commission therefore expects that boards, in fulfilling their obligations, will apply this standard to each such director's individual responsibilities as a board member, including specific committee memberships such as the compensation committee. Although personal and business relationships, related party transactions, and other matters suggested by commenters are not specified either as bright-line disqualifications or explicit factors that must be considered in evaluating a director's independence, the Commission believes that compliance with NYSE's rules and the provision noted above would demand consideration of such factors with respect to compensation committee members, as well as to all Independent Directors on the board.

Notwithstanding the concern of some commenters, the Commission confirms that Rule 10C–1 does not mean that a director cannot be disqualified on the basis of one factor alone. Although NYSE does not state this explicitly in its rules, in response to comments, the Exchange confirmed that they have interpreted their current rules as providing that a single relationship could be sufficiently material that it would render a director non-independent. The Commission believes that nothing in Rule 10C–1 or in NYSE's current or proposed rules implies otherwise.

Finally, the Commission does not believe that NYSE is required in the current proposed rule change to consider further revisions of its independence rules as suggested by some commenters, although it may wish to do so in the future after it has experience with its rules. The Commission notes that the NYSE provision requires a board to further exercise appropriate discretion to consider all factors specifically relevant in determining whether a director has a relationship to the listed company which is material to that director's ability to be independent from management in connection with the duties of a compensation committee member. The Commission notes that one commenter argues this provision is vague and unnecessary and should be deleted from the proposal.[162] The Commission does not agree with the commenter, however, that the consideration of the explicitly enumerated factors will be sufficient in all cases to achieve the objectives of Section 10C(a)(3), because it is not possible to foresee all possible kinds of relationships that might be material to a compensation committee member's

[157] Rule 10C–1 Adopting Release. At the same time, the Commission noted that significant shareholders may have other relationships with the listed company that would result in such shareholders' interests not being aligned with those of other shareholders and that the exchanges may want to consider these other ties between a listed issuer and a director. While the Exchange did not adopt any additional factors, the current affiliation standard would still allow a company to prohibit a director whose affiliations ''impair his ability to make independent judgment'' as a member of the committee. *See also supra* notes 31–35 and accompanying text.

[158] The Commission notes that one commenter suggested there was ambiguity as to whether boards must consider business or personal relationships between directors and senior management. *See* Brown Letter. In response, NYSE noted that its existing independence standards require the board to make an affirmative determination that there is no material relationship between the director and the company which would affect the director's independence. NYSE noted that Commentary to Section 303A.02(a) of the Manual explicitly notes with respect to the board's affirmative determination of a director's independence that the concern is independence from management. Consequently, NYSE does not believe that any further clarification of this requirement is necessary. *See* NYSE Response Letter.

[159] *See supra* notes 92–102 and accompanying text. As noted above, one comment letter refers specifically to NYSE Arca, but applies equally to the NYSE proposal.

[160] *See supra* note 11.

[161] *See* Section 303A.02(a) of the Manual. *See also* NYSE Response Letter.

[162] *See* Corporate Secretaries Letter.

independence. We therefore believe the flexibility provided in NYSE's new compensation committee independence standards provides companies with guidance, while allowing them to identify those relationships that might raise questions of independence for service on the compensation committee. For these reasons, we believe the director independence standards are consistent with the investor protection provision of Section 6(b)(5) of the Act.

B. Authority of Committees to Retain Compensation Advisers; Funding; and Independence of Compensation Advisers and Factors

As discussed above, NYSE proposes to set forth explicitly in its rules the requirements of Rule 10C–1 regarding a compensation committee's authority to retain compensation advisers, its responsibilities with respect to such advisers, and the listed company's obligation to provide appropriate funding for payment of reasonable compensation to a compensation adviser retained by the committee. As such, the Commission believes these provisions meet the mandate of Rule 10C–1 [163] and are consistent with the Act.[164]

In addition, the Commission believes that requiring companies to specify the enhanced compensation committee responsibilities through the compensation committee's written charter will help to assure that there is adequate transparency as to the rights and responsibilities of compensation committee members. As discussed above, the proposed rule change requires the compensation committee of a listed company to consider the six factors relating to independence that are enumerated in the proposal before selecting a compensation consultant, legal counsel or other adviser to the compensation committee. The Commission believes that this provision is consistent with Rule 10C–1 and Section 6(b)(5) of the Act.

As noted above, one commenter believed that Rule 10C–1 could be read as not requiring a compensation committee to consider the enumerated independence factors with respect to regular outside legal counsel and sought to have NYSE revise its proposal.[165] This reading is incorrect, and NYSE's rule language reflects the appropriate reading. The Commission notes that Rule 10C–1 includes an instruction that specifically requires a compensation committee to conduct the independence assessment with respect to ''any compensation consultant, legal counsel or other adviser that provides advice to the compensation committee, other than in-house counsel.'' [166] To avoid any confusion, NYSE added rule text that reflects this instruction in its own rules.[167]

In approving this aspect of the proposal, the Commission notes that compliance with the rule requires an independence assessment of any compensation consultant, legal counsel, or other adviser that provides advice to the compensation committee, and is not limited to advice concerning executive compensation. However, NYSE has proposed, in Amendment No. 3, to add language to the provision regarding the independence assessment of compensation advisers [168] to state that the compensation committee is not required to conduct an independence assessment for a compensation adviser that acts in a role limited to the following activities for which no disclosure is required under Item 407(e)(3)(iii) of Regulation S–K: (a) Consulting on any broad-based plan that does not discriminate in scope, terms, or operation, in favor of executive officers or directors of the company, and that is available generally to all salaried employees; and/or (b) providing information that either is not customized for a particular issuer or that is customized based on parameters that are not developed by the adviser, and about which the adviser does not provide advice. NYSE states that this exception is based on Item 407(e)(3)(iii) of Regulation S–K, which provides a limited exception to the Commission's requirement for a registrant to disclose any role of compensation consultants in determining or recommending the amount and form of a registrant's executive and director compensation.[169]

The Commission views NYSE's proposed exception as reasonable, as the Commission determined, when adopting the compensation consultant disclosure requirements in Item 407(e)(3)(iii), that the two excepted categories of advice do not raise conflict of interest concerns.[170] The Commission also made similar findings when it noted it was continuing such exceptions in the Rule 10C–1 Adopting Release, including excepting such roles from the new conflict of interest disclosure rule required to implement Section 10C(c)(2). The Commission also believes that the exception should allay some of the concerns raised by the commenters regarding the scope of the independence assessment requirement. Based on the above, the Commission believes these limited exceptions are consistent with the investor protection provisions of Section 6(b)(5) of the Act.

Regarding the belief of another commenter that the independence assessment requirement could discourage compensation committees from obtaining the advice of advisers,[171] the Commission notes that, as already discussed, nothing in the proposed rule prevents a compensation committee from selecting any adviser that it prefers, including ones that are not independent, after considering the six factors. In this regard, in Amendment No. 3, NYSE added specific rule language stating, among other things, that nothing in its rule requires a compensation adviser to be independent, only that the compensation committee must consider the six independence factors before selecting or receiving advice from a compensation adviser.[172] Regarding the commenter's concern over the burdens that the Exchange proposal imposes, the Commission notes that Rule 10C–1 explicitly requires exchanges to require consideration of these six factors.[173] Moreover, five of the six factors were dictated by Congress itself in the Dodd-Frank Act. As previously stated by the Commission in adopting Rule 10C–1, the requirement that compensation committees consider the independence of potential compensation advisers before they are selected should help assure that compensation committees of affected listed companies are better informed about potential conflicts, which could reduce the likelihood that

[163] 17 CFR. 240.10C–1.

[164] 15 U.S.C. 78j–3.

[165] *See* Wilson Sonsini Letter and *supra* notes 122–127 and accompanying text.

[166] *See* Instruction to paragraph (b)(4) of Rule 10C–1.

[167] *See supra* note 46 and accompanying text.

[168] *See* proposed Commentary to Section 303A.05(c), as amended by Amendment No. 3.

[169] *See* 17 CFR 229.407(e)(3)(iii).

[170] *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089 (Dec. 19, 2009), 74 FR 68334 (Dec. 23, 2009), at 68348 (''We are persuaded by commenters who noted that surveys that provide general information regarding the form and amount of compensation typically paid to executive officers and directors within a particular industry generally do not raise the potential conflicts of interest that the amendments are intended to address.'').

[171] *See* Corporate Secretaries Letter and *supra* note 130 and accompanying text.

[172] *See supra* notes 49–50 and accompanying text.

[173] The Commission also does not agree with the argument of one commenter that NYSE Arca's substantially similar proposal must require compensation committees to specifically consider, among the independence factors relating to compensation advisers, whether such an adviser requires that clients contractually agree to indemnify or limit their liability. *See* CII Letter. The Commission views as reasonable the Exchange's belief that the six factors set forth in Rule 10C–1 are sufficient for the required independence assessment.

they are unknowingly influenced by conflicted compensation advisers.[174]

Finally, one commenter requested guidance ''on how often the required independence assessment should occur.'' [175] This commenter observed that it ''will be extremely burdensome and disruptive if prior to each such [compensation committee] meeting, the committee had to conduct a new assessment.'' The Commission anticipates that compensation committees will conduct such an independence assessment at least annually.

The changes to NYSE's rules on compensation advisers should therefore benefit investors in NYSE-listed companies and are consistent with the requirements in Section 6(b)(5) of the Act that rules of the exchange further investor protection and the public interest.

C. Application to Smaller Reporting Companies

The Commission believes that the requirement for Smaller Reporting Companies, like all other listed companies, to have a compensation committee, composed solely of Independent Directors is reasonable and consistent with the protection of investors. The Commission notes that NYSE's rules for compensation committees have not made a distinction for Smaller Reporting Companies in the past. However, consistent with the exemption of Smaller Reporting Companies from Rule 10C–1, the NYSE proposal would: (i) Exempt Smaller Reporting Companies from having to consider the additional independence requirements as to compensatory fees and affiliation; and (ii) exempt their compensation committees from having to consider the additional independence factors for compensation advisers. Under this approach, Smaller Reporting Companies will effectively be subject to the same requirements as is currently the case under the existing requirements of the Manual for all companies with respect to having a written charter that provides the compensation committee with the sole authority and funding for the retention of compensation consultants.

The Commission believes that these provisions are consistent with the Act and do not unfairly discriminate between issuers. The Commission believes that, for similar reasons to those for which Smaller Reporting Companies are exempted from the Rule 10C–1 requirements, it makes sense for NYSE to provide some flexibility to Smaller Reporting Companies. Further, because a Smaller Reporting Company does not need to include in its charter the additional provision regarding the independence of compensation advisers that NYSE is requiring all other listed companies to include to comply with Rule 10C–1,[176] and in view of the potential additional costs of such review, it is reasonable not to require a Smaller Reporting Company to conduct such analysis of compensation advisers.

D. Opportunity To Cure Defects

Rule 10C–1 requires the rules of an exchange to provide for appropriate procedures for a listed issuer to have a reasonable opportunity to cure any defects that would be the basis for the exchange, under Rule 10C–1, to prohibit the issuer's listing. Rule 10C–1 also specifies that, with respect to the independence standards adopted in accordance with the requirements of the Rule, an exchange may provide a cure period until the earlier of the next annual shareholders meeting of the listed issuer or one year from the occurrence of the event that caused the member to be no longer independent.

The Commission notes that the cure period that NYSE proposes for companies that fail to comply with the enhanced independence requirements designed to comply with Rule 10C–1 is the same as the cure period suggested under Rule 10C–1, but NYSE limits the cure period's use to circumstances where the committee continues to have a majority of independent directors, as NYSE believes this would ensure that the applicable committee could not take an action without the agreement of one or more independent directors. The Commission believes that the accommodation, including the proposed period and limitation, although it gives a company less leeway in certain circumstances than the cure period provided as an option by Rule 10C–1, is fair and reasonable and consistent with investor protection under Rule 6(b)(5) by ensuring that a compensation committee cannot take action without a majority of independent directors even when a member ceases to be independent and the committee is entitled to a period to cure that situation.

The Commission agrees with the understanding of the commenter who believed that Rule 10C–1 requires that an exchange provide a company an opportunity to cure any defects in compliance with any of the new requirements. The Commission believes that NYSE's general due process procedures for the delisting of companies that are out of compliance with the Exchange's rules satisfy this requirement. For example, NYSE's rules provide that, unless continued listing of the company raises a public interest concern, when a company is deficient in compliance with listing standards, the Exchange will provide the company with an opportunity to provide NYSE with a plan of definitive action the company has taken, or is taking, that would bring it into conformity with continued listing standards within 18 months of receipt of a notice of a deficiency.[177]

The Commission believes that these general procedures for companies out of compliance with listing requirements, in addition to the particular cure provisions for failing to meet the new independence standards, adequately meet the mandate of Rule 10C–1 and also are consistent with investor protection and the public interest, since they give a company a reasonable time period to cure non-compliance with these important requirements before they will be delisted.[178]

E. Exemptions

The Commission believes that it is appropriate for NYSE to exempt from the new requirements established by the proposed rule change the same categories of issuers that are exempt from its existing standards for oversight of executive compensation for listed companies. Although Rule 10C–1 does not explicitly exempt some of these categories of issuers from its requirements, it does grant discretion to exchanges to provide additional exemptions. NYSE states that the reasons it adopted the existing exemptions apply equally to the new requirements, and the Commission believes that this assertion is reasonable.

NYSE proposed to exempt limited partnerships, companies in bankruptcy proceedings and open-end management investment companies that are registered under the Investment Company Act from all of the requirements of Rule 10C–1. The

[174] *See* Rule 10C–1 Adopting Release, *supra* note 11.

[175] *See* Corporate Secretaries Letter.

[176] As discussed *supra* notes 56–57 and accompanying text, the charter of a Smaller Reporting Company will not be required to include, like the charters of other listed companies, a requirement that the committee consider independence factors before selecting such advisers, because Smaller Reporting Companies are not subject to that requirement.

[177] *See supra* text accompanying notes 137–138. *See also* NYSE Response Letter, *supra* note 6.

[178] The Commission notes that the general procedures to cure non-compliance adequately address the comments made in the Corporate Secretaries Letter.

Commission believes such exemptions are reasonable, and notes that such entities, which were already generally exempt from NYSE's existing compensation committee requirements, also are exempt from the compensation committee independence requirements specifically under Rule 10C–1. NYSE also proposes to exempt closed-end management investment companies registered under the Investment Company Act from the requirements of Rule 10C–1. The Commission believes that this exemption is reasonable because the Investment Company Act already assigns important duties of investment company governance, such as approval of the investment advisory contract, to independent directors, and because such entities were already generally exempt from NYSE's existing compensation committee requirements. The Commission notes that, as one commenter stated, typically registered investment companies do not employ executives or employees or have compensation committees. The Commission notes that the existing language of these exemptive provisions is not changed, but that the provisions, which go beyond Rule 10C–1's exemptions, are consistent with Rule 10C–1.

The Commission further believes that other proposed exemption provisions relating to controlled companies,[179] asset-backed issuers and other passive issuers, and issuers whose only listed equity stock is a preferred stock are reasonable, given the specific characteristics of these entities. As noted by the Exchange, many of these issuers are externally managed and do not directly employ executives; do not, by their nature, have employees, or have executive compensation policy set by a body other than their board.

The NYSE proposal would continue to permit foreign private issuers to follow home country practice in lieu of the provisions of the new rules, without requiring any further disclosure from such entities. The Commission believes that granting exemptions to foreign private issuers in deference to their home country practices with respect to compensation committee practices is appropriate, and believes that the existing disclosure requirements will help investors determine whether they are satisfied with the alternative standard. The Commission notes that such entities are exempt from the compensation committee independence requirements of Rule 10C–1 to the extent such entities disclose in their annual reports the reasons they do not have independent compensation committees.

F. Transition to the New Rules for Companies Listed as of the Effective Date

The Commission believes that the deadlines for compliance with the proposal's various provisions are reasonable and should afford listed companies adequate time to make the changes, if any, necessary to meet the new standards. The Commission believes that the deadline proposed is clear-cut and matches the revised deadline set forth by The NASDAQ Stock Market.[180] Accordingly, the deadline gives companies until the earlier of their first annual meeting after January 15, 2014, or October 31, 2014, to comply with the remaining provisions.[181]

G. Compliance Schedules: IPOs; Companies That Lose Their Exemptions; Companies Transferring From Other Markets

The Commission believes that it is reasonable for NYSE to allow, with respect to IPOs, companies listing in conjunction with a carve-out or spin-off transaction, companies emerging from bankruptcy, companies ceasing to be controlled companies, companies ceasing to qualify as a foreign private issuer, and companies transferring from other markets, the same phase-in schedule for compliance with the new requirements as is permitted under its current compensation-related rules.

The Commission also believes that the compliance schedule for companies that cease to be Smaller Reporting Companies, as revised in Amendment No. 3, affords such companies ample time to come into compliance with the full panoply of rules that apply to other companies. In the Commission's view, the revised schedule also offers such companies more clarity in determining when they will be subject to the heightened requirements.

V. Accelerated Approval of Amendment No. 3 to the Proposed Rule Change

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[182] for approving the proposed rule change, as modified by Amendment Nos. 1 and 3, prior to the 30th day after the date of publication of notice in the **Federal Register**.

The change made to the proposal by Amendment No. 3 to change a reference from Item 10(f)(1) of Regulation S–K to a reference to Exchange Act Rule 12b-2 is not a substantive one and merely references an otherwise identical definition.

The revision made by Amendment No. 3 to the compliance rules for companies that cease to be Smaller Reporting Companies [183] establishes a schedule that is easier to understand, while still affording such companies adequate time to come into compliance with the applicable requirements. The Commission notes that the Start Date of the compliance period for such a company is six months after the Smaller Reporting Company Determination Date, and the company is given no less than another six months from the Start Date to gain compliance with the rules from which it had been previously exempt. As originally proposed a Smaller Reporting Company had to comply within six months of the Smaller Reporting Company Determination Date, and for the adviser assessment at the Smaller Reporting Company Determination Date. The Commission believes the amendments to the transitions for issuers that lose their status as a Smaller Reporting Company will afford such companies additional time to comply and avoid issues involving inadvertent non-compliance because of the provision that originally applied immediately on the Smaller Reporting Company Determination Date. The amendments also provide additional clarity on when the time frames commence, and as such the Commission believes good cause exists to accelerate approval.

The change to commentary made by Amendment No. 3 to exclude advisers that provide only certain types of services from the independence assessment is also appropriate. As discussed above, the Commission has already determined to exclude such advisers from the disclosure requirement regarding compensation advisers in Regulation S–K because these types of services do not raise

[179] The Commission notes that controlled companies are provided an automatic exemption from the application of the entirety of Rule 10C–1 by Rule 10C–1(b)(5).

[180] *See* Amendment No. 1 to File No. SR–NASDAQ–2012–109; *see also* Securities Exchange Act Release No. 68013 (October 9, 2012), 77 FR 62563 (October 15, 2012) (Notice of File No. SR–NASDAQ–2012–109).

[181] The proposal is, however, otherwise effective on July 1, 2013, and issuers will be required to comply with the new compensation committee charter and adviser requirements as of that date. As noted above, certain existing issuers, such as smaller reporting companies, are exempt from compliance with the new independence requirement with respect to compensation committee service.

[182] 15 U.S.C. 78s(b)(2).

[183] *See supra* notes 70–73 and accompanying text.

conflict of interest concerns. Finally, the addition of further guidance by Amendment No. 3 merely clarifies that nothing in the Exchange's rules requires a compensation adviser to be independent, only that the compensation committee consider the independence factors before selecting or receiving advice from a compensation adviser, and is not a substantive change, as it was the intent of the rule as originally proposed.

For all the reasons discussed above, the Commission finds good cause to accelerate approval of the proposed changes made by Amendment No. 3.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing and whether Amendment No. 3 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–NYSE–2012–49 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–NYSE–2012–49. 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 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 NYSE. 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–NYSE–2012–49, and should be submitted on or before February 12, 2013.

VII. Conclusion

In summary, and for the reasons discussed in more detail above, the Commission believes that the rules being adopted by NYSE, taken as whole, should benefit investors by helping listed companies make informed decisions regarding the amount and form of executive compensation. NYSE's new rules will help to meet Congress's intent that compensation committees that are responsible for setting compensation policy for executives of listed companies consist only of independent directors.

NYSE's rules also, consistent with Rule 10C–1, require compensation committees of listed companies to assess the independence of compensation advisers, taking into consideration six specified factors. This should help to assure that compensation committees of NYSE-listed companies are better informed about potential conflicts when selecting and receiving advice from advisers. Similarly, the provisions of NYSE's standards that require compensation committees to be given the authority to engage and oversee compensation advisers, and require the listed company to provide for appropriate funding to compensate such advisers, should help to support the compensation committee's role to oversee executive compensation and help provide compensation committees with the resources necessary to make better informed compensation decisions.

For the foregoing reasons, the Commission finds that the proposed rule change, SR–NYSE–2012–49, as modified by Amendment Nos. 1 and 3, is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.[184]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[185] that the proposed rule change, SR–NYSE–2012–49, as modified by Amendment Nos. 1 and 3, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[186]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–01106 Filed 1–18–13; 8:45 am]

BILLING CODE 8011–01–P

[184] 15 U.S.C. 78f(b)(5).

[185] 15 U.S.C. 78s(b)(2).

[186] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 8157]

Culturally Significant Objects Imported for Exhibition Determinations: ''Albrecht Dürer: Master Drawings, Watercolors, and Prints From the Albertina''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Albrecht Dürer: Master Drawings, Watercolors, and Prints from the Albertina,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the National Gallery of Art, Washington, DC, from on or about March 24, 2013, until on or about June 9, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 10, 2013.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–01195 Filed 1–18–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8156]

Culturally Significant Object Imported for Exhibition Determinations: ''Gutai: Splendid Playground''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the object to be included in the exhibition ''Gutai: Splendid Playground,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the Solomon R. Guggenheim Museum, New York, New York, from on or about February 15, 2013, until on or about May 8, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a description of the exhibit object, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 14, 2013.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–01197 Filed 1–18–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending January 5, 2013. The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2012–0220.

Date Filed: December 31, 2012.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 22, 2013.

Description: Application of USA Jet Airlines, Inc. (''USAJ'') requesting the Department of Transportation disclaim jurisdiction over the corporate reorganization of USAJ in which USAJ will be converted, for tax proposes/planning, from a Delaware corporation to a Delaware limited liability company bearing the name USA Jet Airlines, Inc. on December 31, 2012 (the ''Date of Reorganization.

Docket Number: DOT–OST–2013–0005.

Date Filed: January 4, 2013.

Due Date for Answers, Conforming Applications, or Motion To Modify Scope: January 25, 2012.

Description: Application of C.A.L.—Cargo Airlines Ltd. (''C.A.L.—Cargo'') requesting the issuance of an amended foreign air carrier permit as now allowed under the new U.S.-Israel Agreement, for expanded authority to conduct the following services: (i) Scheduled and charter foreign air transportation of property and mail between any point or points in Israel and any point or points in the United States; (ii) scheduled and charter foreign air transportation of property and mail from any point or points behind Israel via Israel and via any intermediate points to any point or points in the United States and to any points beyond; (iii) other charter foreign air transportation of property and mail pursuant to the requirements under 14 CFR part 212; and (iv) transportation authorized by any additional route or other rights made available to Israeli carriers in the future. C.A.L. Cargo further requests a corresponding exemption to the extent necessary to enable it to provide the service described about pending issuance of the amended foreign air carrier permit and such additional or other relief as the Department may deem necessary or appropriate.

Barbara J. Hairston,

Acting Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2013–01131 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Kake Access, AK

ACTION: Notice of intent.

SUMMARY: The Western Federal Lands Highway Division of the Federal Highway Administration (FHWA) is issuing this notice to advise the public that FHWA will prepare an Environmental Impact Statement (EIS) for a proposed transportation project to improve access to and from the community of Kake in Southeast Alaska.

Public Involvement: Opportunities for public involvement will be provided during the scoping process, public meetings, and a public hearing. Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies, Tribal governments, and to private organizations and citizens who have previously expressed or are known to have interest in this project. To ensure that the full range of issues related to this proposed action is addressed and all significant issues are identified, comments and suggestions are invited from all interested parties.

Public Scoping Meetings will be held in the early Spring of 2013 to receive oral and written comments on environmental concerns that should be addressed in the EIS. The public scoping meetings will be held at dates, times, and locations to be published in general circulation newspapers in the project area.

FOR FURTHER INFORMATION CONTACT: Michael Traffalis at FHWA, 610 East 5th Street, Vancouver, WA 98661; *Kake-AccessEIS@dot.gov* or 360–619–7787. A project-specific Web site will also be developed, which will also accept public comments, please go to *www.wfl.fhwa.dot.gov/projects/ak/kake/for* further updates.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with ADOT&PF, will prepare an EIS on a proposal to address the need for an improved transportation system for access to and

from the community of Kake in Southeast Alaska. In its 2004 Southeast Alaska Transportation Plan (and 2011 SATP Scoping Report and updates as posted at *http://dot.alaska.gov/sereg/projects/satp/index.shtml,* ADOT&PF identified the need to improve the transportation system between Southeast Communities, including the need to provide local access for the community of Kake to a major transportation and commercial hub. This EIS will be coordinated with the Kake to Petersburg Transmission Intertie EIS, which is also in progress. The Western Federal Lands Highway Division of FHWA will be the lead federal agency for the Kake Access EIS.

Currently, Kake is accessible by mainline ferry twice a week and by scheduled air taxi service to Juneau and Sitka and chartered aircraft to Petersburg. Preliminary alternatives were identified during the transportation planning phase, and will be evaluated during development of the EIS. These alternatives include:

(1) The Northern Corridor alternative, which begins in Kake and reconstructs segments of logging roads and constructs new road segments to extend a roadway that terminates in the City of Kupreanof across Wrangell Narrows from downtown Petersburg;

(2) The Intertie corridor alternative, which connects Kake with Petersburg by following one of the alternatives being considered in the Transmission Intertie EIS;

(3) The Southern Corridor alternative to Kah Sheets Bay, which follows existing mainline logging roads south from Kake before diverging along a new alignment to Kah Sheets Bay where ferry service would provide access to Mitkof Island and Petersburg, Prince of Wales Island and Ketchikan, or Wrangell;

(4) The Southern Corridor alternative to Totem Bay, which includes upgrading existing mainline logging roads and construction of new roadway south from Kake to Totem Bay where ferry service would provide access to Mitkof Island and Petersburg, Prince of Wales Island and Ketchikan, or Wrangell; and (5) the Kake Ferry Service Improvement alternative would improve direct ferry service between Kake and Juneau, Sitka, or Petersburg using existing Alaska Marine Highway Service ferries and ferry terminals or by adding a new ferry to better serve the community.

The EIS also will evaluate the No Action alternative.

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: January 15, 2013.

Robert B. Lale III,

Director of Project Delivery, Western Federal Lands Highway Division, Federal Highway Administration.

[FR Doc. 2013–01161 Filed 1–18–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0002]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel TERRAPIN; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 21, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0002. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel TERRAPIN is:

Intended Commercial Use of Vessel: Limited sightseeing cruising bay and delta waters.

Geographic Region: ''California.''

The complete application is given in DOT docket MARAD–2013–0002 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: January 14, 2013.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–01122 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0001]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel WINDROSE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for

such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 21, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0001. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION:

As described by the applicant the intended service of the vessel WINDROSE is:

INTENDED COMMERCIAL USE OF VESSEL: Carry passengers for sightseeing tours.

GEOGRAPHIC REGION: Florida, Puerto Rico, Virginia, Maryland, California, Hawaii, Washington.

The complete application is given in DOT docket MARAD–2013–0001 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: January 14, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–01120 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0004]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel JOCELYN MICHELLE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 21, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0004. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel JOCELYN MICHELLE is:

Intended Commercial Use Of Vessel: Commercial dive boat used for transport of personnel involved in underwater inspection support and light construction support.

Geographic Region: California.

The complete application is given in DOT docket MARAD–2013–0004 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: January 14, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–01121 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0003]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel MAGEWIND; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before February 21, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0003. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel MAGEWIND is:

Intended Commercial Use of Vessel: Day and overnight charters.

Geographic Region: ''California, Oregon, Washington, and Puerto Rico.''

The complete application is given in DOT docket MARAD–2013–0003 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: January 14, 2013.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–01119 Filed 1–18–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

Proposed Information Collections; Comment Request

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

ACTION: Notice and request for comments.

SUMMARY: As part of our continuing effort to reduce paperwork and respondent burden, and as required by the Paperwork Reduction Act of 1995, we invite comments on the proposed or continuing information collections listed below in this notice.

DATES: We must receive your written comments on or before March 25, 2013.

ADDRESSES: You may send comments to Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, at any of these addresses:

- *U.S. mail:* 1310 G Street NW., Box 12, Washington, DC 20005;
- *Hand delivery/courier in lieu of mail:* 1310 G Street NW., Suite 200E, Washington, DC 20005;
- 202–453–2686 (facsimile); or
- *formcomments@ttb.gov* (email).

Please send separate comments for each specific information collection listed below. You must reference the information collection's title, form or recordkeeping requirement number, and OMB number (if any) in your comment. If you submit your comment via facsimile, please send no more than five 8.5 x 11 inch pages in order to ensure our equipment is not overburdened.

FOR FURTHER INFORMATION CONTACT: To obtain additional information, copies of the information collection and its instructions, or copies of any comments received, contact Mary A. Wood, Alcohol and Tobacco Tax and Trade Bureau, 1310 G Street NW., Box 12, Washington, DC 20005; or telephone 202–453–2265.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Department of the Treasury and its Alcohol and Tobacco Tax and Trade Bureau (TTB), as part of their continuing effort to reduce paperwork and respondent burden, invite the general public and other Federal agencies to comment on the proposed or continuing information collections listed below in this notice, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Comments submitted in response to this notice will be included or summarized in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments are part of the public record and subject to disclosure. Please do not include any confidential or inappropriate material in your comments.

We invite comments on: (a) Whether this information collection is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the information collection's burden; (c) ways to enhance the quality, utility, and clarity of the information collected; (d) ways to minimize the information collection's burden 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 the requested information.

Information Collections Open for Comment

Currently, we are seeking comments on the following TTB forms and recordkeeping requirements:

Title: Drawback on Wines Exported.

OMB Control Number: 1513–0016.

TTB Form Numbers: 5120.24.

Abstract: When proprietors export wines that have been produced, packaged, manufactured, or bottled in the U.S., they may file a claim for drawback of the Federal alcohol excise taxes that have already been paid or determined on the wine. This form notifies TTB that the wine was in fact exported and thus helps to protect the revenue and prevent fraudulent claims.

Current Actions: We are submitting this information collection as a revision. We are making minor revisions to the form for clarity. The burden has slightly increased as a result of a slight increase in the number of respondents.

Type of Review: Revision of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 30.

Estimated Total Annual Burden Hours: 134.

Title: Specific Transportation Bond—Distilled Spirits and Wines Withdrawn for Transportation to Manufacturing Bonded Warehouse—Class Six; and Continuing Transportation Bond—Distilled Spirits and Wines Withdrawn for Transportation to Manufacturing Bonded Warehouse—Class Six.

OMB Control Number: 1513–0031.

TTB Form Numbers: 5100.12 and 5110.67, respectively.

Abstract: TTB F 5100.12 and TTB F 5110.67 are specific bonds that protect the Federal alcohol excise tax liability on distilled spirits and wine while in transit from one type of bonded facility to another. The forms identify the shipment, the parties involved, the date, and the amount of bond coverage.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 10.

Estimated Total Annual Burden Hours: 10.

Title: Usual and Customary Business Records Relating to Tax-Free Alcohol.

OMB Control Number: 1513–0059.

TTB Recordkeeping Number: 5150/3.

Abstract: Tax-free alcohol is used for nonbeverage purposes by educational organizations, hospitals, laboratories, etc. The use of alcohol free of Federal excise tax is regulated to prevent the product's illegal diversion to taxable beverage use. These records maintain spirits accountability and protect tax revenue and public safety. The record retention requirement for this information collection is 3 years.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions; Federal Government; and State, local, or tribal governments.

Estimated Number of Respondents: 4,751.

Estimated Total Annual Burden Hours: One (1).

Title: Letterhead Applications and Notices Relating to Denatured Spirits.

OMB Control Number: 1513–0061.

TTB Record Number: 5150/2.

Abstract: Denatured spirits are used for nonbeverage industrial purposes in the manufacture of personal and household products. Permits and applications control the spirits' authorized uses and distribution, and protect tax revenue and public safety. Letterhead application and notice requirements are used by TTB officials to ensure that lawful and appropriate actions are taken with regard to denatured spirits. The record retention requirement for this information collection is 3 years.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; not-for-profit institutions; and State, local, or tribal governments.

Estimated Number of Respondents: 3,778.

Estimated Total Annual Burden Hours: 1,889.

Title: Tobacco Products Importer or Manufacturer—Records of Large Cigar Wholesale Prices.

OMB Number: 1513–0071.

TTB Recordkeeping Number: 5230/1.

Abstract: This information collection applies to importers and manufacturers of large cigars. Records are needed to verify the sale prices of those cigars as the Federal excise tax is based on the sale price. This collection ensures that the appropriate Federal excise tax has been paid. The record retention requirement for this information collection is 3 years.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 818.

Estimated Total Annual Burden Hours: 1,906.

Title: Application, Permit, and Report—Wine and Beer (Puerto Rico); and Application, Permit, and Report—Distilled Spirits Products (Puerto Rico).

OMB Control Number: 1513–0123.

TTB Record Form: 5100.21 and 5110.51, respectively.

Abstract: TTB F 5100.21 serves as a permit to compute the Federal excise tax on, tax pay, and withdraw shipments of wine or beer from Puerto Rico to the United States, as substantively required by 27 CFR 26.93. TTB F 5110.51 is a permit to compute the Federal excise tax on, tax pay, and withdraw shipments of distilled spirits products from Puerto Rico to the United States, as substantively required by 27 CFR 26.78.

Current Actions: We are submitting this information collection for extension purposes only. The information collection, estimated number of respondents, and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 35.

Estimated Total Annual Burden Hours: 6.

Title: Petition for the establishment of an American Viticultural Area.

OMB Control Number: 1513–0127.

TTB Recordkeeping and/or Form Number: None.

Abstract: TTB establishes American Viticultural Areas (AVAs) through the regulatory process based on petitions submitted from the public. TTB regulations in 27 CFR part 9 specify the information that must be included in the petition for TTB to consider creating a new AVA or amending the name, boundary, or other terms of an existing AVA.

Current Actions: We are submitting this information collection as an extension. The estimated number of respondents and estimated total annual burden hours remain unchanged.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit; farms.

Estimated Number of Respondents: 11.

Estimated Total Annual Burden Hours: 1,430.

Dated: January 15, 2013.

Amy R. Greenberg,

Assistant Director, Regulations and Rulings Division.

[FR Doc. 2013–01092 Filed 1–18–13; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network

Bank Secrecy Act Advisory Group; Solicitation of Application for Membership

AGENCY: Financial Crimes Enforcement Network (''FinCEN''), Treasury.

ACTION: Notice and request for nominations.

SUMMARY: FinCEN is inviting the public to nominate financial institutions and trade groups for membership on the Bank Secrecy Act Advisory Group. New members will be selected for three-year membership terms.

DATES: Nominations must be received by February 15, 2013.

ADDRESSES: Applications may be mailed (not sent by facsimile) to Regulatory Policy and Programs Division, Financial Crimes Enforcement Network, P.O. BOX 39, Vienna, VA 22183 or emailed to: *BSAAG@fincen.gov.*

FOR FURTHER INFORMATION CONTACT: Ina Boston, Senior Advisor, Office of Outreach, Regulatory Policy and Programs Division, at 202–354–6400.

SUPPLEMENTARY INFORMATION: The Annunzio-Wylie Anti-Money Laundering Act of 1992 required the Secretary of the Treasury to establish a Bank Secrecy Act Advisory Group (''BSAAG'') consisting of representatives from federal regulatory and law enforcement agencies, financial institutions, and trade groups with members subject to the requirements of the Bank Secrecy Act, 31 CFR 1000—1099 et seq. or Section 6050I of the Internal Revenue Code of 1986. The BSAAG is the means by which the Secretary receives advice on the operations of the Bank Secrecy Act. As chair of the BSAAG, the Director of FinCEN is responsible for ensuring that relevant issues are placed before the BSAAG for review, analysis, and discussion. Ultimately, the BSAAG will make policy recommendations to the Secretary on issues considered.

BSAAG membership is open to financial institutions and trade groups. New members will be selected to serve a three-year term and must designate one individual to represent that member at plenary meetings. In compliance with Executive Order 13490 of January 21, 2009, and White House policy, member organizations may not designate a representative to participate in BSAAG plenary or subcommittee meetings who is currently registered as a lobbyist pursuant to 2 U.S.C. 1603(a).

It is important to provide complete answers to the following items, as applications will be evaluated on the information provided through this application process. Applications should consist of:

- Name of the organization requesting membership
- Point of contact, title, address, email address and phone number
- Description of the financial institution or trade group and its involvement with the Bank Secrecy Act, 31 CFR 1000–1099 et seq.
- Reasons why the organization's participation on the BSAAG will bring value to the group

Organizations may nominate themselves, but applications for individuals who are not representing an organization will not be considered. Members must be able and willing to make the necessary time commitment to participate on subcommittees throughout the year by phone and attend biannual plenary meetings held in Washington DC the second Wednesday of May and October. Members will not be remunerated for their time, services, or travel. In making the selections, FinCEN will seek to complement current BSAAG members in terms of affiliation, industry, and geographic representation. The Director of FinCEN retains full discretion on all membership decisions. The Director may consider prior years' applications when making selections and does not limit consideration to institutions nominated by the public when making selections.

Dated: January 15, 2013.

Jennifer Shasky Calvery,

Director, Financial Crimes Enforcement Network.

[FR Doc. 2013–01174 Filed 1–18–13; 8:45 am]

BILLING CODE 4810–02–P

FEDERAL REGISTER

Vol. 78 Tuesday,
No. 14 January 22, 2013

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 430, 431, 433, *et al.*

45 CFR Part 155

Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 430, 431, 433, 435, 440, 447, and 457

Office of the Secretary

45 CFR Part 155

[CMS–2334–P]

RIN 0938–AR04

Medicaid, Children's Health Insurance Programs, and Exchanges: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes for Medicaid and Exchange Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges, Medicaid and CHIP, and Medicaid Premiums and Cost Sharing

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act), and the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). This proposed rule reflects new statutory eligibility provisions; proposes changes to provide states more flexibility to coordinate Medicaid and the Children's Health Insurance Program (CHIP) eligibility notices, appeals, and other related administrative procedures with similar procedures used by other health coverage programs authorized under the Affordable Care Act; modernizes and streamlines existing rules, eliminates obsolete rules, and updates provisions to reflect Medicaid eligibility pathways; revises the rules relating to the substitution of coverage to improve the coordination of CHIP coverage with other coverage; implements other CHIPRA eligibility-related provisions, including eligibility for newborns whose mothers were eligible for and receiving Medicaid or CHIP coverage at the time of birth; amends certain provisions included in the ''State Flexibility for Medicaid Benefit Packages'' final rule published on April 30, 2010; and implements specific provisions including eligibility appeals, notices, and verification of eligibility for qualifying coverage in an eligible employer-sponsored plan for Affordable Insurance Exchanges. This rule also proposes to update and simplify the complex Medicaid premiums and cost sharing requirements, to promote the most effective use of services, and to assist states in identifying cost sharing flexibilities.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on February 13, 2013.

ADDRESSES: In commenting, please refer to file code CMS–2334–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–2334–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–2334–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:

Sarah deLone, (410) 786–0615, or Stephanie Kaminsky, (410) 786–4653, for provisions related to revisions to eligibility notice and fair hearing appeal processes and additional eligibility changes for Medicaid and CHIP.

Melissa Harris, (410)786–3397, for provisions related to essential health benefits.

Leigha Basini, (301) 492–4307, for provisions related to Affordable Insurance Exchanges.

SUPPLEMENTARY INFORMATION:

Executive Summary

This proposed rule would implement provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act), and the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA). This rule reflects new statutory eligibility provisions, proposes changes to provide states more flexibility to coordinate Medicaid and CHIP eligibility notices, appeals, and other related administrative procedures with similar procedures used by other health coverage programs authorized under the Affordable Care Act. This proposed rule also modernizes and streamlines existing rules, eliminates obsolete rules, and updates provisions to reflect new or revised Medicaid eligibility pathways. This rule also implements CHIPRA eligibility-related provisions, including eligibility for newborns whose mothers were eligible for and receiving Medicaid or CHIP coverage at the time of birth.

This proposed rule amends the final rule published on April 30, 2010, titled ''State Flexibility for Medicaid Benefit Packages,'' which implemented the provisions of section 1937 of the Social Security Act (the Act), and established a state option to provide Medicaid benefits using benchmark or benchmark-equivalent coverage. In an

effort to bring consistency and clarity to part 440, we are removing the terms ''benchmark and benchmark-equivalent plan'' where they appear together and are replacing these terms with ''Alternative Benefit Plan.''

Beginning in 2014, individuals and small businesses will be able to purchase private health insurance through competitive marketplaces called Affordable Insurance Exchanges, or ''Exchanges.'' This proposed rule would: (1) Set forth standards for adjudicating appeals of individual eligibility determinations and exemptions from the individual responsibility requirements, as well as determinations of employer-sponsored coverage, and determinations of SHOP employer and employee eligibility for purposes of implementing section 1411(f) of the Affordable Care Act, (2) set forth standards for adjudicating appeals of employer and employee eligibility to participate in the SHOP, (3) outline criteria related to the verification of enrollment in and eligibility for minimum essential coverage through an eligible employer-sponsored plan, and (4) further specify or amend standards related to other eligibility and enrollment provisions. The intent of this rule is to afford states substantial discretion in the design and operation of an Exchange, with greater standardization provided where directed by the statute or where there are compelling practical, efficiency or consumer protection reasons.

This rule also proposes to update and simplify the complex Medicaid premiums and cost sharing requirements to promote the most effective use of services and to assist states in identifying cost sharing flexibilities. To that end, we propose to update the maximum allowable cost sharing levels, in particular expanding upon the flexibilities related to drugs and emergency department (ED) usage. We propose new options for states to establish higher cost sharing for non-preferred drugs, and to impose higher cost sharing for non-emergency use of the ED.

Besides the specific updates to nominal amounts, we propose to greatly simplify and streamline the entire premiums and cost sharing regulation ''in a manner that is consistent with simplicity of administration and the best interests of the recipients,'' in accordance with section 1902(a)(19) of the Act. This proposed rule would no longer distinguish between the two statutory authorities for premiums and cost sharing (sections 1916 and 1916A of the Act) and instead would simply lay out the parameters under which premiums and cost sharing are permitted.

Finally, this rulemaking provides notice that we are considering, for purposes of the initial open enrollment period for enrollment in a Qualified Health Plan through the Exchange, whether various provisions of the Medicaid and CHIP regulations should be effective October 1, 2013, or whether a later effective date is appropriate.

Table of Contents

To assist readers in referencing sections contained in this document, we are providing the following table of contents.

Acronyms

Because of the many organizations and terms to which we refer by acronym in this proposed rule, we are listing these acronyms and their corresponding terms in alphabetical order below:

[the] Act Social Security Act

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))
AFDC Aid to Families with Dependent Children
BBA Balanced Budget Act of 1997
BHP Basic Health Program
CHIP Children's Health Insurance Program
CHIPRA Children's Health Insurance Program Reauthorization Act of 2009
CMS Centers for Medicare & Medicaid Services
[the] Code Internal Revenue Code of 1986
DHS Department of Homeland Security
DOL U.S. Department of Labor
DRA Deficit Reduction Act of 2005
EITC Earned Income Tax Credit
EPSDT Early and periodic screening, diagnosis, and treatment
FEHBP Federal Employees Health Benefits Program (5 U.S.C 8901, et seq.)
FFE Federally-facilitated Exchange
FFP Federal financial participation
FMAP Federal medical assistance percentage
FPL Federal poverty level
HCERA Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted March 30, 2010)
HHS [U.S. Department of] Health and Human Services
IHS Indian Health Service
INA Immigration and Nationality Act
IRA Individual Retirement Account
IRC Internal Revenue Code of 1986
IRS Internal Revenue Service
MAGI Modified adjusted gross income
OMB Office of Management and Budget
OPM U.S. Office of Personnel Management
PHS Act Public Health Service Act
PRA Paperwork Reduction Act of 1985
PRWORA Personal Responsibility and Work Opportunity Reconciliation Act of 1996
QHP Qualified Health Plan
SHOP Small Business Health Options Program
SMD State Medicaid Director
SNAP Supplemental Nutrition Assistance Program
SPA State Plan Amendment
SSA Social Security Administration
SSI Supplemental Security Income
SSN Social Security number
TANF Temporary Assistance for Needy Families

I. Medicaid Eligibility Expansion Part II

A. Background

1. Introduction

The Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), was amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010). These laws are collectively referred to as the Affordable Care Act. In addition, section 205 of the Medicare & Medicaid Extenders Act of 2010 (Pub. L. 111–309, enacted December 15, 2010) (MMEA) and the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. No. 112–96, enacted February 22, 2012) made additional amendments to the Social Security Act (the Act) provisions affected by the Affordable Care Act.

The Affordable Care Act extends and simplifies Medicaid eligibility and on March 23, 2012, we issued a final rule (referred to as the ''Medicaid eligibility final rule'') addressing certain key Medicaid eligibility issues.

This proposed rule provides states with additional flexibility in beneficiary appeals, notices and related procedures, updates CMS regulations to fully reflect changes in Medicaid eligibility created under the Affordable Care Act and existing legislations, and modernizes administrative procedures to further promote coordination across multiple health coverage programs, including purchase of coverage through the Exchange with advance payments of the premium tax credits and cost sharing reductions, as authorized by the Affordable Care Act, Medicaid and the Children's Health Insurance Program (CHIP). These coverage programs are collectively referred to as ''insurance affordability programs.''

2. Legislative Overview

This proposed rule reflects and implements Medicaid and CHIP eligibility and enrollment provisions of the Affordable Care Act including:

- Sections 1411 and 1413, which ensure coordination in the eligibility, verification, and enrollment systems for Medicaid, CHIP, Basic Health Programs, and Exchanges. This includes ensuring verification of individuals' citizenship status.
- Section 2001, which provides for expanded Medicaid eligibility for adults under age 65.
- Section 2002, which sets out new financial eligibility methodologies for Medicaid for certain populations.
- Sections 2004 and 10201, which expand Medicaid coverage for individuals under age 26 who were receiving Medicaid when they aged out of foster care.
- Section 2101, which sets new financial eligibility methodologies for CHIP.
- Sections 2201 and 1413, which simplify and coordinate eligibility and enrollment systems across insurance affordability programs.
- Section 2202, which permits hospitals to make presumptive eligibility determinations for all Medicaid eligible populations.
- Section 2303, which provides a state option for Medicaid coverage limited to family planning or family planning related services under the state plan.

This proposed rule also makes changes to the Children's Health Insurance Program (CHIP) that reflect and implement certain provisions of the Social Security Act, Affordable Care Act and the Children's Health Insurance Program Reauthorization Act of 2009 (Pub. L 111–3, enacted on February 4, 2009) (CHIPRA) including:

- Sections 111, 113, and 211 of CHIPRA, which require automatic eligibility for newborns whose mothers were receiving medical assistance at the time of birth.
- Section 2105(c)(10) of the Social Security Act, as well as sections 1906 and 1906A of the Social Security Act, which apply a cost-effectiveness test to premium assistance set forth at Section 10203(b) of the Affordable Care Act.

3. Overview of the Proposed Rule

The proposed amendments to 42 CFR parts 430, 431, 435, and 457 in this rule propose the following policies:

- Amendments to part 430 subpart B propose electronic submission of state plans and plan amendments.
- Amendments to part 431 subpart A and part 433 subpart D propose updated, streamlined, and coordinated eligibility, beneficiary notice and appeal functions for Medicaid and CHIP.
- Amendments to part 435 subparts A, B, C and D reflect statutory changes to Medicaid eligibility. These amendments also add new or revised definitions and delete existing regulations that are rendered obsolete.
- Amendments to part 435 subparts E and F reflect statutorily-required changes to state procedures to verify citizenship or non-citizen status.
- Amendments to part 435 subpart G reflect the statutorily-required shift to MAGI-based financial eligibility methods for most populations, as set forth in the final Medicaid eligibility final rule issued on March 23, 2012 at (77 FR 17144).
- Amendment to part 435 subparts J and K and the addition of a new subpart M propose standards to promote the establishment by states of a seamless and coordinated system to determine eligibility of individuals seeking assistance and to enroll them in the appropriate insurance affordability program. Subpart M would delineate the responsibilities of the state Medicaid agency in the coordinated system of eligibility and enrollment established under the Affordable Care Act. Comparable amendments would be made to CHIP requirements at part 457.

The proposed amendments to 45 CFR part 155 in this rule also propose

requirements necessary to facilitate the creation of the Affordable Insurance Exchange eligibility and enrollment system established by the Affordable Care Act.

B. Provisions of the Proposed Rule

The following descriptions are structured to explain the provisions being proposed and do not necessarily follow the order of the regulation's text.

1. Appeals

(a) Generally (§§ 431.10, 431.205, 431.206, 431.221, 431.242, 431.244, 435.4, 435.907, 435.1200 and 45 CFR 155.302)

The Medicaid eligibility final rule published on March 23, 2012 at (77 FR 17144) (''Medicaid eligibility final rule''), along with the Exchange eligibility final rule published on March 27, 2012 (77 FR 18310), established a coordinated system of eligibility and enrollment in a QHP through the Exchange and for all insurance affordability programs, consistent with the Affordable Care Act. In this proposed rule, we propose modifications to Medicaid procedures, similar to those finalized in the Medicaid eligibility final rule, to promote coordination of notices and appeals of eligibility determinations. Consistent with sections 1413 and 2201 of the Affordable Care Act, the proposed revisions aim to coordinate Medicaid fair hearings under section 1902(a)(3) of the Act with appeals of eligibility determinations for enrollment in a QHP and for advance payment of the premium tax credit and cost-sharing reductions under section 1411(f) of the Affordable Care Act. Under the authority of section 1943(b)(3) of the Act, we propose to provide states with options for coordinating appeals to align with the options they have for eligibility determinations.

To promote coordination of appeals when there are appeals of both the level of advance payment of the premium tax credit or cost-sharing reductions granted for enrollment in a QHP through the Exchange and a denial of Medicaid, we propose at § 431.10(c)(1)(ii) to permit Medicaid agencies to delegate authority to conduct fair hearings of eligibility denials based on the applicable modified adjusted gross income (MAGI) standard to an Exchange or Exchange appeals entity (hereinafter, when we refer to a delegation of authority to conduct Medicaid fair hearings to an Exchange, we also intend this reference to include delegation to an Exchange appeals entity), provided that individuals are given the option to have the fair hearing on the Medicaid denial conducted instead by the Medicaid agency. Proposed § 431.206(d) directs that states delegating authority to conduct fair hearings to an Exchange must inform individuals of their right to opt instead for a fair hearing before the Medicaid agency and the method by which the individual may do so. Individuals would be informed of the option to opt into having the appeal heard by the Medicaid agency at the time the appeal is filed, prior to either entity conducting a hearing, and the notice provided would need to be sufficient to enable an informed choice.

The beneficiary option is required by statute, but we expect that most individuals will not opt out of having a consolidated appeal of both Medicaid and Exchange-related issues before the Exchange appeal entity, to choose instead to have two separate hearings (one before the Exchange appeals entity and one before the Medicaid agency). If the Exchange appeals entity conducts the hearing on the Medicaid denial, that hearing decision would be final under the proposed rule, subject to the state's option, proposed at § 431.10(c)(3)(iii) and discussed further below, to review conclusions of law made by the hearing officer.

An Exchange appeals entity, defined at proposed § 431.10(a)(2), would include a State-based Exchange appeals entity, as well as the HHS appeals entity, responsible for adjudicating appeals of determinations of eligibility to enroll in a QHP and for advance payment of the premium tax credit and cost-sharing reductions under section 1411(f) of the Affordable Care Act. Per proposed § 431.10(c)(2), delegation is permitted only to an Exchange that is a governmental agency that maintains merit protections for its employees. Delegation to a governmental agency is discussed in more detail at section I.B.12 of this proposed regulation, related to delegation of authority to conduct eligibility determinations. State Medicaid agencies may not delegate authority to conduct fair hearings to other state agencies, such as a sister human services agency or independent state appeals agency, under § 431.10(c)(1)(ii). States may, however, request a waiver under the Intergovernmental Cooperation Act of 1968, as codified at 31 U.S.C. 6504, as some states have done in the past. We note that these waivers, which may be requested by submitting a State Plan Amendment (SPA), are subject to the state establishing clear oversight over the agency conducting the fair hearings, similar to the standards set forth in § 431.10(c) and (d).

Medicaid agencies may delegate authority to conduct fair hearings to a State-Based Exchange that is also a state agency either under the proposed regulations or by requesting a waiver under the Intergovernmental Cooperation Act of 1968. The primary difference would be that, under the waiver approach, the state would not be required to provide individuals with the option to have the Medicaid agency conduct their fair hearing. We seek comments on whether Medicaid agencies should have authority under the regulations to delegate fair hearing authority to any state agency, subject to the same limitations as those proposed for delegations to a state-based Exchange.

For states choosing to delegate Medicaid fair hearing authority to the Exchange, we propose at § 431.10(c)(3)(iii) to provide states with an additional option under which the Medicaid agency would review decisions made by the Exchange with respect to Medicaid-related conclusions of law, including interpretations of state or federal policies. This option would not extend to reviewing factual determinations made by the Exchange appeals entity's hearing officer. Any such review by the Medicaid agency would need to be accomplished in time for a final decision to be made in accordance with § 431.244 of this part.

Under proposed § 431.10(c)(1)(ii), the agency must specify in the state plan whether it is delegating authority to conduct fair hearings to the Exchange and the scope of the delegated authority (for example, if delegation is limited to fair hearings for individuals determined ineligible for Medicaid by the Exchange or whether the delegation includes individuals determined ineligible by the Medicaid agency). We note that an Exchange must agree to any delegation of authority and we do not expect that either the federally-facilitated Exchange (FFE) or the HHS appeals entity will accept delegated authority to adjudicate appeals of any Medicaid eligibility determinations which were not made by the FFE due to resource constraints.

We propose at § 431.10(c)(3) that any delegation of fair hearing authority to the Exchange would be subject to safeguards to protect the integrity of the appeals process, such that beneficiaries receive the same due process rights and substantive review of their case as is provided in hearings conducted by the Medicaid agency. The Medicaid agency also would exercise appropriate oversight over the delegated hearing process, and take corrective action if necessary. We propose at § 431.10(d) that a delegation of fair hearing

authority would be effectuated through a written agreement specifying the respective roles and responsibilities of the Medicaid agency and Exchange to ensure compliance with the fair hearing requirements in subpart E, quality control and oversight by the Medicaid agency, including any reporting requirements to support the Medicaid agency's oversight, as well as assurances that the Exchange will comply with the terms of the delegation required under the proposed regulation.

In support of the proposed policy, we also propose to revise § 431.10(a) to add definitions of ''Medicaid agency,'' ''appeals decision,'' ''Exchange'' and ''Exchange appeals entity'' at § 431.10(a)(2), and to make conforming changes to existing regulations at § 431.205(b)(1) to reflect the possibility of delegated appeals authority to an Exchange. We propose to delete the requirements currently at § 431.10(e)(2) and § 431.10(e)(3), as these provisions are not consistent with the option to delegate appeals. However, we are retaining the current requirement at § 431.10(e)(1), redesignated at proposed § 431.10(e), that only the single state agency may supervise the plan and/or issue policies, rules and regulations on program matters.

We note that we also have streamlined and reorganized the text of the paragraphs concerning the procedures and safeguards required to permit delegation of eligibility determinations at § 431.10 in this proposed rule. These revisions, promulgated in the Medicaid eligibility final rule to strengthen the authority and oversight of the Medicaid agency, are not intended to substantively change the policy adopted in that final rule.

In order to maximize coordination of appeals involving different insurance affordability programs and minimize burden on consumers and states, regardless of whether the Medicaid agency has retained the authority to conduct Medicaid appeals or delegated such authority to an Exchange, we propose revisions to existing regulations at § 431.221 (relating to requests for a hearing), § 431.244 (relating to hearing decisions) as well as to § 435.4 (modifying the definition of ''electronic account'') and § 435.1200 (relating to the Medicaid agencies' responsibility to ensure a seamless and coordinated system of eligibility and enrollment between all insurance affordability programs).

Specifically, we propose to add new paragraph (e) to § 431.221 to provide that the Medicaid agency treat an appeal of a determination of eligibility for enrollment in a QHP in the Exchange and for advance payment of the premium tax credit or cost-sharing reductions, as a request for a fair hearing of the denial of Medicaid. This revision is intended to avoid the need for an individual to request multiple appeals. For example, an individual who is denied Medicaid and determined eligible for enrollment in a QHP with a certain level of advance payment of the premium tax credit and cost-sharing reductions may believe she should receive more assistance, but may not know in which program she belongs. So that individuals in this situation do not have to submit two appeals or hearing requests—one to the Exchange appeals entity and one to the Medicaid agency—we propose in § 431.221(e) that if such individual appeals the advance payment of the premium tax credit or cost-sharing reductions level, this appeal will automatically be treated as an appeal of the Medicaid denial, without the individual having to file a separate fair hearing request with the Medicaid agency. We are considering whether a later effective date of this provision, such as January 1, 2015, is appropriate to provide states with sufficient time to operationalize the proposed policy.

When the Medicaid agency has delegated the authority to conduct fair hearings to the Exchange and the individual does not opt to have the Medicaid hearing conducted by the Medicaid agency, this appeal of the Medicaid denial will be adjudicated by the Exchange appeal entity. However, where the Exchange appeal entity is not adjudicating the Medicaid appeal either because the individual opts to have a hearing at the Medicaid agency or the state has not delegated to the Exchange the authority to conduct hearings, we propose at § 431.244(f)(2) that a decision of the Medicaid fair hearing may be issued within 45 days from the date the Exchange appeals entity issues its decision relating to eligibility to enroll in a QHP and for advance payment of the premium tax credit and cost-sharing reductions.

In making this proposal, we are attempting to balance the interest of the individual in receiving a timely Medicaid hearing decision with the recognition that, in many cases, Medicaid fair hearings triggered automatically by appeals related to advance payment of the premium tax credit and cost-sharing reductions will involve individuals with income significantly over the applicable Medicaid income standard, who are unlikely to be found eligible for Medicaid as a result of the appeal. In states that have not delegated authority to the Exchange to conduct fair hearings, or for individuals who opt to have a fair hearing before the Medicaid agency, waiting to conduct the Medicaid fair hearing until the Exchange appeals entity has concluded its hearing may reduce burden on all parties in these cases. Doing so will give the Medicaid agency the benefit of the factual record developed by the Exchange appeals entity, avoiding the potential for duplicative, overlapping requests for additional information from the individual. In addition, permitting the appeals to be sequenced in this way will enable individuals satisfied with the adjudication their Exchange appeal, as well as those with income significantly above the Medicaid income standard, to withdraw their Medicaid fair hearing request. This is similar to how an individual may withdraw their application for Medicaid when accepting an advance payment of the premium tax credit under 45 CFR 155.302(b)(4) during an initial eligibility determination. We envision that the withdrawal of the appeal would be permitted in all modalities listed in § 435.907(a). Withdrawal of a Medicaid fair hearing request could be effectuated through a simple process, for example by checking a box on information provided with the Exchange appeals decision or in connection with the steps the individual needs to take to accept advance payment of the premium tax credit and effectuate enrollment in a QHP. If the opportunity for withdrawal of the Medicaid fair hearing is not provided electronically initially due to operational constraints, it could be provided by telephone, through paper notification, or other commonly available electronic means, such as email.

We recognize that there will be situations in which consumers' interests would be better served by the Medicaid agency initiating the Medicaid fair hearing process simultaneously with the Exchange appeal—such as in the case of an individual determined eligible for advance payment of the premium tax credit and cost-sharing reductions at an income level relatively close to the applicable Medicaid income standard—and, while this would be permitted, it would not be required, under the proposed rule. Recognizing the different interests of states and consumers in different situations, we considered a number of approaches to striking the optimal balance, including allowing 30 or 60 days, instead of the proposed 45 days, from the date the Exchange appeals entity makes its decision for the Medicaid agency to render its fair hearing decision; extending the 90 day

timeframe generally permitted for fair hearing decisions to 120 days from the date the fair hearing was requested; allowing for a decision 45 days from the date of the Exchange appeals decision or 120 days from the date the individual requested a fair hearing, whichever is earlier; and not modifying the 90-day timeframe at all. We solicit comments on the different approaches.

Finally, we anticipate that the HHS appeals entity will have an informal resolution process that will serve as a first level of review prior to the Exchange appeals entity engaging in a formal hearing process, and State-based Exchange appeals entities will have the option to adopt such a process, as well. *See* 45 CFR 155.535, discussed in section III.A. of the preamble of this proposed rule. During this process, a review of the initial eligibility determination made by the Exchange will take place, and the individual will have the opportunity to submit additional evidence related to his or her appeal. States that do not delegate authority to conduct Medicaid fair hearings to the Exchange, will be able to utilize the informal resolution process at the Exchange, provided that if an individual has requested a fair hearing, including a fair hearing triggered automatically to the Medicaid agency as a result of an appeal related to advance payment of the premium tax credit and cost-sharing reductions, the fair hearing before the agency also proceeds automatically if the informal process does not result in an approval of Medicaid eligibility. An informal resolution process at the Exchange could resolve a number of individual's appeals without conducting a fair hearing at the Medicaid agency, even if a state has not delegated authority to have fair hearings conducted at an Exchange. Use of the informal resolution process, which would be specified in the agreement between the Medicaid agency and the Exchange consummated in accordance with § 435.1200(b)(3), would not affect the timeliness requirements for a final hearing decision in § 431.244.

We propose to revise the definition of ''electronic account'' in § 435.4 of the Medicaid eligibility final rule to include information collected or generated as part of a Medicaid fair hearing process or Exchange appeals process, so that information generated or collected during an appeal and any appeals decisions will be transferred between programs as part of the individual's electronic account. To align with that new definition, we modify § 431.242(a)(1)(i) by adding that individuals have access to an electronic account, as they currently have access to a ''case file.''

In situations in which the Medicaid agency has delegated to the Exchange authority to make eligibility determinations and to conduct Medicaid fair hearings, we propose revisions at § 435.1200(c) to clarify that the Medicaid agency must receive and accept a decision of the Exchange appeals entity finding an individual eligible for Medicaid just as it accepts determination of Medicaid eligibility made by the Exchange. Moreover, as provided in the proposed revisions to § 435.1200(c), if the Exchange appeals entity to which Medicaid fair hearing authority has been delegated has adjudicated both an appeal of advance payment of the premium tax credit and cost-sharing reductions as well as a Medicaid denial, a combined appeals decision will be required.

We also propose modifications to § 435.1200(d) originally added by the Medicaid eligibility final rule to streamline and coordinate processes when the Exchange does not determine but conducts an assessment of, potential Medicaid eligibility. Under 45 CFR 155.302(b)(4)(i)(A), when the Exchange conducts an assessment, and finds an individual potentially ineligible for Medicaid and eligible for advance payment of the premium tax credit, the Exchange will provide the individual with an opportunity to withdraw the Medicaid application. To ensure coordination across the entire eligibility, enrollment and appeals process, we propose to modify § 435.907 by adding a new paragraph (h) to automatically reinstate the Medicaid application if the individual subsequently files an appeal related to the determination of their eligibility for enrollment in a QHP or for advance payment of the premium tax credit or cost-sharing reductions, and the Exchange appeals entity assesses the individual potentially eligible for Medicaid. Reinstatement of the application for Medicaid would be effective as of the date the application was initially received by the Exchange. Once assessed as potentially Medicaid eligible by the Exchange appeals entity, the individual's electronic account would be transferred to the Medicaid agency per § 435.1200(d) and the Medicaid agency would make a final determination. If the agency denies Medicaid, the individual would have the right to request a Medicaid fair hearing at that time. We note that this scenario would only arise in states that have not delegated to the Exchange the ability to conduct eligibility determinations under § 431.10(c)(1)(i). (Revisions to 45 CFR 155.302(b)(4)(A) related to reinstatement of a withdrawn application are also proposed in this rulemaking and are discussed in section III.A. of the preamble.) We also note that, under the proposed Exchange regulation at 45 CFR 155.510(b), discussed in section III.A of the preamble, the assessment of Medicaid eligibility conducted by an Exchange appeals entity will be as comprehensive as that performed by the Exchange when making the underlying assessment of Medicaid eligibility under § 155.302(b).

Under the proposed revisions to § 435.1200(d)(2), we clarify that when a Medicaid agency is determining the eligibility of an individual who has been assessed as potentially eligible for Medicaid by an Exchange appeals entity, the Medicaid agency may not request information or documentation from the individual already provided in the electronic account, or to the applicable insurance affordability program or appeals entity; similarly, as clarified in § 435.1200(d)(4), the agency must accept any finding relating to a criterion of eligibility made by another insurance affordability program's appeals entity if such finding was made in accordance with the same policies and procedures as those applied by or approved by the Medicaid agency. These procedures parallel those adopted in the Medicaid eligibility final rule with respect to eligibility determinations.

Similar to the revisions proposed at § 435.1200(d), we also propose revisions to § 435.1200(e)(1) to provide that when an individual has been determined ineligible for Medicaid pursuant to a fair hearing conducted by the Medicaid agency, the agency must assess the individual for potential eligibility for other insurance affordability programs, just as it must do under § 435.1200(e), as originally set forth in the Medicaid eligibility final rule for individuals determined ineligible for Medicaid by the agency at initial application or renewal.

Finally, we propose to add a new paragraph (g) to § 435.1200, to ensure coordination between appeals entities. Proposed paragraph (g)(1), which would apply regardless of whether the Medicaid agency delegates authority to conduct any fair hearings to the Exchange, directs the Medicaid agency to establish a secure electronic interface through which:

- The Exchange appeals entity can notify the Medicaid agency that an appeal has been filed related to eligibility to enroll in a QHP and for advance payment of the premium tax credit and cost-sharing reductions when

such appeal triggers an automatic Medicaid fair hearing request; and

• The individual's electronic account, including information provided by the individual to the Medicaid agency during the fair hearing process or the Exchange appeals entity can be transferred between programs or appeals entity.

Under proposed § 435.1200(g)(1), the secure electronic interface established between the Medicaid agency and Exchange may be used for these purposes, or a separate secure interface directly between the Medicaid agency and Exchange appeals entity may be established; therefore this provision does not propose any new requirements on Medicaid agencies. When the Exchange appeals entity conducts a Medicaid fair hearing on an individual's Medicaid denial, no notification or transfer of information through such interface would be needed at the point the individual files the appeal.

Under proposed § 435.1200(g)(2), the Medicaid agency must ensure that, as part of a Medicaid fair hearing conducted under part 431 subpart E, the Medicaid agency does not request information or documentation from the individual already included in the individual's electronic account or provided to the Exchange or Exchange appeals entity. We propose in § 435.1200(g)(3) that the Medicaid agency transmit its Medicaid fair hearing decision to the Exchange in two situations: (1) When an individual had been initially determined ineligible for Medicaid by the Exchange, in accordance with a delegation of authority under § 431.10(c)(i); and (2) when an individual who was initially determined to be ineligible for Medicaid by the Medicaid agency had his or her account transferred to the Exchange under § 435.1200(e) for evaluation of eligibility and financial assistance through the Exchange and the individual had a fair hearing conducted by the Medicaid agency. Because such individuals may have enrolled in a QHP through the Exchange and be receiving advance payment of the premium tax credit and/or cost-sharing reductions pending the outcome of the Medicaid fair hearing, the Exchange will need to know the outcome of the Medicaid fair hearing so that it will know whether to terminate or continue advance payment of the premium tax credit and cost-sharing reductions.

We also make conforming amendments to § 435.1200(b) related to the coordination of appeals between the Medicaid agency and the Exchange and Exchange appeals entity. We propose to modify § 435.1200(b)(1) to incorporate new paragraph (g) in the delineation of general requirements that the Medicaid agency must meet to effectuate a coordinated eligibility system and to revise § 435.1200(b)(3)(i) to clarify that the goal of minimizing burden on consumers through coordination of insurance affordability programs also relates to coordination of appeals processes. Proposed revisions to § 435.1200(b)(3)(ii) provide that the agreement entered into between the Medicaid agency and the Exchange must ensure compliance with new paragraph (g).

Finally, it is important to note that under the proposed Exchange regulations at 45 CFR 155.302(b)(5), if the decision made by the Exchange appeals entity conflicts with a decision made by the Medicaid agency regarding an individual's Medicaid eligibility, the decision of the Medicaid agency takes precedence and is binding on the Exchange, just as a determination of eligibility or ineligibility made by the Medicaid agency takes precedence over an assessment made by the Exchange.

(b) Related Changes to the Medicaid Appeals Process (§§ 431.200, 431.201, 431.205, 431.206, 431.211, 431.213, 431.220, 431.221, 431.224, 431.230, 431.231, 431.232, 431.240, 431.241, 431.242, and 431.244)

We propose the following modifications to our current fair hearing regulations at § 431.200, *et seq.,* to align with the changes described above, to modernize our regulations, and to clarify certain provisions consistent with the Medicaid eligibility final rule. We propose to:

• Revise § 431.200 to list sections 1943(b)(3) of the Act and 1413 of the Affordable Care Act as statutory authority for establishing a system and procedures to coordinate eligibility, including eligibility appeals that result in a final decision about an individual's eligibility.

• Add a definition for ''local evidentiary hearing'' to § 431.201 to clarify terminology in our regulations.

• Modify § 431.220(a)(1) to clarify that a hearing is required when an applicant requests it because the Medicaid agency has denied the individual's eligibility, level of benefits, services, or claim or if the Medicaid agency has failed to act with reasonable promptness, as required by section 1902(a)(3) of the Act. We specify that a determination of eligibility would include, if applicable, a determination of a spend down liability or a determination of income used to impose any premiums, enrollment fees, or cost sharing under part 447 of this subchapter. We intend these modifications as clarifications and do not believe they reflect a change in policy. We modify the definition of action at § 431.201, when information be provided at § 431.206, and the issues to be considered at a hearing at § 431.241(a) and (b) to align with the modification of § 431.220 and do not believe that these changes reflect a change in policy.

• Modify § 431.221 to allow an individual to request a hearing consistent with the ways in which an application may be filed: (1) By telephone; (2) by mail; (3) in person; (4) through other commonly available electronic means; and (5) at state option, via the Internet Web site at § 435.1200(f). We expect other commonly available electronic means to include requesting a fair hearing by email, and could include facsimile or other electronic systems commonly available. In contrast to the final Medicaid eligibility rule policy related to filing applications and renewal forms at §§ 435.907 and 435.916, we have proposed using the Internet Web site at § 435.1200(f) as a state option in light of the operations implications of requiring this method for requesting a hearing. We are considering instead making this option a requirement at a date sometime after January 2014 to allow time for implementation and we solicit comments on this proposal.

• Add § 431.224, ''Expedited Appeals'' to align our fair hearing process at § 431.200, et seq, with that already established for appeals in managed care at § 438.410, to permit an individual who has an urgent health need to have their appeal addressed under expedited timeframes. We do not anticipate that this will be difficult to administer or significantly add to state costs as states can use existing mechanisms such as notices they are already issuing to individuals to implement this provision.

• Modify § 431.231 to align the date an individual is considered to receive notice under this section with that proposed for the notice of reasonable opportunity period in proposed § 435.956, discussed in section I.B.7 of the preamble, to promote consistency and ease of administration. We propose that the date on which the notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she did not receive the notice within the 5-day period. Five days from the date of notice is the standard period used by Social Security Administration for the Supplemental Security Income (SSI) (Title XVI) and Old Age and Disability

(Title II) programs to account for mailing a notice and receipt by the individual (see 20 CFR 416.1401, 20 CFR 404.901, respectively). This is also the standard used by the Exchange in 45 CFR 155.315(c)(3) regarding notices sent to resolve inconsistencies during the verification process for citizenship, status as a national, and lawful presence.

- Modify § 431.232 to clarify that the agency will inform an applicant or beneficiary that he or she has 10 days from the notice of an adverse decision of a local evidentiary hearing to appeal that decision. We also adopt in proposed § 431.232 the language discussed above related to the date an individual is considered to receive notice.
- Modify § 431.240 to specify that a hearing officer must have access to the agency's information, such as state policies and regulations necessary to issue a proper hearing decision, consistent with our proposed regulation to permit delegation of authority to the Exchange to conduct fair hearings at § 431.10(c) and (e).
- Modify § 431.242 to align our regulations related to an individual's ability to review an individual case file, to include an individual's ability to review his or her electronic account, as defined at § 435.4.
- Modify existing regulations at § 431.244(f)(1) to clarify that the 90-day timeframe to issue a decision after an individual files an appeal applies broadly to appeals decisions, not only to managed care appeals decisions. This text was inadvertently deleted in a previous rulemaking. This codifies this long-standing policy and does not reflect a change in policy.
- Revise § 431.244(f)(2) to modify the appeals decision timeframe to account for the expedited appeals process being proposed at § 431.224, aligning with the existing expedited decision process for managed care appeals decisions at § 431.244(f)(2) and (f)(3).

(c) Applicability to CHIP (§§ 457.10, 457.340, 457.348, 457.350, 457.1180, 457.351)

Revisions to the regulations for CHIP are proposed to achieve similar coordination of appeals among insurance affordability programs and to minimize burden on consumers. Regulations governing the CHIP appeals, or ''review'' process, are set forth at subpart K of part 457 of the current regulations. Under § 457.1120, states currently have broad flexibility to delegate the CHIP review process, and no revision to permit delegation of review authority to the Exchange or Exchange appeals entity is needed. To effectuate the same coordination of CHIP appeals with other insurance affordability programs, as is proposed with respect to Medicaid fair hearings, a new § 457.351 (Coordination involving appeals entities for different insurance affordability programs) is proposed. Conforming changes to existing CHIP regulations are also proposed.

- Under § 457.10, we propose to revise the definition of electronic account to include any information collected or generated as part of a review, and to add the definition of exchange appeals entity, similar to the revision to the definition in the Medicaid regulations at § 435.4.
- Section 457.340 (Application for and enrollment in CHIP) is revised to include provision of notice of an individual's right to review, consistent with § 457.1180 and to apply § 435.907(h), proposed for addition to the Medicaid regulation in this rulemaking (Reinstatement of withdrawn applications) to CHIP.
- Section 457.348, related to the provision of CHIP for individuals found eligible by other insurance affordability programs, is revised to include individuals found eligible as a result of a decision made by the Exchange appeals entity authorized by the state to adjudicate reviews of CHIP eligibility determinations, similar to the revisions proposed for the Medicaid regulations at § 435.1200(c) and to apply the provisions for transfer of information via secure electronic interface, similar to the revisions proposed for Medicaid regulations at § 435.1200 (d).
- Proposed revisions to § 457.350 apply the rules for eligibility screening and enrollment in other insurance affordability programs to individuals determined not eligible for CHIP pursuant to a review conducted in accordance with subpart K of this part, similar to the revisions proposed for the Medicaid regulations at § 435.1200(e).
- Section 457.1180 is revised to propose that states treat an appeal to the Exchange appeals entity of a determination of eligibility for advanced payments of the premium tax credit or cost-sharing reductions as a request for a review of a denial of CHIP eligibility, if the individual was denied eligibility for CHIP by the state or other entity authorized to make such determination, similar to the revisions proposed for the Medicaid regulations at § 431.221(e).

2. Notices

An effective notification process is important to a high quality consumer experience and a coordinated eligibility and enrollment system, as provided for under section 1413 of the Affordable Care Act and section 1943 of the Act. Without revisions to current regulations, many individuals could receive multiple, uncoordinated notices from the different programs. Someone applying through the Exchange who is assessed as potentially eligible for Medicaid, for example, could receive a notice from both Medicaid (approving Medicaid) and the Exchange (denying advance payment of the premium tax credit and cost-sharing reductions). Under current rules, if the Medicaid agency disapproves rather than approves eligibility for an individual assessed by the Exchange as potentially Medicaid eligible, the individual could receive 3 notices (from the Exchange denying advance payment of the premium tax credit and cost sharing reductions, from the Medicaid agency denying Medicaid, and subsequently from the Exchange reversing its earlier denial of advance payment of the premium tax credit and cost sharing reductions).

To avoid confusion for consumers and duplicative administrative activity we propose that, to the maximum extent feasible, state Medicaid and CHIP agencies and the Exchange produce a single combined notice after all MAGI-based eligibility determinations have been made. We are also proposing to add basic content and accessibility standards for all eligibility notices, and to ensure that electronic eligibility notices are available as an option for applicants and beneficiaries. To ensure that the federal rules for all programs are aligned, we are proposing similar regulations for the Exchange. *See* § 155.230 and § 155.345, discussed in section III of the preamble. However, as described below, given the time needed to allow for systems builds, the requirement to provide a combined eligibility notice will not be effective until January 1, 2015.

(a) Content and Accessibility Standards (§ 435.917 and § 435.918)

We are proposing to redesignate and revise § 435.913 at proposed § 435.917 to clarify the state agency's responsibilities to communicate specific content in a clear and timely manner to applicants and beneficiaries when issuing either a notice of approved eligibility or a notice of denial or other adverse action. We also propose to delete § 435.919 and to move the provisions now contained therein to proposed § 435.917.

Per proposed § 435.917(a), eligibility notices must be written in plain language and be accessible to individuals who are limited English

proficient and individuals with disabilities and comply with regulations relating to notices in part 431 subpart E and, if provided in electronic format, with § 435.918, newly proposed in this rulemaking. Notices of an approval of Medicaid eligibility must include clear and specific content, as specified in proposed § 435.917(b)(1).

Proposed § 435.917(b)(2) cross references § 431.210 for the specific notice content required for an adverse action—including a denial, termination, suspension of or change in eligibility, or a change in benefits or services. Revisions to § 431.210 are proposed to achieve similar clarity and transparency for notices of adverse actions as are proposed for notices of an approval of Medicaid eligibility. We note that a citation of the specific regulation(s) that support the action, as required by § 431.210(c), does not satisfy the requirement to provide ''a clear statement'' explaining the adverse action under § 431.210(a), as revised in this proposed rulemaking. CMS will work with states and other stakeholders to develop model notices meeting the requirements of the regulations.

Proposed § 435.917(c) directs that all eligibility notices relating to a determination of eligibility based on the applicable MAGI standard include a plain language description of other bases of eligibility (such as disability, long-term care services need, or incurred medical expenses for medically needy coverage) as well as the level of benefits and services to which someone eligible on such other bases is entitled. The information provided must be sufficient to enable individuals to make an informed decision as to whether or not to seek a determination of eligibility on a MAGI-excepted basis. We note that both individuals who are approved for, as well as those who are denied, Medicaid on the basis of the applicable MAGI standard should be provided the information specified, as eligibility on another basis may better meet the individual's needs. We solicit comments on the level of detail which should be required for inclusion in the notice under § 435.917(c).

Current notice regulations require paper-based, written notices. New proposed § 435.918 would maintain the requirement for paper-based written notices, but would also require states to provide individuals with the option to receive notices through a secure electronic format in lieu of written notice by regular mail, which remains the default method of notice provision. Per proposed § 435.918, after an individual elects electronic notification, the agency would send a paper notification informing the individual of his or her election to receive eligibility notices electronically. The agency would post notices to the individual's secure electronic account, notifying the individual by text message, email, or other electronic communication that a notice had been posted and directing the individual to check his or her account. We considered permitting individuals applying on-line to provide electronic confirmation of their election, but believe that confirmation via regular mail provides stronger consumer protection. We welcome comment on this, and other consumer safeguards for electronic notification. Also, we recognize that in addition to eligibility notices, there are other communications that occur between the applicant/beneficiary and the Medicaid or CHIP agency. These communications include requests for additional information, annual renewal forms and reminders, premium payment information, changes in benefits or covered services, etc. We are considering whether all or some of these should be available to the consumer electronically by posting to the electronic account and seek comment.

As described above, newly proposed § 435.917(a), which establishes content and accessibility standards for Medicaid notices, requires that notices comply with the provisions in § 435.918, if provided in electronic format. In addition, paragraph (c)(5), which is proposed for addition to § 431.206, relating to the agency's responsibility to inform applicants and beneficiaries of adverse actions, includes a provision to permit electronic notices consistent with § 435.918. We have also modified §§ 431.211, 431.213, 431.230, and 431.231 to update and modernize the language in the regulation to remove the term ''mail'' and instead use ''send,'' which will still require states to provide paper-based written notices, but also permit states to offer beneficiaries the option of receiving notices electronically, after obtaining consent from the individual, consistent with the consumer protections in proposed § 435.918.

(b) Provision of Coordinated Notice—Medicaid Agency Responsibilities (§ 435.1200)

We propose revisions to the Medicaid eligibility final rule to provide for a coordinated system of notices across all insurance affordability programs based on MAGI, regardless of where the individual initially submits an application or whether the Exchange is authorized to make Medicaid and CHIP eligibility determinations. Under the proposed rule, to the maximum extent feasible, individuals will receive a single notice communicating the determination or denial of eligibility for all applicable insurance affordability programs and for enrollment in a QHP through the Exchange, rather than separate notices from the Medicaid and/or CHIP agencies and the Exchange.

Our proposal is effectuated primarily in revisions to § 435.1200, as published in the Medicaid eligibility final rule. In support of our proposed policy, we also propose to add definitions of ''combined eligibility notice'' and ''coordinated content,'' in § 435.4. ''Combined eligibility notice'' is an eligibility notice that informs an individual, or household when appropriate, of his or her eligibility for multiple insurance affordability programs, including all or most of the information required for inclusion per proposed § 435.917 and § 431.210, as revised in this proposed rule. ''Coordinated content'' refers to information included in an eligibility notice relating to the transfer of the individual's electronic account to another program, and the status of that other program's review of the account. Coordinated content will be important when the eligibility determination for all programs cannot be finalized for inclusion in a single coordinated notice.

In § 435.1200, we propose adding sub paragraph (b)(3)(iv) to provide that the agreements between the Medicaid agency and other insurance affordability programs delineate the responsibilities of each program to provide combined eligibility notices and coordinated content, as appropriate. We note that under these agreements, the Medicaid and CHIP agencies and the Exchange must work together to provide, to the maximum extent possible, a single combined notice of eligibility that includes all family members of the same household applying for coverage together. We include at paragraph (d) of proposed § 435.917, discussed generally in section I.B.2.a of the preamble, above, that the agency's responsibility to provide an eligibility notice is satisfied by a combined notice provided by the Exchange or another insurance affordability program pursuant to an agreement between the agency and the Exchange or such program.

We propose to add sub paragraph (3) to § 435.1200(c) to provide that when the Exchange or other agency administering an insurance affordability program is authorized to, and does make, a determination of Medicaid eligibility, the agreement described in paragraph (b)(3) stipulates that the Exchange or other agency will provide the applicant with a combined

eligibility notice including information about the individual's Medicaid eligibility (approval or denial). For example, if the Exchange receives an application and determines the applicant eligible for Medicaid, the Exchange will issue a combined notice including information related both to the approval of Medicaid eligibility and the denial of eligibility for advanced payments of the premium tax credit and cost-sharing reductions.

We propose for clarity to redesignate paragraph § 435.1200(d)(5) at paragraph (d)(2) and to redesignate the other paragraphs of paragraph (d) accordingly. We further propose to revise redesignated § 435.1200(d)(4) to add new language at clause (d)(4)(i) to specify that, when an individual is assessed by the Exchange or other program as potentially Medicaid eligible and is transferred to the Medicaid agency for a final determination, if the Medicaid agency approves eligibility, the Medicaid agency will provide the combined eligibility notice for all applicable programs. For example, if the Exchange assesses an individual as potentially Medicaid eligible and transfers the individual's electronic account to the Medicaid agency, and the agency approves eligibility, the agency would issue a combined notice, including information related to the approval of Medicaid eligibility as well as the denial of eligibility for advance payment of the premium tax credit and cost-sharing reductions.

Finally, we propose revisions to § 435.1200(e) to provide at new paragraph (e)(1)(ii) that the Medicaid agency include in the agreement consummated under § 435.1200(b)(3) that the Exchange or other program will issue a combined eligibility notice, including the Medicaid agency's denial of Medicaid eligibility, for individuals denied eligibility by the agency at initial application (or terminated at renewal) and assessed and transferred to the Exchange or other insurance affordability program as potentially eligible for such program. For example, if the Medicaid agency determines that an individual is not Medicaid eligible, but transfers the individual's account to the Exchange as potentially eligible for enrollment in a QHP, the Exchange would issue a combined notice of the individual's eligibility for enrollment in a QHP, advance payment of the premium tax credit, cost-sharing reductions, and the denial of Medicaid.

Our proposed policy of a single combined eligibility notice does not apply in the case of individuals determined eligible on a basis other than MAGI, because the Medicaid agency may be continuing its evaluation of an individual's eligibility on such other bases at the same time that the individual is being evaluated for, or is enrolled in, another insurance affordability program pursuant to § 435.911(c)(2) of the Medicaid eligibility final rule. In such cases, while a single, combined notice containing the agency's final determination on all bases would not be required, per proposed § 435.1200(e)(2)(ii), the Medicaid agency would provide notice to the individual, in accordance with § 431.210(a) and § 435.917, that the agency has determined the individual ineligible for Medicaid on the basis of MAGI, and that the agency is continuing to evaluate Medicaid eligibility on other bases. Under the proposed regulation, this notice also would contain coordinated content advising the applicant that the agency has assessed the individual as potentially eligible for, and transferred the individual's electronic account to, another program. Proposed § 435.1200(e)(2)(iii) requires the agency to provide the individual with notice of the final eligibility determination on the non-MAGI bases considered. If the individual is later determined eligible for Medicaid on a basis other than MAGI, the individual would receive a combined notice that includes information of the approval of Medicaid eligibility and ineligibility for advance payment of the premium tax credit and cost-sharing reductions.

There are a few additional situations we have identified under the proposed regulation in which a single notice will not be required—in such situations notices would include coordinated content appropriate to the situation. First, when an individual who is assessed by the Exchange as not potentially Medicaid eligible based on MAGI and determined eligible for advance payment of the premium tax credit and cost-sharing reductions, a notice of eligibility for advance payment of the premium tax credit and cost-sharing reductions (issued by the Exchange) will be needed. If the individual requests a full determination of Medicaid or CHIP eligibility by the state agency, as permitted under the Exchange final regulation at § 155.302(b)(4)(B), a second notice will be needed once the Medicaid or CHIP agency has made a decision on the application. Depending on whether the state agency approves or denies Medicaid or CHIP, either a coordinated notice or coordinated content with information relating to the individual's eligibility for advance payment of the premium tax credit and cost-sharing reductions will be needed.

Second, when different members of the same household are determined eligible for different programs, a single combined notice for all members of the household may not be feasible. In such situations, as described in § 435.1200(b)(4), notices would include appropriate coordinated content related to the status of other members of the individual's household. We welcome comments as to whether there are other situations, besides the two situations identified, when a combined eligibility notice is not feasible.

We also note that, in consultation with states, consumer groups and plain-language experts, we intend to develop language to be released in 2013, which could be adapted by states as a model for delivering combined eligibility notices. Because some states have specific content which will need to be included in notices issued by an Exchange in their state, state Medicaid and CHIP agencies will work with the Exchange on any state-specific content to be included in a combined notice and/or may issue supplementary notices if the Exchange is unable to deliver all required state-specific content.

Finally, given the time needed to allow for systems builds, we are proposing that the policy to provide a combined eligibility notice will not be effective until January 1, 2015. At state option, based on the operational readiness of all programs, combined eligibility notices may be implemented earlier. States with an FFE will only be able to provide a combined eligibility notice prior to January 1, 2015 for eligibility determinations made by the FFE. In the absence of a combined eligibility notice, coordinated content ensures that applicants and beneficiaries are informed of the status of their application with respect to other insurance affordability programs. We also considered a later effective date of October 15, 2015 for the requirement to provide a combined eligibility notice in all circumstances provided for in the proposed rule, which would coincide with the beginning of open enrollment for January 2016. We welcome comments on the proposed effective date of January 1, 2015 and the later effective date of October 15, 2015.

We also make a technical correction to § 435.1200. We update paragraph (a) to correct an erroneous statutory citation.

(c) CHIP Eligibility Notices and Information Requirements (§§ 457.10, 457.110, § 457.340, 457.348 and 457.350)

We propose to modernize and amend the existing CHIP regulations pertaining to notices at § 457.110 and § 457.340(e) to correspond to the regulation changes and additions proposed for Medicaid at § 435.917, and § 435.918. We also propose to add a definition of ''combined notice'' and ''coordinated content'' in § 457.10 and to revise paragraphs (a), (b), (c) and (d) of § 457.348 and paragraphs (f) and (i) in § 457.350 to mirror the proposed revisions to the Medicaid regulations in § 435.1200 (b), (c), (d), and (e) to maximize achievement of a system of coordinated notices across all insurance affordability programs, including CHIP.

Per proposed § 457.350(f)(3), we seek to clarify that the requirement that a state find an individual ineligible, provisionally ineligible, or suspend the individual's application for CHIP unless and until the Medicaid application for the individual is denied applies only at application. We propose to clarify this provision in response to concerns expressed by states that if this provision is applied to CHIP enrollees at redetermination, a gap in coverage could result.

We also propose to update § 457.350(g), relating to the states' responsibility to provide information to CHIP applicants regarding the Medicaid program, to extend to all insurance affordability programs. We also propose to update § 457.350(h)(2), which describes the state's responsibility to inform a CHIP applicant on a waiting list that if circumstances change, the applicant may be eligible for other insurance affordability programs, in addition to Medicaid, so that the Exchange, Medicaid, and CHIP can work together to ensure that eligible applicants are enrolled in the appropriate program.

A technical correction is made to § 457.350(b). We update paragraph (b) to clarify that the requirement to screen for potential eligibility for other insurance affordability programs applies to any applicant or enrollee who submits an application or renewal form to the state which included sufficient information to determine CHIP eligibility. This includes not only those determined ineligible for CHIP but also individuals subject to a waiting period or those screened as not potentially eligible for Medicaid based on MAGI and enrolled in CHIP but also assessed as potentially eligible for Medicaid on another basis and referred to the Medicaid agency for a full Medicaid determination.

3. Medicaid Eligibility Changes Under the Affordable Care Act

(a) Former Foster Care Children (§ 435.150)

Sections 2004 and 10201(a) and (c) of the Affordable Care Act add a new section 1902(a)(10)(A)(i)(IX) of the Act, under which states must provide Medicaid coverage starting in 2014 for individuals under age 26 who were in foster care and receiving Medicaid. Note that states still have the option to cover a similar eligibility group for independent foster care adolescents, which has slightly different requirements (see § 435.226 of this proposed rule).

Consistent with the statute, we propose to add § 435.150 establishing this new mandatory eligibility group for individuals who:

- Are under age 26;
- Are not eligible for and enrolled in mandatory Medicaid coverage under sections 1902(a)(10)(A)(i)(I) through (VII) of the Act, eligibility under which is codified in §§ 435.110 through 435.118 and §§ 435.120 through 435.145 of subpart B of the regulations; and
- Were in foster care under the state's or tribe's responsibility (whether or not under title IV–E of the Act) and also enrolled in Medicaid under the state's Medicaid state plan or 1115 demonstration (or at state option were in foster care and Medicaid in any state rather than ''the'' state where the individual is now residing and applying for Medicaid) when the individual attained age 18 or such higher age at which the state's federal foster care assistance ends under title IV–E of the Act.

We are proposing an interpretation of the statute that an individual qualifies for this mandatory Medicaid coverage if the individual was concurrently enrolled in foster care and Medicaid either when attaining age 18 or at the point of ''aging out'' of foster care. This interpretation is based on the statute's use of the word ''or'' to permit either alternative. We considered a different interpretation that would limit eligibility to individuals who ''age out'' of foster care. Among the states that have extended foster care programs beyond age 18, all but two states end foster care at age 21.

The statute requires that an individual be in foster care under the responsibility of ''the state'' and be enrolled in Medicaid under ''the state plan'' or an 1115 demonstration. In this proposed rule, we are interpreting that requirement as meaning that the individual was in foster care and enrolled in Medicaid in the same state in which coverage under this eligibility group is sought. However, we are proposing to give states the option to cover individuals under this group who were in foster care and Medicaid in any state at the relevant point in time. We request comments on this interpretation of the statute.

In accordance with the statute, there is no income or resource test for this group. Individuals may apply and be determined eligible at any time between attaining age 18 and losing eligibility under this group upon attaining age 26. In accordance with longstanding general Medicaid policy clarified at § 435.916(f) of the Medicaid eligibility final rule, when an individual loses eligibility under this group, coverage shall not be terminated unless the individual is not eligible under any other group (for example, the new adult group at § 435.119 of the Medicaid eligibility final rule.)

Eligibility under the adult group at § 435.119 of the regulations (as specified in the March 23, 2012 Medicaid eligibility final rule) will not take precedence over coverage under the mandatory group of former foster care children. In accordance with the second subclause (XVI) in the matter following subparagraph (G) of section 1902(a)(10) of the Act, as added by section 10201(a)(2) of the Affordable Care Act, individuals eligible for both the former foster care group and the adult group should be enrolled in the former foster care group.

(b) Financial Methodologies for Individuals Excepted From Application of MAGI-Based Methodologies (§ 435.601 and § 435.602)

Due to changes in the Affordable Care Act, we propose technical amendments to § 435.601(b) and § 435.602(a) to specify that these sections, related to general application of financial eligibility methodologies and financial responsibility of relatives and other individuals, only apply to individuals excepted from application of the MAGI-based methodologies in accordance with § 435.603(j). Also, as required by section 1902(e)(14)(B) of the Act, which prohibits income disregards other than those expressly included in MAGI methodologies for the MAGI-related populations, we propose to amend paragraph (d) of § 435.601 to remove ''MAGI-related'' eligibility groups (financial eligibility for which will be determined using MAGI-based methodologies set forth in § 435.603) from the groups to which a state may

use the authority of section 1902(r)(2) of the Act to adopt less restrictive income and resource methodologies than those under the most-closely related cash assistance program.

(c) Family Planning (§ 435.214)

Section 2303 of the Affordable Care Act adds new sections 1902(a)(10)(A)(ii)(XXI) and 1902(ii) of the Act, as well as the first new clause (XVI) in the matter following 1902(a)(10)(G) (there are two paragraph (XVI)s; the first is the one related to family planning), under which states have the option to provide Medicaid coverage to women and men that is limited to family planning or family planning related services under the state plan.

Consistent with the statute, we propose to add § 435.214 establishing this new eligibility group for individuals who:

- Are not pregnant;
- Have income that does not exceed the income eligibility level established by the state, as discussed below. Section 1902(ii)(1) specifically allows for income eligibility up to the highest income eligibility level established by the state for pregnant women in the Medicaid or CHIP state plan. We have interpreted this to also include the income level established by the state for pregnant women under the state's Medicaid or CHIP demonstration approved under the authority of section 1115 of the Act.

Because section 1902(e)(14) applies a ''notwithstanding any other provision of Title XIX,'' and individuals eligible for family planning are not an exempt group listed at 1902(e)(14)(D), beginning January 1, 2014, financial eligibility for this group will be determined using the MAGI-based methodologies set forth at § 435.603 of the regulations. However, section 1902(ii)(3) of the Act, permits states to consider only the income of the individual applying for family planning benefits in determining eligibility under this section. Accordingly, at § 435.603 we are proposing to codify the current policy outlined in the July 2, 2010 state Medicaid Director Letter (*http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD10013.pdf*Error! Bookmark not defined.). Under this policy about determining financial eligibility for the new eligibility group at proposed § 435.214, states may consider the individual's household to consist only of the individual, may consider only the income of the individual applying for coverage (while retaining other members of the household for purposes of determining family size), and may increase the family size used for determining eligibility for coverage under this group by one, similar to the increase in family size for pregnant women.

Finally, we are proposing to amend the definition of a targeted low income child at § 457.310(b)(2) to indicate that eligibility for limited coverage of family planning services under § 435.214 does not preclude an individual from being eligible for CHIP. In circumstances where an individual is enrolled in both CHIP and Medicaid family planning coverage, Medicaid would be secondary payer to CHIP in accordance with 1902(a)(25) of the Act and 42 CFR 433 Subpart D.

4. Medicaid Enrollment Changes Under the Affordable Care Act Needed to Achieve Coordination With the Exchange

(a) Certified Application Counselors (§ 435.908 and § 457.330)

Some individuals require assistance with completing an application, enrolling in coverage or with ongoing communications with the agency once determined eligible. While many may seek informal assistance with applications from friends or relatives, others may seek assistance from trusted community-based organizations, providers, or other organizations with expertise in social service programs. Staff and volunteers from such organizations provide important assistance in completing application and renewal forms, and in explaining and helping individuals to meet any documentation requirements, but do not sign forms, receive notices or other communications, or otherwise act on behalf of the individual being assisted. Individuals able to perform those types of functions (often a family member, legal guardian, or attorney) are referred to as ''authorized representatives'' and are discussed in the next section, below.

Many state Medicaid and CHIP agencies have a long history of enabling providers and other organizations to serve as ''application assisters,'' which we refer to in this proposed rulemaking as ''application counselors'' to provide such direct assistance to individuals seeking coverage, and these counselors play a key role in promoting enrollment among low-income individuals. These proposed regulations seek to ensure that application counselors, who we expect to continue to play an essential role in many states, will have the training and skills necessary to provide reliable, effective assistance to consumers, and that they will meet the confidentiality requirements that apply to the data they will be able to access in their role as assisters, including those established in accordance with section 6103 of the Internal Revenue Code and section 1902(a)(7) of the Act.

We anticipate that, beginning with the initial open enrollment period, an increasing number of individuals will seek to apply for coverage on line, and while some states already have web infrastructure which allows application counselors to track their clients' applications and manage caseloads, we expect that practice to increase as states improve their electronic application systems. Other applicants may still submit applications on paper. The proposed regulation recognizes the role that may be played by application counselors in helping individuals with the process through either the paper or online channels.

To effectively provide application assistance, counselors may have access to personal data, including tax data from the Internal Revenue Service that is subject to the confidentiality rules established under section 6103 of the Internal Revenue Code (''Code''). State Medicaid agencies will need to ensure that their application counselors, and any web infrastructure used by them, comply with applicable privacy and security rules associated with the disclosure and receipt of this data and other personal information as well as with the overall eligibility and enrollment process. Accordingly, we propose to add a new paragraph (c) to § 435.908, as published in the Medicaid eligibility final rule, to establish standards for authorizing application counselors to assist individuals with the application and renewal process, including use of a dedicated web portal, as well as with managing their case between the eligibility determination and regularly scheduled renewals. We apply these provisions to state CHIP agencies through the addition of a cross-reference in § 457.340, and propose similar regulations for certification of application counselors for the Exchange (see proposed § 155.225 and section III.B.4 of this rulemaking). As recipients of federal financial participation, state Medicaid and CHIP agencies are reminded of their obligation to ensure that their programs, including their application counselor programs, provide equal access to individuals with limited English proficiency and individuals with disabilities under applicable federal civil rights laws. As part of this obligation, state Medicaid and CHIP agencies should ensure the availability and provision of appropriate application assistance services, such as language assistance services and auxiliary aids

and services, to meet the needs of these populations. Sometimes this obligation can be met by referral of individuals with limited English proficiency or individuals with disabilities to appropriate counselors participating in the agency's program. Many people applying for coverage also seek informal help from family, friends and local community-based organizations not identified on the application or authorized to communicate with the agency about the application. The proposed regulations do not pertain to such informal assistance.

We note that similar regulations for certified application counselors are proposed for the Exchange at § 155.225. See discussion in section III.B.4. of the preamble. Application counselors would not need to go through two different certification processes. State Medicaid and CHIP agencies and the Exchange generally are charged under the § 435.1200 and § 457.348 of the Medicaid eligibility final rule and § 155.345 of the Exchange final rule to work together to create a seamless and coordinated application and enrollment process for individuals applying for all insurance affordability programs. To achieve this in the case of certified application counselors, states could elect, for example, to create a single certification process for all insurance affordability programs, or each program could accept application counselors certified by another program.

(b) Authorized Representatives (§ 435.923 and § 457.340)

Authorized representatives have historically helped ensure access to coverage for vulnerable individuals, such as seniors and those with disabilities. Although there is no formal limit on the number of individuals an authorized representative may assist—for example, at some institutions or an attorney may serve as such a representative for several clients—most authorized representatives serve in that capacity for one individual, for example for a parent or incapacitated relative. Under current regulations at 42 CFR 435.907, retained in the Medicaid eligibility final rule, states must accept applications from authorized representatives acting on behalf of an applicant. In this rulemaking, we propose to add § 435.923 establishing minimum requirements for the designation of authorized representatives. Proposed § 435.923, which is applied to state CHIP agencies through the addition of a cross reference in proposed § 457.340, is intended to ensure a consistent set of rules and standards for authorized representatives across all insurance affordability programs. We believe the proposed regulation is consistent with current policies and practice in most states today and therefore will not substantially affect state programs.

Specifically, we propose that, consistent with longstanding practice, applicants and beneficiaries may choose to designate an individual or organization to act on the applicant or beneficiary's behalf, or may have such a representative through operation of state law (for example, through a legal guardianship arrangement). The state may not restrict the ability of applicants and beneficiaries to have an authorized representative to only certain groups of applicants and beneficiaries.

Under proposed paragraph § 435.923(a), applicants and beneficiaries who do not designate an authorized representative on their application must be able subsequently to do so, through both electronic and paper formats, as well as the other modalities described in § 435.907(a). Legal documentation of authority to act on behalf of an applicant or beneficiary under state law, such as a court order establishing legal guardianship or a power of attorney may serve in the place of the applicant or beneficiary's designation. The option to submit such documentation is intended to enable applicants who do not have the capacity to provide a signature to authorize representation. Authorized representatives must agree, or be bound by requirements, to maintain the confidentiality of any information regarding the applicant or beneficiary provided by the agency. An applicant or beneficiary may authorize the representative to act on his or her behalf in the activities set forth in proposed § 435.923(b). In accordance with proposed paragraph (c), the applicant or beneficiary may change or withdraw his or her authorization at any time. The authorized representative also may withdraw his or her authorization of representation by notifying the agency. Under proposed § 435.923(d), authorized representatives are responsible for fulfilling the responsibilities encompassed within the scope of the representation to the same extent as the individual he or she represents and must agree to maintain the confidentiality of information provided by the agency. Under proposed paragraph (e), providers and staff members or volunteers of other organizations serving as authorized representatives must agree to adhere to relevant confidentiality and conflict of interest protections, similar to the rules applied to eligibility workers at outstation locations set forth in § 435.904(e) of the regulations. We note that, before data can be released to an authorized representative, the representative must meet the authentication and data security standards of the releasing entity. For example, information relating to an applicant's modified adjusted gross income from the Internal Revenue Service cannot be requested by or released to an authorized representative unless the representative meets the authentication and security standards established by the IRS under section 6103 of the Code. In the event that such authentication or security standards are not met, the agency would need to continue to process the individual's application to the extent possible without use of the data at issue.

We intend that the single streamlined application described in § 435.907(b)(1) of the regulations will provide applicants the opportunity to designate an authorized representative and will collect the information necessary for such representative to enter into any associated agreements with the agency as part of the application process. States developing alternative applications under § 435.907(b)(2) must collect the same information through their alternative applications or supplemental forms. Per proposed § 435.923(f), the agency must accept electronic, including telephonically recorded, signatures authorizing representation as well as handwritten signatures transmitted by facsimile or other electronic transmission. Designations of authorized representatives under the proposed regulation must be accepted through all of the modalities described in § 435.907(a).

(c) Accessibility for Individuals Who Are Limited English Proficient (§ 435.905)

We are proposing to clarify regulations at § 435.905(b) relating to the provision of information to persons who are limited English proficient in order to assure access to coverage for eligible individuals and to achieve alignment between the regulations governing Medicaid and CHIP with existing Exchange regulations at 45 CFR 155.205(c), issued in the Exchange eligibility final rule on March 27, 2012. We propose that providing language services means providing oral interpretation, written translations, and taglines (which are brief statements in a non-English language that inform individuals how to obtain information in their language). These language services will allow individuals who are

limited English proficient to obtain information accessibly.

Longstanding § 435.901 directs states to comply with the Civil Rights Act of 1964, as well as section 504 of the Rehabilitation Act of 1973, and all other relevant provisions of federal and state laws. Guidance published on August 8, 2003 (68 FR 47311) provides some parameters on language assistance services for persons who are limited English proficient, including oral interpretation and written translation services; this guidance is located at *http://www.justice.gov/crt/about/cor/lep/hhsrevisedlepguidance.pdf*. Guidance was subsequently released on the availability of enhanced federal matching funds available for translation and interpretation services in connection with improving outreach to, enrollment of, retention of, and use of services by children in Medicaid and CHIP. Federal Medicaid reimbursement is available for the provision of oral and written translation and interpretation services provided to Medicaid and CHIP beneficiaries as either administration or a medical-assistance related expenditure, at varying matching rates, depending on the specific circumstances involved. (For more information, see our letter to State Health Officials (SHO) dated July 1, 2010, available at *http://www.cms.gov/smdl/downloads/SHO10006.pdf* and the CMCS Information Bulletin on translation services dated April 26, 2011, available at *https://www.cms.gov/CMCSBulletins/downloads/Info-Bulletin-4–26–11.pdf*.)

These proposed policies are consistent with sections 1413 and 2201 of the Affordable Care Act, sections 1902(a)(8), 1902(a)(19) and 1943(b)(1)(F) of the Act and § 435.902 and § 435.906 of the regulations. The proposed regulation at § 435.905(b)(1) is designed to provide flexibility to states and to accommodate differences in populations and languages spoken in a state. As stated in our Medicaid eligibility final rule, after consultation with states and stakeholders, future sub-regulatory guidance will implement the regulatory standards proposed as well as coordinate our accessibility standards with those applied to other insurance affordability programs and other programs overseen by HHS, as appropriate. We also propose at § 435.905(b)(3) to require the state to inform individuals of availability of these services, and how to access them. Proposed paragraph (b)(3) would apply to informing individuals of accessibility services described in § 435.905(b)(2) of the Medicaid eligibility final rule (relating to services available to individuals with disabilities).

We note that under regulations adopted in the Medicaid eligibility final rule, application and renewal forms, Web sites and other electronic systems used to enroll individuals, and assistance provided to individuals must meet the accessibility standard in proposed § 435.905(b) (*see* §§ 435.907(g), 435.916(g), 435.908, 435.1200(f) of the Medicaid eligibility final rule). Thus, to align with the current Exchange regulations issued in the Exchange Eligibility final rule at § 155.205(c) and amending the accessibility standards in this proposed rule, we would also be modifying the standards for such forms, Web sites, and systems. In §§ 435.917(a)(2), 431.205(e), 431.206(d), and 435.956(g), we propose to apply these accessibility standards at § 435.905(b) to notices and appeals procedures. We note that the proposed modification of § 431.206 is intended to provide that all notices and communications across our regulation at part 431, subpart E be accessible to people who are limited English proficient and with disabilities, including but not limited to references to notices in §§ 431.211, 431.224, and 431.245. We also propose to modify § 457.110(a) and § 457.340(e) to apply these accessibility standards to the CHIP program.

5. Medicaid Eligibility Requirements and Coverage Options Established by Other Federal Statutes

To facilitate development of the streamlined eligibility and enrollment system envisioned under the Affordable Care Act, we propose new or amended regulations to simplify several eligibility pathways established by other federal statutes, as follows:

(a) Coverage of Children and Families

(i) Mandatory Coverage of Children With Title IV–E Adoption Assistance, Foster Care, or Guardianship Care Under Title IV–E (§ 435.145)

Section 471(a)(28) of title IV–E of the Act, as added by the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Pub. L. 110–351), gives states and federally-recognized Tribes the option to provide kinship guardianship assistance payments on behalf of children placed with family members under certain conditions. Under section 473(b)(3)(C) of the Act, children on whose behalf such payments are made are mandatorily eligible for Medicaid to the same extent as children for whom federal foster care maintenance payments are made under title IV–E. Revisions to current regulations at § 435.145 are proposed to implement these statutory provisions. Also, we are proposing to eliminate a duplicative rule at § 435.115(e) for this group and to include in § 435.145 certain provisions from § 435.115(e) that are consistent with the statutory requirements, namely that an adoption assistance agreement is considered to be in effect regardless of whether adoption assistance is being provided or an interlocutory or other judicial decree of adoption has been issued. These proposed changes clarify current policy and have no meaningful impact on state programs.

(ii) Extended Eligibility for Low-Income Families (§ 435.112 and § 435.115)

(1) Families With Medicaid Eligibility Extended Because of Increased Earnings or Hours of Employment (§ 435.112)

Sections 408(a)(11)(A), 1902(e)(1)(A), and 1931(c)(2) of the Act, implemented at existing § 435.112, require a 4-month Medicaid extension for low-income families (including pregnant women without other children) eligible under section 1931 of the Act (because they met prior AFDC income eligibility requirements as modified at state option under section 1931(b)(2) of the Act) who otherwise would lose coverage due to a household member's increased earnings or a parent's increased working hours. This section applies if a Medicaid extension for at most 12 months under Transitional Medical Assistance (TMA) in accordance with section 1925 of the Act is not available (for example, because the federal authority for TMA has sunset). We propose revisions to § 435.112 to align with the implementation of section 1931 of the Act in the Medicaid eligibility final rule for parents and other caretaker relatives at § 435.110, pregnant women at § 435.116, and children at § 435.118.

(2) Families With Medicaid Eligibility Extended Because of Increased Collection of Spousal Support (§ 435.115)

Sections 408(a)(11)(B) and 1931(c)(1) of the Act, implemented at existing § 435.115(f)–(h), require a 4-month Medicaid extension for low-income families eligible under section 1931 of the Act who otherwise would lose coverage due to increased income from collection of child or spousal support under title IV–D of the Act. We propose to revise § 435.115 to limit this requirement to spousal support because, while spousal support is counted as income under the MAGI-based methodologies described in § 435.603,

child support is not. Therefore, increased collection of child support will not affect Medicaid eligibility for parents or children once MAGI-based methodologies take effect in 2014. Also, we propose to delete the obsolete paragraphs (a) through (d) of § 435.115 relating to individuals ''deemed to be receiving AFDC'' and to delete paragraph (e) relating to eligibility for children receiving assistance under title IV–E of the Act as duplicative of § 435.145.

(iii) Extended and Continuous Eligibility for Pregnant Women (§ 435.170) and Hospitalized Children (§ 435.172)

(1) Pregnant Women Eligible for Extended or Continuous Eligibility (§ 435.170)

Section 435.170 of the existing regulations implements section 1902(e)(5) of the Act, requiring extended Medicaid eligibility through the last day of the month in which the 60-day post-partum period ends for women who were covered while pregnant. Section 1902(e)(6) of the Act requires states to provide ''continuous eligibility'' to pregnant women, once determined eligible under any eligibility group, regardless of changes in household income through the last day of the month in which the post-partum period ends. Pregnant women eligible for extended coverage under either provision are entitled to receive pregnancy-related services covered under the state plan in accordance with § 435.116(d)(3) of the Medicaid eligibility final rule. We further clarify in a proposed new paragraph (d) of § 435.170, consistent with section 1902(e)(6) of the Act, that extended or continuous eligibility does not apply to pregnant women only covered during a period of presumptive eligibility. These changes clarify current policy and have no meaningful impact on state programs.

(2) Continuous Eligibility for Hospitalized Children (§ 435.172)

Section 1902(e)(7) of the Act requires that infants and children under age 19 eligible under sections 1902(a)(10)(A)(i)(III), (IV), (VI), and (VII) and (ii)(IX) of the Act remain eligible for Medicaid until the end of a Medicaid-covered inpatient stay, if they otherwise would lose eligibility because of attaining the maximum age for coverage under the applicable section of the Act. We propose to add a new section § 435.172 implementing this requirement for children eligible under § 435.118 of the Medicaid eligibility final rule. This section clarifies current policy and has no meaningful impact on state programs.

(iv) Optional Eligibility Groups and Coverage Options

(1) Optional Eligibility for Parents and Other Caretaker Relatives (§ 435.220)

Optional eligibility for pregnant women and parents or other caretaker relatives under section 1902(a)(10)(A)(ii)(I) of the Act is currently implemented at § 435.210. Optional eligibility for pregnant women, effective January 1, 2014, is implemented at § 435.116 of the Medicaid eligibility final rule. Optional eligibility for most parents and other caretaker relatives now covered under § 435.210 (those with MAGI-based income at or below 133 percent FPL) will be subsumed under the adult group at § 435.119, if they are not elderly and not Medicare eligible. Eligibility for parents and other caretaker relatives with MAGI-based income above the limits for mandatory coverage under § 435.110 and § 435.119 will remain an option under § 435.220 as proposed in this rule. The eligibility group defined in the existing regulations at § 435.220 (for individuals who would meet the income and resource requirements under AFDC if child care costs were paid from earnings) will be rendered obsolete with the prohibition against income disregards under MAGI-based methods per § 435.603(g).

Consistent with our efforts to streamline and simplify eligibility in the Medicaid eligibility final rule, we propose in this rulemaking to delete pregnant women and parents or other caretaker relatives from the scope of the current regulation at § 435.210 and to replace the obsolete provision currently provided for in § 435.220 with optional eligibility of parents and other caretaker relatives based on MAGI. A state may cover parents and other caretaker relatives under this section, including individuals who are elderly or Medicare eligible, if their household income does not exceed the income standard established by the state for this group. The income standard may not exceed the higher of the state's AFDC payment standard in effect as of July 16, 1996 or the state's highest effective income level for optionally eligible parents and other caretaker relatives under the state plan or 1115 demonstration as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard per section 1902(e)(14)(A) and (E) of the Act, in accordance with guidance as issued by the Secretary. States will also have the option to provide Medicaid to parents and other caretaker relatives, along with other individuals under age 65, with income above 133 percent FPL under the new optional eligibility group codified at § 435.218 of the Medicaid eligibility final rule.

(2) Optional Coverage for Reasonable Classifications of Individuals Under Age 21 (§ 435.222)

The existing regulation at § 435.222 implements sections 1902(a)(10)(A)(ii)(I) and (IV) of the Act to give states the option to cover all individuals under age 21 (or, at state option, under age 20, 19, or 18) or reasonable classifications of such individuals, who either meet the state's AFDC income and resource requirements or would meet them if not institutionalized. We propose revisions to § 435.222 to reflect the need for states to convert their current AFDC-based net income standard to an equivalent MAGI-based standard, unless the state currently disregards all income for a reasonable classification under this group. The income standard, if any, established by the state for all individuals or each reasonable classification under this group which may not exceed the higher of the state's AFDC payment standard in effect as of July 16, 1996 or the state's highest effective income level for the group or reasonable classification under the state plan or 1115 demonstration as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard.

(3) Optional Eligibility for Individuals Needing Treatment for Breast or Cervical Cancer (§ 435.213)

We propose to add a new § 435.213 to codify section 1902(a)(10)(A)(ii)(XVIII) of the Act, consistent with existing guidance, which provides states with the option to cover individuals needing treatment for breast or cervical cancer. The eligibility criteria for this optional eligibility group are set forth at section 1902(aa) of the Act. Guidance on this group was provided in a state Health Official letter (SHO) dated January 4, 2001, *http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/sho010401.pdf*. Inasmuch as the proposed regulation codifies this guidance, which remains effective, this section should not have any meaningful impact on state programs.

This optional eligibility group covers individuals under age 65 who are not eligible and enrolled for mandatory coverage under the Medicaid state plan; do not otherwise have creditable coverage for treatment of their breast or cervical cancer; and have been screened

as needing treatment for breast or cervical cancer under a state's Centers for Disease Control and Prevention (CDC) breast and cervical cancer early detection program (BCCEDP). This may include any men screened under the state's screening program for breast cancer. The state entity administering the BCCEDP, not the state Medicaid agency, determines who is considered to have been ''screened under the program'' and establishes the scope of screening provided, regardless of funding source, so that if the state entity considers a man to have been screened under the BCCEDP program, a state electing to cover this Medicaid eligibility must cover such man under this group.

(4) Optional Eligibility for Independent Foster Care Adolescents (§ 435.226)

We propose to add a new § 435.226 to codify section 1902(a)(10)(A)(ii)(XVII) of the Act, which provides states with the option to cover ''independent foster care adolescents'' as described at section 1905(w) of the Act. This existing optional eligibility group covers individuals who are under age 21 (or, at state option, under age 20 or 19) and were in foster care under the responsibility of a state or Tribe on the individual's 18th birthday. As with reasonable classifications of individuals under § 435.222, states which covered such group under the Medicaid state plan or an 1115 demonstration as of March 23, 2010 or December 31, 2013 will need to convert the effective income level, if any, to a MAGI-based standard. The income standard may not exceed the higher of the state's AFDC payment standard in effect as of July 16, 1996 or the state's highest effective income level for this population under the state plan or 1115 demonstration as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard. Many individuals now covered under this optional group will be eligible for coverage as of 2014 under either the new group for former foster care children at the proposed § 435.150 or the adult group at § 435.119, both of which are mandatory eligibility groups under the statute. Unlike the group at § 435.150, this optional group at § 435.226 does not require enrollment in Medicaid upon attaining age 18 in foster care, but coverage in this group ends upon attaining age 21 rather than age 26.

(5) Optional Eligibility for Individuals Under Age 21 Who Are Under State Adoption Assistance Agreements (§ 435.227)

We propose to amend § 435.227 for children with a state adoption assistance agreement in effect (other than an agreement under title IV–E of the Act) to reflect the need for states to convert the current AFDC-based net income standard, if any, to an equivalent MAGI-based standard. If the state covered this group under the Medicaid state plan or an 1115 demonstration as of March 23, 2010 or December 31, 2013 with no income test or MAGI-based effective income level, converted to a MAGI-equivalent standard, exceeding the state's income standards for § 435.118 and § 435.119, that policy may remain in effect. Otherwise, consistent with the existing regulation at § 435.227(a)(3)(i) and retained at proposed § 435.227(b)(3)(i) of this rulemaking, an individual must have been eligible under the Medicaid state plan prior to the adoption agreement being entered into. We request comments on our proposal to delete the alternative eligibility requirement in existing regulations at § 435.227(a)(3)(ii) that the individual would have been eligible if the state's title IV–E foster care financial eligibility standards and methodologies were used, because the Medicaid eligibility requirements at § 435.118 of the Medicaid eligibility final rule are more expansive. Also, we propose language at § 435.227(b)(2), revising the language in existing regulations at § 435.227(a)(2), to clarify that it is the state agency which entered into the adoption agreement with the adoptive parents, which is not necessarily the state determining the child's Medicaid eligibility, that determines whether those eligibility requirements are met.

(6) Optional Targeted Low-Income Children (§ 435.229)

We propose to amend § 435.229 for optional targeted low-income children, as defined at § 435.4, for whom states may claim enhanced match under section 1905(b) and title XXI of the Act, in order to reflect the need for states to convert the current AFDC-based net income standard to an equivalent MAGI-based standard. A state's income standard may not exceed the higher of 200 percent FPL; an FPL percentage which exceeds the state's Medicaid applicable income level, defined at § 457.10, by no more than 50 percentage points; or the highest effective income level for this group in effect under the Medicaid state plan or an 1115 demonstration as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard.

(7) Optional Continuous Eligibility for Children (§ 435.926 and § 457.342)

We propose to add a new § 435.926 codifying section 1902(e)(12) of the Act, which provides states with the option to provide up to 12 months of continuous eligibility for children under age 19, or a younger age selected by the state, once determined eligible for Medicaid, regardless of changes in income or most other circumstances which otherwise would render the child ineligible for Medicaid. These proposed standards codify and clarify past guidance on the continuous eligibility options and have no meaningful impact on state programs. Under the option, continuous eligibility is provided to all children younger than the state's specified age who are covered under subpart B or C of this part, but not those covered as medically needy under subpart D, those eligible only for emergency medical services for non-citizens, or those eligible during a period of presumptive eligibility. Thus, consistent with the statute, states electing the option for continuous eligibility under proposed § 435.926 must provide such coverage to children eligible under § 435.118 as well as all children covered under any other mandatory or optional group covered by the state, including children eligible based on receipt of SSI, disability, institutionalization, or enrollment in a section 1915(c) home and community-based services waiver. Also proposed is § 457.342 for continuous eligibility of children under a state's separate CHIP.

Under proposed § 435.926(c), the state would specify in its state plan the length of a continuous eligibility period, not to exceed 12 months. A continuous eligibility period begins on the effective date of the individual's most recent determination or renewal of eligibility and ends at the end of the length of the continuous eligibility period specified by the state. Under proposed paragraph (d), children remain eligible during a continuous eligibility period regardless of any change in circumstances except attaining the maximum age elected by the state for this option, death, voluntary disenrollment, change in state residence, state error in the eligibility determination, or fraud, abuse, or perjury attributed to the child or the child's representative.

(8) Optional Tuberculosis Eligibility Group (§ 435.215)

We propose to add a new § 435.215 for optional tuberculosis (TB)-infected individuals to codify section

1902(a)(10)(A)(ii)(XII) and (z)(1) of the Act. These provisions provide states with the option to provide Medicaid to TB-infected individuals who are not eligible for Medicaid under subpart B of this part (relating to Mandatory Coverage of the Categorically Needy) and meet certain income and resource requirements. The medical assistance available to individuals eligible in this category is limited to TB-related services, which are defined in section 1902(z) of the Act as: prescribed drugs; physicians' services and services described in section 1905(a)(2); laboratory and X-ray services (including services to confirm the presence of infection); clinic services and federally-qualified health center services; case management services (as defined in section 1915(g)(2)); and services (other than room and board) designed to encourage completion of regimens of prescribed drugs by outpatients, including services to observe directly the intake of prescribed drugs.

The statute limits eligibility in this group to TB-infected individuals whose incomes and resources do not exceed the maximum amount a disabled individual described in subpart B of this part may have and obtain medical assistance under the state plan. The income and resource tests are both based on SSI standards and methodologies, and these rules remain in effect until January 1, 2014.

However, except as provided in section 1902(e)(14)(D) of the Act, section 1902(e)(14)(A) of the Act provides that notwithstanding any other provision of title XIX, financial eligibility for Medicaid for all individuals effective January 1, 2014, will be based on the MAGI-based methodologies set forth in section 1902(e)(14) of the Act. Because TB-infected individuals who qualify for Medicaid on that basis do not meet any of the exceptions from the MAGI-based income rules listed in section 1902(e)(14)(D) of the Act, implemented in § 435.603(j) of the Medicaid eligibility final rule, we propose that, effective January 1, 2014, income eligibility for this group must be determined in accordance with the MAGI rules in § 435.603. States electing to cover this eligibility group need to establish an income standard in their state plan. Under proposed § 435.215(b)(3), the income standard must not exceed the higher of the maximum income standard applicable to disabled individuals for mandatory coverage under subpart B of part 435 of the regulations, or the effective income level for coverage of TB-infected individuals under the state plan in effect as of March 23, 2010 or December 31, 2013, if higher, converted, at state option, to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act. Per § 435.603(g) of the Medicaid eligibility final rule, there will be no resource test for eligibility under this section effective January 1, 2014.

We considered an interpretation of the statute under which, because section 1902(z) of the Act currently provides for application of the financial standards and methods generally used to determine eligibility based on disability, individuals infected with TB and eligible for coverage on such basis would be considered to ''qualify for medical assistance * * * on the basis of being blind or disabled'' for purposes of the exception from application of MAGI methodologies set forth in section 1902(e)(14)(D)(i)(III) of the Act. Under this interpretation, application of the income standards and methodologies applied to coverage of disabled individuals, as provided in with section 1902(z) of Act, would continue to be applied to coverage under this eligibility group after January 1, 2014. We solicit comments on this alternative interpretation.

b. Presumptive Eligibility

(i) Proposed Amendments to Medicaid Regulations for Presumptive Eligibility

We propose to revise Medicaid regulations for children's presumptive eligibility and to add regulations for presumptive eligibility for pregnant women and individuals needing treatment for breast or cervical cancer as well as for the six new options for Medicaid presumptive eligibility provided by the Affordable Care Act. The new options become available on January 1, 2014, except that presumptive eligibility for the family planning option became available on March 23, 2010.

(1) FFP for Administration (§ 435.1001)

We propose to revise paragraph (a)(2) of § 435.1001 to clarify, consistent with current policy, that federal financial participation (FFP) is available for the necessary administrative costs a state incurs in administering all types of presumptive eligibility, not just presumptive eligibility for children as now specified in this section.

(2) FFP for Services (§ 435.1002)

We propose to revise paragraph (c) of § 435.1002 to clarify that FFP is available for services covered for all individuals determined presumptively eligible in accordance with the statute and implementing regulations, rather than just for children as now specified in this section.

(3) Basis for Presumptive Eligibility (§ 435.1100)

We propose to revise § 435.1100 to address the statutory basis of presumptive eligibility under sections 1920, 1920A, 1920B, 1920C, and 1902(a)(47)(B) of the Act for children, pregnant women, and other individuals under subpart L, including the six new options provided by the Affordable Care Act.

(4) Definitions (§ 435.1101)

We propose to revise § 435.1101 to replace the definition of ''application form'' with ''application'' to reflect current practices and to clarify that the definition of ''qualified entity'' includes a health facility operated by the Indian Health Service, a Tribe or Tribal organization, or an Urban Indian Organization.

(5) Presumptive Eligibility for Children (§ 435.1102)

We propose to revise existing regulations at § 435.1102, under which states may select qualified entities to determine presumptive eligibility for children under age 19 or a younger age selected by the state. A qualified entity determines, based on preliminary information, that the child's gross income (or at state option, MAGI household income as defined at § 435.603 or a reasonable estimate using simplified methods prescribed by the state) meets the income requirements at § 435.118(c) of the Medicaid eligibility final rule. The proposed changes, which are consistent with current policy and practice in states, are needed to align with the adoption of MAGI-based methodologies in 2014 and to ensure consistency between the policies governing the existing and new presumptive eligibility options.

We propose to amend § 435.1102(b) to clarify that a qualified entity may not delegate to another entity its authority to determine presumptive eligibility and that the state must establish oversight mechanisms to ensure the integrity of presumptive eligibility determinations. We propose at § 435.1102(d) that a state may require, as a condition of presumptive eligibility, that an individual, or another person who attests to having reasonable basis to know the status of the individual seeking a presumptive eligibility determination, attests that the individual is a citizen or a national of the United States or is in satisfactory immigration status. We seek comment

on whether this should be a state option or a requirement. A state may also require similar attestation that the individual is a state resident. Because the statute requires qualified entities to determine presumptive eligibility ''on the basis of preliminary information,'' under the proposed regulations states would be prohibited from requiring verification of the conditions for presumptive eligibility and from imposing additional conditions for presumptive eligibility. Proposed paragraph (e) clarifies that a presumptive eligibility determination by a qualified entity is not subject to fair hearing rights under subpart E of 42 CFR part 431.

(6) Presumptive Eligibility for Other Individuals (§ 435.1103)

We propose to add § 435.1103 to implement the presumptive eligibility for other populations permitted under sections 1920, 1920A, 1920B, and 1920C of the Act. At paragraph (a), we propose, consistent with section 1920 of the Act and current policy, that a state may elect to provide presumptive eligibility for pregnant women in the same manner as described for children at the proposed § 435.1101 and § 435.1102, except that pregnant women are only covered for ambulatory prenatal care during a presumptive eligibility period. We also propose that pregnant women are limited to one presumptive eligibility period per pregnancy. As prescribed in the statute, if the state has elected to provide presumptive eligibility for children or pregnant women, the state may also elect to provide presumptive eligibility for the additional populations provided for in the Affordable Care Act—that is,—parents and other caretaker relatives (described in § 435.110, adults described in § 435.119, and individuals under age 65 described in § 435.218 of the Medicaid eligibility final rule, as well as former foster care children described in § 435.150 of this proposed rulemaking. We propose at paragraph (c) that a state may cover presumptive eligibility for individuals needing treatment for breast or cervical cancer as described at proposed § 435.213 of this rulemaking; and at paragraph (d) that a state may provide family planning services on a presumptive eligibility basis for individuals who may be eligible for such services under proposed § 435.214 of this rulemaking.

(7) Presumptive Eligibility Determined by Hospitals (§ 435.1110)

We propose to add § 435.1110 for hospitals electing to determine presumptive eligibility. The Affordable Care Act added section 1902(a)(47)(B) of the Act to give hospitals the option (not at state option like for the other types of presumptive eligibility), as of January 1, 2014, to determine presumptive eligibility for Medicaid. The Act provides hospitals participating in Medicaid with this option whether or not the state has elected to permit qualified entities to make presumptive eligibility determinations under other sections of the statute.

At paragraph (a) of § 435.1110, we propose that a qualified hospital may elect to make presumptive eligibility determinations, on the basis of preliminary information and according to policies and procedures established by the state Medicaid agency. Proposed paragraph (b) establishes the basic criteria which a hospital must meet to be a qualified hospital authorized to make presumptive eligibility determinations, including that the hospital (1) participate as a Medicaid provider, (2) notify the agency of its decision to make presumptive eligibility determinations, (3) agree to make determinations consistent with state policies and procedures, (4) at state option, assist individuals in completing and submitting the full application and in understanding any documentation requirements, and (5) not be disqualified by the agency under proposed paragraph (d) (discussed below).

At paragraph (c) of this section, we specify that a state Medicaid agency may limit presumptive eligibility determinations by qualified hospitals to the types of presumptive eligibility that the agency may elect to cover, as described at proposed § 435.1101 through § 435.1103. In addition, qualified hospitals may be permitted by the agency to determine presumptive eligibility on other bases under the state plan or 1115 demonstration (for example, based on disability).

We propose at paragraph (d) that the agency may establish standards for qualified hospitals making presumptive eligibility determinations related to the proportion of individuals determined presumptively eligible for Medicaid by the hospital that submit a regular application before the end of the presumptive eligibility period and/or are determined eligible for Medicaid based on such application. We request comments on whether this should be a federal requirement, a state option, or neither, and what such reasonable standards would be. The agency must take action as necessary if a hospital does not meet the standards established by the agency or is not making determinations in accordance with applicable state policies and procedures.

(ii) Proposed Amendments to CHIP Regulations for Presumptive Eligibility (§ 457.355)

In order to align the regulations governing presumptive eligibility for children under CHIP with Medicaid, we revise current regulations at § 457.355 to incorporate by cross reference the terms of § 435.1101 and § 435.1102 (relating to presumptive eligibility for children in Medicaid) into our CHIP regulations. In addition, prior to passage of CHIPRA, states were permitted to claim enhanced federal matching funds under their CHIP title XXI allotment for coverage of children during a Medicaid presumptive eligibility period; this authority is implemented in the current regulations at § 457.355 and § 457.616(a)(3). Section 113(a) of CHIPRA, however, amended section 2105(a)(1) of the Act to eliminate this authority, so that, effective April 1, 2009, states must claim their regular federal financial participation under title XIX for services provided to children during a Medicaid presumptive eligibility period. This change is implemented through the proposed revisions to § 457.355 and by deleting § 457.616(a)(3).

2. Medically Needy (§§ 435.301, 435.310, 435.831)

Under section 1902(e)(14)(D)(i)(IV) to the Act, as added by section 2002(a) of the Affordable Care Act and codified at § 435.603(j)(6), the determination of eligibility for medically needy individuals is excepted from application of MAGI-based financial methodologies set forth at § 435.603. Under section 1902(a)(10)(C)(i)(III) of the Act, financial eligibility under a medically-needy group for children, pregnant women, parents, and other caretaker relatives ''shall be no more restrictive than the methodology that would be employed under the appropriate state plan described in [section 1902(a)(10)(A)(i) of the Act] to which such group is most closely categorically related.'' Currently, for pregnant women, parents, children, and other caretaker relatives the methods of the former AFDC program are applied. For aged, blind, and disabled individuals, section 1902(a)(10)(C)(i)(III) of the Act requires the use of a methodology that is no more restrictive than the methods applied under the SSI program.

As the former AFDC program has now been eliminated, there is no state plan described in section 1902(a)(10)(A)(i) of the Act that is ''most closely categorically related'' to pregnant women, parents, children, and other

caretaker relatives. In addition, retaining the AFDC methodologies for the purpose of determining countable income for medically needy coverage could be burdensome for states and consumers, and could undermine the simple streamlined eligibility process required under section 1943 of the Act and section 1413 of the Affordable Care Act, as well as the requirements under section 1902(a)(19) of the Act to administer the program in a simple and efficient manner and in the best interest of beneficiaries. Therefore, we are proposing to revise § 435.831 to provide states with flexibility to apply, at state option, either AFDC-based methods or MAGI-based methods for determining income eligibility for medically needy children, pregnant woman, and parents and other caretaker relatives—individuals whose financial eligibility generally will be determined using MAGI-based methods. Although section 1902(e)(14)(A) and 1902(e)(14)(D)(i)(IV) of the Act indicates that states cannot be *required* to apply MAGI-based methods in determining financial eligibility for medically needy individuals, we believe that this does not preclude us from permitting states to apply MAGI-based income methodologies in determining medically needy eligibility for these populations.

However, we also recognize that section 1902(a)(17)(D) of the Act prohibits state plans from taking into account the ''financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient * * * is such individual's spouse or such individual's child who is under age 21, * * * or is blind or disabled.''

Thus, states may use a MAGI-based methodology in determining household income using MAGI-based methods, but in doing so, must ensure that there is no deeming of income or attribution of financial responsibility that would conflict with the requirements of section 1902(a)(17)(D). States could, for example, apply the methodology set forth in § 435.603 of the Medicaid eligibility final rule, and, in cases involving impermissible deeming, subtract the income of the individual whose income may not be counted under § 1902(a)(17)(D). States may also, but would not be required to, remove such individual from the household size. We note also that section 1902(r)(2) of the Act and § 435.601(d) of the current regulations provide states with an option to adopt other reasonable methodologies, provided that such methods are less restrictive than the SSI, AFDC or the MAGI-based methods permitted under this proposed rule.

Furthermore, in order to meet the maintenance of effort requirements (MOE) in section 1902(gg) of the Act, states would have to ensure that the adoption of MAGI methodologies is no more restrictive than the methodology currently used by the state in determining the eligibility of children as medically needy until the MOE expires in 2019. For purposes of this section, states may replace current disregards applied to medically needy individuals, some of which may benefit only part of its medically needy population (such as a disregard for amounts for child care), with a single block-of-income disregard made available to all medically needy individuals such that in the aggregate the MOE is satisfied.

In addition, we are removing the reference to ''family'' in § 435.831(c) to be consistent with the implementation of eligibility for low-income families under section 1931 of the Act in the final Eligibility Rule. Since eligibility under section 1931 of the Act, like all other bases of eligibility, will be determined on an individual basis, parents and other caretaker relatives will be evaluated for medically needy eligibility as individuals, as currently is the case of pregnant women and children.

d. Optional Eligibility of Lawfully-Residing Non-Citizen Children and Pregnant Women (§§ 435.4, 435.406, 457.320)

Section 214 of CHIPRA amended section 1903(v)(4) of the Act to permit states to provide Medicaid coverage to children, pregnant women, or both who are lawfully residing in the United States, and otherwise eligible for Medicaid. We are proposing to amend § 435.406 by revising paragraph (b) to implement this option. Section 214 of CHIPRA also amended section 2107 of the Act similarly to allow states to cover such lawfully residing children and pregnant women under CHIP. We also propose at 45 CFR 155.20 to align the Exchange definition of ''lawfully present'' with the Medicaid/CHIP definition in § 435.4. Individuals who meet this definition could be eligible for enrollment in a QHP through the Exchange.

On July 1, 2010, we issued a State Health Official (SHO) letter providing guidance implementing section 214 of CHIPRA. In the SHO, we interpreted ''lawfully residing'' to mean individuals who are lawfully present in the United States and who are residents of the state in which they are applying under the state's Medicaid or CHIP residency rules. Because state residency is a separate eligibility criteria which must be established independent of an individual's immigration status as a lawfully present non-citizen, we are proposing to use the term ''lawfully present'' in § 435.406(b), without need to include a definition of ''lawfully residing'' in these proposed regulations. Eligibility for Medicaid under § 435.406(b) cannot be approved for an individual who is lawfully present in the United States, if the individual is not also a resident of the state under the state's residency rules. For example, a nonimmigrant visitor for business or pleasure may be lawfully present under immigration regulations, but not meet Medicaid or CHIP residency requirements, and therefore will not be able to qualify for Medicaid or CHIP based on residency.

Current paragraph (b) of § 435.406 is re-designated and revised at proposed paragraph (c) and we propose to add a new paragraph (b). We also propose new definitions of ''lawfully present,'' ''non-citizen,'' ''qualified non-citizen'' at § 435.4. Policies consistent with our already-issued July 1, 2010 SHO letter, are only briefly discussed and we refer readers to the letter for a more in-depth discussion (at *http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO10006.pdf*). Explained in more depth herein are several modest proposed changes in policy as compared to the SHO.

Consistent with the SHO, under proposed § 435.406(b)(1), if a state elects the CHIPRA 214 option for pregnant women and/or children, then it must elect the option for all children and/or pregnant women who are lawfully present, as defined in § 435.4; in other words, the state cannot choose among ''lawfully present'' children or pregnant women and offer Medicaid to some, but not others. We propose in § 435.406(c) consistent with our current policy, that if a state elects to cover lawfully present children and/or pregnant women under § 435.406(b), such individuals may be eligible for any Medicaid eligibility group covered under the state plan for which he or she meets all other eligibility requirements.

In accordance with section 1903(v)(4)(A) and (B) of the Act, proposed § 435.406(b)(2) provides that various limitations otherwise applicable to non-citizen eligibility do not apply to lawfully present non-citizens covered pursuant to a state's election of the option provided at paragraph (b)(1). The restrictions that do not apply to individuals under 21 or pregnant women covered under this option include, the 5-year waiting period described in section 403 of PRWORA, 8

U.S.C. 1613; the restriction relating to the limitation on payment services for individuals who are not qualified non-citizens under section 401(a) of PRWORA, 8 U.S.C. 1611(a); deeming of sponsor income under section 421 of PRWORA, 8 U.S.C. 1631; and the state option to require Lawful Permanent Residents to be credited with 40 qualifying quarters of work or limitation of coverage to seven years, permitted under section 402(b) of PRWORA, 8 U.S.C. 1612(b). We propose a new paragraph (c) of § 435.406, revising and redesignating current paragraph (b) clarifying which non-citizens would be eligible to receive coverage of services of an emergency medical condition including in states that elect to cover children and pregnant women under the option in paragraph (b)(1).

The definition of ''lawfully present'' proposed at § 435.4 is substantially the same as that contained in our July 1, 2010 guidance and at 45 CFR 152.2 (the current definition used for Exchange eligibility) with some minor modifications to further simplify the rules as well as ensure alignment with the eligibility of lawfully present non-citizens for advance payment of the premium tax credit, cost-sharing reductions, and enrollment in a QHP through the Exchange. As these modifications do not substantially affect eligibility, we do not anticipate an impact on state costs. As explained in the SHO, our policy is based on the definition provided in Department of Homeland Security (DHS) regulations at 8 CFR 1.3, used for purposes of Social Security benefits, with some modification appropriate to the Medicaid and CHIP programs.

We propose the following limited differences in the definition of ''lawfully present'' in this proposed rulemaking as compared to our July 1, 2010 SHO.

We propose inclusion of victims of trafficking, at paragraph (9) whose eligibility for Medicaid is mandatory under federal law under section 107 of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386) as amended 22 U.S.C. 7105). Inclusion of victims of trafficking in the definition of ''lawfully present'' is needed to ensure alignment of current Medicaid rules with eligibility for advance payment of the premium tax credit, cost-sharing reductions, and enrollment through the Exchange. We note that these individuals are required to be covered in Medicaid, through the Victims of Trafficking Act. Thus, regardless of whether a state elects to cover lawfully residing children or pregnant women under the option codified at proposed § 435.406(b), coverage of these individuals is required if they meet all other eligibility requirements.

In the definition of lawfully present proposed at § 435.4, with respect to non-citizens with a valid non-immigrant status, we propose in paragraph (2) to include all non-immigrants who have a valid status, rather than limiting inclusion to such individuals who also have not violated the terms of their status, as specified in the SHO. This allows coverage to non-immigrants who have valid and unexpired status, without requiring state Medicaid agencies to understand all the terms of such status, and to determine whether any terms have been violated. This, in turn, will enable agencies to verify this non-citizen status through a data match with DHS through the federal data services hub (using that Department's Systematic Alien Verification for Entitlements (SAVE) system), for virtually all non-immigrant applicants or beneficiaries without further investigation.

With respect to individuals granted an employment authorization document (EAD) under 8 CFR 274a.12(c), we propose in the definition of lawfully present at paragraph (4)(iii) to include most non-citizens granted such document, instead of limiting inclusion only to specified groups of individuals granted an EAD, as was done in the SHO, thereby enabling verification of satisfactory immigration status through SAVE, which typically can verify a grant of EAD in three to five seconds. We note that this proposed modification should not result in an expansion of eligibility, but only a simplification of verification processes for these individuals. It is our understanding that all individuals granted an EAD under § 274a.12(c), are already considered lawfully present under another category under our SHO, with the exception provided in the proposed regulation at paragraph (10).

We propose in the definition of lawfully present at § 435.4 to add two additional categories of non-citizens not included in the definition of ''lawfully present'' in the SHO. First, we propose in § 435.4 at paragraph (4)(vii) inclusion of individuals who have been granted an administrative stay of removal by DHS. We seek comments on whether we should include individuals granted an administrative stay by U.S. Department of Justice. Such stays provide non-citizens with permission to remain living in the United States. We considered also adding individuals who have been granted stays by a court (as opposed to administratively issued by DHS). We understand some court stays are effective without any consideration of the filing, merely by the individual filing for such a stay. We seek comments on this provision and alternative ways to address those for whom a court has considered an individual's situation and granted a stay.

Second, at paragraph (10) of the definition, we propose to add an exception to the lawfully present definition to specify that individuals with deferred action under the Deferred Action for Childhood Arrivals (DACA) process shall not be eligible for Medicaid and CHIP under the CHIPRA state option with respect to any of the categories (1) through (9), in accordance with and based on the rationales included in the interpretative guidance set forth in a SHO letter, #12–002 issued August 28, 2012, available at *www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO–12–002.pdf* and in the interim final rule with request for comments to the Pre-Existing Condition Insurance Plan (PCIP) Program (77 FR 52614, Aug. 30, 2012). We propose that the ''lawfully present'' definition in the Exchange rules would also incorporate this exception.

We note that we propose to remove the language contained in our SHO specifically related to individuals who are lawfully present in the Commonwealth of the Northern Mariana Islands (CNMI) under 48 U.S.C. 1806(e) from our definition of lawfully present at § 435.4. We understand this statutory provision expired on November 28, 2011, which was two years after the transition program to extend U.S. immigration laws to the CNMI's immigration system began. We believe that most of these individuals will continue to be covered under our definition of lawfully present at § 435.4 in other categories, including as non-immigrants or parolees.

We solicit comments on the definition of lawfully present in this proposed regulation. Codification of other statutes relating to categories of non-citizens who are eligible for Medicaid (including under title IV of PRWORA and subsequent federal legislation) that are not reflected in our current regulations are not included in this proposed rulemaking.

We also propose to amend § 457.320(c) to implement section 2107(e)(1) of the Act, to permit a separate CHIP program to cover ''lawfully residing'' children or pregnant women otherwise eligible for CHIP. We propose to align the terminology and the option to provide coverage for ''lawfully present'' children and pregnant women in CHIP under § 457.320(c) with policy for Medicaid in proposed § 435.406(b).

The same definition of ''lawfully present'' proposed for Medicaid also is proposed for CHIP. Consistent with the statute, states may not choose to cover these new groups only in CHIP, without also having extended the option to Medicaid. As section 1903(v)(4)(A) of the Act merely lifts restrictions for lawfully residing, otherwise eligible individuals, a state must have coverage that would otherwise include the individual. Thus, lawfully present pregnant women could be covered under CHIP only if the CHIP program has elected to cover pregnant women generally, either under a waiver or demonstration or under the option provided under section 2112 of the Act to cover pregnant women under its CHIP state plan.

e. Deemed Newborn Eligibility (§ 435.117 and § 457.360)

(i). Medicaid Deemed Newborn Eligibility (§ 435.117)

Section 1902(e)(4) of the Act and existing § 435.117 require that babies born to mothers covered under the Medicaid state plan for benefits on the date of birth, including during a period of retroactive eligibility, be automatically deemed eligible for Medicaid for one year from birth. The provision is intended to ensure coverage of the newborn without any gaps; no application is required. In accordance with section 1903(x)(5) of the Act, as added by section 211(b)(3)(A)(ii) of CHIPRA and consistent with previous guidance, we clarify at proposed paragraph (b)(1)(i) of § 435.117 that a child born to a mother covered by Medicaid for labor and delivery as an emergency medical service pursuant to section 1903(v)(3) of the Act shall be deemed eligible for Medicaid during the child's first year of life.

Section 113(b)(1) of CHIPRA amended section 1902(e)(4) of the Act effective April 1, 2009 to eliminate the previous statutory requirement that eligibility under this section continue only so long as the baby was a member of the mother's household and the mother either remained eligible for Medicaid or would remain eligible if still pregnant. We propose revisions to § 435.117(b) to implement this change in the statute. Previous guidance was provided in SHO letter #09–009 dated August 31, 2009, *http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SHO083109b.pdf*.

Section 111 of CHIPRA added a new section 2112 to title XXI of the Act, giving states the option to cover targeted low-income pregnant women under a separate CHIP state plan. Section 2112(e) of the Act requires that babies born to such pregnant women covered under the CHIP state plan for benefits for the date of birth are deemed to have applied and been determined eligible for Medicaid or CHIP, as appropriate, and remain eligible for one year. At § 435.117(b)(1)(ii), we interpret this to mean that babies born to pregnant women on CHIP with household income at or below the applicable Medicaid income standard for infants under § 435.118 of the Medicaid eligibility final rule must be automatically enrolled in Medicaid, and those born to pregnant women with income above the applicable Medicaid income standard must be automatically enrolled in CHIP.

To promote simplicity of administration and the best interest of beneficiaries, consistent with section 1902(a)(19) of the Act, we also propose at § 435.117(b)(1)(iii) that states be provided with the option to treat as deemed newborns in Medicaid the babies born to mothers covered as a child under a separate CHIP for benefits for the date of birth. We solicit comments on whether states should have the option to extend automatic Medicaid enrollment to the extent that the state determines that, under normal circumstances, such babies would be likely to meet requirements for Medicaid eligibility: (1) To all babies born to mothers covered as a targeted low-income child under a separate CHIP, (2) only to such babies if the state has elected the option to cover targeted low income pregnant women under its CHIP state plan, even if the mother does not qualify as a targeted low-income pregnant woman, or (3) to no such babies born to mothers covered as a targeted low-income child under a separate CHIP who do not qualify as a targeted low-income pregnant woman. Also consistent with section 1902(a)(19) of the Act, we propose at § 435.117(b)(1)(iv) that states be provided with the option to treat as deemed newborns in Medicaid the babies born to mothers covered under a Medicaid or CHIP demonstration under section 1115 of the Act, unless the demonstration's special terms and conditions (STCs) specifically address this issue.

We also propose a new paragraph (c) to give states the option of recognizing the deemed newborn status from another state for purposes of enrolling babies born in another state without need for a new application. Although the statutory language refers to deemed eligibility under ''such state plan'' referring back to the state plan under which the mother was covered by Medicaid, to read this language so narrowly would restrict the rights of mothers and children to travel among states, similar to a durational residency requirement.

Section 1902(e)(4) of the Act provides that for the year of deemed eligibility, the Medicaid identification number of the mother serves as the identification number of the child for Medicaid claims purposes, unless the state issues the child a separate identification number. For babies eligible under proposed § 435.117, proposed paragraph (d)(2) directs the agency to promptly issue a separate Medicaid identification number for the child prior to the date of the child's first birthday or the termination of the mother's Medicaid eligibility, whichever is sooner, unless the child is determined to be ineligible (such as, the child is not a state resident).

Finally, section 1902(e)(4) of the Act does not distinguish between babies born to pregnant women eligible for Medicaid as medically needy under section 1902(a)(10)(C) of the Act and those born to pregnant women eligible for Medicaid as categorically needy under section 1902(a)(10)(A) of the Act. We propose to revise existing regulations at § 435.301 by removing paragraph (b)(1)(iii), which provided that babies born to medically needy pregnant women receive deemed newborn eligibility as a medically needy child. Under revised § 435.117, as proposed in this rulemaking, babies born to pregnant women eligible as medically needy and receiving covered benefits for the date the child is born are covered as deemed newborns under § 435.117. These proposed changes are consistent with current policy, clarifying and simplifying them, and should have no meaningful impact on state programs.

(ii) CHIP Deemed Newborn Eligibility (§ 457.360)

As discussed in the previous section of this preamble, section 111(a) of CHIPRA gives states the option to cover pregnant women under a separate CHIP and also adds section 2112(e) of the Act, requiring states to provide deemed newborn eligibility under Medicaid or CHIP, as appropriate based on income, to newborns of those mothers. Consistent with the proposed regulations at § 435.117 for Medicaid deemed newborn eligibility discussed above, we propose a new § 457.360 to extend deemed newborn eligibility under CHIP to babies born to mothers covered as targeted low-income pregnant women under a separate CHIP for the date of birth, to the extent that the state has not extended Medicaid

eligibility to the babies. We are also proposing a state option to extend deemed newborn eligibility to babies of mothers covered as targeted low-income children under a separate CHIP (not as targeted low-income pregnant women) for the date of birth, to the extent that the state has not extended Medicaid eligibility to the babies. This option would relieve the state from any need to shift children from one category to another, ensuring that benefits are delivered in the children's best interests and thus promoting the effective and efficient delivery of coverage as required by section 2101(a) of the Act. Also, we are proposing a state option to provide CHIP deemed newborn eligibility to babies of mothers who were receiving CHIP coverage in another state for the date of the child's birth or to babies of mothers covered by Medicaid or CHIP under an 1115 demonstration. As discussed above in this preamble, if the mother's household income is no more than the income standard for infants in Medicaid, the baby will be deemed eligible and enrolled in Medicaid; otherwise, the baby will be deemed eligible and enrolled in a separate CHIP.

6. Verification Exceptions for Special Circumstances (§ 435.952)

Under the final eligibility rule at § 435.952(c), states are permitted to request additional information from individuals, including documentation, to verify most eligibility criteria if data obtained electronically by the state is not reasonably compatible with attested information or electronic data is not available, as specified in § 435.952(c)(2)(ii) of the regulation. There are, however, individuals for whom providing documentation even in such limited circumstances would create an insurmountable procedural barrier to accessing coverage, while serving little evidentiary value. To ensure that verification procedures are consistent with simplicity of administration and in the best interest of individuals in accordance with section 1902(a)(19), we are proposing to add an exception at § 435.952(c)(3) to an otherwise permissible requirement to provide documentation in such circumstances. Under paragraph (c)(3), except as specifically required under the Act (for example, with respect to citizenship and immigration status if electronic verification is not successful), states may not require documentation from individuals for whom documentation does not exist or is not reasonably available at the time of application or renewal. Such circumstances include, but are not limited to, individuals who are homeless and victims of domestic violence or natural disasters.

7. Verification Procedures for Individuals Attesting to Citizenship or Satisfactory Immigration Status

Verification of citizenship and immigration status is governed by sections 1137, 1902(a)(46)(B), 1902(ee), and 1903(x) of the Act, and by section 1943 of the Act, which cites to section1413(c) of the Affordable Care Act. Implemented in current regulations at § 435.406, section 1137 of the Act requires that individuals seeking an eligibility determination make a declaration of citizenship or immigration status, and that the status of non-citizens be verified with the Department of Homeland Security (DHS). Under section 1902(a)(46)(B), states must verify citizenship status of applicants either by use of documentary evidence in accordance with section 1903(x) of the Act or through an electronic data match with the Social Security Administration (SSA) under section 1902(ee) of the Act, as added by section 211 of CHIPRA. Documentation of citizenship status under section 1903(x) is implemented in current regulations at § 435.407. Section 211 of CHIPRA also made other changes to section 1903(x), for example, exempting infants deemed eligible for Medicaid under section 1902(e)(4) of the Act from the requirement to verify citizenship, and adding a statutory requirement to provide for a ''reasonable opportunity'' period for individuals declaring U.S. citizenship to provide verification, similar to the ''reasonable opportunity'' afforded individuals declaring satisfactory immigration status under section 1137(d) of the Act. We propose revisions to § 435.406 and § 435.407 of the current regulations and § 435.956 of the Medicaid eligibility final rule in order to implement section 1902(ee) of the Act and other revisions to section 1903(x) of the Act made by CHIPRA, as discussed below and note that we redesignate the definition of ''citizenship'' from the introductory paragraph at § 435.407 to a definition at § 435.4.

a. Electronic Verification of Citizenship and Immigration Status (§ 435.940 and § 435.956)

Under § 435.949 of final Medicaid Eligibility Rule, the Secretary will establish an electronic service (referred to as the ''federal data services hub'') through which all insurance affordability programs can access specified data from pertinent federal agencies needed to verify eligibility. Per § 435.949, if information related to verifying Medicaid eligibility—including information to verify citizenship from SSA and information to verify immigration status from DHS—is available through the federal data services hub described in § 435.949, states will be required to obtain such information through that service. We therefore clarify at proposed § 435.956(a)(1) that states will be required to verify citizenship and immigration status through the federal data services hub if available.

Prior to passage of the Affordable Care Act, section 211 of CHIPRA, which added section 1902(ee) to the Act, has provided states with an option to conduct an electronic data match directly with SSA to satisfy the citizenship verification requirements in lieu of requiring documentation in accordance with section1903(x) of the Act. To date, 44 states have adopted this option in their Medicaid and CHIP programs. Although states will be required to conduct electronic verification of citizenship primarily through the federal data services hub, if such verification is not available, the option under section 1902(ee) of the Act will remain in effect.

If the agency is unable to verify such status through the hub, proposed § 435.956(a)(2) directs the agency to verify citizenship by conducting an electronic data match directly with SSA or by obtaining documentation in accordance with § 435.407 of the regulations, as modified in this proposed rulemaking, and to verify immigration status by conducting a match directly with DHS' SAVE system in accordance with section 1137 of the Act and § 435.406. In such instances, verification of citizenship and immigration status should be conducted in a manner consistent with the requirements of § 435.952(c)(2)(ii) of the final eligibility rule (permitting states to require documentation to verify an eligibility criterion only if electronic data is not available, as defined in the regulation). Note that some of the documentary evidence permitted under section 1903(x) of the Act and § 435.407 to verify citizenship may be available electronically, such as a match with a state's vital statistics agency, and such data also must be accessed when available under the standard established in § 435.952(c)(2)(ii) before paper documentation of citizenship is requested.

Under 8 U.S.C. 1613(b)(2), qualified non-citizens who are veterans with a discharge characterized as a honorable discharge and not on account of alienage and who fulfill the minimum active-duty service requirements of

section 5303A of Title 38 or are in active military duty status (other than active duty for training), or the spouse or dependent child of such a veteran or individual in active duty status, are exempt from the 5-year waiting period applicable to certain qualified non-citizens. We seek comment on appropriate verification procedures for veteran status.

In proposed § 435.956(a)(3), we move and revise current language at § 435.407(i)(5), which provides that verification of citizenship (whether through documentation submitted by the applicant or through an electronic data match) is a one-time activity that should be recorded in the individual's file. At a regular eligibility renewal or as part of a future application for Medicaid, the agency may not re-verify citizenship, but must only check its records to confirm that the individual's citizenship has already been verified. We expect that states will re-verify an individual's immigration status if the status is temporary in nature, such as for individuals in Temporary Protected Status. We solicit comments on whether, consistent with existing regulations at § 431.17(c), Medicaid agencies should be expected to retain such records indefinitely or for a more limited period of time, such as 5 or 10 years.

b. Reasonable Opportunity To Verify Citizenship or Immigration Status

We anticipate that electronic verification with SSA or DHS generally will occur in real or near-real time. In the event that electronic verification through the hub or another source is delayed or fails, sections 1903(x) and 1902(ee) of the Act require that states provide applicants declaring U.S. citizenship with a ''reasonable opportunity period'' to verify their citizenship. During the reasonable opportunity period, states must try to resolve with SSA or the applicant inconsistencies that arise from the data match, and request additional documentation from the applicant if the inconsistencies cannot be resolved. Under sections 1902(ee) and 1903(x) of the Act, states also must furnish Medicaid to otherwise eligible individuals during the reasonable opportunity period. As noted, section 1137(d)(4) of the Act similarly requires states to provide individuals with a ''reasonable opportunity'' to establish satisfactory immigration status if documentation is not provided or verification of satisfactory immigration status with DHS fails, and to receive benefits if otherwise eligible during such time. Section 1411(e)(3) of the Affordable Care Act requires Exchanges to verify an individual's attestation of citizenship and lawful presence in the same manner as Medicaid in accordance with section 1902(ee) of the Act when inconsistencies arise. We anticipate that in many cases states may be able to resolve inconsistencies in real-time or near real-time, in which cases the reasonable opportunity period would not need to be triggered.

In accordance with sections 1137, 1902(ee), and 1903(x) of the Act, we propose to add a new paragraph (g) to § 435.956 to implement the reasonable opportunity period afforded to individuals who declare U.S. citizenship or satisfactory immigration status. Under § 435.911(c) of the final Medicaid Eligibility Rule (revised to update a cross reference in this proposed rule), states must provide benefits to otherwise eligible individuals during such reasonable opportunity period. Situations which may trigger the reasonable opportunity period include the following:

- The individual is unable to provide a SSN, needed for electronic verification with SSA;
- Either the federal data services hub or SSA or DHS databases are temporarily down for maintenance or otherwise unavailable, thereby delaying electronic verification;
- There is an inconsistency between the data available from an electronic source and the individual's declaration of citizenship or immigration status which the agency must attempt to resolve, including by identifying typographical or clerical errors; or
- Electronic verification is unsuccessful, even after agency efforts to resolve any inconsistencies, and additional information, including documentation, is needed.

Recognizing that electronic verification of citizenship and immigration status generally will be accomplished in real-time, we further propose that the reasonable opportunity period is triggered if verification of citizenship or immigration status cannot be concluded ''promptly.'' This standard is consistent with the standard applied to the provision of benefits generally under § 435.911(c) of the final Medicaid Eligibility Rule, pursuant to which individuals must be furnished benefits ''promptly and without undue delay.'' We expressly apply the standard in § 435.911(c) to the provision of benefits to individuals during a reasonable opportunity period by including a cross reference to § 435.911(c) at proposed § 435.956(a)(2)(ii). Thus, if the agency cannot resolve inconsistencies in a data match with SSA or DHS (performed either in accordance with § 435.949 of the final Medicaid eligibility final rule or proposed § 435.956(a)(1) or (2)) in a prompt manner, such that eligibility would be determined and benefits provided with the same promptness as if the agency were able to verify citizenship or immigration status in real-time, the agency must begin the reasonable opportunity period, and benefits must be furnished as soon as other eligibility criteria are verified, in the same manner and as promptly as such criteria are verified for applicants generally. In the case of an individual with respect to whom a temporary immigration status was verified at application and with respect to whom the agency is re-verifying satisfactory status, regulations at § 435.911(c) in the Medicaid eligibility final rule similarly require that benefits be furnished during the reasonable opportunity period afforded under § 435.956(g). We note that in the case of a reasonable opportunity period triggered because the applicant is unable to provide an SSN, resulting in the state's inability to initiate electronic verification of citizenship with SSA, states must comply with the regulations at § 435.910, relating to assisting individuals with obtaining and verifying SSNs. We also note that we are making a technical correction to § 435.910(g) to put back the reference to the verification of SSNs with SSA, which was inadvertently deleted in the Medicaid eligibility final rule.

We propose a conforming amendment to § 435.911(c) of the final Medicaid eligibility final rule to clarify that the reasonable opportunity period encompasses all aspects of the process to verify citizenship immigration status, including not only time for an individual to provide documentation but also time for the agency to resolve inconsistencies or conclude the electronic verification process. This proposed rulemaking also replaces the cross reference in § 435.911(c) of the Medicaid eligibility final rule to the statutory provisions governing the reasonable opportunity period with a cross reference to § 435.956(g), as proposed in this rulemaking.

The proposed rule seeks to balance individuals' ability to access coverage in a timely manner and states' administrative interests in not being required to take steps to enroll someone in the program immediately whenever electronic verification is not accomplished in real time, if inconsistencies can be resolved quickly. We note that section 1137(d)(4) of the Act seems to require a reasonable

opportunity period only in cases where the individual has either not provided documentation or where verification with DHS has failed. This seems to indicate that states have at least the option of some reasonable time during which they can attempt to resolve inconsistencies and verify immigration status prior to providing the reasonable opportunity period, including the provision of benefits. Similarly, section 1902(ee)(1)(B)(ii) discusses the reasonable opportunity period only once an inconsistency in verification cannot be resolved, which is consistent with the proposed policy. We also are considering a policy—either instead of or in addition to the policy described above—under which the reasonable opportunity period, including provision of benefits during such period, would be triggered if the agency cannot resolve any inconsistencies with the electronic match with SSA or DHS within a specified number of business days. We seek comments on both approaches.

We propose to apply the same reasonable opportunity period of 90 days that is required under section 1902(ee) of the Act, and which also is required for Exchanges, to all citizenship verification procedures, whether conducted in accordance with § 435.949, section 1902(ee) of the Act, or § 435.407. We are also proposing this same 90-day timeframe to verifying an individual's satisfactory immigration status in accordance with § 435.949, § 435.406 or section 1137(d) of the Act. This will provide for consistency and ease of administration and coordination between insurance affordability programs and better understanding by the public.

Proposed § 435.956(g)(1) establishes the basic requirement to provide a reasonable opportunity to individuals to verify citizenship or immigration status as well as notice of such opportunity. We propose in paragraph (g)(2) that the reasonable opportunity period extends 90 days from the date on which such notice is received by the individual. We are proposing to define the date the individual receives the notice to mean 5 days after the date on the notice, unless the individual shows that he or she did not receive the notice within the 5-day period, consistent with the proposed revision to § 431.231 (relating to receipt of notice of an individual's right to appeal). We also propose (1) to codify current policy, outlined in previous CMS guidance (SHO–09–016, SMD 06–012), to permit states to extend the reasonable opportunity period if the agency needs more time to complete the verification process, or the individual requests more time and is acting in good faith to obtain the necessary documentation; and (2) to permit states to begin furnishing benefits during the reasonable opportunity period as early as the later of the date of application or declaration of status; however, the 90-day period provided to the individual to furnish necessary evidence must always be counted from the date notice of the reasonable opportunity period is received.

As noted, during the reasonable opportunity period, if electronic verification directly with SSA or DHS is not successful, the agency must first utilize other available data sources (for example, a data match with vital statistic records of birth or the Office of Refugee Resettlement telephone line) to verify citizenship or immigration status, in accordance with § 435.952(c)(2)(ii), prior to seeking additional information or documentation from an individual. If citizenship or immigration status has not been verified through efforts by the agency and satisfactory documentation has not been provided by the individual by the end of the reasonable opportunity period, the agency must take action to terminate benefits. The agency must provide timely notice and fair hearing rights in accordance with part 431 subpart E, except we are proposing that the provisions at § 431.230 and § 431.231 relating to maintaining and reinstating services may be applied at state option. We believe making these provisions applicable at state option is legally permissible under section 1902(a)(3) of the Act, as well as relevant case law on the procedural rights associated with denials or terminations. Thus, once the individual has been provided benefits during a reasonable opportunity, the state may consider the individual to be a beneficiary, eligible for continued benefits pending the outcome of an appeal denying eligibility. On the other hand, individuals provided benefits during a reasonable opportunity period have not actually been determined eligible for Medicaid, as their citizenship or immigration status has not been established. Therefore, once the reasonable opportunity period is over, we believe the state can treat such individuals the same as those denied eligibility for any other reason, which are not eligible for benefits pending the outcome of a fair hearing. Further, the availability of the reasonable opportunity period, and the fact that an otherwise eligible individual is provided eligibility during such period, reduces risk of error that eligible individuals will be denied or delayed benefits, as well as the probable value of additional procedural safeguards of maintaining services pending the outcome of a fair hearing. Thus, once a state has (a) already attempted to resolve discrepancies associated with verification, (b) turned to other electronic data sources if verification with DHS or SSA is unsuccessful, (c) offered an opportunity for the individual to resolve discrepancies or provide alternative documentation of status, including (d) during a reasonable opportunity period during which benefits are furnished as long as the individual meets all other eligibility criteria, the state may legitimately conclude that the marginal value of providing continued benefits to the individual pending appeal does not outweigh the cost to the state associated with maintaining services and reinstating services retroactive to the date or termination if the individual should prevail on his or her appeal.

We note that the requirement to provide a reasonable opportunity period for citizens and nationals under CHIPRA took effect on July 1, 2006, however our proposal to define the length of such period—other than those done through the process described in section 1902(ee) of the Act, for which the 90-day timeframe also went into effect in January 1, 2010 with the passage of CHIPRA—will take effect in January 2014.

Finally, we propose to amend § 435.1008 to reflect the statutory requirement that states are entitled to receive federal financial participation (FFP) for benefits provided to individuals declaring U.S. citizenship or satisfactory immigration status during the reasonable opportunity period, regardless of whether eligibility ultimately is approved for such period.

c. Changes to and Clarification of Current Policy (§ 435.3, § 435.406, and § 435.407)

Section 211 of CHIPRA also made several technical corrections and amendments to section 1903(x) of the Act. On December 28, 2009, CMS issued a state Health Official Letter, SHO #: 09–016, providing guidance regarding section 211 of CHIPRA (*http://www.cms.gov/smdl/downloads/SHO122809corrected.pdf*). We propose to codify key aspects of that guidance in this rulemaking, as described below. These proposed changes clarify current policy and will not significantly impact current state programs.

(i) Exemption From Citizenship Verification Requirement for Deemed Newborns (§ 435.406, § 457.380)

Section 211(b)(3) of CHIPRA amends section 1903(x) of the Act to exempt from the citizenship verification requirement children eligible for Medicaid under 1902(e)(4) of the Act and § 435.117 because their mothers are covered for the child's birth under Medicaid. Such children (often referred to as ''deemed newborns'') are not required to document or verify citizenship at birth or at any subsequent determination or redetermination of eligibility, including after a break in coverage. As allowed by section 1903(x)(2)(E) of the Act, under 435.406(a)(1)(iv)(E), we propose that information from the state's separate CHIP as well as information from another state that the individual was deemed eligible as a newborn under either Medicaid or CHIP in that state also serves to exempt the individual from the requirement to document citizenship. This policy satisfies the intent of section 211(b)(3) of CHIPRA that evidence of deemed newborn eligibility for Medicaid is sufficient evidence of citizenship. Under section 1903(x)(5) of the Act, proposed § 435.406(a)(1)(iv)(E) applies equally to children born to non-citizen mothers covered only for labor and delivery or other emergency services. We propose at § 457.380 also to apply this exemption to CHIP based on the authority given the Secretary under section 1903(x)(2)(E) of the Act (as incorporated in CHIP under section 2105(c)(9)) to specify the bases under which satisfactory documentary evidence of citizenship or nationality previously has been presented.

(ii) Types of Acceptable Documentary Evidence of Citizenship and Identity (§ 435.407)

The current regulations implementing section 1903(x) of the Act, as in effect prior to CHIPRA were designed to reduce Medicaid costs and prevent coverage of individuals who were in the country illegally (72 FR 38688 through 38689). A report by the Government Accountability Office (GAO) indicates that state experience since the regulations were published has demonstrated that very few undocumented individuals apply for Medicaid or falsely claim U.S. citizenship (June 2007, GAO–07–889). The report and other reports from government and non-profit organizations and on state experiences confirms, that, as implemented, the current regulations have resulted in an increase in administrative costs as well as in large numbers of eligible citizens, especially children, being inappropriately denied coverage, or their enrollment in Medicaid delayed.

In light of these findings, we are proposing to modify the regulations governing the verification of citizenship and identity under section 1903(x) of the Act in the event citizenship cannot be verified through the federal data services hub or an electronic data match directly with SSA, by eliminating non-statutory requirements in the current regulations that increase administrative burden and create unnecessary barriers to successful documentation, without compromising program integrity.

We are eliminating the 4-tier structure in the current regulation and instead propose an approach that is consistent with section 1903(x) of the Act, which establishes 2 tiers of documents: (1) Those that provide evidence of citizenship; and (2) those that provide evidence of citizenship but require an additional identity document.

In § 435.406 of the current regulations, we propose to:

- Revise the introductory paragraph (a) to replace the phrase ''residents of the United States'' with ''individuals'' to clarify that § 435.406(a) pertains to an individual's eligibility based on citizenship or non-citizen status, not residency (standards regarding state residency are at § 435.403);
- Revise paragraphs (a)(1)(i) and (ii) to replace the reference to section 1137 of the Act with a cross reference to § 435.956(a), as proposed in this rulemaking.
- Add a new paragraph (a)(3) to revise who is permitted to make the declaration of citizenship or immigration status required under section 1137 of the Act to include: the individual, or an adult member of the individual's family or household; an authorized representative; and, if the applicant is a minor or incapacitated, someone acting responsibly for the applicant. The proposed revisions aim to align with the regulation at § 435.907 of the Medicaid eligibility final rule regarding who is permitted to submit an application on behalf of another individual. Under proposed § 435.406(a)(3), in order for another person to declare citizenship or immigration status on behalf of the applicant, the person must attest to having a reasonable basis for making such declaration, such as personal knowledge that the individual is a citizen or national or in satisfactory immigration status.
- Delete the word ''recipients'' from paragraph (a)(1)(iii) to reflect the policy, discussed above, that verification of citizenship is a one-time activity and therefore only applies to first time applicants.
- Delete paragraph (a)(1)(iv) and redesignate paragraph (a)(1)(v) at (a)(1)(iv) because we have moved the requirement to document the verification of citizenship in the individuals file to § 435.956, and as noted existing regulations provide that re-verification of citizenship at regular renewals is not needed.

In § 435.407(f) of the revised regulations, we propose to remove the requirement that individuals must provide an original copy of documents, and replace it with a requirement that states accept photocopies, facsimiles, scanned or other copies of documents, unless information on the copy is inconsistent with information available to the agency, or the agency otherwise has reason to question the validity of the information on the document. Originals are not required under the statute, have not been shown to enhance program integrity, undermine potential for a real-time online user experience involving electronic submission of documents as well as submission of complete applications by mail, and lead to increased administrative costs since states must return the originals. We also propose to eliminate the requirement that records—such as medical, school or religious records—containing information regarding an individual's place of birth be created within a certain period of time before the date of application, and to permit states to maintain a record (including an electronic record) of a successful verification in lieu of maintaining paper copies of proof of citizenship, consistent with section 1943 of the Act and section 1413 of the Affordable Care Act. These, and other proposed revisions to simplify the existing regulations in accordance with Executive Order 13563's call for streamlining and updating regulations to reduce administrative burden on states and consumers, in order of paragraph letter, are as follows.

In paragraphs (a) through (e) of § 435.407, we remove all references in § 435.407 to forms and form numbers and who can issue certain forms, all of which are subject to change, for example, the Immigration and Naturalization Services (INS) is now part of the Department of Homeland Security (DHS), and such information is not relevant to the probative value of the documents as evidence of citizenship; delete from the list of acceptable documents passports issued through 1980 that may have included several members of the family, as such passport has not been issued for over 30 years;

delete repetitive, extraneous or obsolete language, including reference to individuals born in Guam on or after April 10, 1899 since that would encompass everyone at this time, and the delayed effective date for reliance on Enhanced Driver's Licenses, which some states have begun to issue, and references to tribal documents in paragraphs (b), (d) and (e) which will be encompassed under a new paragraph (a)(5), discussed below.

In § 435.407(a) we also propose revisions to the list of documents that can be used to prove citizenship without separate proof of identity to add:

- At paragraph (a)(1), a U.S. Passport Card, which is issued to U.S. citizens for travel across land or sea borders to Canada, Mexico, the Caribbean, and Bermuda, and delete language discussing certain passports issued through 1980 since such passports have not been issued for over 30 years; and
- At paragraph (a)(5)(i), add documents issued by a federally-recognized Indian tribe showing membership, enrollment or affiliation with such tribe to the list of primary evidence of citizenship and identity, as required under the amendments to section1903(x) of the Act made by section 211 of CHIPRA (effective July 1, 2006, as if included in the Deficit Reduction Act of 2005) and consistent with the policy set forth in the December 28, 2009 SHO Letter (SHO #09–016). We propose at § 435.407(a)(5)(ii) that such documents include, but are not limited to, those identified in SHO #09–016. We note that this list is not exclusive of other tribal documents and, as tribes are individual independent governments which may not have uniform methods of documenting membership, enrollment, or affiliation with a particular tribe, we encourage states to work with tribes located within their borders to identify additional documents used by those tribes to establish tribal membership.

Section 1903(x)(3)(B)(v)(II) of the Act directs the Secretary, after consultation with the tribes, to determine the documentation necessary for federally recognized Indian tribes located within states having an international border and whose members include individuals who are not U.S. citizens. Under section 402 of PRWORA, 8 U.S.C. 1612, individuals who can demonstrate that they are members of an Indian Tribe, as defined in 25 U.S.C. 450b(e), and are not citizens, are eligible for Medicaid without being subject to the 5-year waiting period. Section 402 of PRWORA does not distinguish between cross-border and intra-border tribes. Accordingly, we propose in § 435.407(a)(5) to permit individuals who declare they are citizens and also members of an Indian tribe to rely on the same tribal documents discussed above, regardless of whether the tribe is located in a state with an international border. In making this proposal, we have engaged in the consultation discussed above but invite further comment on this proposal.

We reorganize the list of documents in current paragraph (b) and consolidate and streamline the regulation text currently at § 435.407(c) and (d) in the revised paragraph (b). We propose that revised paragraph (b) would reflect all documents that may be used, along with proof of identity, to verify citizenship and we eliminate the tiered levels of documents in the current regulations. We also eliminate the requirement that, to rely on a document listed in paragraph (b), an applicant must first show that no document listed in paragraph (a) is available. Other changes to paragraph (b) are as follows:

We add a new paragraph (b)(2) to move current language in (b)(1) that states may use a cross match with a state vital statistics agency to document a birth record. Reference to original documents in paragraph (b)(8) also is removed, as is the requirement in redesignated paragraph (b)(13) that a hospital record of birth be on hospital letterhead, as electronic hospital records may not contain letterhead. In redesignated paragraph (b)(15), we eliminate the ''caution'' regarding ''questionable cases'' as such cases will now be addressed in revised paragraph (f), discussed above, as well as the requirement that the religious record has to show the applicant's date of the birth or age at the time the record was made, since this detail is not required for other acceptable documents. We revise redesignated paragraph (b)(16) to remove the requirement that a school record be an ''early'' record, and contain the date of admission to the school, date of birth, and names of parent's and places of the parent's births. A school record need only contain information of place of U.S. birth. We remove from redesignated paragraph (b)(17) the requirement that a census record must show the applicant's age. Section 435.407(d)(2)(v) of the current regulations is deleted because a statement signed by a physician or midwife who was in attendance at the time of the birth would be encompassed under the new proposed paragraph (b)(18) described below, which would allow for signed statements or affidavits.

New paragraph (b)(18) replaces current paragraphs (d)(2)(v) and (d)(5) to simplify the requirements governing use of affidavits to document citizenship. Under proposed paragraph (b)(18), an individual who does not have one of the documents listed in paragraph (a) or paragraphs (b)(1) through (17) may submit an affidavit, containing the individual's name, date of birth, and place of U.S. birth by someone who can reasonably attest to the individual's citizenship. Other restrictions on the use of affidavits, such as there needing to be two affidavits signed by two individuals who have personal knowledge of the individual's birth, and that individual signing the affidavit must prove their citizenship, are eliminated as creating unnecessary barriers to enrollment for eligible applicants and not required under the statute. However, we seek comment on whether two rather than one affidavit is warranted. We are maintaining the current policy that the affidavit does not need to be notarized.

Section 435.407(e), relating to documentation of identity, is redesignated at paragraph (c). We propose language in paragraph (c)(1) that the documents to prove identity must contain a photograph or other identifying information including, but not limited to, name, age, sex, race, height, weight, eye color, or address. With this statement we are deleting all references currently in § 435.407(c) that specific documents must include this information. We clarify at redesignated (c)(1)(i) that a driver's license issued by a Canadian government authority is not a satisfactory document for proving identity in the U.S. We also delete the current language related to tribal documents, which now serve as acceptable evidence of citizenship under paragraph (a)(5). Use of medical and school records to establish a child's identity is moved to paragraph (c)(2), where we also propose to change the age limit applicable to use of such records from under age 16 to age 19 to align the age limit used in CHIP, and to remove the requirement on states to independently verify such records. In redesignated paragraph (c)(3), we propose to reduce the number of corroborating documents from three (in existing paragraph (e)(3)) to 2, and require states to accept them if presented by an applicant based on the authority of section 1903(x)(3)(B)(vi) of the Act for the Secretary to prescribe other documents for verifying citizenship and identity. We streamline the language in redesignated paragraph (c)(4), relating to the permissibility of

states' relying on a finding of identity by another federal or state agency, and add a new paragraph (c)(5) to permit reliance on a finding of identity from an Express Lane agency, as defined in section 1902(e)(13)(F) of the Act, regardless of whether or not the state otherwise has exercised the option under section 1902(e)(13) of the Act to rely on any findings of such agency in determining Medicaid eligibility. We also propose to remove the sentence requiring the Medicaid agency to assure the accuracy of the identity determinations since this provision allows the Medicaid agency to rely on the findings of another state agency. We also consolidate at redesignated paragraph (c)(6), the permissible use of affidavits to establish identity in the current regulations at § 435.407(f) and (g) to apply more broadly to anyone unable to produce other identity documentation, provided that the affiant can reasonably attest to the applicant's identity, consistent with our proposal for affidavits demonstrating citizenship. Because we propose to move the current content of paragraphs (f) and (g) of existing § 435.407 to other sections, current § 435.407(f) and (g) are deleted in this proposed rulemaking.

To further expand the options states have to verify citizenship, we add a new paragraph (d) to § 435.407 to permit reliance on verification of citizenship by another state, provided such verification was made on or after July 1, 2006, when the requirement to verify citizenship under section 1903(x) of the Act went into effect.

Building on previous policy outlined in the June 9, 2006 State Medicaid Directors Letter, (06–012), and the 2007 final rule regarding Medicaid citizenship documentation requirements (72 FR 38662, § 435.407(e) (redesignated from paragraph (h) of the current regulations) is revised to clarify that states must provide individuals needing assistance in obtaining required documentation. The language in the current regulation at § 435.407(h) provides that assistance be available to individuals who are unable to secure documentation due to ''incapacity of mind or body'' and who do not have a representative of their own to provide the help needed. This language is simplified in this proposed rule at § 435.407(e) to reflect that various types of individuals may need assistance in obtaining documentation of their citizenship, even if not ''incapacitated'' (for example, disabled, limited English proficient and homeless individuals and victims of natural disaster). This simplification also removes the requirement that someone needing assistance to first demonstrate that they are mentally or physically incapacitated. We also note that, due to the increased use of electronic data sources to verify citizenship, we anticipate the number of individuals needing assistance in obtaining documentation to be minimal.

As discussed above, we are revising § 435.956 (f) (redesignated from paragraph (i)) to direct states to accept photocopies, facsimile, scanned or other copies of documents to the same extent as original documents, except when the documentation is inconsistent with other information available to the agency or the agency has reason to question the validity of the copy or information provided. We moved the language in § 435.956 (i)(2) to § 435.956(a)(3) related to maintaining copies of documents and revised it to permit states to maintain a record (including an electronic record) of verified citizenship in lieu of retaining paper copies in the individual's record. We propose to delete paragraph (i)(3) related to how individuals can submit citizenship documentation and that states must not require an individual to appear in person because it is redundant with language in § 435.907(a) of the final eligibility rule. Section 435.907(a) allows individuals to submit all documents that are required to establish eligibility, including any documents necessary for verification of citizenship, through various modalities, including online or by mail. We also propose to remove the language in paragraph (i)(4), related to the integrity of documents presented, because it is duplicative of the program integrity requirements in Part 455 or this title governing how Medicaid agencies deal with possible incidences of fraud. Paragraph (i)(6) of the current regulations is deleted as superseded by the electronic verification processes established under section 211 of CHIPRA and through the data services hub established per sections 1412 and 1413 of the Affordable Care Act and described in § 435.949 of the final eligibility rule. We propose to delete current paragraph (j) of § 435.407 because 45 CFR 74.53 is not relevant to the retention of citizenship records. Finally, § 435.407 (k) is deleted because we have revised and moved regulations relating to the reasonable opportunity period to verify citizenship to § 435.956(g) of this proposed rule.

f. Requirement To Verify Citizenship or Nationality and Immigration Status Applied to CHIP (§ 457.320 and § 457.380)

Section 211(c)(1) of CHIPRA amends section 2105(c) of the Act to extend the Medicaid requirement for verifying citizenship to separate CHIP programs. To codify this requirement, we propose to amend § 457.320(b) and redesignated paragraph (d) of § 457.380. We are also codifying previous guidance published by the Department of Justice (62 FR 61344, 63 FR 41662), the Department of Health and Human Services (63 FR 41658), and CMS (SHO January 14, 1998) that requires states to verify immigration status for any federal public benefit, which includes CHIP. We are proposing to amend § 457.320 (b)(6) to indicate that a state cannot exclude otherwise eligible individuals from coverage if they are U.S. citizens or nationals, or qualified non-citizens as long as they have been verified in accordance with § 457.380.

As required by CHIPRA, we are proposing to amend § 457.320 to remove the option for states to accept self-attestation of citizenship to establish eligibility for CHIP. We are also proposing to revise the individuals who may declare citizenship or immigration status in the same manner that is being proposed for Medicaid at § 435.406.

We propose to amend § 457.380(b) to indicate that except for those populations exempt from the citizenship documentation requirement under Medicaid, states must follow the rules for verifying citizenship and immigration status in accordance with § 435.956, including providing such reasonable opportunity period in accordance with § 435.956(g). This change is necessary to achieve alignment between Medicaid, CHIP, and the Exchange.

8. Elimination or Changes to Unnecessary and Obsolete Regulations (§§ 435.113, 435.114, 435.201, 435.210, 435.211, 435.220, 435.223, 435.401, 435.510, 435.522, 435.909, 435.1004)

In response to the President's directive, outlined in Executive Order 13563, that agencies streamline and simplify federal regulations, we propose to revise or eliminate various current regulations, in whole or in part, as obsolete or no longer applicable. The following sections are proposed for deletion because they have been rendered obsolete due to the expansion of Medicaid coverage under the Affordable Care Act to most individuals at or below 133 percent FPL, the de-linkage of Medicaid eligibility from receipt of AFDC, the replacement of AFDC with MAGI-based financial methodologies in CY 2014, or the proposed simplification of multiple eligibility groups:

- § 435.113 (individuals who are ineligible for AFDC because of

requirements that do not apply under title XIX of the Act);

- § 435.114 (individuals who would be eligible for AFDC except for increased OASDI income under Pub. L. 92–336);
- § 435.220 (individuals who would meet the income and resource requirements under AFDC if child care costs were paid from earnings) which we propose to replace with a new § 435.220 for optional eligibility of parents and other caretaker relatives;
- § 435.223 (individuals who would be eligible for AFDC if coverage under the state's AFDC plan were as broad as allowed under title IV–A of the Act);
- § 435.510 (determination of dependency); and
- § 435.522 (determination of age).

We propose to replace reference to ''specified relatives'' as used and defined in the current regulations at § 435.201(a)(5), § 435.301(b)(2)(ii), and § 435.310 with references to ''parents and other caretaker relatives,'' as defined at § 435.4 of the Medicaid eligibility final rule. We also propose to revise § 435.201 (individuals included in optional groups) to delete the reference to pregnant women, because optional groups for pregnant women will be consolidated under § 435.116 in accordance with the Medicaid eligibility final rule. We propose to delete references to AFDC and to pregnant women and parents and other caretaker relatives in § 435.210 (individuals who meet the income and resource requirements of the cash assistance programs), § 435.211 (individuals who would be eligible for cash assistance if they were not in medical institutions), § 435.401 (general eligibility requirements), § 435.909 (automatic entitlement to Medicaid following a determination of eligibility under other programs), and § 435.1004 (beneficiaries overcoming certain conditions of eligibility).

9. Coordinated Medicaid/CHIP Open Enrollment Process (§ 435.1205 and § 457.370)

Under regulations at 45 CFR 155.410, during the initial open enrollment period starting on October 1, 2013, the Exchange will begin accepting a single streamlined application for enrollment in a QHP through the Exchange and for insurance affordability programs, with enrollment effective January 1, 2014. We are proposing a new § 435.1205 to similarly provide that Medicaid and CHIP agencies begin accepting the single streamlined application during the initial open enrollment period to ensure a coordinated transition to new coverage that will become available in Medicaid and through the Exchange in 2014. Proposed § 435.1205 implements several provisions of the Medicaid eligibility final rule effective October 1, 2013, and ensures the coordinated and simplified enrollment system for all insurance affordability programs envisioned in section 1943 of the Act and section 1413 of the Affordable Care Act. Our proposed rule seeks to ensure that no matter where applicants submit the single, streamlined application during the initial open enrollment period, they will receive an eligibility determination for all insurance affordability programs and be able to enroll in appropriate coverage for 2014, if eligible, without delay. In addition, under the proposed rule, states will need during the initial open enrollment period to facilitate a determination of Medicaid and CHIP eligibility based on the rules in effect in 2013 when a single streamlined application is filed. We provide states with several options to ensure that individuals can be properly evaluated for eligibility under the 2013 rules, to the extent applicable, as described below.

Proposed § 435.1205 (a) incorporates certain definitions and references from the Medicaid eligibility final rule which are pertinent to proposed § 435.1205. Proposed § 435.1205 (b) provides that pertinent provisions of the Medicaid eligibility final rule, as modified in this proposed rulemaking, are effective as of October 1, 2013 for purposes of achieving alignment with the Exchange during the open enrollment period.

Under proposed § 435.1205(c)(1), beginning October 1, 2013, state Medicaid agencies will accept (i) the single streamlined application used to make determinations for eligibility for enrollment in a QHP through the Exchange and all insurance affordability programs, or an alternative application developed by the state and approved by the Secretary per § 435.907(b)(2) of the Medicaid eligibility final rule, and (ii) electronic accounts transferred from an agency administering another insurance affordability program, in accordance with 42 CFR 435.1200. We expect that utilization of the new single streamlined application will be in addition to, not in lieu of any applications currently in use by the state Medicaid and CHIP agency to determine eligibility based on 2013 eligibility rules, but are open to discussion with states on transition options, discussed below.

In proposed § 435.1205(c)(2)(i), we clarify that, beginning October 1, 2013, states must begin either (I) accepting determinations based on MAGI made by the Exchange for eligibility effective January 1, 2014 or (II) receiving electronic accounts of applicants assessed as potentially Medicaid eligible by, and transferred from, the Exchange, and determine eligibility for such applicants based on MAGI and the eligibility requirements to be in effect on that date. Whether the agency begins accepting Medicaid eligibility determinations made by the Exchange or receives the electronic accounts of individuals assessed by the Exchange as potentially Medicaid eligible will depend on whether the agency has elected to delegate authority to the Exchange to make eligibility determinations under § 431.10(c) of this rulemaking.

Per paragraph (c)(2)(ii), on October 1, 2013, state Medicaid agencies also will begin (I) making eligibility determinations for applicants submitting the single streamlined application to the agency, based on MAGI and eligibility criteria which will be in effect as of January 1, 2014, for coverage effective on that date and (II) assessing potential eligibility for enrollment in a QHP through the Exchange and for other insurance affordability programs for individuals determined not Medicaid eligible by the agency, and transfer the electronic account, including the application, to such other program, as appropriate. This ensures that electronic accounts for individuals determined potentially eligible for enrollment in a qualified health plan will be transferred to the Exchange in a timely manner so that eligibility for such enrollment as well as for advance payment of the premium tax credit and cost-sharing reductions can be determined by the Exchange and plan selection and enrollment can occur in time for January 1, 2014. Per proposed paragraph (c)(2)(iii), states also will need to provide notice and fair hearing rights consistent with part 431 subpart E of the regulations, as revised in this rulemaking, and § 435.1200 of the Medicaid eligibility final rule, as also revised in this proposed rulemaking, regarding coordination of eligibility determinations, notice and appeals with the Exchange and with agencies administering other insurance affordability programs.

Proposed § 435.1205 (c)(3)(i) provides that, for each individual determined eligible for Medicaid by the agency or the Exchange per proposed paragraph (c)(2)(i) or (ii), the agency must furnish Medicaid effective January 1, 2014. Per proposed paragraph (c)(3)(ii), the terms of § 435.916 of the Medicaid eligibility final rule (relating to beneficiary responsibility to inform the agency of any changes in circumstances that may affect eligibility) and § 435.952 of the

Medicaid eligibility final rule (regarding use of information received by the agency) apply such that individuals determined eligible during the initial open enrollment period for coverage effective January 1, 2014 must report changes in circumstances that may affect their eligibility, and the agency must evaluate the impact of such changes on eligibility, consistent with § 435.952. Under the proposed regulation, the agency has the option to schedule the first regular renewal under § 435.916 for individuals applying during the open enrollment period and determined eligible effective January 1, 2014, to occur anytime between 12 months from the date of application and January 1, 2015. States may also conduct post-eligibility data matching to ensure continued eligibility as of January 1, 2014 and/or through the first regularly-scheduled renewal.

Given the outreach efforts anticipated around the single, streamlined application and the initial open enrollment period, some people who are eligible for Medicaid under 2013 rules can be expected to apply using the single, streamlined application. While Medicaid agencies are not required to adjudicate 2013 eligibility for applicants who apply using the single, streamlined application, we propose at § 435.1205(c)(4) that states establish a process to ensure that individuals submitting the single streamlined application can be evaluated and determined eligible for coverage effective in 2013. States are encouraged, but not required, to determine eligibility effective in 2013 based on the information provided on a single streamlined application, or to adopt a supplemental form or questions to obtain any additional information needed to do so. Specifically, we propose in § 435.1205(c)(4)(i) that the agency may determine an applicant's eligibility for 2013 based on the information gathered as part of the single streamlined application if the agency has sufficient information to make such a determination, or request any additional information (through, for example, use of a supplemental form) needed to do so, providing notice and appeal rights in accordance with the regulations. Alternatively, per proposed § 435.1205(c)(4)(ii), the agency may notify individuals submitting the single streamlined application during the initial enrollment period that to be considered for eligibility in 2013 they must submit a separate application for coverage and provide information on how to obtain and submit such application. We request comment on whether states should only notify a subset of applicants about the process to apply for coverage with an effective date in 2013—for example only those applicants who appear, on the basis of available information provided on the single streamlined application, to be potentially eligible under 2013 rules.

Given the value of implementing a coordinated the eligibility and enrollment process for enrollment in a QHP through the Exchange and all insurance affordability programs during the initial open enrollment period, we are considering, for purposes of the initial open enrollment period, whether, in addition to proposed § 435.1205 and § 457.370, to make some or all of the following sections of the regulations, as promulgated or revised in the Medicaid eligibility final rule or as proposed or revised in this rulemaking, effective October 1, 2013, or whether an effective date of January 1, 2014 for some or all of these sections is appropriate: § 431.10 and § 431.11 (relating to the delegation of authority to the Exchange or Exchange appeals entity to determine eligibility and conduct fair hearings); § 435.603 (MAGI-based methodologies) and § 435.911 (MAGI screen) for purposes of making eligibility determinations effective prior to January 1, 2014 prior to that date; § 435.907 (use of the single streamlined application); § 435.908(c) (use of application assisters) and § 435.923 (use of authorized representatives); §§ 435.940 et seq. (verification of eligibility criteria); §§ 431.200 et seq., § 435.917 § 435.918 and § 435.1200 (coordination of eligibility and enrollment, notices and appeals between the Exchange, Medicaid and CHIP); and corresponding CHIP regulations in part 457 (§§ 457.315, 457.330, 457.340, 457.348, 457.350, 457.351, 457.380 and 457.1180). We solicit comments on the appropriate effective date for these sections to ensure a smooth initial open enrollment period.

We will also work with states interested in not having to assess eligibility during this limited time period based on two different sets of rules. For example, some states have expressed interest in using the authority of section 1115 of the Act to apply MAGI-based methods to determinations of Medicaid eligibility effective with the 2013 open enrollment period, or in more closely aligning current financial methodologies with MAGI-based methods through adoption of less restrictive methods under their state plan. CMS is open to working with states to effectuate these or other ideas states or other stakeholders may have to achieve coordination with the Exchange and minimize administrative and consumer burden during the 2013 open enrollment period.

Finally, during the initial open enrollment period and likely at least through 2014, some individuals may submit the application used by the state to determine eligibility using 2013 rules. We seek comment on the best ways for states to ensure that individuals submitting such applications during the initial open enrollment period are evaluated for coverage effective January 1, 2014, and thereafter, to ensure that state Medicaid agencies obtain such additional information as is necessary to determine whether such individuals are eligible for Medicaid using the MAGI-based standards, methodologies and eligibility categories for coverage effective on January 1, 2014.

Like Medicaid, a separate CHIP program will need to align with the Exchange's initial open enrollment period. We propose a new § 457.370 to apply the same provisions to states administering a separate CHIP as proposed for Medicaid at § 435.1205.

10. Children's Health Insurance Program Changes

a. CHIP Waiting Periods (§ 457.805)

The Affordable Care Act promotes enrollment in and continuity of coverage. CHIP was created in the absence of the Affordable Care Act and allows states to require periods of uninsurance between disenrollment from private group health coverage and the beginning of enrollment in CHIP (often referred to as ''waiting periods''). Waiting periods have been permitted, although are not required, under section 2102(b)(3)(C) of the Act, which requires states to ensure that coverage provided under CHIP does not substitute for (or ''crowd out'') coverage under group health plans. Implementing regulations at § 457.805 specify that CHIP state plans must include a description of ''reasonable procedures'' to prevent substitution. Some 38 states currently employ waiting periods—ranging from one to twelve months in duration, with various state-specified exceptions—as a mechanism for preventing such substitution.

While not directly addressed in our earlier regulations, we received a number of comments suggesting that CHIP waiting period policies should be revised. Although waiting periods are a common strategy in CHIP, states have other options to prevent substitution of coverage. CHIP waiting periods create gaps in coverage that exceed standards established under the Affordable Care Act. Section 1201 of the Affordable Care

Act amends section 2708 of the Public Health Service Act to prohibit waiting periods exceeding 90 days for health plans and health insurance issuers offering group or individual coverage, a standard which, though not directly applicable to CHIP, is exceeded in roughly half of the states with a CHIP waiting period. If permitted to continue, children eligible for a separate CHIP program would be the only population subject to waiting periods that exceed 90 days starting in 2014. In addition, section 5000A of the Internal Revenue Code, as added by section 1501 of the Affordable Care Act, applies the requirement to maintain ''minimum essential coverage'' to both adults and dependents. In families that choose to enroll children in coverage through the Exchange during a waiting period, the child may experience disruption of care when the waiting period, and therefore, availability of the premium tax credit ends and enrollment in CHIP occurs. Coordination between the CHIP agency and the Exchange will be needed. To effectuate this transition, we propose revising § 457.350(i) to include those individuals subject to a waiting period within the requirement to screen for potential eligibility for other insurance affordability programs. For individuals subject to a waiting period, under proposed revisions at § 457.350(i)(3), states also would need to notify such program of the date on which such period ends and the individual is eligible to enroll in CHIP. In an effort to balance the goals of permitting states flexibility to employ waiting periods to prevent substitution of coverage and eliminating barriers and promoting continuity of coverage, and based on the authority provided in sections 2102(b)(3)(E) and 2102(c)(2) of the Act (requiring that states institute procedures to ensure coordination between CHIP and other public and private coverage programs for low-income children) and sections 1943 and 2107(e)(1)(O) of the Act and section 1413 of the Affordable Care Act (requiring coordination of eligibility and enrollment between all insurance affordability programs), we are proposing to allow waiting periods in CHIP with limitations effective January 1, 2014.

Specifically, we propose revisions to existing regulations regarding prevention of substitution of coverage at § 457.805 to retain the ability of states to impose a waiting period, but limit any waiting period to a maximum of 90 days. States would retain the ability to grant state-defined exemptions to the imposition of a waiting period. In conducting research on the use of state-defined exemptions, we found several common exemptions which we propose that all states use to waive imposition of any such period in the following situations:

(1) The cost of the discontinued coverage for the child exceeded 5 percent of household income;

(2) The cost of family coverage that includes the child exceeds 9.5 percent of the household income.

(3) The employer stopped offering coverage of dependents;

(4) A change in employment, including involuntary separation, resulted in loss of access to employer-sponsored insurance (ESI) (other than through payment of the full premium by the parent under COBRA);

(5) The child has special health care needs; and

(6) The child lost coverage due to the death or divorce of a parent.

In addition, we clarify that waiting periods may not be applied to children losing eligibility for other insurance affordability programs. Further, we are considering whether to add an additional affordability exemption when the child's parent is determined eligible for advance payment of the premium tax credit for enrollment in a QHP through the Exchange because the ESI in which the family was enrolled is determined unaffordable in accordance with 26 CFR 1.36B–2(c)(3)(v).

We note that, because of the difficulty in verifying the variety of exemptions from waiting periods currently applied by states (including those described under this proposed regulation) the FFE will not be able to make final determinations of CHIP eligibility in states choosing to impose a CHIP waiting period in 2014. Instead, the FFE would conduct an assessment of CHIP eligibility, transferring all individuals assessed as likely CHIP eligible to the CHIP agency to determine if the child meets an exemption and to make a final determination of eligibility.

We also considered proposing to limit the application of waiting periods to only children with family incomes above 200 or 250 percent of the federal poverty level, as some states currently do, as this is the population more likely to have access to affordable coverage through an employer, or only allowing waiting periods based on evidence of substitution of coverage in a state. Finally, we also considered proposing to eliminate the permissibility of waiting periods in 2014 for CHIP-eligible children. We invite comments on our proposal to allow CHIP waiting periods of up to 90 days as well as other options considered. We also solicit comments on the viability of alternative strategies to reduce substitution of coverage to best balance the goal of preventing coverage gaps for children while ensuring that CHIP coverage does not substitute for coverage available under group health plans.

Finally, we propose revising § 457.810 to eliminate the required six month waiting period if a state elects to provide premium assistance through section 2105(c)(3) of the Act. Instead, we propose that any waiting period imposed under the CHIP state plan for direct coverage must apply to the same extent to the state's premium assistance program. This provision would align the rules relating to the application of waiting periods for premium assistance with those proposed for direct coverage of CHIP-eligible children at § 457.805 and is consistent with the application of waiting periods in the option for premium assistance established in section 2105(c)(10) of the Act as amended by section 301 of CHIPRA. Revisions are proposed to § 457.810(a)(1) and (2) and § 457.810(a)(3) and (4) are deleted.

b. Limiting CHIP Premium Lock-Out Periods (§ 457.570)

The majority (approximately 29) of states operating separate CHIPs require families to pay premiums, or enrollment fees. Over the years, states have established different disenrollment policies for non-payment of premiums and enrollment fees in CHIP.

Approximately 14 states impose a ''lock-out period;'' that is, a specified period of time, that a child will have to wait until being allowed to reenroll in the CHIP program after termination as a result of non-payment of premiums. In some states, this period can be until the unpaid premiums or enrollment fees are paid. In other states, the child is barred from enrollment for a period of time even if the family pays the unpaid premiums or enrollment fees. Other states require individuals to go without CHIP coverage during the premium lock-out period, but do not require families to pay their premium back at the end of the specified time. Lock-out periods currently range from 1 to 6 months. An additional 14 states require individuals to reapply for coverage and/or repay outstanding premiums in order to re-enroll in CHIP (the majority of these states require both, but a few require only one or the other), but do not characterize their programs as having lock-out periods.

We considered the impact of the use of premium lock-out periods relative to the objectives of the Affordable Care Act to promote enrollment in and continuity

of coverage. Prohibiting a child from enrollment after the family pays the unpaid premium or enrollment fee is counter to promoting enrollment in and continual coverage through a streamlined eligibility process and is inconsistent with how the Exchange will address nonpayment of premiums. However, in an effort to achieve a balance between states' ability to collect premium payments and manage program costs, and the goal of removing barriers to coverage, we propose to define a premium lock-out at § 457.10 as a period not exceeding 90 days when, at state option, a CHIP eligible child may not be permitted to reenroll in coverage if they have unpaid premiums or enrollment fees. We also propose at § 457.570 to permit states to continue to impose premium lock-out periods only for families that have not paid outstanding premiums or enrollment fees, and only up to a 90-day period. A 90-day premium lock-out maximum aligns with section 1201 of the Affordable Care Act, which prohibits periods without insurance exceeding 90 days for health plans and health insurance issuers offering group or individual coverage. We also specify that past due premiums or enrollment fees must be forgiven if a child has been subject to a lock-out period, regardless of length of the lock -out period. The majority of states with premium lock-out periods in place do not currently exceed 90 days and some states that have premium lock-out periods do not require the family to pay outstanding premiums in order to reenroll in the CHIP.

Under federal regulations, states have broad flexibility in determining how to notify and collect premiums and enrollment fees from families. We recognize that most states make efforts to facilitate payment of premiums and enrollment fees, easing the process for CHIP families. We invite comments from states on any alternative late payment policies to encourage families to make their CHIP premium payments in a timely manner in order to avoid gaps in coverage.

11. Premium Assistance (§ 435.1015)

Premium assistance programs use federal and state Medicaid and CHIP funds to help subsidize the purchase of coverage for Medicaid and CHIP-eligible individuals who have access to private coverage, but may need assistance in paying for their premiums. Premium assistance can provide a mechanism for facilitating the coordinated system of coverage between Medicaid, CHIP, and the Exchange in 2014. It will provide an option for states to assist families who wish to enroll in the same health plan when some family members are eligible for either Medicaid or CHIP while other family members obtain coverage on the Exchange with advance payments of the premium tax credit. Premium assistance provides an opportunity for state Medicaid and CHIP programs to offer coverage to such families through the same coverage source, even if supported by different payers. States can use federal and state Medicaid and CHIP funds to deliver Medicaid and CHIP coverage through the purchase of private health insurance through plans in the individual market, which in 2014, would include QHPs available through the Exchange.

Premium assistance is authorized for group coverage in Medicaid under sections 1906 or 1906A of the Act, and in CHIP, under sections 2105(c)(3) or 2105(c)(10) of the Act. Based on authority in sections 1905(a) and 2105(c)(3) of the Act, we propose at § 435.1015 also to authorize premium assistance programs to support enrollment of individuals eligible for Medicaid and CHIP in plans in the individual market, including enrollment in QHPs in the Exchange.

Thus, a state Medicaid or CHIP program could use existing premium assistance authority to purchase coverage for a Medicaid or CHIP-eligible individual through a QHP, while other family members would receive advance payment of the premium tax credit. However, APTC would not be provided for the Medicaid or CHIP-eligible family members. Premium assistance could help increase the likelihood that individuals moving from Exchange coverage into Medicaid or CHIP may remain in the same QHP in which they had been enrolled through the Exchange. We invite comments on how the state Medicaid and CHIP agency can coordinate with the Exchange to establish and simplify premium assistance arrangements and how these arrangements will be operationalized.

In the matter following section 1905(a)(29) of the Act, ''medical assistance'' is defined to include payment of part or all of the cost of ''other insurance premiums for medical or any other type of remedial care or cost thereof.'' We interpret this provision to permit payment of FFP for premiums for individual health plans for Medicaid-eligible individuals, provided the state determines it cost-effective to do so, similar to the requirement for payment of premiums for enrollment in a group health plan under sections 1906, 1906A or 2105 of the Act.

Under section 1902(a)(25) of the Act, codified in subpart D of part 433 of the regulations, the insurer would be obligated to be primary payer relative to Medicaid for all health care items and services for which the insurer is legally and contractually responsible under its insurance policy. The matter following section 1905(a)(29) of the Act does not limit the benefits or services to which an individual otherwise is eligible. Thus, Medicaid-eligible individuals enrolled in a private health plan would remain qualified for all benefits for which the individual is covered under the state plan, regardless of whether or not the state is providing payment for enrollment in the private plan, and a state opting to provide premium assistance support for enrollment in an individual health plan would have to provide covered benefits not covered under the private policy. In addition, the state would need to ensure that individuals do not incur cost sharing charges in excess of amounts imposed by the state under sections 1916, 1916A, or 2103(e) of the Act.

Under proposed § 435.1015, states will be expected to demonstrate cost-effectiveness in the same manner as is required under the sections 1906, 1906A, 2105(c)(3), and 2105(c)(10) of the Act. We believe this is consistent with section 10203(b) of the Affordable Care Act, which aligned requirements for cost-effectiveness for premium assistance programs under the authorities of sections 1906, 1906A, 2105(c)(3), and 2105(c)(10), but was silent with respect to premium assistance under section 1905(a) authority.

To be ''cost-effective'' under proposed § 435.1015, the cost of purchasing coverage under an individual health plan for a Medicaid-eligible individual in the private market, including coverage in a QHP in the Exchange, must be comparable to the cost of providing direct coverage under the state plan (or waiver of the state plan). We propose that the test for cost-effectiveness includes administrative expenditures and the costs of providing wraparound benefits for items and services otherwise covered under the Medicaid state plan.

In addition, under the sections 1906 and 1906A premium assistance authorities, states may claim FFP for payment of premiums for non-Medicaid-eligible family members if enrollment in a group health plan of such family members is necessary for the enrollment of the Medicaid-eligible individual, as long as the cost-effectiveness test is met. We do not anticipate that such arrangements

would be necessary to support enrollment of a Medicaid-eligible individual in a health plan in the individual market, and therefore do not include provision for payment of premiums for non-Medicaid-eligible family members under proposed § 435.1015. However, we seek comments on this provision.

12. Electronic Submission of the Medicaid and CHIP State Plan (§§ 430.12, 457.50, and 457.60)

We are proposing to revise sections §§ 430.12, 457.50, and 457.60 to reflect our implementation of an automated transmission process for the Medicaid and CHIP business process. Historically, we have accepted state plan amendments on paper following paper-based templates. These are submitted to the CMS Regional Offices and Central office, and adjudicated using a manual transmission process, resulting in lengthy review times. Additionally, this process was not transparent to states or other stakeholders. To move to a more efficient and transparent business process, in consultation with states, we are developing the MACPro (Medicaid and CHIP Program) system to electronically receive and manage state plan amendments as well as other Medicaid and CHIP business documents. The proposed revisions direct states to use the automated format for submission of state plan amendments, replacing previous paper based documents, and gives states a period of time to make the transition to the new system with technical support from CMS.

13. Changes to Modified Adjusted Gross Income and MAGI Screen

a. Changes for Modified Adjusted Gross Income

We propose several revisions to the Medicaid eligibility final rule regarding the household composition of individuals whose financial eligibility is determined using the MAGI-based methodologies set forth at § 435.603, which implement section 1902(e)(14) of the Act, as added by section 2002 of the Affordable Care Act.

First, in accordance with sections 1902(e)(14)(A) and 1943 of the Act and section 1413 of the Affordable Care Act, we intended in the March 23, 2012 Medicaid eligibility final rule to apply the definitions of ''modified adjusted gross income'' and ''household income'' in section 36B(d)(2) of the Internal Revenue Code of 1986 (''36B definitions'') to treat stepparents the same as natural and adopted parents, and stepchildren and stepsiblings the same as biological and adopted children and siblings, for purposes of determining household composition and household income. However, whereas virtually everywhere that reference in § 435.603 to ''parents'' is made, the Medicaid eligibility final rule explicitly refers to ''natural, adopted or stepparents,'' we inadvertently did not include such reference in § 435.603(f)(2)(ii), referring instead only to children claimed by one ''parent'' who are living with ''both parents.'' We propose to remedy this technical error, and simultaneously further streamline the regulation text, by adding a definition of ''parent'' in paragraph (b) to include natural, adopted and stepparents, and to replace all references elsewhere throughout § 435.603 to ''natural, adopted or stepparents'' with a reference to ''parents,'' as newly defined. We propose adding a similar definition and to make similar streamlining revisions in the case of references in the Medicaid eligibility final rule to ''natural, adopted and step children'' and ''natural, adopted, half or step siblings.'' We considered ''half siblings'' to be included within the meaning of natural and adopted siblings in the Medicaid eligibility final rule, but are including such siblings explicitly in the definition proposed here.

Second, section 1902(e)(14)(I) of the Act requires the application of a 5 percent disregard for purposes of determining the income eligibility of an individual for medical assistance whose eligibility is determined based on MAGI. In the Medicaid eligibility final rule, we defined household income in § 435.603(d)(1) with certain exceptions as the sum of the MAGI-based income of every individual in the individual's household, minus an amount equivalent to 5 percentage points of the federal poverty level for the applicable family size. The result of this disregard policy is that individuals determined for eligibility under MAGI have a 5 percent disregard applied to their income, when their eligibility under a particular eligibility category is being determined, and that disregard can impact the group for which such individual is found eligible.

For example, if the income standard for eligibility under section 1931 in a state were 90 percent of the FPL and a parent with 95 percent of the FPL who met the categorical requirements for coverage applied, the 5 percent disregard would apply to that parent resulting in eligibility for the section 1931 category. If the state had expanded coverage to the new adult group, such that the adult group covered parents with income greater than 90 percent of the FPL to 133 percent of the FPL, a parent with 95 percent FPL would still be determined eligible for the section 1931 category. This would impact the Federal Medical Assistance Percentage that the state could claim for this individual and could impact the benefits the individual received. As set forth in § 433.10 of our Medicaid Eligibility proposed rule, the rate of federal financial participation is increased for newly eligible individuals, provided they are in the adult group. An individual cannot meet the definition of a newly eligible individual for whom the state may claim enhanced FMAP unless, at a minimum, that individual qualifies for eligibility in the adult group. It could also impact the benefits available to that parent, because states are required to provide benchmark benefits for individuals in the adult group.

Since the publication of our Medicaid eligibility final rule, we have considered an alternative interpretation for section 1902(e)(14)(I) of the Act. Section 1902(e)(14)(I) states that the 5 percent disregard should be applied, ''for purposes of determining the income eligibility of an individual for medical assistance whose eligibility is determined based on the application of MAGI''. Instead of applying the five percent disregard to determine eligibility for a particular eligibility category, we are proposing a policy under which the five percent disregard should be applied when its application affects eligibility on the basis of MAGI. Thus the five percent disregard would be applied not when eligibility for any Medicaid eligibility group is being determined but, rather, when an applicant or beneficiary would otherwise be ineligible for any medical assistance (under any MAGI-based eligibility category in the program). The impact of this change would be that the five percent disregard would apply only to the highest income threshold under a MAGI-based group available for that person.

In the example above, the application of the five percent disregard to the 1931 group would be contingent on whether the section 1931 group was the highest income threshold available to that parent or caretaker relative in the Medicaid program. If so—for example, in a state that did not expand eligibility to the adult group—the five percent disregard would be applied, and the individual with household income equaling 95 percent FPL would be determined eligible for the 1931 group. If, in the example above, the state did expand eligibility to the new adult

group, the five percent disregard would not be applied to the parent with income at 95 percent FPL, because the highest income standard for the parent would be the income standard for the new adult group (133 percent FPL), and the individual would be determined eligible for the adult group. If the parent met the definition of a newly eligible individual, the state could then claim the enhanced FMAP for this individual. The five percent disregard would, however, be applied to a parent with income at 138 percent of the FPL, because 133 percent FPL would be the highest eligibility category for which the parent could qualify in the Medicaid program. To implement this policy, we propose to delete the across-the-board application of the deduction of five percent FPL from the calculation of every household income in § 435.603(d)(1) and to add a new sub paragraph § 435.603(d)(4) to apply the five percent disregard only when determining an individual for the eligibility group with the highest income standard, using MAGI-based methodologies, under which the individual may be determined eligible.

Third, we propose to clarify the regulatory exception from application of MAGI-based financial methodologies for individuals needing long-term care services in paragraph (j)(4) of § 435.603 of the Medicaid eligibility final rule, because it could be interpreted in a manner to extend the reach of the exception beyond that intended either under section 1902(e)(14)(D)(iv) of the Act, as added by section 2002 of the Affordable Care Act, or the Medicaid eligibility final rule. As promulgated, paragraph (j)(4) could be interpreted to except from MAGI-based methods individuals requesting long-term care services that are covered under an eligibility group otherwise subject to MAGI-based methodologies, such as those for pregnant women and children at §§ 435.116 and 435.118, respectively. This was not our intention in the Medicaid eligibility final rule. Revisions to § 435.603(j)(4) therefore are proposed to clarify that the exception from application of MAGI-based methods applies only in the case of individuals who request coverage for long-term care services and supports for the purpose of being evaluated for an eligibility group for which meeting a level-of-care need is a condition of eligibility or under which long-term care services not covered for individuals determined eligible using MAGI-based financial methods are covered. The exception does not apply to someone eligible using MAGI-based methodologies under a MAGI-based eligibility group which covers the needed long-term care services, simply because the individual requests such services.

We also are considering for comment, but have not included here, a couple other revisions to the regulations at § 435.603 to address issues stakeholders have raised as a result of the Medicaid eligibility final rule. First, there are situations in which an individual is counted as part of two households for purposes of determining each household's Medicaid eligibility and that individual's entire income is counted as available to each household, when, in reality, only a portion of the individual's income may actually be available to each household. For example, we believe this could occur when one or both spouses in a married couple not filing jointly claims one or more tax dependents, when one or both members of an unmarried couple with a child in common have tax dependents of their own, and in some three-generation households, depending on the tax filing status of the household members. Based on the authority provided in section 1902(e)(14)(H)(ii) of the Act, we are considering revisions to § 435.603 to avoid these results. We are seeking comments on this and other situations in which this might occur, and on revisions that would address this issue.

b. MAGI Screen (§ 435.911)

Consistent with sections 1902(a)(4), (a)(8), (a)(10)(A), (a)(19), and (e)(14) and section 1943 of the Act, in § 435.911, we established at § 435.911 of the Medicaid eligibility final rule a simplified test for determining eligibility based on MAGI. To effectuate this test, we provided a definition of ''applicable MAGI standard,'' which will be at least 133 percent of the FPL, but in some states, based on state-established standards, may be higher for pregnant women, children, or in a few states, parents and caretaker relatives. We propose two minor revisions to the definition of ''applicable MAGI standard'' at § 435.911(b), and to extend use of the MAGI screen to elderly and disabled adults who may be eligible as a parent or caretaker relative based on MAGI, but who are not included in the MAGI screen established in the Medicaid eligibility final rule.

The applicable MAGI standard for parents and caretaker relatives should be the highest income standard which can be applied to determining eligibility for a parent or caretaker relative under any eligibility group using MAGI-based household income, as defined in § 435.603 of the Medicaid eligibility final rule. Section 435.911(b)(1)(i) of the Medicaid eligibility final rule provides that this applicable MAGI standard is the higher of 133 percent FPL (the income standard for the new adult group at § 435.119 of the Medicaid eligibility final rule) and the income standard established by the state for mandatory coverage of parents and caretaker relatives under section 1931(b) of the Act, implemented at § 435.110 of the final Eligibility Rule. Because some states have expanded coverage to parents and caretaker relatives at higher income levels through the adoption of an optional group for parents and caretaker relatives under section 1902(a)(10)(A)(ii)(I) of the Act, implemented at § 435.220 of this proposed rulemaking, the income standard applied by the state to this optional group in accordance with proposed § 435.220(c), if higher than both 133 percent FPL and the standard for coverage under § 435.110, should serve as the applicable MAGI standard for parents and caretaker relatives. We propose revisions at § 435.911(b)(1)(i), accordingly, to accurately reflect the applicable MAGI standard for parents and caretaker relatives. As provided at § 435.911(b)(1)(iv) of the Medicaid eligibility final rule, if the state has adopted, and phased in coverage of parents and caretaker relatives under, the optional eligibility group for individuals with MAGI-based household income over 133 percent FPL, the applicable MAGI standard under paragraph (b)(1) will be the income standard adopted by the state for that optional eligibility group in accordance with § 435.218(b)(1)(iv).

Paragraph (c)(1) of § 435.911 of the Medicaid eligibility final rule excluded from the simplified MAGI screen all individuals who are excluded from the new adult group because they have attained at least age 65 or are entitled to or enrolled for Medicare. Such individuals may be eligible based on MAGI, however, if they also are a parent or caretaker relative or are pregnant. We therefore clarify at proposed § 435.911(b)(2) that there generally is no applicable MAGI standard for individuals who have attained at least age 65 and individuals ages 19–64 who are entitled to or enrolled for Medicare, *unless* such individual also is pregnant or is a parent or caretaker relative. For such individuals, proposed § 435.911(b)(2) defines the applicable MAGI standard, in the case of such individuals who are pregnant as the applicable MAGI standard established for pregnant women under paragraph (b)(1) and, for elderly or Medicare-

eligible parents and caretaker relatives, the higher of the income standards established by the state under the mandatory and optional eligibility groups for parents and caretaker relatives.

14. Single State Agency—Delegation of Eligibility Determination to Exchanges (§§ 155.110, 431.10, and 431.11)

In the Medicaid Eligibility proposed rule, published on August 17, 2011 (76 FR 51148), we proposed to allow Medicaid agencies to delegate eligibility determinations to Exchanges that are public agencies authority to make Medicaid eligibility determinations as long as the single state Medicaid agency retained authority to issue policies, rules and regulations on program matters and to exercise discretion in the administration or supervision of the plan. We also noted that if Exchanges were established as non-governmental entities as allowed by the Affordable Care Act, the coordination provisions in the law may be more challenging and, for example, could require the co-location of Medicaid state workers at Exchanges or other accommodations to ensure coordination is accomplished. We solicited comment on approaches to accommodate the statutory option for a state to operate an Exchange through a private entity, including whether such entities should be permitted to conduct Medicaid eligibility determinations consistent with the law.

Based on comments we received to our proposal, in the Medicaid eligibility final rule, we permitted a broader delegation of Medicaid eligibility determinations that we initially proposed, permitting delegation of eligibility determinations to any Exchange, whether a governmental or non-governmental organizations, to promote coordination and ensure that Exchanges could make Medicaid eligibility determinations, even when non-governmental. We limited the eligibility determination authority of an Exchange operated by a non-governmental entity or that contracted with private entities to MAGI-based determinations only, provided that the single state agency retained its responsibilities for supervising the administration of the plan and for making the rules and regulations for administering the plan, and that it remained accountable for the proper administration of the program exercising appropriate control and oversight over any entity making final eligibility determinations on its behalf.

Several provisions of the Medicaid eligibility final rule were issued on an interim final basis. Though the single state agency provisions were not issued as interim final rules open for comment, we received public comments on them because they were closely related to the interim final regulatory provision at § 435.1200(c) that was subject to comment. That provision referred to treatment of individuals determined eligible for Medicaid by a final determination of another insurance affordability program. Numerous commenters requested that CMS reconsider our policy permitting delegation of eligibility determinations to nongovernmental entities. They expressed multiple concerns including their belief that determining Medicaid eligibility is an inherently governmental function that should not be delegated to a nongovernmental entity. Some argued that even with the stronger standards in the Medicaid eligibility final rule, Medicaid's oversight of Exchanges run by or contracting with private entities would be limited by the lack of a contractual relationship between the Medicaid agency and the private entity.

In light of these public comments, we are proposing to revert to the policy proposed in the Medicaid eligibility proposed rule, that state Medicaid agencies would be limited to delegating eligibility determinations to Exchanges that are government agencies maintaining personnel standards on a merit basis. For purposes of delegation, we would treat a public authority running an Exchange and employing merit system protection principles as a government agency such that delegation to it would be permitted. We would retain many of the provisions strengthening the control and oversight responsibilities of the single state agency. We seek comment to this proposed change regarding permissible delegations of final Medicaid eligibility determinations. In addition, we are seeking further comment regarding ways states can ensure a coordinated system by engaging non-profits and private contractors in the process of supporting Medicaid and the CHIP eligibility determinations while ensuring that any final Medicaid eligibility determination is made by a government agency. We believe this potential change is consistent with current state practices and plans.

Thus, we are proposing at 42 CFR 431.10 to delete the provision at (c)(3) added by the Medicaid eligibility final rule which provided that Exchanges operated as nongovernmental entities as permitted under 45 CFR 155.110(c), or contracting with a private entity for eligibility services, as permitted under 1311(f)(3) of the Affordable Care Act and 45 CFR 155.110(a) are permitted to make final determinations of eligibility limited to determinations using MAGI-based methods as set forth in § 435.603 of this subchapter. We propose instead to add explicit language to: implement 1902(a)(3) and (a)(5) of the Act by requiring the Medicaid agency remain responsible for determining eligibility for all individuals applying for or receiving benefits and for conducting fair hearings; consolidate § 431.10(c)(1) and (c)(2) (regarding the other state or federal agencies to which the single state agency currently is permitted to delegate authority to determine Medicaid eligibility) into a new paragraph (c)(1)(i); and add an Exchange established under sections 1311(b)(1) or 1321(c)(1) of the Affordable Care Act to the list of permissible agencies. We further propose at § 431.10(c)(2) to require that any entity to which such authority is delegated be a governmental agency which maintains personnel standards on a merit basis consistent with section 1902(a)(4) of the Act, which we add as a basis in § 431.10(a)(1).

Consistent with the statutory authority at 1902(a)(5), we are retaining the requirements added in the Medicaid eligibility final rule which strengthened the controls and oversight of the single state agency, but as noted in section II.A of the preamble, we have streamlined and reorganized the text of those paragraphs in this proposed rulemaking. We believe that such strengthened controls are appropriate for a single state agency that delegates eligibility, even to another government agency. We are also proposing conforming changes to § 431.10(d) regarding agreements with federal or state and local entities for eligibility determinations.

We note that because delegation will only be permitted to an Exchange to the extent that the eligibility determinations are made by a government agency maintaining personnel standards on a merit basis consistent with requirements set forth in section 1902(a)(4) of the Act, the single state agency will be allowed to delegate authority for an eligibility determination to the Exchange, including an eligibility determination for MAGI-excepted individuals. Alternatively, the single state agency may arrange to have the Exchange screen for possible Medicaid eligibility for MAGI-excepted individuals as set forth in § 435.911 and coordinate the transfer of the application to the Medicaid agency, as set forth in § 435.1200. Because the single state agency may delegate eligibility determination authority for different populations to more than one agency (for example, to the Social Security

Administration, the agency administering the state's program under title IV–A of the Act, and/or the Exchange), we further propose at § 431.10(c)(1)(i) to require that the state plan reflect both the agency to which authority is delegated as well as the individuals whose eligibility can be determined by such delegee.

Finally, we are proposing to make changes to § 431.11 regarding state organization. We are proposing to delete the requirement at § 431.11(b) for the state plan to provide for a medical assistance unit within the Medicaid agency. Similarly, we are proposing to delete the requirement at § 431.11(c), redesignated as § 431.11(b), for the state plan to provide a description of the organization and functions of the medical assistance unit and an organization chart, as well as a description of the kinds and numbers of professional medical personnel and supporting staff used in the administration of the plan and their responsibilities. We believe that states should have maximum flexibility to organize themselves however they choose, but seek public comment on this proposal regarding any reasons we should retain this requirement. Finally, we are proposing conforming changes to § 431.10(d), redesignated as § 431.10(c) to delete the references to nongovernmental entities conducting eligibility determinations or Exchange contractors performing eligibility functions.

15. Medical Support and Payments (§§ 433.138, 433.145, 433.147, 433.148, 433.152 and 435.610)

Section 1912 of the Act requires, as a condition of eligibility for Medicaid, that parents seeking coverage cooperate with the state in establishing paternity and in obtaining medical support and payments. These requirements can be waived for good cause. While parents can be denied Medicaid eligibility or terminated from coverage for failure to cooperate, children cannot be denied Medicaid eligibility or terminated from coverage due to a parent's failure to do so. State Medicaid agencies must enter into agreements with the child support agency in the state, or another appropriate state agency, to effectuate section 1912 of the Act and the collection of medical child support. Section 1912 of the Act is implemented at § 433.135 through § 433.154 and § 435.610 of the current regulations.

We propose to revise of § 433.148(a)(2) and § 435.610(a)(2) to provide that, consistent with the practice in many states today, individuals (unless exempt per existing regulations) must agree to cooperate in establishing paternity and obtaining medical support at application, but that enforcement of actual measures to cooperate happen following enrollment in coverage. As discussed in the Medicaid eligibility final rule, states must align the eligibility rules for all insurance affordability programs to the maximum extent possible, to achieve a highly coordinated and streamlined eligibility and enrollment system. Important to the achievement of such a system is that individuals are enrolled in coverage in as close to real time as possible. However, in some cases today, enrollment in Medicaid for parents who are subject to these cooperation requirements is often delayed until the parent can show that he or she has cooperated with the child support agency, undermining the goal of real-time processing of applications. Cooperation with establishing paternity and obtaining medical support is not required for purposes of eligibility for other insurance affordability programs. Because all insurance affordability programs will use the same streamlined application and eligibility determinations and enrollment will be coordinated, an eligibility determination for Medicaid should not be delayed by the cooperation requirements. Further, in states which authorize the Exchange to make Medicaid eligibility determinations, it would not be realistic to expect the Exchange to implement this Medicaid requirement prior to making a determination. Post-enrollment enforcement allows the Exchange to make Medicaid determinations, facilitates coordination among the programs, and ensures individuals have access to coverage in a timely manner.

Under the proposed revisions, individuals must attest on the application that they agree to cooperate with the state in establishing paternity and obtaining medical support payments. However, the state should not wait until otherwise eligible individuals actually begin cooperating before finalizing the eligibility determination and furnishing benefits. If the individual does not cooperate, consistent with the requirements described in § 433.147 of the regulations, the Medicaid agency must take action to terminate eligibility in accordance with part 431 subpart E (relating to notice and fair hearing rights). In addition to the change described above, we are making technical corrections to §§ 433.138, 433.145, 433.147 and 435.610 to update references to pregnant women eligibility under section 1902(a)(10)(A)(i) of the Act to a reference to § 435.116, as promulgated in the Medicaid eligibility final rule, and to update or eliminate references to verification regulations in subpart J of part 435 of the regulations which were eliminated or revised in the Medicaid eligibility final rule. We also propose to delete § 433.152(b)(1) because 45 CFR part 306 no longer exists. Section 433.147(c)(1) is revised and § 433.147(d) is deleted to eliminate references to factors applicable to waiving the cooperation requirement contained in 45 CFR part 232 because part 232 of 45 CFR was removed from the regulations following with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). Finally, we propose to delete § 435.610(c) as no longer relevant since the effective dates referenced were at least 25 years ago.

16. Conversion of Federal Minimum Income Standards for Section 1931 (§§ 435.110 and 435.116)

Section 1902(e)(14)(A) and (E) of the Act, as added by section 2002 of the Affordable Care Act, provides for the conversion of the income standards in effect in the state prior to the Affordable Care Act to thresholds that are not less than the levels that applied on the date of enactment. In our Medicaid Eligibility proposed rule published in the **Federal Register** on August 17, 2011, we proposed to retain the minimum income standards specified in federal statute for each eligibility group, while giving states flexibility to set new standards using Modified Adjusted Gross Income (MAGI) at a level that would take into account a state's current rules regarding how income is counted. We discussed that we considered whether or not states should convert the federal minimum income standards prescribed in statute—for example, the minimum standard for pregnant women and children specified in section 1902(l) and for parents and other caretaker relatives in section 1931(b) of the Act—to a MAGI-equivalent minimum income standard based on the income disregards currently used by the state. We explained that while doing so could result in maintaining eligibility for individuals who might otherwise lose Medicaid due to the elimination of income exclusions and disregards under MAGI, if a state were to reduce its income standard to the minimum permitted, it also would result in different minimum income eligibility standards being applied across states and reduce the amount of eligibility simplification that could be achieved. We finalized the policy in our Medicaid

eligibility final rule, and further noted that the effect of the statute's requirement to raise the statutory minimum standards for children ages 6 to 18 to 133 percent of the FPL under section 1902(a)(10)(A)(i)(VII) of the Act was to align all age groups of children at 133 percent of the FPL, along with adults under age 65, and that a policy that required conversion of federal minimums for younger children would defeat such alignment and result in children in the same family potentially being eligible for different insurance affordability programs depending on their age.

Since the publication of the Medicaid eligibility final rule, the Supreme Court decided in *National Federation of Independent Business* v. *Sebelius,* ____ U.S. ____; 132 S. Ct. 2566; 183 L.Ed. 2d 450 (2012) that the Secretary does not have authority to penalize a state for not adopting the new adult group, resulting in uncertainty regarding whether the new adult group coverage will be available for parents and other caretaker relatives with income at or below 133 percent FPL who do not meet the financial eligibility requirements of section 1931 of the Act. We also issued a Solicitation of Public Input on the Conversion of Net Income Standards to Equivalent MAGI Standards (Solicitation) and received numerous comments on this issue. Commenters noted that in states that do not expand coverage to the new adult group, and who reduce coverage for parents to statutory federal minimum thresholds (the AFDC standard in effect as of May 1, 1988 for the applicable family size), eligibility for coverage for these parents could be restricted if minimum eligibility thresholds are not converted. They noted that if the federal minimum thresholds are less than 100 percent of the FPL, parents in a state that does not expand may not even have the opportunity to receive an advance payment of a premium tax credit to purchase coverage on the Exchange.

In light of the comments received to our Solicitation, we are proposing to require conversion of the federal minimum income standard for section 1931 of the Act. Although the statute is silent with respect to conversion of federal minimum income standards, the intent of sections 1902(e)(14)(A) and (E) of the Act is to ensure that in the aggregate individuals that would have been eligible under Medicaid rules in effect prior to the Affordable Care Act remain eligible once the new MAGI-based methodologies go into effect. Our proposal to direct conversion of the federal minimum standard for section 1931 would implement the conversion requirements in the statute more consistently, which is particularly important in light of the voluntary nature of the low income adult expansion under the Supreme Court's decision. In addition, because pregnancy benefits for pregnant women under § 435.116(d)(4)(i) are tied to the same May 1, 1988 AFDC income standard for the applicable family size, we are proposing that this income limit should also be converted. However, for the reasons stated in the Medicaid Eligibility proposed and final rules, we are not revisiting our policy with respect to the conversion of federal minimum income standards and limits for all other eligibility groups and covered services, which are not required to be converted under the Medicaid eligibility final rule.

II. Essential Health Benefits in Alternative Benefit Plans

A. Background

Beginning in 2014, all non-grandfathered health insurance coverage [1] in the individual and small group markets, Medicaid benchmark and benchmark-equivalent plans (now also known as Alternative Benefit Plans), and Basic Health Programs (if applicable) will cover essential health benefits (EHBs), which include items and services in 10 statutory benefit categories, such as hospitalization, prescription drugs, and maternity and newborn care, and are equal in scope to a typical employer health plan.

B. Provision of the Proposed Rule: Part 440—Medicaid Program; State Flexibility for Medicaid Benefit Packages

1. Subpart C—Benchmark Benefit and Benchmark-Equivalent Coverage

a. Conforming Changes to Medicaid To Align With Essential Health Benefits

Section 1937 of the Act provides states with the flexibility to amend their Medicaid state plans to provide for the use of benefit packages other than the standard Medicaid state plan benefit package offered in that state, for certain populations as defined by the state. These ''Alternative Benefit Plans'' are based on benchmark or benchmark-equivalent packages. There are four benchmark packages described in section 1937 of the Act:

- The benefit package provided by the Federal Employees Health Insurance Benefit plan (FEHB) Standard Blue Cross/Blue Shield Preferred Provider Option;
- State employee health coverage that is offered and generally available to state employees;
- The health insurance plan offered through the Health Maintenance Organization (HMO) with the largest insured commercial non-Medicaid enrollment in the state; and
- Secretary-approved coverage, which is a benefit package the Secretary has determined to provide coverage appropriate to meet the needs of the population provided that coverage.

Under the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171, enacted on February 8, 2006), benchmark-equivalent coverage is provided when the aggregate actuarial value of the proposed benefit package is at least actuarially equivalent to the coverage provided by one of the benefit packages described above, for the identified Medicaid population to which it will be offered. Section 1937 of the Act further provides that certain categories of benefits must be provided in any benchmark-equivalent plan, and other categories of benefits must include ''substantial actuarial value'' compared to the benchmark package.

Section 2001(c) of the Affordable Care Act modified the benefit provisions of section 1937. Specifically, section 2001(c) added mental health benefits and prescription drug coverage to the list of benefits that must be included in benchmark-equivalent coverage; required the inclusion of Essential Health Benefits (EHBs) beginning in 2014; and directed that section 1937 benefit plans that include medical/surgical benefits and mental health and/or substance use disorder benefits comply with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA).

In addition, section 2001(a)(1) of the Affordable Care Act established a new adult eligibility group for low-income adults age 19 to 64 effective January 1, 2014. States that implement this new eligibility group shall provide medical assistance for that group through an Alternative Benefit Plan (which must include EHBs as of the same date) subject to the requirements of section 1937 of the Act.

Finally, section 2004 of the Affordable Care Act, as amended by section 10201(a) of the Affordable Care Act, added a new optional eligibility group for ''former foster care children'' under age 26 that provides that these individuals will not be included in the

[1] For more information on status as a grandfathered health plans under the Affordable Care Act, please see Interim Final Rule, ''Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act.'' Available at: *http://cciio.cms.gov/resources/regulations/index.html#gp.*

new adult eligibility group and exempts these individuals from mandatory enrollment in an Alternative Benefit Plan. Section 2303(c) of the Affordable Care Act provides that medical assistance to individuals described in 1905(a)(4)(C) of the Act (individuals of child bearing age), through enrollment in an Alternative Benefit Plan, shall include family planning services and supplies.

This proposed rule revises current Medicaid regulations to conform to these statutory changes; provides further interpretation of how EHBs apply to Medicaid; and makes other changes to further simplify, clarify and align regulatory requirements between Medicaid and the private insurance market, where appropriate. We issued a State Medicaid Director letter on the above topics on November 20, 2012.

We propose to make the following changes in Medicaid regulations to implement new statutory or regulatory requirements flowing from these provisions. These proposed changes are meant to codify statutory requirements or to align Medicaid regulations to the policies discussed earlier in this proposed rule. The proposed changes to the regulation are as follows:

- Amend § 440.305 by re-designating the current paragraph (d) as § 440.386 and to revise sections (a) and (b) to address the addition of the new adult eligibility group as being eligible for coverage under an Alternative Benefit Plan.
- Amend § 440.315(h) to codify the provision that, while a new eligibility group, former foster care children are statutorily exempt from mandatory enrollment in an Alternative Benefit Plan.
- Add to § 440.335 Benchmark-equivalent health benefits coverage, new paragraphs (b)(7) and (b)(8) to include benchmark-equivalent health benefits coverage for prescription drugs and mental health benefits in accordance with section 2001(c) of the Affordable Care Act.
- Add paragraph (b) to § 440.345 to codify section 2303(c) of the Affordable Care Act to provide that Alternative Benefit Plan coverage provided to individuals described in section 1905(a)(4)(C) of the Act (individuals of child bearing age), include family planning services and supplies.
- Add a new paragraph § 440.345(c), to incorporate section 2001(c)(6) of the Affordable Care Act.
- In § 440.345(d), codify the requirement that Alternative Benefit Plans provide EHBs and include all updates or modifications made thereafter by the Secretary to the definition of EHBs.
- In § 440.345(e), allow Alternative Benefit Plans that are determined to include EHBs as of January 1, 2014 to remain effective through December 31, 2015 without need for updating, at the state's option. We will consult with states and stakeholders and evaluate the process to determine how often states would need to update these types of Alternative Benefit Plans after that date.
- Add a new § 440.347 titled ''Essential Health Benefits'' to incorporate section 2001(c)(5) of the Affordable Care Act.
- In § 440.347(e), codify section 1302(b)(4) of the Affordable Care Act provides that benefit design cannot discriminate ''on the basis of an individual's age, expected length of life, or of an individual's present or predicted disability, degree of medical dependency, or quality of life or other health conditions''. Benefit design non-discrimination policies do not prevent states from exercising Section 1937 targeting criteria.

b. Modifications in Applying the Provisions of This Proposed Rule to Medicaid

As reflected above, the definition and coverage provisions for EHBs described in the ''Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation'' proposed rule published on November 20, 2012, apply to Medicaid except in specific circumstances. The conforming changes we propose to existing regulations, together with the statutory and regulatory requirements already existing in title XIX and the **Federal Register**, form the basis for how the Medicaid program will implement these benefit options.

Given the intersection of section 1937 of the Act and the provisions in the Affordable Care Act relating to EHBs, there would be a two-step process in Medicaid for designing Alternative Benefit Plans. The Affordable Care Act modified section 1937 of the Act to implement two standards for minimum coverage provision; not only must EHBs as defined by the Secretary be provided, but all requirements of section 1937 of the Act continue to apply. States will first select a coverage option from the choices found in section 1937 of the Act. The next step is determining whether that coverage option is also one of the base-benchmark plan options identified by the Secretary as an option for defining EHBs.

- If so, the standards for the provision of coverage, including EHBs, would be met, as long as all EHB categories are covered, including through any necessary supplementation of missing EHB categories.
- If not, states will additionally select one of the base-benchmark plan options identified as defining EHBs. This means that states will compare the coverage between the 1937 of the Act coverage option and the selected base-benchmark plan for defining EHBs and if the 1937 of the Act coverage is missing a category of EHB, supplement accordingly.

In keeping with section 1937 of the Act's waiver of comparability, states may choose to target populations for receipt of specialized benefit packages, allowing for different Alternative Benefit Plans to apply to different populations. Furthermore, we propose at a new § 440.347(c) that a state has the option to select a different base-benchmark plan to establish EHBs for each Alternative Benefit Plan.

As described in the ''Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation'' proposed rule published on November 20, 2012, the state has the opportunity to define habilitative benefits using a transitional approach in which states may either define the habilitative services category or leave it to issuers. In § 156.115(a)(4), it was proposed that if the EHB-benchmark plan does not include coverage for habilitative services and the state does not determine habilitative benefits, a health insurance issuer must select from two options: (1) provide parity by covering habilitative services benefits that are similar in scope, amount, and duration to benefits covered for rehabilitative services; or (2) decide which habilitative services to cover and report on that coverage to HHS. The issuer only has to supplement habilitative services when there are no habilitative services offered in in the base benchmark plan or the state has not exercised its option to define habilitative services under § 156.110(f). We propose that states define this benefit for Medicaid. We are seeking comments regarding whether the state defined habilitative benefit definition for the Exchanges should apply to Medicaid or whether states should be allowed to separately define habilitative services for Medicaid. We are soliciting comments on the option for states to fully define the benefit and various approaches for doing so and whether the habilitative benefit should be offered in parity with the rehabilitative benefit as was contemplated in the ''Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation'' proposed rule published on November 20, 2012. Thus, we reserved § 440.347(d) to

incorporate an approach after comments are received for states to define the Medicaid habilitative services EHB.

We also note two areas where states have questioned application of proposed rules for EHBs with respect to Medicaid, and wish to clarify. Neither requires any regulatory change. First, for Medicaid, medically necessary services, including pediatric oral and vision services, must be provided to eligible individuals under the age of 21 under the Medicaid Early Periodic Screening, Diagnostic and Testing (EPSDT) benefit. As a result, any limitation relating to pediatric services that may apply in a base benchmark plan in the context of the individual or small group market does not apply to Medicaid. Second, section 1927 of the Act sets forth requirements for covered outpatient drugs, whereby drug manufacturers must pay statutorily-defined rebates to the states through the Medicaid drug rebate program. In return, any state that provides payment for drugs must cover all covered outpatient drugs, which may include appropriate limitations on amount, duration, and scope, for the drug manufacturers that participate in the Medicaid drug rebate program. Section 1927 of the Act also applies to Alternative Benefit Plans. Consistent with the current law, states have the flexibility within those statutory and regulatory constructs to adopt prior authorization and other utilization control measures, as well as policies that promote the use of generic drugs.

All other provisions under title XIX of the Act apply, unless, as spelled out in section 1937 of the Act, a state can satisfactorily demonstrate that implementing such other provisions would be directly contrary to their ability to implement Alternative Benefit Plans under section 1937 of the Act.

We also clarify that preventive services as established in November 20, 2012 Patient Protection and Affordable Care Act; Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation apply. Specifically, the proposed rule requires that all EHB Benchmark plans cover a broad range of preventive services including: ''A'' or ''B'' services recommended by the United States Preventive Services Task Force; Advisory Committee for Immunization Practices (ACIP) recommended vaccines; preventive care and screening for infants, children and adults recommended by HRSA's Bright Futures program/project; and additional preventive services for women recommended by Institute of Medicine (IOM).Title XIX premium and cost-sharing provisions apply to preventive services.

2. Other Changes To Simplify, Modernize and Clarify Medicaid Benchmark Requirements and Make Technical Corrections to Coverage Requirements

We also propose to make certain changes to the regulations in order to promote simplification and clarification where needed, and provide some additional flexibilities to states regarding benefit options. The proposed changes to the regulations are as follows:

- In § 440.130, conform our regulatory definition relating to who can provide preventive services with the statute. Our current regulation, § 440.130, states that preventive services must be provided by a physician or licensed practitioner. This is not in alignment with the statutory provision at 1905(a)(13) of the Act that defines ''services * * * recommended by a physician or other licensed practitioner of healing arts within the scope of their practice under State law''.
- Add § 440.386 to allow states greater flexibility when required to publish public notice. We propose modifying the public notice requirement for Alternative Benefit Plans to require that such notice be given prior to implementing a state plan amendment (SPA) when the new Alternative Benefit Plan provides individuals with a benefit package equal to or enhanced beyond the state's approved state plan, or adds additional services to an existing Alternative Benefit Plan. We also propose to retain the requirement to publish public notice prior to submitting a SPA that establishes an Alternative Benefit Plan which provides less benefits than the state's approved state plan, which includes or increases cost sharing of any type, or which amends an approved Alternative Benefit Plan by adding cost sharing or reducing benefits.
- Revise § 440.315(f) by modifying the definition of ''medically frail'' to specifically include individuals with disabling mental disorders (to include children with serious emotional disturbances and adults with serious mental illness), individuals with serious and complex medical conditions, individuals with a physical, intellectual or developmental disability that significantly impairs their ability to perform one or more activities of daily living, or individuals with a disability determination, based on Social Security criteria, or in states that apply more restrictive criteria than the Supplemental Security Income (SSI) program, as the state plan criteria. We are clarifying this language to ensure that all people with disabilities are included in the medically frail definition. We are specifically soliciting comments on whether individuals with a substance use disorder should be added to the definition of ''medically frail'' and therefore exempted from mandatory enrollment in an Alternative Benefit Plan.
- Amend § 440.330(d) by replacing the phrase ''benefits within the scope of the categories available under a benchmark coverage package'' with ''benefits of the type, which are covered in one or more of section 1937 of the Act benchmark coverage packages described in § 440.330(a) through (c)'' in order to clarify that Secretary-approved coverage may include benefits of the type which are covered in 1 or more of the section 1937 of the Act commercial coverage packages. We are also clarifying § 440.335(c) and § 440.360 in the same way.
- Revise § 440.330(d), § 440.335(c) and § 440.360 to indicate that such coverage may, at state option, include the benefits described in sections 1915(i), 1915(j), 1915(k) and 1945 of the Act, and any other Medicaid state plan benefits enacted under title XIX, or benefits available under base benchmark plans described in section 45 CFR 156.100, along with the benefits described in 1905(a) of the Act. When including these benefits, the state must comply with all provisions of these sections. And, consistent with the provisions of sections 1902(k)(1) and 1903(i)(36) of the Act, we provide that the coverage for individuals eligible only through section 1902(a)(10)(A)(i)(VIII) is limited to benchmark or benchmark equivalent coverage, except that we propose that exemptions from mandatory enrollment in such coverage would still be applicable for individuals eligible on that basis consistent with our understanding of congressional intent.

III. Eligibility Appeals and Other Provisions Related to Eligibility and Enrollment for Exchanges

A. Background

This proposed rule supplements and, in some respects, amends provisions originally published as the March 27, 2012 rule titled Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers (''Exchange Final Rule'') (77 FR 18310). The provisions contained in this proposed rule encompass key functions of Exchanges related to eligibility and enrollment. Given that states have relied on the provisions of the Exchange final

rule to plan their systems for 2014, we intend whenever possible, when we finalize this rule, to provide some type of transition for such states, and welcome comments on its design and the length of the transition.

1. Legislative Overview

Section 1311(b) and section 1321(b) of the Affordable Care Act provide that each state has the opportunity to establish an Exchange that: (1) Facilitates the purchase of insurance coverage by qualified individuals through qualified health plans (QHPs); (2) assists qualified employers in the enrollment of their employees in QHPs; and (3) meets other standards specified in the Affordable Care Act. Section 1311(k) of the Affordable Care Act specifies that Exchanges may not establish rules that conflict with or prevent the application of regulations promulgated by the Secretary. Section 1311(d) of the Affordable Care Act describes the minimum functions of an Exchange, including the certification of QHPs.

Section 1321 of the Affordable Care Act discusses state flexibility in the operation and enforcement of Exchanges and related policies. Section 1321(c)(1) directs the Secretary to establish and operate such Exchanges within states that either: (1) do not elect to establish an Exchange, or (2) as determined by the Secretary on or before January 1, 2013, will not have an Exchange operable by January 1, 2014. Section 1321(a) also provides broad authority for the Secretary to establish standards and regulations to implement the statutory standards related to Exchanges, QHPs, and other standards of title I of the Affordable Care Act.

Section 1401 of the Affordable Care Act creates new section 36B of the Internal Revenue Code (the Code), which provides for a premium tax credit for eligible individuals who enroll in a QHP through an Exchange. Section 1402 of the Affordable Care Act establishes provisions to reduce the cost-sharing obligation of certain eligible individuals enrolled in a QHP through an Exchange, including standards for determining whether Indians are eligible for certain categories of cost-sharing reductions.

Under section 1411 of the Affordable Care Act, the Secretary is directed to establish a program for determining whether an individual meets the eligibility standards for Exchange participation, advance payments of the premium tax credit, cost-sharing reductions, and exemptions from the shared responsibility payment under section 5000A of the Code.

Sections 1412 and 1413 of the Affordable Care Act and section 1943 of the Social Security Act (the Act), as added by section 2201 of the Affordable Care Act, contain additional provisions regarding eligibility for advance payments of the premium tax credit and cost-sharing reductions, as well as provisions regarding simplification and coordination of eligibility determinations and enrollment with other health programs.

Unless otherwise specified, the provisions in this proposed rule related to the establishment of minimum functions of an Exchange are based on the general authority of the Secretary under section 1321(a)(1) of the Affordable Care Act.

2. Stakeholder Consultation and Input

HHS has consulted with interested stakeholders on policies related to the eligibility provisions and Exchange functions. HHS held a number of listening sessions with consumers, providers, employers, health plans, and state representatives to gather public input, and released several documents for public review and comment. HHS also released a bulletin that outlined our intended regulatory approach to verifying access to employer-sponsored coverage and sought public comment on the specific approaches.

Finally, HHS consulted with stakeholders through regular meetings with the National Association of Insurance Commissioners (NAIC), regular contact with states through the Exchange grant process, Medicaid consultation, and meetings with tribal leaders and representatives, health insurance issuers, trade groups, consumer advocates, employers, and other interested parties.

We considered all of these comments as we developed the policies in this proposed rule.

3. Structure of the Proposed Rule

The proposed amendments to 45 CFR part 155 in this rule propose standards related to eligibility appeals, notices, and other eligibility standards for insurance affordability programs to facilitate a streamlined process for eligibility for enrollment in a QHP through the Exchange and insurance affordability programs.

Amendments to 45 CFR part 155 subpart A revise existing definitions and propose new definitions.

A technical correction is made to 45 CFR part 155 subpart B.

Amendments to 45 CFR part 155 subpart C provide for standards related to application counselors and authorized representatives.

Amendments to 45 CFR part 155 subpart D propose standards related to eligibility determinations for enrollment in a QHP and for insurance affordability programs.

Amendments to 45 CFR part 155 subpart E propose standards related to enrollment-related transactions, special enrollment periods, and terminations.

The addition of 45 CFR part 155 subpart F proposes standards related to the eligibility appeals process.

Amendments to 45 CFR part 155 subpart H propose standards related to eligibility appeals related to the SHOP.

4. Alignment With Related Rules and Published Information

As outlined previously in this proposed rule, this rule proposes Medicaid provisions associated with the eligibility changes under the Affordable Care Act of 2010. We refer to these provisions throughout this section as the ''Medicaid proposed provisions.''

B. Provisions of the Proposed Regulations: Part 155—Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act

Throughout this proposed rule, we propose technical corrections to regulation sections in part 155 to replace references to section 36B of the Code with the corresponding sections to the Department of Treasury's final rule, Health Insurance Premium Tax Credit (26 CFR 1.36B), published in the May 23, 2012 **Federal Register** (77 FR 30377).

1. Definitions (§ 155.20)

We propose to make a technical correction to the definition of the term ''advance payments of the premium tax credit.'' We note that advance payments of the premium tax credit means the advance payment of the tax credits authorized by section 36B of the Code as well as its implementing regulations. We also propose to remove the reference to section 1402 of the Affordable Care Act, as it concerns cost-sharing reductions as opposed to the premium tax credit.

We propose to make a technical correction to the term ''application filer.'' We clarify that our previous inclusion of an authorized representative in the definition refers to the authorized representative of an applicant. We also cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to define the term ''catastrophic plan'' by reference to section 1302(e) of the Affordable Care Act.

We propose to amend the term ''lawfully present.'' As discussed in preamble to 45 CFR 155.20, the definition of ''lawfully present'' included in the Exchange final rule is intended to align with the definition of ''lawfully residing'' as used in section 214 of the Children's Health Insurance Program Reauthorization Act (Pub. L. 111–3, enacted on February 4, 2009) (CHIPRA). As 42 CFR 435.4 of the Medicaid proposed provisions implements the CHIPRA definition by defining the term, ''lawfully present'', we are proposing to adjust our definition to define ''lawfully present'' through reference to the Medicaid proposed provisions. The definition used in 42 CFR 435.4 of the Medicaid proposed provisions is substantially the same as the definition used in 45 CFR 152.2, with minor modifications, described in more detail in the preamble associated with 42 CFR 435.4, 435.406, and 457.320 of the Medicaid proposed provisions. Generally, these modifications are made in order to achieve greater operational simplification and to align with current policies, including a clarification regarding eligibility for individuals with deferred action under the Deferred Action for Childhood Arrivals (DACA) process.

2. Approval of a State Exchange (§ 155.105)

We propose to make a technical correction in paragraph (b)(2) to cite to the applicable Treasury regulation instead of section 36B of the Code.

3. Functions of an Exchange (§ 155.200)

We propose to revise paragraph (a) to clarify that the Exchange must also perform the minimum functions described in subpart F.

4. Consumer Assistance Tools and Programs of an Exchange (§ 155.205)

We propose to split paragraph (d) into paragraphs (d)(1) and (d)(2), and revise the text to clarify that prior to providing the consumer assistance specified in paragraph (d)(1) of this section, an individual must be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state. This is consistent with proposed § 155.225(b)(2), and is designed to ensure that all types of assistance provided by the Exchange are provided by individuals who are appropriately trained, in order to ensure quality.

5. Certified Application Counselors (§ 155.225)

Section 1413 of the Affordable Care Act directs the Secretary to establish, subject to minimum requirements, a streamlined enrollment system for QHPs and all insurance affordability programs. State Medicaid and CHIP agencies have a long history of offering application assistance programs through which application counselors have had a key role in promoting enrollment for low-income individuals seeking coverage, and we believe that making such assistance available for the Exchange will be critical to achieving a high rate of enrollment. Accordingly, the proposed regulation seeks to ensure that application counselors will also be available in the Exchange to help individuals and employees apply for enrollment in a QHP and for insurance affordability programs by adding § 155.225 to establish the standards for Exchange certification of such application counselors. This language specifies that each Exchange will establish an application counselor program. The proposed standards closely track those for Medicaid application counselors so that the training can be streamlined.

In essence, application counselors will provide the same core application assistance service that is also available directly through the Exchange, as well as through Navigators and licensed agents and brokers; the distinction between these entities is that application counselors are not funded through the Exchange, through grants or directly, or licensed by states as agents or brokers. We believe that this separate class of application counselors is important to ensure that skilled application assistance is available from entities like community health centers and community-based organizations that may not fit in to the other categories. We are proposing a certification process so that individuals and employees will have assurance of the quality and privacy and security of the assistance available through these certified application counselors understanding that individuals may receive some level of informal assistance from family members and others who are not officially certified by the Exchange. We are proposing that certified application counselors would have a relationship with the Exchange so that they could officially support the process while ensuring the privacy and security of personal information. Given the overlap in the scope of responsibilities between application counselors, Navigators, agents and brokers, and other entities that provide help to consumers, we believe a state can develop a single set of core training materials that can be utilized by Navigators, agents and brokers, and application counselors. Additionally, we plan to make selected federal training and support materials available that can be used by states, without the need to develop their own, to the extent that the state uses the model application established by HHS.

In paragraph (a), we propose that staff and volunteers of both Exchange-designated organizations and organizations designated by state Medicaid and CHIP agencies as it is defined in proposed § 435.908 will be certified by the Exchange to act as application counselors, subject to the conditions in paragraphs (b) and (c). The Exchange will certify employees and volunteers of organizations as application counselors, which may include health care providers and entities, as well as community-based organizations, among other organizations. The designation of organizations by state Medicaid and CHIP agencies is subject to proposed § 435.908.

We propose that certified application counselors: (1) Provide information to individuals and employees on insurance affordability programs and coverage options; (2) assist individuals and employees in applying for coverage in a QHP through the Exchange and for insurance affordability programs; and (3) help facilitate enrollment in QHPs and insurance affordability programs. We acknowledge that certified application counselors will not be able to sign the application or make any attestations on behalf of the individual. In contrast, we propose in § 155.227 that an authorized representative can perform that function.

In paragraph (b), we propose standards for certification of individuals seeking to become application counselors. These standards will serve to ensure that application counselors will have the training and skills necessary to provide reliable assistance to consumers, that they disclose to the Exchange and applicant any financial or other relationships (either of the application counselor personally or of the sponsoring organization), that they will comply with the confidentiality requirements that apply to the data they will access in their role as application counselors, including section 6103 of the Internal Revenue Code and section 1902(a)(7) of the Act. Accordingly, we propose that the Exchange will certify as an application counselor any individual who: registers with Exchange; is trained

prior to providing application assistance; complies with applicable authentication and data security standards, and with the Exchange's privacy and security standards adopted consistent with 45 CFR 155.260; provides application assistance in the best interest of applicants; complies with any applicable state law related to application counselors, including state law related to conflicts of interests; provides information with reasonable accommodations for those with disabilities, if providing in-person assistance; and enters into an agreement with the Exchange. We seek comment on whether the Exchange should have the authority to create additional standards for certification or otherwise limit eligibility of certified application counselors beyond what is proposed here.

In paragraph (c) we provide that the Exchange will establish procedures to withdraw certification from individual application counselors, or from all application counselors associated with a particular organization, when it finds noncompliance with the terms and conditions of the application counselor agreement.

In paragraph (d), we propose that the Exchange establish procedures that ensure that applicants are informed of the functions and responsibilities of certified application counselors and provide authorization for the disclosure of his or her information to an application counselor prior to a counselor helping the applicant with submitting an application.

In paragraph (e), we propose that certified application counselors may not impose any charge on applicants for application assistance in order to support access for low-income individuals.

6. Authorized Representatives (§ 155.227)

Under 45 CFR 155.405(c)(1), the Exchange must accept applications from application filers which includes authorized representatives acting on behalf of an applicant. The proposed rules for authorized representatives for Exchanges closely track those for Medicaid. We propose to add a new § 155.227 establishing minimum requirements for the designation of authorized representatives who may act on an individual's or employee's behalf.

In § 155.227(a), we propose that, subject to applicable privacy and security requirements, the Exchange must permit individuals and employees to designate an individual or organization to act on that individual or employee's behalf, or may have such a representative through operation of state law (for example, through a legal guardianship arrangement). The Exchange must not restrict the option to designate an authorized representative to only certain groups of individuals or employees. We propose the Exchange ensures the authorized representative agrees to maintain, or be legally bound to maintain, the confidentiality of any information regarding the individual or employee provided by the Exchange, and that authorized representatives adhere to applicable authentication and data security standards. Additionally, we propose the Exchange ensures the authorized representative is responsible for fulfilling all responsibilities encompassed within the scope of the authorized representation, as described in this section, to the same extent as the individual he or she represents.

In § 155.227(b), we propose the times during which the Exchange must permit an individual or employee may choose to designate an authorized representative. We intend that the single, streamlined application described in 45 CFR 155.405 will provide applicants the opportunity to designate an authorized representative and will collect the information necessary for such representative to enter into any associated agreements with the Exchange as part of the application process, and any alternative application developed by a state under 45 CFR 155.405(b) must do so as well. Individuals and employees who do not designate an authorized representative on their applications will subsequently be able to do so through electronic, paper formats and other modalities as described in 45 CFR 155.405(c)(2). Legal documentation of authority to act on behalf of an individual under state law, such as a court order establishing legal guardianship or a power of attorney, may serve in the place of the individual or employee's designation. The option to submit such documentation is intended to enable these applicants to have authorized representation without requiring duplicate authorization.

In § 155.227(c), we propose that the Exchange must permit an individual to authorize a representative to—(1) Sign the application on the individual's behalf; (2) submit an update or respond to a redetermination for the individual; (3) receive copies of the individual's notices and other communications from the Exchange; and (4) act on behalf of the individual in all other matters with the Exchange. Unlike a certified application counselor, the authorized representative has the ability to sign the application and make attestations on behalf of an individual.

In § 155.227(d), we propose that the Exchange must permit an individual or employee to change or withdraw their authorization at any time. The authorized representative also may withdraw his or her representation by notifying the Exchange and the individual.

In § 155.227(e), we propose that an authorized representative acting as either a staff member or volunteer of an organization and the organization itself must sign an agreement meeting the requirements in § 155.225(b) of this part. While important in instances where an authorized representative is a member or volunteer of an organization, we believe that the protections afforded by the agreement are not logical in cases where an authorized representative is not acting on behalf of an organization. For example, a friend or family member who is authorized to represent an applicant would not be legally obliged to keep the applicant or enrollee's eligibility status confidential. We seek comments on applying the protections in paragraph (e) to authorized representatives more broadly.

In § 155.227(f), we propose that the Exchange require authorized representatives to comply with any applicable state and federal laws concerning conflicts of interest and confidentiality of information.

In § 155.227(g),we propose that designation of an authorized representative must be in writing including a signature or through another legally binding format and be accepted through all of the modalities described in 45 CFR 155.405(c) of this part.

7. General Standards for Exchange Notices (§ 155.230)

We propose to make a technical correction in paragraph (a) to clarify that the general standards for notices apply to all notices sent by the Exchange to individuals or employers. The goal of this change is to eliminate any confusion that may have resulted from the multiple categories of individuals, employees, and employers that were previously listed.

We also propose to revise paragraph (a) by redesignating paragraph (a)(1) as paragraph (a)(4) and redesignating paragraph (a)(2) as paragraph (a)(5). We revise redesignated (a)(2) to change ''; and'' to ''.'' We propose to add new paragraph (a)(1) to indicate that any notice required to be sent by the Exchange to individuals or employers must be written and include an explanation of the action that is reflected in the notice, including the effective date of the action, and we propose to add new paragraph (a)(2) to

require the notice to include any factual findings relevant to the action. We revise paragraph (a)(3) to clarify that the notice must include the citation to, or identification of, the relevant regulations that supports the action.

We propose to add paragraph (d) to allow the Exchange to provide notices either through standard mail, or if an individual or employer elects, electronically, provided that standards for use of electronic notices are met as set forth in § 435.918, which contains a parallel provision. These standards ensure that individuals have the ability to control their preferences regarding how they receive notices; additionally, since notices will include personally identifiable information, these standards ensure that proper safeguards for the generation and distribution of notices are met. Providing an option for individuals and employers to receive notices electronically allows the Exchange to leverage available technology to reduce administrative costs and improve communication. This provision is discussed further in the preamble to § 435.918. We note that the notice standards described in this section apply to notices required throughout 45 CFR part 155, including notices sent by the SHOP Exchange. We propose that the standards specifically described under proposed paragraph (d) do not apply to the SHOP Exchange, because of the distinct nature of the relationship between the SHOP Exchange, employers, and employees. However, we also considered adopting an alternative approach whereby we would propose the same standard for the SHOP Exchange that we propose adopting for the individual market Exchange under paragraph (d), except that the SHOP Exchange would have more flexibility to adopt an all-electronic approach. We note that we expect that the SHOP Exchange may rely more heavily on electronic notices than the individual market Exchange. We seek comment on the approach we have proposed, and whether we should adopt the alternative approach.

8. Definitions and General Standards for Eligibility Determinations (§ 155.300)

We propose to make a technical correction to remove the definition of ''adoption taxpayer identification number'' from paragraph (a), as it will not be used in the income verification process for advance payments of the premium tax credit and cost-sharing reductions, in accordance with proposed rules issued by the Secretary of the Treasury at 77 FR 25381.

We propose to make a technical correction to the definition of, ''minimum value'', to add ''employer-sponsored'' before the words ''plan meets the,'' replace the word ''requirements'' with ''standards'' and cite to applicable Treasury regulations instead of section 36B of the Code. We also propose corrections to the definition of ''modified adjusted gross income'' and ''qualifying coverage in an eligible employer-sponsored plan'' to cite to the applicable Treasury regulation implementing section 36B of the Code.

9. Options for Conducting Eligibility Determinations (§ 155.302)

In § 155.302, we propose to amend paragraphs (a)(1), (b)(4), and (5). We note that this section is currently an interim final rule (77 FR 18451–52). With our proposals below, we intend to modify the interim final rule without finalizing it at this time.

We propose to make a technical correction in paragraph (a)(1) to align the language regarding the Exchange's ability to make eligibility determinations for Medicaid and CHIP with language proposed in § 431.10(c)(2), which specifies that Medicaid eligibility determinations may only be made by a government agency that maintains personnel standards on a merit basis.

We propose to amend paragraph (b)(4)(i)(A), adding language which provides that the withdrawal opportunity is not applicable in cases in which the Exchange has assessed that the applicant is potentially eligible for Medicaid based on factors other than MAGI, in accordance with 45 CFR 155.345(b). In this situation, the application will already be sent to Medicaid for a full determination that includes a determination based on criteria identified in 45 CFR 155.305(c) and (d) and other eligibility criteria not generally considered by an Exchange, such as disability. Therefore, withdrawal of the application in this instance is not applicable. We also propose that an individual's application not be considered withdrawn if the individual appeals his or her eligibility determination for advance payments of the premium tax credit or cost-sharing reductions and the Exchange appeals entity finds that the individual is potentially eligible for Medicaid or CHIP. The added language preserves an individual's right to a Medicaid or CHIP eligibility determination based on the initial date of application, as well as any appeal rights related to that determination.

We propose to amend paragraph (b)(5) to specify that the Exchange also will adhere to the appeals decision for Medicaid or CHIP made by the state Medicaid or CHIP agency, or the appeals entity for such program. The previous language only specified that the Exchange adhere to the initial eligibility determination for Medicaid or CHIP made by the state Medicaid or CHIP agency.

10. Eligibility Standards (§ 155.305)

We propose to amend paragraph (a)(3) to add paragraph (a)(3)(v) concerning the eligibility standards for residency for enrollment in a QHP through the Exchange. We propose to specify that the Exchange may not deny or terminate an individual's eligibility for enrollment in a QHP through the Exchange if the individual meets the standards in paragraph (a)(3) but for a temporary absence from the service area of the Exchange and the individual intends to return when the purpose of the absence has been accomplished, unless another Exchange verifies that the individual meets the residency standard of such Exchange. This proposal is designed to align the Exchange eligibility standards regarding residency with the Medicaid eligibility standards described in 42 CFR 435.403(j)(3). Both this provision and the parallel provision in 42 CFR 435.403(j)(3) are designed to ensure that an individual is not ruled ineligible during a period of temporary absence, which could create significant issues with respect to access to health care, as well as administrative burden associated with termination and reenrollment.

We propose to make technical corrections in paragraphs (f)(1), (f)(2), and (f)(5) to cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to amend paragraph (f)(3) to clarify that advance payments of the premium tax credit and cost-sharing reductions are available on behalf of a tax filer only if one or more applicants for whom the tax filer attests that he or she expects to claim a personal exemption deduction for the benefit year, including the tax filer and his or her spouse, is enrolled in a QHP, that is not a catastrophic plan, through the Exchange. This proposal aligns with the definition of QHP as provided in section 36B of the Code.

We propose to add paragraph (h) to outline the eligibility standards for enrollment through the Exchange in a QHP that is a catastrophic plan, as specified in section 1302(e) of the Affordable Care Act. We note that premium tax credits are not available to support enrollment in a catastrophic plan. In paragraph (h)(1), we propose to add language that an Exchange will

determine a qualified individual eligible for enrollment through the Exchange in a QHP that is a catastrophic plan if he or she has not attained the age of 30 before the beginning of the plan year, in accordance with section 1302(e)(2)(A) of the Affordable Care Act. In paragraph (h)(2), we propose to add language specifying that the Exchange will determine a qualified individual eligible for enrollment through the Exchange in a QHP that is a catastrophic plan if he or she has a certification that he or she is exempt from the shared responsibility payment under section 5000A of the Code based on a lack of affordable coverage or hardship. These standards reflect that the Exchange will only make eligibility determinations for enrollment through the Exchange in a QHP that is a catastrophic plan, as opposed to enrollment in catastrophic plans outside of the Exchange. The eligibility standards for exemptions under section 5000A of the Code will be discussed in future regulations.

11. Eligibility Process (§ 155.310)

In accordance with section 1411(e)(4)(B)(iii) of the Affordable Care Act, section 155.310(h) specifies that the Exchange shall provide a notice to an employer if one of the employer's employees has been determined eligible for advance payments of the premium tax credit or cost-sharing reductions. Sections 1411(e)(4)(B)(iii) and 1411(f)(2) of the Affordable Care Act establish a system of notice to employers and an employer appeal when an employee's eligibility for advance payments of the premium tax credit is based on either the employer's decision not to offer minimum essential coverage to that employee or the plan sponsored by the employer does not meet the minimum value standard or is unaffordable.

Section 4980H of the Code limits the employer's liability for payment under that provision when the employer offers coverage to one or more full-time employees who are ''certified to the employer under section 1411'' as having enrolled in a QHP through the Exchange and for whom an applicable premium tax credit or cost-sharing reduction is allowed or paid. We propose to add new paragraph (i) regarding a certification program pursuant to the Secretary's program for determining eligibility for advance payments of the premium tax credit and cost-sharing reductions in accordance with section 1411(a) of the Affordable Care Act. This certification program is distinct from the notification specified in section 1411(e)(4)(B)(iii) and paragraph (h).

In new § 155.310(i), we propose that the certification to the employer will consist of methods adopted by the Secretary of Treasury as part of the determination of potential employer liability under section 4980H of the Code. In this manner, the certification program will address not only individuals on whose behalf advance payments of the premium tax credit and cost-sharing reductions are provided, but also individuals claiming the premium tax credit only on their tax returns. We welcome comments on this proposal.

We also propose to combine previous paragraphs (i) and (i)(1) into new paragraph (j). We propose to amend paragraph (j) in order to align with proposed revised language in § 155.335, which specifies that the Exchange will redetermine eligibility on an annual basis for all qualified individuals, not only enrollees. This is discussed further in the preamble associated with § 155.335(a). We propose to remove the previous paragraph (i)(2), as it addressed situations in which a qualified individual did not select a plan before the date on which his or her eligibility would have been redetermined as a part of the annual redetermination process. Since the proposed change to § 155.335(a) specifies that all qualified individuals will be redetermined on an annual basis, including paragraph (i)(2) in redesignated paragraph (j) would be unnecessary.

12. Verification Process Related to Eligibility for Enrollment in a QHP Through the Exchange (§ 155.315)

We propose a technical correction in paragraph (b)(2) to clarify that the procedures specified for situations in which the Exchange is unable to validate an individual's Social Security number through the Social Security Administration (SSA) also address situations in which SSA indicates an individual is deceased.

In paragraph (f), we propose to clarify the circumstances that will trigger the inconsistency process described in paragraphs (f)(1) and (2). We clarify that when electronic data are required but data on an individual that is relevant to the eligibility determination is not contained in the electronic data source, the Exchange will follow procedures in paragraphs (f)(1) and (2). Additionally, if electronic data are required but it is not reasonably expected that such data sources will be available within two days of the initial attempt to reach the data source, we clarify that the Exchange will follow procedures in paragraphs (f)(1) and (2), if applicable. We propose this change to clarify that if the Exchange is unable to reach a required electronic data source upon initial attempts, the Exchange may continue to attempt to reach this electronic data source prior to providing an eligibility determination. While we expect that in the majority of cases, such information will be available the next day (for example, when data sources are unavailable very late at night), we include an extra day just to ensure that inconsistency processes are not triggered unnecessarily in order to minimize confusion for individuals and administrative burden for the Exchange. This proposal will ensure that the Exchange completes all possible electronic verifications after the two-day period before requesting additional information from an individual.

We propose to revise paragraph (f)(4), which addresses eligibility for enrollment in a QHP and for advance payments of the premium tax credit and cost-sharing reductions, to clarify that the Exchange will determine eligibility during the period of time described in paragraph (f)(1) of this section based on the information provided by the applicant along with any information that has been verified. Paragraph (f)(1) describes the period during which the Exchange is required to make a reasonable effort to identify and address the causes of an inconsistency including through typographical or other clerical errors, such as by contacting the application filer to confirm the accuracy of the information submitted by the application filer. This effort to resolve the inconsistency without documentation is required by section 1411(c)(3) of the Affordable Care Act, referencing section 1902(ee)(1)(B)(i) of the Act, and section 1411(c)(4)(A)(i) of the Affordable Care Act. We also clarify that we expect that contact made with the individual to resolve typographical or other clerical errors under paragraph (f)(1) will occur primarily in a real-time fashion through the dynamic online application or through the call center as an application is submitted via phone. Therefore, we expect that the initial eligibility determination provided to the individual who is otherwise eligible but for whom inconsistencies are outstanding, will occur, for the most part, after typographical and clerical errors have been addressed. Lastly, we note that to the extent that the effort in paragraph (f)(1) is unsuccessful, existing paragraph (f)(2)(ii) specifies that the Exchange will maintain the eligibility determination during the 90-day period that is provided for an individual to provide satisfactory documentation or otherwise resolve an inconsistency.

We propose to add paragraph (j) concerning the verification process

related to eligibility for enrollment through the Exchange in a QHP that is a catastrophic plan. As noted above, we propose to add language at § 155.305(h) to establish the eligibility standards for enrollment through the Exchange in a QHP that is a catastrophic plan; paragraph (j) provides the corresponding Exchange verification procedures. In paragraph (j)(1), we propose to add language concerning the verification of the applicant's age. We propose two options for this verification. First, the Exchange may accept the applicant's attestation of age without further verification, unless information provided by the applicant is not reasonably compatible with other information previously provided by the individual or otherwise available to the Exchange. Second, the Exchange may examine available electronic data sources that have been approved by HHS for this purpose, based on evidence showing that such data sources are sufficiently current and accurate, and minimize administrative costs and burdens.

In paragraph (j)(2), we propose to add language specifying that the Exchange will verify that an applicant for enrollment through the Exchange in a QHP that is a catastrophic plan based on an exemption from the shared responsibility payment under section 5000A of the Code due to lack of affordable coverage or hardship has a certificate of such an exemption issued by an Exchange. We anticipate that this will be accomplished either through use of the Exchange's records, if the exemption was issued by that Exchange, or through verification of paper documentation if the certificate was issued by a different Exchange. We also note in paragraph (j)(3) that in the event that the Exchange is unable to verify information necessary to determine an applicant's eligibility for enrollment through the Exchange in a QHP that is a catastrophic plan, the Exchange will follow the inconsistency process described in § 155.315(f), except for § 155.315(f)(4), which does not apply to the eligibility criteria for enrollment through the Exchange in a QHP that is a catastrophic plan. That is, an applicant will not be determined eligible through the Exchange in a QHP that is a catastrophic plan until verification of necessary information can be completed. We welcome comments on these provisions.

13. Verifications Related to Eligibility for Insurance Affordability Programs (§ 155.320)

We propose to make a technical correction in paragraph (c)(1)(i) to change ''tax return data'' to ''data regarding annual household income.'' We amend paragraph (c)(1)(i)(A) to include data regarding Social Security benefits as defined in 26 CFR 1.36B–1(e)(2)(iii). This reflects the legislative change made by Public Law 112–56 concerning the treatment of Social Security benefits related to MAGI. Specifically, in some situations, IRS will be unable to calculate MAGI for certain relevant taxpayers who have nontaxable Social Security benefits; the proposed new language in this paragraph reflects the need to obtain this data from the Social Security Administration to support the verification of annual household income. Section 155.320(c)(1)(i) establishes a system through which the Exchange contacts HHS and HHS secures the annual household income data available from IRS and Social Security Administration, for purposes of determining MAGI. We anticipate that the Social Security Administration will provide the full amount of Social Security benefits to HHS for disclosure to the Exchange as part of the verification process described in § 155.320(c).

We propose to make a technical correction in paragraph (c)(1)(i)(A) to remove the language concerning an adoption taxpayer identification number, as it will not be used in the income verification process for advance payments of the premium tax credit and cost-sharing reductions, in accordance with proposed rules issued by the Secretary of the Treasury at 77 FR 25381. We also propose to make a technical correction to cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to make a technical correction in paragraph (c)(1)(ii) to add the word ''calculated'' prior to ''in accordance with 42 CFR 435.603(d).'' We also propose to make a technical correction to cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to make a technical correction in paragraph (c)(3)(i)(D) by adding the word ''the'' after the first word, ''If,'' in the paragraph such that it now reads ''If the Exchange finds that * * *.''

We propose to add paragraph (c)(3)(i)(E) to specify that the Exchange verify that neither advance payments of the premium tax credit nor cost-sharing reductions are already being provided on behalf of an individual, which is an important program integrity measure. As proposed, the language specifies that the Exchange will use information from HHS to support this verification.

We propose to make a technical correction to paragraph (c)(3)(ii)(A) to reflect the amendment made to paragraph (c)(1)(i)(A) of this section, reflecting the legislative change made by Public Law 112–56 concerning the treatment of Social Security benefits related to MAGI.

We propose to amend paragraph (c)(3)(iii) to clarify procedures that the Exchange will follow when an applicant attests that his or her annual household income has increased or is reasonably expected to increase from the annual household income computed based on available data. In general, the proposed language does not modify the general approach of accepting an applicant's attestation to projected annual household income when it exceeds the amount indicated by available data regarding annual household income; however, it provides additional detail regarding the Exchange's procedures to ensure that such an attestation does not dramatically understate income, by checking whether available data regarding current household income indicates that his or her projected annual household income may exceed his or her attestation by a significant amount, and if so, proceeding in accordance with paragraphs (f)(1) through (4) of § 155.315 to verify the applicant's attestation. We have developed these procedures in conjunction with states to clarify an existing provision such that it can be effectively implemented, and solicit comment regarding whether there are ways to further simplify the process.

We propose to amend paragraph (c)(3)(iii)(A) to reflect the proposed amendments to paragraphs (c)(3)(iii)(B) and (C), which are described in more detail below.

We are proposing to redesignate current paragraph (c)(3)(iii)(B) as paragraph (c)(3)(iii)(C). In new paragraph (c)(3)(iii)(B), we propose that if the applicant attests that a tax filer's annual household income has increased or is reasonably expected to increase from annual household income computed based on available data, but available data regarding current household income indicates that his or her projected annual household income may exceed his or her attestation by a significant amount, the Exchange will proceed in accordance with paragraphs (f)(1) through (4) of § 155.315 to verify the applicant's attestation. In newly redesignated paragraph (c)(3)(iii)(C), we propose to add to the prior language of paragraph (c)(3)(iii)(B) such that if other information provided by the application filer (for example, an attestation of current monthly income) indicates that

the applicant's projected annual household income is in excess of his or her attestation by a significant amount, the Exchange will utilize current income data to verify the applicant's attestation. In the event that such data are not available or is not reasonably compatible with the applicant's attestation, we propose that the Exchange follow procedures described in paragraphs (f)(1) through (f)(4) of § 155.315 to verify the attestation. Together, these procedures are designed to provide a common-sense approach to ensuring that the Exchange will complete additional verification for the very limited number of situations in which an attestation to projected annual household income that is in excess of annual household income data may still be understated by a significant margin.

We propose to amend paragraph (c)(3)(vi) to provide more specificity regarding when electronic data other than tax data and information regarding Social Security benefits is sufficient to verify an applicant's attestation of annual income. Based on consultation with a number of states, we propose revisions to paragraphs (c)(3)(vi)(A) through (F), and add paragraph (c)(3)(vi)(G) to better describe the process that the Exchange will follow in situations in which the applicant's attestation to projected annual household income, as described in paragraph (c)(3)(ii)(B) of this section, is greater than ten percent below the annual household income computed in accordance with paragraph (c)(3)(ii)(A), or if data described in paragraph (c)(1)(i) of this section is unavailable when comparing an applicant's attestation to annualized data from MAGI-based income sources. With the proposed text, the process follows the same standards that the Exchange will use for comparisons with annual income data, which is why states recommended that we take this approach.

Specifically, we propose that the Exchange consider an applicant's attestation to projected annual household income as verified if it is no more than ten percent below annual household income computed from the data sources described in paragraph (c)(3)(vi)(A) of this section, which are annualized data from MAGI-based income sources and any other electronic data sources approved by HHS, respectively. We believe that this is a reasonable threshold given that it is the same threshold as is used in comparing an applicant's attestation to tax data and information regarding Social Security benefits, which are the primary sources of verification specified in paragraph (c)(3) of this section.

Consistent with the final rule, the Exchange will follow the procedures specified in § 155.315(f)(1) through (4) for situations in which an applicant's attestation is more than ten percent below annual household income computed from the data sources described in paragraph (c)(3)(vi)(A) of this section, or when such data are unavailable. Taken together, these proposed clarifications are designed to provide operational specificity to states that are developing Exchanges. We solicit comment regarding whether we can provide additional clarification to further support the design of state systems. We propose to make a technical correction to paragraph (c)(3)(vii) to remove the word ''this'' prior to ''paragraph (c)(3),'' and clarify that we are referring to paragraph (c)(3) of this section. We also propose to make a technical correction to cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to make a technical correction in paragraph (c)(3)(viii) to cite to the applicable Treasury regulation instead of section 36B of the Code.

We propose to consolidate paragraphs (d) and (e), currently entitled ''Verification related to enrollment in an eligible employer-sponsored plan'' and ''Verification related to eligibility for qualifying coverage in an eligible employer-sponsored plan,'' respectively, into new paragraph (d). The new proposed paragraph (d) sets forth the rules for verifying enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. The consolidated paragraph, entitled ''Verifications related to enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan'' streamlines the process, provides further detail regarding the standards for these verification procedures, and proposes a process under which an Exchange may rely on HHS to complete this verification.

HHS performed a comprehensive search to identify potential electronic resources to support a real-time verification of eligibility for qualifying coverage in an eligible employer-sponsored plan, which involves verifying whether an individual has access to health coverage through his or her employer, as well as information regarding the employee's share of the premium amount for and minimum value of that health coverage. We explored existing data resources at the state and federal level, and in the private sector, in an effort to pursue a strategy that minimizes burden for Exchanges, employers, and consumers. HHS also published a Request for Information on April 30, 2012, requesting input from potential vendors who might be able to produce a resource that comprehensively supports this verification (*https://www.fbo.gov/?s=opportunity&mode=form&id=96c35957187f37da97e40d2c384b666c&tab=core&_cview=0*. Based on the results of these efforts, HHS determined that a comprehensive data set that could assist in verification for the entire Exchange population will not be available from a single source by October 1, 2013. Information released to employees under section 18B of the Fair Labor Standards Act and the through the Summary of Benefits and Coverage document specified in section 2715 of the Public Health Service Act is not sufficient because, among other issues, it only requires the disclosure of information regarding whether the employer provides minimum essential coverage, and not whether such coverage is affordable as defined in 26 CFR 1.36B–2(c)(3)(v). Further, the information in these disclosures is reported directly to employees and not reported to the Exchange. Additionally, the limited information such as the Employer Identification Number and aggregate cost of coverage in an eligible employer-sponsored plan that will be available on the W–2, and reporting required under sections 6055 and 6056 of the Code, is retrospective in nature. Since the Exchange must verify whether the applicant reasonably expects to have access to qualifying coverage prospectively at the time of open enrollment, this information is not useful. Reporting under sections 6055 and 6056 of the Code will not begin until 2015, although it is anticipated that this reporting could greatly contribute to the integrity of employer verification in the future. In response to the April 26, 2012 bulletin outlining an interim solution for Exchanges to meet the standards for verifying eligibility for qualifying coverage in an eligible employer-sponsored plan (*http://cciio.cms.gov/resources/files/exc-verification-guidance-vach.pdf*, commenters also suggested that HHS seek information to support this verification from insurers. However, insurers are not typically privy to the relevant data elements needed as part of the eligibility determination for advance payments of premium tax credit. The Administration continues to examine ways, both administrative and legislative, by which employer reporting under the Affordable Care Act can be streamlined

both in timeframe and in the number of elements to prevent inefficient or duplicative reporting. We seek comment on policies to promote these goals.

We identified a limited number of data sources to verify enrollment in or eligibility for employer-sponsored coverage at the federal level. HHS will make available data regarding eligibility and enrollment for coverage under the Federal Employee Health Benefit Program (FEHBP) for verification purposes through HHS. This data will only assist in verification for federal employees and their dependents. We also propose that an Exchange use SHOP records to verify enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan.

We propose to amend § 155.320(d) consistent with the interim strategy outlined in the April 26, 2012 bulletin, with one modification that is described in the preamble associated with paragraph (d)(3)(iii). It is anticipated that the strategy proposed below will evolve as additional data and data sources will become available; for this reason, this verification strategy is subject to change in later years. The approach for plan years 2016 and beyond will depend on the identification and or development of one or more data sources to promote a more comprehensive and automated pre-enrollment verification process.

In paragraph (d), we propose the process for verification related to enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. In paragraph (d)(1), we propose that the Exchange must verify whether an applicant reasonably expects to be enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested. In the following paragraphs, we detail a series of data sources that we propose the Exchange will check as a component of this verification, the verification procedures for situations in which data is unavailable or inconsistent with an individual's attestation, and an option for the Exchange to rely on HHS to complete this verification.

In paragraph (d)(2), we propose the data sources the Exchange will use to verify access to employer-sponsored coverage. We also note that consistent with proposed paragraph (d)(4), an Exchange can elect to have HHS conduct the entire verification process described under paragraph (d), including obtaining data from the proposed data sources. In paragraph (d)(2)(i), we propose that the Exchange will obtain data about enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan from any electronic data sources that are available to the Exchange and which have been approved by HHS for this purpose based on evidence showing that such data sources are sufficiently current, accurate, and minimize administrative burden. This provision is designed to support the use of state-based data sources that exist or may be developed by states (for example, those that support CHIP premium assistance programs).

In paragraph (d)(2)(ii), we specify that the Exchange must obtain any available data regarding enrollment in an eligible employer-sponsored plan or eligibility for qualifying coverage in an eligible employer-sponsored plan based on federal employment by transmitting identifying information specified by HHS to HHS. HHS will then match this request to data maintained by the Office of Personnel Management regarding the Federal Employees Health Benefits Program. Further, in paragraph (d)(2)(iii), we propose that the Exchange must obtain data from the SHOP that operates in the state in which the Exchange is operating, which will provide a readily available source of information with minimal administrative burden.

Finally, in paragraph (d)(2)(iv), we specify that the Exchange must obtain any available data regarding the employment of an applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d), from any electronic data sources that are available to the Exchange and have been approved by HHS for this purpose, based on evidence showing that such data sources are sufficiently current, accurate, and minimize administrative burden. We anticipate that data sources in this category will include state quarterly wage data, as well as commercial sources of current wage data, which we intend to approve for these purposes. These existing data sources provide information regarding employment, which is a basic element of verifying information provided by an individual regarding access to employer-sponsored coverage. Although these data sources, which are also used by the Exchange to verify household income, will only reflect whether an individual is employed and with which employer, and not whether the employer provides health insurance or the characteristics of such health insurance, they can be used as prompts or helpful hints to support accurate attestations, or identify situations in which employment information is inconsistent with an applicant's attestation. Since these data sources do not directly address enrollment in an eligible employer-sponsored plan or eligibility for qualifying coverage in an eligible employer-sponsored plan, we seek comment on whether they should only be used as a point of information for applicants, and not as a point of comparison for the purposes of identifying inconsistencies as part of the verification described in this paragraph.

We believe that the connection to the data sources described in paragraph (d)(2) will be minimally burdensome for Exchanges, considering that data under paragraph (d)(2)(i) will not be available for the first year of operations unless an Exchange proposes an acceptable data source to HHS; data under paragraph (d)(2)(ii) will be available through HHS; data under paragraph (d)(2)(iii) will be internal to the Exchange; and data under paragraph (d)(2)(iv) will already be used to verify current income. We solicit comment regarding the feasibility of making the necessary connections by October 1, 2013, and whether alternative approaches should be considered for the first year of operations.

In paragraph (d)(3), we propose procedures for verifying enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. In paragraph (d)(3)(i), we propose that except as specified in paragraphs (d)(3)(ii) or (iii) of this section, the Exchange must accept an applicant's attestation regarding the verification specified in paragraph (d) without further verification.

In paragraph (d)(3)(ii), we propose, if an applicant's attestation is not reasonably compatible with the information specified in paragraphs (d)(2)(i) through (d)(2)(iii) of this section, other information provided by the application filer, or other information in the records of the Exchange, the Exchange will follow the procedures specified in § 155.315(f) of this subpart, which are used throughout this subpart to address inconsistencies. We note that this process involves providing a period of time for an applicant to provide satisfactory documentation, or otherwise resolve the inconsistency, and we solicit comment regarding whether we should take this approach of relying on the applicant, or instead request information directly from his or her employer.

Finally, we propose in paragraph (d)(3)(iii) that if the Exchange does not

have any of the information specified in paragraphs (d)(2)(i) through (d)(2)(iii) for an applicant, and either does not have the information specified in paragraph (d)(2)(iv) for an applicant or an applicant's attestation is not reasonably compatible with the information specified in (d)(2)(iv) of this section, the Exchange must select a statistically significant random sample of such applicants and follow the procedures proposed in paragraphs (d)(3)(iii)(A) through (d)(3)(iii)(G), which are described below, and are generally consistent with the process specified in § 155.315(f), with modifications to ensure that it suits this verification. The April 26, 2012 bulletin discussed initiating and conducting this review later in the benefit year; however, we have proposed that the Exchange initiate the review at the point of eligibility determination and conduct it within the 90-day period that is also used for other verification requests, in order to allow the Exchange to reuse components of the inconsistency process to the maximum extent possible, streamline communications with applicants, and ensure that any changes that need to be made are made as quickly as possible after initial enrollment, and not significantly later in the year after advance payment of the premium tax credit and CSR have been provided for many months. We also note that to the extent that multiple members of a single tax household are selected for the sample, we expect that the Exchange will consolidate the activities under this section, including communications with employers.

We propose to handle inconsistencies with the information specified in paragraph (d)(2)(iv) through the sampling process, rather than through the procedures specified in § 155.315(f) because the information specified in paragraph (d)(2)(iv) only reflects employment, and does not provide comprehensive information regarding enrollment in an eligible employer-sponsored plan or eligibility for qualifying coverage in an eligible employer-sponsored plan; further, we anticipate that information that is available under paragraph (d)(2)(iv) may be somewhat dated. We solicit comments regarding whether this is a suitable approach, whether the information in paragraph (d)(2)(iv) should only be used as a point of information for applicants and not as a point of comparison for the purposes of identifying inconsistencies as part of the verification described in this paragraph, or if we should treat any inconsistency regarding an employer as an inconsistency that must be resolved in order to continue eligibility.

We believe that requesting and reviewing documentation for a statistically significant random sample of individuals for whom no inconsistencies are identified based on the data in paragraph (d)(2) is appropriate to ensure program integrity while minimizing administrative burden, and also may inform future verification approaches. We request comments on a methodology by which an Exchange could generate a statistically significant sample of applicants and whether there are ways to focus the sample on individuals who are most likely to have access to affordable, minimum value coverage. By using a process that maintains the policy and operational framework of the inconsistency process for these individuals, we leverage existing Exchange processes and also provide an option for advance payments of the premium tax credit and cost-sharing reductions during the period in which the Exchange is working to obtain additional information.

First, in paragraph (d)(3)(iii)(A), we propose that the Exchange will provide notice to an applicant who is selected as part of the sample indicating that the Exchange will be contacting any employer identified on the application for the applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d) to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested. We expect that this notice will not specify a time period for the completion of these activities, and will notify the applicant that the Exchange will provide an additional communication only if information gathered will change anything regarding his or her eligibility. We seek comment on ways the Exchange may communicate this sampling process to consumers with the intention of minimizing confusion.

In paragraph (d)(3)(iii)(B), we propose that the Exchange proceed with all other elements of eligibility determination using the applicant's attestation, and provide eligibility for enrollment in a QHP to the extent that an applicant is otherwise qualified. And in paragraph (d)(3)(iii)(C), we propose that the Exchange ensure that advance payments of the premium tax credit and cost-sharing reductions are provided on behalf of an applicant who is otherwise qualified for such payments and reductions, as described in § 155.305 of this subpart, if the tax filer attests to the Exchange that he or she understands that any advance payments of the premium tax credit paid on his or her behalf are subject to reconciliation. The provisions in paragraphs (d)(3)(iii)(B) and (C) are identical to those in § 155.315(f), based on the principle that an individual should be determined eligible based on his or her attestation during the period in which the Exchange is seeking additional information.

Next, in paragraph (d)(3)(iii)(D), we propose that the Exchange make reasonable attempts to contact any employer identified on the application for the applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d) to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested. We expect that this will involve the Exchange using the employment information provided by an applicant and contacting employers via phone or mail.

One alternative we considered was to rely on consumers to obtain information from their employer or employers. We chose not to take this approach since the application will already solicit all necessary information from consumers, and so it is unclear what would be gained through a second information request to consumers. We seek comment on this alternative and others to implement this process while minimizing burden on consumers, employers, and Exchanges. We also seek comment on ways the Exchange can most efficiently interact with employers, including other entities that employers may rely upon to support this process, such as third-party administrators.

In paragraph (d)(3)(iii)(E), we propose that if the Exchange receives any information from an employer relevant to the applicant's enrollment in an eligible employer-sponsored plan or eligibility for qualifying coverage in an eligible employer-sponsored plan, the Exchange will determine the applicant's eligibility based on such information and in accordance with the effective dates specified in § 155.330(f) of this subpart and if such information changes his or her eligibility determination, notify the applicant and his or her employer or employers of such determination in accordance with the notice requirements specified in 155.310(g) and (h) of this part. We propose to limit notifications to situations in which the information provided by an employer changes an applicant's eligibility determination, as

notifying an applicant that his or her eligibility is unchanged requires additional effort and could be confusing. We anticipate that as an alternative, the initial notice that indicates that the Exchange will be requesting additional information from an applicant's employer will state that the Exchange will notify him or her if anything changes based on additional information received by the Exchange. We solicit comments on this approach.

In paragraph (d)(3)(iii)(F), we propose that if, after a period of 90 days from the date on which the notice described in paragraph (d)(3)(iii)(A) of this section is sent to the applicant, the Exchange is unable to obtain the necessary information from an employer, the Exchange will determine the applicant's eligibility based on his or her attestation regarding that employer. If an individual has multiple employers, and not all employers provide information, the Exchange would determine eligibility based on the information provided by the employers that did respond, along with the information submitted by the applicant with respect to the employers that did not respond. We note that we do not propose that the Exchange provide an additional notice to the applicant and his or her employer based on the actions specified in paragraph (d)(3)(iii)(F), as using the applicant's attestation at the close of the 90-day period would by definition mean that his or her eligibility is unchanged. This is consistent with our approach in paragraph (d)(3)(iii)(E). As with that approach, we seek comment on this proposal and whether it is preferable to include an additional notice to the applicant and employer at the end of the 90-day period.

Finally, in paragraph (d)(3)(iii)(G), we propose that in order to carry out the process described in paragraph (d)(3)(iii) of this section, the Exchange must only disclose an individual's information to an employer to the extent necessary for the employer to identify the employee. This is the only disclosure that we believe is necessary to support this verification process. An employer will receive separate notice from the Exchange regarding an employee who is eligible for advance payments of the premium tax credit and cost-sharing reductions, as well as the employer's right to appeal.

We seek comments on this proposed approach and whether there are ways these procedures can further minimize burden on the Exchange, employers, and consumers. We also note that consistent with proposed paragraph (d)(4), an Exchange can elect to have HHS conduct the entire verification process described under paragraph (d), including sampling and inconsistency resolution.

We note that other sections of the Exchange final rule and the proposed regulation ensure that eligibility determinations are being made based on the most accurate information available regarding enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. Specifically, in § 155.310(h), we specify standards for providing employers with a notice alerting them of their employee's eligibility for advance payments of the premium tax credit or cost-sharing reductions. Further, in § 155.555, we propose a process through which employers can appeal the finding that an employee's coverage is unaffordable or does not meet minimum value. The verification procedures presented in this section along with these notice and appeals provisions will ensure that employers can challenge eligibility determinations for advance payments of the premium tax credit that are made based on the Exchange's findings about the coverage they offer to their employees. This entire system, taken together, ensures that consumers and employers are protected from adverse consequences of inaccurate determinations.

In addition to the verification procedures proposed this section, we are taking steps to help consumers with providing information related to access to employer-sponsored coverage on the application. We suggest the use of a voluntary pre-enrollment template to assist applicants in gathering the information about access to coverage through an eligible employer-sponsored plan as required by the Exchange to determine eligibility for advance payments of the premium tax credit and cost-sharing reductions. We envision that an applicant would download a one-page template from the Exchange web site and present the document to his or her employer (or the employer of his or her spouse or parent). This template would enable the applicant to gather the information necessary from the relevant employer regarding the employer's coverage offerings.

Alternatively, an employer could voluntarily download and populate the template with information regarding its coverage offerings and distribute to employees at hiring, upon request, on the employer intranet or benefit site, or in conjunction with other information about employer-sponsored coverage provided by the employer to employees. When an individual completes his or her Exchange application, he or she would provide the information from the completed template in response to relevant questions on the single, streamlined application. We seek comments on the use of this pre-enrollment template and ways it can be used to assist consumers with providing the necessary information to complete the verification described in this paragraph while minimizing burden on employers. Elements of this tool can be commented upon as part of the information collection request related to the Supporting Statement for Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Benefits Exchanges, Medicaid, and Children's Health Insurance Program Agencies (CMS–10440). We intend to release the template for comment in the near future.

We also propose, pursuant to authority under section 1411(d) of the Affordable Care Act, that an Exchange may rely on HHS to complete this verification. We first indicated that we were exploring this in a set of questions and answers released on November 29, 2011,[2] and we received a significant amount of feedback from states indicating that this would be useful. As outlined in paragraph (d)(4), we propose that the Exchange may satisfy the provisions of this paragraph by implementing a verification process performed by HHS, provided that the Exchange sends the notices described in 45 CFR 155.310(g) and (h) of this part; other activities required in connection with the verifications described are performed by the Exchange in accordance with the standards identified in this subpart or by HHS in accordance with the agreement described in paragraph (d)(4)(iv) or this section; the Exchange provides all relevant application information to HHS through a secure, electronic interface, promptly and without undue delay; and the Exchange and HHS enter into an agreement specifying their respective responsibilities in connection with the verifications described in this paragraph. We anticipate that under this option, the Exchange would collect an individual's attestations regarding eligibility for qualifying coverage in an eligible employer-sponsored plan and integrate the verification outcome in to the eligibility determination for advance payments of the premium tax credit and cost-sharing reductions, and HHS would provide the other components of the

[2] *http://cciio.cms.gov/resources/files/Files2/11282011/exchange_q_and_a.pdf.pdf.*

process. We welcome comments on this proposed option.

We propose to remove paragraph (e) as it has been incorporated into § 155.320(d). Due to removing this paragraph, we propose to redesignate paragraph (f) as paragraph (e).

14. Eligibility Redetermination During a Benefit Year (§ 155.330)

We propose to amend paragraph (d)(1)(ii) to clarify that the Exchange will conduct periodic examination of data sources to identify eligibility determinations for Medicare, Medicaid, CHIP, or the BHP, if a BHP is operating in the service area of the Exchange, only for enrollees on whose behalf advance payments of the premium tax credit or cost-sharing reductions are being provided, as opposed to all QHP enrollees, since this information is not relevant to eligibility for enrollment in a QHP without advance payments and cost-sharing reductions.

In 45 CFR 155.330(e)(1)(ii) and 155.335(c) of the Exchange final rule, we describe how the Exchange must notify an enrollee of his or her redetermination as the result of situations in which an enrollee reports a change in circumstance, or the Exchange conducts limited periodic data matching or an annual redetermination. We seek comment on adding a provision such that if an enrollee experiences a change in his or her level of cost-sharing reductions as a result of a redetermination occurring under 45 CFR 155.330(e)(1) or 155.335(c), the notice issued by the Exchange will describe how the enrollee's amount of deductibles, co-pays, coinsurance, and other forms of cost sharing would change as a result of the change in level of cost-sharing reductions if the enrollee stays in the same QHP (and only changes plan variations). We note that an enrollee who experiences a change in the level of cost-sharing reductions as a result of a redetermination will qualify for a special enrollment period to change QHPs, in accordance with § 155.420(d)(6). We believe that including this information in the notice describing how the enrollee's amount of deductibles, co-pays, coinsurance, and other forms of cost sharing would change as a result of the change in level of cost-sharing reductions if the enrollee stays in the same QHP (and only changes plan variations) will be particularly important in the event an individual does not decide to change QHPs during the special enrollment period. We solicit comment on whether HHS should adopt this approach.

We propose to consolidate and revise existing paragraphs (e)(2) and (e)(3) into new paragraph (e)(2) to clarify how the Exchange should proceed when data matching indicates that an individual is deceased. In paragraph (e)(2)(i), we clarify the procedures that the Exchange will follow for data matches that indicate that an individual is deceased. Clarifying the application of these procedures permits the Exchange to properly effectuate an eligibility redetermination based on death without a response from the individual who data indicates is deceased, as the deceased enrollee will not be able to respond and confirm the updated information. We also note that the procedures in paragraph (e)(2)(i) provide an opportunity for an individual to address incorrect data matches in the extremely limited situations in which they may occur.

In revised paragraph (e)(2)(ii), we propose the process the Exchange follows after identifying updated information regarding income, family size, or family composition through data matching; we reiterate that information regarding death does not require the Exchange to follow these procedures. The only difference between this proposal for paragraph (e)(2)(ii)(B) and new paragraph (e)(2)(ii)(D) and the regulation text in its current form is to clarify that if an enrollee provides more up-to-date information in response to the notice regarding the information identified through periodic data matching, the Exchange will proceed in accordance with paragraph (c)(1), which provides procedures for verification of enrollee-reported changes. The prior language did not specify that enrollee-reported information would be subject to verification, which was an oversight we propose to rectify here.

We propose to amend paragraph (f) to incorporate changes as a result of eligibility appeals decisions, as well as changes that affect only enrollment or premiums, but do not affect eligibility. Changes affecting only enrollment or premiums include those changes that must be submitted to health insurance issuers as part of an enrollment transaction, but do not require an eligibility redetermination. Examples include name changes, phone number changes, or changes to the amount of tax credit a household elects to apply to its premium. Incorporating concerns from states, the proposed changes to paragraph (f) are designed to bring the effective dates under this section in line with the effective dates for enrollment, as specified in subpart E, which are aligned with the typical QHP billing cycle. In particular, we note that the process used to provide initial enrollment information to QHP issuers will be the same as the process used to provide updates, and so the ability to create parallel timing should support efficient operations. The modified effective dates are also designed to accommodate the limited situations in which retroactive eligibility may be necessary. We note that advance payments of the premium tax credit and cost-sharing reductions may only be provided for a ''coverage month'' as defined in 26 CFR 1.36B–3(c).

First, in paragraph (f)(1), we propose that, except as specified in paragraphs (f)(2) through (f)(7), the Exchange must implement the changes as described in paragraph (f)(1). As proposed here, paragraph (f)(1)(i) provides that changes resulting from a redetermination under this section must be implemented on the first day of the month following the date of the notice described in paragraph (e)(1)(ii) of this section. We propose in paragraph (f)(1)(ii) that changes resulting from an appeal decision under subpart F must be implemented on the first day of the month following the date of the notices described in §§ 155.545(b) and 155.555(k), or on the date specified in the appeal decision pursuant to § 155.545(c)(1). As the Exchange will not be required to provide a notice for changes affecting only enrollment through the Exchange or premiums, the Exchange must implement the changes as described in paragraph (f)(1)(iii) based instead on when the Exchange is notified of the change. We anticipate that this notice may come from the enrollee or the QHP issuer, depending on the nature of the change. We propose to amend paragraph (f)(2) to clarify that except as specified in paragraphs (f)(3) through (f)(7) of this section, the Exchange may determine a reasonable point in a month, no earlier than the 15th of the month, after which a change as described in paragraph (f)(1) of this section will not be effective until the first day of the month after the month specified in paragraph (f)(1) of this section. This proposal is designed to align the effective dates for redeterminations to align with the effective dates for enrollment, as specified in subpart E of this part, which provide that in general, a QHP selection will be effective on the first of the month following the selection only if the selection is made by the 15th of the month.

We propose to redesignate current paragraph (f)(3) as paragraph (f)(7), and propose a new paragraph (f)(3) to provide that except as specified in paragraph (f)(7) of this section, the

Exchange must implement a change described in paragraph (f)(1) of this section resulting in a decreased amount of advance payments of the premium tax credit or cost-sharing reductions, including when an individual becomes newly ineligible for advance payments of the premium tax credit or cost-sharing reductions, and for which the date of the notices described in paragraphs (f)(1)(i) and (ii) of this section, or the date on which the Exchange is notified in accordance with paragraph (f)(1)(iii) of this section is after the 15th of the month, on the first day of the month after the month specified in paragraph (f)(1) of this section. We provide this exception to paragraph (f)(1) because a decrease in the amount of cost-sharing reductions effectuated after the 15th of the month results in operational challenges for issuers due to the nature of QHP billing cycles. We understand that cost-sharing reductions will be applied at the point-in-time in which an enrollee pays for their services, and thus the potential for a retroactive decrease in cost-sharing reductions will pose complications regarding services for which the enrollee has already paid. Similarly a retroactive decrease in advance payments of the premium tax credit will also create problems for issuers regarding the billing of previous premiums. Thus, we propose that they also be effectuated on the first day of the month after the month specified in paragraph (f)(1) of this section.

We propose to add paragraph (f)(4) to provide that except as specified in paragraph (f)(7) of this section, the Exchange must implement changes that result in an increased level of cost-sharing reductions and for which the date of the notices described in paragraphs (f)(1)(i) and (ii) of this section, or the date on which the Exchange is notified in accordance with paragraph (f)(1)(iii) of this section is after the 15th of the month, on the first day of the month after the month specified in paragraph (f)(1) of this section. As discussed above concerning paragraph (f)(3) of this section, a retroactive increase in the level of cost-sharing reductions will pose complications for issuers regarding those services that the enrollee has already paid for. As such, we also propose that the changes in paragraph (f)(4) be implemented effective the first day of the month after the month specified in paragraph (f)(1) of this section.

We propose to add paragraph (f)(5) to provide that the Exchange may implement a change associated with the events specified in § 155.420(b)(2)(i) and (ii) (birth, adoption, placement for adoption, marriage, and loss of minimum essential coverage) on the coverage effective dates described in § 155.420(b)(2)(i) and (ii) respectively, and will ensure that advance payments of the premium tax credit and cost-sharing reductions are effective on the first day of the month following such events, unless the event occurs on the first day of the month. These changes are to align the effective dates for eligibility with those specified in § 155.420. We also considered whether to adjust eligibility effective dates for the purposes of advance payments of the premium tax credit and cost-sharing reductions in cases of birth, adoption, or placement for adoption such that eligibility for APTC and CSR would be effective on the date of birth, adoption, or placement for adoption. However, we do not believe that current regulations under section 36B of the Code address this situation. We expect that the Secretary of the Treasury will provide through subsequent guidance that a child may be eligible for the premium tax credit for the month the child is born or is adopted, placed for adoption, or placed in foster care. We expect to amend our regulations as necessary in final rulemaking to match the guidance from the Secretary of the Treasury. We note that the special enrollment period described in § 155.420(b)(2)(i) does not currently address children placed in foster care, and we solicit comments regarding whether we should expand it to cover children placed in foster care, and then make a corresponding change to eligibility effective dates in this paragraph.

We propose to add paragraph (f)(6) specifying that notwithstanding paragraphs (f)(1) through (f)(5) of this section, the Exchange may implement a change associated with the events described in § 155.420(d)(4), (5), and (9) based on the specific circumstances of each situation. We seek to provide flexibility for the Exchange to respond to these potential errors, violations, or exceptional circumstances as needed to effectuate the appropriate eligibility date for enrollees, including those situations that impact the amount of advance payments of the premium tax credit and cost-sharing reductions, while also minimizing operational complications for issuers associated with the QHP billing cycle. We reiterate here that advance payments of the premium tax credit and cost-sharing reductions may only be provided for a ''coverage month'' as defined in 26 CFR 1.36B–3(c), which requires coverage to be in place on the first of the month; we note that the Exchange may not authorize these benefits for periods other than when an individual is in a coverage month. In redesignated paragraph (f)(7), we propose to maintain the existing language of paragraph (f)(3) in accordance with the proposed changes throughout paragraph (f).

We welcome comments on these changes.

15. Annual Eligibility Redetermination (§ 155.335)

We propose to amend paragraphs (a), (b), (c), (e), (f), (g), (h), (k), and (l) of this section to specify that subject to the limitations specified in paragraph (l) and new paragraph (m), the Exchange will conduct an annual eligibility redetermination for all qualified individuals, not only those who are enrolled in a QHP. Our proposal thus replaces the word ''enrollee'' with the term ''qualified individual'' in these paragraphs. This change accommodates situations in which an individual submitted an application prior to the annual open enrollment period, was determined eligible for enrollment in a QHP with or without advance payments of the premium tax credit and cost-sharing reductions, and did not meet the criteria for a special enrollment period. In such situations, this change will mean that the Exchange will provide such an individual with an annual eligibility redetermination notice, which means that he or she will not have to submit a new application to obtain coverage for the following benefit year. The annual eligibility determination notice projects eligibility for the upcoming benefit year, and provides a streamlined process for individuals to select a QHP for the upcoming year during the annual open enrollment period.

We propose to amend paragraph (b) to include data regarding Social Security benefits as defined under 26 CFR 1.36B–1(e)(2)(ii). This reflects the revision we propose to make in § 155.320(c)(1)(i)(A).

We also propose to make technical corrections to paragraph (l) to specify that if the Exchange does not have authorization to use such qualified individual's tax information, the Exchange will redetermine the qualified individual's eligibility only for enrollment in a QHP, and will notify the enrollee in accordance with the timing described in paragraph (d) of this section. This proposed correction aligns with the preamble from the Exchange final rule at 77 FR 18376.

Lastly, we propose to add new paragraph (m), which provides that if a qualified individual does not select a QHP before the redetermination

described in this section, and is not enrolled in a QHP through the Exchange at any time during the benefit year for which such redetermination is made, the Exchange must not conduct a subsequent redetermination of his or her eligibility for a future benefit year. This proposal is designed to ensure that a qualified individual who never selects a QHP is not redetermined every year, which minimizes burden on the Exchange. For example, if a qualified individual seeks to enroll in a QHP in July, 2014, is determined eligible for a QHP but not a special enrollment period, and then following an annual redetermination in late 2014 for the 2015 benefit year is again determined eligible in a QHP but decides not to enroll at any time up to the point at which the Exchange would conduct his or her next annual redetermination (late 2015), the Exchange will not conduct another annual redetermination in late 2015.

16. Administration of Advance Payments of the Premium Tax Credit and Cost-Sharing Reductions (§ 155.340)

We propose to make technical corrections in paragraphs (b) and (c) to cite to the applicable Treasury regulation instead of Section 36B of the Code.

17. Coordination With Medicaid, CHIP, the Basic Health Program, and the Pre-Existing Condition Insurance Plan (§ 155.345)

We propose to make a technical correction to paragraph (a) to clarify that the agreements that the Exchange enters into with the agencies administering Medicaid, CHIP, and the BHP, if the BHP is operating in the service area of the Exchange, must include a clear delineation of the responsibilities of each ''agency'' as opposed to each ''program.'' We propose to amend paragraph (a)(2) to specify that the agreement the Exchange enters into with other agencies administering insurance affordability programs addresses the responsibilities of each agency to ensure prompt determinations of eligibility and enrollment in the appropriate program without undue delay, based on the date the application is submitted to, or redetermination is initiated by, the Exchange or another agency administering an insurance affordability program. We propose to change the ordering of agencies listed for purposes of clarity. We also propose to redesignate paragraph (a)(3) as paragraph (a)(4), and add a new paragraph (a)(3) to ensure that, as of January 1, 2015, the agreement provides for a combined eligibility notice, as defined in § 435.4, to individuals and members of the same household, to the extent feasible, for enrollment in a QHP through the Exchange and for all insurance affordability programs. Section 155.345(a)(3)(i) includes that prior to January 1, 2015, the notice include coordinated content, as defined in 42 CFR 435.4, while § 155.345(a)(3)(ii) addresses the combined eligibility notice requirement as of January 1, 2015. As defined in § 435.4, a combined eligibility notice is an eligibility notice that informs an individual, or household when appropriate, of his or her eligibility for eligibility for enrollment in a QHP and each of the insurance affordability programs. We are proposing that in most cases the combined notice is issued by the last agency to determine the individual's eligibility, not taking into account eligibility determinations for Medicaid on a non-MAGI basis, and regardless of which agency initially received the application. Providing a combined eligibility notice for eligibility determinations for enrollment in a QHP and for insurance affordability programs, with the exception of eligibility determinations for Medicaid on a non-MAGI basis, would reduce the occurrence of an individual receiving multiple eligibility notices from agencies administering insurance affordability programs based on a single application. To the extent that the eligibility determinations reflected in a combined notice are not made by the agency issuing the notice, the notice should identify the agency that made each eligibility determination that is reflected in the combined notice.

We acknowledge that there are situations in which the provision of a combined eligibility notice may not be appropriate, and expect that agencies administering insurance affordability programs will limit the use of combined eligibility notices to only those situations in which it is beneficial to the applicant. The preamble associated with § 435.1200 describes situations in which the combined eligibility notice may not be appropriate. We request comments on situations in which the combined eligibility notice may or may not be particularly appropriate.

We understand that it may not be operationally feasible for the Exchange and state agencies administering Medicaid, CHIP, and the BHP, if the BHP is operating in the service area of the Exchange, to deliver combined eligibility notices by October, 1, 2013, particularly in cases where the Exchange is performing assessments of eligibility for Medicaid and CHIP based on MAGI in accordance with § 155.302(b). Accordingly, we are proposing a phased-in approach for the provision of a combined eligibility notice in cases where the Exchange is performing assessments of eligibility for Medicaid and CHIP based on MAGI. We propose that the agreements between the Exchange and other agencies administering insurance affordability programs provide for provision of combined eligibility notices by January 1, 2015.

For the period prior to January 1, 2015, when an individual submits an application to the state Medicaid agency, is denied eligibility for Medicaid, found not potentially eligible for CHIP, and is transferred to the Exchange, the state Medicaid agency would send a first notice to an individual, explaining that the individual is denied eligibility for Medicaid, and that the individual's information is being transferred to the Exchange for a determination of eligibility for enrollment in a QHP and for advance payments of the premium tax credit and cost-sharing reductions. The Exchange would then send a second notice explaining the individual's eligibility for enrollment in a QHP and for advance payments of the premium tax credit and cost-sharing reductions. However, after January 1, 2015 and to the extent feasible—when sending a combined notice is part of the agreement among the relevant agencies—in the same scenario, the Exchange would provide a combined eligibility notice that includes information about the individual's denial of eligibility for Medicaid and eligibility for enrollment in a QHP and for advance payments of the premium tax credit and cost-sharing reductions because the Exchange is the last agency to make an eligibility determination. The provision of a combined eligibility notice would also mean that if the Exchange is transferring an individual's information to the state Medicaid or CHIP agency and the individual is Medicaid or CHIP eligible, the Medicaid or CHIP agency would issue the combined eligibility notice that reflects both the findings of the Exchange (not eligible for enrollment in a QHP or advance payments of the premium tax credit or cost-sharing reductions) and of the Medicaid and CHIP agencies (eligible for Medicaid or CHIP).

Under § 155.345(a)(3) and (g)(7) of this proposal, we propose that the Exchange implement the use of a combined eligibility notice as of January 1, 2015, to the extent feasible, and in the interim, provide for the use of coordinated content in the eligibility notice. The Exchange will work with

agencies administering other insurance affordability programs to ensure the inclusion of coordinated content, including coordinated language, in eligibility determination notices. An example of coordinated content would include information about the Exchange and about insurance affordability programs, including specific program names and customer service information for each program, as applicable. Based on the operational readiness of the Exchange and other agencies administering insurance affordability programs, combined eligibility notices may be implemented earlier. However, we note that in states where the FFE is conducting assessments rather than final determinations of eligibility, the FFE will only be able to provide an eligibility notice prior to January 1, 2015 for eligibility determinations made by the FFE.

We request comments on the phased-in approach and the standards proposed related to the provision of a combined eligibility notice and the use of coordinated content for eligibility notices by the Exchange and agencies administering insurance affordability programs, which would include information about the Exchange and about insurance affordability programs, including specific program names and customer service information for each program, as applicable. We have been working in consultation with relevant stakeholders on model notices, and intend to release model notices in early 2013 for use by states that want to rely on HHS' templates for notices instead of developing their own. We also request comments regarding how to assess when provision of a combined eligibility notice is feasible.

We propose to make a technical correction in paragraph (f) to cite to the applicable Treasury regulation instead of Section 36B of the Code.

We propose to make a technical correction to paragraph (g) to change ''or'' to ''and'' and add ''agency or.''

We propose to add new language at paragraph (g)(2) to specify that the Exchange will notify the transmitting agency of the receipt of an electronic account when another agency is transmitting the account to the Exchange in the situation in which an application is submitted directly to the transmitting agency, and a determination of eligibility is needed for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions. Additionally, we propose in (g)(2) that the Exchange notify the transmitting agency of an individual's eligibility determination for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions. This aims to ensure that the Exchange can provide effective customer service, while also aligning with proposed § 435.1200(d)(5).

As such, we propose to make technical corrections to redesignate the paragraphs following paragraph (g)(2). We redesignate paragraph (g)(2) to (g)(3), (g)(3) to (g)(4), (g)(4) to (g)(5), and (g)(5) to (g)(6).

We propose to make a technical correction in paragraph (g)(3) to change ''program'' to ''agency.''

We propose to make technical corrections to paragraph (g)(4) to change ''of'' to ''or,'' and to clarify that the rule is referring to an agency administering an insurance affordability program.

We propose to make a technical correction to remove ''and'' at the end of paragraph (g)(5) and add it at the end of paragraph (g)(6) to provide for the appropriate transition to paragraph (g)(7).

We propose to add paragraph (g)(7) to direct that the Exchange provide the combined eligibility notice, as defined in § 435.4, for eligibility determinations for enrollment in a QHP and for insurance affordability programs, effective on January 1, 2015.

We propose to add paragraph (g)(8) to direct that prior to January 1, 2015, the Exchange include coordinated content, as defined in 42 CFR 435.4, into the notice of eligibility determination provided to the individual when another agency administering an insurance affordability program transfers an individual's account to the Exchange, or that the Exchange issue a combined eligibility notice when the Exchange is the last agency to make an eligibility determination, except for an eligibility determination for Medicaid on a non-MAGI basis. The intent of this provision is to allow the Exchange flexibility to provide coordinated content or a combined eligibility notice, in the event an Exchange is able to provide a combined eligibility notice, prior to January 1, 2015. As noted previously, we understand that the Exchange may not be operationally ready to issue a combined eligibility notice prior to 2015, and so have designed this proposal to allow an appropriate phase-in period.

18. Special Eligibility Standards and Process for Indians (§ 155.350)

We propose to make a technical correction in paragraph (a)(1)(ii) to cite to the applicable Treasury regulation instead of section 36B of the Code.

19. Enrollment of Qualified Individuals Into QHPs (§ 155.400)

We propose to add paragraph (b)(3) to clarify the earlier requirement in 45 CFR 155.400(b)(1) that the Exchange send eligibility and enrollment information to QHP issuers and HHS promptly and without undue delay. In this section, we propose that the Exchange send HHS updated eligibility and enrollment information. We interpret the requirement concerning ''updated eligibility and enrollment information'' to mean all enrollment-related transactions, including, but not limited to, enrollments sent to issuers for which the qualified individual has not yet remitted premiums, enrollments for which payment has been made on any applicable enrollee premium, cancellations of enrollment prior to coverage becoming effective, terminations of enrollment, and enrollment changes (to include terminations and cancellations initiated by issuers).

20. Special Enrollment Periods (§ 155.420)

Section 1311(c)(6)(C) of the Affordable Care Act specifies that the Secretary shall require Exchanges to provide for special enrollment periods, which allow a qualified individual to enroll in a QHP, add or drop dependents enrolled with the qualified individual, or change from one QHP to another outside of the annual open enrollment period. We implemented this provision in section 155.420 of the Exchange final rule published March 27, 2012 (77 FR 18310). The statute further specifies that such periods should be those specified in section 9801 of the Code, as well as other special enrollment periods under circumstances similar to such periods under part D of title XVIII of the Act. Section 155.420 is structured such that the special enrollment periods are listed in paragraph (d), while the effective dates for these special enrollment periods are described in paragraph (b).

In order to clarify the scope of the special enrollment periods described in paragraph (d), we propose to redesignate existing paragraph (a) as paragraph (a)(1) and to add paragraph (a)(2) to define ''dependent'' such that it aligns with the meaning provided in 26 CFR 54.9801–2, a regulation implementing section 9801(f) of the Code.[3] Under this

[3] Note that the special enrollment periods specified in section 9801(f) of the Code are also required in section 701 of the Employee Retirement Income Security Act of 1974 (ERISA) and section 2704 of the PHS Act. (Before the amendments made

Continued

proposal, a dependent would include any individual who is or who may become eligible for coverage under the terms of a QHP because of a relationship to a qualified individual or enrollee. This proposal does not broaden our existing use of dependent throughout this section; rather, it clarifies our existing interpretation such that the availability of special enrollment periods to dependents is limited to those dependents for whom the selected QHP would provide coverage. We propose to apply this definition throughout this section, including for the special enrollment periods not specified in section 9801(f) of the Code, in order to promote efficient operations and uniform standards to guide QHP issuers and Exchanges. We note that this proposal means that those special enrollment periods that specifically mention dependents will be evaluated on a plan-by-plan basis for a given set of individuals, and that a special enrollment period may be available for an individual in some plans but not in other plans.

We also propose to amend paragraph (b)(2)(i), which addresses birth, adoption, or placement for adoption, to clarify that this special enrollment period is applicable for either ''a qualified individual or an enrollee.'' This revision clarifies the existing language in the Exchange final rule, which could have been misinterpreted. We also propose to remove language from paragraph (b)(2)(i) concerning the effective dates for advance payments of the premium tax credit and cost-sharing reductions, which we propose to move to § 155.330(f). We solicit comments regarding whether we should also expand this special enrollment period to cover children placed in foster care. Similarly, we propose to amend paragraph (b)(2)(ii) to clarify that the special enrollment period for marriage and loss of minimum essential coverage is applicable for either a qualified individual or an enrollee.

We propose to add new paragraph (b)(2)(iii) regarding effective dates for qualified individuals or enrollees eligible for a special enrollment period under paragraphs (d)(4), (d)(5) or (d)(9) (respectively the special enrollment period for ''error, misrepresentation, or inaction of an officer, employee, or agent of the Exchange, HHS, or its instrumentalities''; the special enrollment period for when ''the QHP * * * substantially violated a material provision of its contract in relation to the enrollee''; and the special enrollment period for ''exceptional circumstances''). Under this proposal, the Exchange will ensure an effective date that is tailored based on the circumstances around the specific events. This will include, in accordance with any guidelines issued by HHS, providing, when applicable and on a case-by-case basis, that coverage will be effective in accordance with the regular effective dates specified in paragraph (b)(1) or on the date of the event that triggered the special enrollment period under paragraphs (d)(4), (d)(5), or (d)(9) of this section. We believe the nature of the circumstances that will trigger these special enrollment periods make it necessary to provide the Exchange with appropriate flexibility regarding coverage effective dates. We have proposed a similar provision in § 155.330(f), and welcome comments on standards for effective dates in such situations.

We propose to add paragraph (b)(4) to specify that notwithstanding the standards otherwise provided in this section, the Exchange must ensure that the effective dates concerning advance payments of the premium tax credit and cost-sharing reductions adhere to the modified effective dates we have proposed in § 155.330(f). This is designed to bring the effective dates under this section, which are aligned with the typical QHP billing cycle, in line with the effective dates for eligibility, as specified in subpart D. While § 155.330(f) concerns redeterminations and other changes during the benefit year, we clarify that the effective enrollment dates concerning § 155.420(b) apply to both qualified individuals first enrolling in a QHP through the Exchange via a special enrollment period, as well as to current enrollees. We also note that as in existing regulations, there are situations in which eligibility and enrollment effective dates will not perfectly align, such that an enrollment effective date might be immediate, but advance payments of the premium tax credit and cost-sharing reductions might not be effective until the first of a future month.

Accordingly, as noted above, we propose to make a technical correction to remove part of paragraph (b)(2)(i), as well as paragraphs (b)(3)(i)(A) and (B) to remove language concerning advance payments of the premium tax credit and cost-sharing reductions and propose to make a technical correction in paragraph (b)(3)(i) to remove the words ''provided that either'' at the end of the paragraph to reflect this change.

We next propose to amend paragraph (d) to specify that the Exchange must allow, when specified in the paragraphs therein, for a dependent of a qualified individual or enrollee to qualify for a special enrollment period. The previous language allowed a qualified individual or enrollee to qualify for the listed special enrollment periods. The proposed language allows that for certain triggering events specified in paragraph (d), the Exchange will determine a qualified individual or enrollee, as well as his or her dependents, eligible for a special enrollment period, subject to whether the QHP that such individuals wish to select covers the dependents. Therefore, for specified special enrollment periods, a qualified individual or enrollee who experiences the triggering event will be eligible for the special enrollment period, along with any dependents able to enroll in the plan selected for the qualified individual or enrollee. For example, if a 25 year old loses access to minimum essential coverage, he will qualify for a special enrollment period, along with his parents and any other dependents who may enroll in the plan selected.

We propose amending this language in order to accommodate situations in which all members of a household would likely need to enroll in or change QHPs in response to an event experienced by one member of the household. We also propose to make technical corrections to each paragraph within paragraph (d) to replace the introductory word ''A'' with ''The'' in order to reflect that in response to each triggering event, the Exchange will allow a qualified individual or enrollee, and when specified, his or her dependent to qualify for a special enrollment period, subject to whether the QHP covers the dependent.

We also propose to make a technical change to paragraph (d)(1) to add the words ''his or her'' after ''The qualified individual or''. We also propose to clarify the triggering events associated with a qualified individual or his or her dependent losing minimum essential coverage. We propose to add paragraph (d)(1)(i) to specify that the triggering event in the case of a QHP decertification is the date of the notice of decertification as described in § 155.1080(e)(2). We also propose to add paragraph (d)(1)(ii) to specify that the triggering event in all other cases is the date the individual or dependent loses eligibility for minimum essential coverage. This proposal adds specificity

by the Affordable Care Act, the special enrollment provisions were located in section 2701(f) of the PHS Act; after the amendments made by the Affordable Care Act, these requirements are found in PHS Act section 2704(f).) Similarly, the special enrollment periods specified 26 CFR 54.9801–2 are also found in 29 CFR 2590.701–6 and 45 CFR 146.117.

regarding these triggering events in order to minimize gaps in coverage for a qualified individual or his or her dependent.

We propose to amend paragraphs (d)(3) through (d)(7), as well as (d)(9), to clarify the specific individuals that are affected by the eligibility of a qualified individual for each special enrollment period. In paragraph (d)(3), we make a technical correction to add the word, ''qualified'', before ''individual'', to specify that only a qualified individual may be eligible for the special enrollment period for an individual who was not previously a citizen, national, or lawfully present gaining such status. In paragraphs (d)(4), (d)(5), (d)(7), and (d)(9) (concerning errors in enrollment, contract violations, permanent relocations, and exceptional circumstances), we specify that these special enrollment periods apply to a qualified individual or enrollee, as well as to his or her dependent. This is because errors in enrollment, contract violations, permanent relocations, and exceptional circumstances that affect only one individual, to the extent that this occurs, will likely result in him or her needing to change QHPs for his or her entire family. We considered similar amendments for other special enrollment periods, but decided not to revise them, as we do not believe that the circumstances of other special enrollment periods warrant movement of related individuals. However, we solicit comment regarding whether we should permit such movement of related individuals for other special enrollment periods.

We further propose to amend paragraph (d)(6) to specify that the Exchange will provide a special enrollment period for (i) An enrollee in a QHP who is determined newly eligible or newly ineligible for advance payments of the premium tax credit or experiences a change in eligibility for cost-sharing reductions, (ii) his or her dependent who is an enrollee in the same QHP and who is determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost sharing reductions, or (iii) a qualified individual or his or her dependent enrolled in qualifying coverage in an eligible employer-sponsored plan who are determined newly eligible for advance payments of the premium tax credit based in part on a finding that such individual will cease to be eligible for qualifying coverage in an eligible-employer sponsored plan in the next 60 days, and is allowed to terminate existing coverage. Proposed paragraph (d)(6)(iii) differs from paragraphs (d)(6)(i) and (ii) in that it allows the qualified individual or his or her dependent to be determined eligible for this special enrollment period and the opportunity to enroll in a new QHP prior to the end of his or her employer-sponsored coverage. However, he or she is not eligible to receive advance payments of the premium tax credit until the end of his or her coverage through such eligible employer-sponsored plan. The existing language provided this special enrollment period regardless of an individual's current coverage status, which could have resulted in any individual who did not apply during the initial annual open enrollment period being able to receive a special enrollment period. This could have been disruptive to the market, because the potential for an individual to be eligible for this special enrollment period regardless of his or her coverage status could heighten adverse selection by dissuading more healthy individuals from enrolling in a QHP during the initial annual open enrollment period. We provide this special enrollment period for the dependent of an enrollee determined newly eligible or newly ineligible for advance payments of the premium tax credit or an enrollee experiencing a change in eligibility for cost-sharing reductions to account for situations where members of different tax households are enrolled together in the same plan and otherwise would be prevented from enrolling together in a new plan during the special enrollment period.

We also specify in paragraph (d)(6) that the Exchange must permit a qualified individual, or his or her dependent, enrolled in qualifying coverage in an eligible employer-sponsored plan who are eligible for this special enrollment period due to their plan no longer being affordable or providing minimum value within the next 60 days prior to the end of his or her coverage, to access this special enrollment period prior to the end of his or her coverage through such an eligible employer-sponsored plan if he or she is allowed to terminate existing coverage. This protects those qualified individuals from potential gaps in coverage, while also outlining a reasonable period of time in which they are eligible for this special enrollment period such that it does not pose significant operational complications for the Exchange.

We propose to make a technical correction to paragraph (d)(8) such that the beginning of the paragraph now reads, ''The qualified individual who is an Indian''. The previous language did not specify that this special enrollment period was limited to a qualified individual.

Finally, we propose to add a new paragraph (d)(10) to provide a special enrollment period for a qualified individual or his or her dependent, who is enrolled in an eligible employer-sponsored plan that does not provide qualifying coverage, as the term is defined in § 155.300 of this part, and is allowed to terminate his or her existing coverage. Under this proposal, the Exchange would permit such an individual to access this special enrollment period 60 days prior to the end of his or her coverage in an eligible employer-sponsored plan. This protects those qualified individuals from potential gaps in coverage and ensures that a qualified individual and his or her dependent would not be prevented from enrolling together in a QHP during the special enrollment period; we note that an individual's eligibility for advance payments of the premium tax credit and cost-sharing reductions will still be subject to termination of existing enrollment in an eligible employer-sponsored plan.

21. Termination of Coverage (§ 155.430)

We propose to amend paragraph (b)(1) to clarify that it specifically refers to enrollee-initiated terminations. We further propose to divide paragraph (b)(1) into two paragraphs. We propose to add paragraph (b)(1)(i) to account for circumstances in which, through periodic data matching, an Exchange finds an enrollee eligible for other minimum essential coverage, thus resulting in the enrollee's ineligibility for advance payments of the premium tax credit. The Exchange final rule currently provides that enrollees must actively terminate their enrollment in a QHP after losing eligibility for advance payments of the premium tax credit and cost-sharing reductions, or otherwise the enrollee will remain enrolled in multiple plans, since gaining other minimum essential coverage does not affect eligibility for enrollment in a QHP. Under the existing rule, enrollees who did not initiate a termination upon gaining other minimum essential coverage would maintain coverage in a QHP without advance payments of the premium tax credit. HHS believes that the majority of individuals who gain other minimum essential coverage will not want to maintain coverage in a QHP without advance payments of the premium tax credit and cost-sharing reductions. To accommodate this anticipated preference, and allow individuals to maintain enrollment in a QHP in the limited number of situations in which they want to do so, we propose

in paragraph (b)(1)(ii) that at the time of plan selection, the Exchange will provide a qualified individual with the opportunity to choose to remain enrolled in a QHP if the Exchange identifies that they have become eligible for other minimum essential coverage through data matching and the enrollee does not request a termination in accordance with paragraph (b)(1)(i). We solicit comment on this proposal.

We propose to amend paragraph (d)(1) to specify that changes in advance payments of the premium tax credit and cost-sharing reductions, including terminations, adhere to the effective dates specified in § 155.330(f), which ensures alignment of processes.

22. Subpart F—Appeals of Eligibility Determinations for Exchange Participation and Insurance Affordability Programs

This subpart is proposed to provide standards for eligibility appeals, including appeals of individual eligibility determinations and employer determinations as required by section 1411(f) of the Affordable Care Act, which makes clear that the Secretary will provide for an appeals process. We propose to provide Exchanges with options for coordinated appeals to align with the options for eligibility determinations. In addition, the following sections propose standards for appeal requests, eligibility pending appeal, dismissals, informal resolution and hearing requirements, expedited appeals, appeal decisions, the appeal record, and corresponding provisions for employer appeals.

23. Definitions (§ 155.500)

In this section, we propose definitions for this subpart, in addition to incorporating the definitions previously established in § 155.20 and § 155.300.

We propose the term ''appeal record'' to mean the appeal decision, all papers and requests filed in the proceeding, and, if a hearing was held, the transcript or recording of hearing testimony or an official report containing the substance of what happened at the hearing, and any exhibits introduced at hearing.

We propose the term ''appeal request'' to mean a clear expression, made either orally or in writing, by an applicant, enrollee, employer, or small business employer or employee to have any eligibility determination or redetermination contained in a notice issued in accordance with §§ 155.310(g), 155.330(e)(1)(ii), 155.335(h)(1)(ii), 155.715(e) or (f), or pursuant to future guidance on section 1311(d)(4)(H) of the Affordable Care Act adjudicated by an appeals entity.

We propose the term ''appeals entity'' to mean a body designated to hear appeals of eligibility determinations or redeterminations contained in notices issued in accordance with §§ 155.310(g), 155.330(e)(1)(ii), 155.335(h)(1)(ii), 155.715(e) or (f), or notices issued in accordance with future guidance on exemptions pursuant to section 1311(d)(4)(H).

We propose the term ''appellant'' to mean the applicant or enrollee, the employer, or the small business employer or employee who is requesting an appeal.

We propose the term ''*de novo* review'' to mean a review of an appeal without deference to prior decisions in the case.

We propose the term ''evidentiary hearing'' to mean a hearing conducted where new evidence may be presented.

We propose the term ''vacate'' to mean to set aside a previous action.

We seek comment on these definitions.

24. General Eligibility Appeals Requirements (§ 155.505)

In § 155.505, we propose the general eligibility appeals standards as well as the options for an Exchange to conduct eligibility appeals. In paragraph (a), we propose that, unless otherwise specified, the provisions of subpart F apply to Exchange eligibility appeals processes, regardless of whether the appeals process is provided by a state-based Exchange appeals entity or by HHS. We seek comment on this provision.

In paragraph (b), we propose to define the scope of those determinations that an applicant or enrollee may appeal, pursuant to § 155.355 and forthcoming guidance on exemptions under section 1311(d)(4)(H) of the Affordable Care Act. Specifically, we propose that applicants and enrollees have the right to appeal eligibility determinations made in accordance with subpart D. This includes initial eligibility determinations made pursuant to § 155.305(a) through (h) (eligibility for enrollment in a QHP, Medicaid, CHIP, and the BHP, if applicable, and for advance payments of the premium tax credit, and cost-sharing reductions as well as eligibility for QHP enrollment periods and eligibility for enrollment in a catastrophic plan), and redeterminations made pursuant to §§ 155.330 and 155.335. Applicants and enrollees may also appeal the amount of advance payments of the premium tax credit and level of cost-sharing reductions for which they are eligible. In paragraph (b)(2), we propose that applicants and enrollees may appeal an eligibility determination for an exemption made in accordance with future guidance on exemptions pursuant to 1311(d)(4)(H) of the Affordable Care Act. Finally, in paragraph (b)(3), we propose that if the Exchange fails to provide timely notice of an eligibility determination or redetermination under §§ 155.310(g), 155.330(e)(1)(ii), or 155.335(h)(1)(ii), such failure is appealable. We seek comment on these provisions.

In paragraph (c), we propose the options for Exchange appeals. Specifically, we propose that final eligibility determinations, after exhaustion of any inconsistency period under § 155.315(f), may be appealed through the Exchange appeals process, if the Exchange elects to establish such a process, or to HHS. In addition, pursuant to the requirements of section 1411(f)(1) of the Affordable Care Act, all Exchange appellants may have their appeal reviewed by HHS upon exhaustion of the Exchange appeals process. Thus, we expect that, where a state-based Exchange is operating and has established an appeals process, appellants will first appeal through the state-based process and then, if dissatisfied with the outcome, have the opportunity to elevate the appeal to the HHS appeals process. We anticipate that a state-based Exchange may elect to establish the appeals function within the Exchange or to authorize an eligible state entity to carry out the appeals function.

We anticipate that states will have an interest in adjudicating appeals of eligibility determinations made by their state-based Exchanges; therefore, we propose to provide flexibility for states to provide an appeals process while respecting the requirement in section 1411(f)(1) of the Affordable Care Act that a federal appeals process be available to appellants in the individual market. We seek comment on this provision.

In paragraph (d), we propose that appeals entities must comply with the standards set forth for providing fair hearings established by Medicaid at 42 CFR 431.10(c)(2). Meeting Medicaid due process requirements is part of the minimum standard an entity must meet to be eligible to process Medicaid appeals, which we propose may be delegated to Exchange appeals entities. We seek comment on this provision.

In paragraph (e), we propose that an appellant may designate an authorized representative to act on his or her behalf, including making an appeal request, as provided in § 155.227. We anticipate that many appellants will need to or will prefer to rely on an

authorized representative to assist them with the appellate process. Such assistance and representation is common in other public benefit appeals processes and we seek to offer similar accommodation to Exchange appellants. We seek comment on this provision.

In paragraph (f), we propose that appeals processes must be accessible to appellants who are limited English proficient, or who are living with disabilities, consistent with the requirements in §§ 155.205(c). We solicit comments on this provision.

In paragraph (g), we propose that an appellant may seek judicial review to the extent allowable by law. We anticipate that some appellants may wish to pursue legal recourse beyond the administrative appeals proposed here. We seek comment on this provision.

25. Appeals Coordination (§ 155.510)

In § 155.510, we propose the general coordination requirements for the appeals entities and the agencies administering insurance affordability programs. Similar to the flexibility offered to states in choosing an eligibility determination process, the corresponding flexibility for eligibility appeals can ensure that appeals are managed in a seamless, consumer-friendly manner.

In paragraph (a), we propose that the appeals entity or the Exchange must enter into agreements with the agencies administering insurance affordability programs regarding the appeals processes for such programs as are necessary to fulfill the requirements of this subpart. The agreements will clearly outline the responsibilities of each entity to support the eligibility appeals process. In paragraph (a)(1), we propose the agreements must seek to minimize burden on appellants, including not requesting the appellant provide information previously provided in the process. However, we note that in the case where the appellant has provided information but the information cannot be located after a careful review of the appellant's file, including all information transmitted from other entities, we anticipate that it may be reasonable for the receiving entity to request the previously submitted documentation from the appellant. In paragraph (a)(2), we propose the agreements must ensure prompt issuance of appeal decisions. Finally, in paragraph (a)(3), we propose the agreements must comply with the coordination requirements established by Medicaid under 42 CFR 431.10(d). We seek comment on these provisions.

In paragraph (b), we propose coordination standards for Medicaid and CHIP appeals. In paragraph (b)(1), we propose that consistent with 42 CFR 431.10(c)(1)(ii) (the proposed Medicaid rule regarding delegations of authority to conduct fair hearings) and § 457.1120, the appellant must be informed of the option to opt into pursuing his or her appeal of an adverse Medicaid or CHIP determination made by the Exchange directly with the Medicaid or CHIP agency, and if the appellant elects to do so, the appeals entity transmits the eligibility determination and all information provided via secure electronic interface, promptly and without undue delay, to the Medicaid or CHIP agency, as applicable. Our goal is to achieve a coordinated and integrated eligibility and appeals process that limits the burden on the appellant, the Exchange appeals entity, and the state Medicaid and CHIP agencies. The proposed regulatory language in paragraph (b)(1) provides a general requirement that the appellant be notified of the option to opt into appealing a Medicaid or CHIP denial to the Medicaid or CHIP agency rather than to the Exchange appeals entity. We are also considering a more specific requirement to align with the preamble proposed by Medicaid in which the appellant would be informed at the time of the eligibility determination made by the Exchange of his or her right to opt into an appeal of the denial of Medicaid or CHIP eligibility with the state Medicaid or CHIP agency. Under this approach, we assume that most appellants will not opt into having his or her appeal heard by the Medicaid agency, which would result in two separate appeals (one before the Exchange appeals entity and one before the Medicaid or CHIP agency) and will instead choose to have both Medicaid or CHIP and Exchange-related issues heard before the Exchange appeal entity. If the Exchange appeals entity conducts the hearing on the Medicaid or CHIP denial that hearing decision would be final under the proposed rule. We seek comment on the proposed provision and the alternative for this proposed provision.

In paragraph (b)(2), we propose that where the Medicaid or CHIP agency has delegated appeals authority to the Exchange appeals entity consistent with 42 CFR 431.10(c)(1)(ii) and the appellant has elected to have the Exchange appeals entity hear the appeal, the appeals entity may include in the appeals decision a determination of Medicaid and CHIP eligibility. In addition, we propose in paragraph (b)(2)(i) that the appeals entity must apply MAGI-based income standards and standards for citizenship and immigration status using verification rules and procedures consistent with Medicaid and CHIP requirements under 42 CFR parts 435 and 457. In paragraph (b)(2)(ii), we propose that notices required in connection with an eligibility determination for Medicaid or CHIP be performed by the appeals entity consistent with standards set forth by this subpart, subpart D, and by the state Medicaid or CHIP agency, consistent with applicable law. We seek comment on these provisions.

In paragraph (b)(3), we propose that where a state Medicaid or CHIP agency has not delegated appeals authority to an appeals entity and the appellant seeks review of a denial of Medicaid or CHIP eligibility, the appeals entity must transmit the eligibility determination and all information provided as part of the appeal via secure electronic interface, promptly and without undue delay, to the Medicaid or CHIP agency, as applicable. We seek comment on this provision.

In paragraph (b)(4), we propose the Exchange must consider an appellant determined or assessed by the appeals entity as not potentially eligible for Medicaid or CHIP as ineligible for Medicaid and CHIP based on the applicable Medicaid and CHIP MAGI-based income standards for the purposes of determining eligibility for advance payments of the premium tax credit and cost-sharing reductions. We seek comment on this provision.

In paragraph (c), we propose that appeals entities must ensure that all data exchanges that are part of the appeals process comply with the requirements of § 155.260, § 155.270 and § 155.345(h) and comply with all data sharing requests from HHS. We anticipate that appeals-related data will need to be passed between the Exchange, Medicaid, CHIP, and the state-based Exchange and HHS appeals entities in order to process appeal requests and implement appeal decisions. In addition, specific appeals-related information will be shared with the Internal Revenue Service via HHS in order to facilitate the tax reconciliation process under 26 CFR 1.36B–4.

We solicit comments on the provisions regarding appeals coordination between the Exchange, the appeals entities, and the Medicaid and CHIP agencies, where applicable.

25. Notice of Appeal Procedures (§ 155.515)

In paragraph (a) of this section, we propose that an Exchange must provide

notice of appeal procedures at the time of the application and again when the eligibility determination notice is sent under § 155.310(g), § 155.330(e)(1)(ii), § 155.335(h)(1)(ii), or future guidance on exemptions pursuant to § 1311(d)(4)(H) of the Affordable Care Act. We anticipate that Exchanges can meet this requirement by including a reference to the appeals process in the single streamlined application required under § 155.405 and in the eligibility determination notices required under §§ 155.310(g), 155.330(e)(1)(ii), and 155.335(h)(1)(ii) and future guidance on exemptions under section 1311(d)(4)(H) of the Affordable Care Act.

We also propose, in paragraph (b), the general content for notices on the right to appeal and on appeal procedures. Specifically, we propose content including an explanation of the applicant or enrollee's appeal rights, procedures for requesting an appeal, right of representation, and an explanation of the circumstances under which eligibility may be maintained or reinstated pending an appeal. We note that the right of representation includes both legal counsel and authorized representatives. As defined in § 155.227, an authorized representative can be anyone designated as such by the appellant. We also propose that notice content should include an explanation that the outcome of an appeal decision for one household member may result in a change in eligibility for other household members and that such a change may be handled as a redetermination in accordance with the standards specified in § 155.305. We solicit comments on the proposed publication of appellate procedures.

27. Appeal Requests (§ 155.520)

In paragraph (a) of § 155.520, we propose that the Exchange and the appeals entity must accept appeal requests submitted by telephone, via mail, in person (if the Exchange or appeals entity is capable of receiving in-person appeal requests), or via the Internet. We believe that this is the appropriate policy to propose in order to provide appellants greater flexibility and access to the process. We propose that the Exchange and the appeals entity may assist the applicant or enrollee in making the appeal request. In addition, we propose that the appeals entity must not limit or interfere with an applicant or enrollee's right to make an appeal request. Finally, we propose that an appeal request must be considered valid for the purposes of this subpart if it is submitted in accordance with the requirements of paragraphs (b) and (c) of this section and § 155.505(b). We seek comment on these provisions.

In paragraph (b), we propose that the Exchange or appeals entity must allow an applicant or enrollee to request an appeal within 90 days of the date of the eligibility determination notice. In paragraph (c), we propose that appellants who disagree with a state-based Exchange appeals entity decision may appeal to HHS for further administrative review within 30 days of the date of the state-based Exchange appeals entity's notice of appeal decision. We seek comment on these provisions.

In paragraph (d), we propose standards for acknowledging an appeal request. In paragraph (d)(1), we propose that upon receipt of a valid appeal request, the appeals entity must send timely acknowledgement to the appellant of the receipt of his or her valid appeal request, including information regarding the appellant's eligibility pending appeal pursuant to § 155.525 and an explanation that any advance payments of the premium tax credit paid on behalf of the tax filer pending appeal are subject to reconciliation under 26 CFR 1.36B–4. We note that we use the term ''tax filer'' in this instance because the appellant may not be the household tax filer; therefore, the tax filer will be the recipient of the advance payments of the premium tax credit on behalf of the appellant. In paragraph (d)(1)(ii), we propose that the appeal entity must send timely notice via secure electronic interface of the appeal request and, if applicable, instructions to provide eligibility pending appeal pursuant to § 155.525 to the Exchange and to the agencies administering Medicaid and CHIP, where applicable. We anticipate that this proposed standard will facilitate coordination between the appeals entity and the Exchange, Medicaid, and CHIP, where applicable, so that appellants who qualify for continuing eligibility during an appeal will not experience a gap in coverage. In paragraph (d)(1)(iii), we propose that if the appeal request is made pursuant to paragraph (c) of this section, the appeals entity must send timely notice via secure electronic interface of the appeal request to the state-based Exchange appeals entity. In paragraph (d)(1)(iv), we propose that the appeals entity must promptly confirm receipt of the records transferred pursuant to paragraph (d)(3) or (4) of this section to the Exchange or the state-based Exchange appeals entity, as applicable.

In paragraph (d)(2), we propose that, upon receipt of an appeal request that is not valid under § 155.520 or § 155.505(b), the appeals entity must, promptly and without undue delay, send written notice, either electronically or in hard copy, to the applicant or enrollee that the appeal request has not been accepted and the reason why, so that the applicant or enrollee may have the opportunity to cure a defect in the appeal request. We propose that the appeals entity must accepted an amended appeal request that meets the requirements of § 155.520 and § 155.505(b), including standards for timeliness.

In paragraph (d)(3), we propose that, upon receipt of a valid appeal request pursuant to paragraph (b) of this section, or upon receipt of the notice under paragraph (d)(1)(ii) of this section, the Exchange must transmit via secure electronic interface to the appeals entity the appeal request, if the appeal request was initially made to the Exchange, and the appellant's eligibility record. Because we have provided flexibility for the appellant to request an appeal at the Exchange or at the appeals entity under § 155.520(a), we anticipate that in some cases the Exchange will be the initial receiver of the appeal request and, therefore, must transmit this information to the appeals entity for review. However, regardless of whether the Exchange receives the appeal request first or is notified by the appeals entity of such a request, the Exchange must transmit the appellant's eligibility record to the appeals entity to use in the adjudication of the appeal. In paragraph (d)(4), we propose that upon receipt of the notice pursuant to paragraph (d)(1)(iii), the state-based Exchange appeals entity must transmit via secure electronic interface the appellant's appeal record, including the appellant's eligibility record as received from the Exchange, to HHS.

We seek comment on the appeal acknowledgement and notification provisions in § 155.520(d).

28. Eligibility Pending Appeal (§ 155.525)

In § 155.525, we propose the process by which an appellant may receive benefits while his or her appeal is pending in specific circumstances. In paragraph (a), we propose that upon receipt of a valid appeal request or notice under § 155.520(d)(1)(ii) that concerns an appeal of a mid-year or annual redetermination, the Exchange, or the Medicaid or CHIP agency as applicable, must continue to consider the appellant eligible while the appeal is pending in accordance with the standards in paragraph (b) or as determined by Medicaid or CHIP, as applicable, under 42 CFR parts 435 and

457. In paragraph (b), we propose that the Exchange must continue the appellant's eligibility for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions, as applicable, in accordance with the level of eligibility immediately before the redetermination being appealed. For example, if the appellant had been eligible for advance payments of the premium tax credit in the previous coverage year but, upon annual redetermination, was denied advance payments of premium tax credit, the Exchange would consider the appellant eligible to continue to receive advance payments of premium tax credit at the level of the appellant's prior eligibility while the appeal is pending. As stated in subpart D of this part, receipt of advance payments of the premium tax credit may be waived by the tax filer. In addition, the continued receipt of advance payments of the premium tax credit during the appeal may impact the amount owed or due at the IRS reconciliation process, depending upon the appeal decision.

As is standard in many public programs, including Medicaid and the private market, we propose that a continuation of benefits should be available to individuals already enrolled in coverage while appealing a change in current eligibility. This approach ensures continuity of coverage and care during an appeal as well as minimizes the impact of eligibility errors on beneficiaries. Eligibility pending appeal will not be offered to appellants who are appealing their initial denial of eligibility because of the unique challenges in identifying the appropriate pended benefit (if any) for such an appellant. It should be noted that while applicants and enrollees may receive coverage during the inconsistency period prior to receiving their final redetermination, as set forth in § 155.315, coverage during this period is based on a different standard than eligibility received while an appeal is pending. Specifically, under §§ 155.315(f)(4)(i) and (ii), an applicant or enrollee in an inconsistency period receives the eligibility based on the information to which he or she attested. However, we propose that during an appeal, qualified appellants receive eligibility that corresponds to that which they had immediately before the redetermination being appealed. Because of the differences in calculating eligibility during these two processes, we anticipate that an individual who appeals a redetermination following an inconsistency period may not receive the same eligibility during the appeal as during the inconsistency period. Finally, we note that for an applicant who receives an initial eligibility determination that is not a denial and requests an appeal, he or she will receive eligibility per the original determination during the course of his or her appeal. We solicit comments on the proposed approach, including our proposal to not pend benefits to new applicants who are denied eligibility.

29. Dismissals (§ 155.530)

In paragraph (a) of § 155.530, we propose the circumstances under which an appeals entity must dismiss the appeal. We propose paragraphs (1) through (4) that the appeals entity must dismiss an appeal if the appellant withdraws the appeal request in writing, either electronically or in hard copy; fails to appear at a scheduled hearing; fails to submit a valid appeal request as defined in § 155.520(a)(4); or dies while the appeal is pending. We note that paragraph (a)(4) is only intended to exclude those appeal requests which fail to meet timeliness standards or are clearly requesting an appeal for something unrelated to the eligibility determinations relevant to this subpart. This provision is not intended to exclude appeal requests that may have other minor deficiencies or are submitted without complete information. In paragraph (b), we propose that an appellant whose appeal is dismissed must be provided a timely notice by the appeals entity that includes the reason for dismissal, an explanation of the dismissal's effect on the appellant's eligibility, and an explanation of how the appellant may show good cause why the dismissal should be vacated in accordance with paragraph (d) of this section. In paragraph (c), we propose that, if an appeal is dismissed, the appeals entity must provide timely notice to the Exchange and to the agency administering Medicaid or CHIP, as applicable, which must include instructions regarding the appropriate eligibility determination to implement and the discontinuation of pended eligibility provided under § 155.525. Finally, in paragraph (d), we that propose the appeals entity may vacate a dismissal if the appellant makes a written request, either electronically or in hard copy, within 30 days of the date of the notice of dismissal, showing good cause why the dismissal should be vacated. The option for the appeals entity to vacate dismissals allows for programmatic flexibility. For example, if the appellant can prove that he or she was incapacitated and therefore could not attend his or her scheduled hearing, the appeals entity may vacate a dismissal that was based upon the appellant's failure to appear at a scheduled hearing. We solicit comments on the proposed approach for appeal dismissals and vacating an appeal dismissal.

30. Informal Resolution and Hearing Requirements (§ 155.535)

In § 155.535, we propose standards for adjudicating eligibility appeals. We provide the option for informal resolution of appeals as well as hearings. In paragraph (a), we propose that the HHS appeals process will provide an opportunity for informal resolution and a hearing, and that a state-based Exchange appeals entity may also provide an informal resolution process prior to a hearing. We anticipate that this process will provide appellants the opportunity to work with appeals staff to try to resolve the appeal pre-hearing through a review of case documents, verification of the accuracy of submitted documents, and the opportunity for the appellant to submit updated information or provide further explanation of previously submitted documents. Although this subpart does not require state-based Exchange appeals entities to provide an informal resolution process, HHS will provide an informal resolution process to all appellants who use the HHS appeals process.

In paragraph (a), we propose that informal resolution will be offered to appellants in the HHS appeals process, and may be offered to appellants in a state-based Exchange appeals process, provided that the process is limited in scope to what would be considered at hearing, including the information used to determine the appellant's eligibility as well as any additional relevant evidence provided by the appellant during the course of the appeal. In addition, the provision of, or an appellant's participation in, an informal resolution process must not impair the appellant's right to hearing, where the appellant remains dissatisfied with the outcome of the informal resolution process. We consider that the appellant is in the best position to determine whether he or she is satisfied with the outcome of an informal resolution and, therefore, must be afforded a hearing if he or she is dissatisfied with the outcome of the informal resolution process. For example, an appellant may continue to be dissatisfied with the level of advance payments of the premium tax credits for which he or she is determined eligible following informal resolution and seek to pursue the issue at hearing. Furthermore, this parallels

the Medicaid fair hearing requirement that an appellant must be provided a hearing where he or she believes the agency has taken an erroneous action. We also propose that an appeals entity whose process includes an informal resolution component must minimize the burden on the appellant by not requesting that he or she provide duplicative information at various stages of appeal. We expect a significant portion of appeals may be resolved through informal resolution. For example, some applicants will fail to submit all required information or documentation during the application process (or information or documentation submitted will not be verified), and will fail to rectify this during the statutory inconsistency period, but will present such information during an appeal. However, some appellants will remain dissatisfied with the eligibility determination that results from the informal resolution process, and these appellants must be afforded the opportunity for a hearing. We note that unless an appellant requests a hearing, the decision reached through informal resolution by the appeals entity is considered final and binding.

In paragraph (b), we propose that when a hearing is scheduled the appeals entity must send written notice, electronically or in hard copy, to the appellant of the date, time, and location or format of the hearing no later than 15 days prior to the date of hearing. We anticipate that 15 days will provide the appellant enough time to contact the appeals entity if the date and time are prohibitive of participation. If the appellant informs the appeals entity that the designated date and time are prohibitive of participation, we expect that the appeals entity will work with the appellant to set a reasonable and mutually convenient date and time. In addition, the format of a hearing encompasses telephonic hearings and hearings held by video teleconference. Again, if an appeal is resolved to the appellant's satisfaction through informal resolution, a hearing will not be necessary and will not need to be scheduled. We do not expect the appeals entity to schedule a hearing until the appellant has indicated that he or she is dissatisfied with the outcome of the informal resolution process, if such a process is in place; however, if the appeals entity does not provide an informal resolution process, we expect that the appeals entity will schedule a hearing upon receipt of the appeal request.

In paragraph (c), we propose requirements for conducting hearings, including that hearings must be conducted at a reasonable date, time, and location or format; after notice of the hearing has been issued to the appellant; as an evidentiary hearing where appellants may present evidence; and by one or more impartial officials who have not been directly involved in the eligibility determination or any prior Exchange appeal decision in the same matter. These requirements are modeled off Medicaid's fair hearing requirements and aim to provide the appellant with sufficient notice and opportunity to participate in the hearing as well as ensure the hearing decision is issued by an impartial hearing officer.

In paragraph (d), we propose the procedural rights afforded to an appellant. These rights are based on those provided in Medicaid fair hearings under 42 CFR 431.242. In paragraph (d)(1), we propose that the appeals entity must provide the appellant with the opportunity to review his or her appeal record and all the documents to be used by the appeals entity at the hearing, at a reasonable time before the date of the hearing as well as during the hearing. In paragraph (d)(2), we propose that the appellant have the ability to bring witnesses to testify. In paragraph (d)(3), we propose that the appellant have the opportunity to establish all relevant facts and circumstances. In paragraph, (d)(4), we propose that the appellant may present arguments without undue interference. Finally, in paragraph (d)(5), we propose that the appellant may question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses. Although we have included the ability to cross-examine adverse witnesses, we anticipate that most hearings will be held in a non-adversarial manner without an adverse party or representative from the agency determining eligibility present during appeal. However, we understand that eligibility representatives are occasionally part of Medicaid fair hearings, and we do not want to foreclose the possibility of cross examination for such cases where an adverse witness is present. The procedural rights we outline correspond to those afforded to Medicaid appellants.

In paragraph (e), we propose that the appeals entity must consider the information used to determine the appellant's eligibility and any relevant evidence presented during the course of the appeal, including at the hearing. This provision will allow the appellant to bring forward information at multiple points in the process. We seek comment on this provision.

In paragraph (f), we propose that the appeals entity review appeals *de novo.* We consider this standard of review critical to allow the appellant the opportunity for a fresh review at each stage of appeal and the opportunity to bring new relevant evidence throughout the process.

We seek comment on our informal resolution and hearing requirements and standards.

31. Expedited Appeals (§ 155.540)

In § 155.540, we propose the standards for expedited appeals. In paragraph (a), we propose that the appeals entity must establish and maintain an expedited appeals process for an appellant to request an expedited process where there is an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function. In paragraph (b), we propose that if an appeal entity denies a request for an expedited appeal, it must handle the appeal under the standard process and issue the appeal decision in accordance with § 155.545(b)(1) and make reasonable efforts to inform the appellant through electronic or oral notification of the denial and, if notified orally, follow up with the appellant by written notice, either electronically or in hard copy, within two days of the denial. The standards proposed for expedited appeals parallel those contained in the proposed Medicaid regulations in this proposed rule at § 431.224 and § 431.244. We seek comment on this provision and the timelines associated with it.

32. Appeal Decisions (§ 155.545)

In section 155.545, we propose requirements for the content and issuance of appeal decisions. In paragraph (a)(1), we propose that appeal decisions be based exclusively on the application of the eligibility rules established in subpart D of this part or pursuant to future guidance on section 1311(d)(4)(H) of the Affordable Care Act, as applicable, to the information used to make the eligibility determination as well as any relevant evidence provided by the appellant during the course of the appeal. In paragraphs (a)(2) through (a)(5), we propose that the content of the appeal decision must include the decision with a plain language description of the effect of the decision on the appellant's eligibility, a summary of the facts relevant to the appeal, an identification

of the legal basis for the decision, and the effective date of the decision. The above requirements are based on Medicaid's fair hearing standards, and we intend each piece to assist the appellant in understanding how the eligibility standards, applied to the facts of his or her case, resulted in the appeal decision.

Finally, in paragraph (a)(6), we propose that, if the appeals entity is a state-based Exchange appeals entity, the appeal decision must include an explanation of the appellant's right to pursue an appeal at HHS if the appellant remains dissatisfied with the post-hearing eligibility determination. We seek comment on these provisions for the appeal decision.

In paragraph (b)(1), we propose the standards for the appeals entity to issue written notice of the appeal decision, either electronically or in hard copy, to the appellant. We propose that such notice to the appellant be issued within 90 days of the date an appeal request under § 155.520(b) or (c) is received, as administratively feasible. We anticipate the appeals entity may, at times, experience significant increases in appeals volume, such as during open enrollment or high-volume redetermination periods, and may also require additional time due to coordination requirements with Medicaid and other agencies and appeals entities. In paragraph (b)(2), we propose that, in the case of an appeal request submitted under § 155.540 that the appeals entity determines meets the criteria for an expedited appeal, the appeals entity must issue notice of the appeal decision as expeditiously as the appellant's health condition requires, but no later than three working days after the appeals entity receives the request for an expedited appeal. Finally, in paragraph (b)(3), we propose that the appeals entity send notice of the appeal decision via secure electronic interface to the Exchange or the Medicaid or CHIP agency, as applicable. This notice requirement seeks to connect the appeals decision with the entity responsible for implementing the appeal decision. In addition, the Exchange or the Medicaid or CHIP agency, as applicable, will need to be notified that the appellant no longer should receive pended eligibility. We seek comment on these proposed appeal decision notice requirements.

In paragraph (c), we propose that the Exchange or the Medicaid or CHIP agency, as applicable, must promptly implement appeal decisions upon receiving the notice described in paragraph (b). In paragraph (c)(1), we propose that the effective dates of the changes resulting from an appeal correspond with existing timeframes established under § 155.330(f) or, where applicable, retroactively to the eligibility determination date that was the subject of the appeal, or in accordance with standards set forth by Medicaid or CHIP, in 42 CFR parts 435 or 457, as applicable. The purpose of an appeal is to ensure that the appellant receives the appropriate benefit determination. Therefore, appeal decisions that overturn the original eligibility determination commonly seek to ''right the wrong'' by making the appellant whole, which we believe includes retroactive eligibility. In the Medicaid context (as with the majority of public benefit programs), 42 CFR 431.246 directs state agencies to ''promptly make corrective payments, retroactive to the date an incorrect action was taken.''

We seek comment regarding the operational considerations associated with retroactive eligibility as a result of an appeal, and whether potential operational difficulties, if any, could be alleviated by limiting the policy on retroactive eligibility. For example, we considered limiting retroactive eligibility to those already enrolled in coverage. In addition, we note that an individual who is not enrolled and receives retroactive eligibility could always choose not to enroll retroactively. We believe this choice might be desirable if an appellant did not wish to obtain the retroactive coverage, which could involve the payment of premiums. We also considered specifically limiting the scope of retroactive eligibility with respect to advance payments of the premium tax credit or cost-sharing reductions, consistent with our approach in 155.330(f)(2)–(7). Finally, we note that the inconsistency period under § 155.315(f) may mitigate many of these operational concerns by allowing the resolution of eligibility issues pre-appeal. We seek comment on the retroactive implementation of appeal decisions, and specifically on whether the ability to enroll in coverage retroactively should be optional or limited, and if so, in what way.

In paragraph (c)(2), we propose that the Exchange or the Medicaid or CHIP agency, as applicable, must promptly redetermine the eligibility of other members of the appellant's household who have not appealed their own eligibility determinations but whose eligibility may be affected by the appeal decision, in accordance with the standards specified in § 155.305. We anticipate that evidence received during the course of an appeal, for example updated income information, may indicate that a redetermination is required for household members who have not appealed their own eligibility determinations. For such household members, the Exchange, or the Medicaid or CHIP agency, as applicable, must undertake a redetermination. We seek comment on these provisions.

33. Appeal Record (§ 155.550)

In § 155.550, we propose requirements for accessing the appeal record. In paragraph (a), we propose the appeal record be made accessible to the appellant at a convenient place and time subject to the requirements of all applicable federal and state laws regarding privacy, confidentiality, disclosure, and personally identifiable information. In paragraph (b), we propose the appeals entity must provide public access to all appeal records, subject to all applicable federal and state laws regarding privacy, confidentiality, disclosure, and personally identifiable information. The requirement for access to the appeal record by the appellant corresponds to a similar Medicaid fair hearing requirements under 42 CFR 431.244(c) and 431.244(g). We seek comment on this provision.

34. Employer Appeals Process (§ 155.555)

In paragraph (a), pursuant to section 1411(f)(2) of the Affordable Care Act, we propose that an appeals process shall be established through which an employer may appeal, in response to a notice under § 155.310(h) regarding an employer's potential tax liability, a determination that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide such coverage but it is not affordable coverage with respect to the employee referenced in the notice. We note that the employer appeal is the opportunity for the employer to correct any information the Exchange received from an employee's application regarding the employer's offering of coverage. The appeals entity is responsible for a *de novo* review of whether the employer's offer of coverage is sufficient such that the employee at issue is not entitled to advance payments of the premium tax credit or other cost-sharing reductions under section 1402.

The employer appeals process is separate and distinct from the IRS's process determining whether an employer is liable for a tax penalty under section 4980H of the Code and any appeal rights the employer may

have under subtitle F of the Code. We anticipate that some employers will receive a notice of potential tax liability from the Exchange even though the employer may not in fact have any tax liability under section 4980H. For example, notices under § 155.310(h) must be issued to employers without regard to their size, yet tax liability under section 4980H arises only against applicable large employers, that is, generally, those employers with more than 50 full-time equivalent employees. Our goal is to work closely with the IRS to educate and develop notices that help employers understand their potential tax liabilities and the consequences of a successful appeal. We seek comment on these provisions.

In paragraph (b), we propose that Exchanges have the flexibility to establish an employer appeals process in accordance with the requirements of § 155.505(e) through (g), and § 155.510(a)(1), (a)(2), and (c). We further propose that, where an Exchange has not established an employer appeals process, HHS will provide an employer appeals process that meets the requirements of this section, § 155.505(e) through (g), and § 155.510(a)(1), (a)(2), and (c).

In paragraph (c), we propose the process and standards for requesting an appeal. In paragraph (c)(1), we propose that an Exchange or appeals entity must allow an employer to request an appeal within 90 days from the date of the notice of the employee's eligibility for advance payments of the premium tax credit or cost-sharing reductions is sent. In paragraph (c)(2), we propose that the Exchange or appeals entity must allow an employer to submit relevant evidence to support the appeal request. We anticipate only a limited set of evidence (information already possessed by the employer) will be relevant to this appeal. For example, employers might submit information pertaining to whether coverage is offered by the employer, whether the employee has taken up such coverage, the employee's portion of the lowest cost plan offered, and whether or not the employee is in fact employed by the employer. In paragraph (c)(3), we propose that an Exchange or appeals entity must allow an employer to submit an appeal request to the Exchange or the state-based Exchange appeals entity, if the Exchange establishes an employer appeals process, or to HHS, if the Exchange does not offer an employer appeals process. This option for filing an appeal request reflects the flexibility described in paragraph (b) of this section that states have to establish an employer appeal process. In addition, unlike the appeals process for individual eligibility determinations, section 1411(f)(2) of the Affordable Care Act does not require employer appeals to be reviewed by a federal officer; therefore, an employer does not have the right to elevate an appeal decision made by a state-based Exchange appeals entity to HHS. However, employer appeals may be appealed to HHS where no appeals process is established by the Exchange for employers. We seek comment on these provisions.

In paragraph (c)(4), we propose that the Exchange and the appeals entity must comply with the requirements of § 155.520(a)(1) through (3), such that an employer appeal may be submitted by telephone, mail, in person where available, or by Internet, and the appeals entity may assist the employer with making the appeal request and must not limit or interfere with the employer's right to request an appeal. We seek comment on these provisions.

In paragraph (c)(5), we propose that an appeals entity must consider an appeal request valid if it is submitted within 90 days of the notice to the employer of a determination that the employer does not provide minimum essential coverage through am employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage with respect to an employee. We seek comment on this provision.

We propose in paragraph (d)(1) that, upon receipt of a valid appeal request, the appeals entity must send timely acknowledgement of the receipt of the appeal request to the employer, including an explanation of the appeals process. We propose in paragraph (d)(2), that, upon receipt of a valid appeal request, the appeals entity must send notice of the request to the employee, including an explanation of the appeals process, instructions for submitting additional evidence for consideration by the appeals entity, and an explanation of the potential effect of the employer's appeal on the employee's eligibility. We anticipate that the notice to the employee under paragraph (d)(2) will be the primary means through which the employee will learn about the employer's appeal. Just as the employer will have the opportunity to submit information in support of the appeal to the appeals entity, the employee's notice will describe the employee's opportunity to participate in the employer appeal process Furthermore, we note that the explanation of the potential effect of the employer's appeal on the employee's eligibility proposed in (d)(2)(iii) must explain that the employer appeal process may result in a redetermination that the employee is not eligible for advance payments of the premium tax credit or cost sharing reductions. For example, a redetermination may occur if the employee attested that he or she was not offered employer sponsored coverage but the employer establishes the offering of coverage through the appeal; the employee would be redetermined as ineligible for advance payments of the premium tax credit and cost sharing reductions.

In paragraph (d)(3), we propose that the appeals entity must promptly notify the Exchange of the employers' appeal request, if the employer did not initially make the appeal request to the Exchange. In paragraph (d)(4), we propose that, upon receipt of an appeal request that is not valid under the same section, the appeals entity must, promptly and without undue delay, send written notice, either electronically or in hard copy, to the employer that the appeal request has not been accepted and the reason why, so that the employer may have the opportunity to cure a defect in the appeal request. We propose that the appeals entity must accept an amended appeal request that meets the requirements of the same section, including standards for timeliness. We seek comment on these provisions.

In paragraph (e), we propose that upon receipt of a valid appeal request or the notice described in paragraph (d)(3) of the same section, the Exchange must promptly transmit via secure electronic interface the employee's eligibility record and the appeals entity must also promptly confirm receipt of the records transferred by the Exchange. We did not propose specified timelines for ''promptly'' within this section and seek comment on these provisions, including on appropriate standards for promptness in this context.

In paragraph (f), we propose the process for the dismissal of an employer appeal. In paragraph (f)(1), we propose that the appeals entity must dismiss an appeal under the circumstances described in § 155.530(a)(1) or if the request fails to comply with the standards in paragraph (c)(4) of this section. Specifically, this standard requires dismissal where the employer withdraws the request in writing, either electronically or in hard copy, or fails to submit a valid appeal request. We note that paragraph (f)(1) is only intended to exclude those appeal requests which fail to meet timeliness standards or are clearly requesting an appeal for something unrelated to the employer determination relevant to this section. This provision is not intended to

exclude appeal requests that may have other minor deficiencies or are submitted without complete information. In paragraph (f)(2), we propose that the appeals entity must provide timely notice of the dismissal to the employer, employee, and Exchange, including the reason for dismissal. In paragraph (f)(3), we propose that the appeals entity may vacate a dismissal if the employer makes a written request, either electronically or in hard copy, within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated. We seek comment on the provisions regarding dismissal and vacatur of a dismissal.

In paragraph (g), we propose the procedural rights of the employer requesting the appeal. In paragraph (g)(1), we propose that the employer must have the opportunity to provide relevant evidence to the appeals entity for review as part of the appeal. In paragraph (g)(2), we propose that the employer must be able to review the information included in the statute and described in § 155.310(h) and 26 CFR 1.36B, which includes the identity of the employee, information regarding whether the employee has been determined eligible for advance payments of the premium tax credit, and an explanation that the employer may be liable for the payment assessed under section 4980(H) of the Code. In addition, the employer may request information regarding whether the employee's income is above or below the threshold by which the affordability of employer-sponsored minimum essential coverage is measured. Finally, the employer may have access to other data used to determine the employee's eligibility to the extent allowable by law, except the information described in paragraph (h) of this section. We seek comment on these proposed procedural rights.

We propose in paragraph (h) that neither the Exchange nor the appeals entity may make available to an employer any tax return information with respect to an employee in relation to his or her eligibility for advance payments of the premium tax credit or cost sharing reductions. We seek comment on the employers' right to review data and information used to make the employee's eligibility determination.

In paragraph (i), we propose the process and standards for adjudication of employer appeals. Specifically, we propose that the appeal must be reviewed by one or more impartial officials not directly involved in the employee eligibility determination implicated in the appeal, and that the appeal must include consideration of the information used to determine the employee's eligibility as well as any additional relevant evidence provided by the employer or the employee during the course of the appeal. Additionally, we propose that the appeal be reviewed *de novo.* We seek comment on this proposed approach.

In paragraph (j), we propose the standards for employer appeal decisions. Specifically, we propose that the appeal decision must be based exclusively on the information used to determine the employee's eligibility as well as any relevant evidence provided by the employer or the employee during the course of the appeal, and on the standards for an employer to provide minimum essential coverage that meets both affordability and minimum value standards through an employer-sponsored plan as stated in 45 CFR part 155, subpart D. Additionally, we propose that the appeal decision must state the decision, including a plain language description of the effect of the decision on the employee's eligibility, and must comply with the requirements of § 155.545(a)(3) through (5). We seek comment on the proposed approach.

In paragraph (k), we propose the requirements for the content and issuance of the notice of the employer appeal decision. We propose that the appeals entity must provide written notice, electronically or in hard copy, of the appeal decision within 90 days of the date the appeal request is received, as administratively feasible, to the employer, employee, and the Exchange. In paragraph (k)(1), we propose the employer's notice must include the appeal decision and an explanation that the appeal decision does not foreclose any appeal rights the employer may have under subtitle F of the Code. In paragraph (k)(2), we propose the employee's notice must include the appeal decision. Lastly, in paragraph (k)(3), we propose the appeals entity must provide written notice of the appeal decision, either electronically or in hard copy, to the Exchange. We seek comment on the proposed content of and timelines for issuing the notice of appeal decision.

In paragraph (l), we propose the requirements for implementation of the appeal decision. We propose that, after receipt of the notice under paragraph (k)(3) of this section, if the appeal decision affects the employee's eligibility, the Exchange must promptly redetermine the employee's eligibility in accordance with the standards specified in § 155.305. We are considering, and we solicit comments on, two alternative options regarding whether the employee may appeal the results from this redetermination. Under the first option, the employee would be permitted to appeal a change in eligibility reflected in the redetermination notice generated after an employer appeal. However, if the employee were subsequently determined to be eligible for advance payments of the premium tax credit or cost-sharing reductions as a result of such an appeal, the employer would not be able to again appeal that determination to the Exchange. We believe that this approach would protect the interests of both the employee, whose appeal rights are determined by section 1411(f)(1) of the Affordable Care Act, and the employer, whose appeal rights are determined by section 1411(f)(2). Although the employer would not have the option to appeal to the Exchange a second time, this would not foreclose any appeal rights still available under subtitle F of the Code.

Under the second option, the employee would not be permitted to appeal a change in eligibility reflected in the redetermination notice generated after an employer appeal. Instead, the employee would be issued a redetermination notice under this section which would not be appealable under § 155.505(b)(1)(ii). For example, if the employer were able to establish during the appeal that it does provide coverage that is both affordable and meets minimum value standards, the employee would be redetermined as ineligible for advance payments of the premium tax credit and cost-sharing reductions. Because the redetermination would be the result of an employer appeal under this section, the employee would not have the appeal rights associated with redetermination notices, generally. However, under this option, the employee's interests would be protected by the opportunity to submit information to support his or her eligibility determination during the employer's appeal. Moreover, if the employee's circumstances were to change following the employer appeal decision and redetermination notice, the employee could submit information to the Exchange as a mid-year update under § 155.330 and any resulting redetermination would be appealable.

We believe that either of these two approaches would be effective in limiting recurring appeals among the employee and employer. We seek comment on paragraph (l) and, specifically, on the two alternative options discussed above.

In paragraph (m), we propose that the appeal record be accessible to the employer and the employee in a

convenient format and at a convenient time in accordance all applicable laws regarding privacy, confidentiality, disclosure, and personally identifiable information and the prohibition on sharing confidential employee information in paragraph (h) of this section. We seek comment on paragraph (m).

35. Functions of a SHOP (§ 155.705)

In accordance with the Secretary's authority in section 1321(A)(1)(A) of the Affordable Care Act to establish standards related to requirements of the Exchange and the SHOP Exchange, we propose standards for the SHOP to coordinate with the functions of the individual market Exchange for determining eligibility for insurance affordability programs. In paragraph (c) we specify that the SHOP will provide data to the individual market Exchange that corresponds to the service area in which the SHOP is operating related to eligibility and enrollment for a qualified employee, that is, an employee who is enrolled in a QHP through the SHOP or is eligible to enroll in coverage through a SHOP because of an offer of coverage from a qualified employer. We propose these standards to ensure that the Exchange can use SHOP data for purposes of verifying enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan as specified in § 155.320(d). We expect that this will not create significant administrative burden since the SHOP and individual market Exchange may share core information technology systems and other supporting functionality. We note that like all information collected or maintained by the individual market Exchange or SHOP, this information is subject to the privacy and security standards of 45 CFR 155.260. We seek comment on the feasibility of sharing this data and the usefulness of this data in determining eligibility for advance payments of the premium tax credit and cost-sharing reductions.

36. SHOP Employer and Employee Eligibility Appeals (§ 155.740)

We propose to amend subpart H by adding proposed § 155.740 to define the standards for SHOP employer and employee eligibility appeals, pursuant to our broad authority to establish standards for operating SHOP Exchanges under section 1321(a)(1)(A) of the Affordable Care Act. Although not expressly required by the Affordable Care Act, we believe that SHOP employers and employees should have the opportunity to appeal determinations of ineligibility to participate in the SHOP.

In paragraph (a), we propose applying the definitions in § 155.20, § 155.300, and § 155.500 to this section.

In paragraph (b), we propose the general requirements for establishing a SHOP appeals process for both employer and employee eligibility. First, in paragraph (b)(1), we propose that a state, establishing an Exchange pursuant to § 155.100 must provide an eligibility appeals process for the SHOP. Because the SHOP was designed with flexibility to meet the individual needs of states, we anticipate that each SHOP will be in the best position to adjudicate SHOP eligibility appeals. The SHOP eligibility standards allow for a state to require additional verification before providing the employer or employee with an eligibility determination. We propose that, where a state has not established an Exchange pursuant to § 155.100, HHS will provide an eligibility appeals process for the SHOP. In paragraph (b)(2), we propose that SHOP appeals entities comply with the requirements set forth in this section; § 155.505(e) through (g); and § 155.510(a)(1)–(2) and (c). We seek comment on these provisions.

In paragraph (c), we propose that an employer may appeal a notice of denial of eligibility under § 155.715(e), or the failure of the SHOP to make an eligibility determination in a timely manner.

In paragraph (d), we propose an employee may appeal a notice of denial of eligibility under § 155.715(f), or a failure of the SHOP to make an eligibility determination in a timely manner. We note that, although the employer has the option to provide information during an employee appeal (as stated below in paragraph (g) of this section), the employer is not required to participate in an employee's appeal and need not submit additional information beyond what the employer submitted at the time of application.

In paragraph (e), we propose that the SHOP provide notice of the employer or employee's right to appeal a determination of denial of eligibility in the written notice of eligibility provided under § 155.715(e) or (f). We propose in paragraph (e)(1) that notice of this right must include the reason for the denial of eligibility along with a citation to the applicable regulations. In paragraph (e)(2), we propose that the notice must also include an explanation of the procedure by which the employer or the employee may request an appeal of the denial of eligibility. We seek comment on these provisions.

In paragraph (f), we propose the standards through which a SHOP appeal may be requested. In paragraph (f)(1), we propose the SHOP and appeals entity allow an employer or employee a 90-day window from the date of the notice of the denial of eligibility to request an appeal. Because the eligibility criteria for the SHOP are minimal and straightforward, we believe that 90 days to request an appeal provides ample time for an employer or employee to review the determination, gather any evidence that he or she may want considered in the appeal, and submit the appeal. In addition, we propose in (f)(1)(i) that employers and employees may submit their appeal requests to the SHOP or directly to the SHOP appeals entity established by the Exchange. In (f)(1)(ii), we propose that where a state has not established an Exchange, employers and employees may submit appeal requests to HHS. We seek comment on this timeframe.

In paragraph (f)(2), we propose that the SHOP and appeals entity accept appeal requests made by telephone, by mail, in person where available, or via the Internet. This requirement mirrors the methods to request an appeal in the individual market as provided in § 155.520(a)(1). We seek comment on these appeal request methods.

In paragraph (f)(3), we propose that the SHOP and appeals entity comply with the requirements of § 155.520(a)(2)–(3), which state that the SHOP or appeals entity may assist the employer or employee with the submission and processing of the appeal request and must not limit or interfere with an employer or employee's right to request an appeal. These provisions ensure the accessibility of the process and prohibit appeals entities from dissuading an employer or employee who wishes to pursue the appeal rights provided under this section. We seek comment on these provisions.

In paragraph (f)(4), we propose that the SHOP and appeals entity must consider an appeal request valid if it is submitted within the 90-day timeframe described in paragraph (f)(1) of this section. We propose these requirements so that an appeals entity may dismiss appeal requests that do not meet these baseline standards. We seek comment on this provision.

We propose in paragraph (g)(1) that upon receipt of a valid appeal request, the appeals entity must send timely acknowledgement to the employer, or the employer and employee if an employee is appealing, of the receipt of the appeal request, including an explanation of the appeals process as well as instructions for submitting

additional evidence for consideration by the appeals entity. In the case of an appeal by an employee, the employer may be able to take action to facilitate the employee's eligibility for coverage through the SHOP; accordingly, we propose to require that employers be notified of employee appeals so that employers may assess whether action on their part would be helpful. However, we note that the employer is not required to participate in the employee's appeal and need not submit additional information for an employee's appeal beyond what the employer submitted at the time of application. In paragraph (g)(2), we propose that the appeals entity must promptly notify the SHOP of the appeal, if the appeal request was not initially made to the SHOP. In paragraph (g)(3), we propose to require that the appeals entity must promptly and without undue delay, notify the employer or employee in writing upon receipt of an invalid appeal request, so that the employer or employee may have an opportunity to cure the defect, and the appeals entity must treat as valid an amended appeal request meeting all applicable requirements. We seek comment on these provisions.

In paragraph (h), we propose that upon receipt of a valid appeal request or the notice described in paragraph (g)(2) of the same section, the SHOP must promptly transmit via secure electronic interface to the appeals entity the appeal request and the eligibility record of the employer or employee that is appealing, and the appeals entity must also promptly confirm receipt of the records transferred by the SHOP. We did not propose specified timelines for ''promptly'' within this section and seek comment on the timelines standard in paragraph (h).

In paragraph (i), we propose the standards for the dismissal of an appeal request. In paragraph (i)(1)(i), we propose that the appeals entity must dismiss an appeal if the employer or employee that is appealing, or the employer or employee's authorized representative, withdraws the request in writing, either electronically or in hard copy. In paragraph (i)(1)(ii), we propose that the appeals entity must dismiss an appeal if the request does not meet the standards for a valid appeal outlined in paragraph (f)(4). We note that paragraph (f)(4) is only intended to exclude those appeal requests which fail to meet timeliness standards or are clearly requesting an appeal for something unrelated to SHOP eligibility determinations. This provision is not intended to exclude appeal requests that may have other minor deficiencies or are submitted without complete information. In paragraph (i)(2), we propose that the appeals entity must provide timely notice of a dismissal to the employer or employee that is appealing, including the reason for the dismissal, and must notify the SHOP of the dismissal. Finally, in paragraph (i)(3), we propose that the appeals entity may vacate a dismissal if the employer or employee demonstrates good cause to overturn the dismissal in writing within 30 days of the date of the notice of dismissal. We seek comment on these provisions and timeframes.

In paragraph (j), we propose the procedural rights of a SHOP appellant; specifically, we propose that the employer, or the employer and employee if an employee is appealing, must have the opportunity to submit relevant evidence for review of the eligibility determination by the appeals entity as part of a desk review. We anticipate that eligibility for SHOP participation can be proven through documentary evidence. The proposed approach differs from the individual market because of the less complex nature of the SHOP eligibility criteria. We seek comment on this approach.

In paragraph (k), we propose the requirements for adjudicating a SHOP appeal. In paragraph (k)(1), we state that the appeal must comply with the requirements proposed in § 155.555(i)(1) and (3), which state that an appeal must be reviewed by an impartial official who has not been directly involved in the eligibility determination subject to the appeal, and that appeals must be reviewed *de novo.* In paragraph (k)(2), we propose that the information considered in the appeal include the information used to determine the employer or employee's eligibility as well as any additional relevant evidence submitted during the appeal by the employer or employee. We intend this provision to allow employers and employees to submit evidence in support of their own appeal as well as allowing an employer to submit evidence during an employee's appeal. We seek comment on these provisions.

In paragraph (l), we propose SHOP appeal decision standards. In paragraph (l)(1), we propose that the appeal decision must be based solely on the evidence referenced in paragraph (k)(2) of this section, and the eligibility criteria established in § 155.710(b) or (e), as applicable. In paragraph (l)(2), we propose that the appeal decision must comply with the requirements of §§ 155.545(a)(2) through (5), which state that a decision must be explained clearly and in plain language, and must summarize the facts relevant to the appeal, identify the legal basis for the decision, and provide the effective date for the decision. These requirements are based on common fair hearing standards, and we intend each piece to assist the employer or employee in understanding how the rules of eligibility and the facts of the case result in the appeal decision. Finally, in paragraph (l)(3), we propose that SHOP appeal decisions be effective retroactive to the date the incorrect eligibility determination was made, if the decision finds the employer or employee eligible, or effective as of the date of the notice of the appeal decision, if eligibility is denied. We seek comment on these provisions pertaining to the appeal decision.

In paragraph (m), we propose requirements for issuing notice of the SHOP appeals decision. We propose that the appeals entity issue written notice, electronically or in hard copy within 90 days of the receipt of the appeal request to the employer, or to the employer and employee if an employee is appealing, and to the SHOP. The notice must include the contents of the decision described in paragraph (l). Administrative appeal processes within public programs allow a broad range of timeframes (for example, 30–365 days) for submitting appeal requests and adjudicating decisions. We anticipate that 90 days for resolution will be sufficient given the limited criteria involved in SHOP eligibility determinations. We seek comment on these provisions and timeframes.

In paragraph (n), we propose that the SHOP must promptly implement the appeal decision upon receiving notice under paragraph (m) of this section. We did not include a specific timeliness requirement for implementation of the decision in order to provide flexibility for SHOPs, which may vary in their capacity for turnaround times. We seek comment on this provision.

In paragraph (o), we propose that, subject to the requirements in § 155.550, the appeal record must be made accessible to the employer, or to the employer and employee if an employee is appealing, in a convenient format and at a convenient time. We anticipate that many employers and employees will be able to access their appeal records electronically through the SHOP. We seek comment on these provisions.

IV. Medicaid Premiums and Cost Sharing

A. Background

Section 1916 of the Act describes long-standing requirements for cost sharing, which apply broadly to all individuals who are not specifically

exempted. Such cost sharing is limited to ''nominal'' amounts. Section 1916 of the Act also establishes authority for states to impose premiums on specific groups of beneficiaries with family income above 150 percent of the federal poverty level (FPL). The Deficit Reduction Act of 2005 (DRA) established a new section 1916A of the Act, which gives states additional flexibility, allowing for alternative premiums and cost sharing, beyond what is allowed under section 1916 of the Act, for somewhat higher income beneficiaries. Such alternative cost sharing may be targeted to specific groups of beneficiaries and payment may be required as a condition of providing services. Alternative premiums and cost sharing imposed under section 1916A of the Act, cannot exceed five percent of family income.

The current regulations for Medicaid premiums and cost sharing are at 42 CFR 447.50 through 447.82. The first 11 provisions apply primarily to premiums and cost sharing established under the authority of section 1916 of the Act, while the remaining provisions apply primarily to the authority established by section 1916A of the Act. However, some provisions apply to all premiums and cost sharing regardless of the statutory authority, leading to confusion about what is permitted for individuals at various income limits. The proposed regulations make it clear what cost sharing is allowed for individuals with income under 100 percent of the FPL and what flexibilities exist for imposing premiums and cost sharing on individuals with higher income. This proposed rule would eliminate redundant provisions and create consistency between the two statutory authorities where appropriate and consistent with the law. To that effect, we propose to delete in its entirety the current Medicaid premiums and cost sharing rules at § 447.50 through § 447.82 and to replace them with new § 447.50 through § 447.57. Sections 447.58 through 447.82 will be reserved.

While this streamlined and simplified approach generally retains current options and limitations consistent with the statute, we are proposing some changes to increase state flexibility. For example, we propose to update the maximum nominal cost sharing amounts, provide new flexibility to impose higher cost sharing for non-preferred drugs and for non-emergency use of the ED, change the exemption for Indians to ensure that these protections are implemented effectively, and modify the public notice provisions. We seek comment on any element of the proposed rule, which aims to significantly streamline and expand flexibility regarding premiums and cost sharing.

B. Provisions of Proposed Rule

1. Definitions (§ 447.51)

At § 447.51, we propose to add a definition for premiums, which includes enrollment fees and other similar charges. We also propose to add a definition for cost sharing to encompass deductibles, copayments, coinsurance, and other similar charges. Because each of these charges would now be included within cost sharing, we have removed separate requirements related to deductibles, copayments, and coinsurance; all cost sharing would be subject to a single set of parameters as discussed below. We also propose new definitions specific to the premiums and cost sharing rules, for preferred drugs, emergency and non-emergency services, as well as alternative non-emergency service provider, since the cost sharing rules vary for these items and services. We are considering adding definitions of ''inpatient stay'' and ''outpatient services'' for purposes of cost sharing to take into account situations where an individual might return to an inpatient institution after a brief period when the return is for treatment of a condition that was present in the initial period. We solicit comments as to the utility of such a definition. Finally we propose a technical correction to the Indian definition to correct the citation to 25 U.S.C. 1603.

2. Update to Maximum Nominal Cost Sharing (§ 447.52)

Under the authority granted under sections 1916(a)(3) and (b)(3) of the Act for the Secretary to define nominal cost sharing, at § 447.52(b) we propose to revise the maximum amount of nominal cost sharing for outpatient services, which may be imposed on beneficiaries with incomes below 100 percent of the FPL. Currently, maximum allowable cost sharing is tied to what the agency pays for the service. This can be confusing and burdensome for states, providers, and beneficiaries. For example, for fiscal year 2013, states may charge up to $1.30 for outpatient services, if the agency pays $10.01 to $25, and up to $3.90 if the agency pays more than $50.

To simplify the rules, we propose to remove the state payment as the basis for the cost sharing charge and replace it with a flat $4 maximum allowable charge for outpatient services. The $4 maximum for outpatient services is comparable to the amount, states may charge under current rules ($3.90) for services for which the state pays more than $50. Because the majority of state services are reimbursed at more than $50, we believe a flat $4 cost sharing maximum is reasonable. We seek comment on this amount as well as the proposed approach in general, including the impact on individuals with significant service needs, such as those with disabilities who are residing in the community.

At § 447.52(b)(3), we propose that the maximum cost sharing established by the agency should not be equal to or exceed the amount the agency pays for the service. In accordance with the statute, we also propose that these proposed nominal amounts continue to be updated; however, since we are proposing to increase the nominal amounts, effective in fiscal year 2014, we propose to freeze the next CPI–U increase until October 2015. This increase is also applied to the nominal amounts for drugs and non-emergency use of the emergency department in § 447.53 and § 447.54, respectively.

Current rules permit cost sharing for institutional care, up to 50 percent of the cost for the first day of care, for individuals with incomes below 100 percent of the FPL. We are not proposing a change but are considering alternatives for the maximum allowable cost sharing related to an inpatient stay because this is a relatively high cost for very low income people and not a service that consumers have the ability to avoid or prevent. Options under consideration include the $4 maximum applied to outpatient services, $50, or $100, which would encompass the majority of hospital cost sharing currently in effect. If we were to revise the maximum allowable cost sharing for an inpatient stay, we are considering a transition period, for example, through October 1, 2015, to permit states time to make adjustments to their cost sharing and payment rate schedules. We seek comment on the best approach to cost sharing for an inpatient stay for very low-income individuals.

Beyond the differentiation between inpatient and outpatient care for purposes of establishing nominal levels of permissible cost sharing, we are also considering a separate distinction for nominal levels of cost sharing for community-based long-term services and supports. Community-based long-term services and supports may include services such as personal care, home health, and rehabilitative services that are furnished over an extended period of time pursuant to a coordinated plan of care. The delivery of these services differs from other outpatient services that are furnished in finite increments.

As a result, we are considering whether it may be more appropriate to define nominal cost sharing differently for community-based long-term services and supports, or perhaps to refine the treatment of nominal cost sharing generally for a continuous coordinated course of care. We seek comment on these approaches, including how we would define long-term services and supports and the unit of service for which separate cost sharing could be charged. As states exercise their options with respect to cost sharing, they should continue to be aware of their independent obligations under the Americans with Disabilities Act and the Supreme Court's *Olmstead* decision.

3. Higher Cost Sharing Permitted for Individuals With Incomes Above 100 Percent of the FPL (§ 447.52)

Proposed § 447.52 consolidates the requirements for cost sharing established under sections 1916 and 1916A of the Act. Under the statute, states may impose cost sharing at higher than nominal levels for nonexempt individuals with incomes at or above 100 percent of the FPL. Section 1916A provides that states may establish cost sharing for nonexempt services, other than drugs and ED services, up to 10 percent of the cost paid by the state for such services, for individuals with incomes between 100 and 150 percent of the FPL. This option is described in the newly proposed § 447.52; cost sharing for drugs and emergency department services are separately addressed. At § 447.52(c), we clarify that states may target cost sharing for individuals with family income above 100 percent of the FPL, meaning they may have differential cost sharing levels for different groups of individuals. We seek comment on whether the regulations should specifically address the types of targeting that would be allowed, keeping in mind that such targeting must be based on reasonable categories of beneficiaries, such as a specific income group or population. In addition, we seek comment on state methodologies or administrative processes that would make such targeting easier to implement.

4. Cost Sharing for Drugs (§ 447.53)

At § 447.53, we propose to establish a single provision specific to cost sharing for drugs so that the policies related to drugs can be clearly referenced. Building on current policy allowed by statute, proposed § 447.53 would specifically authorize states to establish differential cost sharing for preferred and non-preferred drugs, limited to the maximum amounts proposed at § 447.53(b). This cost sharing flexibility applies to individuals at all income levels.

Section 1916A(c) of the Act limits cost sharing for preferred drugs to nominal amounts (at all income levels). Section 1916A(c) also limits cost sharing for non-preferred drugs to nominal amounts, for individuals with family income at or below 150 percent of the FPL and individuals who are otherwise exempt from cost sharing. To provide additional flexibility to states, and to further encourage the use of preferred drugs, we are proposing to define nominal for this purpose so as to allow cost sharing of up to $8 for non-preferred drugs for individuals with income equal to or less than 150 percent of the FPL or who are otherwise exempt from cost sharing. States will have the flexibility to apply differential cost sharing for preferred and non-preferred drugs in whatever manner they consider most effective. For example, a state may charge $2 for preferred and $6 for non-preferred drugs or $0 for preferred and $8 for non-preferred drugs.

For individuals with family income above 150 percent of the FPL, per section 1916A(c) of the Act, cost sharing for non-preferred drugs may not exceed 20 percent of the cost the agency pays for the drug.

At § 447.53(a), we clarify our existing policy that all drugs will be considered preferred drugs if so identified or if the agency does not differentiate between preferred and non-preferred drugs.

5. Cost Sharing for Emergency Department Services (§ 447.54)

At § 447.54, we propose a new regulatory provision specific to non-emergency services furnished in a hospital emergency department (ED). Sections 1916(a)(3) and 1916(b)(3) of the Act allow states to establish cost sharing for non-emergency use of the ED of up to twice the nominal amount for outpatient services with a waiver. In addition, section 1916A(e)(2)(A) of the Act allows states to establish targeted cost sharing for individuals with family income above 100 and at or below 150 percent of the FPL in an amount not to exceed twice the nominal amount for such services. In order to make it easier for states to utilize existing flexibilities to reduce non-emergency use of the ED, at § 447.54(a) we propose to allow cost sharing of up to $8 for non-emergency use of the ED no waiver will be required. We seek comment on this approach, which can complement a range of other strategies available to states to reduce nonemergency use of the ED. For individuals with family income above 150 percent of the FPL, per section 1916A(e) of the Act, there is no limit on the cost sharing that may be imposed for non-emergency use of the ED.

If an emergency condition does not exist, § 447.54(d) includes the requirements for hospital screening and referral currently codified at § 447.80(b)(2), to ensure that beneficiaries have appropriate access to other sources of care, before cost sharing is imposed. Hospitals must assess the individual clinically, identify an accessible and available alternative provider with lesser cost sharing, and establish a referral to coordinate scheduling. Examples of accessible alternative providers are those that are located within close proximity, accessible via public transportation, open extended hours, and able to serve individuals with LEP and disabilities. (Note that for exempt populations, there must be access to an alternative provider with no cost sharing). For any individual who presents with an emergency medical condition, the hospital must provide stabilizing treatment per the Emergency Medical Treatment and Active Labor Act (EMTALA), as codified at § 489.24. An emergency medical condition is currently defined at § 438.114 as having ''acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention'' to seriously jeopardize or impair the individual's health. The EMTALA screening requirements combined with the prudent layperson standard for an emergency medical condition make it difficult to determine a service as non-emergency just based on CPT code. Chest pains, for example, could easily be considered an emergency condition under the prudent layperson standard, though a medical screening may indicate that the individual is suffering from heartburn or anxiety, which may not otherwise be considered emergency medical conditions. While the applicable CPT code might indicate a non-emergency condition, such chest pains would meet the definition of emergency medical condition and therefore may not be assessed a copayment. States have flexibility to consider how best to address some of these logistical and clinical challenges that exist when applying cost sharing to non-emergency use of the ED. To better understand the approaches used by states, at proposed 447.52(f)(5), we would request that states describe the process by which non-emergency

services are identified, when submitting a state plan amendment to implement such cost sharing. As successful approaches are identified, CMS will make that information available to states.

We seek comment on these standards and procedures, on ways to make this provision a viable option for states and hospitals, and in particular approaches to successfully distinguish between emergency and non-emergency services.

5. Premiums (§ 447.55)

At proposed § 447.55, we consolidate and simplify the requirements for premiums established under sections 1916 and 1916A of the Act. Proposed § 447.56(a) describes the option to impose premiums on individuals with family income above 150 percent of the FPL, as established under section 1916A of the Act, while paragraphs (a)(1) through (a)(5) describe the options to impose premiums for specific populations as established under section 1916 of the Act. Except for the minor revisions described below, we are not seeking to change current policy related to premiums.

At § 447.56(a)(1), we propose to modify slightly the option under section 1916 of the Act, which allows states to impose premiums on pregnant women described in 1902(l)(1)(A) of the Act. This option currently applies to individuals whose family income equals or exceeds 150 percent of the FPL and we propose to revise the option to apply only to those with family income that exceeds 150 percent of the FPL to align with other allowable premiums. In addition we are removing the reference to infants under age one described in 1902(l)(1)(B) on whom the state may impose premiums under 1916 because they are included in the group of children who may be charged premiums under 1916A of the Act. In so doing, as with pregnant women, premiums would be allowed for infants with family income exceeding 150 percent of the FPL rather than those with income equal to or exceeding 150 percent of the FPL. In addition, with this change, consistent with current state practice, all premiums imposed on infants will be subject to the aggregate limit of 5 percent of family income. We recognize that the statutory citations for the pregnant women who can be charged premiums do not line up with the streamlining and collapsing of eligibility groups in Medicaid eligibility final rule. We are exploring the options we have to cite to the new regulation rather than the statute.

To provide clarity and ensure a comprehensive policy, at § 447.55 paragraphs (a)(2) through (4) we add language from section 1916 describing the basis for charging premiums to working disabled individuals described at sections 1905(p)(3)(A)(i) and 1902(a)(10)(A)(ii)(XVI) of the Act and disabled children provided medical assistance under section 1902(a)(10)(A)(ii)(XIX) of the Act in accordance with the Family Opportunity Act.

At § 447.55(a)(5), we propose to revise requirements related to premiums imposed on medically needy individuals whose income is under 150 percent of the FPL. We removed the current income-related scale currently at § 447.52(b) and instead would provide states with the flexibility to determine their own sliding scale for establishing premiums for the medically needy up to maximum of $20 instead of the $19 in current regulation. We also propose to remove the requirement that premiums must be based on gross income, since starting in 2014, all income for purposes of determining premiums will be based on modified adjusted gross income (MAGI).

6. Limitations on Premiums and Cost Sharing (§ 447.56)

At § 447.56, we propose one single section that describes the general premium and cost sharing limitations. The current regulations have duplicative provisions specific to sections 1916 and 1916A of the Act and we propose a single streamlined approach wherever the policies align. We do not believe that the proposed change would have a meaningful impact on current state programs.

Sections 1916(a), (b), and (j), and 1916A(b)(3) of the Act specify certain groups of individuals exempt from premiums and/or cost sharing, including certain children, pregnant women, American Indians and Alaska Natives (Indians), individuals residing in an institution, individuals receiving hospice care and women eligible through the Breast and Cervical Cancer Treatment and Prevention Program. Proposed 447.56(a) would align all of these statutory exemptions.

At § 447.56(a)(1)(v), we propose to revise the current exemption at § 447.53(b)(3) and § 447.70(a)(5) for individuals in an institution who are required to spend all but a minimal amount of their income for personal needs, to allow a state option to include individuals under this exemption who are receiving services in a home and community-based setting. Since these individuals are only allowed to keep a personal needs allowance, similar to those residing in an institution, we propose to allow states to exempt these individuals from cost sharing in the same manner as those residing in an institution in accordance with the comparability requirements under section 1902(a)(19) of the Act.

At § 447.56(a)(1)(vii), we propose to clarify the exemption of Indians currently at § 447.53(b)(6) and § 447.70(a)(10) from cost sharing to ensure that Indians are not charged cost sharing inappropriately. Section 1916(j) of the Act requires that no cost sharing ''shall be imposed against an Indian who is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services.'' Section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603), as amended by the Affordable Care Act, further clarified these requirements by defining contract health services as any health service that is ''delivered based on a referral by, or at the expense of, an Indian Health Program.'' Because no formal paper trail may occur for the Medicaid agency to establish that a service has been delivered based on a referral under contract health services, we propose a broad definition of the cost sharing exemption for Indians. We propose that those Indians who are currently receiving or have ever received an item or service furnished by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization (I/T/U) or through referral under contract health services are exempt from all cost sharing. With this clarification the Medicaid agency would not have to know if a particular service was provided based on contract health service referral and would ensure that Indians who should be exempt on such bases will not be inadvertently charged cost sharing. States could implement this exemption by using claims payment data to identify Indians who have accessed services from an I/T/U, or as many states have done, by requesting that eligible Indians submit a letter, available through the Indian Health Service, designating them as Indians who have utilized such services and are, therefore, exempt from Medicaid cost sharing. We note that this provision would not impact contract health services eligibility or payment regulations. Authorization for payment by a contract health service program remains subject to all requirements of 42 CFR part 136.

We are considering requiring that states apply a periodic renewal process for exempting Indians from cost sharing, such that the exemption would not be indefinite, but would instead be limited

to a certain period of time following utilization of services at an I/T/U or under a contract health services referral. This would be consistent with a reading that the exemption applies for Indians who are currently receiving services through an I/T/U or contract health services referral, to eliminate any burden the absence of cost sharing would impose on those providers, who are not permitted to collect any payment from an eligible Indian. We seek comment on the feasibility of initiating a periodic renewal process for the Indian exemption, as well as an appropriate time frame for such renewals.

At § 447.56(a)(1)(viii), we propose to extend the existing exemption for individuals needing treatment for breast or cervical cancer, currently applied only to alternative cost sharing under section 1916A of the Act, to all cost sharing, and to cite to § 435.213, as added in this proposed rule. With this modification, this exemption is extended to apply to men as well since they are encompassed under § 435.213.

Consistent with § 435.116(d), which describes covered services for pregnant women as laid out in the Medicaid eligibility final rule (77 FR 17204), at § 447.56(a)(2)(iv) we propose to revise the exemption for pregnancy-related services so that all services provided to pregnant women shall be considered pregnancy-related unless specifically identified in the state plan as not pregnancy-related. We are also codifying the requirement in the Affordable Care Act to exempt smoking cessation counseling and drugs for pregnant women from cost sharing.

We recognize that the statutory citations for children who are exempt from premiums and cost sharing do not line up with the streamlining and collapsing of eligibility groups in Medicaid eligibility final rule. We are exploring the options we have to cite to the new regulation rather than the statute.

At § 447.56(b), we propose to codify the existing statutory requirement to ensure comparability, such that states may not exempt additional populations from cost sharing, except in the case of targeted cost sharing. Any cost sharing included in the state plan would be applied equally to services provided under fee-for-service, managed care, or benchmark coverage. At proposed § 447.56(c)(2), we move existing regulations at § 447.57 and § 447.82 requiring the agency to reduce the payment it makes to providers by the amount of a beneficiary's cost sharing obligation.

At § 447.56(f) we update the requirements around aggregate limits for premiums and cost sharing to be based on the Medicaid household as defined in § 435.603(f) of the Medicaid eligibility final rule and revised in this proposed rule. Existing regulations at §§ 447.64(d)(2) and 447.68(d) provide that an agency cannot rely solely on families who are risk of reaching the aggregate limit to track their own premiums and cost sharing, we clarify that this means that the agency must have an automated system in place to do such tracking. At § 447.56(f)(6), we indicate that the agency may establish additional aggregate limits, including but not limited to a monthly limit on cost sharing charges for a particular service. This new paragraph replaces the paragraph related to cumulative maximums at § 447.54(d) of the current regulations. We seek comment on whether there are efficient alternatives to using an automated system to conduct this tracking.

7. Beneficiary and Public Notice Requirements (§ 447.57)

At § 447.57 we have included the existing requirements for notice regarding current premiums and cost sharing and changes to such premiums and cost sharing, as currently described at § 447.76. At proposed 447.57(b) we codify existing policy that requires that notice be provided in a manner ensuring that affected beneficiaries, providers, and the general public have access to the notice. Appropriate formats for providing notice might include, the agency Web site, newspapers with wide circulation, web and print media reaching racial, ethnic, and linguistic minorities, stakeholder meetings, and formal notice and comment in accordance with the state's administrative procedures. With this proposed revision, we would no longer consider state legislation discussed at a public hearing or posted on a Web site to be sufficient notice that a beneficiary or provider would likely have been made aware of the premium or cost sharing changes. At proposed § 447.57(c) we clarify that prior to submitting to CMS any state plan amendment that establishes or significantly modifies existing premiums or cost sharing, or changes the consequences for non-payment of cost sharing, the agency must provide the public with advance notice of the amendment and opportunity to comment. We are considering a policy that if cost sharing is substantially modified during the SPA approval process, the agency must provide additional public notice and seek comment on this approach.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

This proposed rule continues to implement key provisions of the Affordable Care Act including the appeals process for the Medicaid and Children's Health Insurance Program (CHIP) applicants and beneficiaries; requirements for combined eligibility notices; and completion of the streamlining of eligibility for children, pregnant women, and adults that was initiated in the Medicaid eligibility final rule published on March 23, 2012. This rule also proposes to streamline the citizenship documentation requirement rules consistent with the statute and proposes a revision regarding Medicaid eligibility determinations made by Exchanges. The rule proposes to implement provisions of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA), such as those related to deemed newborn eligibility, and modifies CHIP rules relating to substitution of coverage and premium lock-out periods, which are important to a coordinated system of coverage across programs.

The policies proposed in this rule will result in a reduction in burden for individuals applying for and renewing coverage, as well as for states. The Medicaid program and CHIP will be made easier for states to administer and for individuals to navigate by streamlining Medicaid eligibility and simplifying Medicaid and CHIP eligibility rules for most individuals, Even though there are short-term burdens associated with the implementation of the proposed rule,

the Medicaid program and CHIP will be easier for states to administer over time due to the streamlined eligibility and coordinated efforts for Medicaid, CHIP, and the new affordable insurance exchanges.

The proposed rule also continues to implement provisions related to the establishment of Exchanges. This proposed rule would: (1) Set forth standards for adjudicating appeals of individual eligibility determinations and exemptions from the individual responsibility requirements, as well as determinations of employer-sponsored coverage, and determinations of SHOP employer and employee eligibility for purposes of implementing section 1411(f) of the Affordable Care Act, (2) set forth standards for adjudicating appeals of employer and employee eligibility to participate in the SHOP, (3) outline criteria related to the verification of enrollment in and eligibility for minimum essential coverage through an eligible employer-sponsored plan, and (4) further specify or amend standards related to other eligibility and enrollment provisions. The description of the burden estimates associated with these provisions is included in the information collection requirements outlined in section D.

Section A outlines the information collection requirements in this proposed regulation that will be addressed through a separate notice and comment process under the Paperwork Reduction Act (PRA). Section B outlines the information collection requirements that involve Medicaid and CHIP eligibility and enrollment. We are soliciting public comment on each of these issues for the following sections of the proposed rule that contain information collection requirements (ICRs). We used data from the Bureau of Labor Statistics to derive average costs for all estimates of salary in establishing the information collection requirements. Salary estimates include the cost of fringe benefits, calculated at 35 percent of salary, which is based on the June 2012 Employer Costs for Employee Compensation report by the U.S. Bureau of Labor Statistics.

A. Medicaid and CHIP Information Collection Requirements (ICRs) To Be Addressed Through Separate Notices and Comment Process Under the Paperwork Reduction Act

1. ICRs Regarding State Plan Amendments

1a. (§§ 430.12, 431.10, 431.11, 433.138, 433.145, 433.147, 433.148, 435.110, 435.112, 435.115, 435.116, 435.117, 435.139, 435.145, 435.150, 435.170, 435.172, 435.201, 435.210, 435.211, 435.213, 435.214, 435.215, 435.220, 435.222, 435.226, 435.227, 435.229, 435.301, 435.310, 435.406, 435.407, 435.601, 435.602, 435.603, 435.610, 435.831, 435.905, 435.910, 435.917, 435.918, 435.926, 435.952, 435.955, 435.956, 435.1100–1110, 435.1200, 440.130, 440.210, 440.220, 440.305, 440.315, 440.330, 440.335, 440.345, 457.50, 447.52, 447.55, 447.56, 457.320, 457.342, 457.348, 457.355, 457.360, 457.455, 457.460, 457.465, 457.805, 457.495, and 457.1120).

These amendments to the Medicaid and CHIP state plans are necessary to reflect changes in statute and federal policy. We are aware of the need to estimate the PRA burden associated with the submission of state plan amendments related to the provisions described in the preceding sections of the preamble. The state plan amendments will be addressed as part of the electronic state plan being developed by CMS as part of the MACPro system. The MACPro system will be made available for public comment through a separate PRA process, along with the estimated burden.

1b. (§§ 435.113, 435.114, 435.223, and 435.510)

We are proposing to eliminate the following provisions of existing regulation: §§ 435.113, 435.114, 435.223, and 435.510. Because we are eliminating these regulations, states will not be required to submit state plan amendments related to them. Therefore, there is no burden associated with these provisions of the proposed rule.

2. ICRs Regarding Authorized Representatives (§ 435.923, § 457.340), Verification Exception for Special Circumstances (§ 435.952, § 457.320) and Verification Requirements Regarding Citizenship and Immigration Status (§§ 435.3, 435.4, 435.406, 435.407, 435.940, 435.952, 435.956, 435.1008, 457.320, and 457.380)

In this rulemaking, we propose to add a new § 435.923 establishing minimum requirements for the designation of authorized representatives. We are also applying these provisions to state CHIP agencies through the addition of a cross reference in § 457.340. At § 435.952 and § 457.320 we are proposing to permit self-attestation on a case by case basis in special circumstances for individuals who do not have access to documentation (for example, victims of natural disasters). The provisions at §§ 435.3, 435.4, 435.406, 435.407, 435.940, 435.952, 435.956, 435.1008, 457.320, and 457.380 propose guidelines for verification of Medicaid and CHIP eligibility based on citizenship or immigration status.

We are aware of the need to estimate the PRA burden associated with the collection of information related to authorizing an individual to act as a representative of an applicant, to permit self-attestation for individuals who do not have access to documentation, and the citizenship and immigration verification requirements. These requirements will be addressed as part of the single, streamlined application developed by the Secretary. The application will be made available for public comment through a separate PRA process, along with the estimated burden.

B. ICRs Regarding Medicaid Eligibility and Enrollment

1. ICRs Regarding Delegation of Eligibility Determinations and Appeals (§§ 431.10, 431.11, and 457.1120)

According to §§ 431.10, 431.11, and 457.1120 as proposed in this rule, a state may delegate authority to make eligibility determinations and to conduct fair hearings. States generally have written agreements with various entities for similar purposes. Under the proposed rule, agreements may need to be modified or new agreements established. However, states that use the same agency to administer more than one program (for example, Medicaid and the Exchange) will not need an agreement for the determination of eligibility by that agency.

Delegation of eligibility determinations was approved under OMB control number 0938–1147. This rule is proposing minor changes in the existing requirement related to the type of agencies that can make Medicaid and CHIP eligibility determinations. These proposed amendments do not change the burden associated with the requirement and, therefore, are not subject to additional OMB review. Medicaid and CHIP agencies will need to establish new agreements in order to delegate authority to conduct eligibility appeals. The burden associated with the delegation of appeals is the time and effort necessary for the Medicaid and CHIP agencies to create and execute the agreements with the organization to which they are delegating authority.

There are 53 Medicaid agencies (the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa) and 43 CHIP agencies, for a total of 96 agencies. For the purpose of developing the cost burden, we estimate that half of these agencies will establish an agreement with an

organization to conduct fair hearings. We estimate a one-time burden of 50 hours to develop an agreement that can be used with the organization. It will take an additional 10 hours for Medicaid and 10 hours for a separate CHIP agency to negotiate and execute the agreement with the organization for a total time burden of 2,880 hours across all agreements. For the purpose of the cost burden, we estimate it will take a health policy analyst 40 hours at $49.35 an hour and a senior manager 10 hours at $79.08 an hour to complete the model agreement (for a total of $2,764.80) plus 10 additional hours ($493.50) for a health policy analyst to execute a completed agreement with each organization. The estimated cost burden for each agreement is $3,258.30 for a total cost burden of $156,398.40.

2. ICRs Regarding Fair Hearing Processes (§§ 431.205(e), 431.206(b)(4) and (c)(5), 431.210, 431.221(a), 431.224(a), 431.232(b), and 431.240(c))

In §§ 431.205(e) and 431.206(c)(5), we propose to require that the hearing system and information must be accessible to persons who are limited English proficient and persons with disabilities. While states would be required to make the hearing system accessible, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

In § 431.206(b)(4), states would be required to give individuals the choice of where to have their hearing held. There are 53 Medicaid agencies (the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa) and 43 CHIP agencies for a total of 96 agencies that will be subject to this requirement. The burden associated with providing this choice is developing the process and workflow to enable the choice and sending the request for the fair hearing to the appropriate agency. We estimate it will take each agency an average of 70 hours to create the process and workflow required in providing the choice. For the purpose of the cost burden, we estimate it will take a health policy analyst 40 hours at $49.35 an hour, a senior manager 10 hours at $79.08 an hour, and a computer programmer 20 hours at $52.50 to complete the process and workflow. The estimated cost burden for each agency is $3,814.80. The total estimated cost burden is $366,220.80.

In §§ 431.210 and 431.232(b), we are clarifying the type of information that must be included in the fair hearing notices. While states will need to provide additional explanation of the reason for their action and the right and timeframe for appealing the decision, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

In § 431.221(a), states would be required to establish procedures that permit an individual or an authorized representative to submit a hearing request by telephone, by mail, in person, or by the Internet. While states would be required to permit an individual to submit the request through these various means, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

In § 431.224(a), states would be required to establish and maintain an expedited review process for hearings for individuals for whom taking the time for a standard hearing could seriously jeopardize the individual's life or health. While states would be required to have an expedited review process for hearings, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

In § 431.240(c), states would be required to ensure that a hearing office has access to the information necessary to issue a proper hearing decision, including access to the agency's policies and regulation. While the agency would be required to make this information available, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

3. ICRs Regarding Eligibility Determination Notices (§§ 435.917, 435.918, 435.1200, 457.110, 457.340, 457.348, and 457.350)

In § 435.917 and § 457.340, the agency would be required to provide a timely combined notice to individuals regarding their eligibility determination. The notice is to include reasons for the action, the specific supporting action, and an explanation of hearing rights. We expect that the eligibility determination notice will be dynamic and include information tailored to all possible outcomes of an application or renewal. In § 435.918 and § 457.110, states must provide electronic notices to individuals when elected.

The burden associated with the requirements to deliver notices is the time necessary for the state staff to understand the requirements related to notices; to develop the language for approval, denial, termination, suspension, and change of benefits notices; and to program the language in the Medicaid and CHIP notice systems so that the notice can be populated and generated based on the outcome of the eligibility determination.

We estimate 53 state Medicaid agencies (the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa) and 43 CHIP agencies (in states that have a separate or combination CHIP), totaling 96 agencies, will be subject to this requirement. We estimate that it will take each Medicaid and CHIP agency 194 hours annually to develop, automate, and distribute the notice of eligibility determination. For the purpose of the cost burden, we estimate it will take a health policy analyst 138 hours at $49.35 an hour, a senior manager 4 hours at $79.08, an attorney 20 hours at $90.14, and a computer programmer 32 hours at $52.50 to complete the notices. The estimated cost burden for each agency is $10,609.42. The total estimated cost burden is $1,018,504.30, and the total annual hour burden is 18,624 hours.

In §§ 435.1200, 457.348, and 457.350, we propose to permit state Medicaid and CHIP agencies to include the provision of combined notices or notices with coordinated content in the agreement established with the Exchange or other insurance affordability programs. These agreements were approved under OMB control number 098–1147. This rule is proposing only minor changes in the existing requirement related to the

agreements. These proposed amendments do not change the burden associated with the requirement and, therefore, are not subject to additional OMB review.

4. ICRs Regarding Application Assistors (§§ 435.909 and 457.340)

In § 435.909(a) and § 457.340, states would have the option to authorize certain staff and volunteers of organizations to act as certified application assistors. The burden associated with the requirements to assist individuals with the application process is the time and effort necessary for the state to create agreements with these organizations, to create a registration process for assistors, and to train staff on the eligibility and confidentiality rules and requirements and how to assist applicants with the completing the application.

We estimate the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa will establish agreements with on average 20 organizations in their state or territory for a total of 1,060 agreements related to application assistance. As part of this estimate, we assumed that state Medicaid and CHIP agencies will be party to the same agreements and, therefore, will not establish separate agreements. The first burden associated with this provision is the time and effort necessary for the state Medicaid and CHIP agencies to establish an agreement.

We assume that each state will establish an agreement with the organization to fulfill the requirements of § 435.908 and § 457.340. To develop an agreement, we estimate 53 states Medicaid agencies (the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa) would be subject to this requirement. We estimate that it would take each state and territory 50 hours to develop a model agreement. For the purpose of the cost burden, we estimate it would take a health policy analyst 40 hours at $49.35 an hour and a senior manager 10 hours at $79.08 to develop an agreement. The estimated cost burden would be $2,764.80 (per state) or $146,534.40 (total) while the total annual hour burden would be 2,650 hours.

To negotiate and complete the agreement, we estimate that each of the 53 states/territories would execute 20 agreements. For the purpose of the cost burden, we estimate it would take a health policy analyst 10 hours at $49.35 an hour to execute each agreement. The estimated cost burden would be $9,870 (per state) or $523,110 (total) while the total annual hour burden would be 10,600 hours.

To develop and execute the model agreements, the total cost would be $669,644.40 for 13,250 hours of labor.

The next burden associated with this provision is the time and effort necessary for the states and territories to establish the registration process and workflow for the application assistors. We estimate that the 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa) will be subject to this requirement.

We estimate it will take each state or territory an average of 70 hours to create the registration process and workflow for the application assistors. For the purpose of the cost burden, we estimate it will take a health policy analyst 40 hours, at $49.35 an hour, a senior manager 10 hours, at $79.08 an hour, and a computer programmer 20 hours at $52.50 to complete the registration process and workflow. The estimated cost burden for each state or territory is $3814.80. The total estimated cost burden is $202,184.40.

The next burden associated with this provision is the time and effort necessary for the state Medicaid and CHIP agencies to provide training to the application assistors. We estimate 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa will be subject to this requirement.

For the purpose of the cost burden, we estimate it will take a training specialist 40 hours at $26.64 an hour and a training and development manager 10 hours at $64.43 an hour to develop training materials for the application assistors, for a total time burden of 2,650 hours. The estimated cost burden for each state or territory is $1,709.90. The total estimated cost burden is $90,624.70.

Lastly, we estimate that each state or territory will offer 50 hours of training sessions to train individuals to assist applicants with Medicaid and CHIP applications for a total time burden of 2650 hours. For the purpose of the cost burden, we estimate it will take a training specialist 50 hours at $26.64 an hour to train the application assistors. The estimated cost burden for each agency is $1,332. The total estimated cost burden is $70,596.

5. ICRs Regarding the Availability of Program Information for Individuals who are Limited English Proficient (§§ 431.205(e) and 435.905(b))

While states would be required to provide language services to individuals who are limited English proficient, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

6. ICRs Regarding Presumptive Eligibility (§§ 435.1101(b) and 457.355)

In § 435.1101(b) and § 457.355 by reference to § 435.1101, states would be required to provide qualified entities with training in all applicable policies and procedures related to presumptive eligibility. The burden associated with this provision is the time and effort necessary for the states and territories to provide training to the application assistors. We estimate 50 states, the District of Columbia, Northern Mariana Islands, and American Samoa will be subject to this requirement. As part of this estimate, we assumed that state Medicaid agencies and CHIP agencies, where there are separate agencies, will develop and use the same training.

For the purpose of the cost burden, we estimate it will take a training specialist 40 hours at $26.64 an hour and a training and development manager 10 hours at $64.43 an hour to develop training materials for the qualified entities, for a total time burden of 2,650 hours. The estimated cost burden for each state or territory is $1,709.90. The total estimated cost burden is $90,624.70. We estimate that each state or territory will offer 50 hours of training sessions to qualified entities, for a total time burden of 2,650 hours. For the purpose of the cost burden, we estimate it will take a training specialist 50 hours at $26.64 an hour to train the application assistors. The estimated cost burden for each agency is $1,332. The total estimated cost burden is $70,596.

7. ICRs Regarding Deemed Newborn Children (§§ 435.117(d) and 457.360(d))

In § 435.117(d) and § 457.360(d), states would be required issue separate Medicaid identification numbers to babies covered by Medicaid as ''deemed newborns'' if the mother for the date of the child's birth was receiving Medicaid in another state, covered in the state's separate CHIP, or covered for only emergency medical services. Also, the state must issue a separate Medicaid identification number to a deemed newborn prior to the effective date of any termination of the mother's eligibility or prior to the date of the child's first birthday, whichever is sooner. Under such circumstances, a separate Medicaid identification number must be assigned to the infant

so the state may reimburse providers for covered services, document the state's expenditures, and request federal financial participation.

While states are required to issue Medicaid identification numbers to these children, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

8. ICRs Regarding Adoption Assistance Agreements (§§ 435.145 and 435.227)

At §§ 435.145 and 435.227, we are proposing to amend current regulations for these Medicaid eligibility groups for consistency with federal statutory requirements. Among the eligibility requirements and alternatives for these groups is that an adoption assistance agreement be in effect. As noted in section A, Medicaid state plan amendments for these and other eligibility groups will be addressed through a separate notice and comment process under PRA. This proposed rule is not making any revision to states' adoption assistance agreements. These agreements are between state agencies and the adoptive parents and are specific to the rules and laws in place in each state. We do not govern these agreements; therefore, there is no burden associated with these provisions of the proposed rule.

9. ICRs Regarding Enrollment Assistance and Information Requirements (§ 457.110)

While states would be required to provide accurate and easily understood information and to provide assistance to help families make informed decisions about their health plans, professionals, and facilities, we believe the associated burden is exempt from the PRA in accordance with 5 CFR 1320.3(b)(2). We believe that the time, effort, and financial resources necessary to comply with this requirement would be incurred by persons during the normal course of their activities and should, therefore, be considered as a usual and customary business practice.

10. ICRs Regarding Medicaid and CHIP Agency Responsibilities Related to Coordination Involving an Appeals Entity (§§ 435.1200(g) and 457.348(d))

In § 435.1200(g) and § 457.348(d), the state Medicaid and CHIP agencies would be required to establish a secure electronic interface to enable communications when an appeal is filed. Transmission of the electronic account would contain the outcome of the appeal among the data elements. The requirement for a secure electronic interface, creation of an electronic account and transmission of information in the account was addressed under OMB control number 0938–1147. We are only minimally changing this requirement to include information on eligibility appeals. The inclusion of this information does not change the burden estimate therefore this provision is not subject to further OMB review.

11. ICRs Regarding Beneficiary and Public Notice Requirements (§ 447.57)

In § 447.57(a), the agency would be required to make available a public schedule describing current premiums and cost sharing requirements containing the information in paragraphs (a)(1) through (6). In § 447.57(b), the agency would be required to make the public schedule available to those identified in paragraphs (b)(1) through (4).

Prior to submitting a SPA for Secretary approval to establish or modify existing premiums or cost sharing or change the consequences for non-payment, § 447.57(c), would require that the state provide the public with advance notice of the SPA (specifying the amount of premiums or cost sharing and who is subject to the charges); provide a reasonable opportunity to comment on SPAs that propose to substantially modify premiums and cost sharing; submit documentation to demonstrate that these requirements were met; and provide additional public notice if cost sharing is modified during the SPA approval process.

In § 447.57(d), the information must be provided in a manner that ensures that affected beneficiaries and providers are likely to have access to the notice and be able to provide comments on proposed state plan amendments.

The burden associated with this requirement is the time and effort it would take for a state to provide advance notice to the public and prepare and submit documentation with the state plan amendment. We estimate it would take 1 state or territory approximately 6 hours to meet this requirement; we believe 53 states will be affected by this requirement for an annual burden of 30 hours.

C. Part 155—Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act

It is important to note that these regulations involve several information collections that will occur through the single, streamlined application for enrollment in a QHP and for insurance affordability programs described in 45 CFR 155.405. We have accounted for the burden associated with these collections in the Supporting Statement for Data Collection to Support Eligibility Determinations for Insurance Affordability Programs and Enrollment through Health Benefits Exchanges, Medicaid, and Children's Health Insurance Program Agencies (CMS–10440).

We would also like to highlight that this supporting statement includes several information collections from regulatory provisions finalized in the Exchange final rule. We have included these information collections in this PRA package to address PRA requirements related to those provisions as they were not included in the information collection section of the Exchange final rule.

1. ICRs Regarding Appeals (§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740)

The eligibility appeals provisions in subparts F and H include requirements for the collection of information that will support processing and adjudicating appeals for individuals, employers facing potential tax liability, and SHOP employers and employees. The information collection will be largely the same for each type of appeal and includes the appeal request, expedited appeal request, appeal withdrawal, request to vacate, request for additional information, hearing request form, special considerations form, and appointment of authorized representative. We anticipate most appellants will opt to accept and respond to these forms and notices electronically; however, appeals entities will be equipped to handle the sending and submission of paper forms and documents. Appellants providing information to the appeals entity will likely need to search their personal files at home or obtain documentation from employers or government entities to support their appeal. If the appellant is an employer, it is likely that the employer may rely on human resources personnel or an attorney to provide information during the appeal. Appeal entities will rely on office clerks and paralegals or legal assistants to process the information submitted. Finally, the use of many of these forms and notices is dependent on the trajectory of each appeal; therefore, not every form will be implicated in each appeal.

The appeal request form will be available to each appellant type in hard

copy and electronically but appellants may also request an appeal telephonically. Regardless of the mode of transmission, some basic information will be required to initiate an appeal, including the identity of the appellant and the appellant's contact information. Appellants are encouraged, but not required, to also submit information detailing why they are appealing and evidence to support their appeal. We anticipate that most appellants will choose to submit more than the base-level of information. We estimate that most appellants will complete the form within one hour and that the appeals entity will require up to 1.5 hours to process the form, which includes 0.5 hours for an office clerk, at an hourly cost of $19.97, to digitize and link the form to the appellant's account, and one hour for a paralegal or legal assistant, at an hourly cost of $34.51, to review the information submitted, and notify the appropriate appeals workers of a new appeal request. Across all types of appeals, we estimate a total of 279,055 appeals requests for each year, which will require 418,582 hours, at a total cost of $12,416,553.

Appellants will receive an acknowledgement of his or her appeal request that includes the invitation to submit evidence to support the appeal in the form of the Request for Additional Information Form. Completing this form is optional for all appellants. However, we anticipate that many appellants will use the opportunity to send additional information to the appeals entity. Much like the appeal request, the appeals entity will be responsible for digitizing the submitted information, placing it in the proper account, and reviewing it. The burden on the appellant is dependent on how easily he or she can access information relevant eligibility. We estimate this may require up to two hours for the appellant. To process additional information submitted, we estimate that the appeals entity will require 0.5 hours for an office clerk, at an hourly cost of $19.97, to digitize and link the form to the appellant's account, and 0.5 hours for a paralegal or legal assistant, at an hourly cost of $34.51, to review the information submitted, and notify the appropriate appeals workers of the updated information, for a total cost of about $27 per appellant.

Other forms the appellant may encounter during the appeals process include the appeal withdrawal form, request to vacate a dismissal, special considerations form, hearing request form, and appointment of authorized representative form. Each of these include information collections that are initiated by the appellant when he or she, for example, wishes to withdraw an appeal or intends to have another person act on his or her behalf. In most cases, the information submitted for these actions will require little more than acknowledging the appellant's intentions and including contact information. The Request to Vacate a Dismissal will entail slightly more effort because, to successfully vacate a dismissal, the appellant must show good cause. We anticipate that these forms may require as little as 15 minutes or up to 2 hours for the appellant to complete and approximately 30 minutes to 1.5 hours for the appeals entity to process for a cost of approximately $10–$45 per submission.

The appeals process also includes several instances where notice of appeals actions must be sent to the Exchange, the SHOP, or Medicaid or CHIP agencies. For example, the appeals entity is required to notify the Exchange or the SHOP when an appeal request has been submitted and when an appeal decision has been issued. This notice will be sent via secure electronic interface. In addition, eligibility records and, in some instances, appeals records must be transmitted electronically to the appeals entity from the Exchange, the SHOP, or the Medicaid or CHIP agency. To accommodate these electronic notifications and transfers of records, we estimate the Exchange will need to include language in agreements with other agencies administering insurance affordability programs. We estimate that the creation of the necessary agreements will necessitate 35 hours from a health policy analyst at an hourly cost of $49.35, and 35 hours from an operations analyst at an hourly cost of $54.45 to develop the agreement; and 30 hours from an attorney at an hourly cost of $90.14 and five hours from a senior manager at an hourly cost of $79.14 to review the agreement. Accordingly, the total burden on the Exchange associated with the creation of the necessary agreements will be approximately 105 hours and $6,733 per Exchange, for a total cost of $343,382 for 51 Exchanges.

We also propose that appeals entities maintain appeals records and provide the appellant and the public access to those records, subject to applicable state and federal privacy and confidentiality laws. We estimate that an individual requesting access to appeal records may require up to 30 minutes to submit the request form. An employer submitting a similar request may require up to an hour to complete the form at a maximum cost of $62.65, which includes 0.5 hours of time from a human resources specialist at an hourly cost of $40.68 to complete the record request; and 0.25 hours of time from an attorney at an hourly cost of $90.14 and 0.25 hours from a senior manager at an hourly cost of $79.08 to review the request before submission. In order to process record requests, we anticipate the appeals entity will require two hours for a total cost of $42.98 with an additional dollar for the cost of printing and mailing hard copy records. We estimate that the development of the records storage system will necessitate 15 hours from a health policy analyst at an hourly cost of $49.35, and 20 hours from an operations analyst at an hourly cost of $54.45 to provide specifications for the records that need to be maintained; 20 hours from an attorney at an hourly cost of $90.14 and five hours from a senior manager at an hourly cost of $79.14 to provide oversight and supervision; and 120 hours from a computer programmer at an hourly cost of $52.50 to conduct the necessary system development. Accordingly, the total burden on the Exchange associated with the development of the records storage system will be 159 labor hours with a cost of approximately $9,159 per Exchange and a total cost of $467,131 for 51 Exchanges.

Finally, the appeals process will require the sending of notices to the appellant and other parties throughout the process. Notices include notice of dismissal, notice of hearing, notice of denial of an expedited hearing request, and notice of appeals decision. We expect that the appeal decision notice will be dynamic and include information tailored to the appellant's case. We estimate that the development of each of the necessary notices will necessitate 44 hours from a health policy analyst at an hourly cost of $49.35 to learn appeals rules and draft notice text; 20 hours from an attorney at an hourly cost of $90.14 and four hours from a senior manager at an hourly cost of $79.08 to review the notice; and 32 hours from a computer programmer at an hourly cost of $52.50 to conduct the necessary development. In total, we estimate that the development of each notice specified as part of the appeals process will require 100 hours to complete in the first year, at a cost of $5,971 per Exchange, for a total of $304,497 for 51 Exchanges.

2. ICRs Regarding Notices (§§ 155.302, 155.310, 155.315, 155.320, 155.330, 155.335, 155.345, 155.410, 155.715, 155.722, 155.725, 155.1080)

Several provisions in subparts D and E outline specific notices that the Exchange will send to individuals and

employers throughout the eligibility and enrollment process. The purpose of these notices is to alert the individuals and employers of actions taken by the Exchange. When possible, we anticipate that the Exchange will consolidate this notice when multiple members of a household are applying together and receive an eligibility determination at the same time. The notice may be in paper or electronic format but must be in writing and will be sent after an eligibility determination has been made by the Exchange. We anticipate that a large volume of enrollees will request electronic notification while others will opt to receive the notice by mail. As a result of certain enrollees opting to receiving the notice by mail in some instances, we estimated the associated mailing costs for the time and effort needed to mail notices in bulk to enrollees as appropriate.

We expect that the electronic eligibility determination notice will be dynamic and include information tailored to all possible outcomes of an application throughout the eligibility determination process. To develop the paper and electronic notices, Exchange staff would need to learn eligibility rules and draft notice text for various decision points, follow up, referrals, and appeals procedures. A peer analyst, manager, and legal counsel would review the notice. The Exchange would then engage in review and editing to incorporate changes from the consultation and user testing including review to ensure compliance with plain writing, translation, and readability standards. The Exchange will also consult with the state Medicaid or CHIP agency in order to develop coordinated notices. Finally, a developer would program the template notice into the eligibility system so that the notice may be populated and generated in the correct format according to an individual's preference to receive notices, via paper or electronically, as the applicant moves through the eligibility process.

HHS is currently developing model eligibility determination notices and several other models for notices described in this subpart which will also decrease the burden on Exchanges to establish such notices. If a state opts to use the model notices provided by HHS, we estimate that the Exchange effort related to the development and implementation of the eligibility notice will necessitate 44 hours from a health policy analyst at an hourly cost of $49.35 to learn appeals rules and draft notice text; 20 hours from an attorney at an hourly cost of $90.14 and four hours from a senior manager at an hourly cost of $79.08 to review the notice; and 32 hours from a computer programmer at an hourly cost of $52.50 to conduct the necessary development. In total, we estimate that this will take a total of 100 hours for each Exchange, at a cost of approximately $5,971 per Exchange and a total cost of $304,497 for 51 Exchanges. We expect that the burden on the Exchange to maintain this notice will be significantly lower than to develop it.

Section 155.310(h) specifies that the Exchange will notify an enrollee's employer that an employee has been determined eligible for advance payments of the premium tax credits and/or cost-sharing reductions. Upon making such an eligibility determination, the Exchange will send a notice to the employer with information identifying the employee, along with a notification that the employer may be liable for the payment under section 4980H of the Code, and that the employer has a right to appeal this determination. Because this notice will be sent to an employer at the address as provided by an application filer on the application, we anticipate all of these notices will be sent by mail. As a result, we estimated the associated mailing costs for the time and effort needed to mail notices in bulk to employers. Like the eligibility notice, the employer notice above will be developed and programmed into the eligibility system. However, unlike the eligibility notice, we expect the information on the employer notice to be minimal in comparison to the eligibility notice and therefore the burden on the Exchange to develop the notice to be substantially less. Further, as with the individual eligibility notice, HHS will provide model notice text for Exchanges to use in developing this notice.

3. ICRs Regarding Verification of Enrollment in an Eligible Employer-Sponsored Plan and Eligibility for Qualifying Coverage in an Eligible Employer-Sponsored Plan (§ 155.320)

Section 155.320(d) proposes the process for the verification of enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. Paragraph (d)(2) specifies that the Exchange will obtain relevant data from any electronic data source available to the Exchange which has been approved by HHS, as well as data from certain specified electronic data sources. This will involve the development and execution of data sharing agreements; however, this burden is already captured in the data sharing agreements described in § 155.315. As these verification activities will all be electronic, we do not expect for there to be any additional burden than that which is required to design the overall eligibility and enrollment system.

Paragraph (d)(3)(iii)(A) proposes that the Exchange provide notice to the applicant indicating that the Exchange will be contacting any employer identified on the application to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested. The burden associated with this notice is addressed in 155.310(g) as this will not be a separate notice, but incorporated into the eligibility determination notice described in the above paragraph.

In paragraph (d)(3)(iii)(D), we propose that the Exchange make reasonable attempts to contact any employer to which the applicant attested employment to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested. It is difficult to estimate the burden associated with this information collection as the calculation involves identifying the number of individuals for whom employer-sponsored coverage information will be unavailable. As such, below, we estimate the time and cost associated with the Exchange making a reasonable attempt to contact one employer. We estimate the time associated with this information collection to be a total of 2.2 hours per employer at a total cost of $34.

Section 155.320(d)(4) proposes that Exchange may satisfy the provisions in this paragraph by relying on a verification process performed by HHS. The burden associated with this provision is the time and effort necessary for the Exchange to establish or modify an agreement for eligibility determinations and coordination of eligibility functions. The burden associated with this provision is included in § 155.345.

4. ICRs Regarding Application Counselors and Authorized Representatives (§ 155.225 and § 155.227)

Section 155.225 of the regulation provides the standards on which an Exchange will certify application counselors to facilitate enrollment in the Exchange. Section 155.225(b) outlines the standards for certification of individuals seeking to become

application counselors. Section 155.227 of the regulation gives an individual or employee the ability to designate an authorized representative to act on the individual or employee's behalf. Section 155.227(e) outlines the standards for certification if the authorized representative is acting as either a staff member or volunteer of an organization. The burden associated with these provisions is the time and effort necessary for the Exchange to develop and execute agreements with applicable application counselors. For each provision we estimate that it will take 105 hours per Exchange to meet these reporting requirements. This includes a mid-level health policy analyst drafting the agreement with managerial oversight and comprehensive review of the agreement. The estimated cost for each Exchange is $6,733 and a total cost of $343,383 for 51 Exchanges.

5. ICRs Regarding Electronic Transmissions (§§ 155.310, 155.315, 155.320, 155.330, 155.340, 155.705)

Sections 155.310, 155.315, 155.320, 155.330, 155.340, and 155.705 involve the electronic transmission of data in order to determine eligibility for enrollment in a QHP and for insurance affordability programs. Section 155.310(d)(3) specifies that the Exchange must notify the state Medicaid or CHIP agency and transmit all information from the records of the Exchange to the Medicaid or CHIP agency to ensure that the Medicaid or CHIP agency can provide the applicant with coverage promptly and without undue delay. This applicant information will be transmitted electronically from the Exchange to the agency administering Medicaid or CHIP upon receiving an indication that the Exchange has determined an applicant eligible for such program. The purpose of this data transmission is to notify the agency administering Medicaid or CHIP that an individual is newly eligible and thus the agency should facilitate enrollment in a plan or delivery system. Data will be transmitted through a secure electronic interface.

Sections 155.315 and 155.320 include transactions necessary to verify applicant information. We expect there to be no transactional burden associated with the electronic transactions needed to implement § 155.315 and § 155.320. As these transmission functions will all be electronic, we do not expect for there to be any additional burden than that which is required to design the overall eligibility and enrollment system.

In section 155.340, the Exchange must provide the relevant information, such as the dollar amount of the advance payment and the cost-sharing reductions eligibility category, to enable advance payments of the premium tax credit and cost-sharing reductions, reconciliation of the advance payments of the premium tax credit, and employer responsibility. As we hope that these transmissions of information will all be electronic, we do not expect for there to be any additional burden than that which is required to design the overall eligibility and enrollment system.

6. ICRs Regarding Reporting Changes (§§ 155.315, 155. 330, 155.335)

Section 155.315(f) outlines the process for resolving inconsistencies identified through the verification process. In § 155.330(c)(1), we state that the Exchange will verify any information reported by an enrollee in accordance with the processes specified in §§ 155.315 and 155.320 prior to using such information in an eligibility redetermination. Section 155.335(e) provides that the Exchange will require a qualified individual to report any changes with respect to the information listed in the notice described in paragraph (c) of this section within 30 days from the date of the notice. It is not possible at this time to provide estimates for the number of applicants for whom a reported change will necessitate the adjudication of documentation, but we anticipate that this number will decrease as applicants become more familiar with the eligibility process and as more data become available. As such, for now, we note that the burden associated with this provision is one hour for an individual to collect and submit documentation, and 12 minutes for eligibility support staff to review the documentation.

7. ICRs Regarding Enrollment and Termination (§§ 155.400, 155.405, 155.430)

In Part 155, subpart E of the Exchange final rule, we describe the requirements for Exchanges in connection with enrollment and disenrollment of qualified individuals through the Exchange. These information collections are associated with sending eligibility and enrollment information to QHP issuers and to HHS, maintaining records of all enrollments in QHPs through the Exchange, reconciling enrollment information with QHP issuers and HHS, and retaining and tracking coverage termination information. The burden estimates associated with these provisions include the time and cost to meet these record requirements. We estimate that it will take 142 hours for an Exchange to meet these recordkeeping requirements for a total of 7,242 hours.

In the case of the requirement related to termination standards, the burden includes estimates related to the maintenance and transmission of coverage termination information, as well as the time and effort needed to develop the system to collect and store the information. We estimate that it will take approximately 70 hours annually for the time and effort to meet this requirement for a total of 3,570 hours.

8. ICRs Regarding Agreements (§§ 155. 302, 155.225, 155.227, 155.345, 155.510)

These provisions propose that Exchanges and appeals entities will enter into written agreements with agencies administering other insurance affordability programs. These agreements are necessary to minimize burden on individuals, ensure prompt determinations of eligibility and enrollment in the appropriate program without undue delay, prompt issuance of appeal decisions, and to provide standards for transferring an application from an insurance affordability program to the Exchange. Agencies will also develop agreements to share data between insurance affordability programs. The specific number of agreements needed may vary depending on how states choose to divide responsibilities regarding eligibility determinations.

The burden associated with this provision is the time and effort necessary for the Exchange to establish or modify an agreement for eligibility determinations and coordination of eligibility and enrollment functions. If an Exchange chooses to draft separate agreements for each insurance affordability program or a subset of insurance affordability programs, then the estimate would likely increase. We estimate it will take each Exchange an average of 105 hours to create a new agreement, although we assume that such agreements will be largely standardized across states, and that HHS will provide initial drafts. This includes a mid-level health policy analyst and an operations analyst reviewing the agreement with managerial oversight and comprehensive review of the agreement an operations analyst. We estimate a cost burden of $6,733 per Exchange.

9. ICRs Regarding Notices to QHP Issuers (§§ 156.260, 156.265, 156.270, 156.290)

First, section 156.260(b) provides that QHP issuers will notify a qualified individual of his or her effective date of coverage, in accordance with the

effective dates of coverage established by the Exchange in accordance with § 155.410(c) and (f). Second, under § 156.270(b), QHP issuers will send a notice of termination of coverage to an enrollee if the enrollee's coverage in the QHP is being terminated for any reason. Third, section 156.270(f) provides that QHP issuers will provide enrollees with a notice about the grace period for non-payment of premiums. QHP issuers will send this notice to enrollees who are delinquent on premium payments. Fourth, section 156.265(e) provides that QHP issuers will provide new enrollees with an enrollment information package, which we anticipate that issuers may combine with the notification of coverage effective date described in § 156.260(b). Lastly, under § 156.290(b), QHP issuers will provide a notice to enrollees if the issuer elects not to seek recertification of a QHP.

We anticipate that some of the above QHP issuer required notices are similar in nature to the notices that issuers currently send to enrollees. For example, it is standard practice for issuers to provide new enrollees with information about their enrollment in a plan, their effective date of coverage, and if and when their coverage is terminating. Accordingly, we anticipate that QHP issuers will review, update, and revise notice templates that they utilize currently as they work to address the notice requirements described below and to ensure that the notices include the appropriate information. Similar to notices that will be issued by the Exchange, we expect that for QHP-issued notices, an analyst will develop text, and a peer analyst, manager, and legal counsel for the issuer will review the notices, including a review to ensure compliance with plain writing, language access, and readability standards as required under § 156.250(c). Finally, a developer will need to incorporate programming changes into the issuer's noticing system to account for the changes and updates that will be necessary to ensure that the QHP issuer is in compliance with the notice standards set forth in this rule and to ensure the notice can be populated and generated according to an individual's preference to receive notices. We estimate that the burden related to the development and implementation of this notice will necessitate 44 hours from a health policy analyst at an hourly cost of $49.35 to learn appeals rules and draft notice text; 20 hours from an attorney at an hourly cost of $90.14 and four hours from a senior manager at an hourly cost of $79.08 to review the notice; and 32 hours from a computer programmer at an hourly cost of $52.50 to conduct the necessary development. In total, we estimate that this will take a total of 100 hours for each QHP issuer, at a cost of approximately $5,971 per issuer. We expect that the burden on QHP issuers to maintain this notice will be significantly lower than to develop it.

However, we believe that the burden estimate described under § 155.310(g) likely represents an upper bound estimate of the burden on issuers to develop each of these notices as in some cases the notice described under § 155.310(g) will be somewhat more dynamic in order to address the additional information we expect to be included in that notice.

Since the above estimate applies to one notice, and we described five notices under part 156, the total burden estimate is $40,710. Due to uncertainty regarding the number of individuals who will choose to receive paper notices, as well as some uncertainty regarding the frequency of circumstances that will trigger notices in accordance with this part, we have only included an estimate of the printing and mailing costs for a QHP issuer to send one notice to a qualified individual or enrollee.

We have submitted a copy of this proposed rule to the OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by the OMB.

10. ICRs Regarding Notices and Third-Party Disclosures in the SHOP (§§ 157.205(e), 157.205(f))

45 CFR part 157 includes several instances in which qualified employers participating in the SHOP Exchange will need to provide information to employees or to the SHOP Exchange. We include the data elements for these notifications in appendix A of this PRA package. For the individual market Exchange, we anticipate that a large share of enrollees will elect to receive electronic notices while the rest will receive notices by mail. We do not make this assumption for notices described here as we expect that qualified employers will provide notices to employees in whatever format the qualified employer usually provides notices to employees; in paper, electronically, or in a combination of both formats. We estimate that the associated printing costs for paper notices will be approximately $0.10 per notice. We do not take mailing costs into consideration for notices provided by qualified employers, as we expect that if qualified employers provide notices in paper format, the employer may provide the employee with the notice in person, as opposed to mailing the notice. We do not have a reasonable way to estimate total printing costs for notices provided by qualified employers in the SHOP Exchange due to uncertainty regarding the number of employees who will choose to receive paper notices, as well as some uncertainty regarding the frequency of circumstances that will trigger notices in accordance with this part.

First, § 157.205(e) specifies that a qualified employer provide an employee with information about the enrollment process. A qualified employer will inform each employee that he or she has an offer of coverage through the SHOP Exchange, and instructions for how the employee can apply for and enroll in coverage. We anticipate that the qualified employer will also provide information about the acceptable formats in which an employee may submit an application; online, on paper, or by phone, as described under § 157.205(c). If the employee being offered coverage was hired outside an initial or annual enrollment period, the notice will also inform the employee if he or she is qualified for a special enrollment period. Second, in § 157.205(f) we provide that a qualified employer will notify the SHOP Exchange regarding an employee's change in eligibility for enrollment in a QHP through the SHOP Exchange, including when a dependent or employee is newly eligible, or is no longer eligible.

We expect that the information that qualified employers will provide to employees and the SHOP Exchange, as described above, will be somewhat standardized. Additionally, we anticipate that qualified employers may be more likely to manually develop the notices described in this part, as compared to the other notices described in part 155 and 156 which we anticipate are more likely to be automatically generated. We expect that in order for a qualified employer to establish a notice, the qualified employer will need 20 hours from a human resources specialist at an hourly cost of $40.68 to develop the text; and four hours from a human resources manager at an hourly cost of $75.01 and ten hours from an attorney at an hourly cost of $90.14 to review the notices. We do not anticipate that a developer will be needed to develop the notices described in this part since we expect that in most cases, these notices will be manually generated on demand. Accordingly, we expect that the burden hours for developing each of the notices will be approximately 34 hours, for a total of 68 hours per qualified employer,

at a total cost of $4,030. We expect that the burden on the qualified employer to maintain the notices will be significantly lower than to develop the notices.

D. Summary of Annual Burden Estimates for Proposed Requirements

TABLE 1—PROPOSED ANNUAL RECORDKEEPING AND REPORTING REQUIREMENTS

Regulation section(s)	OMB & CMS ID Nos.	Respondents	Responses (total)	Burden per response (hours)	Total annual burden (hours)	Labor cost of reporting ($)	Total cost ($)
42 CFR 431.10, 431.11, and 457.1120	OCN 0938–New; CMS–10456 ..	48	48	60	2,880	3,258 (per respondent)	156,398
§ 431.206(b)(4)	OCN 0938–New; CMS–10456 ..	96	96	70	6,720	3,815 (per respondent)	366,221
§§ 435.917, 435.918, 457.110, and 457.340	OCN 0938–New; CMS–10456 ..	96	96	194	18,624	10,609 (per respondent)	1,018,504
§§ 435.923 and 457.340 (develop and execute agreements).	OCN 0938–New; CMS–10456 ..	53	1060	12.5	13,250	12,635 (per respondent)	669,644
§§ 435.923 and 457.340 (create registration process and work flow).	OCN 0938–New; CMS–10456 ..	53	53	70	3,710	3,815 (per respondent)	202,184
§§ 435.923 and 457.340 (develop training materials).	OCN 0938–New; CMS–10456 ..	53	53	50	2,650	1,710 (per respondent)	90,625
§§ 435.923 and 457.340 (train application assistors).	OCN 0938–New; CMS–10456 ..	53	53	50	2,650	1,332 (per respondent)	70,596
§§ 435.1101(b) and 457.355	OCN 0938–New; CMS–10456 ..	53	53	50	2,650	1,710 (per respondent)	90,625
447.57	0938–New; CMS–10456	53	53	6	318	210 (per respondent)	11,130
§§ 155.225 and 155.227	OCN 0938–New; CMS–10400 ..	51	51	105	5,355	6,733 (per respondent)	343,382
§§ 155.302, 155.225, 155.227, 155.345, 155.510.	OCN 0938–New; CMS–10400 ..	51	51	105	5,355	6,733 (per respondent)	343,382
§§ 155.302, 155.310, 155.315, 155.320, 155.330, 155.335, 155.345, 155.410, 155.715, 155.722, 155.725, and 155.1080.	OCN 0938–New; CMS–10400 ..	51	51	100	5,100	5,971 (per respondent)	304,497
§§ 155.315, 155. 330, 155.335	OCN 0938–New; CMS–10400 ..	51	51	.2		29 (for one respondent)	5.73
§ 155.320	OCN 0938–New; CMS–10400 ..	1		2.2		34 (for one respondent)	
§§ 155.400, 405, and 430	OCN 0938–New; CMS–10400 ..	51	51	142	7242	7,254 (per respondent)	369,958
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Processing Appeal Request Forms).	OCN 0938–New; CMS–10400 ..	51	279,055	1.5	418,582	243,461 (per respondent)	12,416,553
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Processing Request for Additional Information Forms).	OCN 0938–New; CMS–10400 ..	51		1		27 (per appellant)	
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Processing Other Appeals-Related Forms).	OCN 0938–New; CMS–10400 ..	51		0.5–1.5		10–45 (per appellant)	
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Creating Agreements (Medicaid, CHIP) for Appeals).	OCN 0938–New; CMS–10400 ..	51	51	105	5,355	6,733 (per respondent)	343,382
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Developing Records Storage System for Appeals).	OCN 0938–New; CMS–10400 ..	51	51	159	8,109	9,159 (per respondent)	467,131
§§ 155.505, 155.510, 155.520, 155.530, 155.535, 155.540, 155.545, 155.550, 155.555, 155.740 (Developing Appeals-Related Notices).	OCN 0938–New; CMS–10400 ..	51	51	100	5,100	5,971 (per respondent)	304,497
§§ 156.260, 156.265, 156.270, and 156.290	OCN 0938–New; CMS–10400 ..	51	51	100	5,100	5,971 (per respondent)	304,497
§ 157.205(e) and (f)	OCN 0938–New; CMS–10400 ..			68		4,030 (per respondent)	
Total					518,432		17,862,082

E. Submission of PRA-Related Comments

We have submitted a copy of this proposed rule to OMB for its review of the rule's information collection and recordkeeping requirements. These requirements are not effective until they have been approved by the OMB.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the CMS Web site at *http://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html* or call the Reports Clearance Office at 410–786–1326.

We invite public comments on these potential information collection requirements. If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, (CMS–2334–P) Fax: (202) 395–6974; or Email: *OIRA_submission@omb.eop.gov*. PRA-specific comments must be received by March 15, 2013.

VI. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the ''DATES'' section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VII. Regulatory Impact Analysis

A. Overall Impact

We have examined the impact of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011). 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 rules with economically significant effects ($100 million or more in any 1 year). The Office of Management and Budget has determined that this rulemaking 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 a Regulatory Impact Analysis that presents the costs and benefits of this rulemaking. The Department invites comments on this assessment and its conclusions.

In the April 30, 2010, final rule on State Flexibility for Medicaid Benefit Packages, the assumptions utilized in modeling the estimated economic impact of the associated provisions took into perspective the costs of the benefit package for the new adult group. Coverage of these benefits was already accounted for in the April 30, 2010, final rule, and therefore, does not need to be repeated here. A central aim of Title I of the Affordable Care Act is to expand access to health insurance coverage through the establishment of Exchanges. The number of uninsured Americans is rising due to lack affordable insurance, barriers to insurance for people with pre-existing conditions, and high prices due to limited competition and market failures. Millions of people without health insurance use health care services for which they do not pay, shifting the uncompensated cost of their care to health care providers. Providers pass much of this cost to insurance companies, resulting in higher premiums that make insurance unaffordable to even more people. The Affordable Care Act includes a number of policies to address these problems, including the creation of Affordable Insurance Exchanges.

Beginning in 2014, individuals and small businesses will be able to purchase private health insurance—known as qualified health plans—through competitive marketplaces called Affordable Insurance Exchanges, or ''Exchanges.'' This proposed rule would: (1) Set forth standards for adjudicating appeals of eligibility determinations, including eligibility for enrollment in a qualified health plan through the Exchange and insurance affordability programs, certificates of exemption from the shared responsibility payment, and SHOP eligibility, for purposes of implementing section 1411(f) of the Affordable Care Act; (2) outline criteria related to the verification of enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan; and (3) further specify or amend other eligibility and enrollment provisions to provide detail necessary for state implementation. This rule continues to afford states substantial discretion in the design and operation of an Exchange, with greater standardization provided where directed by the statute or where there are compelling practical, efficiency or consumer protection reasons.

B. Estimated Impact of the Medicaid and CHIP Eligibility Provisions

The RIA published with the March 2012 Medicaid eligibility final rule detailed the impact of the Medicaid eligibility changes related to implementation of the Affordable Care Act. The majority of provisions included in this proposed rule were described in that detailed RIA.

1. Anticipated Effects on Medicaid Enrollment

The Affordable Care Act's anticipated effects on Medicaid enrollment were described in the March 2012 RIA, with the exception of the new eligibility group for former foster care children. The former foster care group was not covered in the March 2012 rule and therefore was not included in the RIA for that rule. Estimates for this new group are provided below. We note that the estimates included in the March 2012 RIA, and those for the former foster care group, reference the Medicaid baseline for the FY 2013 President's Budget.

As described in Table 2, the CMS Office of the Actuary (OACT) estimates that by 2017, an additional 74,000 individuals will be enrolled in Medicaid under the new eligibility group for former foster care children.

TABLE 2—ESTIMATED EFFECTS OF THIS PROPOSED RULE ON MEDICAID ENROLLMENT, 2013–2017

[In thousands]

	2013	2014	2015	2016	2017
Enrollment	0	55	72	73	74

Source: CMS Office of the Actuary.

OACT prepared this estimate using data on individuals, together with their income levels and insured status, from the Current Population Survey and the Medical Expenditure Panel Survey. In addition, they made assumptions as to the actions of individuals in response to the new coverage options under the Affordable Care Act and the operations of the new enrollment processes and the Exchanges. OACT notes that such estimates are inherently uncertain, since they depend on future economic, demographic, and other factors that cannot be precisely determined in advance. Moreover, the actual behavior of individuals and the actual operation of the new enrollment processes and Exchanges could differ from OACT's assumptions.

The net increase in enrollment in the Medicaid program and the resulting reduction in the number of uninsured individuals will produce several benefits. For new enrollees, eligibility for Medicaid will improve access to medical care. Evidence suggests that improved access to medical care will result in improved health outcomes and greater financial security for these individuals and families. Evidence on how Medicaid coverage affects medical care utilization, health, and financial security comes from a recent evaluation of an expansion of Oregon's Medicaid program.[4] In 2008, Oregon conducted a lottery to expanded access to uninsured adults with incomes below 100 percent of the FPL. Approximately 10,000 low-income adults were newly enrolled in Medicaid as a result. The evaluation is particularly strong because it was able to compare outcomes for those who won the lottery with outcomes for those who did not win, and contains an estimate of the benefits of Medicaid coverage. The evaluation concluded that for low-income uninsured adults, Medicaid coverage has the following effects:

- Significantly higher utilization of preventive care (mammograms, cholesterol monitoring, etc.),
- A significant increase in the probability of having a regular office or clinic for primary care, and
- Significantly better self-reported health.

While there are limitations on the ability to extrapolate from these results to the likely impacts of the Affordable Care Act's expansion of Medicaid coverage, these results provide evidence of health and financial benefits associated with coverage expansions for a population of non-elderly adults.

The results of the Oregon study are consistent with prior research, which has found that health insurance coverage improves health outcomes. The Institute of Medicine (2002) analyzed several population studies and found that people under the age 65 who were uninsured faced a 25 percent higher risk of mortality than those with private coverage. This pattern was found when comparing deaths of uninsured and insured patients from heart attack, cancer, traumatic injury, and HIV infection.[5] The Institute of Medicine also concluded that having insurance leads to better clinical outcomes for diabetes, cardiovascular disease, end-stage renal disease, HIV infection and mental illness, and that uninsured adults were less likely to have regular checkups, recommended health screening services and a usual source of care to help manage their disease than a person with coverage. Other research has found that birth outcomes for women covered by Medicaid are not different than those achieved for privately insured patients, adjusting for risk variables.[6]

In addition to being able to seek treatment for illnesses when they arise, Medicaid beneficiaries will be able to more easily obtain preventive care, which will help maintain and improve their health. Research demonstrates that when uninsured individuals obtain coverage (including Medicaid), the rate at which they obtain needed care increases substantially.[7] [8] [9] Having health insurance also provides significant financial security. Comprehensive health insurance coverage provides a safety net against the potentially high cost of medical care, and the presence of health insurance can mitigate financial risk. The Oregon study found people who gained coverage were less likely to have unpaid medical bills referred to a collection agency. Again, this study is consistent with prior research showing the high level of financial insecurity associated with lack of insurance coverage. Some recent research indicates that illness and medical bills contribute to a large and increasing share of bankruptcies in the United States.[10] Another recent analysis found that more than 30 percent of the uninsured report having zero (or negative) financial assets and uninsured families at the 90th percentile of the asset distribution report having total financial assets below $13,000—an amount that can be quickly depleted with a single hospitalization.[11] Other research indicates that uninsured individuals who experience illness suffer on average a loss of 30 to 50 percent of assets relative to households with insured individuals.[12]

2. Anticipated Effects on States

The major state impacts from this proposed rule were covered in the RIA of the March 2012 Medicaid eligibility final rule. However, OACT estimates that state expenditures on behalf of the additional individuals gaining Medicaid coverage as a result of the establishment of the new eligibility group for former foster care children will total $72 million in FY 2014 and $399 million over five years (2013–2017), as described in Table 3. These estimates do not consider offsetting savings that will result, to a varying degree depending on

[4] Amy Finkelstein, et al, ''The Oregon Health Insurance Experiment: Evidence from the First Year,'' National Bureau of Economic Research Working Paper No. 17190, July 2011.

[5] Institute of Medicine, *Care without coverage: too little, too late* (National Academies Press, 2002).

[6] E.A. Anum, et al, ''Medicaid and Preterm Birth and Low Birth Weight: The Last Two Decades'' Journal of Women's Health Vol. 19 (November 2010).

[7] S.K. Long, et al., ''How well does Medicaid work in improving access to care?'' HSR: Health Services Research 40:1 (February 2005).

[8] Henry J. Kaiser Family Foundation, ''Children's Health—Why Health Insurance Matters.'' Washington, DC: KFF, 2002.

[9] C. Keane, et al., ''The impact of Children's Health Insurance Program by age,'' Pediatrics 104:5 (1999).

[10] D.U. Himmelstein, et al., ''Medical bankruptcy in the United States, 2007: Results of a National Study,'' The American Journal of Medicine 122 no. 8, (2009).

[11] ASPE. The Value of Health Insurance: Few of the Uninsured Have Adequate Resources to Pay Potential Hospital Bills. (2011).

[12] Cook, K. et al., ''Does major illness cause financial catastrophe?,'' *Health Services Research* 45, no. 2 (2010).

the state, from less uncompensated care, less need for state-financed health services and coverage programs, and greater efficiencies in the delivery of care.

TABLE 3—ESTIMATED STATE BUDGETARY EFFECTS OF INCREASED MEDICAID BENEFIT SPENDING FY 2013–2017

[In millions of dollars]

	2013	2014	2015	2016	2017	2013–2017
Net Effect on Medicaid Benefit Spending	0	72	101	109	117	399

Source: Office of the Actuary.

Simplifying Medicaid and CHIP eligibility policies, such as by eliminating obsolete and unnecessary eligibility groups and establishing streamlined verification procedures and notice and appeals processes, would reduce administrative burdens for states and for individuals. Medicaid's current patchwork of eligibility rules is complex for states to administer, requiring significant state resources and staff attention. The coordination of Medicaid and CHIP eligibility policy and processes with those of the new Exchanges, including processes to allow for consistency in the provision of notices and appeal rights, and the movement to simplify verification processes with less reliance on paper documentation should all result in a Medicaid eligibility system that is far easier for states to administer than Medicaid's current, more complex system. These changes could generate administrative savings and increase efficiency. The new system through which states will verify certain information with other federal agencies, such as income data from the IRS, will also relieve state Medicaid agencies of some current responsibilities, creating further efficiencies for the states. Currently more than 40 states use an electronic data match with the Social Security Administration in lieu of requiring paper documentation, and many states have found savings from this electronic verification process. In addition, the option to provide electronic notices, combined with coordination of notice processes among all insurance affordability programs, may improve consumer access to information while decreasing burden and costs to the states.

These administrative simplifications are expected to lower state administrative costs, although we expect that states may incur short term increases in administrative costs (depending on their current systems and practices) as they implement these changes. The extent of these initial costs will depend on current state policy and practices. Federal support is available to help states finance these system modifications. Notably, in previous rulemaking, CMS increased federal funding to states to better support state efforts to develop significantly upgraded eligibility and enrollment systems. To anticipate and support these efforts, CMS published the *Federal Funding for Medicaid Eligibility Determination and Enrollment Activities* final rule (75 FR 21950) in the April 19, 2011 **Federal Register**. That rule amended the definition of Mechanized Claims Processing and Information Retrieval Systems to include systems used for eligibility determination, enrollment, and eligibility reporting activities by Medicaid, and made this work eligible for enhanced funding with a federal matching rate of 90 percent for development through 2015 and 75 percent for ongoing maintenance and operations costs. Systems must meet certain standards and conditions in order to qualify for the enhanced match.

3. Anticipated Effects on Providers

As expansion and simplification of Medicaid and CHIP eligibility could result in more individuals obtaining health insurance coverage, health centers, hospitals, clinics, physicians, and other providers are likely to experience a significant increase in their insured patient volume. We expect providers that serve a substantial share of the low-income population to realize the most substantial increase in insured patients. Providers, such as hospitals that serve a low-income population, may financially benefit from having a higher insured patient population and providing less uncompensated care, and the establishment of a presumptive eligibility option for hospitals will further simplify access to coverage for patients. In addition, we expect continuity of coverage to improve providers' ability to maintain their relationship with patients and to reduce provider administrative burdens such as time spent helping patients to access information on coverage options and to apply for Medicaid or CHIP.

The improved financial security provided by health insurance also helps ensure that patients can pay their medical bills. The Oregon study found that coverage significantly reduces the level of unpaid medical bills sent to a collection agency.[13] Most of these bills are never paid, so this reduction in unpaid bills means that one of the important effects of expanded health insurance coverage, such as the coverage that will be provided through the Exchanges, is a reduction in the level of uncompensated care provided.

Because the majority of individuals gaining coverage under this provision are likely to have been previously uninsured, we do not anticipate that the provisions of this proposed rule will impose new costs on providers. Medicaid generally reimburses providers at a lower rate than employer-sponsored health insurance or other forms of private health insurance. For the minority of individuals who become eligible for Medicaid under this provision who are currently covered by employer-sponsored health insurance, there is thus a possibility that their providers may experience lower payment rates. Conversely, Medicaid generally reimburses federally qualified health centers at a higher rate than employer-sponsored insurance and many new Medicaid enrollees may seek treatment in this setting, which would increase payment to these providers. At the same time, the increased federal financial support for Medicaid, the growth in Medicaid enrollment, and the potential that many plans will operate in both the Exchange and in Medicaid may result in states electing to increase Medicaid payment rates to providers.[14]

4. Anticipated Effects on Federal Budget

Table 4 presents estimates of the federal budget effect of this rule beyond

[13] A Finkelstein, et al., ''The Oregon Health Insurance Experiment: Evidence from the First Year,'' *National Bureau of Economic Research Working Paper Series* No. 17190 (2011).

[14] D. Bachrach, et al., ''Medicaid's role in the Health Benefits Exchange: A road map for States,'' A Maximizing Enrollment Report, National Academy for State Health Policy and Robert Wood Johnson Foundation (March 2011). Available online at *http://www.nashp.org/sites/default/files/maxenroll%20Bachrach%20033011.pdf*.

the impact provided in the March 2012 Medicaid eligibility final rule RIA. The federal financial impact of proposed changes to CHIP will be small; as CHIP expenditures are capped under current law, any increases in spending could be expected to be offset by less available funding in the future. The costs provided below are primarily attributable to the impact of the eligibility group for former foster care children on net federal spending for Medicaid benefits. The impact of other Affordable Care Act provisions was detailed in the prior Medicaid eligibility final rule RIA. As a result of the establishment of the eligibility group for former foster care children, OACT estimates an increase in net federal spending on Medicaid benefits for the period FY 2014 and later, with the increase estimated to be about $95 million in 2014 and about $528 million over the 4-year period from FY 2014 through 2017.

TABLE 4—ESTIMATED NET INCREASE IN FEDERAL MEDICAID BENEFIT SPENDING, FY 2013–2017

[In millions of dollars]

	2013	2014	2015	2016	2017	2013–2017
Net Effect on Medicaid Benefit Spending	0	95	134	144	155	528

Source: Office of the Actuary.

C. Estimated Impact of the Medicaid Premiums and Cost Sharing Provisions

1. Overall Impact

The changes proposed to Medicaid premiums and cost sharing clarify and update existing flexibilities and provide new flexibility for states to increase beneficiaries' cost sharing obligations. The DRA provided states new authority to implement increased cost sharing and premiums for beneficiaries with incomes above 100 percent of the federal poverty line, but to date, most states have not taken advantage of these flexibilities. As states contemplate the changes required under the Affordable Care Act, more states may consider these authorities, as well as the new flexibility proposed by these regulations to impose higher copayments for non-preferred drugs and non-emergency use of emergency department services. Based on our policy analysis, we do not anticipate significant costs or savings from these proposed changes at the program level given the targeted nature of the cost sharing. We believe these proposed policies would encourage less costly care and decreased use of unnecessary services, which may reduce state and federal costs for the specified services. In addition, any nominal increase in the beneficiary share of costs would result in a small reduction in the state and federal share of costs. A full analysis by OACT is currently under development.

2. Anticipated Effects

As states better understand their options for imposing premiums and cost sharing, more states may take advantage of existing flexibilities, such as cost sharing of up to 20 percent of the cost of the service, and the option of allowing providers to deny services for unpaid cost sharing, both of which are targeted to somewhat higher income beneficiaries. Research has shown that higher-than-nominal cost sharing on very low-income individuals can have an adverse impact on access to services by discouraging or preventing such individuals from seeking needed care. However, such impacts are not likely to result from the changes proposed here as they are largely focused on services where there are more appropriate and less costly alternatives. Increased cost sharing may have a negative impact on providers, as uncollected cost sharing reduces provider reimbursement, to the extent that the beneficiary cannot or does not pay the cost sharing and services are nonetheless provided. Under the DRA provisions and this proposed rule, however, states may minimize this impact by allowing providers to deny services for failure to pay the required cost sharing in certain circumstances.

D. Estimated Impact of Exchange Provisions

The provisions in this proposed rule amend certain provisions of the Exchange final rule as well as add new provisions, mainly those related to eligibility appeals. Our approach in this regulatory impact analysis was to build off of the analysis conducted as part of the Exchange final rule, available at *http://cciio.cms.gov/resources/files/Files2/03162012/hie3r-ria-032012.pdf* as we do not believe this proposed rule significantly alters the estimates of the impact of Exchanges on the budget or on enrollment in health insurance and therefore does not significantly alter the regulatory impact analysis drafted as part of such rulemaking. This section summarizes benefits and costs of this proposed rule.

1. Methods of Analysis

The estimates in this analysis reflect estimates from the FY 2013 President's Budget for State Planning and Establishment Grants, which incorporate the costs associated with state implementation of the provisions proposed in this rule.

2. Benefits of the Proposed Regulation

This RIA focuses on the effects of the proposed standards implementing the provisions in the Affordable Care Act related to eligibility appeals and other elements of the eligibility and enrollment process. It is difficult to isolate the benefits of these provisions from other provisions related to the establishment and operations of Exchanges and the Affordable Care Act more generally. Moreover, the benefits and costs of the proposed regulation are affected by the other elements of the Exchange Establishment final rule and related policies in the Affordable Care Act. Accordingly, in this section, we provide a discussion of the benefits of increased health coverage, which is the primary impact of the creation of Affordable Insurance Exchanges.

Exchanges are expected to reduce the complexity of information regarding available choices and increase the ability of consumers to easily access insurance. Therefore, we believe, for example, that the eligibility appeals process and the streamlined notice standards included in this proposed rule will support the development and implementation of a streamlined eligibility process, and in doing so, increase enrollment in health insurance.

As discussed in full above regarding the anticipated effect on Medicaid enrollment, the best available evidence on how health insurance affects medical care utilization, health, and financial security comes from a recent evaluation of an expansion of Oregon's Medicaid program.[15] These same benefits apply to

[15] Finkelstein, A., et al., ''The Oregon Health Insurance Experiment: Evidence from First Year,'' National Bureau of Economic Research Working Paper Series No. 17190 (2011).''

the proposed Exchange provisions which, when taken together with the provisions in the Exchange final rule, will increase access to health coverage. The benefits concluded in the study included significantly better self-reported health.

The regulations proposed here in subparts D and E are consistent with the overall theme of the entire Exchange rule adopted in March 2012, in that they continue to rely on the use of information technology and data matching to minimize administrative burden on applicants, states, and plans. For example, section 155.320(d) of the proposed rule outlines the process to verify enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. In this section, we specify that the Exchange must first rely on electronic data sources wherever possible, using paper documentation only in situations in which electronic data is unavailable or is not reasonably compatible with the applicant's attestation. Further, in § 155.230(d), we propose that the Exchange will provide eligibility notices electronically to the extent that the recipient elects electronic notices. Together, this emphasis on the use of technology in place of paper-driven processes minimizes costs for all involved parties.

Subpart F of the proposed rule outlines standards and processes for Exchange eligibility appeals. For individual eligibility determinations, applicants and enrollees may appeal eligibility determinations made through the eligibility process at the state level, if the state opts to establish an appeals process, or at the federal level, if the state opts not to establish an appeals process or upon exhaustion of a state-based appeals process. An effective eligibility appeals process improves access to health insurance, by providing recourse for issues that arise in the eligibility process that can disrupt coverage, and also reduces administrative costs, by providing resolution options that enable the vast majority of issues to be resolved by lower-level staff.

The Exchange appeals entity may provide an opportunity for an informal resolution process prior to a hearing, where appellants work with appeals staff to resolve issues, and the proposed appeals process for individuals conducted by HHS will be handled initially through an informal process. If the appellant is not satisfied with the outcome of the informal resolution, he or she has the right to a hearing. The proposed appeals process is based on best practices to provide flexible, transparent, and consumer-centric appeals review and resolution. By providing an efficient, but comprehensive appeals process, the provisions of this proposed rule will ensure accurate and fair appeals of eligibility determinations.

Subpart F of the proposed rule also includes standards for employers related to notices and appeals. Employers will receive notice when an employee is determined eligible for advance payments of the premium tax credit or cost-sharing reductions. This notice indicates that the employer *may* be liable for a penalty through the IRS because the employee has been determined eligible for advance payments of the premium tax credit based, in part, on a determination that the employer does not provide qualifying coverage. Employers may appeal the determination about the nature of the coverage they offer to employees to the Exchange before the penalty is imposed by the IRS. We propose that employer appeals will be conducted through a record review. States may choose to establish an employer appeals process, or HHS will provide such a process if a state fails to do so. However, unlike the individual appeals process, we propose that employers will not elevate an appeal decision by a state-based Exchange appeals entity to the HHS process.

Subpart H includes standards for SHOP eligibility appeals. We propose that employers and employees will have a similar system for appealing denials of eligibility by the SHOP. These appeals will be conducted through a record review by the appeals entity. Any state that chooses to operate an Exchange will also operate a SHOP and provide a SHOP eligibility appeals process. HHS will handle SHOP eligibility appeals in the federally facilitated SHOP. SHOP appellants do not have the option to elevate state-based SHOP appeal decisions to HHS. By providing a separate appeals process for small businesses, the provisions of this proposed rule will help ensure accurate and satisfactory determinations are made for small businesses complying with their responsibilities as defined in the Affordable Care Act.

3. Costs of the Proposed Regulation

The Affordable Care Act and the implementing regulations found in subpart D of the proposed rule provide for a streamlined system based on simplified eligibility rules, and an expedited process that will enhance enrollment of eligible individuals and minimize costs to states, Exchanges and to the federal government. To support this new eligibility structure, states seeking to operate Exchanges are expected to build new or modify existing information technology (IT) systems. We believe that how each state constructs and assembles the components necessary to support its Exchange and Medicaid infrastructure will vary and depend on the level of maturity of current systems, current governance and business models, size, and other factors. It is important to note that, although states have the option to establish and operate an Exchange, there is no federal requirement that each state establish an Exchange. We believe the proposed provisions provide options and flexibility to states that minimize costs and burden on Exchanges, consumers, employers and other entities. We also believe that overall administrative costs may increase in the short term as states build IT systems; however, in the long term, states may see savings through the use of more efficient systems.

Any administrative costs incurred in the development of IT infrastructure to support the Exchange may be funded through Exchange Planning and Establishment Grants to states. The federal government expects that these grants will fund the development of IT systems that can be used by many states who either develop their own Exchanges or who partner with the federal government to provide a subset of Exchage services.[16] Costs for IT infrastructure that will also support Medicaid must be allocated to Medicaid, but are eligible for a 90 percent federal matching rate to assist in development.[17]

In addition to costs associated with IT infrastructure, potential costs associated with this proposed rule relate to the appeals process. States that form their own appeals entities will incur costs of staff labor to conduct informal resolution proceedings, if a state voluntarily takes up the option to offer informal resolution, and to conduct hearings. Other costs will be borne by HHS when hearing appeals for states without a state-based appeals entity, or when hearing secondary appeals from individuals who have exhausted their state-based appeals process. In addition,

[16] For example, CMS has awarded a number of Early Innovator grants to develop efficient and replicable IT systems that can provide the foundation for other states' work in this area. These amounts vary from $6 million to $48 million per state.

[17] Federal Funding for Medicaid Eligibility Determination and Enrollment Activities. Final Rule. April 19, 2011 [42 CFR Part 433, 75 FR 68583, pg 21950].

costs will be borne by HHS and state-based Exchange appeals entities when adjudicating employer and SHOP appeals. However, the proposed rule is designed to facilitate the ability of states to choose to consolidate appeals operations with similar functions that exist today for Medicaid and CHIP, which could reduce one-time and ongoing costs.

In general, as noted in our discussion of benefits, we anticipate that the proposed rule would increase take-up of health insurance; therefore, one type of rule-induced cost would be associated with providing additional medical services to newly enrolled individuals. A recent study found that insured individuals received more hospital care and more outpatient care than their uninsured counterparts.[18]

Below we include estimated federal government payments related to grants for Exchange startup. States' initial costs due to the creation of Exchanges will be funded by these grants. Eligibility determination is a minimum function of the Exchange; therefore the Exchange costs to develop the infrastructure for the provisions included in this proposed rule are covered by these grant outlays.

TABLE 5—ESTIMATED FEDERAL GOVERNMENT OUTLAYS FOR THE AFFORDABLE INSURANCE EXCHANGES

FY 2013–FY2017, in Billions of Dollars

Year	2013	2014	2015	2016	2017	2013–2017
Grant Authority for Exchange Start up[a]	1.1	0.8	0.4	0.1	0.01	2.41

[a] FY 2013 President's Budget

E. Alternatives Considered

The majority of Medicaid and CHIP eligibility provisions proposed in this rule serve to implement the Affordable Care Act. All of the provisions in this final rule are a result of the recent passage of the Affordable Care Act and are largely self-implementing. Therefore, alternatives considered for this proposed rule were constrained due to the statutory provisions. With publication of this proposed rule, we desire to make our implementing regulations available to states and the public as soon as possible to facilitate continued efficient operation of the state flexibility authorized under section 1937 of the Act.

In developing this rule, we considered alternatives to some of the simplified eligibility policies proposed here, as well as to the streamlined, coordinated process and eligibility policies this rule established between Medicaid, the Exchange, and other insurance affordability programs. One alternative would be to allow Medicaid agencies to provide notices to individuals independently of the notices provided by other insurance affordability programs. This option would allow states to maintain current Medicaid notice practices, but could result in multiple communications from different entities regarding each individual's eligibility determination process. This could create significant confusion for applicants and beneficiaries. Another alternative would be to consolidate all notice responsibilities within the Exchanges and require one clear line of communication between applicants and the entities determining eligibility for insurance affordability programs. However, this would reduce state flexibility relative to the flexibility already offered in the prior Medicaid eligibility rule and would mandate significant coordination among insurance affordability programs that could stretch beyond just the provision of notices.

In developing the provisions related to Medicaid premiums and cost sharing, we considered maintaining the current structure of the regulations and limiting proposed changes to simple updates of maximum nominal cost sharing amounts. However, the current structure, with its duplicative and sometimes overlapping provisions, makes it much more difficult for states to establish a simple, straightforward cost sharing policy. We believe the proposed approach will assist states, providers, and beneficiaries in understanding their obligations.

We considered three alternatives on Exchange provisions.

- *Alternative #1:* Establish only a federal appeals process

States are not required to establish an Exchange, and those that do not will rely on a federally facilitated Exchange. States that do form a state-based Exchange likewise have the option to establish a state-based Exchange appeals entity; however, states without an appeals process may rely on the HHS appeals process for individual and employer appeals. If states do form a state-based appeals entity, HHS will serve as a second level of appeal for individuals unsatisfied with the outcome of their state-based Exchange appeal. All state-based Exchanges must establish an appeals process for employers and employees in the SHOP. One alternative considered was to establish only a federal appeals process, as prescribed in statute, and not to offer state-based Exchanges the option to establish their own appeal programs. However, this alternative was not selected because it would limit state flexibility, and negate the administrative efficiencies available through the use of existing appeals processes.

- *Alternative #2:* Require paper documentation to verify access to employer-sponsored coverage.

Section 155.320(d) of the proposed rule provides a process for verification related to enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan. The proposed process relies on available electronic data sources, with the use of paper documentation in situations in which information submitted by an applicant is not reasonably compatible with information in electronic data sources, along with a sample-based review for situations in which no data is available.

The alternative model would require the Exchange to require individuals to submit paper documentation to verify this information. This would not only increase the burden on individuals to identify and collect this information, which may not be readily available to the applicant, but on employers, who would have to produce this information at the request of applicants, and would also require additional time and resources for Exchanges to accept and process the paper documentation needed for an eligibility determination. In addition, it could ultimately increase the amount of time it would take for an individual to receive health coverage through the Exchange or an insurance affordability program, would reduce the

[18] Finkelstein, A. et al., (2011). The Oregon Health Insurance Experiment: Evidence from the First Year,'' *National Bureau of Economic Research Working Paper Series,* 17190.

number of states likely to operate an Exchange due to increased administrative costs, and would dissuade individuals from seeking coverage through the Exchange.

• *Alternative #3:* Require Paper Notices

In § 155.230(d), we provide that the Exchange will provide the option to an individual or employer to receive notices electronically. We anticipate that this will be accommodated by the Exchange generating electronic notices, storing them on a secure Web site, and notifying individuals and employers through a generic email or text message communication that a notice is available for review.

The alternative model would require the Exchange to send all notices via U.S. mail. This would significantly increase administrative costs for printing and mailing, and also generate significant volumes of undeliverable mail which would be returned to the Exchange.

Summary of Costs for Each Alternative

Alternative 1 would add additional costs as it does not allow the use of existing state resources to administer appeals. The paper-driven process outlined under alternatives 2 and 3 would ultimately increase the amount of time it would take for an individual to receive health coverage through the Exchange or an insurance affordability program, would increase administrative costs, and would dissuade individuals from seeking coverage through the Exchange.

F. Limitations of the Analysis

A number of challenges face estimators in projecting Medicaid and CHIP benefits and costs under the Affordable Care Act and the proposed rule. Health care cost growth is difficult to project, especially for people who are currently not in the health care system—the population targeted for the Medicaid eligibility changes. Such individuals could have pent-up demand and thus have costs that may be initially higher than other Medicaid enrollees, while they might also have better health status than those who have found a way (for example, ''spent down'') to enroll in Medicaid.

There is also considerable uncertainty about behavioral responses to the Medicaid and CHIP changes. Individuals' participation rates are particularly uncertain. Medicaid participation rates for people already eligible tend to be relatively low (estimates range from 75 to 86 percent), despite the fact that there are typically no premiums and low to no cost sharing for comprehensive services. It is not clear how the proposed changes will affect those already eligible, or the interest in participating for those newly eligible, as previously described.

G. Accounting Statement

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/omb/circulars_a004_a-4/*), in Table 6 we have prepared an accounting statement table showing the classification of the impacts associated with implementation of this proposed rule.

TABLE 6—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED NET COSTS, FROM FY 2013 TO FY 2017

[In millions]

Category	Estimates	Units		
		Year dollar	Discount rate (Percent)	Period covered
Benefits				
Annualized Monetized ($million/year)	Not Estimated	2012	7	2013–2017
	Not Estimated	2012	3	2013–2017
Qualitative	The Exchanges, combined with other actions being taken to implement the Affordable Care Act, will improve access to health insurance, with numerous positive effects, including reduced morbidity and fewer bankruptcies. The Exchange will also serve as a distribution channel for insurance reducing administrative costs as a part of premiums and providing comparable information on health plans to allow for a more efficient shopping experience.			
Costs*				
Annualized Monetized ($million/year)	521	2012	7	2013–2017
	499	2012	3	2013–2017
Qualitative	Unquantified costs include State implementation costs above the amount covered by Federal grants, costs associated with hearings, and increased medical costs associated with more widespread enrollment in health insurance.			
Transfers**				
Annualized Monetized ($million/year)	101	2012	7	2013–2017
	103	2012	3	2013–2017
From Whom to Whom	The transfer is from Federal Government to States on Behalf of Beneficiaries.			
Annualized Monetized ($million/year)	76	2012	7	2013–2017
	78	2012	3	2013–2017

TABLE 6—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED NET COSTS, FROM FY 2013 TO FY 2017—Continued

[In millions]

Category	Estimates	Units		
		Year dollar	Discount rate (Percent)	Period covered
From Whom to Whom	The transfer is from States on Behalf of Beneficiaries.			

* These costs include grant outlays to States to establish Exchanges; most of these Exchange-establishment costs have been included in the accounting statement for the Exchange final rule.
** Source: Office of the Actuary.

H. Regulatory Flexibility Analysis

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 proposed 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 Act 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 as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 to 5 percent.

As discussed above, this proposed rule is necessary to implement certain standards related to the establishment and operation of Exchanges as authorized by the Affordable Care Act. Specifically, this proposed rule would: (1) Set forth standards for adjudicating appeals of eligibility determinations, including eligibility for enrollment in a QHP through the Exchange and insurance affordability programs, certificates of exemption from the shared responsibility payment, and SHOP eligibility, for purposes of implementing section 1411(f) of the Affordable Care Act, (2) outline criteria related to the verification of enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan, and (3) further specify or amend standards related to other eligibility and enrollment provisions to provide detail necessary for state implementation.

The intent of this rule is to continue to afford states substantial discretion in the design and operation of an Exchange, with greater standardization provided where directed by the statute or where there are compelling practical, efficiency or consumer protection reasons.

For the purposes of the regulatory flexibility analysis, we expect the following types of entities to be affected by this proposed rule—(1) QHP issuers; and (2) employers. We believe that health insurers would be classified under the North American Industry Classification System (NAICS) Code 524114 (Direct Health and CMS–9989–P 166 Medical Insurance Carriers). According to SBA size standards, entities with average annual receipts of $7 million or less would be considered small entities this NAICS code. Health issuers could also possibly be classified in 621491 (HMO Medical Centers) and, if this is the case, the SBA size standard would be $10 million or less.

QHP Issuers

This rule proposes standards for Exchanges that affect eligibility determinations for enrollment in a QHP, advance payments of the premium tax credit, cost-sharing reductions, Medicaid, and CHIP. Although these standards are for Exchanges, they also affect health plan issuers that choose to participate in an Exchange. QHP issuers receive information from an Exchange about an enrollee in order to enable the QHP issuer to provide the correct level of advance payments of the premium tax credit and cost-sharing reductions. The issuer of the QHP will adjust an enrollee's net premium to reflect the advance payments of the premium tax credit, as well as make any changes required to ensure that cost-sharing reflects the appropriate level of reductions. Issuers benefit significantly from advance payments of the premium tax credit and cost-sharing reductions, but may face some administrative costs relating to receiving enrollee information from an Exchange.

As discussed in the Web Portal interim final rule (75 FR 24481), HHS examined the health insurance industry in depth in the Regulatory Impact Analysis we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few, if any, insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for ''small'' business established by the SBA (currently $7 million in annual receipts for health insurers, based on North American Industry Classification System Code 524114).[16]

Additionally, as discussed in the Medical Loss Ratio interim final rule (75 FR 74918), the Department used a data set created from 2009 National Association of Insurance Commissioners (NAIC) Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and group markets. For purposes of that analysis, the Department used total Accident and Health (A&H) earned premiums as a proxy for annual receipts. The Department estimated that there were 28 small entities with less than $7 million in accident and health earned premiums offering individual or group comprehensive major medical coverage; however, this estimate may overstate the actual number of small health insurance issuers offering such coverage, because it does not include receipts from these companies' other lines of business.

Employers

The establishment of SHOP in conjunction with tax incentives for some employers will provide new opportunities for employers to offer affordable health insurance to their employees. A detailed discussion of the impact on employers related to the establishment of the SHOP is found in the RIA for the Exchange final rule,

[16] ''Table of Size Standards Matched To North American Industry Classification System Codes,'' effective November 5, 2010, U.S. Small Business Administration, available at *http://www.sba.gov.*

available at *http://cciio.cms.gov/resources/files/Files2/03162012/hie3r-ria-032012.pdf*.

Subpart F of part 155 proposes to establish an appeals process through which an employer may appeal a determination that the employer does not provide qualifying coverage in an eligible employer-sponsored plan with respect to the employee referenced in the notice pursuant to section 1411(f)(2) of the Affordable Care Act, or an eligibility determination for SHOP. This rule proposes standards for employers that choose to participate in a SHOP. 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. However, since participation in the SHOP is voluntary, this proposed rule does not place any requirements on small employers.

We request comment on whether the small entities affected by this 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.

Except in the Exchange provisions, few of the entities that meet the definition of a small entity as that term is used in the RFA (for example, small businesses, nonprofit organization, and small governmental jurisdictions with a population of less than 50,000) would be impacted directly by this proposed rule. Individuals and states are not included in the definition of a small entity. In addition, the impact of the majority of this rule was addressed in the RIA accompanying the March 2012 Medicaid eligibility rule. Therefore, the Secretary has determined that this final rule will not have a significant economic impact on a substantial number of small entities, and we have not prepared a regulatory flexibility analysis.

Additionally, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a proposed rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this proposed rule would not have a direct economic impact on the operations of a substantial number of small rural hospitals.

I. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) 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, by state, local, or tribal governments, in the aggregate, or by the private sector. Currently, that threshold is approximately $139 million. This final rule does not mandate expenditures by state governments, local governments, tribal governments, in the aggregate, or the private sector, of $139 million. The majority of state, local, and private sector costs related to implementation of the Affordable Care Act were described in the RIA accompanying the March 2012 Medicaid eligibility rule. Furthermore, the proposed rule does not set any mandate on states to set up an Exchange.

J. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule that imposes substantial direct effects on states, preempts state law, or otherwise has federalism implications. We wish to note again that the impact of changes related to implementation of the Affordable Care Act were described in the RIA of the March 2012 Medicaid eligibility rule. As discussed in the March 2012 RIA, we have consulted with states to receive input on how the various Affordable Care Act provisions codified in this proposed rule would affect states. We continue to engage in ongoing consultations with Medicaid and CHIP Technical Advisory Groups (TAGs), which have been in place for many years and serve as a staff level policy and technical exchange of information between CMS and the states. Through consultations with these TAGs, we have been able to get input from states specific to issues surrounding the changes in eligibility groups and rules that will become effective in 2014.

Because states have flexibility in designing their Exchange, state decisions will ultimately influence both administrative expenses and overall premiums. However, because states are not required to create an Exchange, these costs are not mandatory. For states electing to create an Exchange, the initial costs of the creation of the Exchange will be funded by Exchange Planning and Establishment Grants. After this time, Exchanges will be financially self-sustaining with revenue sources left to the discretion of the state. In the Department's view, while this proposed rule does not impose substantial direct on state and local governments, it 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 coverage (that is, for QHPs) that is offered in the individual and small group markets. Each state electing to establish a state-based Exchange must adopt the federal standards contained in the Affordable Care Act and in this proposed rule, or have in effect a state law or regulation that implements these federal standards. However, the Department anticipates that the federalism implications (if any) are substantially mitigated because states have choices regarding the structure and governance of their Exchanges. Additionally, the Affordable Care Act does not require states to establish an Exchange; but if a state elects not to establish an Exchange or the state's Exchange is not approved, HHS, will establish and operate an Exchange in that state. Additionally, states will have the opportunity to participate in state Partnership Exchanges that would allow states to leverage work done by other states and the federal government.

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, the Department 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 officials on an individual basis.

Pursuant to the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department certifies that CMS has complied with the requirements of Executive Order 13132 for the attached proposed regulation in a meaningful and timely manner.

K. 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.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects

42 CFR Part 430

Administrative practice and procedure, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 431

Grant programs—health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

42 CFR Part 433

Administrative practice and procedure, Child support Claims, Grant programs—health, Medicaid, Reporting and recordkeeping requirements.

42 CFR Part 435

Aid to Families with Dependent Children, Grant programs—health, Medicaid, Reporting and recordkeeping requirements, Supplemental Security Income (SSI), Wages.

42 CFR Part 440

Grant programs-health, Medicaid.

42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs—health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

42 CFR Part 457

Administrative practice and procedure, Grant programs—health, Health insurance, Reporting and recordkeeping requirements.

45 CFR Part 155

Administrative practice and procedure, Advertising, Brokers, Conflict of interest, Consumer protection, Grant programs-health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, Safety, State and local governments, Technical assistance, Women, and Youth.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 430—GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

■ 1. The authority citation for part 430 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 430.12 is amended by revising paragraph (a) to read as follows:

§ 430.12 Submittal of State plans and plan amendments.

(a) *Format.* A State plan for Medicaid consists of a standardized automated template, issued and periodically updated by CMS, that includes both basic requirements and individualized content that reflects the characteristics of the State's program.

(1) States with approved paper State plans shall submit plans to comply with the required automated format with full compliance not later than one year following the availability of the automated template.

(2) Thereafter, approved paper State plans or plan amendments shall be valid only temporarily to the extent specifically authorized and incorporated by reference under the approved automated State plan.

* * * * *

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

■ 3. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 4. Section 431.10 is amended by—

■ A. Revising paragraphs (a), (c), (d), and (e).

■ B. Adding paragraph (b)(3).

The revisions and additions read as follows:

§ 431.10 Single State agency.

(a) *Basis, purpose, and definitions.* (1) This section implements section 1902(a)(4) and (5) of the Act.

(2) For purposes of this part—

Appeals decision means a decision made by a hearing officer adjudicating a fair hearing under subpart E of this part, including by a hearing officer employed an Exchange appeals entity to which the agency has delegated authority to conduct such hearings under this section.

Exchange has the meaning given to the term in 45 CFR 155.20.

Exchange appeals entity has the meaning given to the term ''appeals entity,'' as defined in 45 CFR 155.500.

Medicaid agency is the single State agency for the Medicaid program.

(b) * * *

(3) The single State agency is responsible for determining eligibility for all individuals applying for or receiving benefits in accordance with regulations in part 435 of this chapter and for fair hearings filed in accordance with subpart E of this part.

(c) *Delegations.* (1) Subject to the requirement in paragraph (c)(2) of this section, the Medicaid agency may, in the approved state plan—

(i)(A) Delegate authority to determine eligibility for all or a defined subset of individuals to—

(*1*) The single State agency for the financial assistance program under title IV–A (in the 50 States or the District of Columbia), or under title I or XVI (AABD), in Guam, Puerto Rico, or the Virgin Islands;

(*2*) The Federal agency administering the supplemental security income program under title XVI of the Act; or

(*3*) The Exchange.

(B) The plan must specify to which agency or public authority and the individuals with respect to which, authority to determine eligibility is delegated.

(ii) Delegate authority to conduct fair hearings in accordance with subpart E of this part for denials of eligibility based on the applicable modified adjusted gross income standard, as described in § 435.911 of this chapter, to an Exchange or Exchange appeals entity, provided that individuals who have requested a fair hearing of such a denial are given the choice to have their fair hearing conducted by the Medicaid agency or the Exchange or Exchange appeals entity.

(2) The Medicaid agency may delegate authority to make eligibility determinations or to conduct fair hearings under this section only to a government agency or public authority which maintains personnel standards on a merit basis.

(3) The Medicaid agency—

(i) Must ensure that any agency or public authority to which eligibility determinations or appeals decisions are delegated—

(A) Complies with all relevant Federal and State law, regulations and policies, including, but not limited to, those related to the eligibility criteria applied by the agency under part 435 of this chapter; prohibitions against conflicts of interest and improper incentives; and safeguarding confidentiality, including regulations set forth at subpart F of this part.

(B) Informs applicants and beneficiaries how they can directly contact and obtain information from the agency; and

(ii) Must exercise appropriate oversight over the eligibility determinations and appeals decisions made by such agencies to ensure compliance with paragraphs (c)(2) and (c)(3)(i) of this section and institute corrective action as needed, including, but not limited to, rescission of the authority delegated under this section.

(iii) If authority to conduct fair hearings is delegated to the Exchange or Exchange appeals entity under paragraph (c)(1)(ii) of this section, the agency may establish a review process whereby the agency reviews appeals decisions made by the Exchange or Exchange appeals entity, but only with respect to conclusions of law, including interpretations of State or Federal requirements.

(d) *Agreement with Federal, State or local entities making eligibility determinations or appeals decisions.* The plan must provide for written agreements between the Medicaid agency and the Exchange or any other State or local agency that has been delegated authority under paragraph (c)(1)(i) of this section to determine Medicaid eligibility and for written agreements between the agency and the Exchange or Exchange appeals entity that has been delegated authority to conduct Medicaid fair hearings under paragraph (c)(1)(ii) of this section. Such agreements must be available to the Secretary upon request and must include provisions for:

(1) The relationships and respective responsibilities of the parties, including but not limited to the respective responsibilities to effectuate the fair hearing rules in subpart E of this part;

(2) Quality control and oversight by the Medicaid agency, including any reporting requirements needed to facilitate such control and oversight;

(3) Assurances that the entity to which authority to determine eligibility or conduct fair hearings will comply with the provisions set forth in paragraph (c)(3) of this section.

(4) For appeals, procedures to ensure that individuals have notice and a full opportunity to have their fair hearing conducted by either the Exchange or Exchange appeals entity or the Medicaid agency.

(e) *Authority of the single State agency.* The Medicaid agency may not delegate, to other than its own officials, the authority to supervise the plan or to develop or issue policies, rules, and regulations on program matters.

■ 5. Section 431.11 is amended by—

■ A. Removing paragraph (b).

■ B. Redesignating paragraphs (c) and (d), as paragraphs (b) and (c), respectively.

■ C. Revising newly redesignated paragraphs (b) and (c).

The revisions read as follows:

§ 431.11 Organization for administration.

* * * * *

(b) *Description of organization.* The plan must include a description of the organization and functions of the Medicaid agency.

(c) *Eligibility determined or appeals decided by other entities.* If eligibility is determined or appeals decided by Federal or State entities other than the Medicaid agency or by local agencies under the supervision of other State agencies, the plan must include a description of the staff designated by those other entities and the functions they perform in carrying out their responsibilities.

■ 6. Section 431.200 is amended by adding paragraph (d) to read as follows:

§ 431.200 Basic and scope.

* * * * *

(d) Implements section 1943(b)(3) of the Act and section 1413 of the Affordable Care Act to permit coordinated hearings and appeals among insurance affordability programs.

■ 7. Section 431.201 is amended by —

■ A. Revising the definition of ''Action.''

■ B. Adding the definition of ''Local evidentiary hearing'' in alphabetical order

The revisions and addition to read as follows:

§ 431.201 Definitions.

* * * * *

Action means a termination, suspension, or reduction of Medicaid eligibility or a reduction in the level of benefits and services, including a determination of the amount of medical expenses which must be incurred to establish income eligibility in accordance with § 435.121(e)(4) or § 435.831 of this chapter, or a determination of income for the purposes of imposing any premiums, enrollment fees, or cost-sharing under subpart A of part 447 of this chapter. It also means determinations by skilled nursing facilities and nursing facilities to transfer or discharge residents and adverse determinations made by a State with regard to the preadmission screening and resident review requirements of section 1919(e)(7) of the Act.

* * * * *

Local evidentiary hearing means a hearing held on the local or county level serving a specified portion of the State.

* * * * *

■ 8. Section 431.205 is amended by—

■ A. Revising paragraphs (b)(1)and (b)(2).

■ B. Adding paragraph (e).

The revisions and additions read as follows:

§ 431.205 Provision of hearing system.

* * * * *

(b) * * *

(1) A hearing before—

(i) The Medicaid agency; or

(ii) For the denial of eligibility based on the applicable modified adjusted gross income standard, the Exchange or Exchange appeals entity to which authority to conduct fair hearings under this subpart has been delegated under § 431.10(c)(1)(ii) of this subpart, provided that individuals who have requested a fair hearing are given the choice to have their fair hearing conducted by the agency or the Exchange or Exchange appeals; or

(2) An evidentiary hearing at the local level, with a right of appeal to the Medicaid agency.

* * * * *

(e) The hearing system must be accessible to persons who are limited English proficient and persons who have disabilities, consistent with § 435.905(b) of this chapter.

■ 9. Section 431.206 is amended by—

■ A. Revising paragraph (b) introductory text and paragraph (c)(2).

■ B. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

§ 431.206 Informing applicants and beneficiaries.

* * * * *

(b) The agency or entity taking action must, at the time specified in paragraph (c) of this section, inform every applicant or beneficiary in writing—

* * * * *

(c) * * *

(2) At the time the agency or entity denies eligibility or services, or takes other action affecting the individual's eligibility, level of benefits and services, or claims;

* * * * *

(d) If, in accordance with § 431.10(c)(1)(ii) of this part, the agency has delegated authority to the Exchange or Exchange appeals entity to conduct the fair hearing, that the individual has the right to have his or her hearing before the agency, Exchange or the Exchange appeals entity, and the method by which the individual may make such election.

(e) The information required under this section must be accessible to individuals who are limited English proficient and to individuals with disabilities, consistent with § 435.905(b)

of this chapter, and may be provided in electronic format in accordance with § 435.918 of this chapter.

■ 10. Section 431.210 is amended by revising paragraphs (a), (b), and (d)(1) to read as follows:

§ 431.210 Content of notice.

* * * * *

(a) A Statement of what action the agency, skilled nursing facility, or nursing facility intends to take and the effective date of such action;

(b) A clear Statement of the specific reasons supporting the intended action;

* * * * *

(d) * * *

(1) The individual's right to request a local evidentiary hearing if one is available, or a State agency hearing; or

* * * * *

■ 11. Section 431.211 is revised to read as follows:

§ 431.211 Advance notice.

The State or local agency must send a notice at least 10 days before the date of action, except as permitted under § 431.213 and § 431.214 of this part.

■ 12. Section 431.213 is amended by revising the introductory text to read as follows:

§ 431.213 Exceptions from advance notice.

The agency may send a notice not later than the date of action if —

* * * * *

■ 13. Section 431.220 is amended by revising paragraph (a)(1) to read as follows:

§ 431.220 When a hearing is required.

(a) * * *

(1) Any applicant who requests it because the agency denies his or her eligibility, level of benefits, services or claims, or such claim is not acted upon with reasonable promptness including, if applicable —

(i) A determination of the amount of medical expenses which must be incurred to establish eligibility in accordance with § 435.121(e)(4) or § 435.831 of this part; or

(ii) A determination of income for the purposes of imposing any premiums, enrollment fees, and cost sharing under subpart A of part 447 of this chapter.

* * * * *

■ 14. Section 431.221 is amended by —

■ A. Revising paragraph (a).

■ B. Adding paragraph (e).

The revisions and additions read as follows:

§ 431.221 Request for hearing.

(a) The agency must establish procedures that permit an individual, or an authorized representative acting on behalf of an individual to submit a hearing request:

(1) By telephone;

(2) Via mail;

(3) In person;

(4) Through other commonly available electronic means; and

(5) Via the internet Web site described in § 435.1200(f) of this chapter, at State option.

* * * * *

(e) If an individual has been denied eligibility for Medicaid by the agency or other entity authorized, in accordance with § 431.10(c)(1) of this part, to make such determination, the agency must treat an appeal to the Exchange appeals entity of a determination of eligibility for advanced payments of the premium tax credit or cost-sharing reduction, as a request for a hearing, under this section.

■ 15. Section 431.224 is added to read as follows:

§ 431.224 Expedited appeals.

(a) *General rule.* The agency must establish and maintain an expedited review process for hearings, when an individual requests or a provider requests, or supports the individual's request, that the time otherwise permitted for a hearing could jeopardize the individual's life or health or ability to attain, maintain, or regain maximum function.

(b) *Action following denial of a request for expedited hearing.* If the agency denies a request for an expedited appeal, it must—

(1) Use the standard appeal timeframe, in accordance with § 431.244(f)(1) of this part.

(2) Notify the individual orally or through electronic means of the denial and, if oral notification is provided, follow up with written notice within 2 calendar days of the denial. Provision of electronic notice must be consistent with § 435.918 of this subchapter.

§ 431.230 [Amended]

■ 16. In § 431.230, amend paragraph (a) by removing the term ''mails'' and adding in its place the term ''sends.''

■ 17. Section 431.231 is amended by revising the section heading and paragraph (c)(2) to read as follows:

§ 431.231 Reinstating services.

* * * * *

(c) * * *

(2) The beneficiary requests a hearing within 10 days that the individual receives the notice of action. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the beneficiary shows that he or she did not receive the notice within the 5-day period; and

* * * * *

■ 18. Section 431.232 is amended by revising the introductory language and paragraph (b) to read as follows:

§ 431.232 Adverse decision of local evidentiary hearing.

If the decision of a local evidentiary hearing is adverse to the applicant or beneficiary, the agency must—

* * * * *

(b) Inform the applicant or beneficiary that he or she has a right to appeal the decision to the State agency, in writing, within 10 days after the individual receives the notice of the adverse decision. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she received the notice at a later date; and

* * * * *

■ 19. Section 431.240 is amended by adding paragraph (c) to read as follows.

§ 431.240 Conducting the hearing.

* * * * *

(c) A hearing officer must have access to agency information necessary to issue a proper hearing decision, including information concerning State policies and regulations.

■ 20. Section 431.241 is amended by revising paragraphs (a) and (b) to read as follows:

§ 431.241 Matters to be considered at the hearing.

* * * * *

(a) An Agency denial of, or action affecting, a claim for eligibility or services, or failure to act with reasonable promptness on such claim, including:

(1) An initial and subsequent decision regarding eligibility;

(2) A determination of the amount of medical expenses which must be incurred to establish income eligibility in accordance with § 435.121(e)(4) or § 435.821 of this part; or

(3) A determination of income for the purposes of imposing any premiums, enrollment fees, deductibles, copayments, coinsurance or other cost sharing under subpart A of part 447 of this subchapter.

(b) An Agency decision regarding changes in the type or level of benefits and services;

* * * * *

■ 21. Section 431.242 is amended by—

■ A. Revising paragraph (a)(1).

■ B. Adding paragraph (f).

The revisions and additions read as follows:

§ 431.242 Procedural rights of the applicant or beneficiary.

* * * * *

(a) * * *

(1) The content of the applicant's or beneficiary's case file and electronic account, as defined in § 435.4 of this part; and

* * * * *

(f) Request an expedited hearing, if appropriate.

■ 22. Section 431.244 is amended by—

■ A. Revising paragraph (f)(1)(ii).

■ B. Redesignating paragraphs (f)(2) and (f)(3) as paragraphs (f)(4) and (f)(5), respectively.

■ C. Adding new paragraphs (f)(2) and (f)(3).

The revisions and additions read as follows:

§ 431.244 Hearing decisions.

* * * * *

(f) * * *

(1) * * *

(ii) The date the applicant, beneficiary, or enrollee (in a State that permits an MCO or PIHP enrollee direct access to a State fair hearing) requests a State fair hearing.

(2) Within 45 days from the date of the appeal decision issued by the Exchange appeals entity if—

(i) The individual's appeal to the Exchange appeals entity of a determination of eligibility for advanced payments of the premium tax credit or cost-sharing reductions is treated as a request for a fair hearing in accordance with § 431.221(e) of this part, or the individual otherwise has both requested a fair hearing of an adverse Medicaid determination and appealed a determination of eligibility for advance payment of the premium tax credit or cost-sharing reductions; and

(ii) The Exchange appeals entity is not conducting the fair hearing for the individual, in accordance with § 431.10(c)(1)(ii) of this part.

(3) As expeditiously as the individual's health condition requires, but no later than 3 working days after the agency receives a request from an individual or provider for an expedited hearing under § 431.221 of this subpart, unless the agency determines that the request does not meet the criteria for expedited appeals and notifies the individual of such determination in accordance with § 431.224(b)(2) of this part; or

* * * * *

PART 433—STATE FISCAL ADMINISTRATION

■ 23. The authority citation for part 433 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 24. Section 433.138 is amended by revising paragraphs (d)(1) introductory text, (d)(3), (f), and (g)(1)(i) to read as follows:

§ 433.138 Identifying liable third parties.

* * * * *

(d) * * *

(1) Except as specified in paragraph (d)(2) of this section, as part of the data exchange requirements under § 435.945 of this chapter, from the State wage information collection agency (SWICA) defined in § 435.4 of this chapter and from the SSA wage and earnings files data as specified in § 435.948(a)(1) of this chapter, the agency must—

* * * * *

(3) The agency must request, as required under § 435.948(a)(2), from the State title IV–A agency, information not previously reported that identifies those Medicaid beneficiaries that are employed and their employer(s).

* * * * *

(f) *Data exchanges and trauma code edits: Frequency.* Except as provided in paragraph (l) of this section, the agency must conduct the data exchanges required in paragraphs (d)(1) and (d)(3) of this section, and diagnosis and trauma edits required in paragraphs (d)(4) and (e) of this section on a routine and timely basis. The State plan must specify the frequency of these activities.

(g) * * *

(1) * * *

(i) Within 45 days, the agency must follow up (if appropriate) on such information in order to identify legally liable third party resources and incorporate such information into the eligibility case file and into its third party data base and third party recovery unit so the agency may process claims under the third party liability payment procedures specified in § 433.139 (b) through (f); and

* * * * *

■ 25. Section § 433.145 is amended by revising paragraph (a)(2) to read as follows:

§ 433.145 Assignment of rights to benefits—State plan requirements.

(a) * * *

(2) Cooperate with the agency in establishing paternity and in obtaining medical support and payments, unless the individual establishes good cause for not cooperating, and except for individuals described in § 435.116 (pregnant women), who are exempt from cooperating in establishing paternity and obtaining medical support and payments from, or derived from, the father of the child born out of wedlock; and

* * * * *

■ 26. Section § 433.147 is amended by—

■ A. Revising paragraph (a)(1), paragraph (c) introductory text, and paragraph (c)(1).

■ B. Removing paragraph (d).

The revisions read as follows:

§ 433.147 Cooperation in establishing paternity and in obtaining medical support and payments and in identifying and providing information to assist in pursuing third parties who may be liable to pay.

(a) * * *

(1) Except as exempt under § 433.145(a)(2), establishing paternity of a child born out of wedlock and obtaining medical support and payments for himself or herself and any other person for whom the individual can legally assign rights; and

* * * * *

(c) *Waiver of cooperation for good cause.* (1) With respect to establishing paternity of a child born out of wedlock or obtaining medical care support and payments, or identifying or providing information to assist the State in pursuing any liable third party for a child for whom the individual can legally assign rights, the agency must find the cooperation is against the best interests of the child.

* * * * *

■ 27. Section 433.148 is amended by revising paragraph (a)(2) to read as follows:

§ 433.148 Denial or termination of eligibility.

* * * * *

(a) * * *

(2) In the case of an applicant, does not attest to willingness to cooperate, and in the case of a beneficiary, refuses to cooperate in establishing paternity, obtaining medical child support and pursuing liable third parties, as required under § 433.147(a) of this part unless cooperation has been waived;

* * * * *

■ 28. Section 433.152 is amended by revising paragraph (b) to read as follows:

§ 433.152 Requirements for cooperative agreements for third party collections.

* * * * *

(b) Agreements with title IV–D agencies must specify that the Medicaid agency will provide reimbursement to the IV–D agency only for those child support services performed that are not reimbursable by the Office of Child Support Enforcement under title IV–D of the Act and that are necessary for the collection of amounts for the Medicaid program.

PART 435—ELIGIBILITY IN THE STATES, DISTRICT OF COLUMBIA, THE NORTHERN MARIANA ISLANDS, AND AMERICAN SAMOA

■ 29. The authority citation for part 435 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 30. Section 435.3 is amended by –
■ A. In paragraph (a), adding section 1902(a)(46)(B), 1902(ee) and 1905(a) in numerical order.
■ B. Revising section 1903(v).

The revisions and additions read as follows:

§ 435.3 Basis.

(a) * * *

1902(a)(46)(B) Requirement to verify citizenship.

* * * * *

1902(ee) Option to verify citizenship through electronic data sharing with the Social Security Administration.

* * * * *

1903(v) Optional coverage of lawfully residing children and pregnant women in Medicaid and payment for emergency services under Medicaid provided to certain non-citizens.

* * * * *

1905(a) (third sentence; text below paragraph (29) Payment of other insurance premiums for medical or any other type of remedial care.

* * * * *

■ 31. Section 435.4 is amended by—
■ A. Revising the definition of ''Electronic account''
■ B. Adding the definitions of ''Citizenship,'' ''Combined eligibility notice,'' ''Coordinated content,'' ''Lawfully present,'' ''Non-citizen,'' and ''Qualified non-citizen'' in alphabetical order.

The revision and additions read as follows:

§ 435.4 Definitions and use of terms.

* * * * *

Citizenship includes status as a ''national of the United States'' defined in 8 U.S.C. 1101(a)(22) that includes both citizens of the United States and non-citizen nationals of the United States.

Combined eligibility notice means an eligibility notice that informs an individual, or multiple family members of a household when feasible, of eligibility for each of the insurance affordability programs and enrollment in a qualified health plan through the Exchange, for which a determination or denial was made. A combined eligibility notice shall be issued by the last agency to make a determination of eligibility, regardless of which entity received the application. A combined notice must meet the requirements of § 435.917(a) of this part and contain the content described in § 435.917(b) and (c) of this part, except that information described in § 435.917(b)(1)(iii)(D) of this part must be included in a combined notice issued by another insurance affordability program only if known to that program.

Coordinated content means information included in an eligibility notice regarding the transfer of the individual's or households' electronic account to another insurance affordability program for a determination of eligibility.

* * * * *

Electronic account means an electronic file that includes all information collected and generated by the agency regarding each individual's Medicaid eligibility and enrollment, including all documentation required under § 435.914 of this part and including any information collected or generated as part of a fair hearing process conducted under subpart E of this chapter or through the Exchange appeals process conducted under 45 CFR part 155, Subpart F.

* * * * *

Lawfully present means an individual who is a non-citizen and who—

(1) Is a qualified non-citizen, as defined in this section;

(2) Is in a valid nonimmigrant status, as defined in 8 U.S.C. 1101(a)(15) or otherwise under the immigration laws (as defined in 8 U.S.C. 1101(a)(17));

(3) Is paroled into the United States in accordance with 8 U.S.C. 1182(d)(5) for less than 1 year, except for an individual paroled for prosecution, for deferred inspection or pending removal proceedings;

(4) Belongs to one of the following classes:

(i) Granted temporary resident status in accordance with 8 U.S.C. 1160 or 1255a, respectively;

(ii) Granted Temporary Protected Status (TPS) in accordance with 8 U.S.C. 1254a, and individuals with pending applications for TPS who have been granted employment authorization;

(iii) Granted employment authorization under 8 CFR 274a.12(c);

(iv) Family Unity beneficiaries in accordance with section 301 of Public Law 101–649, as amended;

(v) Under Deferred Enforced Departure (DED) in accordance with a decision made by the President;

(vi) Granted Deferred Action status;

(vii) Granted an administrative stay of removal under 8 CFR part 241;

(viii) Beneficiary of approved visa petition who has a pending application for adjustment of status;

(5) Is an individual with a pending application for asylum under 8 U.S.C. 1158, or for withholding of removal under 8 U.S.C. 1231, or under the Convention Against Torture who—

(i) Has been granted employment authorization; or

(ii) Is under the age of 14 and has had an application pending for at least 180 days;

(6) Has been granted withholding of removal under the Convention Against Torture;

(7) Is a child who has a pending application for Special Immigrant Juvenile status as described in 8 U.S.C. 1101(a)(27)(J);

(8) Is lawfully present in American Samoa under the immigration laws of American Samoa;

(9) Is a victim of a severe form of trafficking in persons, in accordance with the Victims of Trafficking and Violence Protection Act of 2000, Public Law 106–386, as amended (22 U.S.C. 7105(b)); or

(10) *Exception.* An individual with deferred action under the Department of Homeland Security's deferred action for childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012 memorandum, shall not be considered to be lawfully present with respect to any of the above categories in paragraphs (1) through (9) of this definition.

* * * * *

Non-citizen has the same meaning as the term ''alien,'' as defined in section 101(a)(3) of the Immigration and Nationality Act (INA), (8 U.S.C. 1101(a)(3)) and includes any individual who is not a citizen or national of the United States, defined at 8 U.S.C. 1101(a)(22).

* * * * *

Qualified non-citizen has the same meaning as the term ''qualified alien'' as defined at 8 U.S.C. 1641(b) and (c).

* * * * *

■ 32. Section 435.110 is amended by—
■ A. Republishing paragraph (c) introductory text.
■ B. Revising paragraph (c)(1).

The revisions read as follows:

§ 435.110 Parents and other caretaker relatives.

* * * * *

(c) *Income standard.* The agency must establish in its State plan the income standard as follows:

(1) The minimum income standard is a State's AFDC income standard in effect as of May 1, 1988 for the

applicable family size converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

* * * * *

■ 33. Section 435.112 is revised to read as follows:

§ 435.112 Families with Medicaid eligibility extended because of increased earnings or hours of employment.

(a) *Basis and scope.* (1) This section implements sections 408(a)(11)(A), 1902(e)(1)(A), and 1931(c)(2) of the Act.

(2) If Transitional Medical Assistance under section 1925 of the Act is not available or applicable, extended eligibility must be provided in accordance with this section, if applicable.

(b) *Eligibility.* (1) The extended eligibility period is for 4 months.

(2) The agency must provide coverage during an extended eligibility period to—

(i) A pregnant woman who was eligible and enrolled for Medicaid under § 435.116 of this part with household income at or below the income limit described in paragraph (c) of this section in at least 3 out of the 6 months immediately preceding the month that eligibility under such section was lost due to increased earnings; and

(ii) A parent or other caretaker relative who was eligible and enrolled for Medicaid under § 435.110 of this part, and any dependent child of such parent or other caretaker relative who was eligible and enrolled under § 435.118 of this part, in at least 3 out of the 6 months immediately preceding the month that eligibility for the parent or other caretaker relative under § 435.110 of this part is lost due to—

(A) Increased earnings; or

(B) Increased hours from a parent's employment resulting in the parent no longer having a ''dependent child,'' as defined at § 435.4 of this part, living in his or her home.

(c) *Income limit for potential extended eligibility* is a State's income standard for coverage of parents and other caretaker relatives under § 435.110(c) of this part.

§ 435.113 [Removed]

■ 34. Section 435.113 is removed.

§ 435.114 [Removed]

■ 35. Section 435.114 is removed.

■ 36. Section 435.115 is revised to read as follows:

§ 435.115 Families with Medicaid eligibility extended because of increased collection of spousal support.

(a) *Basis.* This section implements sections 408(a)(11)(B) and 1931(c)(1) of the Act.

(b) *Eligibility.* (1) The extended eligibility period is for 4 months.

(2) The agency must provide coverage during an extended eligibility period to—

(i) A pregnant woman who was eligible and enrolled for Medicaid under § 435.116 of this part with household income at or below the income limit described in paragraph (c) of this section in at least 3 out of the 6 months immediately preceding the month that eligibility under such section was lost due to increased income from collection of spousal support under title IV–D of the Act; and

(ii) A parent or other caretaker relative who was eligible and enrolled for Medicaid under § 435.110 of this part, and any dependent child of such parent or other caretaker relative who was eligible and enrolled under § 435.118 of this part, in at least 3 out of the 6 months immediately preceding the month that eligibility for the parent or other caretaker relative under § 435.110 of this part is lost due to increased collection of spousal support under title IV–D of the Act.

(c) *Income limit for potential extended eligibility* is a State's income standard for coverage of parents and other caretaker relatives under § 435.110(c) of this part.

■ 37. Section 435.116 is amended by—

A. Republishing paragraph (d)(4) introductory text.

B. Revising paragraph (d)(4)(i).

The revisions read as follows:

§ 435.116 Pregnant women.

* * * * *

(d) * * *

(4) *Applicable income limit for full Medicaid coverage of pregnant women.* For purposes of paragraph (d)(1) of this section—

(i) The minimum applicable income limit is the State's AFDC income standard in effect as of May 1, 1988 for the applicable family size converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

* * * * *

■ 38. Section 435.117 is revised to read as follows:

§ 435.117 Deemed newborn children.

(a) *Basis.* This section implements sections 1902(e)(4) and 2112(e) of the Act.

(b) *Eligibility.* (1) The agency must provide Medicaid to children from birth until the child's first birthday without application if, for the date of the child's birth, the child's mother was eligible for and received covered services under—

(i) The Medicaid State plan (including during a period of eligibility under § 435.914) regardless of whether payment for services for the mother is limited to services necessary to treat an emergency medical condition, as defined in section 1903(v)(3) of the Act;

(ii) The State's separate CHIP State plan as a targeted low-income pregnant woman in accordance with section 2112 of the Act, with household income at or below the income standard established by the agency under § 435.118 of this part for infants under age 1;

(iii) At State option, the State's separate CHIP State plan as a targeted low-income child with household income at or below the income standard established by the agency under § 435.118 for infants under age 1; or

(iv) At State option, the State's demonstration under section 1115 of the Act as a Medicaid or CHIP population, with household income at or below the income standard established by the agency under § 435.118 for infants under age 1.

(2) The child is deemed to have applied and been determined eligible under the Medicaid State plan effective as of the date of birth, and remains eligible regardless of changes in circumstances (except if the child dies or ceases to be a resident of the State or the child's representative requests a voluntary termination of the child's eligibility) until the child's first birthday.

(c) At State option, the agency may provide deemed newborn eligibility under this section to a child if the child's mother was eligible for and receiving Medicaid in another State for the date of the child's birth.

(d) *Medicaid identification number.* (1) The Medicaid identification number of the mother serves as the child's identification number, and all claims for covered services provided to the child may be submitted and paid under such number, unless and until the State issues the child a separate identification number in accordance with paragraph (d)(2) of this section.

(2) The State must issue a separate Medicaid identification number for the child prior to the effective date of any termination of the mother's eligibility or prior to the date of the child's first birthday, whichever is sooner, unless the child is determined to be ineligible (such as, because the child is not a State resident), except that the State must

issue a separate Medicaid identification number for the child promptly after the agency is notified of a child under 1 year of age, residing in the State and born to a mother:

(i) Whose coverage is limited to services necessary for the treatment of an emergency medical condition, consistent with § 435.139 or § 435.350 of this part;

(ii) Covered under the State's separate CHIP; or

(iii) Who received Medicaid in another State on the date of birth.

■ 39. Section 435.145 is revised to read as follows:

§ 435.145 Children with adoption assistance, foster care, or guardianship care under title IV–E.

(a) *Basis.* This section implements sections 1902(a)(10)(A)(i)(I) and 473(b)(3) of the Act.

(b) *Eligibility.* The agency must provide Medicaid to individuals for whom—

(1) An adoption assistance agreement is in effect with a State or tribe under title IV–E of the Act, regardless of whether adoption assistance is being provided or an interlocutory or other judicial decree of adoption has been issued; or

(2) Foster care or kinship guardianship assistance maintenance payments are being made by a State or Tribe under title IV–E of the Act.

■ 40. Section 435.150 is added to read as follows:

§ 435.150 Former foster care children.

(a) *Basis.* This section implements section 1902(a)(10)(A)(i)(IX) of the Act.

(b) *Eligibility.* The agency must provide Medicaid to individuals who:

(1) Are under age 26;

(2) Are not eligible and enrolled for mandatory coverage under §§ 435.110 through 435.118 or §§ 435.120 through 435.145 of this part; and

(3) Were in foster care under the responsibility of the State or Tribe and enrolled in Medicaid under the State's Medicaid State plan or 1115 demonstration (or at State option were in foster care and Medicaid in any State) upon attaining:

(i) Age 18; or

(ii) Such higher age at which the State's or Tribe's foster care assistance ends under title IV–E of the Act.

■ 41. Section 435.170 is revised to read as follows:

§ 435.170 Pregnant women eligible for extended or continuous eligibility.

(a) *Basis.* This section implements sections 1902(e)(5) and 1902(e)(6) of the Act.

(b) *Extended eligibility for pregnant women.* For a pregnant woman who was eligible and enrolled under subpart B, C, or D of this part on the date her pregnancy ends, the agency must provide coverage for pregnancy-related services in accordance with § 435.116(d)(3) of this part through the last day of the month in which the 60-day post-partum period ends.

(c) *Continuous eligibility for pregnant women.* For a pregnant woman who was eligible and enrolled under subpart B, C, or D of this part and who, because of a change in household income, would not otherwise remain eligible, the agency must provide coverage for pregnancy-related services in accordance with § 435.116(d)(3) of this part through the last day of the month in which the 60-day post-partum period ends.

(d) This section does not apply to—

(1) Pregnant women covered during a presumptive eligibility period under section 1920 of the Act.

(2) [Reserved]

■ 42. Section 435.172 is added to read as follows:

§ 435.172 Continuous eligibility for hospitalized children.

(a) *Basis.* This section implements section 1902(e)(7) of the Act.

(b) The agency must provide Medicaid to a child eligible and enrolled under § 435.118 until the end of an inpatient stay for which inpatient services are furnished, if the child:

(1) Was receiving inpatient services covered by Medicaid on the date the child is no longer eligible under § 435.118 of this part based on the child's age or household income; and

(2) Would remain eligible but for attaining such age.

■ 43. Section 435.201 is amended by—

A. Revising paragraph (a) introductory text and paragraph (a)(5).

B. Removing paragraph (a)(6).

The revisions read as follows:

§ 435.201 Individuals included in optional groups.

(a) The agency may choose to cover an optional group or groups of individuals who are not eligible and enrolled for mandatory coverage under the State's Medicaid State plan in accordance with subpart B of this part and who meet the appropriate eligibility criteria for groups specified in the separate sections of this subpart:

* * * * *

(5) Parents and other caretaker relatives (as defined in § 435.4 of this part).

* * * * *

■ 44. The undesignated center heading immediately preceding § 435.210 is revised to read as follows:

Options for Coverage of Families, Children, Adults, and the Aged, Blind, or Disabled

■ 45. Section 435.210 is revised to read as follows:

§ 435.210 Optional eligibility for individuals who meet the income and resource requirements of the cash assistance programs.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(I) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to any group or groups of individuals specified in § 435.201(a)(1) through (a)(3) of this part who meet the income and resource requirements of SSI or an optional State supplement program in States that provide Medicaid to optional State supplement recipients.

■ 46. Section 435.211 is revised to read as follows:

§ 435.211 Optional eligibility for individuals who would be eligible for cash assistance if they were not in medical institutions.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(IV) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to any group or groups of individuals specified in § 435.201(a)(1) through (a)(3) of this part who are institutionalized in a title XIX reimbursable medical institution and who:

(1) Are ineligible for the SSI or an optional State supplement program in States that provide Medicaid to optional State supplement recipients, because of lower income standards used under the program to determine eligibility for institutionalized individuals; but

(2) Would be eligible for aid or assistance under SSI or an optional State supplement program (as specified in § 435.232 or § 435.234 of this part) if they were not institutionalized.

■ 47. Section 435.213 is added to read as follows:

§ 435.213 Optional eligibility for individuals needing treatment for breast or cervical cancer.

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(XVIII) and 1902(aa) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals who—

(1) Are under age 65;

(2) Are not eligible and enrolled for mandatory coverage under the State's Medicaid State plan in accordance with subpart B of this part;

(3) Have been screened under the Centers for Disease Control and Prevention (CDC) breast and cervical cancer early detection program (BCCEDP), established in accordance

with the requirements of section 1504 of the Public Health Service Act, and determined by such screen to need treatment for breast or cervical cancer; and

(4) Do not otherwise have creditable coverage, as defined in section 2704(c) of the Public Health Service Act, for treatment of their breast or cervical cancer, but creditable coverage is not considered to be available just because the individual may:

(i) Receive medical services provided by the Indian Health Service, a tribal organization, or an Urban Indian organization; or

(ii) Obtain health insurance coverage only after a waiting period of uninsurance.

(c) An individual is considered to need treatment for breast or cervical cancer if the screen determines that:

(1) Definitive treatment for breast or cervical cancer is needed, including a precancerous condition or early stage cancer, and which may include diagnostic services as necessary to determine the extent and proper course of treatment; and

(2) More than routine diagnostic services or monitoring services for a precancerous breast or cervical condition are needed.

■ 48. Section 435.214 is added to read as follows:

§ 435.214 Eligibility for family planning services.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(XXI) and 1902(ii) and clause (XVI) in the matter following 1902(a)(10)(G) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals (male and female) who meet all of the following requirements:

(1) Are not pregnant.

(2) Meet the income eligibility requirements at paragraph (c) of this section.

(c) *Income standard.* (1) The income standard established in the State plan may not exceed the higher of the income standard for pregnant women in effect under—

(i) The Medicaid State plan in accordance with § 435.116 of this part.

(ii) A Medicaid demonstration under section 1115 of the Act.

(iii) The CHIP State plan under section 2112 of the Act

(iv) A CHIP demonstration under section 1115 of the Act.

(2) The individual's household income is determined in accordance with § 435.603 of this part. The agency must indicate in its state plan the options selected by it under paragraph (k) of that section.

(d) *Covered services.* Individuals eligible under this section are covered for family planning and family planning-related benefits as described in clause (XVI) of the matter following 1902(a)(10)(G) of the Act.

■ 49. Section 435.215 is added to read as follows:

§ 435.215 Individuals infected with tuberculosis.

(a) *Basis.* This section implements sections 1902(a)(10)(A)(XII) and 1902(z)(1) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals who—

(1) Are infected with tuberculosis;

(2) Are not otherwise eligible for mandatory coverage under the State's Medicaid plan;

(3) Have household income that does not exceed the income standard established by the state in its State plan, which standard must not exceed the higher of—

(i) The maximum income standard applicable to disabled individuals for mandatory coverage under subpart B of this part; or

(ii) The effective income level for coverage of individuals infected with tuberculosis under the state plan in effect as of March 23, 2010 or December 31, 2013, if higher, converted, at State option, to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act; and

(c) Individuals eligible under this section are covered for the following services related to the treatment of infection with tuberculosis:

(1) Prescribed drugs, described in § 440.120 of this subchapter;

(2) Physician's services, described in § 440.50 of this subchapter;

(3) Outpatient hospital and rural health clinic described in § 440.20 of this subchapter, and Federally-qualified health center services;

(4) Laboratory and x-ray services (including services to confirm the presence of the infection), described in § 440.30 of this subchapter;

(5) Clinic Services, described in § 440.90 of this subchapter;

(6) Case management services defined in § 440.169 of this subchapter; and

(7) Services other than room and board designated to encourage completion of regimens of prescribed drugs by outpatients including services to observe directly the intake of prescription drugs.

■ 50. Section 435.220 is revised to read as follows:

§ 435.220 Optional eligibility for parents and other caretaker relatives.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(I) of the Act for optional eligibility of parents and other caretaker relatives.

(b) *Eligibility.* The agency may provide Medicaid to parents and other caretaker relatives defined in § 435.4 of this part and, if living with such parent or other caretaker relative, his or her spouse, whose household income is at or below the income standard established by the agency in its State plan, in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard under this section—

(1) Must exceed the income standard established by the agency under § 435.110(c) of this part; and

(2) May not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996, or the State's highest effective income level for optional eligibility of parents and other caretaker relatives in effect under the Medicaid State plan or demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

■ 51. Section 435.222 is revised to read as follows:

§ 435.222 Optional eligibility for reasonable classifications of individuals under age 21.

(a) *Basis.* This section implements sections 1902(a)(10)(A)(ii)(I) and (IV) of the Act for optional eligibility of individuals under age 21.

(b) *Eligibility.* The agency may provide Medicaid to all—or to one or more reasonable classifications, as defined in the State plan, of—individuals under age 21 (or, at State option, under age 20, 19 or 18) who have household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996 or the State's highest effective income level, if any, for such individuals under the Medicaid State plan or a demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

§ 435.223 [Removed]

■ 52. Section 435.223 is removed.

■ 53. Section 435.226 is added to read as follows:

§ 435.226 Optional eligibility for independent foster care adolescents.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(XVII) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 21 (or, at State option, under age 20 or 19) who were in foster care under the responsibility of a State or Tribe (or, at State or Tribe option, only with respect to whom assistance under title IV–E of the Act was being provided) on the individual's 18th birthday and have household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996 or the State's highest effective income level, if any, for such individuals under the Medicaid State plan or a demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

■ 54. Section 435.227 is revised to read as follows:

§ 435.227 Optional eligibility for individuals under age 21 who are under State adoption assistance agreements.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(VIII) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 21 (or, at State option, under age 20, 19, or 18):

(1) For whom an adoption assistance agreement (other than an agreement under title IV–E of the Act) between a State and the adoptive parent or parents is in effect;

(2) Who the State agency which entered into the adoption agreement determined could not be placed for adoption without Medicaid coverage because the child has special needs for medical or rehabilitative care; and

(3) Who, prior to the adoption agreement being entered into—

(i) Were eligible under the Medicaid State plan; or

(ii) Had household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of the State's AFDC payment standard in effect as of July 16, 1996 or the State's highest effective income level, if any, for such individuals under the Medicaid State plan or a demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

(d) The agency may limit eligibility under this section to children with respect to whom the State and such other States as are identified in the State plan have entered into an adoption assistance agreement.

■ 55. Section 435.229 is revised to read as follows:

§ 435.229 Optional targeted low-income children.

(a) *Basis.* This section implements section 1902(a)(10)(A)(ii)(XIV) of the Act.

(b) *Eligibility.* The agency may provide Medicaid to individuals under age 19, or at State option within a range of ages under age 19 established in the State plan, who meet the definition of an optional targeted low-income child in § 435.4 of this part and have household income at or below the income standard established by the agency in its State plan in accordance with paragraph (c) of this section.

(c) *Income standard.* The income standard established under this section may not exceed the higher of—

(1) 200 percent FPL;

(2) A percentage of the Federal poverty level which exceeds the State's Medicaid applicable income level, defined at § 457.10 of this chapter, by no more than 50 percentage points; and

(3) The highest effective income level for such individuals under the Medicaid State plan or a demonstration program under section 1115 of the Act as of March 23, 2010 or December 31, 2013, if higher, converted to a MAGI-equivalent standard in accordance with guidance issued by the Secretary under section 1902(e)(14)(A) and (E) of the Act.

■ 56. Section 435.301 is amended by—

■ A. Removing paragraph (b)(1)(iii).

■ B. Redesignating paragraph (b)(1)(iv) as paragraph (b)(1)(iii).

■ C. Republishing paragraph (b)(2) introductory text.

■ D. Revising paragraph (b)(2)(ii).

The revisions read as follows:

§ 435.301 General rules.

* * * * *

(b) * * *

(2) The agency may provide Medicaid to any of the following groups of individuals:

* * * * *

(ii) Parents and other caretaker relatives (§ 435.310 of this part).

* * * * *

■ 57. Section 435.310 is amended by revising the section heading and paragraph (a) to read as follows:

§ 435.310 Medically needy coverage of parents and other caretaker relatives.

(a) If the agency provides Medicaid for the medically needy, it may provide Medicaid to parents and other caretaker relatives who meet:

(1) The definition of ''caretaker relative'' at § 435.4 of the part, or are the spouse of a parent or caretaker relative; and

(2) The medically needy income and resource requirements at subpart I of this part.

* * * * *

§ 435.401 [Amended]

■ 58. Section 435.401 is amended by removing and reserving paragraph (c)(1).

■ 59. Section 435.406 is amended by—

■ A. Revising the section heading.

■ B. Revising paragraph (a) introductory text, and paragraphs (a)(1) introductory text, (a)(1)(i), (a)(1)(ii), (a)(1)(iii).

■ C. Removing paragraph (a)(1)(iv) and redesignating paragraph (a)(1)(v) as paragraph (a)(1)(iv).

■ D. Republishing newly redesignated paragraph (a)(1)(iv) introductory text.

■ E. Adding newly redesignated paragraph (a)(1)(iv)(E).

■ F. In paragraph (a)(2), removing the terms ''alien'' or ''aliens'' and adding in their place the terms, ''non-citizen'' or ''non-citizens'' respectively.

■ G. In paragraph (a)(2)(ii), removing the reference to paragraph ''(b)'' and adding in its place a reference to paragraph ''(c)''.

■ H. Adding a new paragraph (a)(3).

■ I. Revising paragraph (b).

■ J. Adding paragraph (c).

The revisions read as follows:

§ 435.406 Citizenship and non-citizen eligibility.

(a) The agency must provide Medicaid to otherwise eligible individuals who are—

(1) Citizens, provided that—

(i) The individual has declared that he or she is a citizen or national of the United States; and

(ii) The agency has verified such declaration in accordance with § 435.956(a) of this part.

(iii) For purposes of the declaration and citizenship verification

requirements discussed in paragraphs (a)(1)(i) and (a)(1)(ii) of this section, an individual includes applicants under a section 1115 demonstration (including a family planning demonstration project) for which a State receives Federal financial participation in its expenditures.

(iv) The following groups of individuals are exempt from the requirements in paragraph (a)(1)(ii) of this section:

* * * * *

(E) Newborns who are eligible for coverage under § 435.117 or § 457.360, and individuals who received medical assistance on such basis in any State on or after July 1, 2006.

* * * * *

(3) For purposes of paragraphs (a)(1) and (a)(2) of this section, the declaration of citizenship or immigration status may be provided by the individual, or an adult member of the individual's family or household, an authorized representative, or if the applicant is a minor or incapacitated, someone acting responsibly for the applicant provided that such individual attests to having a reasonable basis to make a declaration of such status.

(b) *State option to provide Medicaid to Lawfully Residing Non-Citizen Children or Pregnant Women.*

(1) *Basic Rule.* The agency may provide Medicaid to all individuals under 21 and/or all pregnant women who are lawfully present, as defined in § 435.4 of this part, and who otherwise meet the eligibility requirements under this part;

(2) *5-Year Waiting Period and Other Restrictions Do Not Apply.* The following restrictions on the provision of Medicaid do not apply to lawfully present non-citizen individuals under age 21 or pregnant women in States electing to provide eligibility in accordance with this paragraph: 8 U.S.C. 1611(a) (relating to the limitation on payment services for individuals who are not qualified non-citizens, 8 U.S.C. 1612(b) (relating to state option to limit eligibility of certain Lawful Permanent Residents to those credited with 40 qualifying quarters of work or seven year limitation), and 8 U.S.C. 1613 (relating to the 5-year waiting period), as implemented at paragraph (a)(2) of this section; and 8 U.S.C. 1631 (relating to sponsor deeming).

(c) Non-citizens whom the agency elects to cover under paragraph (b)(1) of this section and non-citizens whose eligibility is not restricted, as described in paragraph (b)(2) of this section, are covered for the same benefits as citizens who are eligible under the same section of subpart B, C or D of this part under which the non-citizen is eligible. For all other non-citizens who otherwise meet the eligibility requirements in this part, provisions of sections 1903(v)(2) and 1903(v)(3) of the Act, implemented at § 440.255 of this subchapter, apply,

■ 60. Section 435.407 is revised to read as follows:

§ 435.407 Types of acceptable documentary evidence of citizenship.

(a) *Stand-alone evidence of citizenship.* The following must be accepted as satisfactory documentary evidence of citizenship:

(1) A U.S. passport, including a U.S. Passport Card issued by the Department of State, without regard to any expiration date as long as such passport or Card was issued without limitation.

(2) A Certificate of Naturalization.

(3) A Certificate of U.S. Citizenship.

(4) A valid State-issued driver's license if the State issuing the license requires proof of U.S. citizenship, or obtains and verifies a social security number from the applicant who is a citizen before issuing such license.

(5)(i) Documentary evidence issued by a Federally recognized Indian Tribe, as published in the **Federal Register** by the Bureau of Indian Affairs within the U.S. Department of the Interior, and including Tribes located in a State that has an international border, which—

(A) Identifies the Federally recognized Indian Tribe that issued the document;

(B) Identifies the individual by name; and

(C) Confirms the individual's membership, enrollment, or affiliation with the Tribe.

(ii) Documents described in paragraph (a)(5)(i) of this section include, but are not limited to:

(A) A Tribal enrollment card;

(B) A Certificate of Degree of Indian Blood;

(C) A Tribal census document;

(D) Documents on Tribal letterhead, issued under the signature of the appropriate Tribal official, that meet the requirements of paragraph (a)(5)(i) of this section.

(b) *Evidence of citizenship.* If an applicant does not provide documentary evidence from the list in paragraph (a) of this section, the following must be accepted as satisfactory evidence to establish citizenship if also accompanied by an identity document listed in paragraph (c) of this section—

(1) A U.S. public birth certificate showing birth in one of the 50 States, the District of Columbia, Puerto Rico (if born on or after January 13, 1941), Guam, the Virgin Islands of the U.S. (on or after January 17, 1917), American Samoa, Swain's Island, or the Commonwealth of the Northern Mariana Islands (CNMI) (after November 4, 1986 (CNMI local time)). The birth record document may be issued by the State, Commonwealth, Territory, or local jurisdiction. If the document shows the individual was born in Puerto Rico, the Virgin Islands of the U.S., or the CNMI before these areas became part of the U.S., the individual may be a collectively naturalized citizen.

(2) At State option, a cross match with a State vital statistics agency documenting a record of birth.

(3) A Certification of Report of Birth, issued to U.S. citizens who were born outside the U.S.

(4) A Report of Birth Abroad of a U.S. Citizen.

(5) A Certification of birth.

(6) A U.S. Citizen I.D. card.

(7) A Northern Marianas Identification Card, issued to a collectively naturalized citizen, who was born in the CNMI before November 4, 1986.

(8) A final adoption decree showing the child's name and U.S. place of birth, or if an adoption is not final, a Statement from a State-approved adoption agency that shows the child's name and U.S. place of birth.

(9) Evidence of U.S. Civil Service employment before June 1, 1976.

(10) U.S. Military Record showing a U.S. place of birth.

(11) A data match with the Systematic Alien Verification for Entitlements (SAVE) Program or any other process established by the Department of Homeland Security to verify that an individual is a citizen.

(12) Documentation that a child meets the requirements of section 101 of the Child Citizenship Act of 2000 (8 U.S.C. 1431).

(13) Medical records, including, but not limited to, hospital, clinic, or doctor records or admission papers from a nursing facility, skilled care facility, or other institution that indicate a U.S. place of birth.

(14) Life, health, or other insurance record that indicates a U.S. place of birth.

(15) Official religious record recorded in the U.S. showing that the birth occurred in the U.S.

(16) School records, including pre-school, Head Start and daycare, showing the child's name and U.S. place of birth.

(17) Federal or State census record showing U.S. citizenship or a U.S. place of birth.

(18) If the applicant does not have one of the documents listed in paragraphs (a) or (b)(1) through (17) of this section, he or she may submit an affidavit signed

by another individual under penalty of perjury who can reasonably attest to the applicant's citizenship, and that contains the applicant's name, date of birth, and place of U.S. birth. The affidavit does not have to be notarized.

(c) *Evidence of identity.* (1) The agency must accept the following as proof of identity, provided such document has a photograph or other identifying information including, but not limited to, name, age, sex, race, height, weight, eye color, or address:

(i) Identity documents listed at 8 CFR 274a.2(b)(1)(v)(B)(*1*), except a driver's license issued by a Canadian government authority.

(ii) Driver's license issued by a State or Territory.

(iii) School identification card.

(iv) U.S. military card or draft record.

(v) Identification card issued by the Federal, State, or local government.

(vi) Military dependent's identification card.

(vii) U.S. Coast Guard Merchant Mariner card.

(2) For children under age 19, a clinic, doctor, hospital, or school record, including preschool or day care records.

(3) Two documents containing consistent information that corroborates an applicant's identity. Such documents include, but are not limited to, employer identification cards, high school and college diplomas (including high school equivalency diplomas), marriage certificates, divorce decrees, and property deeds or titles.

(4) Finding of identity from a Federal or State governmental agency. The agency may accept as proof of identity—

(i) A finding of identity from a Federal agency or another State agency, including but not limited to a public assistance, law enforcement, internal revenue or tax bureau, or corrections agency, if the agency has verified and certified the identity of the individual.

(ii) [Reserved]

(5) A finding of identity from an Express Lane agency, as defined in section 1902(e)(13)(F) of the Act.

(6) If the applicant does not have any document specified in paragraphs (c)(1) through (c)(3) of this section and identity is not verified under paragraph (c)(4) or (c)(5) of this section, the applicant may submit an affidavit signed, under penalty of perjury, by another person who can reasonably attest to the applicant's identity. Such affidavit must contain the applicant's name and other identifying information establishing identity, as describe in paragraph (c)(1) of this section. The affidavit does not have to be notarized.

(d) *Verification of citizenship by a Federal agency or another State.* (1) The agency may rely, without further documentation of citizenship or identity, on a verification of citizenship made by a Federal agency or another State agency, if such verification was done on or after July 1, 2006.

(2) [Reserved]

(e) *Assistance with obtaining documentation.* States must provide assistance to individuals who need assistance in securing satisfactory documentary evidence of citizenship in a timely manner.

(f) *Documentary evidence.* A photocopy, facsimile, scanned or other copy of a document must be accepted to the same extent as an original document under this section, unless information on the submitted document is inconsistent with other information available to the agency or the agency otherwise has reason to question the validity of the document or the information on the document.

§ 435.510 [Removed]

■ 61. Remove § 435.510 and the undesignated center heading of ''Dependency.''

§ 435.522 [Removed]

■ 62. Remove § 435.522 and the undesignated center heading of ''Age.''

■ 63. Section 435.601 is amended by—

■ A. Revising paragraph (b).

■ B. Removing paragraphs (d)(1)(i) and (d)(1)(ii).

■ C. Redesignating paragraphs (d)(1)(iii) through (d)(1)(vi) as paragraphs (d)(1)(i) through (d)(1)(iv), respectively.

The revision reads as follows:

§ 435.601 Application of financial eligibility methodologies.

* * * * *

(b) *Basic rule for use of cash assistance methodologies.* (1) This section only applies to individuals excepted from application of MAGI-based methods in accordance with § 435.603(j) of this subpart.

(2) Except as specified in paragraphs (c) and (d) of this section or in § 435.121 of this part in determining financial eligibility of individuals as categorically or medically needy, the agency must apply the financial methodologies and requirements of the cash assistance program that is most closely categorically related to the individual's status.

* * * * *

■ 64. Section 435.602 is amended by revising paragraph (a) to read as follows:

■ A. Redesignating and republishing the introductory language in paragraph (a) as introductory language in paragraph (a)(2).

■ B. Redesignating paragraphs (a)(1) through (a)(4) as paragraphs (a)(2)(i) through (a)(2)(iv).

■ C. Adding paragraphs (a) introductory text and (a)(1).

The addition reads as follows:

§ 435.602 Financial responsibility of relatives and other individuals.

(a) *Basic requirements.* (1) This section only applies to individuals excepted from application of MAGI-based methods in accordance with § 435.603(j) of this part.

(2) Subject to the provisions of paragraphs (b) and (c) of this section, in determining financial responsibility of relatives and other persons for individuals under Medicaid, the agency must apply the following requirements and methodologies:

(i) Except for a spouse of an individual or a parent for a child who is under age 21 or blind or disabled, the agency must not consider income and resources of any relative as available to an individual.

(ii) In relation to individuals under age 21 (as described in section 1905(a)(i) of the Act), the financial responsibility requirements and methodologies that apply include considering the income and resources of parents or spouses whose income and resources would be considered if the individual under age 21 were dependent under the State's approved AFDC plan, whether or not they are actually contributed, except as specified under paragraphs (c) and (d) of this section. These requirements and methodologies must be applied in accordance with the provisions of the State's approved AFDC plan.

(iii) When a couple ceases to live together, the agency must count only the income of the individual spouse in determining his or her eligibility, beginning the first month following the month the couple ceases to live together.

(iv) In the case of eligible institutionalized spouses who are aged, blind, and disabled and who have shared the same room in a title XIX Medicaid institution, the agency has the option of considering these couples as eligible couples for purposes of counting income and resources or as eligible individuals, whichever is more advantageous to the couple.

* * * * *

■ 65. Section 435.603 is amended by—

■ A. In paragraph (b), adding the definitions of ''Child,'' ''Parent,'' and ''Sibling'' in alphabetical order.

■ B. Adding paragraphs (d)(4) and (k).

■ C. Revising paragraphs (c), (d)(1), (f)(2)(i), (f)(3)(ii) and (iii), and (j)(4).

The revisions and additions read as follows:

§ 435.603 Application of modified adjusted gross income (MAGI).

* * * * *

(b) *Definitions.* For purposes of this section—

Child means a natural or biological, adopted or step child.

* * * * *

Parent means a natural or biological, adopted or step parent.

Sibling means natural or biological, adopted, half or step sibling.

* * * * *

(c) *Basic rule.* Except as specified in paragraph (i), (j) and (k) of this section, the agency must determine financial eligibility for Medicaid based on ''household income'' as defined in paragraph (d) of this section.

(d) * * *

(1) *General rule.* Except as provided in paragraphs (d)(2) through (d)(4) of this section, household income is the sum of the MAGI-based income, as defined in paragraph (e) of this section, of every individual included in the individual's household.

* * * * *

(4) In determining the eligibility of an individual for medical assistance under the eligibility group with the highest income standard under which the individual may be determined eligible using MAGI-based methodologies, an amount equivalent to 5 percentage points of the Federal poverty level for the applicable family size is deducted from household income.

* * * * *

(f)

* * * * *

(2)

* * * * *

(i) Individuals other than a spouse or child who expect to be claimed as a tax dependent by another taxpayer; and

* * * * *

(3) *Rules for individuals who neither file a tax return nor are claimed as a tax dependent.*

* * * * *

(ii) The individual's children under the age specified in paragraph (f)(3)(iv) of this section; and

(iii) In the case of individuals under the age specified in paragraph (f)(3)(iv) of this section, the individual's parents and siblings under the age specified in paragraph (f)(3)(iv) of this section.

* * * * *

(j) * * *

(4) Individuals who request coverage for long-term care services and supports for the purpose of being evaluated for an eligibility group for which meeting a level-of-care need is a condition of eligibility or under which long-term care services not covered for individuals determined eligible using MAGI-based financial methods are covered. ''Long-term care services'' include nursing facility services, a level of care in any institution equivalent to nursing facility services; home and community-based services furnished under a waiver or State plan under sections 1915 or 1115 of the Act; home health services as described in sections 1905(a)(7) of the Act and personal care services described in sections 1905(a)(24) of the Act.

* * * * *

(k) In the case of an individual whose eligibility is being determined under § 435.214 of this part, the agency may—

(1) Consider the household to consist of only the individual for purposes of paragraph (f) of this section.);

(2) Count only the MAGI-based income of the individual for purposes of paragraph (d) of this section.).

(3) Increase the family size of the individual, as defined in paragraph (b) of the section, by one.

■ 66. Section 435.610 is amended by—

■ A. Revising paragraph (a) introductory text and paragraph (a)(2).

■ B. Removing paragraph (c).

The revisions read as follows:

§ 435.610 Assignment of rights to benefits.

(a) Consistent with § 433.145 through § 433.148 of this chapter, as a condition of eligibility, the agency must require legally able applicants and beneficiaries to:

* * * * *

(2) In the case of applicants, attest that they will cooperate, and, in the case of beneficiaries, cooperate with the agency in—

(i) Establishing paternity and in obtaining medical support and payments, unless the individual establishes good cause for not cooperating or is a pregnant woman described in § 435.116; and

(ii) Identifying and providing information to assist the Medicaid agency in pursuing third parties who may be liable to pay for care and services under the plan, unless the individual establishes good cause for not cooperating.

* * * * *

■ 67. Section 435.831 is amended by revising paragraph (b) introductory text, (b)(1), and (c) to read as follows:

§ 435.831 Income eligibility.

* * * * *

(b) *Determining countable income.* For purposes of determining medically needy eligibility under this part, the agency must determine an individual's countable income as follows:

(1) For individuals under age 21, pregnant women, and parents and other caretaker relatives, the agency may apply the AFDC methodologies in effect in the State as of August 16, 1996 or the MAGI-based methodologies defined in § 435.603(e) of this part; except that, the agency must comply with the terms of § 435.602 of this part (relating to the financial responsibility of relatives and other individuals).

* * * * *

(c) *Eligibility based on countable income.* If countable income determined under paragraph (b) of this section is equal to or less than that applicable income standard under § 435.814 of this part, the individual is eligible for Medicaid.

* * * * *

■ 68. Section 435.905 is amended by—

■ A. Revising paragraph (b)(1).

■ B. Adding paragraph (b)(3).

The revisions and additions read as follows:

§ 435.905 Availability of program information.

* * * * *

(b) * * *

(1) Individuals who are limited English proficient through the provision of language services at no cost to the individual including, oral interpretation, written translations, and taglines in non-English languages indicating the availability of language services.

* * * * *

(3) Individuals must be informed of the availability of the services described in paragraph (b) of this section and how to access such services.

■ 69. Section 435.907 is amended by adding paragraph (h) to read as follows.

§ 435.907 Application.

* * * * *

(h) *Reinstatement of withdrawn applications.* (1) In the case of individuals described in paragraph (h)(2) of this section, the agency must reinstate the application submitted by the individual, effective as of the date the application was first received by the Exchange.

(2) Individuals described in this paragraph are individuals who—

(i) Submitted an application described in paragraph (b) of this section to the Exchange;

(ii) Withdrew their application for Medicaid in accordance with 45 CFR 155.302(b)(4)(A);

(iii) Are assessed as potentially eligible for Medicaid by the Exchange appeals entity.

■ 70. Section 435.908 is amended by adding paragraph (c) to read as follows:

§ 435.908 Assistance with application and renewal.

* * * * *

(c) *Certified Application Assisters.* (1) At State option, the agency may certify staff and volunteers of State-designated organizations to act as application assisters, authorized to provide assistance to applicants and beneficiaries with the application process and during renewal of eligibility. To be certified, application assisters must be—

(i) Authorized and registered by the agency to provide assistance at application and renewal;

(ii) Effectively trained in the eligibility and benefits rules and regulations governing enrollment in a QHP through the Exchange and all insurance affordability programs operated in the State, as implemented in the State; and

(iii) Trained in and subject to regulations relating to the safeguarding and confidentiality of information and conflict of interest, including regulations set forth at part 431, subpart F of this chapter, and at 45 CFR 155.260(f), regulations relating to the prohibition against reassignment of provider claims specified in § 447.10 of this chapter, and all other State and Federal laws concerning conflicts of interest and confidentiality of information.

(2) For purposes of this section, assistance includes providing information on insurance affordability programs and coverage options, helping individuals complete an application or renewal, gathering required documentation, submitting applications and renewals to the agency, interacting with the agency on the status of such applications and renewals, assisting individuals with responding to any requests from the agency, and managing their case between the eligibility determination and regularly scheduled renewals. Application assisters may be certified by the agency to act on behalf of applicants and beneficiaries with respect to one, some or all of the permitted assistance activities.

(3) If the agency elects to certify application assisters, it must establish—

(i) A designated web portal to which only certified application assisters have access and through which the assisters may provide the assistance described in paragraph (c)(2) of this section. The agency must develop a secure mechanism to ensure that certified application assisters are able to perform only those activities for which they are certified.

(ii) Procedures to ensure that—

(A) Applicants and beneficiaries are informed of the functions and responsibilities of certified application assisters;

(B) Individuals are able to authorize application assisters to receive confidential information about the individual related to the individual's application for or renewal of Medicaid; and

(C) The agency does not disclose confidential applicant or beneficiary information to an application assister unless the applicant or beneficiary has authorized the application assister to receive such information.

(4) Application assisters may not impose any charge on applicants or beneficiaries for application assistance.

§ 435.909 [Amended]

■ 71. Paragraph (a) is removed and reserved.

■ 72. Section 435.910 is amended by revising paragraph (g) to read as follows:

§ 435.910 Use of social security number.

* * * * *

(g) The agency must verify the SSN furnished by an applicant or beneficiary with SSA to insure the SSN was issued to that individual, and to determine whether any other SSNs were issued to that individual.

* * * * *

■ 73. Section § 435.911 is amended by—

■ A. Revising paragraph (b)(1) introductory text, paragraph (b)(1)(i), paragraph (c) introductory text, and paragraph (c)(1).

■ B. Adding paragraph (b)(2).

The revisions and addition read as follows:

§ 435.911 Determination of eligibility.

* * * * *

(b)(1) Except as provided in paragraph (b)(2) of this section, applicable modified adjusted gross income standard means 133 percent of the Federal poverty level or, if higher—

(i) In the case of parents and other caretaker relatives described in § 435.110(b) of this part, the income standard established in accordance with § 435.110(c) or § 435.220(c) of this part;

* * * * *

(2) In the case of individuals who have attained at least age 65 and individuals who have attained at least age 19 and who are entitled to or enrolled for Medicare benefits under part A or B or title XVIII of the Act, there is no applicable modified adjusted gross income standard, except that in the case of such individuals—

(i) Who are also pregnant, the applicable modified adjusted gross income standard is the standard established under paragraph (b)(1) of this section; and

(ii) Who are also a parent or caretaker relative, as described in § 435.4 of this part, the applicable modified adjusted gross income standard is the higher of the income standard established in accordance with § 435.110(c) or § 435.220(c) of this part.

(c) For each individual who has submitted an application described in § 435.907 or whose eligibility is being renewed in accordance with § 435.916 and who meets the non-financial requirements for eligibility (or for whom the agency is providing a reasonable opportunity to verify citizenship or immigration status in accordance with § 435.956(g) of this part), the state Medicaid agency must comply with the following—

(1) The agency must, promptly and without undue delay consistent with timeliness standards established under § 435.912, furnish Medicaid to each such individual whose household income is at or below the applicable modified adjusted gross income standard.

* * * * *

§ 435.913 [Removed]

■ 74. Section 435.913 is removed.

■ 75. Section § 435.917 is added to read as follows.

§ 435.917 Notice of agency's decision concerning eligibility.

(a) *Notice of eligibility determinations.* Consistent with §§ 431.206 through 431.214 of this chapter, the agency must provide all applicants and beneficiaries with timely and adequate written notice of any decision affecting their eligibility, including a denial, termination or suspension of eligibility, or a denial or change in benefits and services. Such notice must—

(1) Be written in plain language;

(2) Be accessible to persons who are limited English proficient and individuals with disabilities, consistent with § 435.905(b) of this subpart, and

(3) If provided in electronic format, comply with § 435.918 of this subpart.

(b) *Content of eligibility notice.*

(1) *Notice of approved eligibility.* Any notice of an approval of Medicaid eligibility must include, but is not limited to, the following information—

(i) The basis and effective date of eligibility;

(ii) The circumstances under which the individual must report, and

procedures for reporting, any changes that may affect the individual's eligibility;

(iii) If applicable, the amount of medical expenses which must be incurred to establish eligibility in accordance with § 435.121 or § 435.831 of this part.

(iv) Information on the level of benefits and services approved, including, if applicable, the notice relating to any premiums, enrollment fees, and cost sharing required under Part 447 Subpart A of this chapter, and the right to appeal the level of benefits and services approved.

(2) *Notice of adverse action including denial, termination or suspension of eligibility or change in benefits or services.* Any notice of denial, termination or suspension of Medicaid eligibility or change in benefits or services must be consistent § 431.210 of this chapter.

(c) Whenever an approval, denial, or termination of eligibility is based on an applicant's or beneficiary's having household income at or below the applicable modified adjusted gross income standard in accordance with § 435.911 of this subpart, the eligibility notice must contain—

(1) Information regarding bases of eligibility other than the applicable modified adjusted gross income standard and the benefits and services afforded to individuals eligible on such other bases, sufficient to enable the individual to make an informed choice as to whether to request a determination on such other bases; and

(2) Information on how to request a determination on such other bases;

(d) The agency's responsibility to provide notice under this section is satisfied by a combined eligibility notice, as defined in § 435.4 of this chapter, provided by the Exchange or other insurance affordability program in accordance with an agreement between the agency and such program consummated in accordance with § 435.1200(b)(3) of this chapter, except that, if the information described in paragraph (b)(1)(iii) through (iv) of this section is not included in such combined eligibility notice, the agency must provide the individual with a supplemental notice of such information, consistent with this section.

■ 76. Section 435.918 is added to read as follows:

§ 435.918 Use of electronic notices.

(a) The agency must provide individuals with a choice to receive notices and information required under this part or subpart E of part 431 of this chapter in electronic format or by regular mail. If the individual elects to receive communications from the agency electronically, the agency must—

(1) Confirm by regular mail the individual's election to receive notices electronically;

(2) Inform the individual of his or her right to change such election, at any time, to receive notices through regular mail;

(3) Post notices to the individual's electronic account within 1 business day of notice generation;

(4) Send an email or other electronic communication alerting the individual that a notice has been posted to his or her account. The agency may not include confidential information in the email or electronic alert.

(5) If an electronic communication is undeliverable, send any notice by regular mail within three business days of the date of the failed electronic communication;

(6) At the individual's request, provides through regular mail any notice posted to the individual's electronic account.

(b) The agency may provide notice or other communications electronically only if the individual—

(1) Has affirmatively elected to receive electronic communications in accordance with paragraph (a) of this section; and

(2) Is permitted to change such election at any time.

§ 435.919 [Removed]

■ 77. Section 435.919 is removed.

■ 78. Section 435.923 is added to read as follows:

§ 435.923 Authorized Representatives.

(a) The agency must permit applicants and beneficiaries to designate an individual or organization to act responsibly on their behalf in assisting with the individual's application and renewal of eligibility and other ongoing communications with the agency. Such a designation must be in writing including the applicant's signature, and must be permitted at the time of application and at other times. Legal documentation of authority to act on behalf of an applicant or beneficiary under state law, such as a court order establishing legal guardianship or a power of attorney, shall serve in the place of written authorization by the applicant or beneficiary.

(b) Representatives may be authorized to—

(1) Sign an application on the applicant's behalf;

(2) Complete and submit a renewal form;

(3) Receive copies of the applicant or beneficiary's notices and other communications from the agency;

(4) Act on behalf of the applicant or beneficiary in all other matters with the agency.

(c) The power to act as an authorized representative is valid until the applicant or beneficiary modifies the authorization or notifies the agency that the representative is no longer authorized to act on his or her behalf, or the authorized representative informs the agency that he or she no longer is acting in such capacity, or there is a change in the legal authority upon which the individual or organization's authority was based. Such notice must be in writing and should include the applicant or authorized representative's signature as appropriate.

(d) The authorized representative—

(1) Is responsible for fulfilling all responsibilities encompassed within the scope of the authorized representation, as described in paragraph (b)(2) of this section, to the same extent as the individual he or she represents;

(2) Must agree to maintain, or be legally bound to maintain, the confidentiality of any information regarding the applicant or beneficiary provided by the agency.

(e) The agency must require that, as a condition of serving as an authorized representative, a provider or staff member or volunteer of an organization must sign an agreement that he or she will adhere to the regulations in part 431, subpart F of this chapter and at 45 CFR 155.260(f) (relating to confidentiality of information), § 447.10 of this chapter (relating to the prohibition against reassignment of provider claims as appropriate for a health facility or an organization acting on the facility's behalf), as well as other relevant State and Federal laws concerning conflicts of interest and confidentiality of information.

(f) For purposes of this section, the agency must accept electronic, including telephonically recorded, signatures and handwritten signatures transmitted by facsimile or other electronic transmission. Designations of authorized representatives must be accepted through all of the modalities described in § 435.907(a) of this part.

■ 79. Section 435.926 is added to read as follows:

§ 435.926 Continuous eligibility for children.

(a) *Basis.* This section implements section 1902(e)(12) of the Act.

(b) *Eligibility.* The agency may provide continuous eligibility for the length of a continuous eligibility period

specified in paragraph (c) of this section for an individual who is:

(1) Under age 19 or under a younger age specified by the agency in its State plan; and

(2) Eligible and enrolled for mandatory or optional coverage under the State plan in accordance with subpart B or C of this part.

(c) *Continuous eligibility period.* (1) The agency must specify in the State plan the length of the continuous eligibility period, not to exceed 12 months.

(2) A continuous eligibility period begins on the effective date of the individual's most recent determination or renewal of eligibility at the end of the length of the continuous eligibility period specified in the State plan.

(d) *Applicability.* A child's eligibility may not be terminated during a continuous eligibility period, regardless of any changes in circumstances, unless:

(1) The child attains the maximum age specified in accordance with paragraph (b)(1) of this section;

(2) The child or child's representative requests a voluntary termination of eligibility;

(3) The child ceases to be a resident of the State;

(4) The agency determines that eligibility was erroneously granted at the most recent determination or renewal of eligibility because of agency error or fraud, abuse, or perjury attributed to the child or the child's representative; or

(5) The child dies.

■ 80. Section 435.940 is amended by revising the first sentence to read as follows:

§ 435.940 Basis and scope.

The income and eligibility verification requirements set forth at § 435.940 through § 435.960 of this part are based on sections 1137, 1902(a)(4), 1902(a)(19), 1902(a)(46)(B), 1902(ee), 1903(r)(3), 1903(x), and 1943(b)(3) of the Act, and section 1413 of the Affordable Care Act. * * *

■ 81. Section 435.952 is amended by adding paragraph (c)(3) to read as follows:

§ 435.952 Use of information and requests of additional information from individuals.

* * * * *

(c) * * *

(3) *Exception for Special Circumstances:* The agency must establish an exception to permit, on a case-by-case basis, self-attestation of individuals for all eligibility criteria when documentation does not exist at the time of application or is not reasonably available, such as for individuals who are homeless or have experienced domestic violence or a natural disaster. Except that this does not apply if documentation is specifically required under title XIX, such as is the case of verifying citizenship and immigration status, as implemented at § 435.956(a) of this part.

* * * * *

■ 82. Section 435.956 is amended by—

■ A. Adding paragraph (a).

■ B. Adding paragraph (g).

The revision and addition read as follows:

§ 435.956 Verification of other non-financial information.

(a) *Citizens and Non-citizens.* (1) The agency must verify citizenship and immigration status through the electronic service established in § 435.949 if available. If the agency is unable to verify citizenship or immigration status through such service the agency must—

(i) Verify citizenship in accordance with section 1902(ee) of the Act or § 435.407 of this part consistent with the requirements of § 435.952(c)(2)(ii) of this part.

(ii) Verify immigration status in accordance with section 1137(d) of the Act and § 435.406 of this part, consistent with the requirements of § 435.952(c)(2)(ii) of this part.

(2) If the agency cannot promptly verify the citizenship or immigration status of an individual in accordance with paragraph (a)(1) of this section, the agency—

(i) Must comply with paragraph (g) of this section; and

(ii) May not delay, deny, reduce or terminate benefits for an individual who is otherwise eligible for Medicaid during the reasonable opportunity period described in paragraph (g) of this section, in accordance with § 435.911(c) of this part.

(3) The agency must maintain a record of having verified citizenship or immigration status for each individual, in a case record or electronic database. The agency may not re-verify or require an individual to re-verify citizenship at a renewal of eligibility or subsequent application following a break in coverage.

* * * * *

(g) *Reasonable opportunity period.* (1) The agency must provide a reasonable opportunity period to individuals for whom the agency is unable to promptly verify citizenship or satisfactory immigration status in accordance with paragraph (a) of this section, as well as notice of such opportunity. Such notice must be accessible to persons who are limited English proficient and individuals with disabilities, consistent with § 435.905(b) of this chapter. During such reasonable opportunity period, the agency must, if relevant to verification of the individual's status—

(i) Assist the individual in obtaining an SSN, in accordance with § 435.910;

(ii) Attempt to resolve any inconsistencies, including typographical or other clerical errors, between information provided by the individual and data from an electronic data source, and resubmit corrected information to the electronic data source.

(iii) Provide the individual with information on how to contact the source of the electronic data so he or she can attempt to resolve such inconsistencies directly with such source; and

(iv) Permit the individual to provide other documentation of citizenship or immigration status, in accordance with section 1137(d) of the Act and § 435.406 and § 435.407 of this part.

(2) The reasonable opportunity period—

(i) Begins on, and must extend 90 days from, the date on which the notice described in paragraph (g)(1) of this section is received by the individual. The date on which the notice is received is considered to be 5 days after the date on the notice, unless the individual shows that he or she did not receive the notice within the 5-day period.

(ii) At state option, may be extended beyond 90 days if the individual is making a good faith effort to resolve any inconsistencies or obtain any necessary documentation in accordance with paragraph (g)(1) of this section or the agency needs more time to complete the verification process.

(3) At State option, the agency may begin to furnish benefits to otherwise eligible individuals during the reasonable opportunity period under paragraph (a)(2)(ii) of this section on an earlier date, up to and including the date the notice is sent or the date of application containing the declaration of citizenship or immigration status by or on behalf of the individual.

(4) If, by the end of the reasonable opportunity period, the individual's citizenship or immigration status has not been verified in accordance with paragraph (a) of this section, the agency must take action within 30 days to terminate eligibility in accordance with part 431 subpart E (relating to notice and appeal rights), except that § 431.230 and § 431.231 of this part (relating to maintaining and reinstating services) may be applied at State option.

■ 83. Section 435.1001 is amended by—

■ A. Republishing paragraph (a) introductory language.

■ B. Revising paragraph (a)(2).

The revisions read as follows:

§ 435.1001 FFP for administration.

(a) FFP is available in the necessary administrative costs the State incurs in—

* * * * *

(2) Administering presumptive eligibility.

* * * * *

■ 84. Section 435.1002 is amended by—

■ A. Republishing paragraph (c) introductory language.

■ B. Revising paragraphs (c)(1) and (c)(4).

The revisions read as follows:

§ 435.1002 FFP for services.

* * * * *

(c) FFP is available in expenditures for services covered under the plan that are furnished—

(1) During a presumptive eligibility period to individuals who are determined to be presumptively eligible for Medicaid in accordance with subpart L of this part;

* * * * *

(4) Regardless of whether such individuals file an application for a full eligibility determination or are determined eligible for Medicaid following the presumptive eligibility period.

■ 85. Section 435.1004 is amended by revising paragraph (b) to read as follows:

§ 435.1004 Beneficiaries overcoming certain conditions of eligibility.

* * * * *

(b) FFP is available for a period not to exceed—

(1) The period during which a recipient of SSI or an optional State supplement continues to receive cash payments while these conditions are being overcome; or

(2) For beneficiaries, eligible for Medicaid only and recipients of SSI or an optional State supplement who do not continue to receive cash payments, the second month following the month in which the beneficiary's Medicaid coverage would have been terminated.

■ 86. Section 435.1008 is revised to read as follows:

§ 435.1008 FFP in expenditures for medical assistance for individuals who have declared citizenship or nationality or satisfactory immigration status.

(a) This section implements sections 1137 and 1902(a)(46)(B)of the Act.

(b) Except as provided in paragraph (c) of this section, FFP is not available to a State for expenditures for medical assistance furnished to individuals unless the State has verified citizenship or immigration status in accordance with § 435.956 of this part.

(c) FFP is available to States for otherwise eligible individuals whose declaration of U.S. citizenship or satisfactory immigration status in accordance with section 1137(d) of the Act and § 435.406(a)(1)(i) of this part has been verified in accordance with § 435.956, or for whom benefits are provided during a reasonable opportunity period to verify citizenship, nationality, or immigration status in accordance with section § 435.956(a)(2) of this part.

FFP for Premium Assistance

■ 87. Add a new undesignated center heading immediately following § 435.1012 as set forth above.

■ 88. Section 435.1015 is added to read as follows:

§ 435.1015 FFP for premium assistance for plans in the individual market.

(a) FFP is available for payment of the costs of insurance premiums for an individual health plan on behalf of an individual who is eligible for Medicaid under this part, subject to the following conditions:

(1) The insurer is obligated to pay primary to Medicaid for all health care items and services for which the insurer is legally and contractually responsible under the individual health plan, as required under part 433 subpart D of this chapter;

(2) The agency furnishes all benefits for which the individual is covered under the State plan that are not available through the individual health plan;

(3) The individual does not incur any cost sharing charges in excess of any amounts imposed by the agency under subpart A of part 447; and

(4) The cost of purchasing such coverage, including administrative expenditures and the costs of providing wraparound benefits for items and services covered under the Medicaid State plan, but not covered under the individual health plan, must be comparable to the cost of providing direct coverage under the State plan.

(b) A State may not require an individual who is eligible for services under the Medicaid State plan to enroll in premium assistance under this section as a condition of eligibility under this part.

Subpart L—Options for Coverage of Special Groups Under Presumptive Eligibility

■ 89. The heading for subpart L is revised as set forth above.

■ 90. Section 435.1100 is revised to read as follows:

§ 435.1100 Basis for presumptive eligibility.

This subpart implements sections 1920, 1920A, 1920B, 1920C, and 1902(a)(47)(B) of the Act.

■ 91. Remove the undesignated center heading ''Presumptive Eligibility for Children'' that is immediately before § 435.1101.

■ 92. Section 435.1101 is amended by—

■ A. Removing the definition of ''Application form.''

■ C. Adding the definition of ''Application.''

■ D. Amending the definition of ''Qualified entity'' by redesignating paragraph (10) as paragraph (11), and adding a new paragraph (10).

The additions read as follows:

§ 435.1101 Definitions related to presumptive eligibility for children.

Application means, consistent with the definition at § 435.4 of this part, the single streamlined application adopted by the agency under § 435.907(a) of this part.

* * * * *

Qualified entity * * *

(10) Is a health facility operated by the Indian Health Service, a Tribe or Tribal organization under the Indian Self Determination and Education Assistance Act (25 U.S.C. 450 et seq.), or an Urban Indian Organization under title V of the Indian Health Care Improvement Act (25 U.S.C. 1651 et seq.).

* * * * *

■ 93. Section 435.1102 is amended by—

■ A. Revising the section heading.

■ B. Revising paragraphs (a) and (b)(3).

■ C. Removing ''and'' at the end of paragraph (b)(2)(iv)(B) and adding ''and'' at the end of paragraph (b)(2)(v)(B);

■ D. Adding paragraphs (b)(2)(vi), (d) and (e).

■ E. Removing paragraph (b)(4).

The revisions and additions read as follows:

§ 435.1102 Children covered under presumptive eligibility.

(a) The agency may elect to provide Medicaid services for children under age 19 or a younger age specified by the State during a presumptive eligibility period following a determination by a qualified entity, on the basis of preliminary information, that the individual has gross income (or, at state option, a reasonable estimate of household income, as defined in § 435.603 of this part, determined using simplified methods prescribed by the

agency) at or below the income standard established by the State for the age of the child under § 435.118(c) or under § 435.229 if applicable and higher.

(b) * * *

(2) * * *

(vi) Do not delegate the authority to determine presumptive eligibility to another entity.

(3) Establish oversight mechanisms to ensure that presumptive eligibility determinations are being made consistent with the statute and regulations.

* * * * *

(d) The agency—

(1) May require, for purposes of making a presumptive eligibility determination under this section, that the individual has attested to being, or another person who attests to having reasonable knowledge of the individual's status has attested to the individual being, a—

(i) Citizen or national of the United States or in satisfactory immigration status; or

(ii) Resident of the State; and

(2) May not—

(i) Impose other conditions for presumptive eligibility not specified in this section; or

(ii) Require verification of the conditions for presumptive eligibility.

(e) Notice and fair hearing regulations in subpart E of part 431 of this chapter do not apply to determinations of presumptive eligibility under this section.

■ 94. Section 435.1103 is added to read as follows:

§ 435.1103 Presumptive eligibility for other individuals.

(a) The terms of § 435.1101 and § 435.1102 of this subpart apply to pregnant women such that the agency may provide Medicaid to pregnant women during a presumptive eligibility period following a determination by a qualified entity that the pregnant woman has income at or below the income standard established by the State under § 435.116(c), except that coverage of services provided to such women are limited to ambulatory prenatal care and the number of presumptive eligibility periods that may be authorized for pregnant women is one per pregnancy.

(b) If the agency provides Medicaid during a presumptive eligibility period to children under § 435.1102 of this subpart or to pregnant women under paragraph (a) of this section, the agency may also apply the terms of § 435.1101 and § 435.1102 of this subpart to the individuals described in one or more of the following sections of this part, based on the income standard established by the state for such individuals and providing the benefits covered under that section: §§ 435.110 (parents and caretaker relatives), 435.119 (individuals aged 19 or older and under age 65), 435.150 (former foster care children), and 435.218 (individuals under age 65 with income above 133 percent FPL).

(c)(1) The terms of § 435.1101 and § 435.1102 of this subpart apply to individuals who may be eligible under § 435.213 of this part (relating to individuals with breast or cervical cancer) or § 435.214 of this part (relating to eligibility for limited family planning benefits) such that the agency may provide Medicaid during a presumptive eligibility period following a determination by a qualified entity described in paragraph (c)(2) of this section that—

(i) The individual meets the eligibility requirements of § 435.213; or

(ii) The individual meets the eligibility requirements of § 435.214, except that coverage provided during a presumptive eligibility period to such individuals is limited to the services described in § 435.214(d).

(2) Qualified entities described in this paragraph include qualified entities which participate as a provider under the State plan and which the agency determines are capable of making presumptive eligibility determinations.

■ 95. Section 435.1110 is added to read as follows:

§ 435.1110 Presumptive eligibility determined by hospitals.

(a) *Basic rule.* The agency must provide Medicaid during a presumptive eligibility period to individuals who are determined by a qualified hospital, on the basis of preliminary information, to be presumptively eligible in accordance with the policies and procedures established by the State consistent with this section and §§ 435.1102 and 435.1103 of this part, but regardless of whether the agency provides Medicaid during a presumptive eligibility period under such sections.

(b) *Qualified hospitals.* A qualified hospital is a hospital that—

(1) Participates as a provider under the State plan or a demonstration under section 1115 of the Act, notifies the agency of its election to make presumptive eligibility determinations under this section, and agrees to make presumptive eligibility determinations consistent with State policies and procedures;

(2) At State option, assists individuals in completing and submitting the full application and understanding any documentation requirements; and

(3) Has not been disqualified by the agency in accordance with paragraph (d) of this section.

(c) *State options for bases of presumptive eligibility.* The agency may—

(1) Limit the determinations of presumptive eligibility which hospitals may elect to make under this section to determinations based on income for children, pregnant women, parents and caretaker relatives, and other adults, consistent with § 435.1102 and § 435.1103 of this subpart; or

(2) Permit hospitals to elect to make presumptive eligibility determinations on additional bases under the State plan or an 1115 demonstration.

(d) *Disqualification of hospitals.* (1) The agency may establish standards for qualified hospitals related to the proportion of individuals determined presumptively eligible for Medicaid by the hospital who:

(i) Submit a regular application, as described in § 435.907 of this part, before the end of the presumptive eligibility period; or

(ii) Are determined eligible for Medicaid by the agency based on such application.

(2) The agency must take action, including, but not limited to, disqualification of a hospital as a qualified hospital under this section, if the agency determines that the hospital is not—

(i) Making, or is not capable of making, presumptive eligibility determinations in accordance with applicable state policies and procedures; or

(ii) Meeting the standard or standards established by the agency under paragraph (d)(1) of this section.

■ 96. Section 435.1200 is amended by—

■ A. Revising the section heading.

■ B. Revising paragraphs (a), (b), (c) introductory text, (c)(3), (d), and (e).

■ C. Adding paragraphs (g).

The revisions and additions read as follows.

§ 435.1200 Medicaid agency responsibilities for a coordinated eligibility and enrollment process with other insurance affordability programs.

(a) *Statutory basis, purpose, and definitions.* (1) *Statutory basis and purpose.* This section implements sections 1943(b)(3) and 2201(b)(3)(B) of the Affordable Care Act to ensure coordinated eligibility and enrollment among insurance affordability programs.

(2) *Definitions.*

(i) *Combined eligibility notice* has the meaning as provided in § 435.4 of this part.

(ii) *Coordinated content* has the meaning as provided in § 435.4 of this part.

(b) *General requirements and definitions.* The State Medicaid agency must—

(1) Fulfill the responsibilities set forth in paragraphs (d) through (g) and, if applicable, paragraph (c) of this section.

(2) Certify for the Exchange and other insurance affordability programs the criteria applied in determining Medicaid eligibility.

(3) Enter into and, upon request, provide to the Secretary one or more agreements with the Exchange, Exchange appeals entity and the agencies administering other insurance affordability programs as are necessary to fulfill the requirements of this section, including a clear delineation of the responsibilities of each program to—

(i) Minimize burden on individuals seeking to obtain or renew eligibility or to appeal a determination of eligibility for enrollment in a QHP or with respect to one or more insurance affordability program;

(ii) Ensure compliance with paragraphs (d) through (g) of this section and, if applicable, paragraph (c) of this section;

(iii) Ensure prompt determinations of eligibility and enrollment in the appropriate program without undue delay, consistent with timeliness standards established under § 435.912, based on the date the application is submitted to any insurance affordability program.

(iv) Provide for a combined eligibility notice to individuals, as well as multiple members of the same household applying on the same application to the maximum extent feasible, for enrollment in a QHP through the Exchange and all insurance affordability programs.

(4) To the extent to which a combined eligibility notice is not feasible for all members of the same household, applying on the same application, coordinated content must be provided for those household members whose eligibility status is not yet determined.

(c) *Provision of Medicaid for individuals found eligible for Medicaid by another insurance affordability program.* If the agency has entered into an agreement in accordance with § 431.10(d) of this chapter under which the Exchange or other insurance affordability program makes final determinations of Medicaid eligibility, for each individual determined so eligible by the Exchange (including as a result of a decision made by the Exchange or Exchange appeals entity authorized under § 431.10(c) of this chapter to adjudicate appeals of Medicaid eligibility determinations) or other program, the agency must—

* * * * *

(3) Include in the agreement into which the agency has entered under paragraph (b)(3) of this section that the Exchange or other insurance affordability program will provide combined eligibility notice of final eligibility determinations and appeals decisions made by it; and

(d) *Transfer from other insurance affordability programs to the State Medicaid agency.* For individuals for whom another insurance affordability program has not made a determination of Medicaid eligibility, but who have been assessed by such program (including as a result of a decision made by the Exchange appeals entity) as potentially Medicaid eligible, and for individuals not so assessed, but who otherwise request a full determination by the Medicaid agency, the agency must—

(1) Accept, via secure electronic interface, the electronic account for the individual and notify such program of the receipt of the electronic account.

(2) Not request information or documentation from the individual provided in the individual's electronic account, or to another insurance affordability program or appeals entity.

(3) Promptly and without undue delay, consistent with timeliness standards established under § 435.912, determine the Medicaid eligibility of the individual, in accordance with § 435.911 of this part, without requiring submission of another application, and—

(i) Effective January 1, 2015, for individuals determined eligible for Medicaid, provide combined eligibility notice, including notice of a denial or termination of the individual's eligibility for enrollment in a QHP through the Exchange or other insurance affordability programs, as applicable.

(ii) For individuals determined not eligible for Medicaid, comply with paragraph (e) of this section as if the individual had submitted an application to the agency.

(4) Accept any finding relating to a criterion of eligibility made by such program or appeals entity, without further verification, if such finding was made in accordance with policies and procedures which are the same as those applied by the agency or approved by it in the agreement described in paragraph (b)(3) of this section; and

(5) Notify such program of the final determination of the individual's eligibility or ineligibility for Medicaid.

(e) *Evaluation of eligibility for other insurance affordability programs.*

(1) *Individuals determined not eligible for Medicaid.* For individuals who submit an application or return a renewal form to the agency which includes sufficient information to determine Medicaid eligibility, or whose eligibility is being renewed pursuant to a change in circumstance in accordance with § 435.916(d) of this part, and whom the agency determines are not eligible for Medicaid, and for individuals determined ineligible for Medicaid pursuant to fair hearing under subpart E of part 431 of this chapter, the agency must—

(i) Promptly and without undue delay, consistent with timeliness standards established under § 435.912 of this part, determine potential eligibility for, and, as appropriate, transfer via a secure electronic interface the individual's electronic account to, other insurance affordability programs;

(ii) Include in any agreement into which the agency enters in accordance with paragraph (b)(3) of this section, that, effective January 1, 2015, such other program will issue a combined eligibility notice, including the agency's denial of Medicaid eligibility.

(iii) Prior to January 1, 2015—

(A) Include coordinated content, as defined in § 435.4 of the part, in the notice of Medicaid denial or termination, provided to the individual in accordance with § 435.917 of this part, relating to the transfer of the individual's account; or

(B) Include in the agreement into which the agency enters in accordance with (b)(3) of this section, that such other program will issue a combined eligibility notice, including the agency's denial of Medicaid eligibility.

(2) *Individuals undergoing a Medicaid eligibility determination on a basis other than MAGI.* In the case of an individual with household income greater than the applicable MAGI standard and for whom the agency is determining eligibility on another basis in accordance with § 435.911(c)(2) of this part, the agency must promptly and without undue delay, consistent with timeliness standards established under § 435.912 of this part—

(i) Determine potential eligibility for, and as appropriate, transfer via secure electronic interface the individual's electronic account to, other insurance affordability programs and provide timely notice to such other program—

(A) That the individual is not Medicaid eligible on the basis of the applicable MAGI standard, but that a final determination of Medicaid

eligibility on other bases is still pending; and

(B) Of the agency's final determination of eligibility or ineligibility for Medicaid.

(ii) Provide notice to the individual, consistent with § 435.917 of this part, that the agency—

(A) Has determined the individual ineligible for Medicaid on the basis of having household income at or below the applicable MAGI standard; and

(B) Is continuing to evaluate Medicaid eligibility on other bases, including a plain language explanation of the other bases being considered.

(C) Such notice must include coordinated content relating to the transfer of the individual's electronic account to the other insurance affordability program and explanation that eligibility for or enrollment in such program will not affect the determination of Medicaid eligibility on other bases; and

(iii) Provide the individual with notice, consistent with § 435.917 of this part, of the final determination of eligibility on the other bases. In the case of individuals determined eligible for Medicaid on a basis other than having income at or below the applicable modified adjusted gross income standard, such notice also must contain coordinated content informing the individual of the notice provided to the Exchange or other program in accordance with paragraph (e)(2)(i)(II) of this section and that approval of Medicaid eligibility will result in termination of eligibility for and by the other program if the individual is enrolled in such program.

(3) The agency may enter into an agreement with the Exchange to make determinations of eligibility for enrollment in a QHP through the Exchange, advance payments of the premium tax credit and cost-sharing reductions, consistent with 45 CFR 155.110(a)(2).

* * * * *

(g) *Coordination involving appeals entities.* The agency must—

(1) Establish a secure electronic interface the through which—

(i) The Exchange can notify the agency that an appeal of eligibility for enrollment in a QHP through the Exchange, advance payments of the premium tax credit, or cost-sharing reductions, has been filed; and

(ii) The individual's electronic account, including any information provided by the individual as part of an appeal to either the agency or Exchange appeals entity, can be transferred from one program or appeals entity to the other.

(2) In conducting a fair hearing in accordance with subpart E or part 431 of this chapter, not request information or documentation from the individual included in the individual's electronic account or provided to the Exchange or Exchange appeals entity.

(3)(i) In the case of individuals described in paragraph (g)(3)(ii) of this section, transmit to the Exchange, through the electronic interface established under paragraph (g)(1)(i) of this section, the hearing decision made by the agency under part 431 subpart E;

(ii) Individuals described in this paragraph include individuals determined ineligible for Medicaid—

(A) By the Exchange; or

(B) By the agency and transferred to the Exchange in accordance with paragraph (e)(1) or (2) of this section.

■ 97. Section 435.1205 is added to read as follows:

§ 435.1205 Alignment with exchange initial open enrollment period.

(a) *References and definitions.* For purposes of this section—

(1) *March 23, 2012 final rule* refers to the Final rule; Interim final rule published on March 23, 2012 at 77 **Federal Register** 17144.

(2) *Eligibility based on MAGI* means Medicaid eligibility based on the eligibility requirements which will be effective under the State plan, or waiver of such plan, as of January 1, 2014, consistent with §§ 435.110—435.119, 435.218 and 435.603 of the March 23, 2012 final rule, as revised in subsequent rulemaking.

(3) *Electronic account, insurance affordability program and secure electronic interface* have the meanings provided in § 435.4 of the March 23, 2012 final rule, as revised in subsequent rulemaking.

(b) The following are effective for purposes of this section as of October 1, 2013:

(1) Provisions of § 431.10(c) of this chapter, as revised in the March 23, 2012 rule and subsequent rulemaking, relating to the agency's ability to delegate authority to make eligibility determinations to the Exchange;

(2) Sections 435.916 and 435.952 of the March 23, 2012 final rule, as revised in subsequent rulemaking.

(c) *Medicaid agency responsibilities to achieve coordinated open enrollment.* For the period beginning October 1, 2013 through December 31, 2013, the agency must

(1) Accept—

(i) The single streamlined application described in § 435.907 of the March 23, 2012 final rule, as revised in subsequent rulemaking; and

(ii) Via secure electronic interface, an electronic account transferred from another insurance affordability program.

(2) With respect to eligibility based on MAGI effective January 1, 2014, comply with the terms of § 435.1200 of this part, such that—

(i) For each electronic account transferred to the agency under paragraph (c)(1)(ii) of this section, the agency either—

(A) Consistent with § 435.1200(c), accepts a determination of Medicaid eligibility based on MAGI, effective January 1, 2014, made by another insurance affordability program; or

(B) Consistent with § 435.1200(d), determines eligibility for Medicaid based on MAGI, effective January 1, 2014.

(ii) Consistent with § 435.1200(e), for each single streamlined application submitted directly to the agency under paragraph (b)(1)(i) of this section—

(A) Determine eligibility based on MAGI effective January 1, 2014; and

(B) For each individual determined not Medicaid eligible based on MAGI, determine potential eligibility for other insurance affordability programs, based on the requirements which will be effective for each program as of January 1, 2014, and transfer the individual's electronic account to such program via secure electronic interface.

(iii) Provide notice and fair hearing rights, in accordance with § 435.917 of this part, part 431 subpart E of this chapter, and § 435.1200 for those determined ineligible for Medicaid effective January 1, 2014.

(3) For each individual determined eligible based on MAGI in accordance with paragraph (c)(2) of this section—

(i) Provide notice, including the effective date of eligibility, to such individual, consistent with § 435.917 of this part, and furnish Medicaid effective January 1, 2014.

(ii) Apply the terms of § 435.916 (relating to beneficiary responsibility to inform the agency of any changes in circumstances that may affect eligibility) and § 435.952 (regarding use of information received by the agency) of the March 23, 2012 final rule, as revised in subsequent rulemaking. The first renewal under § 435.916 of this part may, at State option, be scheduled to occur anytime between 12 months from the date of application and 12 months from January 1, 2014.

(4) With respect to eligibility effective in 2013, for all applicants—

(i) Consistent with the requirements of subpart J of this part, and applying the eligibility requirements in effect under the State plan, or waiver of such plan, as of the date the individual

submits an application to any insurance affordability program—

(A) Determine the individual's eligibility based on the information provided on the application or in the electronic account; or

(B) Request additional information from the individual needed by the agency to determine eligibility based on the eligibility requirements in effect on such date, including on a basis excepted from application of MAGI-based methods, as described in § 435.603 of the March 23, 2012 final rule, as revised in subsequent rulemaking, and determine such eligibility if such information is provided; and

(C) Furnish Medicaid to individuals determined eligible pursuant to this clause or provide notice and fair hearing rights in accordance with part 431 subpart E of this part if eligibility effective in 2013 is denied; or

(ii) Notify the individual of the opportunity to submit a separate application for coverage effective in 2013 and information on how to obtain and submit such application.

PART 440—SERVICES: GENERAL PROVISIONS

■ 98. The authority citation for part 440 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

■ 99. Section 440.130 is amended by revising paragraph (c) to read as follows:

§ 440.130 Diagnostic, screening, preventive, and rehabilitative services.

* * * * *

(c) *Preventive services* means services recommended by a physician or other licensed practitioner of the healing arts acting within the scope of authorized practice under State law.

■ 100. Section 440.305 is amended by revising paragraphs (a) and (b) to reads as follows:

§ 440.305 Scope.

(a) *General.* This subpart sets out requirements for States that elect to provide medical assistance to certain Medicaid eligible individuals within one or more groups of individuals specified by the State, through enrollment of the individuals in coverage, identified as ''benchmark'' or ''benchmark-equivalent.'' Groups must be identified by characteristics of individuals rather than the amount or level of Federal matching funding.

(b) *Limitations.* A State may only apply the option in paragraph (a) of this section for an individual whose eligibility is based on an eligibility category under section 1905(a) of the Act that could have been covered under the State's plan on or before February 8, 2006, except that individuals who are eligible under 1902(a)(10)(A)(i)(VIII) must enroll in an Alternative Benefit Plan, unless meeting one of the exemptions listed in § 440.315.

* * * * *

■ 101. Section 440.315 is amended by revising the introductory text and paragraphs (f) and (h) to read as follows:

§ 440.315 Exempt individuals.

Individuals within one (or more) of the following categories are exempt from mandatory enrollment in an Alternative Benefit Plan.

* * * * *

(f) The individual is medically frail or otherwise an individual with special medical needs. For these purposes, the State's definition of individuals who are medically frail or otherwise have special medical needs must at least include those individuals described in § 438.50(d)(3) of this chapter, individuals with disabling mental disorders (including children with serious emotional disturbances and adults with serious mental illness), individuals with serious and complex medical conditions, individuals with a physical, intellectual or developmental disability that significantly impairs their ability to perform 1 or more activities of daily living, or individuals with a disability determination based on Social Security criteria or in States that apply more restrictive criteria than the Supplemental Security Income program, the State plan criteria.

* * * * *

(h) The individual is eligible and enrolled for Medicaid under § 435.145 of this title based on current eligibility for assistance under title IV–E of the Act or under § 435.150 of this title based on current status as a former foster care child.

* * * * *

■ 102. Section 440.330 is amended by revising paragraph (d) to read as follows:

§ 440.330 Benchmark health benefits coverage.

* * * * *

(d) *Secretary-approved coverage.* Any other health benefits coverage that the Secretary determines, upon application by a State, provides appropriate coverage to meet the needs of the population provided that coverage. Secretarial coverage may include benefits of the type that are available under 1 or more of the standard benchmark coverage packages defined in § 440.330(a) through (c) of this chapter, State plan benefits described in section 1905(a), 1915(i), 1915(j), 1915(k) or section 1945 of the Act, any other Medicaid State plan benefits enacted under title XIX, or benefits available under base benchmark plans described in 45 CFR 156.100.

(1) States wishing to elect Secretarial approved coverage should submit a full description of the proposed coverage (including a benefit-by-benefit comparison of the proposed plan to one or more of the three other benchmark plans specified above or to the State's standard full Medicaid coverage package), and of the population to which coverage would be offered. In addition, the State should submit any other information that would be relevant to a determination that the proposed health benefits coverage would be appropriate for the proposed population.

(2) [Reserved]

■ 103. Section 440.335 is amended by—

■ A. Adding paragraphs (b)(7)and (b)(8).

■ B. Revising paragraph (c)(1).

The revisions and additions read as follows:

§ 440.335 Benchmark-equivalent health benefits coverage.

* * * * *

(b) * * *

(7) Prescription drugs.

(8) Mental health benefits.

(c)(1) *Additional Coverage.* In addition to the types of benefits of this section, benchmark-equivalent coverage may include coverage for any additional benefits of the type which are covered in 2 or more of the standard benchmark coverage packages described in § 440.330(a through c) of this part or State plan benefits, described in section 1905(a), 1915(i), 1915(j), 1915(k) and 1945 of the Act, any other Medicaid State plan benefits enacted under title XIX, or benefits available under base benchmark plans described in § 156.100.

* * * * *

■ 104. Section 440.345 is amended by—

■ A. Revising the section heading.

■ B. Adding paragraphs (b) through (e).

The revision and additions read as follows:

§ 440.345 EPSDT and other required benefits.

* * * * *

(b) *Family planning.* Alternative Benefit Plans must include coverage for family planning services and supplies.

(c) *Mental health parity.* Alternative Benefit Plans that provide both medical and surgical benefits, and mental health or substance use disorder benefits, must comply with the Mental Health Parity and Addiction Equity Act.

(d) *Essential health benefits.* Alternative Benefit Plans must include at least the essential health benefits described in § 440.347, and include all updates or modifications made thereafter by the Secretary to the definition of essential health benefits.

(e) *Updating of benefits.* States are not required to update Alternative Benefit Plans that have been determined to include essential health benefits as of January 1, 2014, until December 31, 2015. States will adhere to future guidance for updating benefits beyond that date, as described by the Secretary.

■ 105. Section 440.347 is added to read as follows:

§ 440.347 Essential health benefits.

(a) Alternative benefit plans must contain essential health benefits coverage, including benefits in each of the following ten categories, consistent with the requirements set forth in 45 CFR Part 156:

(1) Ambulatory patient services;

(2) Emergency services;

(3) Hospitalization;

(4) Maternity and newborn care;

(5) Mental health and substance use disorders, including behavioral health treatment;

(6) Prescription drugs;

(7) Rehabilitative and habilitative services and devices;

(8) Laboratory services;

(9) Preventive and wellness services and chronic disease management; and

(10) Pediatric services, including oral and vision care.

(b) Alternative benefit plans must include at least the essential health benefits included in one of the state options for establishing essential health benefits described in 45 CFR part 156.

(c) States may select more than one option for establishing essential health benefits in keeping with the flexibility for States to implement more than one alternative benefit plan for targeted populations.

(d) [Reserved]

(e) Essential health benefits cannot be based on a benefit design or implementation of a benefit design that discriminates on the basis of an individual's age, expected length of life, or of an individual's present or predicted disability, degree of medical dependency, or quality of life or other health conditions.

■ 106. Section 440.360 is revised to read as follows:

§ 440.360 State plan requirements for providing additional services.

In addition to the requirements of § 440.345, the State may elect to provide additional coverage to individuals enrolled in alternative benefit plans, except that the coverage for individuals eligible only through section 1902(a)(10)(A)(i)(VIII) of the Act who are not exempt is limited to benchmark or benchmark equivalent coverage. The State must describe the populations covered and the payment methodology for these benefits. Additional benefits must be benefits of the type, which are covered in one or more of the standard benchmark coverage packages described in § 440.330(a) through (c) or State plan benefits including those described in sections 1905(a), 1915(i), 1915(j), 1915(k) and 1945 of the Act and any other Medicaid State plan benefits enacted under title XIX, or benefits available under base benchmark plans described in section § 156.100.

■ 107. Section 440.386 is added to read as follows:

§ 440.386 Public notice.

States submitting to a State plan amendment to establish an alternative benefit plan, or an amendment to modify an existing alternative benefit plan, must provide the public with notification of such an amendment and reasonable opportunity to comment with respect to such amendment, have included in the notice a description of the method of assuring compliance with § 440.345 of this part related to full access to EPSDT services and the method for complying with the provisions of section 5006(e) of the American Recovery and Reinvestment Act of 2009.

(a) Public notice must take place no less than 2 weeks prior to submission of any SPA that seeks to:

(1) Establish an alternative benefit plan that would provide coverage that is less than the coverage provided by the State's approved State plan or includes cost sharing of any type.

(2) Modify an approved alternative benefit plan by adding or increasing cost-sharing, or reducing benefits.

(b) Public notice must take place prior to the implementation of any SPA that seeks to:

(1) Establish an alternative benefit plan that provides the same or more benefits than currently are provided in the State's approved State plan.

(2) Modify an approved alternative benefit plan by reducing cost-sharing or adding additional benefits.

PART 447—PAYMENTS FOR SERVICES

■ 108. The authority citation for part 447 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 109. Section 447.50 is revised to read as follows:

§ 447.50 Premiums and cost sharing: Basis and purpose

Sections 1902(a)(14), 1916 and 1916A of the Act permit states to require certain beneficiaries to share in the costs of providing medical assistance through premiums and cost sharing. Sections 447.52 through 447.56 specify the standards and conditions under which states may impose such premiums and or cost sharing.

■ 110. Section 447.51 is revised to read as follows:

§ 447.51 Definitions

As used in this part—

Alternative non-emergency services provider means a Medicaid provider, such as a physician's office, health care clinic, community health center, hospital outpatient department, or similar provider that can provide clinically appropriate services in a timely manner.

Cost sharing means any copayment, coinsurance, deductible, or other similar charge.

Emergency services has the same meaning as in § 438.114 of this part.

Indian means any individual defined at 25 U.S.C. 1603 or 1679(b), or who has been determined eligible as an Indian, pursuant to § 136.12 of this part, or meets any of the following criteria:

(1) Is a member of a Federally-recognized Indian tribe;

(2) Resides in an urban center and meets one or more of the following four criteria:

(i) Is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member;

(ii) Is an Eskimo or Aleut or other Alaska Native;

(iii) Is considered by the Secretary of the Interior to be an Indian for any purpose; or

(iv) Is determined to be an Indian under regulations promulgated by the Secretary;

(3) Is considered by the Secretary of the Interior to be an Indian for any purpose; or

(4) Is considered by the Secretary of Health and Human Services to be an Indian for purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut, or other Alaska Native.

Indian health care provider means a health care program operated by the

Indian Health Service (IHS) or by an Indian Tribe, Tribal Organization, or Urban Indian Organization (otherwise known as an I/T/U) as those terms are defined in section 4 of the Indian Health Care Improvement Act (25 U.S.C. 1603).

Non-emergency services means any care or services that are not considered emergency services as defined in this section and any services furnished in a hospital emergency department that do not constitute an appropriate medical screening examination or stabilizing examination and treatment required to be provided by the hospital under section 1867 of the Act.

Preferred drugs means drugs that the state has identified on a publicly available schedule as being determined by a pharmacy and therapeutics committee for clinical efficacy as the most cost effective drugs within each therapeutically equivalent or therapeutically similar class of drugs, or all drugs if the agency does not differentiate between preferred and non-preferred drugs.

Premium means any enrollment fee, premium, or other similar charge.

■ 111. Section 447.52 is revised to read as follows:

§ 447.52 Cost sharing.

(a) Except as provided in § 447.56 of this part, the agency may impose cost sharing for any service under the state plan.

(b) *Maximum Allowable Cost Sharing.* (1) At State option, cost sharing imposed for any service (other than for drugs and emergency department services, as described in §§ 447.53 and 447.54 respectively) may be established at or below the amounts shown in the following table (except that the maximum allowable cost for individuals with family income at or below 100 percent of the FPL shall be increased each year, beginning October 1, 2015, by the percentage increase in the medical care component of the CPI–U for the period of September to September of the preceding calendar year, rounded to the next higher 5-cent increment):

	Individuals with family income ≤100% FPL	Individuals with family income 101–150% FPL	Individuals with family income >150% FPL
Outpatient Services *(physician visit, physical therapy, etc.).*	$4	10% of cost the agency pays	20% of cost the agency pays.
Inpatient Stay	50% of cost the agency pays for the first day of care.	50% of cost the agency pays for the first day of care or 10% of total cost the agency pays for the entire stay.	50% of cost the agency pays for the first day of care or 20% of total cost the agency pays for the entire stay.

(2) In states that do not have fee-for-service payment rates, any cost sharing imposed may not exceed the maximum amount established in paragraph (b)(1) of this section, for individuals with income at or below 100 percent of the applicable Federal Poverty Guidelines.

(3) In no case shall the maximum cost sharing established by the agency be equal to or exceed the amount the agency pays for the service.

(c) *Targeted cost sharing.* For individuals with family income above 100 percent of the applicable Federal Poverty Guidelines, cost sharing may be targeted to specified groups of individuals within the applicable income group.

(d) *Denial of service for nonpayment.* (1) The agency may permit a provider, including a pharmacy or hospital, to require an individual to pay cost sharing as a condition for receiving the item or service if—

(i) The individual has family income above 100 percent of the applicable Federal Poverty Guidelines,

(ii) The individual is not part of an exempted group under § 447.56(a) of this part, and

(iii) With respect to cost sharing imposed for non-emergency services furnished in an emergency department, the conditions under § 447.54(d) have been satisfied.

(2) Except as provided under paragraph (d)(1) of this section, the state plan must specify that no provider may deny services to an eligible individual on account of the individual's inability to pay the cost sharing.

(3) Nothing in this section shall be construed as prohibiting a provider from choosing to reduce or waive such cost sharing on a case-by-case basis.

(e) *Prohibition against multiple charges.* For any service, the agency may not impose more than one type of cost sharing.

(f) *State Plan Specifications.* For each cost sharing charge imposed under this section, the state plan must specify—

(1) The service for which the charge is made;

(2) The group or groups of individuals that may be subject to the charge;

(3) The amount of the charge;

(4) The process used by the state to identify which beneficiaries are subject to cost sharing and to ensure individuals exempt from cost sharing are not charged, including the process used by the state to identify for providers whether cost sharing for a specific item or service may be imposed on an individual beneficiary and whether the provider may require the beneficiary, as a condition for receiving the item or service, to pay the cost sharing charge; and

(5) If the agency imposes cost sharing under § 447.54, the process by which services are identified as non-emergent.

■ 112. Section 447.53 is revised to read as follows:

§ 447.53 Cost sharing for drugs.

(a) The agency may establish differential cost sharing for preferred and non-preferred drugs. The provisions in § 447.56(a) shall apply except as the agency exercises the option under paragraph (d) of this section. All drugs will be considered preferred drugs if so identified or if the agency does not differentiate between preferred and non-preferred drugs.

(b) At state option, cost sharing for drugs may be established at or below the amounts shown in the following table (except that the maximum allowable cost sharing shall be increased each year, beginning October 1, 2015, by the percentage increase in the medical care component of the CPI–U for the period of September to September of the preceding calendar year, rounded to the next higher 5-cent increment. Such increase shall not be applied to any cost sharing that is based on the amount the agency pays for the service):

	Individuals with family income ≤ 150% FPL	Individuals with family income >150% FPL
Preferred Drugs.	$4	$4.
Non-Preferred Drugs.	8	20% of cost the agency pays.

(c) In states that do not have fee-for-service payment rates upon which to base the payment, cost sharing may not

exceed the maximum amount established under paragraph (b) of this section for individuals with income at or below 150 percent of the FPL.

(d) For individuals otherwise exempt from cost sharing under § 447.56(a), the agency may impose cost sharing for non-preferred drugs, not to exceed the maximum amount established in paragraph (b) of this section for preferred drugs.

(e) In the case of a drug that is identified by the agency as a non-preferred drug within a therapeutically equivalent or therapeutically similar class of drugs, the agency must have a process in place so that cost sharing is limited to the amount imposed for a preferred drug if the individual's prescribing physician determines that the preferred drug for treatment of the same condition either would be less effective for the individual or would have adverse effects for the individual or both. In such cases the agency must ensure that reimbursement to the pharmacy is based on the appropriate cost sharing amount.

■ 113. Section 447.54 is revised to read as follows:

§ 447.54 Cost sharing for services furnished in a hospital emergency department.

(a) The agency may impose cost sharing for non-emergency services provided in a hospital emergency department (ED). The provisions in § 447.56(a) shall apply except as the agency exercises the option under paragraph (c) of this section.

(b) At state option, cost sharing for non-emergency services provided in an ED may be established at or below the amounts shown in the following table (except that the maximum allowable cost sharing identified for individuals with family income at or below 150 percent of the FPL shall be increased each year, beginning October 1, 2015, by the percentage increase in the medical care component of the CPI–U for the period of September to September of the preceding calendar year, rounded to the next higher 5-cent increment):

	Individuals with family income ≤150% FPL	Individuals with family income >150% FPL
Non-emergency Use of the Emergency Department.	$8	No Limit.

(c) For individuals otherwise exempt from cost sharing under § 447.56(a), the agency may impose cost sharing for non-emergency use of the ED, not to exceed the maximum amount established in paragraph (a) of this section for individuals with income at or below 150 percent of the FPL.

(d) In order for the agency to impose cost sharing under paragraph (a) or (c) of this section for non-emergency use of the ED, the hospital providing the care must—

(1) Conduct an appropriate medical screening pursuant to § 489.24 of this chapter to determine that the individual does not need emergency services.

(2) Before providing treatment and imposing cost sharing on an individual:

(i) Provide the individual with the name and location of an available and accessible alternative non-emergency services provider;

(ii) Ensure that the alternative provider can provide services to the individual in a timely manner with the imposition of a lesser cost sharing amount or no cost sharing if the individual is otherwise exempt from cost sharing; and

(iii) Coordinate scheduling and provide a referral for treatment by this provider.

(e) Nothing in this section shall be construed to:

(1) Limit a hospital's obligations with respect to screening and stabilizing treatment of an emergency medical condition under section 1867 of the Act; or

(2) Modify any obligations under either state or federal standards relating to the application of a prudent-layperson standard with respect to payment or coverage of emergency medical services by any managed care organization.

■ 114. Section 447.55 is revised to read as follows:

§ 447.55 Premiums.

(a) The agency may impose premiums upon individuals whose income exceeds 150 percent of the FPL, subject to the exemptions set forth in § 447.56(a) and the aggregate limitations set forth in § 447.56(f), except that:

(1) Pregnant women described in subparagraph (A) of section 1902(l)(1) of the Act who are receiving medical assistance on the basis of section 1902(a)(10)(A)(ii)(IX) of the Act, whose income exceeds 150 percent of the FPL, may be charged premiums that do not exceed 10 percent of the amount by which their family income exceeds 150 percent of the FPL after deducting expenses for care of a dependent child.

(2) Individuals provided medical assistance only under section 1902(a)(10)(A)(ii)(XV) or section 1902(a)(10)(A)(ii)(XVI) of the Act and the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA), may be charged premiums on a sliding scale based on income.

(3) Disabled children provided medical assistance under section 1902(a)(10)(A)(ii)(XIX) of the Act in accordance with the Family Opportunity Act, may be charged premiums on a sliding scale based on income. The aggregate amount of the child's premium imposed under this paragraph and any premium that the parent is required to pay for family coverage under section 1902(cc)(2)(A)(i) of the Act, and other cost sharing charges may not exceed:

(i) 5 percent of the family's income if the family's income is no more than 200 percent of the FPL.

(ii) 7.5 percent of the family's income if the family's income exceeds 200 percent of the FPL but does not exceed 300 percent of the FPL.

(4) Qualified disabled and working individuals described in section 1905(s) of the Act, may be charged premiums on a sliding scale based on income, expressed as a percentage of Medicare cost sharing described at section 1905(p)(3)(A)(i) of the Act.

(5) Medically needy individuals, as defined in §§ 435.4 and 436.3 of this subchapter, may be charged on a sliding scale not to exceed $20 per month.

(b) *State plan specifications.* For each premium, enrollment fee, or similar charge imposed under paragraph (a) or (b) of this section, the plan must specify—

(1) The group or groups of individuals that may be subject to the charge;

(2) The amount and frequency of the charge;

(3) The process used by the state to identify which beneficiaries are subject to premiums and to ensure individuals exempt from premiums are not charged; and

(4) The consequences for an individual or family who does not pay.

(c) *Consequences for non-payment.* (1) With respect to premiums imposed under paragraph (a) (1) of this section, the agency may—

(i) Require a group or groups of individuals to prepay; and

(ii) Terminate an individual from medical assistance on the basis of failure to pay for 60 days or more.

(2) With respect to premiums imposed under paragraphs (a)(2) and (4), the agency—

(i) May not require prepayment;

(ii) May terminate an individual from medical assistance on the basis of failure to pay the premium for 60 days or more; and

(iii) Specific to premiums imposed under paragraph (a)(2) of this section,

permit state or local funds available under other programs to be used for payment of a premium. Such funds shall not be counted as income to the individual with respect to whom such payment is made.

(3) With respect to premiums imposed under paragraph (a)(3) of this section—

(i) For individuals with annual income exceeding 250 percent of the FPL, the agency may require payment of 100 percent of the premiums imposed under this paragraph for a year, such that payment is only required up to 7.5 percent of annual income for individuals whose annual income does not exceed 450 percent of the FPL.

(ii) For individuals whose annual adjusted gross income (as defined in section 62 of the Internal Revenue Code of 1986) exceeds $75,000, increased by inflation each calendar year after 2000, the agency must require payment of 100 percent of the premiums for a year, except that the agency may choose to subsidize the premiums using state funds which may not be federally matched by Medicaid.

(4) With respect to any premiums imposed under this section, the agency may waive payment of a premium in any case where the agency determines that requiring the payment would create an undue hardship for the individual or family.

■ 115. Section 447.56 is revised to read as follows:

§ 447.56 Limitations on premiums and cost sharing.

(a) *Exemptions.* (1) The agency may not impose premiums or cost sharing upon the following groups of individuals:

(i) Children under 18 years of age (and, at the option of the State, individuals under 21, 20, or 19 years of age, or any reasonable category of individuals 18 years of age or over but under 21) who either have family income at or below 100 percent of the FPL or are described in section 1902(a)(10)(A)(i) of the Act.

(ii) Children for whom child welfare services are made available under Part B of title IV of the Act on the basis of being a child in foster care and individuals with respect to whom adoption or foster care assistance is made available under Part E of that title, without regard to age.

(iii) Disabled children, except as provided at § 447.55(a)(4)(premiums), who are receiving medical assistance by virtue of the application of the Family Opportunity Act in accordance with sections 1902(a)(10)(A)(ii)(XIX) and 1902(cc) of the Act.

(iv) Pregnant women, except as provided in paragraph (2)(cost sharing) and § 447.55(a)(2)(premiums), during the pregnancy and through the postpartum period which begins on the last day of pregnancy and extends through the end of the month in which the 60-day period following termination of pregnancy ends.

(v) Any individual who, as a condition of receiving services in an institution is required to spend all but a minimal amount of the individual's income required for personal needs. At state option, this exemption may be applied to individuals receiving services in a home and community-based setting if they are required to contribute to the cost of their care.

(vi) An individual receiving hospice care, as defined in section 1905(o) of the Act.

(vii) An Indian who is eligible to receive or has received an item or service furnished by an Indian health care provider or through referral under contract health services is exempt from premiums. Indians who are currently receiving or have ever received an item or service furnished by an Indian health care provider or through referral under contract health services are exempt from all cost sharing.

(viii) Individuals who are receiving Medicaid because of the state's election to extend coverage as authorized by § 435.213 (Breast and Cervical Cancer).

(2) The agency may not impose cost sharing for the following services:

(i) Emergency services as defined at section 1932(b)(2) of the Act and § 438.114(a);

(ii) Family planning services and supplies described in section 1905(a)(4)(C) of the Act, including contraceptives and pharmaceuticals for which the State claims or could claim Federal match at the enhanced rate under section 1903(a)(5) of the Act for family planning services and supplies;

(iii) Preventive services, at a minimum the services specified at § 457.520, provided to children under 18 years of age regardless of family income, which reflect the well-baby and well child care and immunizations in the Bright Futures guidelines issued by the American Academy of Pediatrics; and

(iv) Pregnancy-related services, including those defined at §§ 440.210(a)(2) and 440.250(p), and counseling and drugs for cessation of tobacco use All services provided to pregnant women will be considered as pregnancy-related, except those services specifically identified in the state plan as not being related to the pregnancy.

(b) *Applicability.* Except as permitted under § 447.52(c) (targeted cost sharing), the agency may not exempt additional individuals from cost sharing obligations that apply generally to the population at issue.

(c) *Payments to providers.* (1) Except as provided under paragraphs (c)(2) and (c)(3) of this section, the agency must reduce the payment it makes to a provider by the amount of a beneficiary's cost sharing obligation, regardless of whether the provider has collected the payment or waived the cost sharing.

(2) For items and services provided to Indians who are exempt from cost sharing under paragraph (a)(1)(vii) of this section, the agency may not reduce the payment it makes to a provider, including an Indian health care provider, by the amount of cost sharing that would otherwise be due from the Indian.

(3) For those providers that the agency reimburses under Medicare reasonable cost reimbursement principles, in accordance with subpart B of this part, an agency may increase its payment to offset uncollected deductible, coinsurance, copayment, or similar charges that are bad debts of providers.

(d) *Payments to managed care organizations.* If the agency contracts with a managed care organization, the agency must calculate its payments to the organization to include cost sharing established under the state plan, for beneficiaries not exempt from cost sharing under paragraph (a) of this section, regardless of whether the organization imposes the cost sharing on its recipient members or the cost sharing is collected.

(e) *Payments to states.* No FFP in the state's expenditures for services is available for—

(1) Any premiums or cost sharing amounts that recipients should have paid under §§ 447.52 through 447.55 (except for amounts that the agency pays as bad debts of providers under paragraph (a)(3) of this section; and

(2) Any amounts paid by the agency on behalf of ineligible individuals, whether or not the individual had paid any required premium, except for amounts for premium assistance to obtain coverage for eligible individuals through family coverage that may include ineligible individuals when authorized in the approved state plan.

(f) *Aggregate limits.* (1) Subject to paragraph (f)(2) of this section, any Medicaid premiums and cost sharing incurred by all individuals in the Medicaid household may not exceed an aggregate limit of 5 percent of the family's income applied on either a

quarterly or monthly basis, as specified by the agency.

(2) The aggregate limit in paragraph (f)(1) of this section shall apply when premiums and cost sharing are imposed on any of the following individuals:

(i) Individuals who are subject to targeted cost sharing under § 447.52(c);

(ii) Individuals who are subject to enforceable cost sharing under § 447.52(d);

(iii) Individuals who are subject to premiums under § 447.55(a)(1); and

(iv) Individuals exempt from premiums and cost sharing under paragraph (a) of this section who are subject to cost sharing for non-preferred drugs under § 447.53 or non-emergency services furnished in an emergency department under § 447.54.

(3) If the state adopts premiums or cost sharing rules that could place beneficiaries at risk of reaching the aggregate family limit, the state plan must indicate a process to track each family's incurred premiums and cost sharing through an automated mechanism that does not rely solely on beneficiary documentation.

(4) The agency must notify beneficiaries and providers when a beneficiary has incurred out-of-pocket expenses up to the aggregate family limit and individual family members are no longer subject to cost sharing for the remainder of the family's current monthly or quarterly cap period.

(5) The agency must have a process in place for beneficiaries to request a reassessment of their family aggregate limit if they have a change in circumstances or if they are being terminated for failure to pay a premium.

(6) Nothing in this paragraph shall preclude the agency from establishing additional aggregate limits, including but not limited to a monthly limit on cost sharing charges for a particular service.

■ 116. Section 447.57 is revised to read as follows:

§ 447.57 Beneficiary and public notice requirements.

(a) The agency must make available a public schedule describing current premiums and cost sharing requirements containing the following information:

(1) The group or groups of individuals who are subject to premiums and/or cost sharing and the current amounts;

(2) Mechanisms for making payments for required premiums and cost sharing charges;

(3) The consequences for an applicant or recipient who does not pay a premium or cost sharing charge;

(4) A list of hospitals charging cost sharing for non-emergency use of the emergency department; and

(5) A list of preferred drugs or a mechanism to access such a list, including the agency Web site.

(b) The agency must make the public schedule available to the following in a manner that ensures that affected applicants, beneficiaries, and providers are likely to have access to the notice:

(1) Beneficiaries, at the time of their enrollment and reenrollment after a redetermination of eligibility, and when premiums, cost sharing charges, or aggregate limits are revised, notice to beneficiaries must be in accordance with § 435.905(b);

(2) Applicants, at the time of application;

(3) All participating providers; and

(4) The general public.

(c) Prior to submitting to the Centers for Medicare & Medicaid Services for approval a state plan amendment (SPA) to establish or substantially modify existing premiums or cost sharing, or change the consequences for non-payment, the agency must provide the public with advance notice of the SPA, specifying the amount of premiums or cost sharing and who is subject to the charges. The agency must provide a reasonable opportunity to comment on such SPAs. The agency must submit documentation with the SPA to demonstrate that these requirements were met.

§ 447.58 [Removed and Reserved]

■ 117. Section 447.58 is removed and reserved.

§ 447.59 [Removed and Reserved]

■ 118. Section 447.59 is removed and reserved.

§ 447.60 [Removed and Reserved]

■ 119. Section 447.60 is removed and reserved.

§ 447.62 [Removed and Reserved]

■ 120. Section 447.62 is removed and reserved.

§ 447.64 [Removed and Reserved]

■ 121. Section 447.64 is removed and reserved.

PART 457—ALLOTMENTS AND GRANTS TO STATES

■ 122. The authority citation for part 457 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 123. Section 457.10 is amended by—

■ A. Revising the definition of ''electronic account.''

■ B. Adding the definitions of ''Combined eligibility notice,'' ''Coordinated content,'' ''Exchange appeals entity,'' and ''Premium Lock Out'' in alphabetical order.

The additions and revisions read as follows:

§ 457.10 Definitions and use of terms.

* * * * *

Combined eligibility notice means an eligibility notice that informs an individual, or multiple family members of a household when feasible, of eligibility for each of the insurance affordability programs and enrollment in a qualified health plan through the Exchange, for which a determination or denial was made. A combined eligibility notice shall be issued by the last agency to make a determination of eligibility, regardless of which entity received the application. A combined notice must meet the requirements of § 457.340(e) of this part and contain the content described in § 457.340(e)(1) of this part, except that information described in § 457.340(e)(1)(i)(C) must be included in a combined notice issued by another insurance affordability program only if known to that program.

Coordinated content means information included in an eligibility notice regarding the transfer of the individual's or households' electronic account to another insurance affordability program for a determination of eligibility.

* * * * *

Electronic account means an electronic file that includes all information collected and generated by the State regarding each individual's CHIP eligibility and enrollment, including all documentation required under § 457.380 of this part and including any information collected or generated as part of a review conducted in accordance with subpart K of this part.

* * * * *

Exchange appeals entity has the meaning given to the term ''appeals entity,'' as defined in 45 CFR 155.500.

* * * * *

Premium Lock-Out is defined as a State-specified period of time not to exceed 90 days that a CHIP eligible child who has an unpaid premium or enrollment fee (as applicable) will not be permitted to reenroll for coverage in CHIP. Premium lock-out periods are not applicable to children who have paid outstanding premiums or enrollment fees.

* * * * *

■ 124. Section 457.50 is revised to read as follows:

§ 457.50 State plan.

The State plan is a comprehensive Statement, submitted using an automated process by the State to CMS.

(a) States with approved paper State plans shall submit conversion plans to comply with the required automated format, with full compliance not later than 1 year following the availability of the automated template.

(b) Thereafter, approved paper State plans or plan amendments shall be valid only temporarily to the extent specifically authorized and incorporated by reference under the approved automated State plan.

■ 125. Section 457.60 is amended by revising the introductory text to read as follows:

§ 457.60 Amendments.

A State may seek to amend its approved State plan in whole or in part at any time through the automated submission of an amendment to CMS.

* * * * *

■ 126. Section 457.110 is amended by revising paragraph (a) to read as follows:

§ 457.110 Enrollment assistance and information requirements.

(a) *Information disclosure.* The State must make accurate, easily understood, information available to families of potential applicants, applicants and enrollees, and provide assistance to these families in making informed decisions about their health plans, professionals, and facilities. This information shall be provided in plain language and is accessible to individuals with disabilities and persons who are limited English proficient, consistent with § 435.905(b) of this part.

(1) The State may provide notices to applicants and beneficiaries in electronic format, provided that the State establish safeguards in accordance with § 435.918 of this chapter.

(2) [Reserved]

* * * * *

■ 127. Section § 457.310 is amended by revising paragraph (b)(2)(i) to read as follows:

§ 457.310 Targeted low-income child.

* * * * *

(b) * * *

(2) * * *

(i) Found eligible or potentially eligible for Medicaid under policies of the State plan (determined through either the Medicaid application process or the screening process described at § 457.350 of this part), except for eligibility under § 435.214 of this chapter (related to coverage for family planning services).

* * * * *

■ 128. Section 457.320 is amended by—

■ A. Republishing paragraph (b) introductory text.

■ B. Revising paragraph (b)(6).

■ C. Redesignating paragraphs (c), (d), and (e) as paragraphs (d), (e), and (f), respectively.

■ D. Adding paragraph (c).

■ E. Revising newly redesignated paragraph (d).

The addition and revisions read as follows:

§ 457.320 Other eligibility standards.

* * * * *

(b) *Prohibited eligibility standards.* In establishing eligibility standards and methodologies, a State may not—

* * * * *

(6) Exclude individuals based on citizenship or nationality, to the extent that the children are U.S. citizens or U.S. nationals, or qualified non-citizens as defined in § 435.4 of this chapter, (except to the extent that 8 U.S.C. sections 1611, 1613, and 1641 precludes them from receiving Federal means-tested public benefits), as verified in accordance with § 457.380 of this part.

* * * * *

(c) *Option to Cover Non-citizen Children and/or Pregnant Women.* The State may cover non-citizen children or pregnant women who are lawfully present in the United States, as defined in § 435.4 of this chapter, but whose CHIP eligibility would otherwise be prohibited under § 457.320(b)(6) of this part, and otherwise meet the eligibility requirements for the CHIP program under this part or section 2112 of the Act, provided that the State has elected to provide Medicaid to the same population.

(d) *Citizenship and immigration status.* All individuals, themselves or an adult member of the individual's family or household, an authorized representative, or if the individual is a minor or incapacitated, someone acting responsibly for the individual, provided that such individual attests to having reasonable basis to make a declaration of such status, seeking coverage under a separate child health plan, must declare to be a citizen or national of the United States or a non-citizen in a satisfactory immigration status.

* * * * *

■ 129. Section 457.340 is amended by revising paragraphs (a) and (e) to read as follows:

§ 457.340 Application for and enrollment in CHIP.

(a) Application and renewal assistance, availability of program information, and Internet Web site. The terms of § 435.905, § 435.906, § 435.907(h), § 435.908, 435.909, and § 435.1200(f) of this chapter apply equally to the State in administering a separate CHIP.

* * * * *

(e) *Notice of eligibility determinations.* The State must provide each applicant or enrollee with timely and adequate written notice of any decision affecting their eligibility, including denial or termination, or suspension of eligibility, consistent with § 457.315, 457.348, and 457.350 of this part. The notice must be written in plain language; and accessible to persons who are limited English proficient and individuals with disabilities, consistent with § 435.905(b) of this chapter and § 457.110 of this part.

(1) *Content of eligibility notice.*

(i) *Notice of approved eligibility.* Any notice of an approval of CHIP eligibility must include, but is not limited to the following information—

(A) The basis and effective date of eligibility;

(B) The circumstances under which the individual must report, and procedures for reporting, any changes that may affect the individual's eligibility;

(C) Information on benefits and services and if applicable, information relating to any premiums, enrollment fees, and cost sharing required, and information on the enrollee's right and responsibilities, including the opportunity for review of matters described in § 457.1130 of this part.

(ii) *Notice of adverse action including denial, termination or suspension of eligibility.* Any notice of denial, termination, or suspension of CHIP eligibility must contain——

(A) The basis supporting the action and the effective date,

(B) Information on the individual's right to a review process, in accordance with § 457.1180 of this part;

(iii) In the case of a suspension or termination of eligibility, the State must provide sufficient notice to enable the child's parent or other caretaker to take any appropriate actions that may be required to allow coverage to continue without interruption.

* * * * *

■ 130. Section 457.342 is added to read as follows:

§ 457.342 Continuous eligibility for children.

(a) A State may provide continuous eligibility for children under CHIP consistent with § 435.926.

(b) Besides as provided in § 435.926(d) of this chapter, continuous eligibility may also be terminated for failure to pay required premiums or enrollment fees as provided for in the CHIP State plan.

■ 131. Section 457.348 is amended by—

A. Redesignating paragraphs (a) through (d) as paragraphs (b) through (e), respectively.

B. Adding new paragraph (a).

C. Revising newly redesignated paragraphs (b), (c) and (d).

The revisions and additions read as follows:

§ 457.348 Determinations of Children's Health Insurance Program eligibility by other insurance affordability programs.

(a) *Definitions.*

Combined eligibility notice has the meaning as provided in § 457.10 of this part.

Coordinated content has the meaning as provided in § 457.10 of this part.

(b) *Agreements with other insurance affordability programs.* The State must enter into and, upon request, provide to the Secretary one or more agreements with the Exchange and the agencies administering other insurance affordability programs as are necessary to fulfill the requirements of this section, including a clear delineation of the responsibilities of each program to—

(1) Minimize burden on individuals seeking to obtain or renew eligibility or to appeal a determination of eligibility with respect to one or more insurance affordability program;

(2) Ensure compliance with paragraph (c) of this section, § 457.350 of this part, and if applicable, paragraph (d) of this section;

(3) Ensure prompt determination of eligibility and enrollment in the appropriate program without undue delay, consistent with the timeliness standards established under § 457.340(d) of this part, based on the date the application is submitted to any insurance affordability program, and

(i) Provide for a combined notice to individuals, as well as multiple members of the same households applying on the same application to the maximum extent feasible and as expressly required in this section, for all insurance affordability programs.

(ii) To the extent to which a combined eligibility notice is not feasible for all members of the same household, applying on the same application, coordinated content must be provided for those household members whose eligibility status is not yet determined.

(c) *Provision of CHIP for individuals found eligible for CHIP by another insurance affordability program.* If a State accepts final determinations of CHIP eligibility made by another insurance affordability program, for each individual determined so eligible by the other insurance affordability program (including as a result of a decision made by the Exchange appeals entity authorized by the State to adjudicate reviews of CHIP eligibility determinations), the State must—

(1) Establish procedures to receive, via secure electronic interface, the electronic account containing the determination of CHIP eligibility;

(2) Comply with the provisions of § 457.340 of this part to the same extent as if the application had been submitted to the State.

(3) Include in the agreement into which the State has entered under paragraph (b) of this section that the Exchange or other insurance affordability program will provide combined eligibility notice of final eligibility determinations made by it; and

(4) Maintain proper oversight of the eligibility determinations made by the other program.

(d) *Transfer from other insurance affordability programs to CHIP.* For individuals for whom another insurance affordability program has not made a determination of CHIP eligibility, but who have been screened as potentially CHIP eligible by such program (including as a result of a decision made by the Exchange appeals entity), the State must—

(1) Accept, via secure electronic interface, the electronic account for the individual and notify such program of the receipt of the electronic account.

(2) Not request information or documentation from the individual already provided to the other insurance affordability program and included in the individual's electronic account or other transmission from the other program or appeals entity;

(3) Promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d) of this part, determine the CHIP eligibility of the individual, in accordance with § 457.340 of this part, without requiring submission of another application;

(i) Effective January 1, 2015, for individuals determined eligible for CHIP, provide combined eligibility notice, including of a denial or termination of eligibility for other insurance affordability programs, as applicable.

(ii) For individuals determined not eligible for CHIP, comply with § 457.350(i) of this section.

(4) Accept any finding relating to a criterion of eligibility made by such program or appeals entity, without further verification, if such finding was made in accordance with policies and procedures which are the same as those applied by the State in accordance with § 457.380 of this part or approved by it in the agreement described in paragraph (a) of this section;

(5) Notify such program of the final determination of the individual's eligibility or ineligibility for CHIP.

* * * * *

132. Section 457.350 is amended by revising paragraph (b) introductory text and paragraphs (f), (g), (h), (i), and (j) to read as follows:

§ 457.350 Eligibility screening and enrollment in other insurance affordability programs.

* * * * *

(b) A State must, promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d) of this subpart, identify potential eligibility for other insurance affordability programs of any applicant, enrollee, or other individual who submits an application or renewal form to the State which includes sufficient information to determine CHIP eligibility, or whose eligibility is being renewed under a change in circumstance in accordance with § 457.343 of this subpart or who is determined not eligible for CHIP pursuant to a review conducted in accordance with subpart K of this part, as follows:

* * * * *

(f) *Applicants found potentially eligible for Medicaid based on modified adjusted gross income.* For individuals identified in paragraph (b)(1), the State must—

(1) Promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d) of this part, transfer the individual's electronic account to the Medicaid agency via a secure electronic interface;

(2) Include in any agreement into which the agency enters in accordance with paragraph § 457.348(a) of this section, that, effective January 1, 2015, such other program will issue a combined eligibility notice, including the State's denial of CHIP eligibility;

(3) Except as provided in § 457.355 of this subpart, find the individual at application ineligible, provisionally

ineligible, or suspend the individual's application for CHIP unless and until the Medicaid application for the individual is denied; and

(4) Determine or redetermine eligibility for CHIP, consistent with the timeliness standards established under § 457.340(d) of this part, if—

(i) The State is notified, in accordance with § 435.1200(d)(5) of this chapter that the applicant has been found ineligible for Medicaid; or

(ii) The State is notified prior to the final Medicaid eligibility determination that the applicant's circumstances have changed and another screening shows that the applicant is no longer potentially eligible for Medicaid.

(g) *Informed application decisions.* To enable a family to make an informed decision about applying or completing the application process for Medicaid, or other insurance affordability programs, a State must provide the child's family with information, in writing, about—

(1) The State's Medicaid program and other insurance affordability programs, including the benefits covered, and restrictions on cost sharing; and

(2) Eligibility rules that prohibit children who have been screened eligible for Medicaid from being enrolled in a separate child health program, other than provisional temporary enrollment while a final Medicaid eligibility determination is being made.

(3) The State will determine the written format and timing of the information regarding Medicaid, or other insurance affordability program, eligibility, benefits, and the application processes required under this paragraph (g) of this section.

(h) *Waiting lists, enrollment caps and closed enrollment.* The State must establish procedures to ensure that—

(1) The procedures developed in accordance with this section have been followed for each child applying for a separate child health program before placing the child on a waiting list or otherwise deferring action on the child's application for the separate child health program; and

(2) Families are informed that a child may be eligible for Medicaid, or other insurance affordability programs, if circumstances change while the child is on a waiting list for separate child health program.

(i) *Applicants found potentially eligible for other insurance affordability programs.* For individuals identified in paragraph (b)(3) of this section, including during a period of uninsurance imposed by the State under § 457.805 of this part, the State must—

(1) Promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d) of this part, transfer the electronic account to the applicable program via a secure electronic interfaces.

(2) Include in any agreement into which the agency enters in accordance with paragraph § 457.348(a) of this section, that, effective January 1, 2015, such other program will issue a combined eligibility notice, including the State's denial of CHIP eligibility.

(3) In the case of individuals subject to a period of uninsurance under this part, the State must notify such program of the date on which such period ends and the individual is eligible to enroll in CHIP.

(i) Prior to January 1, 2015—

(A) Include coordinated content, as defined in § 457.104 of the part, in the notice of CHIP denial or termination, provided to the individual in accordance with § 457.340 of this part, relating to the transfer of the individual's account; or

(B) Include in the agreement into which the agency enters in accordance with 457.348(a) of this section, that such other program will issue a combined eligibility notice, including the State's denial of CHIP eligibility.

(ii) [Reserved]

(j) *Applicants potentially eligible for Medicaid on a basis other than modified adjusted gross income.* For individuals identified in paragraph (b)(2) of this section, the State must—

(1) Promptly and without undue delay, consistent with the timeliness standards established under § 457.340(d) of this section, transfer the electronic account to the Medicaid agency via a secure electronic interface;

(2) Complete the determination of eligibility for CHIP in accordance with § 457.340 of this part;

(3) Include in any agreement into which the agency enters in accordance with paragraph § 457.348(a) of this section, that, effective January 1, 2015, such other program will issue a combined eligibility notice, including the State's denial of CHIP eligibility.

(i) Prior to January 1, 2015—

(A) Include coordinated content, as defined in § 457.104 of the part, in the notice of CHIP denial or termination, provided to the individual in accordance with § 457.340 of this part, relating to the transfer of the individual's account; or

(B) Include in the agreement into which the agency enters in accordance with 457.348(a) of this section, that such other program will issue a combined eligibility notice, including the State's denial of CHIP eligibility.

(ii) [Reserved]

(4) Dis-enroll the enrollee from CHIP if the State is notified in accordance with § 435.1200(d)(5) of this chapter that the applicant has been determined eligible for Medicaid.

* * * * *

■ 133. Section 457.351 is added to read as follows:

§ 457.351 Coordination involving appeals entities for different insurance affordability programs.

The State must—

(a) Establish a secure electronic interface the through which—

(1) The Exchange can notify the State that an appeal of eligibility for enrollment in a QHP through the Exchange, advance payments of the premium tax credit, or cost-sharing reductions, has been filed; and

(2) An individual's electronic account, including any information provided by the individual as part of review under subpart K of this part or an appeal to the Exchange appeals entity, can be transferred from one program or appeals entity or review body to the other.

(b) In conducting review in accordance with subpart K of this part, not request information or documentation from the individual included in the individual's electronic account or provided to the Exchange or Exchange appeals entity.

(c)(1) In the case of individuals described in paragraph (c)(2) of this section, transmit to the Exchange, through the electronic interface established under paragraph (a) of this section, a review decision issued per subpart K of this part;

(2) Individuals described in this paragraph include individuals determined ineligible for CHIP.

(i) By the Exchange or

(ii) By the State and transferred to the Exchange in accordance with § 457.350(i) of this part.

■ 134. Section 457.355 is revised to read as follows:

§ 457.355 Presumptive eligibility for children.

The State may pay costs of coverage under a separate child health program during a presumptive eligibility period, determined in the same manner as Medicaid presumptive eligibility at § 435.1102 of this chapter, for children applying for coverage under the separate child health program.

■ 135. Section 457.360 is added to read as follows:

§ 457.360 Deemed newborn children.

(a) *Basis.* This section implements section 2112(e) of the Act.

(b) *Eligibility.* (1) The agency must provide CHIP to children from birth until the child's first birthday without application if—

(i) The child's mother was eligible for and received covered services for the date of the child's birth under the State's separate CHIP State plan as a targeted low-income pregnant woman in accordance with section 2112 of the Act, or at State option as a targeted low-income child; and

(ii) The child is not eligible for Medicaid under § 435.117 of this chapter.

(2) The child is deemed to have applied and been determined eligible under the State's separate CHIP State plan effective as of the date of birth, and remains eligible regardless of changes in circumstances (except if the child dies or ceases to be a resident of the State or the child's representative requests a voluntary termination of the child's eligibility) until the child's first birthday.

(c) At State option, the agency may provide deemed newborn eligibility under CHIP to a child whose mother for the date of the child's birth was eligible for and receiving:

(1) CHIP coverage in another State; or

(2) Coverage under the State's demonstration under section 1115 of the Act as a Medicaid or CHIP population.

(d) *CHIP identification number.* (1) The CHIP identification number of the mother serves as the child's identification number, and all claims for covered services provided to the child may be submitted and paid under such number, unless and until the State issues a separate identification number for the child in accordance with paragraph (d)(2) of this section.

(2) The State must issue a separate CHIP identification number for the child prior to the effective date of any termination of the mother's CHIP eligibility or prior to the date of the child's first birthday, whichever is sooner, unless the child is determined to be ineligible, except that the State must issue a separate CHIP identification number for the child if the mother was covered in another State at the time of birth.

■ 136. Section 457.370 is added to read as follows:

§ 457.370 Alignment with Exchange initial open enrollment period.

The terms of § 435.1205 apply equally to the State in administering a separate CHIP, except that the State shall make available and accept the application described in § 457.330 of this part, shall accept electronic accounts as described in § 457.348 of this part, and furnish coverage in accordance with § 457.340 of this part.

■ 137. Section 457.380 is amended by revising paragraph (b) to read as follows:

§ 457.380 Eligibility verification.

* * * * *

(b) *Status as a citizen or a non-citizen.* (1) Except with respect to newborns identified in § 435.406(a)(1)(iv) of this chapter who are exempt from any requirement to verify citizenship, States must verify citizenship or immigration status in accordance with § 435.956(a) and provide a reasonable opportunity to verify such status in accordance § 435.956(g) of this chapter.

(2) [Reserved]

■ 138. Section § 457.570 is revised as follows:

§ 457.570 Disenrollment protections.

(a) The State must give enrollees reasonable notice of and an opportunity to pay past due premiums, copayments, coinsurance, deductibles, or similar fees prior to disenrollment.

(b) The disenrollment process must afford the enrollee an opportunity to show that the enrollee's family income has declined prior to disenrollment for non-payment of cost-sharing charges, and in the event that such a showing indicates that the enrollee may have become eligible for Medicaid or for a lower level of cost sharing, the State must facilitate enrolling the child in Medicaid or adjust the child's cost-sharing category as appropriate.

(c) The State must ensure that disenrollment policies, such as policies related to non-payment of premiums, do not present barriers to the timely determination of eligibility and enrollment in coverage of an eligible child in the appropriate insurance affordability program. A State may not—

(1) Establish a premium lock-out period that exceeds 90-days in accordance with § 457.10 of this part.

(2) Require the collection of past due premiums or enrollment fees as a condition of eligibility for reenrollment once the State-defined lock out period has expired, regardless of the length of the lock out period.

(d) The State must provide the enrollee with an opportunity for an impartial review to address disenrollment from the program in accordance with § 457.1130(a)(3) of this part.

§ 457.616 [Amended]

■ 139. Section 457.616 is amended by removing and reserving paragraph (a)(3).

■ 140. Section 457.805 is revised to read as follows:

§ 457.805 State plan requirement: Procedures to address substitution under group health plans.

(a) *State plan requirements.* The State plan must include a description of reasonable procedures to ensure that health benefits coverage provided under the State plan does not substitute for coverage provided under group health plans as defined at § 457.10 of this part.

(b) *Limitations.* (1) A state may not, under this section, impose a period of uninsurance which exceeds 90 days from date a child otherwise eligible for CHIP is disenrolled from coverage under a group health plan.

(2) A waiting period may not be applied to a child following the loss of eligibility for and enrollment in Medicaid or another insurance affordability program.

(3) If a state elects to impose a period of uninsurance following the loss of coverage under a group health plan under this section, such period may not be imposed in the case of any child if:

(i) The premium paid by the family for coverage of the child under the group health plan exceeded 5 percent of household income;

(ii) The cost of family coverage that includes the child exceeds 9.5 percent of the household income.

(iii) The employer stopped offering coverage of dependents (or any coverage) under an employer-sponsored health insurance plan;

(iv) A change in employment, including involuntary separation, resulted in the child's loss of employer-sponsored insurance (other than through full payment of the premium by the parent under COBRA);

(v) The child has special health care needs; and

(vi) The child lost coverage due to the death or divorce of a parent.

■ 141. Section 457.810 is amended by revising paragraph (a) to read as follows:

§ 457.810 Premium assistance programs: Required protections against substitution.

* * * * *

(a) *Minimum period without coverage under a group health plan.* For health benefits coverage provided through premium assistance for group health plans, the following rules apply:

(1) Any waiting period imposed under the state child health plan prior to the provision of child health assistance to a targeted low-income child under the state plan shall apply to the same extent to the provision of a premium assistance subsidy for the child.

(2) States must permit the same exemptions to the required waiting

period for premium assistance as are permitted under the state plan for the provision of child health assistance to a targeted low-income child.

* * * * *

■ 142. Section 457.1180 is revised to read as follows:

§ 457.1180 Program specific review process: Notice.

(a) A State must provide enrollees and applicants timely written notice of any determinations required to be subject to review under § 457.1130 that includes the reasons for the determination, an explanation of the applicable rights to review of that determination, the standard and expedited time frames for review, the manner in which a review can be requested, and the circumstances under which enrollment may continue pending review. If an individual has been denied eligibility for CHIP by the State or other entity authorized to make such determination, the State must treat an appeal to the Exchange appeals entity of a determination of eligibility for advanced payments of the premium tax credit or cost-sharing reductions, as a request for a review of a denial of CHIP eligibility under this subpart.

(b) [Reserved]

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter B, as set forth below:

PART 155 —EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

■ 143. The authority citation for part 155 is revised to read as follows:

Authority: Sections 1301, 1302, 1303, 1304, 1311, 1312, 1313, 1321, 1322, 1331, 1332, 1334, 1402, 1413, 1321, 1322, 1331, 1332, 1334, 1402, 1411, 1412, 1413 of the Affordable Care Act, Pub. L. 111–148, 124 Stat 199.

■ 144. Section 155.20 is amended by:

■ A. Revising the definitions of ''Advance payments of the premium tax credit,'' ''Application filer,'' and ''Lawfully present''

■ B. Adding a new definition of ''Catastrophic plan,''

The revisions and addition read as follows:

§ 155.20 Definitions.

* * * * *

Advance payments of the premium tax credit means payment of the tax credits authorized by 26 U.S.C. 36B and its implementing regulations, which are provided on an advance basis to an eligible individual enrolled in a QHP through an Exchange in accordance with section 1412 of the Affordable Care Act.

* * * * *

Application filer means an applicant, an adult who is in the applicant's household, as defined in 42 CFR 435.603(f), or family, as defined in 26 CFR 1.36B–1(d); an authorized representative of an applicant; or if the applicant is a minor or incapacitated, someone acting responsibly for an applicant.

* * * * *

Catastrophic plan means a health plan described in section 1302(e) of the Affordable Care Act.

* * * * *

Lawfully present has the meaning given the term in 42 CFR 435.4.

* * * * *

■ 145. Section 155.105 is amended by revising paragraph (b)(2) to read as follows:

§ 155.105 Approval of a State Exchange.

* * * * *

(b) * * *

(2) The Exchange is capable of carrying out the information reporting requirements of 26 CFR 1.36B–5;

* * * * *

■ 146. Section 155.200 is amended by revising paragraph (a) to read as follows:

§ 155.200 Functions of an Exchange.

(a) *General requirements.* The Exchange must perform the minimum functions described in this subpart and in subparts D, E, F, H, and K of this part.

* * * * *

■ 147. Section 155.205 is amended by revising paragraph (d) to read as follows:

§ 155.205 Consumer assistance tools and programs of an Exchange.

* * * * *

(d) *Consumer assistance.* (1) The Exchange must have a consumer assistance function that meets the standards in paragraph (c) of this section, including the Navigator program described in § 155.210. Any individual providing such consumer assistance must be trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to providing such assistance.

(2) The Exchange must refer consumers to consumer assistance programs in the state when available and appropriate.

■ 148. Section 155.225 is added to read as follows:

§ 155.225 Certified application counselors.

(a) *General rule.* The Exchange must certify staff and volunteers of Exchange-designated organizations and organizations designated by state Medicaid and CHIP agencies pursuant to 42 CFR 435.908 to act as application counselors to—

(1) Provide information about insurance affordability programs and coverage options;

(2) Assist individuals and employees to apply for coverage in a QHP through the Exchange and for insurance affordability programs; and

(3) Help to facilitate enrollment of eligible individuals in QHPs and insurance affordability programs.

(b) *Standards of certification.* The Exchange must certify an individual to become an application counselor if he or she:

(1) Registers with the Exchange;

(2) Is trained regarding QHP options, insurance affordability programs, eligibility, and benefits rules and regulations governing all insurance affordability programs operated in the state, as implemented in the state, prior to functioning as an application counselor;

(3) Discloses to the Exchange and potential applicants any relationships the application assister or sponsoring agency has with QHPs or insurance affordability programs, or other potential conflicts of interest;

(4) Complies with the Exchange's privacy and security standards adopted consistent with 45 CFR 155.260, and applicable authentication and data security standards;

(5) Agrees to act in the best interest of the applicants assisted;

(6) Complies with applicable state law related to application counselors, including but not limited to state law related to conflicts of interest;

(7) Provides information with reasonable accommodations for those with disabilities, as defined by the Americans with Disabilities Act, if providing in-person assistance; and

(8) Enters into an agreement with the Exchange regarding compliance with the standards specified in this paragraph.

(c) *Withdrawal of certification.* The Exchange must establish procedures to withdraw certification from individual application counselors, or from all application counselors associated with a particular organization, when it finds noncompliance with the terms and conditions of the application counselor agreement.

(d) *Availability of information; authorization.* The Exchange must

establish procedures to ensure that applicants—

(1) Are informed of the functions and responsibilities of certified application counselors; and

(2) Provide authorization for the disclosure of applicant information to an application counselor prior to a counselor helping the applicant with submitting an application.

(e) *Fees.* Certified application counselors may not impose any charge on applicants for application assistance.

■ 149. Section 155.227 is added to read as follows:

§ 155.227 Authorized representatives.

(a) *General rule.* (1) The Exchange must permit an individual or employee, subject to applicable privacy and security requirements, to designate an individual or organization to act on his or her behalf in applying for an eligibility determination or redetermination, under subpart D of this part, and in carrying out other ongoing communications with the Exchange.

(2) Designation of an authorized representative must be in writing, including a signature or through another legally binding format subject to applicable authentication and data security standards. If submitted, legal documentation of authority to act on behalf of an individual under state law, such as a court order establishing legal guardianship or a power of attorney for, shall serve in the place of the applicant's signature.

(3) The Exchange ensures the authorized representative agrees to maintain, or be legally bound to maintain, the confidentiality of any information regarding the individual or employee provided by the Exchange.

(4) The Exchange ensures the authorized representative is responsible for fulfilling all responsibilities encompassed within the scope of the authorized representation, as described in this section, to the same extent as the individual he or she represents.

(b) *Timing of designation.* The Exchange must permit an individual or employee to designate an authorized representative:

(1) At the time of application.

(2) At other times and through methods as described in 45 CFR 155.405(c)(2).

(c) *Duties.* The Exchange must permit an individual to authorize their representative to:

(1) Sign an application on the individual's behalf;

(2) Submit an update or respond to a redetermination for the individual in accordance with § 155.330 or § 155.335;

(3) Receive copies of the individual's notices and other communications from the Exchange; and

(4) Act on behalf of the individual in all other matters with the Exchange.

(d) *Duration.* The Exchange must consider an authorized representative valid until the applicant or enrollee:

(1) Modifies the authorization;

(2) Notifies the Exchange and the representative that the representative is no longer authorized to act on his or her behalf using one of the methods available for the submission of an application, as described in 45 CFR 155.405(c); or

(3) The authorized representative informs the Exchange and the individual that he or she no longer is acting in such capacity.

(e) *Agreement.* When an organization is designated as an authorized representative, staff or volunteers of that organization that exercise that capacity for an applicant before the Exchange and the organization itself must enter into an agreement with the Exchange to comply with the requirements set forth at § 155.225(b).

(f) *Compliance with State and federal law.* The Exchange require an authorized representative to comply with applicable state and federal laws concerning conflicts of interest and confidentiality of information.

(g) *Signature.* For purposes of this section, designation of an authorized representative must be in writing including a signature or through another legally binding format and be accepted through all of the modalities described in 45 CFR 155.405(c) of this part.

■ 150. Section 155.230 is amended by—

■ A. Revising paragraph (a).

■ B. Adding paragraph (d).

The revision and addition read as follows:

§ 155.230 General standards for Exchange notices.

(a) *General requirement.* Any notice required to be sent by the Exchange to individuals or employers must be written and include:

(1) An explanation of the action reflected in the notice, including the effective date of the action.

(2) Any factual findings relevant to the action.

(3) Citations to, or identification of, the relevant regulations supporting the action.

(4) Contact information for available customer service resources.

(5) An explanation of appeal rights, if applicable.

* * * * *

(d) *Electronic notices.* The Exchange, with the exception of the SHOP Exchange, must provide required notices either through standard mail, or if an individual or employer elects, electronically, provided that the requirements for electronic notices in 42 CFR 435.918 are met.

■ 151. Section 155.300(a) is amended by—

■ A. Removing the definition of ''Adoption taxpayer identification number.''

■ B. Revising the definitions of ''Minimum value,'' ''Modified Adjusted Gross Income (MAGI),'' and ''Qualifying coverage in an eligible employer-sponsored plan.''

The revisions read as follows:

§ 155.300 Definitions and general standards for eligibility determinations.

(a) * * *

Minimum value when used to describe coverage in an eligible employer-sponsored plan, means that the employer-sponsored plan meets the standards with respect to coverage of the total allowed costs of benefits set forth in 26 CFR 1.36B–2(c)(3)(vi).

Modified Adjusted Gross Income (MAGI) has the same meaning as it does in 26 CFR 1.36B–1(e)(2).

* * * * *

Qualifying coverage in an eligible employer-sponsored plan means coverage in an eligible employer-sponsored plan that meets the affordability and minimum value standards specified in 26 CFR 1.36B–2(c)(3).

* * * * *

■ 152. Section 155.302 is amended by revising paragraphs (a)(1), (b)(4)(i)(A) and (b)(5) to read as follows:

§ 155.302 Options for conducting eligibility determinations.

(a) * * *

(1) Directly or through contracting arrangements in accordance with § 155.110(a), provided that the standards in 42 CFR 431.10(c)(2) are met; or

* * * * *

(b) * * *

(4) * * *

(i) * * *

(A) Withdraw his or her application for Medicaid and CHIP, unless the Exchange has assessed the applicant as potentially eligible for Medicaid based on factors not otherwise considered in this subpart, in accordance with § 155.345(b), and provided that the application will not be considered withdrawn if he or she appeals his or her eligibility determination for advance payments of the premium tax credit or cost-sharing reductions and the appeals entity described in § 155.500(a) finds

that the individual is potentially eligible for Medicaid or CHIP; or

* * * * *

(5) The Exchange adheres to the eligibility determination or appeals decision for Medicaid or CHIP made by the State Medicaid or CHIP agency, or the appeals entity for such agency.

* * * * *

■ 153. Section 155.305 is amended by—

■ A. Revising paragraphs (f)(1)(i), (f)(1)(ii)(B), (f)(2)(ii), (f)(2)(iii), (f)(3), and (f)(5).

■ B. Adding paragraphs (a)(3)(v), and (h).

The revisions and additions read as follows:

§ 155.305 Eligibility standards.

(a) * * *

(3) * * *

(v) *Temporary absence.* The Exchange may not deny or terminate an individual's eligibility for enrollment in a QHP through the Exchange if the individual meets the standards in paragraph (a)(3) of this section but for a temporary absence from the service area of the Exchange and intends to return when the purpose of the absence has been accomplished, unless another Exchange verifies that the individual meets the residency standard of such Exchange.

* * * * *

(f) * * *

(1) * * *

(i) He or she is expected to have a household income, as defined in 26 CFR 1.36B–1(e), of greater than or equal to 100 percent but not more than 400 percent of the FPL for the benefit year for which coverage is requested; and

(ii) * * *

(B) Is not eligible for minimum essential coverage, with the exception of coverage in the individual market, in accordance with section 26 CFR 1.36B–2(a)(2) and (c).

(2) * * *

(ii) He or she is expected to have a household income, as defined in 26 CFR 1.36B–1(e) of less than 100 percent of the FPL for the benefit year for which coverage is requested; and

(iii) One or more applicants for whom the tax filer expects to claim a personal exemption deduction on his or her tax return for the benefit year, including the tax filer and his or her spouse, is a non-citizen who is lawfully present and ineligible for Medicaid by reason of immigration status, in accordance with 26 CFR 1.36B–2(b)(5).

(3) *Enrollment required.* The Exchange may provide advance payments of the premium tax credit on behalf of a tax filer only if one or more applicants for whom the tax filer attests that he or she expects to claim a personal exemption deduction for the benefit year, including the tax filer and his or her spouse, is enrolled in a QHP that is not a catastrophic plan, through the Exchange.

* * * * *

(5) *Calculation of advance payments of the premium tax credit.* The Exchange must calculate advance payments of the premium tax credit in accordance with 26 CFR 1.36B–3.

* * * * *

(h) *Eligibility for enrollment through the Exchange in a QHP that is a catastrophic plan.* The Exchange must determine an applicant eligible for enrollment in a QHP through the Exchange in a QHP that is a catastrophic plan as defined by section 1302(e) of the Affordable Care Act, if he or she—

(1) Has not attained the age of 30 before the beginning of the plan year; or

(2) Has a certification in effect for any plan year that he or she is exempt from the requirement to maintain minimum essential coverage under section 5000A of the Code by reason of—

(i) Section 5000A(e)(1) of the Code (relating to individuals without affordable coverage); or

(ii) Section 5000A(e)(5) of the Code (relating to individuals with hardships).

■ 154. Section 155.310 is amended by—

■ A. Redesignating paragraph (i) as paragraph (j).

■ B. Adding new paragraph (i).

■ C. Revising newly redesignated paragraph (j).

The addition reads as follows:

§ 155.310 Eligibility process.

* * * * *

(i) *Certification program for employers.* As part of its determination of whether an employer has a liability under section 4980H of the Code, the Internal Revenue Service will adopt methods to certify to an employer that one or more employees has enrolled for one or more months during a year in a QHP with respect to which a premium tax credit or cost-sharing reduction is allowed or paid.

(j) *Duration of eligibility determinations without enrollment.* To the extent that an applicant who is determined eligible for enrollment in a QHP does not select a QHP within his or her enrollment period, or is not eligible for an enrollment period, in accordance with subpart E, and seeks a new enrollment period prior to the date on which his or her eligibility is redetermined in accordance with § 155.335 the Exchange must require the applicant to attest as to whether information affecting his or her eligibility has changed since his or her most recent eligibility determination before determining his or her eligibility for a special enrollment period, and must process any changes reported in accordance with the procedures specified in § 155.330.

■ 155. Section 155.315 is amended by—

■ A. Revising paragraph (b)(2), paragraph (f) introductory text, and paragraph (f)(4).

■ B. Adding paragraph (j).

The revisions and addition read as follows:

§ 155.315 Verification process related to eligibility for enrollment in a QHP through the Exchange.

* * * * *

(b) * * *

(2) To the extent that the Exchange is unable to validate an individual's Social Security number through the Social Security Administration, or the Social Security Administration indicates that the individual is deceased, the Exchange must follow the procedures specified in paragraph (f) of this section, except that the Exchange must provide the individual with a period of 90 days from the date on which the notice described in paragraph (f)(2)(i) of this section is received for the applicant to provide satisfactory documentary evidence or resolve the inconsistency with the Social Security Administration. The date on which the notice is received means 5 days after the date on the notice, unless the individual demonstrates that he or she did not receive the notice within the 5 day period.

* * * * *

(f) *Inconsistencies.* Except as otherwise specified in this subpart, for an applicant for whom the Exchange cannot verify information required to determine eligibility for enrollment in a QHP through the Exchange, advance payments of the premium tax credit, and cost-sharing reductions, including when electronic data is required in accordance with this subpart but data for individuals relevant to the eligibility determination are not included in such data sources or when electronic data is required but it is not reasonably expected that data sources will be available within 2 days of the initial request to the data source, the Exchange:

* * * * *

(4) During the periods described in paragraphs (f)(1) and (f)(2)(ii) of this section, must:

* * * * *

(j) *Verification related to eligibility for enrollment through the Exchange in a*

QHP that is a catastrophic plan. The Exchange must verify an applicant's attestation that he or she meets the requirements of § 155.305(h) by—

(1) Verifying the applicant's attestation of age as follows—

(i) Except as provided in paragraph (j)(1)(iii) of this section, accepting his or her attestation without further verification; or

(ii) Examining electronic data sources that are available to the Exchange and which have been approved by HHS for this purpose, based on evidence showing that such data sources are sufficiently current and accurate, and minimize administrative costs and burdens.

(iii) If information regarding age is not reasonably compatible with other information provided by the individual or in the records of the Exchange, the Exchange must examine information in data sources that are available to the Exchange and which have been approved by HHS for this purpose based on evidence showing that such data sources are sufficiently current and accurate.

(2) Verifying that an applicant has received a certificate of exemption as described in § 155.305(h)(2).

(3) To the extent that the Exchange is unable to verify the information required to determine eligibility for enrollment through the Exchange in a QHP that is a catastrophic plan as described in paragraphs (j)(1) and (j)(2) of this section, the Exchange must follow the procedures specified in § 155.315(f), except for § 155.315(f)(4).

■ 156. Section 155.320 is amended by—

■ A. Revising the introductory text of paragraph (c)(1)(i).

■ B. Revising paragraphs (c)(1)(i)(A), (c)(1)(ii), (c)(3)(i)(D), (c)(3)(ii)(A), (c)(3)(iii)(A) and (B), (c)(3)(vi), (c)(3)(vii), (c)(3)(viii), and (d).

■ C. Adding paragraphs (c)(3)(i)(E) and (c)(3)(iii)(C).

■ D. Removing paragraph (e).

■ E. Redesignating paragraph (f) as paragraph (e).

The revisions and additions read as follows:

§ 155.320 Verification process related to eligibility for insurance affordability programs.

* * * * *

(c) * * *

(1) * * *

(i) *Data regarding annual household income.*

(A) For all individuals whose income is counted in calculating a tax filer's household income, as defined in 26 CFR 1.36B–1(e), or an applicant's household income, calculated in accordance with 42 CFR 435.603(d), and for whom the Exchange has a Social Security number, the Exchange must request tax return data regarding MAGI and family size from the Secretary of the Treasury and data regarding Social security benefits described in 26 CFR 1.36B–1(e)(2)(iii) from the Commissioner of Social Security by transmitting identifying information specified by HHS to HHS.

* * * * *

(ii) *Data regarding MAGI-based income.* For all individuals whose income is counted in calculating a tax filer's household income, as defined in 26 CFR 1.36B–1(e), or an applicant's household income, calculated in accordance with 42 CFR 435.603(d), the Exchange must request data regarding MAGI-based income in accordance with 42 CFR 435.948(a).

* * * * *

(3) * * *

(i) * * *

(D) If the Exchange finds that an applicant's attestation of a tax filer's family size is not reasonably compatible with other information provided by the application filer for the family or in the records of the Exchange, with the exception of the data described in paragraph (c)(1)(i) of this section, the Exchange must utilize data obtained through other electronic data sources to verify the attestation. If such data sources are unavailable or information in such data sources is not reasonably compatible with the applicant's attestation, the Exchange must request additional documentation to support the attestation within the procedures specified in § 155.315(f) of this part.

(E) The Exchange must verify that neither advance payments of the premium tax credit nor cost-sharing reductions are being provided on behalf of an individual using information obtained by transmitting identifying information specified by HHS to HHS.

* * * * *

(ii) * * *

(A) The Exchange must compute annual household income for the family described in paragraph (c)(3)(i)(A) of this section based on the data described in paragraph (c)(1)(i) of this section;

* * * * *

(iii) * * *

(A) Except as specified in paragraph (c)(3)(iii)(B) and (C) of this section, if an applicant's attestation, in accordance with paragraph (c)(3)(ii)(B) of this section, indicates that a tax filer's annual household income has increased or is reasonably expected to increase from the data described in paragraph (c)(3)(ii)(A) of this section for the benefit year for which the applicant(s) in the tax filer's family are requesting coverage and the Exchange has not verified the applicant's MAGI-based income through the process specified in paragraph (c)(2)(ii) of this section to be within the applicable Medicaid or CHIP MAGI-based income standard, the Exchange must accept the applicant's attestation regarding a tax filer's annual household income without further verification.

(B) If data available to the Exchange in accordance with paragraph (c)(1)(ii) of this section indicate that a tax filer's projected annual household income is in excess of his or her attestation by a significant amount, the Exchange must proceed in accordance with § 155.315(f)(1) through (4) of this part.

(C) If other information provided by the application filer indicates that a tax filer's projected annual household income is in excess of his or her attestation by a significant amount, the Exchange must utilize data available to the Exchange in accordance with paragraph (c)(1)(ii) of this section to verify the attestation. If such data is unavailable or are not reasonably compatible with the applicant's attestation, the Exchange must proceed in accordance with § 155.315(f)(1) through (4) of this part.

(vi) *Alternate verification process for decreases in annual household income and situations in which tax return data is unavailable.* If a tax filer qualifies for an alternate verification process based on the requirements specified in paragraph (c)(3)(iv) of this section and the applicant's attestation to projected annual household income, as described in paragraph (c)(3)(ii)(B) of this section, is greater than ten percent below the annual household income computed in accordance with paragraph (c)(3)(ii)(A), or if data described in paragraph (c)(1)(i) of this section is unavailable, the Exchange must attempt to verify the applicant's attestation of the tax filer's projected annual household income by following the procedures specified in paragraph (c)(3)(vi)(A) through (G).

(A) *Data.* The Exchange must annualize data from the MAGI-based income sources specified in paragraph (c)(1)(ii) of this section, and obtain any data available from other electronic data sources that have been approved by HHS, based on evidence showing that such data sources are sufficiently accurate and offer less administrative complexity than paper verification.

(B) To the extent that the applicant's attestation indicates that the information described in paragraph (c)(3)(vi)(A) of this section represents an accurate projection of the tax filer's household income for the benefit year for which coverage is requested, the

Exchange must determine the tax filer's eligibility for advance payments of the premium tax credit and cost-sharing reductions based on the household income data in paragraph (c)(3)(vi)(A) of this section.

(C) *Increases in annual household income.* If an applicant's attestation, in accordance with paragraph (c)(3)(ii)(B) of this section, indicates that a tax filer's annual household income has increased or is reasonably expected to increase from the data described in paragraph (c)(3)(vi)(A) of this section to the benefit year for which the applicant(s) in the tax filer's family are requesting coverage and the Exchange has not verified the applicant's MAGI-based income through the process specified in paragraph (c)(2)(ii) of this section to be within the applicable Medicaid or CHIP MAGI-based income standard, the Exchange must accept the applicant's attestation for the tax filer's family without further verification, unless the Exchange finds that an applicant's attestation of a tax filer's annual household income is not reasonably compatible with other information provided by the application filer or available to the Exchange in accordance with paragraph (c)(1)(ii) of this section, in which case the Exchange must request additional documentation using the procedures specified in § 155.315(f).

(D) *Decreases in annual household income and situations in which electronic data is unavailable.* If electronic data are unavailable or an applicant's attestation to projected annual household income, as described in paragraph (c)(3)(ii)(B) of this section, is more than ten percent below the annual household income as computed using data sources described in paragraphs (c)(3)(vi)(A) of this section, the Exchange must follow the procedures specified in § 155.315(f)(1) through (4).

(E) If, following the 90-day period described in paragraph (c)(3)(vi)(D) of this section, an applicant has not responded to a request for additional information from the Exchange and the data sources specified in paragraph (c)(1) of this section indicate that an applicant in the tax filer's family is eligible for Medicaid or CHIP, the Exchange must not provide the applicant with eligibility for advance payments of the premium tax credit, cost-sharing reductions, Medicaid, CHIP or the BHP, if a BHP is operating in the service area of the Exchange.

(F) If, at the conclusion of the period specified in paragraph (c)(3)(vi)(D) of this section, the Exchange remains unable to verify the applicant's attestation, the Exchange must determine the applicant's eligibility based on the information described in paragraph (c)(3)(ii)(A) of this section, notify the applicant of such determination in accordance with the notice requirements specified in § 155.310(g), and implement such determination in accordance with the effective dates specified in § 155.330(f).

(G) If, at the conclusion of the period specified in paragraph (c)(3)(vi)(D) of this section, the Exchange remains unable to verify the applicant's attestation for the tax filer and the information described in paragraph (c)(3)(ii)(A) of this section is unavailable, the Exchange must determine the tax filer ineligible for advance payments of the premium tax credit and cost-sharing reductions, notify the applicant of such determination in accordance with the notice requirement specified in § 155.310(g), and discontinue any advance payments of the premium tax credit and cost-sharing reductions in accordance with the effective dates specified in § 155.330(f).

(vii) For the purposes of paragraph (c)(3) of this section, ''household income'' means household income as specified in 26 CFR 1.36B–1(e).

(viii) For the purposes of paragraph (c)(3) of this section, ''family size'' means family size as specified in 26 CFR 1.36B–1(d).

(d) *Verification related to enrollment in an eligible employer-sponsored plan and eligibility for qualifying coverage in an eligible employer-sponsored plan.*

(1) *General requirement.* The Exchange must verify whether an applicant reasonably expects to be enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested.

(2) *Data.* The Exchange must—

(i) Obtain data about enrollment in and eligibility for an eligible employer-sponsored plan from any electronic data sources that are available to the Exchange and which have been approved by HHS, based on evidence showing that such data sources are sufficiently current, accurate, and minimize administrative burden.

(ii) Obtain any available data regarding enrollment in employer-sponsored coverage or eligibility for qualifying coverage in an eligible employer-sponsored plan based on federal employment by transmitting identifying information specified by HHS to HHS.

(iii) Obtain data from the SHOP that corresponds to the State in which the Exchange is operating.

(iv) Obtain any available data regarding the employment of an applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d), from any electronic data sources that are available to the Exchange and have been approved by HHS for this purpose, based on evidence showing that such data sources are sufficiently current, accurate, and minimize administrative burden.

(3) *Verification procedures.* (i) Except as specified in paragraphs (d)(3)(ii) or (iii) of this section, the Exchange must accept an applicant's attestation regarding the verification specified in paragraph (d) without further verification.

(ii) If an applicant's attestation is not reasonably compatible with the information specified in paragraphs (d)(2)(i) through (d)(2)(iii) of this section, other information provided by the application filer, or other information in the records of the Exchange, the Exchange must follow the procedures specified in § 155.315(f) of this subpart.

(iii) If the Exchange does not have any of the information specified in paragraphs (d)(2)(i) through (d)(2)(iii) for an applicant, and either does not have the information specified in paragraph (d)(2)(iv) for an applicant or an applicant's attestation is not reasonably compatible with the information specified in (d)(2)(iv) of this section, the Exchange must select a statistically significant random sample of such applicants and—

(A) Provide notice to the applicant indicating that the Exchange will be contacting any employer identified on the application for the applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d), to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested;

(B) Proceed with all other elements of eligibility determination using the applicant's attestation, and provide eligibility for enrollment in a QHP to the extent that an applicant is otherwise qualified;

(C) Ensure that advance payments of the premium tax credit and cost-sharing reductions are provided on behalf of an applicant who is otherwise qualified for such payments and reductions, as described in § 155.305 of this subpart, if the tax filer attests to the Exchange that he or she understands that any advance payments of the premium tax credit paid on his or her behalf are subject to reconciliation;

(D) Make reasonable attempts to contact any employer identified on the application for the applicant and the members of his or her household, as defined in 26 CFR 1.36B–1(d), to verify whether the applicant is enrolled in an eligible employer-sponsored plan or is eligible for qualifying coverage in an eligible employer-sponsored plan for the benefit year for which coverage is requested;

(E) If the Exchange receives any information from an employer relevant to the applicant's enrollment in an eligible employer-sponsored plan or eligibility for qualifying coverage in an eligible employer-sponsored plan, the Exchange must determine the applicant's eligibility based on such information and in accordance with the effective dates specified in 155.330(f) of this subpart, and if such information changes his or her eligibility determination, notify the applicant and his or her employer or employers of such determination in accordance with the notice requirements specified in § 155.310(g) and (h) of this part;

(F) If, after a period of 90 days from the date on which the notice described in paragraph (d)(3)(iii)(A) of this section is sent to the applicant, the Exchange is unable to obtain the necessary information from an employer, the Exchange must determine the applicant's eligibility based on his or her attestation regarding that employer.

(G) In order to carry out the process described in paragraph (d)(3)(iii) of this section, the Exchange must only disclose an individual's information to an employer to the extent necessary for the employer to identify the employee.

(4) *Option to rely on verification performed by HHS.* The Exchange may satisfy the provisions of this paragraph by relying on a verification process performed by HHS, provided that—

(i) The Exchange sends the notices described in § 155.310(g) and (h) of this part;

(ii) Other activities required in connection with the verifications described in this paragraph are performed by the Exchange in accordance with the standards identified in this subpart or by HHS in accordance with the agreement described in paragraph (d)(4)(iv) of this section;

(iii) The Exchange provides all relevant application information to HHS through a secure, electronic interface, promptly and without undue delay; and

(iv) The Exchange and HHS enter into an agreement specifying their respective responsibilities in connection with the verifications described in this paragraph.

* * * * *

■ 157. Section 155.330 is amended by—
■ A. Revising paragraphs (d)(1)(ii), (e)(2), (f).
■ D. Removing paragraph (e)(3).

The revisions and additions read as follows:

§ 155.330 Eligibility redetermination during a benefit year.

* * * * *

(d) * * *

(1) * * *

(ii) For an enrollee on whose behalf advance payments of the premium tax credit or cost-sharing reductions are being provided, eligibility determinations for Medicare, Medicaid, CHIP, or the BHP, if a BHP is operating in the service area of the Exchange.

* * * * *

(e) * * *

(2) *Data matching.*

(i) If the Exchange identifies updated information regarding death, in accordance with paragraph (d)(1)(i) of this section, or regarding any factor of eligibility not regarding income, family size, or family composition, the Exchange must—

(A) Notify the enrollee regarding the updated information, as well as the enrollee's projected eligibility determination after considering such information.

(B) Allow an enrollee 30 days from the date of the notice to notify the Exchange that such information is inaccurate.

(C) If the enrollee responds contesting the updated information, proceed in accordance with § 155.315(f) of this part.

(D) If the enrollee does not respond within the 30-day period specified in paragraph (e)(2)(i)(B) proceed in accordance with paragraphs (e)(1)(i) and (ii) of this section.

(ii) If the Exchange identifies updated information regarding income, family size, or family composition, with the exception of information regarding death, the Exchange must—

(A) Follow procedures described in paragraph (e)(2)(i)(A) and (B) of this section; and

(B) If the enrollee responds confirming the updated information, proceed in accordance with paragraphs (e)(1)(i) and (ii) of this section.

(C) If the enrollee does not respond within the 30-day period specified in paragraph (e)(2)(i)(B) of this section, maintain the enrollee's existing eligibility determination without considering the updated information.

(D) If the enrollee provides more up-to-date information, proceed in accordance with paragraph (c)(1) of this section.

* * * * *

(f) *Effective dates.* (1) Except as specified in paragraphs (f)(2) through (f)(7) of this section, the Exchange must implement changes—

(i) Resulting from a redetermination under this section on the first day of the month following the date of the notice described in paragraph (e)(1)(ii) of this section; or

(ii) Resulting from an appeal decision, on the first day of the month following the date of the notices described in §§ 155.545(b) and 155.555(k), or on the date specified in the appeal decision pursuant to § 155.545(c)(1), as applicable; or

(iii) Affecting enrollment or premiums only, on the first day of the month following the date on which the Exchange is notified of the change;

(2) Except as specified in paragraphs (f)(3) through (f)(7) of this section, the Exchange may determine a reasonable point in a month after which a change described in paragraph (f)(1) of this section will not be effective until the first day of the month after the month specified in paragraph (f)(1) of this section. Such reasonable point in a month must be no earlier than the 15th of the month.

(3) Except as specified in paragraphs (f)(6) and (f)(7) of this section, the Exchange must implement a change described in paragraph (f)(1) of this section that results in a decreased amount of advance payments of the premium tax credit or level of cost-sharing reductions, and for which the date of the notices described in paragraphs (f)(1)(i) and (ii) of this section, or the date on which the Exchange is notified in accordance with paragraph (f)(1)(iii) of this section is after the 15th of the month, on the first day of the month after the month specified in paragraph (f)(1) of this section.

(4) Except as specified in paragraph (f)(6) of this section, the Exchange must implement a change described in paragraph (f)(1) of this section that results in an increased level of cost-sharing reductions, including when an individual becomes newly eligible for cost-sharing reductions, and for which the date of the notices described in paragraphs (f)(1)(i) and (ii) of this section, or the date on which the Exchange is notified in accordance with paragraph (f)(1)(iii) of this section is after the 15th of the month, on the first day of the month after the month specified in paragraph (f)(1) of this section.

(5) The Exchange must implement a change associated with the events described in § 155.420(b)(2)(i) and (ii) of this part on the coverage effective dates described in § 155.420(b)(2)(i) and (ii) of this part respectively, and ensure that advance payments of the premium tax credit and cost-sharing reductions are effective on the first day of the month following such events, unless the event occurs on the first day of the month.

(6) Notwithstanding paragraphs (f)(1) through (f)(5) of this section, the Exchange may provide the effective date of a change associated with the events described in § 155.420(d)(4), (d)(5) of this part, and (d)(9) based on the specific circumstances of each situation.

(7) Notwithstanding paragraphs (f)(1) through (f)(6) of this section, when a change described in paragraph (f)(1) results in an enrollee being ineligible to continue his or her enrollment in a QHP through the Exchange, the Exchange must maintain his or her eligibility for enrollment in a QHP without advance payments of the premium tax credit and cost-sharing reductions, in accordance with the effective dates described in § 155.430(d)(3) of this part.

■ 158. Section 155.335 is amended by—

■ A. Revising paragraphs (a), (b), (c), (e), (f), (g), (h), (k)(1), and (l).

■ B. Adding paragraph (m).

The revisions and addition read as follows:

§ 155.335 Annual eligibility redetermination.

(a) *General requirement.* Except as specified in paragraphs (l) and (m) of this section, the Exchange must redetermine the eligibility of a qualified individual on an annual basis.

(b) *Updated income and family size information.* In the case of a qualified individual who requested an eligibility determination for insurance affordability programs in accordance with § 155.310(b) of this part, the Exchange must request updated tax return information, if the qualified individual has authorized the request of such tax return information, data regarding Social Security benefits, and data regarding MAGI-based income as described in § 155.320(c)(1) of this part for use in the qualified individual's eligibility redetermination.

(c) *Notice to qualified individual.* The Exchange must provide a qualified individual with an annual redetermination notice including the following:

(1) The data obtained under paragraph (b) of this section, if applicable.

(2) The data used in the qualified individual's most recent eligibility determination.

(3) The qualified individual's projected eligibility determination for the following year, after considering any updated information described in paragraph (c)(1) of this section, including, if applicable, the amount of any advance payments of the premium tax credit and the level of any cost-sharing reductions or eligibility for Medicaid, CHIP or BHP.

* * * * *

(e) *Changes reported by qualified individuals.* (1) The Exchange must require a qualified individual to report any changes with respect to the information listed in the notice described in paragraph (c) of this section within 30 days from the date of the notice.

(2) The Exchange must allow a qualified individual, or an application filer, on behalf of the qualified individual, to report changes via the channels available for the submission of an application, as described in § 155.405(c)(2).

(f) *Verification of reported changes.* The Exchange must verify any information reported by a qualified individual under paragraph (e) of this section using the processes specified in § 155.315 and § 155.320, including the relevant provisions in those sections regarding inconsistencies, prior to using such information to determine eligibility.

(g) *Response to redetermination notice.* (1) The Exchange must require a qualified individual, or an application filer, on behalf of the qualified individual, to sign and return the notice described in paragraph (c) of this section.

(2) To the extent that a qualified individual does not sign and return the notice described in paragraph (c) of this section within the 30-day period specified in paragraph (e) of this section, the Exchange must proceed in accordance with the procedures specified in paragraph (h)(1) of this section.

(h) *Redetermination and notification of eligibility.* (1) After the 30-day period specified in paragraph (e) of this section has elapsed, the Exchange must—

(i) Redetermine the qualified individual's eligibility in accordance with the standards specified in § 155.305 using the information provided to the qualified individual in the notice specified in paragraph (c) of this section, as supplemented with any information reported by the qualified individual and verified by the Exchange in accordance with paragraphs (e) and (f) of this section.

(ii) Notify the qualified individual in accordance with the requirements specified in § 155.310(g).

(iii) If applicable, notify the qualified individual employer, in accordance with the requirements specified in § 155.310(h).

(2) If a qualified individual reports a change with respect to the information provided in the notice specified in paragraph (c) of this section that the Exchange has not verified as of the end of the 30-day period specified in paragraph (e) of this section, the Exchange must redetermine the qualified individual's eligibility after completing verification, as specified in paragraph (f) of this section.

* * * * *

(k) *Authorization of the release of tax data to support annual redetermination.* (1) The Exchange must have authorization from a qualified individual to obtain updated tax return information described in paragraph (b) of this section for purposes of conducting an annual redetermination.

* * * * *

(l) *Limitation on redetermination.* To the extent that a qualified individual has requested an eligibility determination for insurance affordability programs in accordance with § 155.310(b) and the Exchange does not have an active authorization to obtain tax data as a part of the annual redetermination process, the Exchange must redetermine the qualified individual's eligibility only for enrollment in a QHP and notify the enrollee in accordance with the timing described in paragraph (d) of this section. The Exchange may not proceed with a redetermination for insurance affordability programs until such authorization has been obtained or the qualified individual continues his or her request for an eligibility determination for insurance affordability programs in accordance with § 155.310(b).

(m) *Special rule.* The Exchange must not redetermine a qualified individual's eligibility in accordance with this section if the qualified individual's eligibility was redetermined under this section during the prior year, and the qualified individual was not enrolled in a QHP through the Exchange at the time of such redetermination, and has not enrolled in a QHP through the Exchange since such redetermination.

■ 159. Section 155.340 is amended by revising paragraphs (b) introductory text, (b)(1) and (c) to read as follows:

§ 155.340 Administration of advance payments of the premium tax credit and cost-sharing reductions.

* * * * *

(b) *Requirement to provide information related to employer responsibility.* (1) In the event that the Exchange determines that an individual is eligible for advance payments of the premium tax credit or cost-sharing reductions based in part on a finding that an individual's employer does not provide minimum essential coverage, or provides minimum essential coverage that is unaffordable, within the standard of 26 CFR 1.36B–2(c)(3)(v)(A)(1), or provide minimum essential coverage that does not meet the minimum value standard of 26 CFR 1.36B–2(c)(3)(vi), the Exchange must transmit the individual's name and taxpayer identification number to HHS.

* * * * *

(c) *Requirement to provide information related to reconciliation of advance payments of the premium tax credit.* The Exchange must comply with the requirements of 26 CFR 1.36B–5 regarding reporting to the IRS and to taxpayers.

* * * * *

■ 160. Section 155.345 is amended by—

■ A. Revising paragraphs (a) introductory text, (a)(2), (f), (g) introductory text and (g)(2) hrough (g)(5).

■ B. Redesignating paragraph (a)(3) as paragraph (a)(5).

■ C. Adding new paragraphs (a)(3), (a)(4), g)(6), (g)(7).

The revisions and addition read as follows:

§ 155.345 Coordination with Medicaid, CHIP, the basic Health Program, and the Pre-existing Condition Insurance Plan.

(a) *Agreements.* The Exchange must enter into agreements with agencies administering Medicaid, CHIP, and the BHP, if a BHP is operating in the service area of the Exchange, as are necessary to fulfill the requirements of this subpart and provide copies of any such agreements to HHS upon request. Such agreements must include a clear delineation of the responsibilities of each agency to—

* * * * *

(2) Ensure prompt determinations of eligibility and enrollment in the appropriate program without undue delay, based on the date the application is submitted to or redetermination is initiated by the Exchange or the agency administering Medicaid, CHIP, or the BHP;

(3) *Notices.* (i) Prior to January 1, 2015, include coordinated content, as defined in 42 CFR 435.4, in the notice of eligibility determination provided to the individual in accordance with § 155.310(g) of this part;

(ii) As of January 1, 2015 and to the extent feasible, provide for a combined eligibility notice, as defined in 42 CFR 435.4 and which meets the requirements of § 155.230(a) and (b), promptly and without undue delay, to an applicant and the members of his or her household, as defined in 42 CFR 435.603(f) and 26 CFR 1.36B–1(d), who apply together, for enrollment in a qualified health plan through the Exchange and for all insurance affordability programs. To the extent appropriate, such a notice will be issued by the last agency to determine the individual's eligibility except for eligibility for Medicaid based on standards other than those specified in § 155.305(c), regardless of which agency receives the application, and must specify the agency which actually made each included eligibility determination.

(4) Ensure compliance with paragraphs (c), (d), (e), and (g) of this section.

* * * * *

(f) *Special rule.* If the Exchange verifies that a tax filer's household income, as defined in 26 CFR 1.36B–1(e), is less than 100 percent of the FPL for the benefit year for which coverage is requested, determines that the tax filer is not eligible for advance payments of the premium tax credit based on § 155.305(f)(2), and one or more applicants in the tax filer's household has been determined ineligible for Medicaid and CHIP based on income, the Exchange must—

* * * * *

(g) *Determination of eligibility for individuals submitting applications directly to an agency administering Medicaid, CHIP, or the BHP.* The Exchange, in consultation with the agency or agencies administering Medicaid, CHIP, and the BHP if a BHP is operating in the service area of the Exchange, must establish procedures to ensure that an eligibility determination for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions is performed when an application is submitted directly to an agency administering Medicaid, CHIP, or the BHP if a BHP is operating in the service area of the Exchange. Under such procedures, the Exchange must—

* * * * *

(2) Notify such agency of the receipt of the information described in paragraph (g)(1) of this section and final eligibility determination for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions;

(3) Not duplicate any eligibility and verification findings already made by the transmitting agency, to the extent such findings are made in accordance with this subpart;

(4) Not request information or documentation from the individual already provided to another agency administering an insurance affordability program and included in the transmission of information provided on the application or other information transmitted from the other agency;

(5) Determine the individual's eligibility for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions, promptly and without undue delay, and in accordance with this subpart;

(6) Follow a streamlined process for eligibility determinations regardless of the agency that initially received an application; and

(7) Effective January 1, 2015, provide a combined eligibility notice, as defined in 42 CFR 435.4, for eligibility determinations for enrollment in a QHP and for insurance affordability programs, except for eligibility for Medicaid based on standards other than those specified in § 155.305(c), when another agency administering an insurance affordability program transfers the information described in paragraph (g)(1) of this section to the Exchange.

* * * * *

■ 161. Section 155.350 is amended by revising paragraph (a)(1)(ii) to read as follows:

§ 155.350 Special eligibility standards and process for Indians.

(a) * * *

(1) * * *

(ii) Is expected to have a household income, as defined in 26 CFR 1.36B–1(e) that does not exceed 300 percent of the FPL for the benefit year for which coverage is requested.

* * * * *

■ 162. Section 155.400 is amended by adding paragraph (b)(3) to read as follows:

§ 155.400 Enrollment of qualified individuals into QHPs.

* * * * *

(b) * * *

(3) Send updated eligibility and enrollment information to HHS promptly and without undue delay, in a manner and timeframe as specified by HHS.

* * * * *

■ 163. Section 155.420 is amended by—

■ A. Revising paragraphs (a), (b)(2), (b)(3), and (d)(1) through (d)(9).

■ B. Adding paragraphs (b)(4) and (d)(10).

The revisions and additions read as follows:

§ 155.420 Special enrollment periods.

* * * * *

(a) *General requirements.* (1) The Exchange must provide special enrollment periods consistent with this section, during which qualified individuals may enroll in QHPs and enrollees may change QHPs.

(2) For the purpose of this section, ''dependent'', has the same meaning as it does in 26 CFR 54.9801–2, referring to any individual who is or who may become eligible for coverage under the terms of a QHP because of a relationship to a qualified individual or enrollee.

(b) * * *

(2) *Special effective dates.* (i) In the case of birth, adoption, or placement for adoption, the Exchange must ensure that coverage is effective for a qualified individual or enrollee on the date of birth, adoption, or placement for adoption.

(ii) In the case of marriage, or in the case where a qualified individual loses minimum essential coverage, as described in paragraph (d)(1) of this section, the Exchange must ensure that coverage is effective for a qualified individual or enrollee on the first day of the following month.

(iii) In the case of a qualified individual or enrollee eligible for a special enrollment period as described in paragraphs (d)(4), (d)(5), or (d)(9) of this section, the Exchange must ensure that coverage is effective on an appropriate date based on the circumstances of the special enrollment period, in accordance with guidelines issued by HHS. Such date much be either—

(A) The date of the event that triggered the special enrollment period under (d)(4), (d)(5), or (d)(9) of this section; or

(B) In accordance with the regular effective dates specified in paragraph (b)(1) of this section.

(3) *Option for earlier effective dates.* Subject to the Exchange demonstrating to HHS that all of its participating QHP issuers agree to effectuate coverage in a timeframe shorter than discussed in paragraph (b)(1) or (b)(2)(ii) of this section, the Exchange may do one or both of the following for all applicable individuals:

(i) For a QHP selection received by the Exchange from a qualified individual in accordance with the dates specified in paragraph (b)(1) or (b)(2)(ii) of this section, the Exchange may provide a coverage effective date for a qualified individual earlier than specified in such paragraphs.

(ii) For a QHP selection received by the Exchange from a qualified individual on a date set by the Exchange after the fifteenth of the month, the Exchange may provide a coverage effective date of the first of the following month.

(4) *Advance payments of the premium tax credit and cost-sharing reductions.* Notwithstanding the standards of this section, the Exchange must ensure that advance payments of the premium tax credit and cost-sharing reductions adhere to the effective dates specified in § 155.330(f).

* * * * *

(d) The Exchange must allow a qualified individual or enrollee, and, when specified below, his or her dependent, to enroll in or change from one QHP to another if one of the following triggering events occur:

(1) The qualified individual or his or her dependent loses minimum essential coverage:

(i) In the case of a QHP decertification, the triggering event is the date of the notice of decertification as described in § 155.1080(e)(2); or

(ii) In all other cases, the triggering event is the date the individual or dependent loses eligibility for minimum essential coverage;

(2) The qualified individual gains a dependent or becomes a dependent through marriage, birth, adoption or placement for adoption;

(3) The qualified individual, who was not previously a citizen, national, or lawfully present individual gains such status;

(4) The qualified individual's or his or her dependent's, enrollment or non-enrollment in a QHP is unintentional, inadvertent, or erroneous and is the result of the error, misrepresentation, or inaction of an officer, employee, or agent of the Exchange or HHS, or its instrumentalities as evaluated and determined by the Exchange. In such cases, the Exchange may take such action as may be necessary to correct or eliminate the effects of such error, misrepresentation, or inaction;

(5) The enrollee or, his or her dependent adequately demonstrates to the Exchange that the QHP in which he or she is enrolled substantially violated a material provision of its contract in relation to the enrollee;

(6) *Newly eligible or ineligible for advance payments of the premium tax credit, or change in eligibility for cost-sharing reductions.* (i) The enrollee is determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions;

(ii) The enrollee's dependent enrolled in the same QHP is determined newly eligible or newly ineligible for advance payments of the premium tax credit or has a change in eligibility for cost-sharing reductions; or

(iii) A qualified individual or his or her dependent who is enrolled in qualifying coverage in an eligible employer-sponsored plan is determined newly eligible for advance payments of the premium tax credit based in part on a finding that such individual will cease to be eligible for qualifying coverage in an eligible-employer sponsored plan in the next 60 days and is allowed to terminate existing coverage. The Exchange must permit an individual whose existing coverage through an eligible employer-sponsored plan will no longer be affordable or provide minimum value to access this special enrollment period prior to the end of his or her coverage through such eligible employer-sponsored plan, although he or she is not eligible for advance payments of the premium tax credit until the end of his or her coverage through such eligible employer-sponsored plan;

(7) The qualified individual or enrollee, or his or her dependent, gains access to new QHPs as a result of a permanent move;

(8) The qualified individual who is an Indian, as defined by section 4 of the Indian Health Care Improvement Act, may enroll in a QHP or change from one QHP to another one time per month; and

(9) The qualified individual or enrollee, or his or her dependent, demonstrates to the Exchange, in accordance with guidelines issued by HHS, that the individual meets other exceptional circumstances as the Exchange may provide.

(10) The qualified individual or his or her dependent is enrolled in an eligible employer-sponsored plan that is not qualifying coverage in an eligible employer-sponsored plan, as the term is defined in § 155.300 of this part, and is allowed to terminate existing coverage. The Exchange must permit such an individual to access this special enrollment period 60 days prior to the end of his or her coverage through such eligible employer-sponsored plan.

■ 164. Section 155.430 is amended by revising paragraphs (b)(1) and (d)(1) to read as follows:

§ 155.430 Termination of coverage.

* * * * *

(b) * * *

(1) *Enrollee-initiated terminations.* (i) The Exchange must permit an enrollee to terminate his or her coverage in a QHP, including as a result of the enrollee obtaining other minimum essential coverage, with appropriate notice to the Exchange or the QHP.

(ii) The Exchange must provide an opportunity at the time of plan selection for an enrollee to choose to remain enrolled in a QHP if the Exchange identifies that he or she has become eligible for other minimum essential coverage through the data matching described in § 155.330(d) and the enrollee does not request termination in accordance with paragraph (b)(1)(i) of this section. If an enrollee does not choose to remain enrolled in a QHP in such a situation, the Exchange must initiate termination of his or her coverage upon completion of the redetermination process specified in § 155.330.

* * * * *

(d) * * *

(1) For purposes of this section—

(i) Reasonable notice is defined as fourteen days from the requested effective date of termination; and

(ii) Changes in eligibility for advance payments of the premium tax credit and cost sharing reductions, including terminations, must adhere to the effective dates specified in § 155.330(f).

* * * * *

■ 165. Add Subpart F to read as follows:

Subpart F—Appeals of Eligibility Determinations for Exchange Participation and Insurance Affordability Programs

Sec.

Subpart F—Appeals of Eligibility Determinations for Exchange Participation and Insurance Affordability Programs

§ 155.500 Definitions.

In addition to those definitions in § 155.20 and § 155.300, for purposes of this subpart and § 155.740 of subpart H, the following terms have the following meanings:

Appeal record means the appeal decision, all papers and requests filed in the proceeding, and, if a hearing was held, the transcript or recording of hearing testimony or an official report containing the substance of what happened at the hearing, and any exhibits introduced at the hearing.

Appeal request means a clear expression, either orally or in writing, by an applicant, enrollee, employer, or small business employer or employee to have any eligibility determination or redetermination contained in a notice issued in accordance with § 155.310(g), § 155.330(e)(1)(ii), § 155.335(h)(1)(ii), § 155.715(e) or (f), or pursuant to future guidance on section 1311(d)(4)(H) of the Affordable Care Act, reviewed by an appeals entity.

Appeals entity means a body designated to hear appeals of eligibility determinations or redeterminations contained in notices issued in accordance with §§ 155.310(g), 155.330(e)(1)(ii), 155.335(h)(1)(ii), 155.715(e) and (f), or notices issued in accordance with future guidance on exemptions pursuant to section 1311(d)(4)(H).

Appellant means the applicant or enrollee, the employer, or the small business employer or employee who is requesting an appeal.

De novo review means a review of an appeal without deference to prior decisions in the case.

Evidentiary hearing means a hearing conducted where new evidence may be presented.

Vacate means to set aside a previous action.

§ 155.505 General eligibility appeals requirements.

(a) *General requirements.* Unless otherwise specified, the provisions of this subpart apply to Exchange eligibility appeals processes, regardless of whether the appeals process is provided by a state-based Exchange appeals entity or by HHS.

(b) *Right to appeal.* In accordance with § 155.355 and future guidance on section 1311(d)(4)(H) of the Affordable Care Act, an applicant or enrollee must have the right to appeal—

(1) An eligibility determination made in accordance with subpart D, including—

(i) An initial determination of eligibility, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, made in accordance with the standards specified in 45 CFR 155.305(a) through (h); and

(ii) A redetermination of eligibility, including the amount of advance payments of the premium tax credit and level of cost-sharing reductions, made in accordance with 45 CFR 155.330 and § 155.335;

(2) An eligibility determination for an exemption made in accordance with future guidance on exemptions pursuant to section 1311(d)(4)(H) of the Affordable Care Act; and

(3) A failure by the Exchange to provide timely notice of an eligibility determination in accordance with § 155.310(g), § 155.330(e)(1)(ii), or § 155.335(h)(1)(ii).

(c) *Options for Exchange appeals.* Exchange eligibility appeals may be conducted by—

(1) The Exchange, if the Exchange establishes an appeals process in accordance with the requirements of this subpart; or

(2) HHS, upon exhaustion of the state-based Exchange appeals process, or if the Exchange has not established an appeals process in accordance with the requirements of this subpart.

(d) *Eligible entities.* An appeals process established under this subpart must comply with the requirements of 42 CFR 431.10(c)(2).

(e) *Authorized representatives.* An appellant may designate an authorized representative to act on his or her behalf, including in making an appeal request, as provided in § 155.227.

(f) *Accessibility requirements.* Appeals processes established under this subpart must comply with the accessibility requirements in § 155.205(c).

(g) *Judicial review.* An appellant may seek judicial review to the extent it is available by law.

§ 155.510 Appeals coordination.

(a) *Agreements.* The appeals entity or the Exchange must enter into agreements with the agencies administering insurance affordability programs regarding the appeals processes for such programs as are necessary to fulfill the requirements of this subpart. Such agreements will include a clear delineation of the responsibilities of each entity to support the eligibility appeals process, and must—

(1) Minimize burden on appellants, including not asking the appellant to provide duplicative information or documentation that he or she already provided to an agency administering an insurance affordability program or eligibility appeals process;

(2) Ensure prompt issuance of appeal decisions consistent with timeliness standards established under this subpart; and

(3) Comply with the requirements set forth in 42 CFR 431.10(d).

(b) *Coordination for Medicaid and CHIP appeals.* (1) Consistent with 42

CFR 431.10(c)(1)(ii) and § 457.1120, the appellant must be informed of the option to opt into pursuing his or her appeal of an adverse Medicaid or CHIP determination made by the Exchange directly with the Medicaid or CHIP agency, and if the appellant elects to do so, the appeals entity transmits the eligibility determination and all information provided via secure electronic interface, promptly and without undue delay, to the Medicaid or CHIP agency, as applicable.

(2) Where the Medicaid or CHIP agency has delegated appeals authority to the Exchange appeals entity consistent with 42 CFR 431.10(c)(1)(ii) and the appellant has elected to have the Exchange appeals entity hear the appeal, the appeals entity may include in the appeal decision a determination of Medicaid and CHIP eligibility, provided that—

(i) The appeals entity applies Medicaid and CHIP MAGI-based income standards and standards for citizenship and immigration status, using verification rules and procedures consistent with 42 CFR parts 435 and 457.

(ii) Notices required in connection with an eligibility determination for Medicaid or CHIP are performed by the appeals entity consistent with the standards identified in this subpart, subpart D, and the State Medicaid or CHIP agency consistent with applicable law.

(3) Where the Medicaid or CHIP agency has not delegated appeals authority to the appeals entity and the appellant seeks review of a denial of Medicaid or CHIP eligibility, the appeals entity must transmit the eligibility determination and all information provided as part of the appeal via secure electronic interface, promptly and without undue delay, to the Medicaid or CHIP agency, as applicable.

(4) The Exchange must consider an appellant determined or assessed by the appeals entity as not potentially eligible for Medicaid or CHIP as ineligible for Medicaid and CHIP based on the applicable Medicaid and CHIP MAGI-based income standards for purposes of determining eligibility for advance payments of the premium tax credit and cost-sharing reductions.

(c) *Data exchange.* The appeals entity must—

(1) Ensure that all data exchanges that are part of the appeals process, comply with the data exchange requirements in § 155.260, § 155.270, and § 155.345(h); and

(2) Comply with all data sharing requests made by HHS.

§ 155.515 Notice of appeal procedures.

(a) *Requirement to provide notice of appeal procedures.* The Exchange must provide notice of appeal procedures at the time that the—

(1) Applicant submits an application; and

(2) Notice of eligibility determination is sent under § 155.310(g), § 155.330(e)(1)(ii), § 155.335(h)(1)(ii), or future guidance on exemptions pursuant to section 1311(d)(4)(H) of the Affordable Care Act.

(b) *General content on right to appeal and appeal procedures.* Notices described in paragraph (a) of this section must contain—

(1) An explanation of the applicant or enrollee's appeal rights under this subpart;

(2) A description of the procedures by which the applicant or enrollee may request an appeal;

(3) Information on the applicant or enrollee's right to represent himself or herself, or to be represented by legal counsel or an authorized representative;

(4) An explanation of the circumstances under which the appellant's eligibility may be maintained or reinstated pending an appeal decision, as described in § 155.525; and

(5) An explanation that an appeal decision for one household member may result in a change in eligibility for other household members and may be handled as a redetermination in accordance with the standards specified in § 155.305.

§ 155.520 Appeal requests.

(a) *General standards for appeal requests.* The Exchange and the appeals entity—

(1) Must accept appeal requests submitted—

(i) By telephone;

(ii) By mail;

(iii) In person, if the Exchange or the appeals entity, as applicable, is capable of receiving in-person appeal requests; or

(iv) Via the Internet.

(2) May assist the applicant or enrollee in making the appeal request;

(3) Must not limit or interfere with the applicant or enrollee's right to make an appeal request; and

(4) Must consider an appeal request to be valid for the purpose of this subpart, if it is submitted in accordance with the requirements of paragraphs (b) and (c) of this section and § 155.505(b).

(b) *Appeal request.* The Exchange and the appeals entity must allow an applicant or enrollee to request an appeal within 90 days of the date of the notice of eligibility determination.

(c) *Appeal of a state-based Exchange appeals entity decision to HHS.* If the appellant disagrees with the appeal decision of a state-based Exchange appeals entity, he or she may make an appeal request to HHS within 30 days of the date of the state-based Exchange appeals entity's notice of appeal decision through any of the methods described in paragraph (a)(1) of this section.

(d) *Acknowledgement of appeal request.* (1) Upon receipt of a valid appeal request pursuant to paragraph (b), (c), or (d)(3)(i) of this section, the appeals entity—

(i) Must send timely acknowledgment to the appellant of the receipt of his or her valid appeal request, including—

(A) Information regarding the appellant's eligibility pending appeal pursuant to § 155.525; and

(B) An explanation that any advance payments of the premium tax credit paid on behalf of the tax filer pending appeal are subject to reconciliation under 26 CFR 1.36B–4.

(ii) Must send timely notice via secure electronic interface of the appeal request and, if applicable, instructions to provide eligibility pending appeal pursuant to § 155.525, to the Exchange and to the agencies administering Medicaid or CHIP, where applicable.

(iii) If the appeal request is made pursuant to paragraph (c) of this section, must send timely notice via secure electronic interface of the appeal request to the state-based Exchange appeals entity.

(iv) Must promptly confirm receipt of the records transferred pursuant to paragraph (d)(3) or (4) of this section to the Exchange or the state-based Exchange appeals entity, as applicable.

(2) Upon receipt of an appeal request that is not valid because it fails to meet the requirements of this section or § 155.505(b), the appeals entity must—

(i) Promptly and without undue delay, send written notice to the applicant or enrollee that the appeal request has not been accepted and of the nature of the defect in the appeal request; and

(ii) Treat as valid an amended appeal request that meets the requirements of this section and of § 155.505(b).

(3) Upon receipt of a valid appeal request pursuant to paragraph (b) of this section, or upon receipt of the notice under paragraph (d)(1)(ii) of this section, the Exchange must transmit via secure electronic interface to the appeals entity—

(i) The appeal request, if the appeal request was initially made to the Exchange; and

(ii) The appellant's eligibility record.

(4) Upon receipt of the notice pursuant to paragraph (d)(1)(iii) of this section, the state-based Exchange appeals entity must transmit via secure electronic interface the appellant's appeal record, including the appellant's eligibility record as received from the Exchange, to HHS.

§ 155.525 Eligibility pending appeal.

(a) *General standards.* After receipt of a valid appeal request or notice under § 155.520(d)(1)(ii) that concerns an appeal of a redetermination under § 155.330(e) or § 155.335(h), the Exchange or the Medicaid or CHIP agency, as applicable, must continue to consider the appellant eligible while the appeal is pending in accordance with standards set forth in paragraph (b) of this section or as determined by the Medicaid or CHIP agency consistent with 42 CFR parts 435 and 457, as applicable.

(b) *Implementation.* The Exchange must continue the appellant's eligibility for enrollment in a QHP, advance payments of the premium tax credit, and cost-sharing reductions, as applicable, in accordance with the level of eligibility immediately before the redetermination being appealed.

§ 155.530 Dismissals.

(a) *Dismissal of appeal.* The appeals entity must dismiss an appeal if the appellant—

(1) Withdraws the appeal request in writing;

(2) Fails to appear at a scheduled hearing;

(3) Fails to submit a valid appeal request as specified in § 155.520(a)(4); or

(4) Dies while the appeal is pending.

(b) *Notice of dismissal to the appellant.* If an appeal is dismissed under paragraph (a) of this section, the appeals entity must provide timely notice to the appellant, including—

(1) The reason for dismissal;

(2) An explanation of the dismissal's effect on the appellant's eligibility; and

(3) An explanation of how the appellant may show good cause why the dismissal should be vacated in accordance with paragraph (d) of this section.

(c) *Notice of the dismissal to the Exchange, Medicaid, or CHIP.* If an appeal is dismissed under paragraph (a) of this section, the appeals entity must provide timely notice to the Exchange, and to the agency administering Medicaid or CHIP, as applicable, including instruction regarding—

(1) The eligibility determination to implement; and

(2) Discontinuing eligibility provided under § 155.525.

(d) *Vacating a dismissal.* The appeals entity may vacate a dismissal if the appellant makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated.

§ 155.535 Informal resolution and hearing requirements.

(a) *Informal resolution.* The HHS appeals process will provide an opportunity for informal resolution and a hearing in accordance with the requirements of this section. A state-based Exchange appeals entity may also provide an informal resolution process prior to a hearing, provided that—

(1) The process complies with the scope of review specified in paragraph (e) of this section;

(2) The appellant's right to a hearing is preserved in any case in which the appellant remains dissatisfied with the outcome of the informal resolution process;

(3) If the appeal advances to hearing, the appellant is not asked to provide duplicative information or documentation that he or she previously provided during the application or informal resolution process; and

(4) If the appeal does not advance to hearing, the informal resolution decision is final and binding.

(b) *Notice of hearing.* When a hearing is scheduled, the appeals entity must send written notice to the appellant of the date, time, and location or format of the hearing no later than 15 days prior to the hearing date.

(c) *Conducting the hearing.* All hearings under this subpart must be conducted—

(1) At a reasonable date, time, and location or format;

(2) After notice of the hearing, pursuant to paragraph (b) of this section;

(3) As an evidentiary hearing, consistent with paragraph (e) of this section; and

(4) By one or more impartial officials who have not been directly involved in the eligibility determination or any prior Exchange appeal decisions in the same matter.

(d) *Procedural rights of an appellant.* The appeals entity must provide the appellant with the opportunity to—

(1) Review his or her appeal record, including all documents and records to be used by the appeals entity at the hearing, at a reasonable time before the date of the hearing as well as during the hearing;

(2) Bring witnesses to testify;

(3) Establish all relevant facts and circumstances;

(4) Present an argument without undue interference; and

(5) Question or refute any testimony or evidence, including the opportunity to confront and cross-examine adverse witnesses.

(e) *Information and evidence to be considered.* The appeals entity must consider the information used to determine the appellant's eligibility as well as any additional relevant evidence presented during the course of the appeal, including at the hearing.

(f) *Standard of review.* The appeals entity will review the appeal *de novo* and will consider all relevant facts and evidence adduced during the appeal.

§ 155.540 Expedited appeals.

(a) *Expedited appeals.* The appeals entity must establish and maintain an expedited appeals process for an appellant to request an expedited process where there is an immediate need for health services because a standard appeal could seriously jeopardize the appellant's life or health or ability to attain, maintain, or regain maximum function.

(b) *Denial of a request for expedited appeal.* If the appeals entity denies a request for an expedited appeal, it must—

(1) Handle the appeal request under the standard process and issue the appeal decision in accordance with § 155.545(b)(1); and

(2) Make reasonable efforts to inform the appellant through electronic or oral notification of the denial and, if notified orally, follow up with the appellant by written notice within 2 days of the denial.

§ 155.545 Appeal decisions.

(a) *Appeal decisions.* Appeal decisions must—

(1) Be based exclusively on the information and evidence specified in § 155.535(e) and the eligibility requirements under subpart D of this part or pursuant to future guidance on section 1311(d)(4)(H) of the Affordable Care Act, as applicable;

(2) State the decision, including a plain language description of the effect of the decision on the appellant's eligibility;

(3) Summarize the facts relevant to the appeal;

(4) Identify the legal basis, including the regulations that support the decision;

(5) State the effective date of the decision; and

(6) If the appeals entity is a state-based Exchange appeals entity, provide an explanation of the appellant's right to pursue the appeal at HHS, if the appellant remains dissatisfied with the eligibility determination.

(b) *Notice of appeal decision.* The appeals entity—

(1) Must issue written notice of the appeal decision to the appellant within 90 days of the date an appeal request under § 155.520(b) or (c) is received, as administratively feasible.

(2) In the case of an appeal request submitted under § 155.540 that the appeals entity determines meets the criteria for an expedited appeal, must issue the notice as expeditiously as the appellant's health condition requires, but no later than 3 working days after the appeals entity receives the request for an expedited appeal.

(3) Must provide notice of the appeal decision and instructions to cease pended eligibility to the appellant, if applicable, via secure electronic interface, to the Exchange or the Medicaid or CHIP agency, as applicable.

(c) *Implementation of appeal decisions.* The Exchange or the Medicaid or CHIP agency, as applicable, upon receiving the notice described in paragraph (b) of this section, must promptly—

(1) Implement the appeal decision retroactive to the date the incorrect eligibility determination was made or at a time determined under § 155.330(f), as applicable, or in accordance with the applicable Medicaid or CHIP standards in 42 CFR parts 435 or 457; and

(2) Redetermine the eligibility of household members who have not appealed their own eligibility determinations but whose eligibility may be affected by the appeal decision, in accordance with the standards specified in § 155.305.

§ 155.550 Appeal record.

(a) *Appellant access to the appeal record.* Subject to the requirements of all applicable federal and state laws regarding privacy, confidentiality, disclosure, and personally identifiable information, the appeals entity must make the appeal record accessible to the appellant at a convenient place and time.

(b) *Public access to the appeal record.* The appeals entity must provide public access to all appeal records, subject to all applicable federal and state laws regarding privacy, confidentiality, disclosure, and personally identifiable information.

§ 155.555 Employer appeals process.

(a) *General requirements.* The provisions of this section apply to employer appeals processes through which an employer may, in response to a notice under § 155.310(h), appeal a determination that the employer does not provide minimum essential coverage through an employer-sponsored plan or that the employer does provide that coverage but it is not affordable coverage with respect to an employee.

(b) *Exchange employer appeals process.* An Exchange may establish an employer appeals process in accordance with the requirements of this section, § 155.505(e) through (g), and § 155.510(a)(1), (a)(2), and (c). Where an Exchange has not established an employer appeals process, HHS will provide an employer appeals process that meets the requirements of this section, § 155.505(e) through (g), and § 155.510(a)(1), (a)(2), and (c).

(c) *Appeal request.* The Exchange and appeals entity, as applicable, must—

(1) Allow an employer to request an appeal within 90 days from the date the notice described under § 155.310(h) is sent;

(2) Allow an employer to submit relevant evidence to support the appeal;

(3) Allow an employer to submit an appeal request to—

(i) The Exchange or the Exchange appeals entity, if the Exchange establishes an employer appeals process; or

(ii) HHS, if the Exchange has not established an employer appeals process;

(4) Comply with the requirements of § 155.520(a)(1) through (3); and

(5) Consider an appeal request valid if it is submitted in accordance with paragraph (c)(1) of this section and with the purpose of appealing the determination identified in the notice specified in § 155.310(h).

(d) *Notice of appeal request.* Upon receipt of a valid appeal request, the appeals entity must—

(1) Send timely acknowledgement of the receipt of the appeal request to the employer, including an explanation of the appeals process;

(2) Send timely notice to the employee of the receipt of the appeal request, including—

(i) An explanation of the appeals process;

(ii) Instructions for submitting additional evidence for consideration by the appeals entity; and

(iii) An explanation of the potential effect of the employer's appeal on the employee's eligibility.

(3) Promptly notify the Exchange of the appeal, if the employer did not initially make the appeal request to the Exchange.

(4) Upon receipt of an appeal request that is not valid because it fails to meet the requirements of this section, the appeals entity must—

(i) Promptly and without undue delay, send written notice to the employer that the appeal request has not been accepted and of the nature of the defect in the appeal request; and

(ii) Treat as valid an amended appeal request that meets the requirements of this section, including standards for timeliness.

(e) *Transmittal and receipt of records.* (1) Upon receipt of a valid appeal request under this section, or upon receipt of the notice under paragraph (d)(3) of this section, the Exchange must promptly transmit via secure electronic interface to the appeal entity—

(i) The appeal request, if the appeal request was initially made to the Exchange; and

(ii) The employee's eligibility record.

(2) The appeals entity must promptly confirm receipt of records transmitted pursuant to paragraph (e)(1) of this section to the entity that transmitted the records.

(f) *Dismissal of appeal.* The appeals entity—

(1) Must dismiss an appeal under the circumstances specified in § 155.530(a)(1) or if the request fails to comply with the standards in paragraph (c)(4) of this section.

(2) Must provide timely notice of the dismissal to the employer, employee, and Exchange including the reason for dismissal; and

(3) May vacate a dismissal if the employer makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated.

(g) *Procedural rights of the employer.* The appeals entity must provide the employer the opportunity to—

(1) Provide relevant evidence for review of the determination of an employee's eligibility for advance payments of the premium tax credit or cost-sharing reductions;

(2) Review—

(i) The information described in § 155.310(h)(1);

(ii) Information regarding whether the employee's income is above or below the threshold by which the affordability of employer-sponsored minimum essential coverage is measured, as set forth by standards described in 26 CFR 1.36B; and

(iii) Other data used to make the determination described in § 155.305(f) or (g), to the extent allowable by law, except the information described in paragraph (h) of this section.

(h) *Confidentiality of employee information.* Neither the Exchange nor the appeals entity may make available to an employer any tax return information of an employee as prohibited by § 6103 of the Code.

(i) *Adjudication of employer appeals.* Employer appeals must—

(1) Be reviewed by one or more impartial officials who have not been directly involved in the employee eligibility determination implicated in the appeal;

(2) Consider the information used to determine the employee's eligibility as well as any additional relevant evidence provided by the employer or the employee during the course of the appeal; and

(3) Be reviewed *de novo.*

(j) *Appeal decisions.* Employer appeal decisions must—

(1) Be based exclusively on the information and evidence described in paragraph (i)(2) and the eligibility standards in 45 CFR part 155, subpart D;

(2) State the decision, including a plain language description of the effect of the decision on the employee's eligibility; and

(3) Comply with the requirements set forth in § 155.545(a)(3) through (5).

(k) *Notice of appeal decision.* The appeals entity must provide written notice of the appeal decision within 90 days of the date the appeal request is received, as administratively feasible, to—

(1) The employer. Such notice must include—

(i) The appeal decision; and

(ii) An explanation that the appeal decision does not foreclose any appeal rights the employer may have under subtitle F of the Code.

(2) The employee. Such notice must include the appeal decision.

(3) The Exchange.

(l) *Implementation of the appeal decision.* After receipt of the notice under paragraph (k)(3) of this section, if the appeal decision affects the employee's eligibility, the Exchange must promptly redetermine the employee's eligibility in accordance with the standards specified in § 155.305.

(m) *Appeal record.* Subject to the requirements of § 155.550 and paragraph (h) of this section, the appeal record must be accessible to the employer and to the employee in a convenient format and at a convenient time.

Subpart H—Exchange Functions: Small Business Health Options Program (SHOP)

■ 166. Section 155.705 is amended by adding paragraph (c) to read as follows:

§ 155.705 Functions of a SHOP.

* * * * *

(c) *Coordination with individual market Exchange for eligibility determinations.* A SHOP must provide data to the individual market Exchange that corresponds to the service area of the SHOP related to eligibility and enrollment of a qualified employee.

* * * * *

■ 167. Section 155.740 is added to Subpart H to read as follows:

§ 155.740 SHOP employer and employee eligibility appeals requirements.

(a) *Definitions.* The definitions in § 155.20, § 155.300, and § 155.500 apply to this section.

(b) *General requirements.* (1) A state, establishing an Exchange pursuant to § 155.100, must provide an eligibility appeals process for the SHOP. Where a state has not established an Exchange pursuant to § 155.100, HHS will provide an eligibility appeals process for the SHOP that meets the requirements of this section and the requirements in paragraph (b)(2) of this section.

(2) The SHOP appeals entity must conduct appeals in accordance with the requirements established in this section, § 155.505(e) through (g), and § 155.510(a)(1), (a)(2), and (c).

(c) *Employer right to appeal.* An employer may appeal—

(1) A notice of denial of eligibility under § 155.715(e); or

(2) A failure of the SHOP to make an eligibility determination in a timely manner.

(d) *Employee right to appeal.* An employee may appeal—

(1) A notice of denial of eligibility under § 155.715(f); or

(2) A failure of the SHOP to make an eligibility determination in a timely manner.

(e) *Appeals notice requirement.* Notices of the right to appeal a denial of eligibility under § 155.715(e) or (f) must be written and include—

(1) The reason for the denial of eligibility, including a citation to the applicable regulations; and

(2) The procedure by which the employer or employee may request an appeal of the denial of eligibility.

(f) *Appeal request.* The SHOP and appeals entity must—

(1) Allow an employer or employee to request an appeal within 90 days from the date of the notice of denial of eligibility to—

(i) The SHOP or the appeals entity; or

(ii) HHS, if no State-based Exchange has been established.

(2) Accept appeal requests submitted through any of the methods described in § 155.520(a)(1);

(3) Comply with the requirements of § 155.520(a)(2) and (3); and

(4) Consider an appeal request valid if it is submitted in accordance with paragraph (f)(1) of this section.

(g) *Notice of appeal request.* Upon receipt of a valid appeal request, the appeals entity must—

(1) Send timely acknowledgement to the employer, or employer and employee if an employee is appealing, of the receipt of the appeal request, including—

(i) An explanation of the appeals process; and

(ii) Instructions for submitting additional evidence for consideration by the appeals entity.

(2) Promptly notify the SHOP of the appeal, if the appeal request was not initially made to the SHOP.

(3) Upon receipt of an appeal request that is not valid because it fails to meet the requirements of this section, the appeals entity must—

(i) Promptly and without undue delay, send written notice to the employer or employee that is appealing that the appeal request has not been accepted and of the nature of the defect in the appeal request; and

(ii) Treat as valid an amended appeal request that meets the requirements of this section.

(h) *Transmittal and receipt of records.* (1) Upon receipt of a valid appeal request under this section, or upon receipt of the notice under paragraph (g)(2) of this section, the SHOP must promptly transmit, via secure electronic interface, to the appeals entity—

(i) The appeal request, if the appeal request was initially made to the SHOP; and

(ii) The eligibility record of the employer or employee that is appealing.

(2) The appeals entity must promptly confirm receipt of records transmitted pursuant to paragraph (h)(1) of this section to the SHOP that transmitted the records.

(i) *Dismissal of appeal.* The appeals entity—

(1) Must dismiss an appeal if the employer or employee that is appealing—

(i) Withdraws the request in writing; or

(ii) Fails to submit an appeal request meeting the standards specified in paragraph (f)(4) of this section.

(2) Must provide timely notice to the employer or employee that is appealing of the dismissal of the appeal request, including the reason for dismissal, and must notify the SHOP of the dismissal.

(3) May vacate a dismissal if the employer or employee makes a written request within 30 days of the date of the notice of dismissal showing good cause why the dismissal should be vacated.

(j) *Procedural rights of the employer or employee.* The appeals entity must provide the employer, or the employer

and employee if an employee is appealing, the opportunity to submit relevant evidence for review of the eligibility determination.

(k) *Adjudication of SHOP appeals.* SHOP appeals must—

(1) Comply with the standards set forth in § 155.555(i)(1) and (3); and

(2) Consider the information used to determine the employer or employee's eligibility as well as any additional relevant evidence submitted during the course of the appeal by the employer or employee.

(l) *Appeal decisions.* Appeal decisions must—

(1) Be based solely on—

(i) The evidence referenced in paragraph (k)(2) of this section;

(ii) The eligibility requirements for the SHOP under § 155.710(b) or (e), as applicable.

(2) Comply with the standards set forth in § 155.545(a)(2) through (5); and

(3) Be effective retroactive to the date the incorrect eligibility determination was made, if the decision finds the employer or employee eligible, or effective as of the date of the notice of the appeal decision, if eligibility is denied.

(m) *Notice of appeal decision.* The appeals entity must issue written notice of the appeal decision to the employer, or to the employer and employee if an employee is appealing, and to the SHOP within 90 days of the date the appeal request is received.

(n) *Implementation of SHOP appeal decisions.* The SHOP must promptly implement the appeal decision upon receiving the notice under paragraph (m) of this section.

(o) *Appeal record.* Subject to the requirements of § 155.550, the appeal record must be accessible to the employer, or employer and employee if an employee is appealing, in a convenient format and at a convenient time.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: December 6, 2012.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: December 19, 2012.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1026
Escrow Requirements Under the Truth in Lending Act (Regulation Z); Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1026

[Docket No. CFPB–2013–0001]

RIN 3170–AA16

Escrow Requirements Under the Truth in Lending Act (Regulation Z)

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule; official interpretations.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is publishing a final rule that amends Regulation Z (Truth in Lending) to implement certain amendments to the Truth in Lending Act made by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Regulation Z currently requires creditors to establish escrow accounts for higher-priced mortgage loans secured by a first lien on a principal dwelling. The rule implements statutory changes made by the Dodd-Frank Act that lengthen the time for which a mandatory escrow account established for a higher-priced mortgage loan must be maintained. The rule also exempts certain transactions from the statute's escrow requirement. The primary exemption applies to mortgage transactions extended by creditors that operate predominantly in rural or underserved areas, originate a limited number of first-lien covered transactions, have assets below a certain threshold, and do not maintain escrow accounts on mortgage obligations they currently service.

DATES: *Effective date:* The rule is effective June 1, 2013.

Applicability date: Its requirements apply to transactions for which creditors receive applications on or after that date.

FOR FURTHER INFORMATION CONTACT: David Friend or Ebunoluwa Taiwo, Counsels, Office of Regulations, at (202) 435–7700.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

In response to the recent mortgage crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to strengthen certain consumer protections under existing law. The Bureau of Consumer Financial Protection (Bureau) is issuing this final rule to implement provisions of the Dodd-Frank Act requiring creditors to establish escrow accounts for certain mortgage transactions to help ensure that consumers set aside funds to pay property taxes, and premiums for homeowners insurance, and other mortgage-related insurance required by the creditor. The final rule takes effect on June 1, 2013.

The final rule has three main elements:

- As directed by the Dodd-Frank Act, the rule amends existing regulations that require creditors to establish and maintain escrow accounts for at least one year after originating a ''higher-priced mortgage loan'' to require generally that the accounts be maintained for at least five years.
- The rule creates an exemption from the escrow requirement for small creditors that operate predominately in rural or underserved areas. Specifically, to be eligible for the exemption, a creditor must: (1) Make more than half of its first-lien mortgages in rural or underserved areas; (2) have an asset size less than $2 billion; (3) together with its affiliates, have originated 500 or fewer first-lien mortgages during the preceding calendar year; and (4) together with its affiliates, not escrow for any mortgage it or its affiliates currently services, except in limited instances. Under the rule, eligible creditors need not establish escrow accounts for mortgages intended at consummation to be held in portfolio, but must establish accounts at consummation for mortgages that are subject to a forward commitment to be purchased by an investor that does not itself qualify for the exemption.
- Finally, the rule expands upon an existing exemption from escrowing for insurance premiums (though not for property taxes) for condominium units to extend the partial exemption to other situations in which an individual consumer's property is covered by a master insurance policy.

II. Background

A. TILA and Regulation Z

Congress enacted the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.,* based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. One of the purposes of TILA is to provide meaningful disclosure of credit terms to enable consumers to compare credit terms available in the marketplace more readily and avoid the uninformed use of credit. TILA's disclosures differ depending on whether credit is an open-end (revolving) plan or a closed-end (installment) transaction. TILA also contains certain procedural and substantive protections for consumers.

With the enactment of the Dodd-Frank Act, general rulemaking authority under TILA transferred from the Board of Governors of the Federal Reserve System (Board) to the Bureau on July 21, 2011. Pursuant to the Dodd-Frank Act and TILA, as amended, the Bureau published for public comment an interim final rule establishing a new Regulation Z, 12 CFR part 1026, implementing TILA (except with respect to persons excluded from coverage by section 1029 of the Dodd-Frank Act). *See* 76 FR 79768 (Dec. 22, 2011). This rule did not impose any new substantive obligations but did make technical and conforming changes to reflect the transfer of authority and certain other changes made by the Dodd-Frank Act. The Bureau's Regulation Z took effect on December 30, 2011. An official commentary interprets the requirements of Regulation Z. By statute, creditors that follow in good faith official interpretations contained in the commentary are insulated from civil liability, criminal penalties, and administrative sanction.

On July 30, 2008, the Board published a final rule amending Regulation Z to establish new regulatory protections for consumers in the residential mortgage market pursuant to authority originally granted to the Board by the Home Ownership and Equity Protection Act of 1994 (HOEPA). *See* 73 FR 44522 (July 30, 2008) (2008 HOEPA Final Rule). Among other things, the 2008 HOEPA Final Rule defined a class of higher-priced mortgage loans that are subject to certain protections. A higher-priced mortgage loan was established by the 2008 HOEPA Final Rule as a closed-end transaction secured by a consumer's principal dwelling with an annual percentage rate that exceeds an ''average prime offer rate'' for a comparable transaction by 1.5 or more percentage points for transactions secured by a first lien, or by 3.5 or more percentage points for transactions secured by a subordinate lien.[1] Under the 2008 HOEPA Final Rule, such transactions are subject to a number of special requirements, including that creditors

[1] The ''average prime offer rate'' is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Bureau publishes average prime offer rates for a broad range of types of transactions in a table updated at least weekly, as well as the methodology the Bureau uses to derive these rates.

assess consumers' ability to repay such transactions before extending credit, that creditors establish escrow accounts for higher-priced mortgage loans secured by a first lien on a principal dwelling (with some exceptions), and imposes significant restrictions on the use of prepayment penalties. Specifically with regard to escrows, the rule required that creditors establish and maintain escrow accounts for property taxes and premiums for mortgage-related insurance required by the creditor for a minimum of one year after originating a higher-priced mortgage loan secured by a first lien on a principal dwelling. The escrow requirement was effective on April 1, 2010, for transactions secured by site-built homes, and on October 1, 2010, for transactions secured by manufactured housing.

B. The Dodd-Frank Act

On July 21, 2010, Congress enacted the Dodd-Frank Act after a cycle of unprecedented expansion and contraction in the mortgage market sparked the most severe U.S. recession since the Great Depression.[2] The Dodd-Frank Act created the Bureau and consolidated various rulemaking and supervisory authorities in the new agency, including the authority to implement HOEPA and TILA.[3] At the same time, Congress significantly amended the statutory requirements governing mortgage practices with the intent to restrict the practices that contributed to the crisis.

As part of these changes, the Dodd-Frank Act enacted several substantive requirements designed to address questionable practices in the mortgage market. Several of these provisions expanded upon elements of the 2008 HOEPA Final Rule. For instance, among other provisions, title XIV of the Dodd-Frank Act amends TILA to establish certain requirements for escrow accounts for consumer credit transactions secured by a first lien on a consumer's principal dwelling. Sections 1461 and 1462 of the Dodd-Frank Act create new TILA section 129D, 15 U.S.C. 1639d, which substantially codifies Regulation Z's escrow requirement for higher-priced mortgage loans but lengthens the period for which escrow accounts are required, adjusts the rate threshold for determining whether escrow accounts are required for ''jumbo loans,'' whose principal amounts exceed the maximum eligible for purchase by the Federal Home Loan Mortgage Corporation (Freddie Mac), and adds two disclosure requirements. The new section also authorizes the Bureau to create an exemption from the escrow requirement for transactions originated and held in portfolio by creditors that operate predominantly in ''rural or underserved'' areas and meet certain other prescribed criteria.

The Dodd-Frank Act also expanded upon the 2008 HOEPA Final Rule to require that creditors assess all consumers' ability to repay mortgage transactions, even if they are not higher-priced mortgage loans. Sections 1411 and 1412 set forth these ability-to-repay requirements and provide a presumption of compliance for certain ''qualified mortgages,'' including certain balloon-payment mortgages originated and held in portfolio by creditors that operate predominantly in ''rural or underserved'' areas and meet certain other prescribed criteria. The provisions for balloon-payment qualified mortgages and for the potential escrow exemption are similar but not identical under the statute.

In the spring of 2011, the Board issued two proposals to implement the escrow and ability-to-repay/qualified mortgage provisions. Specifically, on March 2, 2011, the Board published a proposed rule to implement the requirements of sections 1461 and 1462 of the Dodd-Frank Act. 76 FR 11598 (Mar. 2, 2011) (the Board's 2011 Escrows Proposal). The Board's 2011 Escrows Proposal would have amended the escrow requirement of Regulation Z, by creating an exemption for transactions by certain creditors operating in rural or underserved areas, and by establishing two new disclosure requirements relating to escrow accounts. The proposal also would have adjusted the threshold for ''higher-priced mortgage loans'' based on a loan's ''transaction coverage rate,'' rather than its annual percentage rate (APR). This element of the proposal grew out of a separate initiative by the Board in which it had proposed to expand the definition of finance charge to include more fees and charges, and thus also generally to increase APRs, under Regulation Z to make disclosures more useful to consumers. Because those changes would have caused more transactions to exceed the thresholds for higher-priced mortgage loans, the Board proposed using a ''transaction coverage rate'' metric to keep coverage levels relatively constant. *See* 74 FR 43232 (Aug. 26, 2009); 75 FR 58539, 58660–61 (Sept. 24, 2010).

On May 11, 2011, the Board published a proposal 2011 ATR Proposal to implement the ability-to-repay/qualified mortgage provisions added to TILA by the Dodd Frank Act, as discussed above. *See* 76 FR 27390 (May 11, 2011) (the Board's 2011 ATR Proposal). The Board's 2011 Escrows and 2011 ATR Proposals used similar definitions of ''rural'' and ''underserved'' but varied with regard to certain other proposed provisions for the balloon-payment qualified mortgage and escrow exemptions.

On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. On November 23, 2012, the Bureau published a final rule that delays the implementation of certain disclosure requirements contained in title XIV of the Dodd-Frank Act, including those contained in TILA section 129D, as added by Dodd-Frank Act sections 1461 and 1462. *See* 77 FR 70105 (Nov. 23, 2012). Consequently, the disclosure portions of the Board's 2011 Escrows Proposal will be the subject of future rulemaking by the Bureau and are not finalized in this rule.

C. Size and Volume of the Current Mortgage Origination Market

Even with the economic downturn and tightening of credit standards, approximately $1.28 trillion in mortgage loans were originated in 2011.[4] In exchange for an extension of mortgage credit, consumers promise to make regular mortgage payments and provide their home or real property as collateral. The overwhelming majority of homebuyers continue to use mortgages to finance at least some of the purchase price of their property. In 2011, 93 percent of all home purchases were financed with a mortgage credit transaction.[5]

Consumers may obtain mortgage credit to purchase a home, to refinance an existing mortgage, to access home equity, or to finance home improvement. Purchase transactions and refinancings together produced 6.3 million new first-lien mortgage originations in 2011.[6] The proportion of

[2] For a more in-depth discussion of the mortgage market, the financial crisis, and mortgage origination generally, see the Bureau's 2013 ATR Final Rule, discussed below in part III.C.

[3] Sections 1011, 1021, and 1061 of title X of the Dodd-Frank Act, the ''Consumer Financial Protection Act,'' Public Law 111–203, sections 1001–1100H, codified at 12 U.S.C. 5491, 5511, 5581. The Consumer Financial Protection Act is substantially codified at 12 U.S.C. 5481–5603.

[4] *Credit Forecast 2012,* Moody's Analytics (2012), available at: http://www.economy.com/default.asp (reflects first-lien mortgage loans) (data service accessibly only through paid subscription).

[5] 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 12 (2012).

[6] Credit Forecast 2012; 1 Inside Mortg. Fin., The 2012 Mortgage Market Statistical Annual 17 (2012).

transactions that are for purchases as opposed to refinancings varies with the interest rate environment and other market factors. In 2011, 65 percent of the market was refinance transactions and 35 percent was purchase transactions, by volume.[7] Historically the distribution has been more even. In 2000, refinancings accounted for 44 percent of the market while purchase transactions comprised 56 percent; in 2005, the two products were split evenly.[8]

With a home equity transaction, a homeowner uses his or her equity as collateral to secure consumer credit. The credit proceeds can be used, for example, to pay for home improvements. Home equity credit transactions and home equity lines of credit resulted in an additional 1.3 million mortgage originations in 2011.[9]

The market for higher-priced mortgage loans remains significant. Data reported under the Home Mortgage Disclosure Act (HMDA) show that in 2011 approximately 332,000 transactions, including subordinate liens, were reportable as higher-priced mortgage loans. Of these transactions, refinancings accounted for approximately 44 percent of the higher-priced mortgage loan market, and 90 percent of the overall higher-priced mortgage loan market involved first-lien transactions. The median first-lien higher-priced mortgage loan was for $81,000, while the interquartile range (where one quarter of the transactions are below, and one quarter of the transactions are above) was $47,000 to $142,000.

III. Summary of the Rulemaking Process

A. The Board's 2011 Escrows Proposal

The Board's 2011 Escrows Proposal would have made certain amendments to Regulation Z's escrow requirement, in accordance with the Dodd-Frank Act. First, the Board's 2011 Escrows Proposal would have expanded the minimum period for mandatory escrow accounts from one to five years, and under certain circumstances longer. Second, the Board's 2011 Escrows Proposal would have extended the partial exemption for certain transactions secured by a condominium unit to planned unit developments and other, similar property types that have governing associations that maintain a master insurance policy. Third, the Board's 2011 Escrows Proposal would have created an exemption from the escrow requirement for any transaction extended by a creditor that makes most of its first-lien higher-priced mortgage loans in counties designated by the Board as ''rural'' or ''underserved,'' has annual originations (together with affiliates) of 100 or fewer first-lien mortgage transactions originated and retained servicing rights in either the current or prior year, and does not escrow for any mortgage obligation it services. The Board's 2011 Escrows Proposal would have limited the definition of ''rural'' areas to those based on the ''urban influence codes'' numbered 7, 10, 11, and 12, maintained by the Economic Research Service (ERS) of the United States Department of Agriculture. Additionally, the Board's 2011 Escrows Proposal would also have designated a county as ''underserved'' where no more than two creditors extend consumer credit secured by a first lien on real property or a dwelling five or more times in that county during either of the two previous calendar years.

The Board's 2011 Escrows Proposal also would have established two new disclosure requirements relating to escrow accounts. One disclosure would have been required to be given three business days before consummation of a mortgage transaction for which an escrow account would have been established, explaining what an escrow account is, how it works, and the risks of not having an escrow account. The disclosure would also have contained the estimated amount of the first year's disbursements, the amount to be paid at consummation to fund the escrow account initially, the amount of the consumer's regular mortgage payments to be paid into the escrow account, as well as a statement that the amount of the regular escrow payment could change in the future.

In addition, the Board's 2011 Escrows Proposal would have created a second disclosure to be given for mortgage transactions where an escrow account would not be established or when an escrow account on an existing mortgage obligation was to be cancelled. This disclosure would have explained what an escrow account is, how it works, the risk of not having an escrow account, as well as the potential consequences of failing to pay home-related costs such as taxes and insurance in the absence of an escrow account. Further, it would have stated why there would be no escrow account or why it was being cancelled, as applicable, the amount of any fee imposed for not having an escrow account, and how the consumer could request that an escrow account be established or left in place, along with any deadline for such requests. The Board's 2011 Escrows Proposal would have required that this disclosure be delivered at least three business days before consummation or cancellation of the existing escrow account, as applicable.

B. Overview of Comments Received

The Bureau reviewed the approximately 70 comment letters submitted to the Board and in one case directly to the Bureau concerning the Board's 2011 Escrows Proposal. These comments came from mortgage creditors, banks, savings associations, credit unions, industry trade groups, Federal agencies and officials, individual consumers, and consumer advocates. In addition to this overview, comments received are discussed in more detail, where applicable, in part V below.

Commenters generally supported the Board's effort to implement the new Dodd-Frank Act escrow requirements. However, industry commenters expressed concerns about the costs of implementation, particularly with respect to the proposed disclosure requirements. In addition, several industry commenters recommended that the proposed exemptions from the escrow requirement for higher-priced mortgage loans be broadened to include: (1) Transactions a creditor holds in portfolio; (2) transactions made by community banks and local credit unions; (3) transactions made in broader areas than the Board's proposed definitions of ''rural'' and ''underserved''; and (4) transactions for certain chattel dwellings, including manufactured homes, trailers, and house boats.

In contrast, consumer advocates were concerned that certain provisions could allow creditors to skirt the proposed rule. Consumer advocates suggested a narrower exemption than the one proposed by the Board to ensure that higher-priced mortgage loans made in well-served rural areas would be subject to the escrow requirement.

C. Other Rulemakings

In addition to this final rule, the Bureau is adopting several other final rules and issuing one proposal, all relating to mortgage credit to implement requirements of title XIV of the Dodd-Frank Act. The Bureau is also issuing a final rule jointly with other Federal agencies to implement requirements for mortgage appraisals in title XIV. Each of the final rules follows a proposal issued in 2011 by the Board or in 2012 by the

[7] Inside Mortg. Fin., Mortgage Originations by Product, Mortgage Market Statistical Annual (2012).

[8] *Id.* These percentages are based on the dollar amounts of the transactions.

[9] *Credit Forecast 2012.*

Bureau alone or jointly with other Federal agencies. Collectively, these proposed and final rules are referred to as the Title XIV Rulemakings.

• *Ability to Repay:* The Bureau is finalizing a rule, following a May 2011 proposal issued by the Board (the Board's 2011 ATR Proposal),[10] to implement provisions of the Dodd-Frank Act (1) requiring creditors to determine that a consumer has a reasonable ability to repay covered transactions and establishing standards for compliance, such as by making a ''qualified mortgage,'' and (2) establishing certain limitations on prepayment penalties, pursuant to TILA section 129C as established by Dodd-Frank Act sections 1411, 1412, and 1414. 15 U.S.C. 1639c. The Bureau's final rule is referred to as the 2013 ATR Final Rule. Simultaneously with the 2013 ATR Final Rule, the Bureau is issuing a proposal to amend the final rule implementing the ability-to-repay requirements, including by the addition of exemptions for certain nonprofit creditors and certain homeownership stabilization programs and a definition of a ''qualified mortgage'' for certain mortgages made and held in portfolio by small creditors (the 2013 ATR Concurrent Proposal). The Bureau expects to act on the 2013 ATR Concurrent Proposal on an expedited basis, so that any exceptions or adjustments to the 2013 ATR Final Rule can take effect simultaneously with that rule.

• *HOEPA:* Following its July 2012 proposal (the 2012 HOEPA Proposal),[11] the Bureau is issuing a final rule to implement Dodd-Frank Act requirements expanding protections for ''high-cost mortgages'' under the Homeownership and Equity Protection Act (HOEPA), pursuant to TILA sections 103(bb) and 129, as amended by Dodd-Frank Act sections 1431 through 1433. 15 U.S.C. 1602(bb) and 1639. The Bureau also is finalizing rules to implement certain title XIV requirements concerning homeownership counseling, including a requirement that lenders provide lists of homeownership counselors to applicants for federally related mortgage loans, pursuant to RESPA section 5(c), as amended by Dodd-Frank Act section 1450. 12 U.S.C. 2604(c). The Bureau's final rule is referred to as the 2013 HOEPA Final Rule.

• *Servicing:* Following its August 2012 proposals (the 2012 RESPA Servicing Proposal and 2012 TILA Servicing Proposal),[12] the Bureau is adopting final rules to implement Dodd-Frank Act requirements regarding force-placed insurance, error resolution, information requests, and payment crediting, as well as requirements for mortgage loan periodic statements and adjustable-rate mortgage reset disclosures, pursuant to section 6 of RESPA and sections 128, 128A, 129F, and 129G of TILA, as amended or established by Dodd-Frank Act sections 1418, 1420, 1463, and 1464. 12 U.S.C. 2605; 15 U.S.C. 1638, 1638a, 1639f, and 1639g. The Bureau also is finalizing rules on early intervention for troubled and delinquent borrowers, and loss mitigation procedures, pursuant to the Bureau's authority under section 6 of RESPA, as amended by Dodd-Frank Act section 1463, to establish obligations for mortgage servicers that it finds to be appropriate to carry out the consumer protection purposes of RESPA, and its authority under section 19(a) of RESPA to prescribe rules necessary to achieve the purposes of RESPA. The Bureau's final rule under RESPA with respect to mortgage servicing also establishes requirements for general servicing standards policies and procedures and continuity of contact pursuant to its authority under section 19(a) of RESPA. The Bureau's final rules are referred to as the 2013 RESPA Servicing Final Rule and the 2013 TILA Servicing Final Rule, respectively.

• *Loan Originator Compensation:* Following its August 2012 proposal (the 2012 Loan Originator Proposal),[13] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring certain creditors and loan originators to meet certain duties of care, including qualification requirements; requiring the establishment of certain compliance procedures by depository institutions; prohibiting loan originators, creditors, and the affiliates of both from receiving compensation in various forms (including based on the terms of the transaction) and from sources other than the consumer, with specified exceptions; and establishing restrictions on mandatory arbitration and financing of single premium credit insurance, pursuant to TILA sections 129B and 129C as established by Dodd-Frank Act sections 1402, 1403, and 1414(a). 15 U.S.C. 1639b, 1639c. The Bureau's final rule is referred to as the 2013 Loan Originator Final Rule.

• *Appraisals:* The Bureau, jointly with other Federal agencies,[14] is issuing a final rule implementing Dodd-Frank Act requirements concerning appraisals for higher-risk mortgages, pursuant to TILA section 129H as established by Dodd-Frank Act section 1471. 15 U.S.C. 1639h. This rule follows the agencies' August 2012 joint proposal (the 2012 Interagency Appraisals Proposal).[15] The agencies' joint final rule is referred to as the 2013 Interagency Appraisals Final Rule. In addition, following its August 2012 proposal (the 2012 ECOA Appraisals Proposal),[16] the Bureau is issuing a final rule to implement provisions of the Dodd-Frank Act requiring that creditors provide applicants with a free copy of written appraisals and valuations developed in connection with applications for transactions secured by a first lien on a dwelling, pursuant to section 701(e) of the Equal Credit Opportunity Act (ECOA) as amended by Dodd-Frank Act section 1474. 15 U.S.C. 1691(e). The Bureau's final rule is referred to as the 2013 ECOA Appraisals Final Rule.

The Bureau is not at this time finalizing proposals concerning various disclosure requirements that were added by title XIV of the Dodd-Frank Act, integration of mortgage disclosures under TILA and RESPA, or a simpler, more inclusive definition of the finance charge for purposes of disclosures for closed-end mortgage transactions under Regulation Z. The Bureau expects to finalize these proposals and to consider whether to adjust regulatory thresholds under the Title XIV Rulemakings in connection with any change in the calculation of the finance charge later in 2013, after it has completed quantitative testing, and any additional qualitative testing deemed appropriate, of the forms that it proposed in July 2012 to combine TILA mortgage disclosures with the good faith estimate (RESPA GFE) and settlement statement (RESPA settlement statement) required under the Real Estate Settlement Procedures Act (RESPA), pursuant to Dodd-Frank Act section 1032(f) and sections 4(a) of RESPA and 105(b) of TILA, as amended by Dodd-Frank Act sections 1098 and 1100A, respectively (the 2012 TILA–RESPA Proposal).[17] Accordingly, the Bureau already has issued a final rule delaying implementation of various

[10] 76 FR 27390 (May 11, 2011).

[11] 77 FR 49090 (Aug. 15,2012).

[12] 77 FR 57200 (Sept. 17, 2012) (RESPA); 77 FR 57318 (Sept. 17, 2012) (TILA).

[13] 77 FR 55272 (Sept. 7, 2012).

[14] Specifically, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Federal Housing Finance Agency.

[15] 77 FR 54722 (Sept. 5, 2012).

[16] 77 FR 50390 (Aug. 21, 2012).

[17] 77 FR 51116 (Aug. 23, 2012).

affected title XIV disclosure provisions.[18] The Bureau's approaches to coordinating the implementation of the Title XIV Rulemakings and to the finance charge proposal are discussed in turn below.

Coordinated Implementation of Title XIV Rulemakings

As noted in all of its foregoing proposals, the Bureau regards each of the Title XIV Rulemakings as components of a single, comprehensive undertaking; each of them affecting aspects of the mortgage industry and its regulation. Many of these rules intersect with one or more of the others. Accordingly, as noted in its proposals, the Bureau is coordinating carefully the Title XIV Rulemakings, both in terms of their interrelated substantive provisions and, in recognition thereof, particularly with respect to their effective dates. The Dodd-Frank Act requirements to be implemented by the Title XIV Rulemakings generally will take effect on January 21, 2013, unless final rules implementing those requirements are issued on or before that date and provide for a different effective date. *See* Dodd-Frank Act section 1400(c), 15 U.S.C. 1601 note. In addition, some of the Title XIV Rulemakings are to take effect no later than one year after they are issued. *Id.*

The comments on the appropriate implementation date for this final rule are discussed in detail below in part VI of this notice. In general, however, consumer advocates requested that the Bureau put the protections in the Title XIV Rulemakings into effect as soon as practicable. In contrast, the Bureau received some industry comments indicating that implementing so many new requirements at the same time would create a significant cumulative burden for creditors. In addition, many commenters also acknowledged the advantages of implementing multiple revisions to the regulations in a coordinated fashion.[19] Thus, a tension exists between coordinating the adoption of the Title XIV Rulemakings and facilitating industry's implementation of such a large set of new requirements. Some have suggested that the Bureau resolve this tension by adopting a sequenced implementation, while others have requested that the Bureau simply provide a longer implementation period for all of the final rules.

The Bureau recognizes that many of the new provisions will require creditors to make changes to automated systems and, further, that most administrators of large systems are reluctant to make too many changes to their systems at once. At the same time, however, the Bureau notes that the Dodd-Frank Act established virtually all of these changes to institutions' compliance responsibilities, and contemplated that they be implemented in a relatively short period of time. And, as already noted, the extent of interaction among many of the Title XIV Rulemakings necessitates that many of their provisions take effect together. Finally, notwithstanding commenters' expressed concerns for cumulative burden, the Bureau expects that creditors actually may realize some efficiencies from adapting their systems for compliance with multiple new, closely related requirements at once, especially if given sufficient overall time to do so.

Accordingly, the Bureau is requiring that, as a general matter, creditors and other affected persons begin complying with the final rules on January 10, 2014. As noted above, section 1400(c) of the Dodd-Frank Act requires that some provisions of the Title XIV Rulemakings take effect no later than one year after the Bureau issues them. Accordingly, the Bureau is establishing January 10, 2014, one year after issuance of the Bureau's 2013 ATR, Escrows, and HOEPA Final Rules (*i.e.,* the earliest of the title XIV final rules), as the baseline effective date for most of the Title XIV Rulemakings. The Bureau believes that, on balance, this approach will facilitate the implementation of the rules' provisions, while also affording creditors sufficient time to implement the more complex or resource-intensive new requirements.

The Bureau has identified certain rulemakings or selected aspects thereof, however, that do not present significant implementation burdens for industry. Accordingly, the Bureau is setting earlier effective dates for those final rules or certain aspects thereof, as applicable. Those effective dates are set forth and explained in the **Federal Register** notices for those final rules.

More Inclusive Finance Charge Proposal

As noted above, the Bureau proposed in the 2012 TILA–RESPA Proposal to make the definition of finance charge more inclusive, thus rendering the finance charge and annual percentage rate a more useful tool for consumers to compare the cost of credit across different alternatives. 77 FR 51116, 51143 (Aug. 23, 2012). Because the new definition would include additional costs that are not currently counted, it would cause the finance charges and APRs on many affected transactions to increase. This in turn could cause more such transactions to become subject to various compliance regimes under Regulation Z. Specifically, the finance charge is central to the calculation of a transaction's ''points and fees,'' which in turn has been (and remains) a coverage threshold for the special protections afforded ''high-cost mortgages'' under HOEPA. Points and fees also will be subject to a 3-percent limit for purposes of determining whether a transaction is a ''qualified mortgage'' under the 2013 ATR Final Rule. Meanwhile, the APR serves as a coverage threshold for HOEPA protections as well as for certain protections afforded ''higher-priced mortgage loans'' under § 1026.35, including the mandatory escrow account requirements being amended by this final rule. Finally, because the 2013 Interagency Appraisals Final Rule uses the same APR-based coverage test as is used for identifying higher-priced mortgage loans, the APR affects that rulemaking as well. Thus, the proposed more inclusive finance charge would have had the indirect effect of increasing coverage under HOEPA and the escrow and appraisal requirements for higher-priced mortgage loans, as well as decreasing the number of transactions that may be qualified mortgages—even holding actual loan terms constant—simply because of the increase in calculated finance charges, and consequently APRs, for closed-end mortgage transactions generally.

As noted above, these expanded coverage consequences were not the intent of the more inclusive finance charge proposal. Accordingly, as discussed more extensively in the Escrows Proposal, the HOEPA Proposal, the ATR Proposal, and the Interagency Appraisals Proposal, the Board and subsequently the Bureau (and other agencies) sought comment on certain adjustments to the affected regulatory thresholds to counteract this

[18] 77 FR 70105 (Nov. 23, 2012).

[19] Of the several final rules being adopted under the Title XIV Rulemakings, six entail amendments to Regulation Z, with the only exceptions being the 2013 RESPA Servicing Final Rule (Regulation X) and the 2013 ECOA Appraisals Final Rule (Regulation B); the 2013 HOEPA Final Rule also amends Regulation X, in addition to Regulation Z. The six Regulation Z final rules involve numerous instances of intersecting provisions, either by cross-references to each other's provisions or by adopting parallel provisions. Thus, adopting some of those amendments without also adopting certain other, closely related provisions would create significant technical issues, *e.g.,* new provisions containing cross-references to other provisions that do not yet exist, which could undermine the ability of creditors and other parties subject to the rules to understand their obligations and implement appropriate systems changes in an integrated and efficient manner.

unintended effect. First, the Board and then the Bureau proposed to adopt a ''transaction coverage rate'' for use as the metric to determine coverage of these regimes in place of the APR. The transaction coverage rate would have been calculated solely for coverage determination purposes and would not have been disclosed to consumers, who still would have received only a disclosure of the expanded APR. The transaction coverage rate calculation would exclude from the prepaid finance charge all costs otherwise included for purposes of the APR calculation except charges retained by the creditor, any mortgage broker, or any affiliate of either. Similarly, the Board and Bureau proposed to reverse the effects of the more inclusive finance charge on the calculation of points and fees; the points and fees figure is calculated only as a HOEPA and qualified mortgage coverage metric and is not disclosed to consumers. The Bureau also sought comment on other potential mitigation measures, such as adjusting the numeric thresholds for particular compliance regimes to account for the general shift in affected transactions' APRs.

The Bureau's 2012 TILA–RESPA Proposal sought comment on whether to finalize the more inclusive finance charge proposal in conjunction with the Title XIV Rulemakings or with the rest of the TILA–RESPA Proposal concerning the integration of mortgage disclosure forms. *See* 77 FR 51116, 51125 (Aug. 23, 2012). Upon additional consideration and review of comments received, the Bureau decided to defer a decision whether to adopt the more inclusive finance charge proposal and any related adjustments to regulatory thresholds until it later finalizes the TILA–RESPA Proposal. *See* 77 FR 54843 (Sept. 6, 2012); 77 FR 54844 (Sept. 6, 2012).[20] Accordingly, this final rule as well as the 2013 HOEPA, ATR, and Interagency Appraisals Final Rules all are deferring any action on their respective proposed adjustments to regulatory thresholds.

IV. Legal Authority

The Bureau is issuing this final rule on January 10, 2013, in accordance with 12 CFR 1074.1, pursuant to its authority under TILA and the Dodd-Frank Act. *See* TILA section 105(a), 15 U.S.C. 1604(a). On July 21, 2011, section 1061 of the Dodd-Frank Act transferred to the Bureau the ''consumer financial protection functions'' previously vested in certain other Federal agencies, including the Board. The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [21] TILA is defined as a Federal consumer financial law. [22] Accordingly, the Bureau has general authority to issue regulations pursuant to TILA.

A. Escrow Provisions Under the Dodd-Frank Act

As discussed above, the Dodd-Frank Act amended TILA to mandate escrow accounts for certain consumer credit transactions secured by a first lien on a consumer's principal dwelling. Sections 1461 and 1462 of the Dodd-Frank Act create new TILA section 129D, which establishes a minimum period for which escrows must be held for higher-priced mortgage loans, creates a rate threshold for determining whether escrow accounts are required for ''jumbo loans,'' whose principal amounts exceed the maximum eligible for purchase by Freddie Mac, and adds two disclosure requirements concerning escrow accounts. The Dodd-Frank Act further provides that the Bureau may exempt certain creditors from the escrow requirement by regulation. *See* TILA section 129D(c), 15 U.S.C. 1639(c). In addition, the Dodd-Frank Act provides the Bureau with authority to prescribe regulations that revise, add to, or subtract from the criteria that describe when an escrow account is required upon a finding that such regulations are in the interest of the consumers and in the public interest. *See* 15 U.S.C. 1639d note.

B. Other Rulemaking and Exception Authorities

This final rule also relies on other rulemaking and exception authorities specifically granted to the Bureau by TILA and the Dodd-Frank Act, including the authorities discussed below.

TILA Section 105(a)

As amended by the Dodd-Frank Act, TILA section 105(a), 15 U.S.C. 1604(a), directs the Bureau to prescribe regulations to carry out the purposes of TILA, and provides that such regulations may contain additional requirements, classifications, differentiations, or other provisions and may provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. A purpose of TILA is '' * * * to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit* * * .'' TILA section 102(a), 15 U.S.C. 1601(a). This stated purpose is informed by Congress's finding that ''* * * economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit.'' *Id.* Thus, strengthened competition among financial institutions is a goal of TILA, achieved through the effectuation of TILA's purposes.

Historically, TILA section 105(a) has served as a broad source of authority for rules that promote the informed use of credit through required disclosures and substantive regulation of certain practices. However, Dodd-Frank Act section 1100A clarified the Bureau's section 105(a) authority by amending that section to provide express authority to prescribe regulations that contain ''additional requirements'' that the Bureau finds are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. This amendment clarified the Bureau's authority under TILA section 105(a) to prescribe requirements beyond those specifically listed in the statute that meet the standards outlined in section 105(a), which include effectuating all of TILA's purposes. Therefore, the Bureau believes that its authority under TILA section 105(a) to make exceptions, adjustments, and additional provisions that the Bureau finds are necessary or proper to effectuate the purposes of TILA applies with respect to the purpose of section 129D. That purpose is to ensure that consumers understand and appreciate the full cost of home ownership. The purpose of TILA section 129D is also informed by the findings articulated in section 129B(a) that economic stabilization would be enhanced by the

[20] These notices extended the comment period on the more inclusive finance charge and corresponding regulatory threshold adjustments under the 2012 TILA–RESPA and HOEPA Proposals. It did not change any other aspect of either proposal.

[21] 12 U.S.C. 5581(a)(1).

[22] *See* Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA).

protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible and affordable mortgage credit remains available to consumers. *See* 15 U.S.C. 1639b(a).

As discussed in the section-by-section analysis below, the Bureau is issuing regulations to carry out TILA's purposes, including such additional requirements, adjustments, and exceptions as, in the Bureau's judgment, are necessary and proper to carry out the purposes of TILA, prevent circumvention or evasion thereof, or to facilitate compliance therewith. In developing these aspects of the final rule pursuant to its authority under TILA section 105(a), the Bureau has considered the purposes of TILA, including the purposes of TILA section 129D, and the findings of TILA, including strengthening competition among financial institutions and promoting economic stabilization, and the findings of TILA section 129B(a)(1) that economic stabilization would be enhanced by the protection, limitation, and regulation of the terms of residential mortgage credit and the practices related to such credit, while ensuring that responsible, affordable mortgage credit remains available to consumers.

Dodd-Frank Act Section 1022(b)

Section 1022(b)(1) of the Dodd-Frank Act authorizes the Bureau to prescribe rules ''as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof[.]'' 12 U.S.C. 5512(b)(1). TILA and title X of the Dodd-Frank Act are Federal consumer financial laws.[23] Accordingly, in adopting this final rule, the Bureau is exercising its authority under Dodd-Frank Act section 1022(b) to prescribe rules that carry out the purposes and objectives of TILA and title X of the Dodd-Frank Act and prevent evasion of those laws.

V. Section-by-Section Analysis

Section 1026.19 Certain Mortgage and Variable-Rate Transactions

In the 2011 Escrows Proposal, the Board proposed a new § 226.19(f) to implement the account disclosure requirements of TILA section 129D, as enacted by Sections 1461 and 1462 of the Dodd- Frank Act. Proposed § 226.19(f)[24] would have required disclosures for the establishment or non-establishment of an escrow account in connection with consummation of a transaction secured by a first lien, but not a subordinate lien. As discussed above, on November 23, 2012, the Bureau published in the **Federal Register** a rule that delays the implementation of certain disclosure requirements contained in title XIV of the Dodd-Frank Act, including those contained in sections 1461 and 1462. *See* 77 FR 70105 (Nov. 23, 2012). Consequently, the Bureau will not be adopting a new § 1026.19(f) in this rule.

Section 1026.20 Subsequent Disclosure Requirements

In the 2011 Escrows Proposal, the Board proposed a new § 226.20(d) to implement the disclosure requirements of TILA sections 129D(j)(1)(B) and 129D(j)(2), as enacted by section 1462 of the Dodd-Frank Act. TILA section 129D(j)(1)(B) requires a creditor or servicer to provide the disclosures set forth in TILA section 129D(j)(2) when a consumer requests closure of an escrow account that was established in connection with a transaction secured by real property. Proposed § 226.20(d) would have directed the creditor or servicer to disclose the information about escrow accounts in accordance with certain format and timing requirements. As previously noted, the Bureau has delayed the implementation of certain disclosure requirements contained in title XIV of the Dodd-Frank Act, including those contained in sections 1461 and 1462. *See* 77 FR 70105 (Nov. 23, 2012). Consequently, the Bureau will not be adopting a new § 1026.20(d) in this rule.

Section 1026.34 Prohibited Acts or Practices in Connection With High-Cost Mortgages

34(a) Prohibited Acts or Practices for High-Cost Mortgages 34(a)(4)(i) Mortgage-Related Obligations

In the 2011 Escrows Proposal, the Board proposed amendments to the definition of mortgage-related obligations in § 226.34(a)(4)(i) and comment 34(a)(4)(i)–1, which contained cross-references to the definition of mortgage-related insurance in § 226.35(b)(3)(i). Because the Board proposed removing and reserving § 226.35(b)(3)(i) and preserving the substance of that provision in the proposed new § 226.45(b)(1), the Board made conforming amendments to § 226.34(a)(4)(i) and staff comment 34(a)(4)(i))–1 to reflect the new cross-reference. Section 1026.34(a)(4)(i) and staff comment 34(a)(4)(i)–1 are being amended under the 2013 HOEPA Final Rule to remove the cross-reference to § 1026.35(b)(3)(i). Consequently, the Bureau will not be adopting conforming amendments in this rule.

Section 1026.35 Requirements for Higher-Priced Mortgage Loans

35(a) Definitions

35(a)(1)

As noted above, the Dodd-Frank Act substantially codified the Board's escrow requirement for higher-priced mortgage loans, but with certain differences. One of those differences is the higher threshold above the average prime offer rate established by the Dodd-Frank Act for determining when escrow accounts are required for transactions that exceed the maximum principal balance eligible for sale to Freddie Mac (''jumbo'' transactions). In general, the coverage thresholds are 1.5 percentage points above the average prime offer rate for first-lien transactions and 3.5 percentage points above the average prime offer rate for subordinate-lien transactions. Under section 1461 of the Dodd-Frank Act, however, Congress established a new threshold of 2.5 percentage points above the average prime offer rate for ''jumbo'' transactions. Under an interim final rule published concurrently with the Board's 2011 Escrows Proposal, the Board implemented this special coverage test for ''jumbo'' transactions by amending its existing escrow requirement for higher-priced mortgage loans in § 226.35(b)(3). *See* 76 FR 11319 (Mar. 2, 2011) (the Board's 2011 ''Jumbo'' Final Rule).

Under the Board's 2011 Escrows Proposal, proposed § 226.45(a)(1) would have provided that a higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling that exceeds the applicable pricing threshold as of the date the transaction's rate is set. The Board's proposed § 226.45(a)(1) incorporated the special, separate coverage threshold for ''jumbo'' transactions, as provided by the Dodd-Frank Act. In addition, as discussed above, the Board's proposed § 226.45(a)(1) would have based ''higher-priced mortgage loan'' status on a comparison of the transaction's

[23] *See* Dodd-Frank Act section 1002(14), 12 U.S.C. 5481(14) (defining ''Federal consumer financial law'' to include the ''enumerated consumer laws'' and the provisions of title X of the Dodd-Frank Act); Dodd-Frank Act section 1002(12), 12 U.S.C. 5481(12) (defining ''enumerated consumer laws'' to include TILA).

[24] This section-by-section analysis discusses the Board's 2011 Escrows Proposal by reference to the Board's Regulation Z, 12 CFR part 226, which the Board proposed to amend, and discusses this final rule by reference to the Bureau's Regulation Z, 12 CFR part 1026, which this final rule amends.

''transaction coverage rate,'' rather than its APR, to the average prime offer rate.

A few commenters suggested that the proposed thresholds should be reconsidered. However, the Bureau believes the current thresholds capture the expansion intended by Congress and is therefore generally adopting proposed § 226.45(a)(1) as § 1026.35(a)(1). As discussed above, however, the Bureau is suspending consideration of the transaction coverage rate until it considers the proposed expansion of the definition of finance charge in connection with the TILA–RESPA Final Rule. Accordingly, the final rule continues to base the definition of higher-priced mortgage loans on a comparison of the transaction's APR to the average prime offer rate. The Bureau will consider comments received concerning the transaction coverage rate proposal in connection with the TILA–RESPA Final Rule. Comment 35(a)(1)–1 clarifies how to determine if a transaction is a higher-priced mortgage loan by comparing the annual percentage rate to the average prime offer rate. Comment 35(a)(1)–2 clarifies when the comparison between the annual percentage rate and the average prime offer rate should occur. Comment 35(a)(1)–3 clarifies how to determine whether a transaction is a higher-priced mortgage loan when the principal balance exceeds the limit in effect as of the date the transaction's rate is set for the maximum principal obligation eligible for purchase by Freddie Mac.

35(a)(2)

The Bureau is not altering current § 1026.35(a)(2), which defines the ''average prime offer rate'' as the annual percentage rate derived from average interest rates, points, and other transaction pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Bureau is, however, adding comment 35(a)(2)–3 to clarify that the average prime offer rate in § 1026.35 has the same meaning as in Regulation C, 12 CFR part 1003. *See* 12 CFR 1003.4(a)(12)(ii).

35(b) Escrow Accounts

35(b)(1)

As amended by the Dodd-Frank Act, TILA section 129D(a) contains the general requirement that an escrow account be established for any consumer credit transaction secured by a first lien on a consumer's principal dwelling. TILA section 129D(b), however, restricts that general requirement to four specified circumstances: (1) Where an escrow account is required by Federal or State law; (2) where the transaction is made, guaranteed, or insured by a State or Federal agency; (3) where the transaction's annual percentage rate exceeds the average prime offer rate by prescribed amounts; and (4) where an escrow account is ''required pursuant to regulation.''

The Board's proposed § 226.45(b)(1) implemented only the third of the four circumstances, pursuant to TILA section 129D(b)(3), because the other three either are self-effectuating or are effectuated by other agencies' regulations. Nonetheless, the Bureau recognizes that those other three provisions may have implications for existing State and Federal credit programs, under which the applicable agencies may need to revise their own underlying guidelines to accommodate or otherwise reflect the statutory changes. Moreover, the Board's proposed § 226.45(b)(1) would have stated that, for purposes of § 226.45(b), ''escrow account'' has the same meaning as under Regulation X. This proposed provision paralleled existing § 226.35(b)(3)(iv).

No comments were received on the scope and structure of § 226.45(b)(1). The Bureau is adopting the proposed language with certain technical changes as § 1026.35(b)(1).

35(b)(2) Exemptions

Under existing regulations, certain categories of transactions are exempt from the escrow requirement. The Board proposed § 226.45(a)(3) and (b)(2)(i) and (ii) to reflect these provisions. The Board's proposed § 226.45(a)(3) would have provided that a ''higher-priced mortgage loan'' does not include a transaction to finance the initial construction of a dwelling, a temporary or ''bridge'' transaction with a term of twelve months or less, a reverse mortgage transaction, or a home equity line of credit. This provision is identical to existing § 1026.35(a)(3) (adopted as § 226.35(a)(3) in the 2008 HOEPA Final Rule), which provides that the term ''higher-priced mortgage loan'' does not include a transaction to finance the initial construction of a dwelling, a temporary or ''bridge'' transaction with a term of twelve months or less, a reverse mortgage transaction, or a home equity line of credit. The Board's proposed § 226.45(b)(2)(i) would have provided that escrow accounts need not be established for transactions secured by shares in a cooperative. This provision would track existing § 1026.35(b)(3)(ii)(A). It also is consistent with new TILA section 129D(e), as added by section 1461 of the Dodd-Frank Act.

In light of the way in which the Dodd-Frank Act has expanded on various elements of the 2008 HOEPA Final Rule, the Bureau believes that a more tailored approach is appropriate to specify what types of transactions are exempt from specific substantive requirements in Regulation Z. Accordingly, with the exception of home equity lines of credit (HELOCs), the Bureau is using its exemption authority under TILA section 129D [25] to recodify the exemptions that were formerly located in § 1026.35(a)(3) and § 1026.35(b)(3)(ii)(A) in the exemptions from coverage of the escrow requirement under new § 1026.35(b)(2). The separate exemption for HELOCs is no longer necessary because § 1026.35(a)(1) has been modified to apply only to closed-end consumer credit transactions.[26] The Bureau believes that the use of its exemption authority is appropriate given the nature of the transactions at issue and would benefit consumers and industry alike. Given that reverse mortgages are unique transactions that are currently addressed by § 1026.33,[27] the Bureau believes it is in the interest of consumers and the public interest to pursue a course involving further review of § 1026.33 and to consider whether new or different protections would be appropriate for reverse mortgages at a later date.[28] In addition, because of the nature of construction-only and bridge loan transactions, the Bureau believes that exempting these transactions is in the interest of consumers and the public interest. In both cases, the payments and amounts of property taxes and hazard insurance will depend on various time-sensitive factors for loan transactions that generally do not exist for more than one or two years, making maintaining

[25] The Bureau may prescribe rules that revise, add to, or subtract from the criteria of section 129D(b) of TILA if the Bureau determines that such rules are in the interest of consumers and the public interest. *See* 15 U.S.C. 1639d note. These exceptions are also justified by section 105(a) of TILA which provides that the Bureau in its regulations to carry out the purposes of TILA may provide for such adjustments and exceptions for all or any class of transactions that the Bureau judges are necessary or proper to effectuate the purposes of TILA, to prevent circumvention or evasion thereof, or to facilitate compliance therewith. *See* 15 U.S.C. 1604(a).

[26] The Bureau notes that open-end credit transactions are excluded from section 129D(a) of TILA under Dodd-Frank Act section 1461. *See* 15 U.S.C. 1639d.

[27] Reverse mortgages are also excluded from section 129D(a) of TILA under Dodd-Frank Act section 1461. *See* 15 U.S.C. 1639d.

[28] *See, e.g.,* Consumer Financial Protection Bureau, *Reverse Mortgages: Report to Congress* (June 28, 2012) available at: *http://files.consumerfinance.gov/a/assets/documents/201206_cfpb_Reverse_Mortgage_Report.pdf.*

an escrow account for a minimum of five years impractical. The recodification of the other exemptions from the escrows requirements is purely for organizational purposes and has no substantive effect. Exemptions from the new appraisal requirements are being finalized separately by the 2013 Interagency Appraisals Final Rule, in § 1026.35(c).

35(b)(2)(i)

The Board's proposed § 226.45(b)(2)(i) would have provided that escrow accounts need not be established for transactions secured by shares in a cooperative, tracking the existing regulation, which is now located at § 1026.35(b)(3)(ii)(A). The Bureau is adopting this proposal with certain conforming changes as § 1026.35(b)(2)(i)(A). The Bureau is adopting the Board's proposed exemption for transactions to finance the initial construction of a dwelling as § 1026.35(b)(2)(i)(B). The Bureau is adopting the Board's proposed exemption for ''bridge'' loan transactions as § 1026.35(b)(2)(i)(C). Finally, the Bureau is adopting the Board's proposed exemption for reverse mortgage transactions as § 1026.35(b)(2)(i)(D) with certain conforming changes. Comment 35(b)(2)(i)–1 clarifies the operation of the exemption for transactions to finance the initial construction of a dwelling under § 1026.35(b)(2)(i)(B) in relation to a construction-to-permanent mortgage transaction, noting that where a transaction is determined to be a higher-priced mortgage loan, only the permanent phase of the transaction is subject to § 1026.35.

35(b)(2)(ii)

As added by section 1461 of the Dodd- Frank Act, new TILA section 129D(e) codifies the current provision stating that escrow accounts that are established in connection with transactions secured by condominium units need not reserve funds to cover mortgage-related insurance, found in existing § 1026.35(b)(3)(ii)(B), and expands it to other, similar ownership arrangements involving governing associations that have an obligation to maintain a master insurance policy. The Board's proposed § 226.45(b)(2)(ii) would have provided that insurance premiums need not be included in escrow accounts for transactions secured by dwellings in condominiums, planned unit developments (PUDs), or similar arrangements in which ownership requires participation in a governing association, where the governing association has an obligation to the dwelling owners to maintain a master policy insuring all dwellings.

Several commenters suggested that even with this expanded definition other ownership structures might not be captured by the Board's proposed exemption. The Bureau is responding to these comments by revising the proposed language to adopt the umbrella term ''common interest community,'' which one commenter had suggested would be sufficiently broad to capture the various arrangements under which a governing association has an obligation to the dwelling owners to maintain a master policy insuring all dwellings. The Bureau is adopting the Board's proposed comment 45(b)(2)(ii)–1 as comment 35(b)(2)(ii)–1, which parallels existing comment 35(b)(3)(ii)(B)–1, but with conforming amendments to reflect the expanded scope of the exemption. The Bureau also is adopting the Board's proposed comment 45(b)(2)(ii)–2 as comment A22b)(2)(ii)–2 to provide details about the nature of PUDs and to clarify that the exemption is available for not only condominiums and PUDs but also any other type of property ownership arrangement that has a governing association with an obligation to maintain a master insurance policy. Following a request from one commenter, the Bureau additionally adds comment 35(b)(2)(ii)–3 to clarify that properties with multiple governing associations would also qualify for the limited exemption provided in § 1026.35(b)(2)(ii).

35(b)(2)(iii)

As adopted by Dodd-Frank Act section 1461, TILA section 129D(c) authorizes the Bureau to exempt from the higher-priced mortgage loan escrow requirement a creditor that: (1) Operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual mortgage loan originations that do not exceed a limit set by the Bureau; (3) retains its mortgage obligations in portfolio; and (4) meets any asset-size threshold and any other criteria as the Bureau may establish. As discussed above, Dodd-Frank Act section 1412 ability-to-repay provisions contain a similar set of criteria with regard to certain balloon-payment mortgages originated and held in portfolio by creditors that operate predominantly in rural or underserved areas. The statute authorizes the Bureau to issue regulations permitting certain balloon-payment mortgages issued by the specified creditors to receive a presumption of compliance with the ability-to-repay requirements as ''qualified mortgages,'' even though the general qualified mortgage criteria prohibit balloon-payment features. Specifically, in addition to having to meet certain transaction-specific features and underwriting requirements, balloon-payment qualified mortgages may be made only by a creditor that: (1) Operates predominantly in rural or underserved areas; (2) together with all affiliates, has total annual residential mortgage transaction originations that do not exceed a limit set by the Bureau; (3) retains the balloon-payment mortgages in portfolio; and (4) meets any asset-size threshold and any other criteria as the Bureau may establish. *See* TILA section 129C(b)(2)(E), 15 U.S.C. 1639c(b)(2)(E).

The Board interpreted the two provisions as serving similar but not identical purposes, and thus varied certain aspects of the proposals to implement the balloon qualified mortgage and escrow provisions. Specifically, the Board interpreted the escrow provision as being designed to exempt creditors that do not possess economies of scale to offset cost-effectively the burden of establishing escrow accounts by maintaining a certain minimum portfolio size from being required to establish escrow accounts on higher-priced mortgage loans, and the balloon-payment qualified mortgage provision to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from community banks offering balloon-payment mortgages. Accordingly, the two Board proposals would have used similar definitions of ''rural'' and ''underserved,'' but did not provide uniformity in calculating and defining various other elements. Specifically, the Board's proposed § 226.45(b)(2)(iii) would have implemented the escrow exemption in TILA section 129D(c) by requiring that the creditor have (1) in the prior year made more than 50 percent of its first-lien higher-priced mortgage loans in rural or underserved areas, (2) together with all affiliates, originated and retained servicing rights to no more than 100 first-lien mortgage obligations in either the current or prior calendar year, and (3) together with all affiliates, not maintained an escrow account on any consumer credit transaction secured by real property or a dwelling that is currently serviced by the creditor or its affiliates. The Board also sought comment on whether to add a requirement for the creditor to meet an asset-size limit and what that size should be.

In contrast, the Board's proposal for balloon qualified mortgages would have required that the creditor (1) in the

preceding calendar year, have made more than 50 percent of its balloon-payment mortgages in rural or underserved areas; and (2) have assets that did not exceed $2 billion. The Board proposed two alternatives for qualifications relating to (1) the total annual originations limit; and (2) the retention of balloon-payment mortgages in portfolio.

In both cases, the Board proposed to use a narrow definition of rural based on the Economic Research Service (ERS) of the United States Department of Agriculture's (USDA) ''urban influence codes'' (UICs). The UICs are based on the definitions of ''metropolitan'' and ''micropolitan'' as developed by the Office of Management and Budget, along with other factors reviewed by the ERS that place counties into twelve separately defined UICs depending on the size of the largest city and town in the county. The Board's proposal would have limited the definition of rural to certain ''non-core'' counties, which are areas outside of any metropolitan or micropolitan area, excluding those adjacent to a metropolitan area of at least one million residents or adjacent to a micropolitan area with a town of at least 2,500 residents. This definition corresponded with UICs of 7, 10, 11, and 12, which would have covered areas in which only 2.3 percent of the nation's population lives.

In light of the overlap in criteria between the escrow exemption and balloon qualified mortgage provisions, the Bureau considered comments responding to both proposals in determining how to finalize the particular elements of each rule as discussed further below. With regard to exercising the Bureau's authority to create an escrows exemption in general, the bulk of the comments received asserted that the Bureau should exercise such authority but that the scope of the proposal was too limited and would lead to reduced access to credit or increased costs for consumers in rural areas because of increased compliance costs for creditors. Two industry commenters suggested a blanket exemption for community banks, but did not identify any criteria to define a community bank. Five industry commenters suggested the exemption should be based solely on loan-to-value ratio of the transaction being originated, ranging from 50 percent to 80 percent, without using any of the statutory requirements. Four trade association commenters suggested that the exemption should be based solely on whether the debt obligation was being kept in the creditor's portfolio. One consumer advocacy group stated that the exemption was too broad because, under its reading of section 1461 of the Dodd-Frank Act, the exemption was not meant to protect access to credit but, rather, to protect communities that need credit but cannot find credit with terms better than the terms of higher-priced mortgage loans.

The Bureau believes that escrows generally provide meaningful consumer protections, as consumers may not incorporate recurring costs related to the ownership of a dwelling to their monthly mortgage payments to anticipate the total costs associated with the dwelling. For consumers who struggle with their monthly mortgage payments, there is a higher probability of foreclosure as a result. Based on recent research,[29] consumers that do not have an escrow account in the first year after consummation result in 0.35 percent more foreclosures per year for first-lien, higher-priced mortgages. However, in rural and underserved areas where there are fewer creditors that may be willing to extend higher-priced mortgage loans, the number of providers could be further reduced when additional costs associated with establishing and maintaining escrow accounts are taken into account. The reduction in the number of providers could lead to some consumers being unable to obtain higher-priced mortgage loans, or to increase the costs of the higher-priced mortgage loans as a result of a concentrated market with limited competition to a point where the consumer would be unable to repay the higher-priced mortgage loan.

There are also substantial data suggesting that the small portfolio creditors that are most likely to have difficulty maintaining escrow accounts (or to rely on balloon loan transactions to manage their interest rate risks) have a significantly better track record than larger creditors with regard to the performance of their mortgage transactions. As discussed in more depth in the 2013 ATR Concurrent Proposal, because small portfolio creditors retain a higher percentage of their transactions on their own books, they have strong incentives to engage in thorough underwriting. To minimize performance risk, small community creditors have developed underwriting standards that differ from those employed by larger institutions. Small creditors generally engage in ''relationship banking,'' in which underwriting decisions rely at least in part on qualitative information gained from personal relationships between creditors and consumers. This qualitative information focuses on subjective factors such as consumer character and reliability which ''may be difficult to quantify, verify, and communicate through the normal transmission channels of banking organization.'' [30] While it is not possible to disaggregate the impact of each of the elements of the community banking model, the combined effect is highly beneficial. Moreover, where consumers have trouble paying their mortgage obligations, small portfolio creditors have stronger incentives to work with the consumers to get them back on track, to protect both the creditors' balance sheets and their reputations in their local communities. Market-wide data demonstrate that mortgage delinquency and charge-off rates are significantly lower at smaller banks than at larger banks.[31]

The Bureau believes that Congress carefully weighed these considerations in authorizing the Bureau to establish an exemption in TILA section 129D(c) to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from community banks that cannot maintain escrow accounts on a cost-effective basis. Thus, the Bureau concludes that exercising its authority is appropriate, but also that the exemption should implement the statutory criteria to ensure it effectuates Congress's intent. Accordingly, as discussed in more detail below, the Bureau is adopting § 1026.35(b)(2)(iii) largely as proposed, but with certain changes described below, to implement TILA section 129D(c).

In particular, the Bureau has concluded that it is appropriate to make the specific creditor qualifications much more consistent between the balloon-payment qualified mortgage and escrow exemptions than originally proposed by the Board.[32] The Bureau believes that

[29] Nathan B. Anderson and Jane B. Dokko, *Liquidity Problems and Early Payment Default Among Subprime Mortgages,* Finance and Economics Discussion Series, Federal Reserve Board (2011), available at: *http://www.federalreserve.gov/pubs/feds/2011/201109/201109pap.pdf.*

[30] *See* Allen N. Berger and Gregory F. Udell, *Small Business Credit Availability and Relationship Lending: The Importance of Bank Organizational Structure,* Economic Journal (2002).

[31] *See* 2013 ATR Concurrent Proposal; FDIC, Community Banking Study, December 2012, available at: *http://www.fdic.gov/regulations/resources/cbi/report/cbi-full.pdf.*

[32] The Bureau has similarly attempted to maintain consistency between the asset-size limit, annual originations threshold, and requirements concerning portfolio transactions as between the final rules that it is adopting with regard to balloon qualified mortgages and the escrow exemption and its separate proposal to create a new type of qualified mortgage originated and held by small

Continued

this approach is justified by several considerations, including the very similar statutory language, the similar congressional intents underlying the two provisions, and the fact that requiring small creditors operating predominantly in rural or underserved areas to track overlapping but not identical sets of technical criteria for each separate provision could create unwarranted compliance burden that itself would frustrate the intent of the statutes. Although the Bureau has recast and loosened some of the criteria to promote consistency, the Bureau has carefully calibrated the changes to further the purpose of each rulemaking. Further, the Bureau believes that any risk to consumers from the modifications is minimal given the nature of the small creditors' operations and in particular the fact that they are required to hold the affected transactions in portfolio (in this final rule's case, indirectly, by virtue of the requirement that a transaction originated under the escrow exemption not be subject to a forward commitment at consummation). As discussed in more detail below and in the 2013 ATR Concurrent Proposal, which also proposes to adopt several of the criteria to define a new type of qualified mortgage, the creditors at issue have strong motivations to provide vigorous underwriting and high levels of customer service to protect their balance sheets and reputations in their local communities. This motivation is manifest in the fact that they have demonstrably lower credit losses on their mortgage originations than larger institutions.

For the foregoing reasons, the Bureau is adopting § 1026.35(b)(2)(iii) to implement TILA section 129D(c) by providing that a transaction is exempt from the escrow account requirement otherwise applicable to a higher-priced mortgage loan if the creditor: (1) In the preceding calendar year made more than 50 percent of its first-lien covered transactions in counties designated by the Bureau as ''rural'' or ''underserved''; (2) together with all affiliates extended 500 or fewer first-lien covered transactions in the preceding calendar year; and (3) has total assets that are less than $2 billion, adjusted annually for inflation. The final rule also creates greater parallelism with the balloon qualified mortgage provision with regard to the requirement that the affected transactions be held in portfolio by requiring in both rules that the transactions not be subject to a ''forward commitment'' agreement at the time of consummation. These qualifications and the other requirements under the final rule are discussed in more detail below.

35(b)(2)(iii)(A)

''Operates Predominantly in Rural or Underserved Areas''

Under TILA section 129D(c)(1), to qualify for the exemption, a creditor must ''operate predominantly in rural or underserved areas.'' The Board's 2011 Escrows Proposal would have required a creditor to have made during the preceding calendar year more than 50 percent of its first-lien higher-priced mortgage loans in ''rural or underserved'' counties. One industry commenter agreed with the Board's proposal. Numerous commenters to the Board's proposal in this rule and the Board's 2011 ATR Proposal objected to the proposed definition of ''rural or undeserved'' as discussed below, but commenters did not generally dispute the definition of ''predominantly'' as meaning more than 50 percent of originations of its first-lien higher-priced mortgage loans in rural or underserved counties.

The Bureau believes Congress enacted the exemption in TILA section 129D(c)(1) to ensure access to credit in rural and underserved areas where consumers may be able to obtain credit only from community banks or other small creditors serving those areas. The ''operates predominantly in'' requirement serves to limit the exemption to these institutions. To remove this portion of the qualifications of the creditor would be to circumvent Congress's stated requirement that the exemption was intended for creditors operating predominantly in rural or underserved areas. The Bureau believes that ''predominantly'' indicates a portion greater than half, hence the regulatory requirement of more than 50 percent.

Upon further analysis of the differences in the proposals for the escrows exemption and the balloon-payment qualified mortgage provisions, however, the Bureau believes that further harmonization between the two sets of requirements is warranted. The Board's 2011 Escrows Proposal would have required creditors to track first-lien higher-priced mortgage loans by county, while the qualified mortgage proposal would have required creditors to track balloon-payment mortgages. Given that the underlying statutory language regarding ''operates predominantly'' is the same in each instance and that tracking each type of mortgage separately would increase administrative burden, the Bureau believes it is appropriate to base the threshold for both rules on the distribution of all first-lien ''covered transactions'' as defined in § 1026.43(b)(1). As provided in the 2013 ATR Final Rule, a covered transaction is defined in § 1026.43(b)(1) as a consumer credit transaction that is secured by a dwelling, as defined in § 1026.2(a)(19), other than a transaction exempt from coverage under § 1026.43(a). The Bureau believes that counting only first-lien transactions will facilitate compliance, as well as promote consistency in applying to creditors the two exemptions under both rulemakings, since both exemptions relate to first-lien transactions. Balloon-payment mortgages that will meet the qualifications of the balloon-payment qualified mortgage exemption will be first-lien covered transactions, as having subordinate financing along with the balloon-payment mortgage would be rare since it further constrains a consumers' ability to build equity in the property and to refinance the balloon-payment mortgage when it becomes due. Subordinate-lien, higher-priced mortgage loans are not required to establish escrow accounts, as only first-lien higher priced mortgage loans must establish escrow accounts under § 1026.35(b)(1).

Accordingly, § 1026.35(b)(2)(iii)(A) provides that, during the preceding calendar year, a creditor must have made more than 50 percent of its total first-lien covered transactions in counties designated ''rural'' or ''underserved'' as defined by § 1026.35(b)(2)(iv), discussed below. Comment 35(b)(2)(iii)–1.i states that the Bureau publishes annually a list of counties that qualify as rural or underserved.

35(b)(2)(iii)(B)

Total Annual Mortgage Originations

TILA section 129D(c)(3) provides that, to qualify for the exemption, a creditor together with its affiliates must have total annual mortgage originations that do not exceed a limit set by the Bureau. The Board's proposed § 226.45(b)(2)(iii)(B) required that the creditor and its affiliates, during either of the preceding two calendar years, have originated and retained servicing rights to 100 or fewer mortgage obligations secured by a first lien on real property or a dwelling. Although the Dodd-Frank Act requirement to establish escrow accounts applies only

portfolio creditors. The Bureau is seeking comment in that proposal on these elements and on whether other adjustments are appropriate to the existing rules to maintain continuity and reduce compliance burden. *See* the 2013 ATR Concurrent Proposal.

to higher-priced mortgage loans that are secured by first liens, the Board reasoned that it was appropriate to base the threshold on all first-lien originations because creditors are free to establish escrow accounts for all of their first-lien mortgages voluntarily to achieve the scale necessary to escrow cost-effectively. The Board estimated that a minimum servicing portfolio size of 500 is necessary to escrow cost-effectively, and assumed that the average life expectancy of a mortgage loan is about five years. Based on this reasoning, the Board believed that creditors would no longer need the benefit of the exemption if they originated and serviced more than 100 first-lien transactions per year. In contrast, the Board did not propose a specific annual originations threshold in connection with the balloon-payment qualified mortgages, but rather sought comment on whether to adopt a threshold based on the number of transactions or dollar volume and what numeric threshold would be appropriate.

In connection with the Board's 2011 Escrows Proposal, trade association and industry commenters generally said that the proposed maximum annual volume of originations would be insufficient to make the escrow accounts cost effective for creditors. No commenters provided information to support their suggestions for alternative thresholds or to refute the Board's analysis that creditors can provide escrow accounts cost-effectively when they annually originate and retain servicing rights to more than 100 mortgage obligations secured by a first lien on real property or a dwelling. Suggestions for higher thresholds ranged from 200 to 1,000 mortgage obligations per year originated and serviced. One consumer advocacy commenter suggested the proposed threshold was too high because it counted only first-lien mortgage transactions, instead of all mortgage obligations, but offered no specific alternative amount. Two industry commenters also suggested that the origination limit should measure only the number of higher-priced mortgage loans originated and serviced by the creditor and its affiliates.

In response to the Board's 2011 ATR Proposal, two trade associations and one group of State bank regulators, argued that other criteria, such as the asset-size limit or portfolio requirement, were sufficient and that neither a volume nor a total annual originations limit would be necessary. One industry trade association suggested combining the proposed alternatives and permitting creditors to elect under which limit they would operate. Other trade group and industry commenters indicated that the total annual originations limit would be preferable because of the varying dollar amount of transactions originated, which would constrain the number of consumers with limited credit options who could obtain balloon-payment mortgages in rural or underserved areas. Four trade group and industry commenters suggested a range for the total annual originations limit of 250 to 1,000 transactions.

The Bureau believes that the requirement of TILA section 129D(c)(2) reflects a recognition that larger creditors have the systems capability and operational scale to establish cost-efficient escrow accounts. Similarly, the Bureau believes the requirement of TILA section 129C(b)(2)(E)(iv)(II) reflects Congress's recognition that larger creditors who operate in rural or underserved areas should be able to make credit available without resorting to balloon-payment mortgages. In light of the strong concerns expressed in both rulemakings about the potential negative impacts on small creditors in rural and underserved areas, the Bureau conducted further analysis to try to determine the most appropriate thresholds, although it was significantly constrained by the fact that data are limited with regard to mortgage originations in rural and underserved areas generally and in particular with regard to originations of balloon-payment mortgages.

The Bureau started with the premise that it would be preferable to use the same annual originations threshold in both rules to reflect the consistent language in both statutory provisions focusing on total annual mortgage loan originations, to facilitate compliance by not requiring institutions to track multiple metrics and to promote consistent application of the two exemptions. This approach requires significant reconciliation between the two proposals, however, because the escrows proposal focused specifically on transactions originated and serviced to gauge creditors' ability to maintain escrow accounts over time, while retention of servicing is not directly relevant to the balloon-payment qualified mortgage. However, to the extent that creditors chose to offer balloon-payment mortgages to manage their interest rate risk without having to undertake the compliance burdens involved in administering adjustable rate mortgages over time, the Bureau believes that both provisions are focused in a broad sense on accommodating creditors whose systems constraints might otherwise cause them to exit the market.

With this in mind, the Bureau ultimately decided to adopt a threshold of 500 or fewer annual originations of first-lien transactions for both rules. The Bureau believes that this threshold will provide greater flexibility and reduce concerns that the specific threshold that had been proposed in the Board's 2011 Escrows Proposal (100 higher-priced mortgage loans originated and serviced annually in either of the preceding two years) would reduce access to credit by excluding creditors that need special accommodations in light of their capacity constraints. At the same time, the increase is not as dramatic as it may first appear because the Bureau's analysis of HMDA data suggests that even small creditors are likely to sell a significant number of their originations in the secondary market. Assuming that most mortgage transactions that are retained in portfolio are also serviced in house, the Bureau estimates that a creditor originating no more than 500 first-lien transactions per year would maintain and service a portfolio of about 670 mortgage obligations over time, assuming an average obligation life expectancy of five years.[33] Thus, the higher threshold will help to ensure that creditors that are subject to the escrow requirement do in fact maintain portfolios of sufficient size to maintain the escrow accounts on a cost efficient basis over time, in the event that the Board's estimate of a minimum portfolio of 500 transactions was too low. However, the Bureau believes that the 500 annual originations threshold in combination with the other requirements will still ensure that the balloon-payment qualified mortgage and escrow exemptions are available only to small creditors that focus primarily on a relationship-lending model and face significant systems constraints.

The Bureau also believes that it is appropriate to focus the annual originations threshold on all first-lien originations. Given that escrow accounts are typically not maintained for transactions secured by subordinate liens, the Bureau does not believe that it makes sense to count such transactions toward the threshold because they would not contribute to a creditor's ability to achieve cost-efficiency. At the same time, the Bureau believes it is appropriate to count all

[33] A review of 2011 HMDA data shows creditors that otherwise meet the criteria of § 1026.43(f)(1)(vi) and originate between 200 and 500 or fewer first-lien covered transactions per year average 134 transactions per year retained in portfolio. Over a five year period, the total portfolio for these creditors would average 670 mortgage obligations.

first-lien transactions toward the threshold because creditors can voluntarily establish escrow accounts for such transactions to increase the cost-effectiveness of their program even though the mandatory account requirements under the Dodd-Frank Act apply only to first-lien, higher-priced mortgage loans. Focusing on all first-lien originations also provides a metric that is useful for gauging the relative scale of creditors' operations for purposes of the balloon-payment qualified mortgages, while focusing solely on the number of higher-priced mortgage loan originations would not. Accordingly, the Bureau adopts § 1026.35(b)(2)(iii)(B) requiring to creditor and its affiliates to have originated 500 or fewer covered transactions secured by a first lien.

35(b)(2)(iii)(C)

Asset-Size Threshold

TILA section 129D(c)(4) provides that, to qualify for the exemption, a creditor must meet any asset-size threshold established by the Bureau. The Board's 2011 Escrows Proposal did not establish an asset-size threshold but did request comment on whether one should be added and, if so, what threshold level would be appropriate. In contrast, the Board proposed a $2 billion threshold for the balloon qualified mortgage exception. This number was based on the limited data available to the Board at the time of the proposal. Based on that limited information, the Board reasoned that none of the entities it identified as operating predominantly in rural or underserved areas had total assets as of the end of 2009 greater than $2 billion, and therefore, the limitation should be set at $2 billion. The Board expressly proposed setting the asset-size threshold at the highest level currently held by any of the institutions that appear to be smaller institutions that served areas with otherwise limited credit options.

In response to the Board's 2011 Escrows Proposal, a group of State bank regulators and a trade association advocated including an asset-size prerequisite in the exemption. The group of State bank regulators suggested that the asset-size prerequisite be the sole requirement to obtain the exemption but did not propose a specific dollar threshold. The industry commenter suggested the asset-size be $1 billion in assets, but did not provide a rationale for the amount.

Based on the Board's 2011 ATR Proposal, one group of State bank regulators suggested that the asset-size threshold be included and be the only requirement for a creditor to qualify for the balloon-mortgage qualified mortgage exemption. Two trade association commenters suggested that a $2 billion asset-size threshold was appropriate, with one also suggesting that the asset-size threshold be the only requirement for a creditor to qualify for the balloon-payment qualified mortgage exemption. One industry commenter suggested that the asset-size threshold be $10 billion.

For reasons discussed above, the Bureau is adopting an annual originations limit as contemplated by the statute. Given that limitation, restricting the asset size of institutions that can claim the exemption is of limited importance. Nonetheless, the Bureau believes that an asset-size limitation is still helpful because very large institutions should have sufficient resources to adapt their systems to make mortgages without a balloon payment and to establish and maintain escrow accounts even if the scale of their mortgage operations is relatively modest. A very large institution with a relatively modest mortgage operation also does not have the same type of reputational and balance-sheet incentives to maintain the same kind of relationship-banking model as a smaller community-based creditor. An asset-size limitation can guard against circumvention of the rule if a larger institution were to elect to enter a rural area to make a limited number of higher-priced mortgage loans or balloon-payment mortgages. Therefore, the Bureau believes that the $2 billion asset limitation proposed by the Board in the Board's 2011 ATR Proposal remains an appropriate limitation and should be adopted in both this final rule and the 2013 ATR Final Rule.[34]

Accordingly, the Bureau adopts § 1026.35(b)(2)(iii)(C) to require creditors to have total assets as of the end of the preceding calendar year that are less than $2 billion and is effectively adopting the same threshold by cross-reference to § 1026.35(b)(2)(iii) for purposes of the balloon-payment qualified mortgage exemption in the 2013 ATR Final Rule. As provided in § 1026.35(b)(2)(iii)(C), this threshold dollar amount will adjust automatically each year based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI–W), not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars. Comment 35(b)(2)(iii)–1.iii recites this initial threshold and further clarifies that a creditor that had total assets below the threshold on December 31 of the preceding year satisfies this criterion for purposes of the exemption during the current calendar year. The comment also notes that the Bureau will publish notice of each year's asset threshold by amending the comment.

35(b)(2)(iii)(D)

Creditor and Affiliates Do Not Maintain Escrows

As adopted by section 1461 of the Dodd-Frank Act, TILA section 129D(c)(4) provides that, to qualify for the exemption, a creditor must meet any other criteria established by the Bureau consistent with the provisions of TILA. The Board's proposed § 226.45(b)(2)(iii)(C) would have required that, to obtain the exemption, the creditor and its affiliates not maintain an escrow account for any mortgage they currently service through at least such mortgage obligation's second installment due date. The Board used the second installment due date as a cutoff point because it recognized that a creditor may sometimes hold a mortgage obligation for a short period after consummation to take steps necessary before transferring and assigning the mortgage debt obligation to the intended investor. The Board recognized that the process of transferring and assigning the mortgage obligation could extend beyond the mortgage obligation's first payment due date, especially when the first payment is due shortly after consummation.

The Board believed this additional condition was necessary to effectuate the purpose of the exemption. The Board reasoned that, if a creditor already establishes and maintains escrow accounts, it has the capacity to escrow and therefore has no need for the exemption. Moreover, the Board concluded that a creditor's capacity to escrow should reflect not only its own activities but those of any affiliate because it assumed that a creditor could rely on its affiliate to help meet the escrow requirement. The Board sought comment, however, on three aspects: first, whether affiliates' capacities to escrow should be considered; second, whether the second payment due date is the appropriate cutoff point for whether a creditor has established an escrow account for purposes of the exemption; and third, whether the proposal should allow some *de minimis* number of

[34] The $2 billion threshold reflects the purposes of the exemption and the structure of the mortgage servicing industry. The Bureau's choice of $2 billion in assets as a threshold for purposes of TILA section 129D(c)(4) does not imply that a threshold of that type or of that magnitude would be an appropriate way to distinguish small firms for other purposes or in other industries.

mortgage obligations for which escrows are maintained and, if so, what that number should be.

Six trade association commenters, five industry commenters and a Federal agency submitted comments noting that many creditors had only begun to establish escrow accounts for mortgage transactions after the Board adopted the 2008 HOEPA Final Rule, which took effect for most transactions in April 2010. Many of the same commenters argued that it would be unfair to deny the exemption in TILA section 129D(c) to those creditors that established escrow accounts only to comply with the current escrow requirements. Two trade association commenters and one industry commenter suggested a *de minimis* number of mortgage obligations ranging from 10 to 50 mortgage obligations to address the exclusion of creditors currently escrowing that would otherwise qualify for the exemption. In addition, one industry commenter suggested that a creditor that establishes escrow accounts for distressed mortgage obligations should still be eligible for the exemption, as these creditors are doing so as an accommodation to the consumer to attempt to avoid foreclosure. No comments were received as to whether the second payment due date is the appropriate cutoff point for whether a creditor has established an escrow account for purposes of the exemption.

The Bureau is adopting the Board's proposal in § 1026.35(b)(2)(iii)(D), with the addition of two exceptions based on comments received. The Bureau agrees with the Board generally that creditors that currently provide escrow accounts can afford to establish and maintain escrow accounts for higher-priced mortgage loans. Thus, to qualify for the exemption, a creditor and its affiliates must not maintain escrow accounts for any extensions of consumer credit secured by real property or a dwelling that the creditor, or its affiliates, currently services through at least the second installment due date. However, the Bureau agrees with commenters that those creditors that would otherwise qualify for the exemption but for their compliance with the current regulation, and creditors that establish escrow accounts as an accommodation to distressed consumers, should still be able to qualify for the exemption in TILA section 129D(c). In particular, the Bureau notes that Congress's decision to codify and expand upon the escrow requirement from the 2008 HOEPA Final Rule while simultaneously providing authority to exempt certain mortgage transactions by creditors operating predominantly in rural or underserved areas suggests that Congress intended to provide relief to creditors that were struggling to meet the existing requirements. Accordingly, the Bureau is adopting § 1026.35(b)(2)(iii)(D)(*1*) and (*2*) to provide exceptions to the exemption's general prerequisite that a creditor and its affiliates not maintain an escrow account.

Comment 35(b)(2)(iii)–1.iv clarifies that the limitation excluding creditors and their affiliates who currently maintain escrow accounts for other mortgage obligations they service applies only to mortgage obligations serviced at the time a transaction purporting to invoke the escrows exemption is consummated. Thus, the exemption still could apply even if the creditor or its affiliates previously established and maintained escrows for mortgage obligations it no longer services. However, if a creditor or an affiliate escrows for mortgage obligations currently serviced, those institutions are ineligible to invoke the escrows exemption until the escrow accounts are no longer maintained. The comment also clarifies that a creditor or its affiliate ''maintains'' an escrow account for a mortgage obligation only if it services the mortgage obligation at least through the due date of the second periodic payment under the terms of the legal obligation.

Comment 35(b)(2)(iii)(D)(*1*)–1 clarifies that escrow accounts created by a creditor and its affiliates established between April 1, 2010, and June 1, 2013 are not counted for purposes of § 1026.35(b)(2)(iii)(D). In addition, the comment clarifies that creditors that continue to maintain escrow accounts that were established between April 1, 2010, and June 1, 2013 until the termination of those escrow accounts will still qualify for the exemption, so long as they or their affiliates do not establish escrow accounts for other mortgage obligations that the creditor and its affiliates service after June 1, 2013 and they otherwise qualify under § 1026.35(b)(2)(iii). Comment 35(b)(2)(iii)(D)(*2*)–1 clarifies that escrow accounts established after consummation for distressed consumers are not considered to be maintaining escrow accounts for purposes of § 1026.35(b)(2)(iii)(D), although creditors that establish escrow accounts after consummation as a regular business practice are considered to be maintaining escrow accounts and cannot qualify for the exception under § 1026.35(b)(2)(iii).

35(b)(2)(iv)

''Rural'' and ''Underserved'' Defined

As adopted in the Dodd-Frank Act, TILA section 129D(c)(1) requires, among other criteria for the escrows exemption, that the creditor operate predominantly in ''rural'' and ''underserved'' areas, but does not define either term. As discussed above, the Board proposed separate definitions for ''rural'' and ''underserved,'' respectively, in both the Board's 2011 Escrows Proposal and the 2011 ATR Proposal, and the definitions for the two terms were similar across the two proposals.

Commenters on the two proposals addressed the specific definitions themselves but not the necessity of creating a definition for ''rural'' that is separate from ''underserved.'' The Bureau is adopting the Board's approach in § 1026.35(b)(2)(iv) which establishes a definition of rural that is separate from underserved. Thus, creditors' activity in either type of area will count toward their eligibility for the escrows exemption and for making balloon-payment qualified mortgages.

''Rural.'' As described above, the Board's proposed definition of rural for purposes of both the balloon-payment qualified mortgage and escrows exemptions would have relied upon the ERS's ''urban influence codes'' (UICs), which in turn are based on the definitions of ''metropolitan statistical area'' and ''micropolitan statistical area.'' [35] The Board's proposal would have limited the definition of rural to certain ''non-core'' counties, which are areas outside of any metropolitan or micropolitan area that are not adjacent to a metropolitan area with at least one million residents or to a micropolitan area with a town of at least 2,500 residents. This definition corresponded to UICs 7, 10, 11, and 12. The counties that would have been covered under the Board's proposed definition contain 2.3 percent of the United States population under the 2000 census. The Board believed this approach limited the definition of ''rural'' to those properties most likely to have only limited sources of mortgage credit because of their remoteness from urban centers and their resources. However, the Board sought comment on all aspects of this approach to defining rural, including whether the definition should be broader or

[35] The ERS places counties into twelve separately defined UICs depending on the size of the largest city or town in the county or in adjacent counties. Descriptions of UICs can be found on the ERS Web site at *http://www.ers.usda.gov/data-products/urban-influence-codes/documentation.aspx.*

narrower or based on information other than UIC codes.

Many commenters to both the 2011 ATR Proposal and the 2011 Escrows Proposal, including more than a dozen trade group commenters, several individual industry commenters, one association of State banking regulators, and a United States Senator, stated that the rural definition was too narrow. The trade association and industry commenters, and the group of State banking regulators, had various proposals to broaden the definition, from the addition of other UICs and a combination of county population and asset size to the adoption of other regulatory definitions of ''rural,'' such as those governing credit unions. The comment from a United States Senator suggested using the eligibility of a property to secure a single-family mortgage under the USDA's Rural Housing Loan program as the definition of a rural property.

The Bureau agrees that a broader definition of ''rural'' is appropriate to ensure access to credit with regard to both the escrows and balloon-payment qualified mortgage exemptions. In particular, the Bureau believes that all ''non-core'' counties should be encompassed in the definition of rural, including counties adjacent to a metropolitan area of at least one million residents or a county with a town of at least 2,500 residents (*i.e.,* counties with a UIC of 4, 6, or 9 in addition to the counties with the UICs included in the Board's definition). The Bureau also believes that micropolitan areas that are not adjacent to a metropolitan area should be included within the definition of rural (*i.e.,* counties with a UIC of 8), as these areas are not located adjacent to metropolitan areas that are served by many creditors. These counties have significantly fewer creditors originating higher-priced mortgage loans and balloon-payment mortgages than other counties.[36] Including these counties within the definition of rural would result in 9.7 percent of the U.S. population being located within rural areas. Under this definition, only counties in metropolitan areas or in micropolitan areas adjacent to metropolitan areas would be excluded from the definition of rural.

The Bureau also considered adopting the definition of rural used to determine the eligibility of a property to secure a single-family mortgage under the USDA's Rural Housing Loan program. This definition subdivides counties into rural and non-rural areas based upon whether certain areas are open country, or contain a town, village, city or place, with certain population criteria, and excludes areas associated with an urban area. Given the size of some counties, particularly in western States, this approach may provide a more nuanced measure of access to credit in some areas than a county-by-county metric. However, use of the Rural Housing Loan metrics would incorporate such significant portions of metropolitan and micropolitan counties that 37 percent of the United States population would be within areas defined as rural. Based on a review of HMDA data and the location of mortgage transactions originated by HMDA reporting entities, the average number of creditors in the areas that would meet the USDA's Rural Housing Loan program definition of rural is ten. The Bureau believes that a wholesale adoption of the Rural Housing Loan definitions would therefore expand the definition of rural beyond the intent of the escrow and balloon-payment qualified mortgage exemptions under sections 1412 and 1461 of the Dodd-Frank Act by incorporating areas in which there is robust access to credit.

Accordingly, the final rule implements § 1026.35(b)(2)(iv)(A) to provide that a county is rural if it is neither in a metropolitan statistical area, nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area. The Bureau intends to continue studying over time the possible selective use of the Rural Housing Loan program definitions and tools provided on the USDA Web site to determine whether a particular property is located within a ''rural'' area. For purposes of initial implementation, however, the Bureau believes that defining ''rural'' to include more UIC categories creates an appropriate balance to preserve access to credit and create a system that is easy for creditors to implement.

''Underserved.'' The Board's proposed § 226.45(b)(2)(iv)(B) would have defined a county as ''underserved'' during a calendar year if no more than two creditors extend credit secured by a first lien on real property or a dwelling five or more times in that county. The definition was based on the Board's judgment that, where no more than two creditors are significantly active, the inability of one creditor to offer a higher-priced mortgage loan would be detrimental to consumers who would have limited credit options because only one creditor, or no creditors, would be left to provide the higher-priced mortgage loan. Essentially, a consumer who could only qualify for a higher-priced mortgage loan would be required to obtain credit from the remaining creditor in that area or would be left with no credit options at all. Most of the same commenters that stated that the proposed definition of rural was too narrow, as discussed above, also stated that this definition of underserved was too narrow. The commenters proposed various different standards, including standards that considered the extent to which the property was in a rural area, as an alternate definition of underserved.

The Bureau agrees with the Board that the purpose of the exemption is to permit creditors to continue to offer credit to consumers, rather than to refuse to make higher-priced mortgage loans if such creditors' withdrawal would significantly limit consumers' ability to obtain mortgage credit. In light of this rationale, the Bureau believes that ''underserved'' should be implemented in a way that protects consumers from losing meaningful access to mortgage credit and that it is appropriate to focus the definition on identifying areas where the withdrawal of a creditor from the market could leave no meaningful competition for consumers' mortgage business. The Bureau notes that the final rule's expanded definition of ''rural,'' as discussed above, will also address concerns about access to credit in many areas. Accordingly, the Bureau is adopting § 1026.35(b)(2)(iv)(B) to define a property as ''underserved'' if it is located in a county where no more than two creditors extend covered transactions secured by a first lien five or more times in that county during a calendar year, substantially consistent with the Board's proposal. As adopted, § 1026.35(b)(2)(iv)(B) also expressly states that the numbers of creditors and of their originations in counties for purposes of this definition is as reported in HMDA data for the year in question.

[36] A review of data from HMDA reporters indicates that there were 700 creditors in 2011 that otherwise meet the requirements of new § 1026.35(b)(2)(iii), of which 391 originate higher-priced mortgage loans in counties that meet the definition of rural, compared to 2,110 creditors that otherwise meet the requirements of § 1026.35(b)(2)(iii) that originate balloon-payment mortgages in counties that would not be rural. The 391 creditors originated 12,921 higher-priced mortgage loans, representing 30 percent of their 43,359 total mortgage loan originations. A review of data from credit unions indicates that there were 830 creditors in 2011 that otherwise meet the requirements of § 1026.35(b)(2)(iii), of which 415 originate balloon-payment and hybrid mortgages in counties that meet the definition of rural, compared to 3,551 creditors that otherwise meet the requirements of § 1026.35(b)(2)(iii) that originate balloon-payment mortgages in counties that would not be rural. The 415 creditors originated 4,980 balloon-payment mortgage originations, representing 20 percent of their 24,968 total mortgage loan originations.

The Bureau adopted this definition based on HMDA data to provide an objective, easily administered rule and one that is consistent with the purpose of preserving credit access in underserved areas. Given that many smaller creditors may not be subject to HMDA reporting requirements, the Bureau recognizes that many counties may be underserved under the definition being adopted, because it is based on HMDA data, yet additional information (if it were available) could reveal that more than two creditors are significantly active in such counties. The Bureau may examine further whether a refinement to the underserved definition is warranted.

Commentary guidance on ''rural'' and ''underserved'' definitions. Comment 35(b)(2)(iv)–1 clarifies that the Bureau will annually update on its Web site a list of counties deemed rural or underserved under the definitions of rural and underserved in § 1026.35(b)(2)(iv). It also clarifies that the definition of rural corresponds to UICs 4, 6, 7, 8, 9, 10, 11, and 12, as determined by the Economic Research Service of the USDA. It further clarifies that the definition of underserved counties is based on HMDA data. Finally, the comment provides that the Bureau also publishes a list of only those counties that are rural but not also underserved, to facilitate compliance with § 1026.35(c).[37] As this final rule takes effect on June 1, 2013, the Bureau expects to publish lists applicable for the current year within approximately four to six weeks after publication of this final rule, but in any event before this final rule takes effect.

35(b)(2)(v)

As established by the Dodd-Frank Act, TILA section 129D(c)(3) requires that the exemption from the escrow requirements apply only where a creditor ''retains its mortgage loan originations in portfolio'' and meets the other statutory requirements. Because the escrow requirements must be applied at the time that a transaction is consummated, while qualified mortgage status may continue for the life of the mortgage obligation, the Board did not propose to implement this requirement consistently with the 2011 ATR Proposal. The Board's proposed § 226.45(b)(2)(v) would have provided that the escrow exemption is not available for certain transactions that, at consummation, are subject to ''forward commitments.'' Forward commitments are agreements entered into at or before consummation of a transaction under which a purchaser is committed to acquire the mortgage obligation from the creditor after consummation. In addition, the Board included a proposed comment to § 226.45(b)(2)(v) which would have clarified that the forward commitment provision would have applied whether the forward commitment refers to the specific transaction or the higher-priced mortgage loan meets prescribed criteria of the forward commitment in order to address a potential method to avoid compliance. The Board's 2011 ATR Proposal, in contrast, proposed two alternatives for comment, either prohibiting a creditor to qualify if it has sold any balloon-payment qualified mortgages at any time or prohibiting a creditor to qualify if it has sold any balloon-payment qualified mortgages in the current or prior calendar year.

The Board considered requiring that a transaction be held in portfolio after consummation as a condition of the escrows exemption, but concluded that this approach would have raised operational problems. Whether a mortgage obligation is held in portfolio can be determined only after consummation, but a creditor making a higher-priced mortgage loan must know by consummation whether it is subject to the escrow requirement. The Board expressed concern that requiring an escrow account to be established sometime after consummation if the creditor in fact sells the mortgage obligation could put a significant burden on consumers, who may not have the money available to make a significant advance payment. In contrast, the Board reasoned that the forward commitment test would be easy to apply at consummation, and would be unlikely to be circumvented by small creditors because they would be reluctant to extend credit for transactions they do not intend to keep in portfolio unless they have the assurance of a committed buyer before extending the credit. Thus, proposed § 226.45(b)(2)(v) would have served as a means of indirectly limiting the exemption to mortgage obligations that are to be held in portfolio. The Board sought comment, however, on whether institutions could easily evade the escrow requirement by making higher-priced mortgage loans without a forward commitment in place and thereafter selling them to non-exempt purchasers and how to address this possibility without relying on post-consummation events.

Among the commenters, there was a divergence of opinion on how this provision would work in practice. One trade association commenter stated that the forward commitment requirement would prevent creditors from selling portfolio mortgage obligations in the future. This appears to be a misreading of the Board's proposal, as it would not have restricted the sale of higher-priced mortgage loans. The Board's proposed § 226.45(b)(2)(v) instead merely provided that, so long as the higher-priced mortgage loan was not subject to a forward commitment at the time of consummation, the higher-priced mortgage loan could later be sold on the secondary market without requiring an escrow account to be established at that time. One consumer advocacy group, concerned about the possibility that creditors would use the provision to skirt the escrow requirements, suggested a blanket rule that higher-priced mortgage loans that are exempt must be maintained in the portfolio of the creditor or, alternatively, that upon sale secondary market purchasers be required to establish escrow accounts for such mortgage obligations.

After reviewing the comments received, the Bureau believes that the Board's proposal is an appropriate method to implement the requirements of TILA section 129D(c)(3), as both creditor and consumer benefit if an escrow account is established at consummation of the transaction, rather than months or years later. Indeed, allowing a consumer to avoid having to make a single large lump-sum payment after consummation is part of the basic purpose of establishing an escrow account. Accordingly, the Bureau is following the approach in the Board's proposal by adopting § 1026.35(b)(2)(v) to require that for a higher-priced mortgage loan to be exempt from the requirements under § 1026.35(b)(1), the higher-priced mortgage loan must not be subject to a forward commitment to be acquired by a creditor that does not satisfy the conditions of § 1026.35(b)(2)(iii). Comment 35(b)(2)(v)–1 clarifies that a higher-priced mortgage loan that is subject to a forward commitment is subject to the escrow requirement under § 1026.35(b)(1), whether the forward commitment refers to the specific transaction or the higher-priced

[37] Section 1026.35(c) is being adopted separately by the Bureau jointly with other Federal agencies, to implement the new appraisal requirements in TILA section 129H, in the 2013 Interagency Appraisals Final Rule, as discussed in part III.C, above. That new section provides an exemption for creditors operating in rural, but not underserved, areas. Consequently, the single, combined list of all counties that are either rural or underserved that the Bureau will publish annually for purposes of the exemption from this final rule's escrow requirement is inadequate for the analogous purpose under the new appraisal requirements in § 1026.35(c).

mortgage loan meets prescribed criteria of the forward commitment, along with an example. As discussed separately in the Bureau's 2013 ATR Final Rule, the Bureau is also adopting language in § 1026.43(f) to provide that qualified mortgage status is not available to balloon-payment mortgages that would otherwise qualify for the exemption if the transactions are subject to a forward commitment at the time of consummation.

35(b)(3) Cancellation

Under TILA section 129D(d), a creditor or servicer of a higher-priced mortgage loan must maintain an escrow account for a minimum of five years following consummation, unless the underlying debt obligation is terminated earlier under certain prescribed circumstances. In addition, even after five years have elapsed, TILA section 129D(d) provides that an escrow account shall remain in existence unless and until the consumer is current on the obligation and has accrued sufficient equity in the dwelling securing the consumer credit transaction ''so as to no longer be required to maintain private mortgage insurance.''

The Board's proposed § 226.45(b)(3) would have implemented TILA section 129D(d) by permitting cancellation of the escrow account only upon the earlier of termination of the legal obligation or five years after consummation, provided that at least 20 percent of the original value of the property securing the underlying debt obligation is unencumbered and the consumer currently is not delinquent or in default on the underlying debt obligation. The Board modeled its proposal after the prerequisites for cancellation of private mortgage insurance coverage under the Homeowners Protection Act of 1998 (HPA), 12 U.S.C. 4901–4910. Under the HPA, the consumer may initiate cancellation of private mortgage insurance (PMI) once the outstanding balance of the mortgage obligation is first scheduled to reach 80 percent of the original value of the property, regardless of the outstanding balance, based on the amortization schedule or actual payments. In addition, servicers must automatically terminate PMI for residential mortgage transactions on the earliest date that the principal balance of the mortgage is first scheduled to reach 78 percent of the original value of the secured property securing the mortgage obligation, where the consumer is current. The Board sought comment on this proposal, as well as whether TILA section 129D(d)(1) should be interpreted narrowly to mean that, among consumers with escrow accounts required pursuant to proposed § 226.45(b)(1), only those that in fact have private mortgage insurance must meet the minimum equity requirement under the HPA as a prerequisite for cancelling their escrow accounts.

Commenters generally agreed with the Board's approach of requiring the 80 percent loan-to-value (LTV) ratio for consumer-requested PMI termination, rather than the 78 percent LTV ratio for automatic PMI termination. Several commenters remarked, however, that the proposed language defining the equity cancellation requirement as ''at least 20% of the original value of the property securing the underlying debt obligation is unencumbered'' was confusing, if not misleading.

The final rule follows the general approach in the Board's proposal by adopting § 1026.35(b)(3) to establish the cancellation criteria for escrow accounts as provided by TILA section 129D(d). In response to comments, § 1026.35(b)(3) contains revised language describing the equity necessary for cancellation as an unpaid principal balance that is less than 80 percent of the original value of the property securing the underlying debt obligation. Additionally, the Bureau is adopting the Board's proposed comment 45(b)(3)–1 as comment 35(b)(3)–1 to clarify that termination of the underlying credit obligation could include, among other things, repayment, refinancing, rescission, and foreclosure. Comment 35(b)(3)–2 clarifies that § 1026.35(b)(3) does not affect the right or obligation of a creditor or servicer, pursuant to the terms of the legal obligation or applicable law, to offer or require an escrow account after the minimum period dictated by § 1026.35(b)(3). Finally, comment 35(b)(3)–3 notes that the term ''original value'' in § 1026.35(b)(3)(ii)(A), as adopted from section 2(12) of the HPA, 12 U.S.C. 4901(12), means the lesser of the sales price reflected in the sales contract for the property, if any, or the appraised value of the property at the time the transaction was consummated.

35(c)

The Board proposed to reserve § 226.45(c) for future use in implementing section 1471 of the Dodd-Frank Act, which creates new TILA section 129H to establish certain appraisal requirements applicable to ''higher-risk mortgages.'' Consistent with that proposal, the Bureau is reserving § 1026.35(c) in this final rule, thus permitting that section to be finalized separately in the 2013 Interagency Appraisals Final Rule, discussed above. As discussed in part III.C, the 2013 Interagency Appraisals Final Rule will take effect subsequent to this final rule.

35(d) Evasion; Open-End Credit

The Board's proposed § 226.45(d) would have paralleled existing § 1026.35(b)(4) in prohibiting a creditor from structuring a home-secured transaction as an open-end plan to evade the requirements of proposed § 226.45 in connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in § 226.2(a)(20). No comments were received regarding the scope or substance of this proposal. The Bureau has adopted the Board's proposal in § 1026.35(d), with certain technical edits.

VI. Effective Date

As indicated above, this final rule is effective June 1, 2013. Thus, compliance with this final rule will be mandatory over eight months earlier than the January 21, 2014 baseline mandatory compliance date that the Bureau is adopting for most of the Title XIV Rulemakings, as discussed above in part III.C. As that discussion notes, the Bureau is carefully coordinating the implementation of the Title XIV Rulemakings, including their effective dates. The Bureau is including this final rule, however, among a subset of the new requirements of the Title XIV Rulemakings that will have earlier effective dates because they do not present significant implementation burdens for industry. For the following reasons, the Bureau believes that this final rule presents little or no compliance burden for creditors and therefore that an accelerated implementation period is appropriate.

Although the Board's 2011 Escrows Proposal did not expressly solicit comment on an appropriate implementation period, four industry trade associations commented on this question. Of the four, one represents financial services companies, and three represent credit unions. All four expressed concern that sufficient time be afforded industry to implement the new requirements when finalized, either as a general matter or specifically because of system changes that would be required. The trade association representing financial services companies merely stated that sufficient time to implement the final rule would be necessary without stating any specific period. Of the other three trade associations, one recommended an implementation period of one year and two recommend 6 to 12 months. The

Bureau notes, however, that these commenters' concerns regarding the implementation period, particularly those relating to necessary system changes, were largely centered around two aspects of the Board's proposal: (1) The proposed new disclosures, and (2) the new ''transaction coverage rate'' proposed to be used instead of the annual percentage rate for determining whether a transaction is a higher-priced mortgage loan subject to the escrow requirements. As discussed above in the applicable section-by-section analyses, the Bureau is not adopting either of those aspects of the Board's proposal in this final rule.

The final rule does not expand either the universe of transactions to which the escrow requirements apply or the universe of creditors subject to them. Indeed, the new exemption adopted by this final rule for higher-priced mortgage loans extended by small creditors that operate in rural or underserved areas represents a reduction in compliance burden for creditors that meet the exemption's prerequisites. Moreover, the expansion of the partial exemption for condominiums to other property types where the governing association has an obligation to maintain a master policy insuring all dwellings, such as planned unit developments, also represents additional compliance burden relief for creditors.

The only expansion of substantive requirements under this final rule is the extension from one to five years of the minimum duration generally applicable to escrow accounts required by the rule. The Bureau believes that even this expansion of the protection afforded consumers by escrow accounts will impose at most a modest increase in compliance burden for creditors because it simply extends an otherwise already applicable requirement by four additional years. Even this minimal additional burden will not be encountered by any creditor until at least one year after the rule's effective date, when cancellation of mandatory escrow accounts otherwise first would have become permissible for the earliest higher-priced mortgage loans to be made after this final rule takes effect.

The Bureau believes that both the burden relief for certain small creditors and the expanded protection for consumers of maintaining escrows for four additional years warrant expedited implementation to avoid any unnecessary delay of either. Such expedited implementation especially is warranted given that, in particular where the Bureau is not adopting the two aspects of the Board's proposal that commenters identified as requiring significant time to implement, little or no new compliance burden accompanies such implementation. For these reasons, the Bureau is limiting the implementation period for this final rule by making it effective on June 1, 2013.

VII. Dodd-Frank Act Section 1022(b)(2)

A. Overview

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts,[38] and has consulted or offered to consult with the prudential regulators, the U.S. Department of Housing and Urban Development, and the Federal Trade Commission (FTC), including with respect to consistency with any prudential, market, or systemic objectives that may be administered by such agencies. The Bureau is issuing this final rule to finalize the Board's 2011 Escrows Proposal, which the Board issued prior to the transfer of rulemaking authority to the Bureau. As the Board was not subject to Dodd-Frank Act section 1022(b)(2)(B), the Board's 2011 Escrows Proposal did not contain a proposed Dodd-Frank Act section 1022 analysis. The Board did generally request comment on projected implementation and compliance costs, although commenters provided little information in response. As discussed above, the Bureau's final rule implements certain amendments to the Truth in Lending Act made by the Dodd-Frank Act. Specifically, the final rule lengthens the time for which a mandatory escrow account established for a higher-priced mortgage loan must be maintained from a minimum period of one year to five years. In addition, the final rule creates an exemption from the escrow requirement for certain transactions extended by a creditor that meets four conditions. Those conditions are that the creditor: (1) Makes most of its first-lien covered transactions in rural or underserved counties; (2) during the preceding calendar year, together with its affiliates, originated 500 or fewer first-lien covered transactions; (3) has an asset size less than $2 billion; and (4) together with its affiliates, generally does not escrow for any mortgage obligation that it or its affiliates currently services, except in limited circumstances. For eligible creditors, the final rule provides the exemption from the escrow requirements for transactions held in portfolio, but not for transactions that, at consummation, are subject to a forward commitment to be purchased by an investor that does not itself qualify for the exemption.

The analysis below considers the benefits, costs, and impacts of key provisions of the final rule. With respect to these provisions, the analysis considers costs and benefits to consumers and costs and benefits to covered persons. The analysis also considers certain alternative provisions that were considered by the Bureau in the development of the final rule.

Because the Bureau's final rule implements certain self-effectuating amendments to TILA, the costs and benefits of the final rule will arise largely from the statute and not from the final rule that implements them. The Bureau's final rule would provide benefits compared to allowing these TILA amendments to take effect alone, however, by clarifying parts of the statute that call for interpretation and using the Bureau's exemption authority to exempt certain creditors who would otherwise be required to implement the escrow provisions. Greater clarity on these amendments, as provided by the final rule, should reduce the compliance burdens on covered persons by, for example, reducing costs for attorneys and compliance officers as well as potential costs of over-compliance and unnecessary litigation.[39] Exempting certain financial institutions from the escrow requirement should reduce compliance costs and regulatory burdens for such institutions as well as provide greater access to credit for consumers in rural and underserved areas. The Bureau notes that any costs that these provisions impose beyond the statute itself are likely to be minimal.

Section 1022 of the Dodd-Frank Act permits the Bureau to consider the benefits, costs and impacts of the final rule solely compared the effects of the statute taking effect without an implementing regulation. To provide the public better information about the benefits and costs of the statute, however, the Bureau has chosen to consider the benefits, costs, and impacts of these major provisions of the

[38] Section 1022(b)(2) of the Dodd-Frank Act calls for the Bureau to consider the potential benefits and costs of a regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services; the impact on depository institutions and credit unions with $10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas.

[39] The Bureau notes that it is focused here on the fact that regulatory provisions that clarify statutory provisions mitigate certain compliance costs associated with uncertainty over what the statutory provisions require. While it is possible that some clarifications would put greater burdens on creditors as compared to what the statute would ultimately be found to mandate, the Bureau believes that the rule's clarifying provisions generally mitigate burden.

proposed rule against a pre-statutory baseline (*i.e.,* the benefits, costs, and impacts of the statute and the regulation combined). The Bureau notes at the outset that there are only limited data that are publicly available and representative of the full universe of mortgage credit, including in particular with respect to rural and underserved communities. Additionally, there are limited data regarding the use of escrow accounts subsequent to the Board's 2008 HOEPA Final Rule.

B. Potential Benefits and Costs to Consumers and Covered Persons

Congress enacted sections 1461 and 1462 of the Dodd-Frank Act as amendments to TILA. As amended, TILA requires the establishment of escrow accounts for certain transactions, establishes minimum periods for which such required escrow accounts must be maintained, and requires certain disclosures relating to escrow accounts. The Bureau's final rule implements certain of these requirements. In addition, the amendments authorize the Board, and now the Bureau, to create certain exemptions from the escrow requirements for transactions originated by creditors meeting certain prescribed criteria. These amendments are being adopted in furtherance of the Bureau's charge to prescribe regulations to carry out the purposes of TILA, including promoting consumers' awareness of the cost of credit and their informed use thereof.

The Bureau has relied on a variety of data sources to analyze the potential benefits, costs, and impacts of the final rule. However, in some instances, the requisite data are not available or are quite limited. Data with which to quantify the benefits of the final rule are particularly limited. As a result, portions of this analysis rely in part on general economic principles to provide a qualitative discussion of the benefits, costs, and impacts of the final rule. The primary source of data used in this analysis is HMDA.[40] Because the latest data available are for originations made in calendar year 2011, the empirical analysis generally uses the 2011 market as the baseline. Data from the fourth quarter 2011 bank and thrift Call Reports,[41] the fourth quarter 2011 credit union call reports from the National Credit Union Administration (NCUA), and de-identified data from the National Mortgage Licensing System (NMLS) Mortgage Call Reports (MCR)[42] for the fourth quarter of 2011 were also used to identify financial institutions and their characteristics. The unit of observation in this analysis is the entity: If there are multiple subsidiaries of a parent company, then their originations are summed, and revenues are total revenues for all subsidiaries.

The estimates in this analysis are based upon data and statistical analyses performed by the Bureau. To estimate counts and properties of mortgages for entities that do not report under HMDA, the Bureau has matched HMDA data to Call Report data and MCR data and has statistically projected estimated transaction counts for those depository institutions that do not report these data either under HMDA or on the NCUA call report. The Bureau has projected originations of higher-priced mortgage loans for depositories that do not report HMDA in a similar fashion. These projections use Poisson regressions that estimate transaction volumes as a function of an institution's total assets, employment, mortgage holdings and geographic presence.

The discussion below describes four categories of benefits and costs. First, the Bureau reviews the benefits and costs to consumers whose creditors are subject to the escrow requirement. Second, the Bureau reviews the potential benefits and costs to those consumers whose creditors are exempt from the escrow requirements. Third, the Bureau analyzes the benefits and costs to creditors subject to the Bureau's escrow requirements. Fourth, the Bureau outlines the benefits and costs to creditors exempt from the Bureau's escrow requirements.

1. Potential Costs and Benefits to Consumers of Non-Exempt Creditors

For consumers whose mortgage transactions are originated by non-exempt creditors, the main effect of this final rule is that the creditor generally must provide an escrow account for four additional years, *i.e.,* for five years instead of for one year. The Bureau estimates that these creditors originated 217,260 first-lien higher-priced mortgage loans in 2011. The Bureau believes that the benefits for consumers of having mandatory escrow accounts established include: (1) The convenience of paying one bill instead of several; (2) a budgeting device to enable consumers not to incur a major expense later; and (3) a lower probability of default and possible foreclosure. Mandatory escrow accounts already must be established for higher-priced mortgage loans pursuant to existing Regulation Z requirements adopted in the Board's 2008 HOEPA Final Rule, but to the extent such accounts are beneficial to consumers the extension of the accounts' minimum durations enhances and extends those benefits.

Consumers may find it more convenient to pay one mortgage bill instead of paying a mortgage bill, an insurance bill, and potentially several tax bills. Consumers then can address any questions or concerns about payment to a single company, the mortgage servicer, thus reducing transaction costs, and having a single bill to pay reduces the likelihood that the consumer forget to pay either the insurance or the tax bill. The servicer effectively assumes the burden of tracking whom to pay, how much, and when, across multiple payees. These benefits, and all the benefits and costs listed below unless specified otherwise, last for as long as the escrow account exists. Thus, the final rule simply extends the duration of these benefits and costs from one year to five. The

[40] The Home Mortgage Disclosure Act (HMDA), enacted by Congress in 1975, as implemented by the Bureau's Regulation C requires lending institutions annually to report public loan-level data regarding mortgage originations. For more information, see *http://www.ffiec.gov/hmda.* It should be noted that not all mortgage creditors report HMDA data. The HMDA data capture roughly 90–95 percent of lending by the Federal Housing Administration and 75–85 percent of other first-lien home loan originations, in both cases including first liens on manufactured homes (transactions which also are subject to the final rule). U.S. Department of Housing and Urban Development, Office of Policy Development and Research (2011), *A Look at the FHA's Evolving Market Shares by Race and Ethnicity,* U.S. Housing Market Conditions (May), pp. 6–12, Depository institutions (including credit unions) with assets less than $40 million (in 2011), for example, and those with branches exclusively in non-metropolitan areas and those that make no home purchase originations or originations refinancing a home purchase obligations secured by a first lien on a dwelling are not required to report under HMDA. Reporting requirements for non-depository institutions depend on several factors, including whether the company made fewer than 100 home purchase loans or refinancings of home purchase loans, the dollar volume of mortgage lending as share of total lending, and whether the institution had at least five applications, originations, or purchased loans from metropolitan areas. Robert B. Avery, Neil Bhutta, Kenneth P. Brevoort & Glenn B. Canner, *The Mortgage Market in 2011: Highlights from the Data Reported under the Home Mortgage Disclosure Act,* 98 Fed. Res. Bull., December 2012, n.6.

[41] Every national bank, State member bank, and insured nonmember bank is required by its primary Federal regulator to file consolidated Reports of Condition and Income, also known as Call Reports, for each quarter as of the close of business on the last day of each calendar quarter (the report date). The specific reporting requirements depend upon the size of the bank and whether it has any foreign offices. For more information, see *http://www2.fdic.gov/call_tfr_rpts/.*

[42] The Nationwide Mortgage Licensing System is a national registry of non-depository financial institutions including mortgage loan originators. Portions of the registration information are public. The Mortgage Call Report data are reported at the institution level and include information on the number and dollar amount of loans originated, and the number and dollar amount of loans brokered.

value of this benefit will vary across consumers, and there is no current research to estimate it. An approximation may be found, however, in a recent estimate of around $20 per month per consumer, depending on the household's income, coming from the value of paying the same bill for phone, cable television, and Internet services (the ''Bundle Study'').[43]

Additionally, extending the duration of the mandatory escrow period ensures that the consumer does not face a sizable, unanticipated fee later, for the four additional years of escrow account provision. Recent research suggests that many consumers value the over-withholding of personal income taxes through periodic payroll deductions and receiving a check from the IRS in the spring despite foregoing the interest on the overpaid taxes throughout the previous year.[44] A mortgage escrow account works in a similar fashion; consumers pay the same fixed amount, sometimes interest-free, throughout the year in return for not having to pay a large lump-sum payment in the end. Consequently, consumers with an escrow account are much less likely to experience potentially unexpected cost shocks associated with paying a large property tax and/or home insurance bills, that could lead other consumers to default on their mortgage. Based on recent research on the value of receiving a refund check from the IRS in the spring,[45] the Bureau estimates that the average value of the benefit of over-withholding resulting from the extension of the escrow period for low- to moderate-income households is 2.65 percent of the yearly amount paid for property taxes and insurance. The analogy is not exact because a tax refund can be used for other purposes whereas an escrow account is calibrated to meet only the consumer's insurance and property tax obligations. However, the Bureau believes consumers may experience similar benefit from this forced-savings method because they are likely to use any forced savings from the tax refund for the most pressing needs first, and not paying property taxes on one's dwelling can result in foreclosure. The Bureau recognizes that any benefit may not be the same for all consumers and that some consumers may prefer to manage their own payments.

Finally, the final rule may lead to a lower probability of default (on average) resulting from the budgeting benefits of escrow accounts. However, based on recent research,[46] this benefit may be most valuable in the first year after originating the mortgage and thus is already provided by the existing escrow requirement. The Bureau nevertheless believes that, although difficult to quantify, some further benefit of default and foreclosure avoidance extending into the second through fifth years exists for at least some consumers.

At least for some consumers, the lengthening of the minimum period under which an escrow must be maintained may have certain costs. The Bureau believes these costs may include (1) foregone interest; (2) increased prices resulting from creditors passing-through their costs; and (3) potentially less access to credit.

Under some State regulations, creditors are not required to pay interest on consumers' funds held in escrow accounts. Therefore, consumers may be foregoing interest on such amounts. While, on average, consumers value the budgeting device described above, it is likely that at least some consumers would rather invest their funds and make their tax and insurance payments on their own. The Bureau, however, believes that any returns on amounts that would have been foregone under the escrow requirements are likely to be modest.

The Bureau additionally notes that the servicing costs of maintaining an escrow account may be passed on to consumers, resulting in a greater overall cost to consumers of effecting the proper and timely payment of their tax and insurance obligations. The magnitude of this pass-through should be small, however, because the marginal increase in overall servicing costs resulting specifically from the escrow requirement is likely to be minor compared to those overall servicing costs. Some creditors might mistakenly allocate the fixed costs of escrow provisions (software changes, personnel training, and so on), to each consumer getting an escrow account, even though these costs should not affect the creditor's profit-maximizing price. This results in a less-profitable pricing scheme, hurting both the creditor and the consumers.[47]

Finally, it is possible that some creditors might consider the additional four years for which escrow accounts must be maintained a sufficiently high burden to exit the market for higher-priced mortgage loans altogether. However, given that these creditors already provide escrows for the first year of a higher-priced mortgage loan, the Bureau believes it is unlikely that a significant number of creditors will exit the market for this reason and that, even if a creditor exits the market, consumers generally should be able to find other creditors. The Bureau believes that, overall, the final rule will not materially reduce consumers' access to consumer financial products or services.

2. Potential Costs and Benefits to Consumers of Exempt Creditors

For consumers who get a higher-priced mortgage loan from an exempt creditor, the final rule will result in no escrow account being required, as opposed to the creditor being required to escrow for a year. The Bureau estimates that these creditors originated 50,468 first-lien higher-priced mortgage loans in 2011. The Bureau acknowledges that it is likely some of these transactions were not eligible for the exemption, because they were subject to a forward commitment to be sold. To further its analysis, however, the Bureau conservatively assumes that none of the transactions were subject to a forward commitment.[48]

The Bureau believes these consumers may benefit from less restricted access to credit; lower prices resulting from creditors not passing through the cost of escrowing to the consumers; and the ability to invest their money and earn a return. As noted earlier, a small mortgage originator operating predominantly in rural or underserved areas may be better able to compete with incumbent originators who escrow because it will not have to incur the

[43] H. Liu, P. Chintagunta, & T. Zhu, *Complementarities and the Demand for Home Broadband Internet Services,* Marketing Science, 29(4), 701–720 (2010).

[44] Michael A. Barr & Jane B. Dokko, *Paying to Save: Tax Withholding and Asset Allocation Among Low- and Moderate-Income Taxpayers,* Finance and Economics Discussion Series, Federal Reserve Board (2008), *available at: http://www.federalreserve.gov/pubs/feds/2008/200811/200811pap.pdf.*

[45] *Id.*

[46] Nathan B. Anderson and Jane B. Dokko, *Liquidity Problems and Early Payment Default Among Subprime Mortgages,* Finance and Economics Discussion Series, Federal Reserve Board (2011), available at: *http://www.federalreserve.gov/pubs/feds/2011/201109/201109pap.pdf.*

[47] Nabil Al-Najjar, Sandeep Baliga, & David Besanko. *Market forces meet behavioral biases: cost misallocation and irrational pricing,* RAND Journal of Economics, 39(1), 214–237 (2008), available at: *http://www.kellogg.northwestern.edu/faculty/baliga/htm/sunkcost.pdf.*

[48] While small creditors operating predominantly in rural or underserved areas originate some higher-priced mortgage loans subject to a forward commitment, based on HMDA 2011 the Bureau believes that the magnitude of these transactions is small, relative to the overall higher-priced mortgage loan market. Moreover, if the transaction is subject to a forward commitment, then the creditor is likely to pass-through the escrow cost to the (eventual) buyer, and thus the creditor's cost is not going to be affected significantly. On the other hand, for consumer benefits this is an unambiguously conservative assumption, see below.

costs of establishing and maintaining an escrow account. This may provide an extra incentive for small originators to enter the market, creating greater access to credit for consumers living in rural and underserved areas. The Bureau does not have the data to be able to estimate the magnitude of this effect.

Additionally, the price for such consumers may be reduced as mortgage providers would not pass the costs of providing escrows to consumers. The magnitude of this pass-through should be small, because firms should optimally pass through only the increase in marginal costs that tend to be small for escrow provision, as opposed to the fixed (overhead) costs. However, some creditors might mistakenly spread the overhead costs of escrow provision over all consumers, resulting in higher prices to such consumers, lower mortgage transaction volume for the creditor, and lower creditor profit overall.

Another benefit for consumers may be the ability to invest their money and earn a return on amounts that might, depending on State regulations, be forgone under an escrow. While, as discussed above, on average, consumers value the budgeting device that the escrow provides, it is likely that at least some consumers would rather have flexibility with regard to payment terms. The Bureau believes that any returns on amounts that would have been foregone under the escrow requirements are likely to be modest. The exemption allows certain creditors not to escrow for the first year after mortgage origination, thus the magnitude of this benefit is even smaller because the creditors would have cancelled the escrow right after one year otherwise.

For some consumers, providing an exemption for creditors operating in rural or underserved communities would create certain costs. These costs include: The inconvenience of paying several bills instead of one; the lack of a budgeting device to enable consumers not to incur a major expense later; a higher probability of foreclosure; and the possibility of underestimating the overall cost of maintaining their residence.

Because the consumer must pay not only a mortgage bill, but also an insurance bill and, potentially, several tax bills, there is a higher probability that the consumer may forget or neglect to pay one or more of the bills. Moreover, there may be higher transaction costs for the consumer who no longer has a single organization to consult regarding payments, but rather must deal with several organizations as payment questions arise. The value of this cost will vary across consumers, and there is no current research to estimate it. An approximation is a recent estimate of around $20 per month per consumer, depending on the household's income, coming from the value of paying the same bill for phone, cable television, and Internet services as described in the Bundle Study, noted above.

Additionally, without a budgeting device, consumers will need to self-manage the payment of intermittent large bills. As described above, recent research suggests that many consumers value the over-withholding of personal income taxes through periodic payroll deductions and receiving a check from the IRS in the spring despite foregoing the interest on the overpaid taxes throughout the previous year. A mortgage escrow works in a similar fashion; consumers pay the same fixed amount, sometimes interest-free, throughout the year, without having to pay a large lump-sum payment in the end. Based on the recent research of the value of receiving a refund check from the IRS in the spring, the Bureau estimates the average value of having an escrow for low to moderate income households to be 2.65 percent of the yearly amount paid for property taxes and insurance. The cost will not be the same for all consumers as some consumers could find cost savings in managing payments on their own.

However, for those consumers who do struggle with payments, there is a higher probability of foreclosure (on average) resulting from the lack of a budgeting device. Based on the recent research,[49] consumers not having an escrow account in the first year after mortgage originations will result in 0.35 percent more foreclosures per year for the first-lien higher-priced mortgage loans. Having an escrow account for the first year of the mortgage obligation's term appears to be particularly important for consumer protection considerations because often the consumer has depleted savings as a part of the mortgage origination process and may not have prepared adequately for the upcoming semi-annual or annual property tax and home insurance bills. Both of these effects, and thus the benefits of having (or the costs of not having) an escrow account, appear to diminish after the first year. As noted above, some consumers might be unaware of the amount of the property tax and home insurance that they will have to pay every year. Having an escrow illustrates to consumers exactly how much they have to pay per month for the mortgage, property tax, and home insurance. If consumers underestimate the cost of the property tax and the home insurance, then some consumers will buy a house that they cannot afford, or buy a more expensive house than they would ideally want. The Bureau does not have the data to estimate the magnitude of this cost.

3. Potential Costs and Benefits for Non-Exempt Creditors

For the non-exempt creditors, the main effect of the final rule is that creditors need to provide an escrow account for four additional years: for five years instead of for one year. The Bureau does not have the data on how many creditors do not already provide escrow accounts up to the fifth year after a mortgage origination. The Bureau estimates that there are 7,434 non-exempt creditors who originated any first-lien higher-priced mortgage loans in 2011.[50] A median creditor in this group originated six first-lien higher-priced mortgage loans in 2011.[51] The Bureau notes that some creditors who might otherwise qualify for the Bureau's exemption may decide to continue to provide escrows for first-lien higher-priced mortgage loans. The Bureau cannot estimate the number of these creditors, and conservatively estimates this number to be insignificant. The benefits and costs described in this part of the analysis would also apply to these creditors.

The two main benefits for this group of creditors are: Assurance that consumers have met their obligations; and the potential for interest earnings in the escrow account subject to State regulations. If consumers are late on their property taxes, the government often has the first claim on the dwelling that secures the transaction in case of consumer default. If consumers do not pay their home insurance premiums, then the creditor might end up with nothing if something happens to the dwelling that secures the transaction. Because of this potential, many creditors currently verify whether or not the consumer made the requisite

[49] Nathan B. Anderson and Jane B. Dokko, *Liquidity Problems and Early Payment Default Among Subprime Mortgages,* Finance and Economics Discussion Series, Federal Reserve Board (2011), available at: *http://www.federalreserve.gov/pubs/feds/2011/201109/201109pap.pdf.*

[50] Out of those, there are 3,235banks, 562 thrifts, 1,372 credit unions, and 2,265 non-depository institutions.

[51] A median bank or thrift originated 7 first lien higher-priced mortgage loans, a median credit union originated 3 first lien higher-priced mortgage loans, and a median non-depository institution originated 13 first lien higher-priced mortgage loans.

insurance premiums and tax payments every year even where the consumer did not set up an escrow account. The final rule will allow creditors to forego this verification process as the funds would be escrowed.

Moreover, the creditor may be able to gain returns on the money that the consumers keep in their escrow account. Depending on the State, the creditor might not be required to pay interest on the money in the escrow account. The amount that the consumer is required to have in the consumer's escrow account is generally limited to two months' worth of property taxes and home insurance. However, some States require a fixed interest rate to be paid on escrow accounts, resulting in an additional cost to the creditors. This cost is higher if the required interest rate is not updated frequently and current interest rates are low compared to the rate set by the State.

There are startup and operational costs of providing escrow accounts. Creditors are already required to provide the escrow account for a year, and thus the Bureau believes that there are few startup costs implicated by the final rule or that any startup costs are relatively minor given that these creditors probably have already set up a system capable of escrowing in response to the current regulation. There are, however, operating costs implicated in maintaining an escrow account for an additional four years. These costs vary widely with the size of the institution and the local jurisdictions served. For the bigger creditors, with up-to-date information technology systems, the Bureau believes the cost of maintaining escrows for four additional years is negligible, and that many of these creditors may already do so. For a small creditor, that does not invest as much in technology, and serves a jurisdiction that does not process taxes automatically, the cost of providing the escrow account could be larger.[52] However, the Bureau believes that escrow accounts become cost-effective once operations reach a certain scale, and thus even this operating cost is relatively minor. The Board's calculation and the Bureau's subsequent adjustments to the minimal portfolio size necessary to escrow ensure that the non-exempt creditors with over 500 originations per year can achieve the scale necessary for cost-efficient escrow provision. Additionally, the creditors can outsource escrowing to servicing firms and pass through at least some of these costs to the consumer.

4. Potential Costs and Benefits for Exempt Creditors

For the exempt creditors, the main effect of the final rule is that the creditor does not need to provide an escrow account at all for the first year after mortgage origination. The Bureau estimates that there are 2,612 exempt creditors who originated any first-lien higher-priced mortgage loans in 2011.[53] A median creditor in this group originated 13 first-lien higher-priced mortgage loans in 2011. A median bank or thrift originated 13, a median credit union originated 10, and a median non-depository institution originated 6 mortgage obligations.[54]

The main benefit for this group of creditors is in eliminating or greatly reducing the accounting and compliance costs of providing the escrow accounts. It is not clear whether this saving is significant, resulting from the fact that these creditors already provide escrows for the first year, and thus have already undertaken the effort to set up a system capable of escrowing. The exemption from the final rule is likely to lead to less employee time being devoted to complying with the regulation; however, the Bureau believes that benefit is likely to be negligible resulting from the number of first-lien higher-priced mortgage loans originated at a median institution.

Because the creditors in this group who currently extend higher-priced mortgage loans have already expended the start-up costs of providing escrows, many of these creditors might be willing to continue providing escrows to their consumers if the ongoing costs of providing escrows are low. For these creditors the costs and benefits are akin to those described above for the non-exempt creditors, with the stipulation that the benefits of providing escrows for five years clearly outweigh the costs.

However, there are several costs associated with this group of creditors, including: The uncertainty over whether a consumer has met his obligations, a higher probability of foreclosure, and foregoing the additional funds that escrows may provide. Because creditors that do not provide escrow accounts are not certain whether consumers have paid their property taxes and home insurance, they carry a considerable amount of risk. As noted previously, if consumers are late on their property taxes, the government often has the first claim on the dwelling that secures the transaction in case of consumer default. If consumers do not pay their home insurance premiums, then the creditor might end up with nothing if something happens to the dwelling that secures the transaction.

Moreover, all else being equal, these consumers have a higher probability of defaulting. Consumers, on average, value a budgeting device to enable consumers not to incur a major expense later. As noted above, recent research suggests that many consumers value the over-withholding of personal income taxes through periodic payroll deductions and receiving a check from the IRS in the spring despite foregoing the interest on the overpaid taxes throughout the previous year. A mortgage escrow works in a similar fashion; consumers pay the same fixed amount, sometimes interest-free, throughout the year, without having to pay a large lump-sum payment in the end. As previously noted, research suggests that consumers not having an escrow in the first year after mortgage originations will result in 0.35 percent more foreclosures per year for first-lien higher-priced mortgage loans.

Finally, creditors who do not escrow forego the opportunity to invest the money in the consumers' escrow accounts. Depending on the State, the creditor might not have to pay interest on the money in the escrow account. The excess amount that the consumer is required to have in the consumer's escrow account is generally limited to two months' worth of property taxes and home insurance. However, some States require a fixed interest rate to be paid on escrow accounts. Laws setting rates may not be updated frequently enough, resulting in an additional cost to creditors, especially when the interest rates are exceptionally low.[55]

C. Impact of the Final Rule on Depository Institutions and Credit Unions With $10 Billion or Less in Total Assets, as Described in Section 1026

The discussion below describes certain consequences of the final rule based on the particular characteristics of the creditor. First, the Bureau analyzes the impact of the final rule on creditors with $10 billion or less in total assets,

[52] The Bureau is aware that some jurisdictions still process taxes by hand and/or impose fees on the creditors seeking access to the tax information, significantly adding to the burden of establishing escrow accounts in these jurisdictions.

[53] Out of those, there are 2,112 banks, 141 thrifts, 355 credit unions, and 4 non-depository institutions. The Bureau does not possess the information on whether HMDA non-reporting non-depository institutions are rural, and conservatively assumes that they are not.

[54] A median bank or thrift originated 13, a median credit union originated 10, and a median non-depository institution originated 6 mortgage obligations.

[55] The Bureau acknowledges that this creditor cost is also a consumer benefit. However, as described above, the Bureau believes the benefit per consumer is fairly modest.

which are subject to the Bureau's escrow requirements. Then, the Bureau outlines the impact of the final rule on creditors with $10 billion or less in total assets, which are exempt from the Bureau's escrow requirements. For both of these groups the benefits, the costs, and the median origination counts are identical to the discussion above.

For the non-exempt creditors, the main effect of the final rule is that the creditor needs to provide an escrow account for four additional years: For five years instead of for one year. The Bureau estimates that there are 5,087 non-exempt creditors with $10 billion or less in total assets, who originated any first-lien higher-priced mortgage loans in 2011.[56] These creditors originated 91,142 first-lien higher-price mortgage loans in 2011. The Bureau additionally notes that some creditors who might otherwise qualify for the Bureau's exemption may decide to continue to provide escrows for first-lien higher-priced mortgage loans. The Bureau cannot estimate the number of these creditors, and conservatively estimates this number to be insignificant. The benefits and costs described in this part of the analysis would also apply to these creditors. The impact described below would also apply to these creditors.

For creditors that qualify for the new exemption for creditors that operate predominantly in rural or underserved areas, the regulation will allow them, post-effective date, to avoid having to comply with both the existing requirement to establish escrow accounts for covered higher-priced mortgage loans for at least one year and the new general requirement to establish accounts for at least five years for new consumer transactions if the creditors determine that it is in their best interest to do so. A creditor in this group could voluntarily require an escrow account for five years if they choose to, and thus this rule does not impose any significant costs on this group of creditors. These creditors originated 50,468 first-lien higher-priced mortgage loans in 2011.

D. Impact of the Final Rule on Consumers in Rural Areas

The Bureau expects that for the consumers in rural areas, the costs and benefits are largely the same as for the consumers in the not necessarily rural areas described above. The single biggest difference is the availability of credit; rural consumers have significantly fewer options for getting a higher-priced mortgage loan. Even for the densest counties included in the rural definition (UIC code 8 counties with micropolitans), the median county has only 10 creditors making higher-priced mortgage loans, as opposed to 16 for the least dense UIC code not included in the rural definition (UIC 5). Given the scope of the rural and underserved exemption, the Bureau believes that any rural consumer can, but need not, get a mortgage transaction from an exempt creditor as opposed to getting a mortgage transaction from a non-exempt creditor, and that there will be sufficiently many creditors left in any given market to ensure a proper competitive process. As a result of the final rule, the Bureau believes that consumers in rural areas may benefit from greater access to credit, because there may be more competition between incumbent originators who escrow and smaller mortgage originators who may benefit from the Bureau's exemption requirement. Some consumers might prefer to get a mortgage with an escrow, for all the benefits described above. However, the Bureau conservatively estimates that all rural consumers will choose to get their mortgages from an exempt creditor and that none of these consumers' transactions will be subject to forward commitment.

For these consumers, the final rule will result in no escrow account being required, as opposed to the creditor being required to escrow for a year. The Bureau estimates that there were 50,468 first-lien higher-priced mortgage loans originated in rural areas in 2011.

The Bureau believes these consumers may benefit from less restricted access to credit; lower prices resulting from creditors not passing through the cost of escrowing to the consumers; and the ability to invest their money and earn a return. Because a small mortgage originator operating predominantly in rural or underserved areas will not have to incur the costs of establishing and maintaining escrow accounts for higher-priced mortgage loans, it may be willing to keep making such transactions where it is not willing to do so under the current regulation. This may provide stronger incentives for small originators to continue making higher-priced mortgage loans (or to resume doing so where they have previously decided to stop), creating greater access to credit for consumers living in rural and underserved areas. The Bureau does not have the data to be able to estimate the magnitude of this effect.

E. Consideration of Alternatives

To implement the statutory changes the Bureau considered different definitions of rural and the size exemption, both for the asset size and for the number of originations. As described above, the definition of rural proposed in the Board's 2011 Escrows Proposal included counties with USDA's urban influence codes of 7, 10, 11, and 12. Taking into account the comments received on the proposal, the Bureau believed this definition was too narrow to capture fully Congress's apparent concern regarding access to credit.

In finalizing the rule the Bureau considered using an alternative definition of rural that would have used the same definition as provided under USDA's section 502 Rural Housing program. Under the USDA section 502 Rural Housing definition of ''rural'', approximately 37 percent of the U.S. population lives in an area considered to be rural, compared to approximately 10 percent according to the definition used in the final rule, which defines rural as counties with UICs 4, 6, 7, 8, 9, 10, 11, and 12. The Bureau considered the trade-off of exempting more creditors and thus potentially mitigating consumer access to credit issues versus exempting fewer creditors and providing more consumers with the consumer protections represented by escrow accounts. The Bureau's analysis of the 2011 HMDA data showed that, even with the definition of rural in the final rule that includes counties with codes of 4, 6, 7, 8, 9, 10, 11, and 12, a median county in the least dense county code that is not exempt (code 5) had 16 creditors that extended any higher-priced mortgage loans in 2011. In light of these data, the Bureau believes that, even if some of these creditors exit the higher-priced mortgage loan market for lack of an exemption, there will still be enough competition in those counties, and therefore the risk of potential access to credit issues for consumers in these areas is mitigated. Consequently, the Bureau believes that expanding the definition of rural in the final rule to the USDA section 502 Rural Housing definition would have allowed creditors to originate mortgage obligations without the escrow protections mandated by the Congress, while access to credit would not be significantly improved. In light of these considerations, the Bureau believes the final rule reflects the Bureau's judgment based upon all of the evidence it has obtained regarding the areas included, such as the urban influence, density of the population, and the number of higher-priced mortgage loan creditors in the county, in how best to effectuate the purposes of the law Congress enacted.

In addition, the Bureau considered alternative origination thresholds. The

[56] These include 3,170 banks, 548 thrifts, and 1,369 credit unions.

Board's proposal extended the exemption to creditors that, together with their affiliates, originate and retain servicing rights to 100 or fewer first-lien mortgage obligations in either of the preceding two years. As discussed more fully above, the Board noted its belief from the available information that the economies of scale necessary to escrow cost-effectively, or else to satisfy the escrow requirement by outsourcing to a sub-servicer, generally exist when a mortgage servicer has a portfolio of at least 500 mortgage obligations. Consequently, the Board proposed setting the cut-off at 100 or fewer first-lien mortgage obligations originated and for which servicing rights are retained, assuming an average of five years until an institution's mortgage obligations are paid off. After reviewing the comments submitted by many creditors in rural areas regarding the adverse conditions they face, such as idiosyncratic accounting systems (including calculations by hand) employed by some of the jurisdictions, the Bureau believes that many such creditors may need a larger number of mortgage obligations in portfolio to be able to provide escrow accounts cost-effectively. The Bureau has expanded the exemption to include creditors that, together with their affiliates, originate 500 or fewer first-lien covered transactions. The Bureau believes that defining the limit in terms of originated transactions, as opposed to transactions originated and serviced, facilitates compliance by not requiring institutions to track multiple metrics for purposes of this final rule and the 2013 ATR Final Rule and to promote consistent application of the two exemptions. However, this change by itself would have severely restricted the scope of the exemption, as there are more creditors that originate and service 100 or fewer transactions than there are creditors that simply originate 100 or fewer.[57] Based on 2011 HMDA data, setting the annual originations limit at 500 ensures that 89.5% of the creditors that originated and serviced 100 transactions are also under the 500 first-lien origination limit.

Because of the changes in the originations limit, the Bureau considered whether an asset-size limit would be appropriate, to prevent larger creditors with sophisticated information technology systems and the capacity to escrow from taking unintended advantage of the exemption. As noted above, in the Board's 2011 Escrows Proposal, no asset-size limit was proposed, although the Board solicited comment on whether such a limit was appropriate. The Bureau initially considered a $1 billion asset-size limit, believing organizations of at least that size had the capacity to implement the escrow requirements. However, in accordance with its goal to harmonize the final rule as much as practicable with the 2013 ATR Final Rule, discussed above, the Bureau has adopted a $2 billion asset-size limit. Based on a review of HMDA data, the Bureau believes that there is an insignificant number of creditors that operate predominantly in rural or underserved areas, have fewer than 500 first-lien originations, and have between $1 and $2 billion in assets. Consequently, the Bureau believes that harmonizing the approaches between the two final rules will simplify compliance and reduce associated compliance costs, while having a negligible impact on the scope of the exemptions.

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) 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.[58] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[59] An entity is considered ''small'' if it has $175 million or less in assets for the banks, and $7 million or less in revenue for non-bank mortgage creditors, mortgage brokers, and mortgage servicers.[60] In the Board's 2011 Escrows Proposal, the Board conducted an initial regulatory flexibility analysis (IRFA) and concluded that the proposed rule would have a significant economic impact on a substantial number of small entities. The Board solicited comments on the number of small entities likely to be affected by the proposal, as well as the costs, compliance requirements, and any changes in operating procedures arising from the application of the proposed rules to small businesses. The Board additionally solicited comments regarding a number of proposed provisions that could minimize compliance burdens on small entities by relying on other disclosure requirements with which they already must comply and/or exempting certain classes of small creditors from the proposed regulations. The Board also welcomed comment on any significant alternatives that would minimize the impact of the proposed rules on small entities.

The Bureau has reviewed the comments on the Board's IRFA and the broader Notice of Proposed Rulemaking addressing the burden imposed by the proposed rule and potential mitigation measures and alternatives. As described further below, the Bureau carefully considered the comments received and performed its own independent analysis of the potential impacts of the final rule on small entities and alternatives to the final rule. Based on the comments received, the Bureau's own analysis, and for the reasons stated in section 4 below, the undersigned certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, to better inform the rulemaking, the Bureau has prepared the following final regulatory flexibility analysis.

1. Statement of the Need for, and Objectives of, the Final Rule

The Bureau is publishing final rules to implement certain amendments to TILA made by the Dodd-Frank Act. Congress enacted TILA based on findings that economic stability would be enhanced and competition among consumer credit providers would be strengthened by the informed use of credit resulting from consumers' awareness of the cost of credit. The Bureau's final rule requires creditors to establish escrow accounts for taxes and insurance for at least five years after consummation. The final rule also creates an exemption from the escrow requirement for certain mortgage transactions extended by a creditor that meets four conditions. Those conditions are that the creditor: (1) Makes most of its first-lien covered transactions in rural or underserved counties; (2)

[57] Consider, for example, a creditor that originates 300 mortgage obligations, but services only 80 of them.

[58] For purposes of assessing the impacts of the final rule on small entities, ''small entities'' is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A ''small business'' is determined by application of Small Business Administration regulations and reference to the North American Industry Classification System (NAICS) classifications and size standards. 5 U.S.C. 601(3). A ''small organization'' is any ''not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' 5 U.S.C. 601(4). A ''small governmental jurisdiction'' is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[59] 5 U.S.C. 609.

[60] The current SBA size standards are found on SBA's Web site at *http://www.sba.gov/content/table-small-business-size-standards.*

together with all affiliates, has annual originations of 500 or fewer first-lien covered transactions; (3) has an asset size less than $2 billion; and (4) together with its affiliates, does not escrow for any mortgage that it or its affiliates currently services, except in limited instances.

These amendments are intended to improve consumers' understanding of the overall costs of a given higher-priced mortgage loan and, in turn, facilitate their ability to shop for mortgages. Moreover, requiring escrow accounts for certain higher-priced mortgage loans may reduce the likelihood that a consumer faces a sizable, unanticipated fee or increase in payments.

2. Summary of Significant Issues Raised by Comments in Response to the Initial Regulatory Flexibility Analysis

In accordance with section 3(a) of the RFA, 5 U.S.C. 603(a), the Board prepared an IRFA in connection with the proposed rule, and acknowledged that the projected reporting, recordkeeping, and other compliance requirements of the proposed rule on the whole would have a significant economic impact on a substantial number of small entities, including small mortgage creditors and servicers. In addition, the Board recognized that the precise compliance costs would be difficult to ascertain because they would depend on a number of unknown factors, including, among other things, the specifications of the current systems used by small entities to prepare and provide disclosures and/or solicitations and to administer and maintain accounts. The Board sought information and comment on any costs, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small businesses.

The Bureau reviewed comments submitted by various financial institutions and trade organizations in order to ascertain the economic impact of the proposed rule on small entities. Although only a few commenters focused on the Board's IRFA analysis, such commenters expressed concern that the Board had underestimated the costs of compliance. In one comment letter a trade organization noted that one large creditor implementing the Regulation Z amendments that became effective October 1, 2009, indicated that it required over 70,000 hours to change its systems. Smaller financial institutions also suggested that compliance costs would be significant given the need to change systems and train personnel. In addition, the Office of Advocacy of the U.S. Small Business Administration (Advocacy) submitted a comment on the Board's IRFA.

Advocacy expressed concern about the level of information the Board provided in its IRFA regarding the impact of the proposed rule on small entities and it encouraged the Board to provide additional information. Advocacy also raised concerns concerning the scope of the exception and made suggestions to ease burdens in connection with the proposed disclosures. For the reasons stated below, the Bureau believes that the Board's IRFA complied with the requirements of the RFA and the Bureau has modified certain aspects of the proposal in order to mitigate some of the impact on small entities, including some identified by Advocacy.

Section 3(a) of the RFA requires agencies to publish for comment an IRFA which shall describe the impact of the proposed rule on small entities. *See* 5 U.S.C. 603(a). In addition, section 3(b) requires the IRFA to contain certain information including a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record. *See* 5 U.S.C. 603(b). The Bureau believes that the Board's IRFA complied with the requirements of the RFA. The Board described the impact of the proposed rule on small entities by describing the rule's proposed requirements in detail throughout the supplementary information for the proposed rule. Additionally, the Board described the projected compliance requirements of the rule in its IRFA, noting the need for small entities to update systems, operating procedures, and disclosures under the proposed rule. In the proposal, the Board described the projected impact of the proposed rule and sought comments from small entities specifically regarding the effect the proposed rule would have on their activities. In their comments, small entities have described to varying degrees the increased costs associated with the Board's proposed rules particularly with respect to the proposed disclosure requirements concerning escrow accounts.

As a result of the Bureau's review of Advocacy's and other comments regarding the potential compliance burdens of adopting the disclosure portions of the Board's 2011 Escrows Proposal before resolution of the Bureau's TILA–RESPA integration rulemaking, the final rule does not adopt the Board's proposed disclosures provisions. In addition, as discussed further below, the Bureau has also considered additional measures as suggested by Advocacy to broaden the proposed exemption so that more small entities can qualify.

3. Description and Estimate of Small Entities to Which the Final Rule Would Apply

The final rule applies generally to institutions and entities that engage in originating or extending home-secured credit, as well as servicers of these mortgage obligations. The Board acknowledged in its IRFA the lack of a reliable source for the total number of small entities likely to be affected by the proposal, because the credit provisions of TILA and Regulation Z have broad applicability to individuals and businesses that originate, extend and service even small numbers of home-secured transactions. The Board identified through data from Reports of Condition and Income (Call Reports) approximate numbers of small entities that would be subject to the proposed rules. The summary of institutions considered small according to the criteria described above, regardless of whether they are exempt from the rule, is in the table below.

Category	NAICS Code	Total Entities	Small Entities	Entities That Originate Any Mortgage Transactions[b]	Small Entities that Originate Any Mortgage Transactions
Commercial Banking	522110	6,505	3,601	6,307[a]	3,466[a]
Savings Institutions	522120	930	377	922[a]	373[a]
Credit Unions[c]	522130	7,240	6,296	4,178[a]	3,240[a]
Real Estate Credit[d e]	522292	2,787	2,294	2,787	2,294[a]
Total		17,462	12,568	14,194	9,372
Source: 2011 HMDA, Dec 31, 2011 Bank and Thrift Call Reports, Dec 31, 2011 NCUA Call Reports, Dec 31, 2011 NMLSR Mortgage Call Reports.					
[a] For HMDA reporters, transaction counts are from HMDA 2011. For institutions that are not HMDA reporters, transaction counts are projected based on Call Report data fields and counts for HMDA reporters.					
[b] Entities are characterized as originating mortgage transactions if they make one or more transaction.					
[c] Does not include cooperativas operating in Puerto Rico. The Bureau has limited data about these institutions or their mortgage activity.					
[d] NMLSR Mortgage Call Report ("MCR") for 2011. All MCR reporters that originate at least one transaction or that have positive transaction amounts are considered to be engaged in real estate credit (instead of purely mortgage brokers). For institutions with missing revenue values, the probability that the institution was a small entity is estimated based on the count and amount of originations and the count and amount of brokered transactions.					
[e] Data do not distinguish nonprofit from for-profit organizations, but Real Estate Credit presumptively includes nonprofit organizations.					

The Bureau estimates that there are 3,777 non-exempt creditors who originated any first-lien higher-priced mortgage loans in 2011.[61] A median creditor in this group originated four first-lien higher-priced mortgage loans in 2011.[62] The Bureau does not have data on how many creditors do not already provide escrow accounts up to the fifth year after a mortgage origination. Moreover, no commenters submitted nationally-representative data including this information. The Bureau additionally notes that some creditors who might otherwise qualify for the Bureau's exemption may decide voluntarily to continue to provide escrows for first-lien higher-priced mortgage loans. The Bureau cannot estimate the number of these creditors, and conservatively estimates this number to be insignificant, but notes that the impacts described in this part of the analysis would also apply to these creditors.

4. Reporting, Recordkeeping, and Other Compliance Requirements

The costs to the non-exempt creditors are described in the section 1022 analysis above, and mainly include the ongoing operating costs of extending the escrow account provision from one to four years. For the creditors who are processing escrows in-house, this cost is negligible, given that these creditors probably have already set up a system capable of escrowing in response to the current regulation. For the creditors that outsource escrowing, the fixed cost of contracting has already been incurred. The creditors that operate predominantly in rural or underserved areas are exempted, unless they have reached the scale at which the Bureau believes that it is cost-efficient to set up escrow accounts.

The Bureau does not possess nationally representative information regarding this cost. However, the cost of escrowing is a part of the overall servicing cost of a mortgage obligation. The most recent estimate of the servicing cost of a mortgage obligation is $100 per transaction per year, if the servicing is outsourced.[63] The Bureau does not possess reliable information on what fraction of the $100 is attributable to maintaining escrow accounts. However, none of the several examined industry, regulatory, and academic studies of servicing singled out escrowing as the first or the main component of the overall servicing costs.[64] Thus, the Bureau conservatively assumes that the cost of this rule per transaction is at most $50, and over the four years is at most $200. According to the Bureau's projections, 85 percent of the affected non-exempt small institutions originate less than 14 higher-priced mortgage loans, resulting in an at most a $2800 cost per institution.[65] Therefore, the Bureau believes that the rule will not have a significant impact on small entities. Examining the ratios of these costs to the revenues[66] of the institutions, for 85% of small creditors these costs represent less than 0.3% of their revenues.[67]

If there are creditors who have not already implemented the Board's 2008 HOEPA Final Rule and would not be

[61] This figure includes 1,432 banks, 203 thrifts, 817 credit unions, and 1,325 non-depository institutions.

[62] The median first-lien higher-priced mortgage loan by institution is as follows: 5 for banks and thrifts; 2 for credit unions; and 5 for non-depository institutions.

[63] National Association of Federal Credit Unions, Top 10 Questions about Mortgage Subservicing (Podcast), available at: *http://www.nafcu.org/NSCTertiary.aspx?id=23703.*

[64] Mortgage Bankers Association, *Residential Mortgage Servicing for the 21st Century,* May 2011. Amy Crews Cutts & Richard K. Green, *Innovative Servicing Technology: Smart Enough to Keep People in Their Houses?* Freddie Mac Working Paper #04–03 (2004). Prime Alliance Loan Servicing, *Re-Thinking Loan Servicing,* (2010). Adam Levitin & Tara Twomey, *Mortgage Servicing,* 28 Yale J. on Reg. 1 (2011).

[65] Breaking this down by small creditor type, 85 percent of banks originate less than 14, and 85 percent of thrifts originate less than 9 higher-priced mortgage loans, 85 percent of credit unions originate less than 10 higher-priced mortgage loans, and 85 percent of non-depository institutions originate less than 16 higher-priced mortgage loans.

[66] Revenue has been used in other analyses of economic impacts under the RFA. For purposes of this analysis, the Bureau uses revenue as a measure of economic impact. In the future, the Bureau will consider whether an alternative quantifiable or numerical measure may be available that would be more appropriate for financial firms.

[67] The ratio is below 0.5 percent for 85 percent of the creditors among any of the four small creditor types.

eligible for the exemption for creditors who operate predominantly in rural or underserved areas, there may be a need for the creditors' staff to develop new professional skills and new recordkeeping regimes to comply with the revised requirements. These costs will depend on a number of unknown factors, including, among other things, the specifications of the current systems used by such entities. The Bureau believes that the number of such institutions would be small and does not affect its judgment that the rule will not impose a significant impact on a substantial number of small entities. Finally, as discussed above, the rule allows exempted creditors to stop establishing escrow accounts even for the first year of the mortgage obligation, which will allow creditors to eliminate the compliance costs of their current programs for new loans going forward if they decide it makes sense to do so.

5. Steps Taken To Minimize the Economic Impact on Small Entities

The steps the Bureau has taken to minimize the economic impact and compliance burden on small entities, including the factual, policy, and legal reasons for selecting the alternatives adopted and why each one of the other significant alternatives was not accepted, are described above in the section-by-section analysis, in part VII, and in the summary of issues raised by the public comments in response to the proposal's IRFA. The final rule's modifications from the proposed rule that minimize economic impact on small entities are discussed below. Additionally, the Bureau considered significant alternatives to most of the dimensions of the small creditor exemption: the definition of rural, the transaction origination limit, and the asset-size threshold.

First, the Bureau has declined to implement at this time the amendments to TILA concerning certain new disclosure requirements concerning escrows accounts. The Bureau believes that this decision to coordinate these disclosures with the finalization of the TILA–RESPA integration rulemaking will decrease the economic impact of the final rule on small entities by limiting their compliance costs. Moreover, the Bureau believes that harmonizing certain title XIV required disclosures may provide greater clarity to the market and better fulfill TILA's stated purpose of enabling consumers to better understand the cost of credit.

Second, upon reviewing public comment, the Bureau has expanded the exemption for creditors who operate predominantly in rural or underserved areas to include a broader range of areas than previously identified in the proposal. The Bureau believes that will decrease the number of small entities covered by the regulation. The Bureau considered different definitions of ''rural'' and the size exemption, both for the asset size and for the number of originations.

In finalizing the rule the Bureau considered using an alternative definition of rural that would have used the same definition as provided under USDA's section 502 Rural Housing program. Under the USDA section 502 Rural Housing definition of ''rural'', approximately 37 percent of the U.S. population lives in an area considered to be rural, compared to approximately 10 percent according to the definition used in the final rule, which defines rural as counties with UICs 4, 6, 7, 8, 9, 10, 11, 12. The Bureau considered the trade-off of exempting more creditors and thus potentially mitigating consumer access to credit issues versus exempting fewer creditors and providing consumers with the consumer protections represented by escrow accounts. The Bureau's analysis of the 2011 HMDA data showed that, even with the definition of rural in the final rule that includes counties with codes of 4, 6, 7, 8, 9, 10, 11, and 12, a median county in the least dense county code that is not exempt (code 5) had 16 creditors that extended any higher-priced mortgage loans in 2011. In light of these data, the Bureau believes that, even if some of these creditors exit the higher-priced mortgage loan market for lack of an exemption, there will still be enough competition in those counties, and therefore the risk of potential access to credit issues for consumers in these areas is mitigated. The Bureau believes that the current definition better reflects the intention of the statute's authorization to create a rural exception, and facts about the areas included, such as the urban influence, density of the population, and the number of higher-priced mortgage loan creditors in the county.

In addition, the Bureau considered alternative origination thresholds. The Board's 2011 Escrows Proposal would have extended the exemption to creditors that, together with their affiliates, originated and retained servicing rights to 100 or fewer mortgage obligations secured by a first-lien on real property or a dwelling. In the Board's 2011 Escrows Proposal the Board noted its belief from the available information that the economies of scale necessary to escrow cost-effectively, or else to satisfy the escrow requirement by outsourcing to a sub-servicer, generally exist when a mortgage servicer has a portfolio of at least 500 mortgage obligations. Consequently, the Board proposed setting the cut-off at 100 or fewer first-lien mortgage obligations originated annually and for which servicing rights are retained, assuming an average of five years until an institution's mortgage obligations are paid off. The Bureau has expanded the exemption to include creditors that, together with their affiliates, originate 500 or fewer first-lien covered transactions annually. The Bureau believes that defining the limit in terms of originated transactions, as opposed to transactions originated and serviced, facilitates compliance by not requiring institutions to track multiple metrics for the escrow and qualified mortgage rules and to promote consistent application of the two exemptions. However, this change by itself would have severely restricted the scope of the exemption, as there are more creditors that originate and service less than 100 transactions than there are creditors that simply originate 100 transactions.[68] From the 2011 HMDA data, setting the new limit at 500 transactions ensures that 89.5 percent of the creditors that originated and serviced 100 transactions are under the new 500 first-lien origination limit. However, as discussed more fully above, to prevent larger creditors with sophisticated information technology systems from taking unintended advantage of this exemption and to further the benefits from coordinated compliance across this final rule and the 2013 ATR Final Rule, the Bureau decided to adopt the $2 billion asset-size limit in both final rules.

The Bureau notes that by expanding the exemption for certain transactions and deferring implementation of the escrow disclosure requirements the Bureau has largely addressed the areas where small entity commenters expressed concern about the costs of compliance. The Bureau believes that these changes minimize the economic impact on small entities while still meeting the stated objectives of TILA and the Dodd-Frank Act.

The small creditor exemption is partially designed to mitigate the rule's costs to small creditors. Providing escrows cost-effectively requires a scale that small creditors do not have, and the 500 first-lien origination limit allows the creditors to reach that scale before they are required to provide escrows. This scale might be much lower in more urban areas, but the Bureau believes that

[68] Consider, for example, a creditor who originates 300 transactions, but services only 80 of them.

because many creditors in rural areas face adverse conditions, such as idiosyncratic accounting systems (including calculations by hand) employed by some of the jurisdictions, such institutions would especially need this number of originations, and consequently a large number of mortgage obligations to be able to provide escrow accounts cost-effectively.

6. Impact on Small Business Credit

The Bureau does not believe that the final rule will result in an increase in the cost of business credit for small entities. Instead, the final rule will apply only to mortgage transactions obtained by consumers primarily for personal, family, or household purposes and the final rule will not apply to transactions obtained primarily for business purposes. Given that the final rule does not increase the cost of credit for small entities, the Bureau has not taken additional steps to minimize the cost of credit for small entities.

IX. Paperwork Reduction Act

The Bureau may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The Board's 2011 Escrows Proposal contained information collection requirements under the Paperwork Reduction Act (PRA), which have been previously approved by OMB under the following OMB control number issued to the Board: 7100–0199. There are no new information collection requirements in the Bureau's final rule.

On March 2, 2011, a notice of the proposed rulemaking was published in the **Federal Register**. As discussed above, the Board proposed certain new disclosures for escrow accounts including format, timing, and content requirements as well as proposed certain model forms regarding escrow accounts for closed-end mortgages secured by a first lien on real property or a dwelling. The Board invited comment on: (1) Whether the proposed collection of information is necessary for the proper performance of agency functions, including whether the information has practical utility; (2) the accuracy of the estimate of the burden of the proposed information collection, including the cost of compliance; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology. The comment period for the proposed rule expired on May 2, 2011.

The Bureau reviewed the comments received regarding the merits of various aspects of the Board's 2011 Escrows Proposal, including the burden of compliance generally, and whether the proposed disclosure requirements should be finalized. Commenters in particular contended that the new disclosure requirements would be redundant of existing information collections and would likely be of limited utility given the Bureau's mandate to integrate the TILA–RESPA disclosures. Given the potential compliance burden of integrating new disclosures in piecemeal fashion, on November 23, 2012, the Bureau published in the **Federal Register** a rule that delays the implementation of certain disclosure requirements contained in title XIV of the Dodd-Frank Act, including those contained in sections 1461 and 1462. *See* 77 FR 70105 (Nov. 23, 2012). Accordingly, because this final rule does not implement the disclosure amendments, the Bureau has determined that this final rule does not impose any new recordkeeping, reporting or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under 44 U.S.C. 3501, et seq.

List of Subjects in 12 CFR Part 1026

Advertising, Consumer protection, Mortgages, Recordkeeping requirements, Reporting, Truth in lending.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation Z, 12 CFR part 1026, as set forth below:

PART 1026—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 1026 continues to read as follows:

Authority: 12 U.S.C. 2601; 2603–2605, 2607, 2609, 2617, 5511, 5512, 5581; 15 U.S.C. 1601 *et seq.*

Subpart E—Special Rules for Certain Home Mortgage Transactions

■ 2. Section 1026.35 is revised to read as follows:

§ 1026.35 Requirements for higher-priced mortgage loans.

(a) *Definitions.* For purposes of this section:

(1) ''Higher-priced mortgage loan'' means a closed-end consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set:

(i) By 1.5 or more percentage points for loans secured by a first lien with a principal obligation at consummation that does not exceed the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac;

(ii) By 2.5 or more percentage points for loans secured by a first lien with a principal obligation at consummation that exceeds the limit in effect as of the date the transaction's interest rate is set for the maximum principal obligation eligible for purchase by Freddie Mac; or

(iii) By 3.5 or more percentage points for loans secured by a subordinate lien.

(2) ''Average prime offer rate'' means an annual percentage rate that is derived from average interest rates, points, and other loan pricing terms currently offered to consumers by a representative sample of creditors for mortgage transactions that have low-risk pricing characteristics. The Bureau publishes average prime offer rates for a broad range of types of transactions in a table updated at least weekly as well as the methodology the Bureau uses to derive these rates.

(b) *Escrow accounts*—(1) *Requirement to escrow for property taxes and insurance.* Except as provided in paragraph (b)(2) of this section, a creditor may not extend a higher-priced mortgage loan secured by a first lien on a consumer's principal dwelling unless an escrow account is established before consummation for payment of property taxes and premiums for mortgage-related insurance required by the creditor, such as insurance against loss of or damage to property, or against liability arising out of the ownership or use of the property, or insurance protecting the creditor against the consumer's default or other credit loss. For purposes of this paragraph (b), the term ''escrow account'' has the same meaning as under Regulation X (24 CFR 3500.17(b)), as amended.

(2) *Exemptions.* Notwithstanding paragraph (b)(1) of this section:

(i) An escrow account need not be established for:

(A) A transaction secured by shares in a cooperative;

(B) A transaction to finance the initial construction of a dwelling;

(C) A temporary or ''bridge'' loan with a loan term of twelve months or less, such as a loan to purchase a new dwelling where the consumer plans to

sell a current dwelling within twelve months; or

(D) A reverse mortgage transaction subject to § 1026.33(c).

(ii) Insurance premiums described in paragraph (b)(1) of this section need not be included in escrow accounts for loans secured by dwellings in condominiums, planned unit developments, or other common interest communities in which dwelling ownership requires participation in a governing association, where the governing association has an obligation to the dwelling owners to maintain a master policy insuring all dwellings.

(iii) Except as provided in paragraph (b)(2)(v) of this section, an escrow account need not be established for a transaction if, at the time of consummation:

(A) During the preceding calendar year, the creditor extended more than 50 percent of its total covered transactions, as defined by § 1026.43(b)(1), secured by a first lien, on properties that are located in counties designated either ''rural'' or ''underserved'' by the Bureau, as set forth in paragraph (b)(2)(iv) of this section;

(B) During the preceding calendar year, the creditor and its affiliates together originated 500 or fewer covered transactions, as defined by § 1026.43(b)(1), secured by a first lien; and

(C) As of the end of the preceding calendar year, the creditor had total assets of less than $2,000,000,000; this asset threshold shall adjust automatically each year, based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars (see comment 35(b)(2)(iii)–1.iii for the current threshold); and

(D) Neither the creditor nor its affiliate maintains an escrow account of the type described in paragraph (b)(1) of this section for any extension of consumer credit secured by real property or a dwelling that the creditor or its affiliate currently services, other than:

(*1*) Escrow accounts established for first-lien higher-priced mortgage loans on or after April 1, 2010, and before June 1, 2013; or

(*2*) Escrow accounts established after consummation as an accommodation to distressed consumers to assist such consumers in avoiding default or foreclosure.

(iv) For purposes of paragraph (b)(2)(iii)(A) of this section:

(A) A county is ''rural'' during a calendar year if it is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area, as those terms are defined by the U.S. Office of Management and Budget and applied under currently applicable Urban Influence Codes (UICs), established by the United States Department of Agriculture's Economic Research Service (USDA–ERS). A creditor may rely as a safe harbor on the list of counties published by the Bureau to determine whether a county qualifies as ''rural'' for a particular calendar year.

(B) A county is ''underserved'' during a calendar year if, according to Home Mortgage Disclosure Act (HMDA) data for that year, no more than two creditors extend covered transactions, as defined in § 1026.43(b)(1), secured by a first lien five or more times in the county. A creditor may rely as a safe harbor on the list of counties published by the Bureau to determine whether a county qualifies as ''underserved'' for a particular calendar year.

(v) Notwithstanding paragraph (b)(2)(iii) of this section, an escrow account must be established pursuant to paragraph (b)(1) of this section for any first-lien higher-priced mortgage loan that, at consummation, is subject to a commitment to be acquired by a person that does not satisfy the conditions in paragraph (b)(2)(iii) of this section, unless otherwise exempted by this paragraph (b)(2).

(3) *Cancellation*—(i) *General.* Except as provided in paragraph (b)(3)(ii) of this section, a creditor or servicer may cancel an escrow account required in paragraph (b)(1) of this section only upon the earlier of:

(A) Termination of the underlying debt obligation; or

(B) Receipt no earlier than five years after consummation of a consumer's request to cancel the escrow account.

(ii) *Delayed cancellation.* Notwithstanding paragraph (b)(3)(i) of this section, a creditor or servicer shall not cancel an escrow account pursuant to a consumer's request described in paragraph (b)(3)(i)(B) of this section unless the following conditions are satisfied:

(A) The unpaid principal balance is less than 80 percent of the original value of the property securing the underlying debt obligation; and

(B) The consumer currently is not delinquent or in default on the underlying debt obligation.

(c) [Reserved]

(d) *Evasion; open-end credit.* In connection with credit secured by a consumer's principal dwelling that does not meet the definition of open-end credit in § 1026.2(a)(20), a creditor shall not structure a home-secured loan as an open-end plan to evade the requirements of this section.

3. In Supplement I to Part 1026—Official Interpretations:

A. The heading for *Section 1026.35—Prohibited Acts or Practices in Connection with Higher-Priced Mortgage Loans* is revised.

B. Under newly designated *Section 1026.35—Requirements for Higher-Priced Mortgage Loans:*

i. Under *35(a) Higher-Priced Mortgage Loans:*

a. *Paragraph 35(a)(1)* and paragraphs 1, 2, and 3 are added.

b. Under *Paragraph 35(a)(2),* paragraphs 2 and 3 are revised, and paragraph 4 is removed.

ii. The heading for *35(b) Rules for higher-priced mortgage loans* is revised.

iii. Under newly designated *35(b) Escrow accounts:*

a. Paragraph 1 is revised.

b. *35(b)(1) Requirement to escrow for property taxes and insurance* and paragraphs 1, 2, and 3 are added.

c. *35(b)(2) Exemptions* is added.

d. *Paragraph 35(b)(2)(i)* and paragraph 1 are added.

e. *Paragraph 35(b)(2)(ii)* and paragraphs 1, 2, and 3 are added.

f. *Paragraph 35(b)(2)(ii)(C)* and paragraphs 1 and 2 are removed.

g. *Paragraph 35(b)(2)(iii)* and paragraph 1 are added.

h. *Paragraph 35(b)(2)(iii)(D)(1)* and paragraph 1 are added.

i. *Paragraph 35(b)(2)(iii)(D)(2)* and paragraph 1 are added.

j. *Paragraph 35(b)(2)(iv)* and paragraph 1 are added.

k. *Paragraph 35(b)(2)(v)* and paragraph 1 are added.

iv. The heading for *35(b)(3) Escrows* is revised.

v. Under newly designated *35(b)(3) Cancellation:*

a. Paragraphs 1, 2, and 3 are added.

b. *35(b)(3)(i) Failure to escrow for property taxes and insurance* and paragraphs 1, 2, and 3 are removed.

c. *Paragraph 35(b)(3)(ii)(B)* and paragraph 1 are removed.

d. *35(b)(3)(v) ''Jumbo'' loans* and paragraphs 1 and 2 are removed.

The revisions and additions read as follows:

Supplement I to Part 1026—Official Interpretations

* * * * *

Subpart E—Special Rules for Certain Home Mortgage Transactions

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§ 1026.35—Requirements for Higher-Priced Mortgage Loans

35(a) Definitions.

Paragraph 35(a)(1).

1. *Comparable transaction.* A higher-priced mortgage loan is a consumer credit transaction secured by the consumer's principal dwelling with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction as of the date the interest rate is set by the specified margin. The table of average prime offer rates published by the Bureau indicates how to identify the comparable transaction.

2. *Rate set.* A transaction's annual percentage rate is compared to the average prime offer rate as of the date the transaction's interest rate is set (or ''locked'') before consummation. Sometimes a creditor sets the interest rate initially and then re-sets it at a different level before consummation. The creditor should use the last date the interest rate is set before consummation.

3. *Threshold for ''jumbo'' loans.* Section 1026.35(a)(1)(ii) provides a separate threshold for determining whether a transaction is a higher-priced mortgage loan subject to § 1026.35 when the principal balance exceeds the limit in effect as of the date the transaction's rate is set for the maximum principal obligation eligible for purchase by Freddie Mac (a ''jumbo'' loan). The Federal Housing Finance Agency (FHFA) establishes and adjusts the maximum principal obligation pursuant to rules under 12 U.S.C. 1454(a)(2) and other provisions of federal law. Adjustments to the maximum principal obligation made by FHFA apply in determining whether a mortgage loan is a ''jumbo'' loan to which the separate coverage threshold in § 1026.35(a)(1)(ii) applies.

Paragraph 35(a)(2).

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2. *Bureau table.* The Bureau publishes on the Internet, in table form, average prime offer rates for a wide variety of transaction types. The Bureau calculates an annual percentage rate, consistent with Regulation Z (*see* § 1026.22 and appendix J), for each transaction type for which pricing terms are available from a survey. The Bureau estimates annual percentage rates for other types of transactions for which direct survey data are not available based on the loan pricing terms available in the survey and other information. The Bureau publishes on the Internet the methodology it uses to arrive at these estimates.

3. *Additional guidance on determination of average prime offer rates.* The average prime offer rate has the same meaning in § 1026.35 as in Regulation C, 12 CFR part 1003. See 12 CFR 1003.4(a)(12)(ii). Guidance on the average prime offer rate under § 1026.35(a)(2), such as when a transaction's rate is set and determination of the comparable transaction, is provided in the official commentary under Regulation C, the publication entitled ''A Guide to HMDA Reporting: Getting it Right!'', and the relevant ''Frequently Asked Questions'' on Home Mortgage Disclosure Act (HMDA) compliance posted on the FFIEC's Web site at *http://www.ffiec.gov/hmda.*

35(b) Escrow Accounts.

1. *Principal dwelling.* Section 1026.35(b)(1) applies to principal dwellings, including structures that are classified as personal property under State law. For example, an escrow account must be established on a higher-priced mortgage loan secured by a first lien on a manufactured home, boat, or trailer used as the consumer's principal dwelling. *See* the commentary under §§ 1026.2(a)(19) and(24), 1026.15, and 1026.23. Section 1026.35(b)(1) also applies to a higher-priced mortgage loan secured by a first lien on a condominium if it is in fact used as the consumer's principal dwelling. But see § 1026.35(b)(2) for exemptions from the escrow requirement that may apply to such transactions.

35(b)(1) Requirement to escrow for property taxes and insurance.

1. *Administration of escrow accounts.* Section 1026.35(b)(1) requires creditors to establish an escrow account for payment of property taxes and premiums for mortgage-related insurance required by the creditor before the consummation of a higher-priced mortgage loan secured by a first lien on a principal dwelling. Section 6 of RESPA, 12 U.S.C. 2605, and Regulation X, 12 CFR 1024.17, address how escrow accounts must be administered.

2. *Optional insurance items.* Section 1026.35(b)(1) does not require that an escrow account be established for premiums for mortgage-related insurance that the creditor does not require in connection with the credit transaction, such as earthquake insurance or credit life insurance, even if the consumer voluntarily obtains such insurance.

3. *Transactions not subject to § 1026.35(b)(1).* Section 1026.35(b)(1) requires a creditor to establish an escrow account before consummation of a first-lien higher-priced mortgage loan. This requirement does not affect a creditor's ability, right, or obligation, pursuant to the terms of the legal obligation or applicable law, to offer or require an escrow account for a transaction that is not subject to § 1026.35(b)(1).

35(b)(2) Exemptions.

Paragraph 35(b)(2)(i).

1. *Construction-permanent loans.* Under § 1026.35(b)(2)(ii)(B), § 1026.35 does not apply to a transaction to finance the initial construction of a dwelling. Section 1026.35 may apply, however, to permanent financing that replaces a construction loan, whether the permanent financing is extended by the same or a different creditor. When a construction loan may be permanently financed by the same creditor, § 1026.17(c)(6)(ii) permits the creditor to give either one combined disclosure for both the construction financing and the permanent financing, or a separate set of disclosures for each of the two phases as though they were two separate transactions. *See also* comment 17(c)(6)–2. Section 1026.17(c)(6)(ii) addresses only how a creditor may elect to disclose a construction-permanent transaction. Which disclosure option a creditor elects under § 1026.17(c)(6)(ii) does not affect the determination of whether the permanent phase of the transaction is subject to § 1026.35. When the creditor discloses the two phases as separate transactions, the annual percentage rate for the permanent phase must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine whether the transaction is a higher-priced mortgage loan under § 1026.35(a). When the creditor discloses the two phases as a single transaction, a single annual percentage rate, reflecting the appropriate charges from both phases, must be calculated for the transaction in accordance with § 1026.22(a)(1) and appendix D to part 1026. This annual percentage rate must be compared to the average prime offer rate for a transaction that is comparable to the permanent financing to determine the transaction is a higher-priced mortgage loan under § 1026.35(a). If the transaction is determined to be a higher-priced mortgage loan, only the permanent phase is subject to the requirement of § 1026.35(b)(1) to establish and maintain an escrow account, and the period for which the escrow account must remain in place under § 1026.35(b)(3) is measured from the time the conversion to the permanent phase financing occurs.

Paragraph 35(b)(2)(ii).

1. *Limited exemption.* A creditor is required to escrow for payment of property taxes for all first-lien higher-

priced mortgage loans secured by condominium, planned unit development, or similar dwellings or units regardless of whether the creditor escrows for insurance premiums for such dwellings or units.

2. *Planned unit developments.* Planned unit developments (PUDs) are a form of property ownership often used in retirement communities, golf communities, and similar communities made up of homes located within a defined geographical area. PUDs usually have a homeowners' association or some other governing association, analogous to a condominium association and with similar authority and obligations. Thus, as with condominiums, PUDs often have master insurance policies that cover all units in the PUD. Under § 1026.35(b)(2)(ii), if a PUD's governing association is obligated to maintain such a master insurance policy, an escrow account required by § 1026.35(b)(1) for a transaction secured by a unit in the PUD need not include escrows for insurance. This exemption applies not only to condominiums and PUDs but also to any other type of property ownership arrangement that has a governing association with an obligation to maintain a master insurance policy.

3. *More than one governing association associated with a dwelling.* The limited exemption provided pursuant to § 1026.35(b)(2)(ii) applies to each master insurance policy for properties with multiple governing associations, to the extent each governing association has an obligation to maintain a master insurance policy.

Paragraph 35(b)(2)(iii).

1. *Requirements for exemption.* Under § 1026.35(b)(2)(iii), except as provided in § 1026.35(b)(2)(v), a creditor need not establish an escrow account for taxes and insurance for a higher-priced mortgage loan, provided the following four conditions are satisfied when the higher-priced mortgage loan is consummated:

i. During the preceding calendar year, more than 50 percent of the creditor's total first-lien covered transactions, as defined in § 1026.43(b)(1), on properties located in counties that are either ''rural'' or ''underserved,'' as set forth in § 1026.35(b)(2)(iv). Pursuant to that section, the Bureau determines annually which counties in the United States are rural or underserved and publishes a list of those counties to enable creditors to determine whether they meet this condition for the exemption. Thus, for example, if a creditor originated 90 first-lien covered transactions, as defined by § 1026.43(b)(1), during 2013, the creditor meets this condition for an exemption in 2014 if at least 46 of those transactions are secured by first liens on properties that are located in counties that are on the Bureau's lists of rural or underserved counties for 2013.

ii. The creditor and its affiliates together originated 500 or fewer first-lien covered transactions, as defined in § 1026.43(b)(1), during the preceding calendar year.

iii. As of the end of the preceding calendar year, the creditor had total assets that are less than the asset threshold for the relevant calendar year. For calendar year 2013, the asset threshold is $2,000,000,000. Creditors that had total assets of less than $2,000,000,000 on December 31, 2012, satisfy this criterion for purposes of the exemption during 2013. This asset threshold shall adjust automatically each year based on the year-to-year change in the average of the Consumer Price Index for Urban Wage Earners and Clerical Workers, not seasonally adjusted, for each 12-month period ending in November, with rounding to the nearest million dollars. The Bureau will publish notice of the asset threshold each year by amending this comment.

iv. The creditor and its affiliates do not maintain an escrow account for any mortgage transaction being serviced by the creditor or its affiliate at the time the transaction is consummated, except as provided in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*). Thus, the exemption applies, provided the other conditions of § 1026.35(b)(2)(iii) are satisfied, even if the creditor previously maintained escrow accounts for mortgage loans, provided it no longer maintains any such accounts except as provided in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*). Once a creditor or its affiliate begins escrowing for loans currently serviced other than those addressed in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*), however, the creditor and its affiliate become ineligible for the exemption in § 1026.35(b)(2)(iii) on higher-priced mortgage loans they make while such escrowing continues. Thus, as long as a creditor (or its affiliate) services and maintains escrow accounts for any mortgage loans, other than as provided in § 1026.35(b)(2)(iii)(D)(*1*) and (*2*), the creditor will not be eligible for the exemption for any higher-priced mortgage loan it may make. For purposes of § 1026.35(b)(2)(iii), a creditor or its affiliate ''maintains'' an escrow account only if it services a mortgage loan for which an escrow account has been established at least through the due date of the second periodic payment under the terms of the legal obligation.

Paragraph 35(b)(2)(iii)(D)(1).

1. *Exception for certain accounts.* Escrow accounts established for first-lien higher-priced mortgage loans on or after April 1, 2010, and before June 1, 2013, are not counted for purposes of § 1026.35(b)(2)(iii)(D). On and after June 1, 2013, creditors, together with their affiliates, that establish new escrow accounts, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), do not qualify for the exemption provided under § 1026.35(b)(2)(iii). Creditors, together with their affiliates, that continue to maintain escrow accounts established between April 1, 2010, and June 1, 2013, still qualify for the exemption provided under § 1026.35(b)(2)(iii) so long as they do not establish new escrow accounts for transactions consummated on or after June 1, 2013, other than those described in § 1026.35(b)(2)(iii)(D)(*2*), and they otherwise qualify under § 1026.35(b)(2)(iii).

Paragraph 35(b)(2)(iii)(D)(2).

1. *Exception for post-consummation escrow accounts for distressed consumers.* An escrow account established after consummation for a distressed consumer does not count for purposes of § 1026.35(b)(2)(iii)(D). Distressed consumers are consumers who are working with the creditor or servicer to attempt to bring the loan into a current status through a modification, deferral, or other accommodation to the consumer. A creditor, together with its affiliates, that establishes escrow accounts after consummation as a regular business practice, regardless of whether consumers are in distress, does not qualify for the exception described in § 1026.35(b)(2)(iii)(D)(*2*).

Paragraph 35(b)(2)(iv).

1. *Requirements for ''rural'' or ''underserved'' status.* A county is considered to be ''rural'' or ''underserved'' for purposes of § 1026.35(b)(2)(iii)(A) if it satisfies either of the two tests in § 1026.35(b)(2)(iv). The Bureau applies both tests to each county in the United States and, if a county satisfies either test, the Bureau will include the county on a published list of ''rural'' or ''underserved'' counties for a particular calendar year. To facilitate compliance with § 1026.35(c), the Bureau also creates a list of only those counties that are ''rural'' but not also ''underserved.'' The Bureau will post on its public Web site the applicable lists for each calendar year by the end of that year. A creditor may rely as a safe harbor, pursuant to section 130(f) of the Truth in Lending Act, on the lists of counties published by the Bureau to determine whether a county qualifies as ''rural'' or ''underserved'' for a particular calendar year. A creditor's originations of

covered transactions, as defined by § 1026.43(b)(1), in such counties during that year are considered in determining whether the creditor satisfies the condition in § 1026.35(b)(2)(iii)(A) and therefore will be eligible for the exemption during the following calendar year.

i. Under § 1026.35(b)(2)(iv)(A), a county is rural during a calendar year if it is neither in a metropolitan statistical area nor in a micropolitan statistical area that is adjacent to a metropolitan statistical area. These areas are defined by the Office of Management and Budget and applied under currently applicable Urban Influence Codes (UICs), established by the United States Department of Agriculture's Economic Research Service (USDA–ERS). Specifically, the Bureau classifies a county as ''rural'' if the USDA–ERS categorizes the county under UIC 4, 6, 7, 8, 9, 10, 11, or 12. Descriptions of UICs are available on the USDA–ERS Web site at *http://www.ers.usda.gov/data-products/urban-influence-codes/documentation.aspx.*

ii. Under § 1026.35(b)(2)(iv)(B), a county is underserved during a calendar year if, according to Home Mortgage Disclosure Act (HMDA) data for that year, no more than two creditors extend first-lien covered transactions, as defined in § 1026.43(b)(1), secured by a first lien five or more times in the county. These areas are defined by reference to the specific calendar year's HMDA data. Specifically, a county is ''underserved'' if, in the applicable calendar year's public HMDA aggregate dataset, no more than two creditors have reported five or more first-lien covered transactions with HMDA geocoding that places the properties in that county. For purposes of this determination, because only covered transactions are counted, all first-lien originations (and only first-lien originations) reported in the HMDA data are counted except those for which the owner-occupancy status is reported as ''Not owner-occupied'' (HMDA code 2), the property type is reported as ''Multifamily'' (HMDA code 3), the applicant's or co-applicant's race is reported as ''Not applicable'' (HMDA code 7), or the applicant's or co-applicant's sex is reported as ''Not applicable'' (HMDA code 4). The most recent HMDA data are available at *http://www.ffiec.gov/hmda.*

Paragraph 35(b)(2)(v).

1. *Forward commitments.* A creditor may make a mortgage loan that will be transferred or sold to a purchaser pursuant to an agreement that has been entered into at or before the time the loan is consummated. Such an agreement is sometimes known as a ''forward commitment.'' Even if a creditor is otherwise eligible for the exemption in § 1026.35(b)(2)(iii), a first-lien higher-priced mortgage loan that will be acquired by a purchaser pursuant to a forward commitment is subject to the requirement to establish an escrow account under § 1026.35(b)(1) unless the purchaser is also eligible for the exemption in § 1026.35(b)(2)(iii) or the transaction is otherwise exempt under § 1026.35(b)(2). The escrow requirement applies to any such transaction, whether the forward commitment provides for the purchase and sale of the specific transaction or for the purchase and sale of mortgage obligations with certain prescribed criteria that the transaction meets. For example, assume a creditor that qualifies for the exemption in § 1026.35(b)(2)(iii) makes a higher-priced mortgage loan that meets the purchase criteria of an investor with which the creditor has an agreement to sell such mortgage obligations after consummation. If the investor is ineligible for the exemption in § 1026.35(b)(2)(iii), an escrow account must be established for the transaction before consummation in accordance with § 1026.35(b)(1) unless the transaction is otherwise exempt (such as a reverse mortgage or home equity line of credit).

35(b)(3) Cancellation.

1. *Termination of underlying debt obligation.* Section 1026.35(b)(3)(i) provides that, in general, an escrow account required by § 1026.35(b)(1) may not be cancelled until the underlying debt obligation is terminated or the consumer requests cancellation at least five years after consummation. Methods by which an underlying debt obligation may be terminated include, among other things, repayment, refinancing, rescission, and foreclosure.

2. *Minimum durations.* Section 1026.35(b)(3) establishes minimum durations for which escrow accounts established pursuant to § 1026.35(b)(1) must be maintained. This requirement does not affect a creditor's right or obligation, pursuant to the terms of the legal obligation or applicable law, to offer or require an escrow account thereafter.

3. *Less than eighty percent unpaid principal balance.* The term ''original value'' in § 1026.35(b)(3)(ii)(A) means the lesser of the sales price reflected in the sales contract for the property, if any, or the appraised value of the property at the time the transaction was consummated. In determining whether the unpaid principal balance has reached less than 80 percent of the original value of the property securing the underlying debt, the creditor or servicer shall count any subordinate lien of which it has reason to know. If the consumer certifies in writing that the equity in the property securing the underlying debt obligation is unencumbered by a subordinate lien, the creditor or servicer may rely upon the certification in making its determination unless it has actual knowledge to the contrary.

* * * * *

Dated: January 10, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO's Federal Digital System (FDsys) at *http://www.gpo.gov/fdsys*. Some laws may not yet be available.

H.R. 1339/P.L. 112–241

To designate the City of Salem, Massachusetts, as the Birthplace of the National Guard of the United States. (Jan. 10, 2013; 126 Stat. 2372)

H.R. 1845/P.L. 112–242

Medicare IVIG Access and Strengthening Medicare and Repaying Taxpayers Act of 2012 (Jan. 10, 2013; 126 Stat. 2374)

H.R. 2338/P.L. 112–243

To designate the facility of the United States Postal Service located at 600 Florida Avenue in Cocoa, Florida, as the ''Harry T. and Harriette Moore Post Office''. (Jan. 10, 2013; 126 Stat. 2382)

H.R. 3263/P.L. 112–244

Lake Thunderbird Efficient Use Act of 2012 (Jan. 10, 2013; 126 Stat. 2383)

H.R. 3641/P.L. 112–245

Pinnacles National Park Act (Jan. 10, 2013; 126 Stat. 2385)

H.R. 3869/P.L. 112–246

To designate the facility of the United States Postal Service located at 600 East Capitol Avenue in Little Rock, Arkansas, as the ''Sidney 'Sid' Sanders McMath Post Office Building''. (Jan. 10, 2013; 126 Stat. 2388)

H.R. 3892/P.L. 112–247

To designate the facility of the United States Postal Service located at 8771 Auburn Folsom Road in Roseville, California, as the ''Lance Corporal Victor A. Dew Post Office''. (Jan. 10, 2013; 126 Stat. 2389)

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H.R. 4057/P.L. 112–249

To amend title 38, United States Code, to direct the Secretary of Veterans Affairs to develop a comprehensive policy to improve outreach and transparency to veterans and members of the Armed Forces through the provision of information on institutions of higher learning, and for other purposes. (Jan. 10, 2013; 126 Stat. 2398)

H.R. 4073/P.L. 112–250

To authorize the Secretary of Agriculture to accept the quitclaim, disclaimer, and relinquishment of a railroad right of way within and adjacent to Pike National Forest in El Paso County, Colorado, originally granted to the Mt. Manitou Park and Incline Railway Company pursuant to the Act of March 3, 1875. (Jan. 10, 2013; 126 Stat. 2403)

H.R. 4389/P.L. 112–251

To designate the facility of the United States Postal Service located at 19 East Merced Street in Fowler, California, as the ''Cecil E. Bolt Post Office''. (Jan. 10, 2013; 126 Stat. 2405)

H.R. 5859/P.L. 112–252

To repeal an obsolete provision in title 49, United States Code, requiring motor vehicle insurance cost reporting. (Jan. 10, 2013; 126 Stat. 2406)

H.R. 6014/P.L. 112–253

Katie Sepich Enhanced DNA Collection Act of 2012 (Jan. 10, 2013; 126 Stat. 2407)

H.R. 6260/P.L. 112–254

To designate the facility of the United States Postal Service located at 211 Hope Street in Mountain View, California, as the ''Lieutenant Kenneth M. Ballard Memorial Post Office''. (Jan. 10, 2013; 126 Stat. 2410)

H.R. 6379/P.L. 112–255

To designate the facility of the United States Postal Service located at 6239 Savannah Highway in Ravenel, South Carolina, as the ''Representative Curtis B. Inabinett, Sr. Post Office''. (Jan. 10, 2013; 126 Stat. 2411)

H.R. 6587/P.L. 112–256

To designate the facility of the United States Postal Service located at 225 Simi Village Drive in Simi Valley, California, as the ''Postal Inspector Terry Asbury Post Office Building''. (Jan. 10, 2013; 126 Stat. 2412)

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S. 3666/P.L. 112–261

To amend the Animal Welfare Act to modify the definition of ''exhibitor''. (Jan. 10, 2013; 126 Stat. 2428)

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Providing for the appointment of Barbara Barrett as a citizen regent of the Board of Regents of the Smithsonian Institution. (Jan. 10, 2013; 126 Stat. 2429)

H.R. 443/P.L. 112–263

To provide for the conveyance of certain property from the United States to the Maniilaq Association located in Kotzebue, Alaska. (Jan. 14, 2013; 126 Stat. 2430)

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North Korean Child Welfare Act of 2012 (Jan. 14, 2013; 126 Stat. 2432)

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H.R. 4212/P.L. 112–266

Drywall Safety Act of 2012 (Jan. 14, 2013; 126 Stat. 2437)

H.R. 4365/P.L. 112–267

To amend title 5, United States Code, to make clear that accounts in the Thrift Savings Fund are subject to certain Federal tax levies. (Jan. 14, 2013; 126 Stat. 2440)

H.R. 4606/P.L. 112–268

To authorize the issuance of right-of-way permits for natural gas pipelines in Glacier National Park, and for other purposes. (Jan. 14, 2013; 126 Stat. 2441)

H.R. 6029/P.L. 112–269

Foreign and Economic Espionage Penalty Enhancement Act of 2012 (Jan. 14, 2013; 126 Stat. 2442)

H.R. 6060/P.L. 112–270

Endangered Fish Recovery Programs Extension Act of 2012 (Jan. 14, 2013; 126 Stat. 2444)

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Clothe a Homeless Hero Act (Jan. 14, 2013; 126 Stat. 2446)

H.R. 6364/P.L. 112–272

World War I Centennial Commission Act (Jan. 14, 2013; 126 Stat. 2448)

H.R. 6586/P.L. 112–273

Space Exploration Sustainability Act (Jan. 14, 2013; 126 Stat. 2454)

H.R. 6621/P.L. 112–274

To correct and improve certain provisions of the Leahy-Smith America Invents Act and title 35, United States Code. (Jan. 14, 2013; 126 Stat. 2456)

H.R. 6655/P.L. 112–275

Protect our Kids Act of 2012 (Jan. 14, 2013; 126 Stat. 2460)

S. 3331/P.L. 112–276

Intercountry Adoption Universal Accreditation Act of 2012 (Jan. 14, 2013; 126 Stat. 2466)

S. 3454/P.L. 112–277

Intelligence Authorization Act for Fiscal Year 2013 (Jan. 14, 2013; 126 Stat. 2468)

S. 3472/P.L. 112–278

Uninterrupted Scholars Act (USA) (Jan. 14, 2013; 126 Stat. 2480)

S. 3630/P.L. 112–279

To designate the facility of the United States Postal Service located at 218 North Milwaukee Street in Waterford, Wisconsin, as the ''Captain Rhett W. Schiller Post Office''. (Jan. 14, 2013; 126 Stat. 2482)

S. 3662/P.L. 112–280

Lieutenant Ryan Patrick Jones Post Office Designation Act (Jan. 14, 2013; 126 Stat. 2483)

S. 3677/P.L. 112–281
To make a technical correction to the Flood Disaster Protection Act of 1973. (Jan. 14, 2013; 126 Stat. 2485)

S.J. Res. 44/P.L. 112–282
Granting the consent of Congress to the State and Province Emergency Management Assistance Memorandum of Understanding. (Jan. 14, 2013; 126 Stat. 2486)

S. 2318/P.L. 112–283
Department of State Rewards Program Update and Technical Corrections Act of 2012 (Jan. 15, 2013; 126 Stat. 2492)

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